

RANDOM, SUSPICIONLESS SEARCHES OF STUDENTS' BELONGINGS: A LEGAL, EMPIRICAL, AND NORMATIVE ANALYSIS

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This Article provides a legal, empirical, and normative analysis of an intrusive search practice used by public school officials to prevent school crime: random, suspicionless searches of students' belongings. First, it argues that these searches are not permitted under the Fourth Amendment unless schools have particularized evidence of a substance abuse or weapons problem. Second, it provides a normative evaluation of strict security measures in schools, especially when they are applied disproportionately to minority students. Third, drawing on recent restricted data from the U.S. Department of Education's School Survey on Crime and Safety, this Article provides empirical findings that raise concerns that some public schools may be conducting unconstitutional searches of students' belongings. In addition, it shows that these potentially unconstitutional searches are more likely to take place in schools with higher minority populations than in schools with lower minority populations, even after taking into account school officials'

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perceptions of the levels of crime where students live and where the school is located. Finally, this Article argues that the Supreme Court should resolve any ambiguity in its jurisprudence by expressly requiring school officials to have particularized, objective evidence of a substance abuse or weapons problem before permitting schools to perform these intrusive searches.

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INTRODUCTION

Everyone agrees that our public schools should be free from violence, crime, and drugs.¹ While school crime has declined in recent years,² recent statistics demonstrate that violence and substance abuse continue to trouble public schools. During the 2009–2010 school year, thirty-three students, staff, and others died in a school-associated violent event.³ In 2009, 8 percent of students in grades nine through twelve reported being threatened or injured with a weapon on school property at least one time.⁴ Also in 2009, 23 percent of students in grades nine through twelve said that drugs were offered, sold, or given to them.⁵

Naturally, school officials are concerned about violence and substance abuse in their schools and have implemented various measures to address these problems. For example, some schools support worthwhile efforts such as implementing curricula and instruction programs aimed at preventing violence, providing mentors to students, and creating other programs that promote a sense of community and social integration among students.⁶ Other schools, however, perform

1. See, e.g., SIMON ROBERTS ET AL., NAT'L CTR. FOR EDUC. STAT., U.S. DEPT OF EDUC., BUREAU OF JUSTICE STAT., U.S. DEPT OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, at iii (2012) [hereinafter INDICATORS OF SCHOOL CRIME AND SAFETY], available at <http://nces.ed.gov/pubs2012/2012002.pdf>.

2. See *id.* at 10 (stating that from 2009 to 2010, “the violent victimization rate for students ages 12–18 at school declined from 20 per 1,000 students to 14 per 1,000 students”); *id.* at 60 (stating that between 1993 and 2009, “the percentage [of students who reported] carrying a weapon on school property declined from 12 percent to 6 percent”); *id.* at v (“The percentage of students in grades 9–12 who reported that drugs were offered, sold, or given to them decreased from 32 percent in 1995 to 23 percent in 2009.”). There is no clear consensus on the reasons for the decline. See LISA SNELL, SCHOOL VIOLENCE AND NO CHILD LEFT BEHIND: BEST PRACTICES TO KEEP KIDS SAFE 2 (Jan. 2005), <http://reason.org/files/70a1152cc03e81af5e7e3f2f073fdce3.pdf> (explaining that it is difficult to measure the effectiveness of many anti-violence programs because they have been imperfectly monitored or evaluated and because school violence is influenced by so many variables).

3. See INDICATORS OF SCHOOL CRIME AND SAFETY, *supra* note 1, at iii.

4. *Id.* at iv.

5. *Id.* at v.

6. See, e.g., SAMANTHA NEIMAN & MONICA R. HILL, NAT'L CTR. FOR EDUC. STAT., U.S. DEPT OF EDUC., CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S.

random, suspicionless searches on students to prevent students from bringing drugs and weapons on campus.⁷ These searches include random drug testing, dog sniffs, metal detector checks, and searches through students' belongings.⁸ Recent data from the U.S. Department of Education show that the use of these strict security measures in public schools is not uncommon.⁹

The use of these search tactics raises important questions regarding students' civil rights under the Fourth Amendment. While several articles discuss students' Fourth Amendment rights in school settings,¹⁰ this Article provides a legal, empirical, and normative analysis of a particularly intrusive type of search practice: random, suspicionless searches of students' belongings. This Article first argues that, consistent with Supreme Court precedent and a recent Eighth Circuit decision, random, suspicionless searches of students' belongings are not permitted under the Fourth Amendment unless certain conditions are present.¹¹ Specifically, in order to justify performing suspicionless, intrusive searches on the

PUBLIC SCHOOLS 15 (2011), <http://nces.ed.gov/pubs2011/2011320.pdf> (reporting the percentages of public schools that use various violence prevention programs).

7. INDICATORS OF SCHOOL CRIME AND SAFETY, *supra* note 1, at 83 (showing the percentages of schools that employ certain search methods).

8. *Id.*

9. *See infra* Table 1.

10. *See, e.g.*, Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 104–05 (1996) (praising the Supreme Court's decision permitting suspicionless drug testing in schools); Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 851 (2011) (criticizing the Supreme Court for departing from traditional Fourth Amendment analysis in the school context); 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 Public Schools*, 22 GA. L. REV. 897, 898 (1988) (urging courts to require a finding of individualized suspicion before permitting school officials to search students); Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2588 (1996) (identifying numerous harms from the Supreme Court's decision to permit suspicionless drug testing); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1669–72 (1986) (arguing that relaxing traditional Fourth Amendment analysis in the school setting illustrates "the dilemma involved in trying to convey constitutional values to our youth through an institution which itself places less value on the particulars of some of these constitutional values"); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 298–301 (2011) (discussing students' reduced expectation of privacy in school settings); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1424–26 (2000) (defending the Supreme Court's Fourth Amendment analysis in schools on the grounds of necessity).

11. *See infra* Section I.

general student population,¹² the Fourth Amendment requires that a school official have particularized evidence demonstrating that the school has a substance abuse or weapons problem, unless the school official reasonably believes that students are in immediate danger.¹³ Conversely, if the school official offers nothing more than “generalized concerns about the existence of weapons and drugs in [her] school[],” she is not entitled to conduct such searches.¹⁴

Second, this Article argues that the above standard is not only legally sound, but it is also more consistent with good educational policy and practice because it limits the authority of school officials to conduct random, suspicionless, intrusive searches absent extenuating circumstances.¹⁵ Research demonstrates that strict security measures deteriorate the learning climate by engendering alienation, mistrust, and resistance among students, instead of building a positive climate based on mutual respect, support, community, and collective responsibility.¹⁶ In fact, empirical studies cast doubt on whether strict security measures effectively reduce school crime,¹⁷ and many researchers argue that implementing such

12. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38 (1985) (“A search of a child’s person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.”).

13. *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 355–56 (8th Cir. 2004); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266–68 (9th Cir. 1999); see also *infra* Section I.E.

14. *Little Rock*, 380 F.3d at 356.

15. See *infra* Section II.

16. AARON KUPCHIK, *HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR* 7, 15–18 (2010) (explaining that student misbehavior is likely to increase rather than decrease when students perceive they are treated unfairly and with disrespect); see Randall R. Beger, *The “Worst of Both Worlds:” School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003) (citing several studies demonstrating that “aggressive security measures produce alienation and mistrust among students”); Michael Easterbrook, *Taking Aim at Violence*, 32 PSYCHOL. TODAY 52, 56 (1999) (providing evidence that strict security measures alienate students); Pedro Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 190–91 (1995) (arguing that a “get tough” approach does not create a safe environment because coercive measures create mistrust and resistance among the student body).

17. See THE ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK* 8 (2005) (explaining that while strict security measures “produce a perception of safety, there is little or no evidence that they create safer learning environments or change disruptive behaviors”), <http://www.advancementproject.org/page/-/resources/FINALEOLrep.pdf>; John Blosnich & Robert Bossarte, *Low-Level Violence in Schools: Is There an*

measures *increases* misbehavior and crime.¹⁸ Rather than relying on coercive measures, research demonstrates that there are alternative, more effective methods for reducing school crime that maintain students' dignity, do not degrade the learning environment, and teach students to value their constitutional rights.¹⁹

Third, this Article presents an empirical analysis that seeks to identify how many schools use this intrusive search practice and the conditions under which they do so.²⁰ The data for this analysis came from two restricted-use datasets from the School Survey on Crime and Safety (SSOCS), primary sources of public school data that the U.S. Department of Education made available in 2010 and 2011 to qualifying researchers.²¹ Each of the SSOCS databases is a collection of

Association Between School Safety Measures and Peer Victimization? 81 J. SCH. HEALTH 107, 107 (2011) (concluding that school security measures did not reduce violent behaviors related to bullying); Abigail Hankin, Marci Hertz & Thomas Simon, *Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research*, 81 J. SCH. HEALTH 100, 105 (2011) (concluding that there is insufficient evidence to demonstrate whether metal detectors reduce school violence), <http://www.edweek.org/media/hankin-02security.pdf>; Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 LAW & POL'Y 297, 319–20 (2001) (“It is hard to find anything better than anecdotal evidence” to demonstrate that strict security measures such as metal detectors and guards reduce violence in schools.).

18. See Beger, *supra* note 16, at 340; Easterbrook, *supra* note 16, at 56; Clifford H. Edwards, *Student Violence and the Moral Dimensions of Education*, 38 PSYCHOL. SCH. 249, 250 (2001) (“[I]ntrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence.”); Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT OF CHILDREN 333, 350, 352 (1999) (finding that student disorder and victimization were higher in schools using strict security measures than in schools that did not use such measures); KUPCHIK, *supra* note 16, at 15–18 (explaining that student misbehavior is likely to increase rather than decrease when students perceive they are treated unfairly and with disrespect).

19. See David C. Anderson, *Curriculum, Culture, and Community: The Challenge of School Violence*, 24 CRIME & JUST. 317, 341, 343–46 (1998) (maintaining that humanistic approaches to discipline more effectively reduce school crime than coercive measures); see also *infra* Section II.

20. See *infra* Section III.

21. See NAT'L CTR. FOR EDUC. STAT., *Restricted Use Data Licenses*, <http://nces.ed.gov/statprog/instruct.asp> (last visited Sept. 29, 2012). NCES defines “restricted-access” data as data that contains “individually identifiable information that are confidential and protected by law. This information is not publicly released.” NAT'L CTR. FOR EDUC. STAT., *Statistical Standard Program: Getting Started*, http://nces.ed.gov/statprog/instruct_gettingstarted.asp (last visited Sept. 29, 2012). The restricted-use data “have a higher level of detail in the data compared to public-use data files.” *Id.* NCES provides restricted-use datasets

survey responses on crime and safety from over 2,500 public school principals throughout the United States.²²

The results of this empirical analysis raise concerns that many public schools may be conducting searches that are either (1) unconstitutional under current precedent or (2) inconsistent with good educational policy. Specifically, the SSOCS data suggest that during the 2009–2010 school year, approximately seventy secondary schools in the sample and an estimated 1,932 secondary schools throughout the United States conducted suspicionless searches of students' belongings without reporting any incidents relating to using, possessing, or distributing weapons, alcohol, or drugs.²³ Furthermore, the estimated number of schools that conducted suspicionless searches of students' belongings sharply climbs for schools that report only a minor problem with drugs, alcohol, or weapons.²⁴

Although these preliminary findings signal that some schools may be violating students' Fourth Amendment rights, more research is needed to draw clearer conclusions. As explained more fully below, the primary survey question on which this analysis is based—whether “it was a practice in the principal's school to . . . [p]erform one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs”—is somewhat ambiguous.²⁵ That question does not

to certain researchers in qualified organizations. *Id.* In order to qualify, “an organization must provide a justification for access to the restricted-use data, submit the required legal documents, agree to keep the data safe from unauthorized disclosures at all times, and to participate fully in unannounced, unscheduled inspections of the researcher's office to ensure compliance with the terms of the License and the Security Plan form.” *Id.*; see also NAT'L CTR. FOR EDUC. STAT., *Applying for a Restricted-use Data License*, http://nces.ed.gov/statprog/instruct_apply.asp?type=rl (last visited Sept. 29, 2012).

22. NEIMAN & HILL, *supra* note 6, at 1; SALLY A. RUDDY ET AL., 2007–2008 SCHOOL SURVEY ON CRIME AND SAFETY: SURVEY DOCUMENTATION FOR PUBLIC-USE DATA FILE USERS 1 (2010), <http://nces.ed.gov/pubs2010/2010307.pdf>.

23. See *infra* Section III.D, Figures 1 & 2. This is an increase from the 2007–2008 school year, where approximately sixty secondary schools in the sample and an estimate of 1,645 secondary schools throughout the United States conducted random, suspicionless searches of students' belongings without reporting any incidents relating to using, possessing, or distributing weapons, alcohol, or drugs.

24. See *infra* Section III.D, Figures 1 & 2.

25. See NAT'L CTR. FOR EDUC. STAT., SCHOOL SURVEY ON CRIME AND SAFETY PRINCIPAL QUESTIONNAIRE: 2009–2010 SCHOOL YEAR 5 [hereinafter 2009–2010 SSOCS QUESTIONNAIRE], http://nces.ed.gov/surveys/ssocs/pdf/SSOCS_2010_Questionnaire.pdf (last visited Sept. 28, 2012); NAT'L CTR. FOR EDUC. STAT., SCHOOL SURVEY ON CRIME AND SAFETY PRINCIPAL QUESTIONNAIRE: 2007–2008 SCHOOL YEAR 5 [hereinafter 2007–2008 SSOCS QUESTIONNAIRE], *available at* http://nces.ed.gov/surveys/ssocs/pdf/SSOCS_2008_Questionnaire.pdf (last visited Sept. 28, 2012).

allow researchers to precisely ascertain (a) the nature of the “random sweeps”; (b) the conditions under which school officials performed the searches; (c) whether the “contraband” searched for was something other than weapons or drugs, such as stolen money; or (d) whether school officials conducted the search on the general student body or on a subset of students that had a lower expectation of privacy.²⁶ Nevertheless, these preliminary findings demonstrate the need to conduct more research in order to probe more deeply into the types of searches school officials perform and why they perform them.

Additionally, and more disturbingly, the analysis suggests that during the 2007–2008 and 2009–2010 school years, schools with higher minority student populations were more likely than schools with lower minority populations to perform these searches without reporting any incidents relating to weapons, alcohol, or drugs.²⁷ These findings hold true even when taking into account school officials’ perceptions of the levels of crime where students live and where the school is located.²⁸ The fact that minority students are more often subject to intrusive searches without apparent justification raises serious concerns that schools are perpetuating racial inequalities.²⁹ Such practices also incorrectly teach students that white students are privileged, leading to increased racial tensions and an undesirable society that harms people of all races.³⁰ Furthermore, even absent Fourth Amendment violations, the fact that many schools perform suspicionless searches without

26. See also *infra* Section III.A–D.

27. See *infra* Section III.E & Table 2.

28. See *infra* Section III.E & Table 2. These results also may raise legal issues under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. That analysis is beyond the scope of this Article, but will be the subject of future research projects.

29. See AARON KUPCHIK & GEOFF K. WARD, REPRODUCING SOCIAL INEQUALITY THROUGH SCHOOL SECURITY: EFFECTS OF RACE AND CLASS ON SCHOOL SECURITY MEASURES 7, <http://www.edweek.org/media/kupchikward-02security.pdf> (last visited Sept. 29, 2012) (describing how strict security measures condition minorities to accept intensive surveillance by the government and limit their future opportunities for success); see also *infra* Section II.B.

30. See Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20–39 (1999) (describing how persistent racial inequalities feed minorities’ skepticism of white society’s commitment to racial equality, which leads to racial tension, anger, and a society that is undesirable to all races); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 33, 42 (1997) (explaining that children learn about race relations from us, and adults should be especially cautious not to teach minorities that they are racially inferior or teach white children that they are racially superior).

reporting a single incident relating to weapons, drugs, or alcohol during the school year raises pedagogical concerns, especially because there are more effective ways to prevent school crime that do not harm the learning environment.³¹

Finally, this Article recommends that the Supreme Court and other federal circuit courts follow the Eighth Circuit's lead by requiring school officials to provide concrete evidence of a serious substance abuse or weapons problem before permitting schools to engage in intrusive search practices.³² In addition, it urges school officials and policymakers to consider alternative, more effective means for reducing school violence and drug abuse rather than resorting to coercive methods that rely on punishment and fear.

This Article proceeds in four sections. Section I evaluates the constitutionality of suspicionless searches in public schools and concludes that such searches violate the Fourth Amendment unless school officials have particularized evidence of a substance abuse or weapons problem in their schools. Section II provides a normative evaluation of strict security measures and concludes that such measures are inconsistent with good educational policy and practice, particularly when applied disproportionately to minority students. Section III presents an empirical analysis of two restrictive-use datasets from the Department of Education. After evaluating the empirical results against the legal framework presented in Section I, it concludes that the empirical findings raise concerns that some public schools may be conducting unconstitutional searches. Section III also presents empirical results suggesting that these potentially unconstitutional searches are more likely to take place in schools with higher minority populations than in schools with lower minority populations, raising additional concerns. Section IV discusses the implications of the empirical findings against the legal and normative analyses. It also argues that the Supreme Court should resolve any ambiguity in its jurisprudence by requiring school officials to have particularized evidence of a serious substance abuse or weapons problem before permitting schools to engage in intrusive search practices. This Article concludes by providing a roadmap to conduct further research on these important issues.

31. *See infra* Section II.A.

32. *See infra* Section IV.

I. THE FOUNDATIONAL CASES FOR EVALUATING THE CONSTITUTIONALITY OF PERFORMING RANDOM, SUSPICIONLESS SEARCHES OF STUDENTS' BELONGINGS

While students do not relinquish their Fourth Amendment rights upon entering the schoolhouse doors,³³ the Supreme Court balances students' rights of privacy against the states' interests in providing a safe and orderly school environment.³⁴ In recent years, the Court has determined that the Fourth Amendment permits school officials to randomly drug test student athletes and students involved in extracurricular activities.³⁵ The Court justified those searches because it determined that (1) students involved in athletics or extracurricular activities have decreased privacy expectations, (2) drug tests are "minimally intrusive," and (3) school officials have an important government interest in deterring drug use and preserving order in schools.³⁶ These rulings no doubt have emboldened school officials to perform other types of random, suspicionless searches at school.³⁷ However, school officials' scope of authority under the Fourth Amendment to conduct random, suspicionless searches of students' belongings remains unsettled. This section discusses the foundational cases for evaluating the constitutionality of random, suspicionless searches of students' belongings. In sum, it argues that these searches are not permitted under the Fourth Amendment absent particularized evidence of a weapons or substance abuse problem.

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

In *New Jersey v. T.L.O.*, the Supreme Court addressed the competing interests of students' privacy rights under the Fourth Amendment and the interests of states in creating a

33. See *New Jersey v. T.L.O.*, 469 U.S. 325, 333–34 (1985); *Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 828 (2002).

34. *T.L.O.*, 469 U.S. at 337–43; see also Dupre, *supra* note 10, at 86–93; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 872–73 (2012); Levin, *supra* note 10, at 1648–49 (1986); Ryan, *supra* note 10, at 1360–63.

35. See *Earls*, 536 U.S. at 838 (permitting random, suspicionless drug testing on students involved in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (permitting random, suspicionless drug testing on student athletes).

36. *Earls*, 536 U.S. at 830–38; *Vernonia*, 515 U.S. at 654–66.

37. See *infra* Section III.C, Table 1.

safe and orderly environment conducive to learning in public schools.³⁸ In *T.L.O.*, a New Jersey high school teacher spotted fourteen-year-old T.L.O. and another student smoking in the bathroom.³⁹ The teacher escorted the two girls to the principal's office and met with Vice Principal Theodore Choplick.⁴⁰ Upon questioning, T.L.O.'s companion admitted that she had been smoking, but T.L.O. denied the accusations.⁴¹ Mr. Choplick brought T.L.O. into his private office and examined the contents of her purse.⁴² He found in her purse a pack of cigarettes.⁴³ When he reached into the purse to remove the cigarettes, he noticed a package of cigarette rolling papers, so he proceeded to search the purse more thoroughly to uncover other evidence of drug use.⁴⁴ Mr. Choplick found marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money, an index card containing a list of students who owed T.L.O. money, and two letters suggesting that T.L.O. was dealing marijuana.⁴⁵ Mr. Choplick notified T.L.O.'s mother and turned the evidence over to the

38. *T.L.O.*, 469 U.S. 325. Before this case, a number of courts did not take a middle position, but gave full force to one interest over the other. *See id.* at 333 n.2. For example, some courts invoked the *in loco parentis* doctrine, concluding that the Fourth Amendment did not apply to in-school searches because school officials acted in the place of parents during school hours and, thus, did not act as an arm of the government. *See id.*; *D.R.C. v. State*, 646 P.2d 252 (Alaska Ct. App. 1982); *In re Thomas G.*, 90 Cal. Rptr. 361 (Cal. Dist. Ct. App. 1970); *R.C.M. v. State*, 660 S.W.2d 552 (Tex. App. 1983). The Supreme Court in *T.L.O.* expressly rejected this reasoning, holding that “[i]n carrying out searches and other disciplinary functions . . . school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.” *T.L.O.*, 469 U.S. at 336–37. Other courts held that the Fourth Amendment applied in full force to searches conducted by school officials, at least under certain circumstances, requiring such officials to meet the probable cause standard. *See M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979); *State v. Mora*, 307 So.2d 317, 323 (La. 1975), *vacated*, 423 U.S. 809 (1975). And still other courts found a middle ground, concluding that the Fourth Amendment applied to searches conducted by public school officials, but the special needs of the government to maintain an appropriate learning environment warranted a standard less exacting than probable cause. *See T.L.O.*, 469 U.S. at 333 n.2; *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); *Horton v. Goose Creek Ind. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982); *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977). *See generally* JAMES A. RAPP, EDUCATION LAW § 9.08(3)(b) (2012) (describing the state of the law prior to *T.L.O.*).

39. *T.L.O.*, 469 U.S. at 328.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

police.⁴⁶ T.L.O. eventually confessed that she had been selling marijuana at the high school, and on the basis of that confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against her in juvenile court.⁴⁷ T.L.O. moved to suppress the evidence, arguing that the search of her purse violated the Fourth Amendment,⁴⁸ but the Supreme Court disagreed.⁴⁹

The Court evaluated the constitutionality of the search by balancing T.L.O.'s expectation of privacy against the school's need to maintain an orderly environment.⁵⁰ The Court first explained that students have legitimate expectations of privacy in the personal items they bring to school.⁵¹ The court reasoned that a "search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."⁵² According to the Court, "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."⁵³ At the same time, the Court recognized the school officials' interest in maintaining an orderly school environment conducive to learning, particularly in light of the fact that "drug use and violent crime in the schools have become major social problems."⁵⁴

To strike a balance between the school's need to maintain an orderly environment and students' legitimate expectation of privacy, the Court held that school officials are not required to obtain a warrant before searching a student, and a school official's level of suspicion need not rise to the level of "probable cause."⁵⁵ Rather, the constitutionality of a search of a student's belongings depends on its reasonableness under the

46. *Id.*

47. *Id.* at 329.

48. *Id.*

49. *Id.* at 333.

50. *Id.* at 337.

51. *Id.* at 337-39.

52. *Id.* at 337-38.

53. *Id.* at 339.

54. *Id.* (citing U.S. DEPT OF HEALTH, EDUC. & WELFARE, NAT'L INST. OF EDUC., VIOLENT SCHOOLS—THE SAFE SCHOOL STUDY REPORT TO CONGRESS (1977)).

55. *Id.* at 340-41.

circumstances.⁵⁶ According to the Court, the determination of “reasonableness” involves a two-fold inquiry: (1) whether “the . . . action was justified at its inception;” and (2) “whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”⁵⁷ A search is “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,” and a search is “permissible in scope” when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁵⁸ Using this framework, the Court concluded that the search was constitutional.⁵⁹ Mr. Choplick had a reasonable suspicion that T.L.O.’s purse contained cigarettes, and once he observed a package of rolling papers upon removing the cigarettes, he was justified to extend his search to the rest of the contents of the purse.⁶⁰

T.L.O. has been criticized for not expressly requiring school officials to have an individualized suspicion to conduct valid searches.⁶¹ Nevertheless, the Court still recognized that students enjoy the protections offered by the Fourth Amendment in schools and have an expectation of privacy in the belongings they bring to school.⁶² As the Court acknowledged, to hold otherwise would equate the Fourth Amendment rights of schoolchildren with those of prisoners, who “retain no legitimate expectations of privacy in their cells.”⁶³ The Court explained that the “prisoner and the

56. *Id.* at 341.

57. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Court recently upheld this two-fold inquiry in *Safford Unified School District #1 v. Redding*, 557 U.S. 370 (2009). In *Safford*, the Court found that a strip search ordered by school administrators on a 13-year-old girl to uncover forbidden prescription and over-the-counter drugs was unconstitutional, but held that the official was entitled to qualified immunity from liability. *Id.*

58. *T.L.O.*, 469 U.S. at 342 (internal quotation marks omitted).

59. *Id.* at 347.

60. *Id.* at 343–48.

61. See Gardner, *supra* note 10, at 924 (finding that *T.L.O.* portended a “gloomy future for student privacy” by not expressly requiring individualized suspicion to conduct searches of students).

62. *T.L.O.*, 469 U.S. at 337–38 (“A search of a child’s person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.”).

63. *Id.* at 338.

schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.”⁶⁴ In subsequent decisions, however, students’ Fourth Amendment rights continued to be tested.

B. Vernonia School District 47J v. Acton

Ten years after *T.L.O.*, in *Vernonia School District 47J v. Acton*,⁶⁵ the Court determined that individualized suspicion is not necessary to conduct what it deemed as “minimally intrusive” searches of students when certain conditions are present.⁶⁶ Evaluating the constitutionality of a random drug testing program on student athletes, the Court balanced three factors: (1) “the scope of the legitimate expectation of privacy at issue”; (2) the “character of the intrusion that is complained of”; and (3) the “nature and immediacy of the governmental concern at issue . . . , and the efficacy of this means for meeting it.”⁶⁷

In *Vernonia*, the Vernonia School District claimed that teachers and administrators “observed a sharp increase in drug use” in the mid-to-late 1980s.⁶⁸ In particular, students “began to speak out about their attraction to the drug culture and boast that there was nothing the school could do about it.”⁶⁹ Not only did student athletes participate in drug use, but also the district court concluded that they were the “leaders of the drug culture.”⁷⁰ The district court explained:

[A] large segment of the student body, particularly those involved in inter-scholastic athletics, was in a state of

64. *Id.* at 338–39 (citations omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1971)); see also *Doe ex rel. v. Little Rock Sch. Dist.*, 380 F.3d 349, 353 (8th Cir. 2004) (“Unlike prisoners, who ‘retain no legitimate expectations of privacy in their cells’ after having been convicted and incarcerated . . . public school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools.”) (citations omitted).

65. 515 U.S. 646 (1995).

66. *Id.* at 653.

67. *Id.* at 646, 658, 660.

68. *Id.* at 648.

69. *Id.*

70. *Id.* at 649.

rebellion. Disciplinary actions had reached ‘epidemic proportions.’ The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff’s direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the students’ misperceptions about the drug culture.⁷¹

School officials decided to implement a student athlete drug testing program.⁷² Students wishing to participate in interscholastic sports and their parents were required to sign a drug testing consent form.⁷³ Under the program, all student athletes would be tested at the beginning of the season.⁷⁴ Additionally, each week of the season, a student, under the supervision of two adults, would randomly select several students for drug testing.⁷⁵ In the fall of 1991, James Acton signed up to play football, but he was denied participation because he and his parents refused to sign the drug testing consent form.⁷⁶ The Actons filed suit, claiming that Vernonia’s drug testing program violated the Fourth Amendment, but the Court disagreed.⁷⁷

The Court recognized that the school search approved in *T.L.O.* was based on individualized suspicion of wrongdoing. Nevertheless, over a scathing dissent by Justice O’Connor,⁷⁸ the Court held that the Fourth Amendment did not impose that

71. *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

72. *Id.* at 649–50.

73. *Id.* at 650.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 651–52.

78. *Id.* at 653. Justice O’Connor was highly critical of the Court’s decision to dispense with the individualized suspicion requirement. She reasoned, “[N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms” *Id.* at 678 (O’Connor, J., dissenting) (emphasis in original). She further reasoned, “The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision.” *Id.* at 678–79 (O’Connor, J., dissenting).

requirement.⁷⁹ Under its new framework, the Court first considered “the nature of the privacy interest upon which the search . . . intrudes.”⁸⁰ While acknowledging that children “assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’”⁸¹ the Court explained that students’ constitutional rights, including those under the Fourth Amendment, are diminished in light of the schools’ custodial and tutelary responsibilities.⁸² Next, the Court explained that privacy expectations for student athletes are even further diminished because: (1) “there is an element of communal undress inherent in athletic participation[.]”⁸³ and (2) by choosing to participate in school athletics, students “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”⁸⁴

Second, the Court considered the intrusiveness of collecting and evaluating student urine samples.⁸⁵ The Court first reasoned that the conditions imposed by Vernonia’s drug testing policy imposed only a negligible degree of intrusion because the conditions were almost identical to conditions commonly encountered in public restrooms.⁸⁶ Male students “produce[d] samples at a urinal along a wall” and “remain[ed] fully clothed and [were] only observed from behind, if at all.”

79. *Id.* at 653 (“The school search we approved in *T.L.O.* while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, ‘the Fourth Amendment imposes no irreducible requirement of such suspicion.’”) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985)) (emphasis in original).

80. *Id.* at 654.

81. *Id.* at 655–56 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

82. *Id.* at 656 (citing *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975)) (holding that students’ due process rights are diminished in schools); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that students’ First Amendment rights to express themselves in school newspapers are diminished); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (concluding that students’ First Amendment rights to express themselves on school property are diminished); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (“Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”).

83. *Vernonia*, 515 U.S. at 657 (internal quotations marks omitted). For example, school athletes are required to suit up, shower, and change in the public locker rooms that lack privacy accommodations. *Id.*

84. *Id.* For example, students must take a preseason physical exam, acquire insurance coverage, maintain a minimum grade point average, and comply with certain rules established by the coaches of the athletic program. *Id.*

85. *Id.* at 658.

86. *Id.*

Female students “produce[d] samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering.”⁸⁷ The Court next concluded that information disclosed from the urinalyses was an insignificant invasion of privacy.⁸⁸ It reasoned that the purpose of the test was only to look for drugs, “not for whether the student is, for example, epileptic, pregnant, or diabetic.”⁸⁹ In addition, the Court took into account the fact that the test results were disclosed only to a limited number of school authorities, not to law enforcement officers.⁹⁰

Third, the Court considered “the nature and immediacy of the governmental concern at issue . . . , and the efficacy of this means for meeting it.”⁹¹ The Court held that the nature of Vernonia’s concern—to deter student drug use—was “important . . . indeed, perhaps compelling.”⁹² According to the Court, the physical, psychological, and addictive effects of drugs are particularly severe to school-aged children, who are still maturing, and the risks of immediate harm to school athletes are particularly high.⁹³ Moreover, “the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.”⁹⁴ The Court also found that Vernonia’s concern was immediate. “[A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, disciplinary actions had reached epidemic proportions, and the rebellion was being fueled by alcohol and drug abuse as well as by the students’ misperceptions about the drug culture.”⁹⁵ Regarding efficacy, the Court held that it was “self-evident that a drug problem largely fueled by the ‘role model’ effect of athletes’ drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.”⁹⁶

Vernonia demonstrates that a school’s random, suspicionless search practice will be upheld when the students

87. *Id.* at 658.

88. *Id.* at 658–60.

89. *Id.* at 658.

90. *Id.*

91. *Id.* at 660.

92. *Id.* at 661.

93. *Id.* at 661–62.

94. *Id.* at 662.

95. *Id.* at 662–63 (internal quotation marked omitted).

96. *Id.* at 663.

subject to the searches have diminished privacy expectations, the searches are relatively unobtrusive, and the school is experiencing severe problems with student crime.⁹⁷ Further, the Court's insistence that Vernonia demonstrate an immediate need to randomly drug test student athletes should not be disregarded. The Court left open the possibility that a *mere concern* that students are bringing drugs and weapons to school, without proof, would not justify searches considered to be highly intrusive, such as searching through students' belongings. This is especially true when intrusive searches are performed on students who have greater expectations of privacy than student athletes.⁹⁸

C. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,⁹⁹ the Court arguably limited students' Fourth Amendment rights even further. The Court held that a school district did not need to show that it had an identifiable drug abuse problem as a condition to randomly drug test students involved in extracurricular activities.¹⁰⁰

In *Earls*, the Pottawatomie County School District implemented a policy that required middle and high school students to consent to random drug testing in order to be eligible to participate in extracurricular activities.¹⁰¹ Two students and their parents brought an action against Pottawatomie, challenging the drug testing policy as violating their rights under the Fourth Amendment.¹⁰² The students argued that Pottawatomie failed to identify a special need for implementing its random drug testing program because it had

97. Though the Court did not address searches for weapons, lower courts have logically concluded that deterring the use of weapons in schools also is an important government interest. *See, e.g.,* *Herrera v. Santa Fe Pub. Schs.*, 792 F. Supp. 2d 1174, 1194–95 (D.N.M. 2011) (acknowledging that deterring students from bringing weapons to a school event is a legitimate government interest).

98. *Id.* at 657.

99. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002).

100. *Id.* at 836 (citing *Earls ex rel. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1278 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002)).

101. *Id.* at 826.

102. *Id.* at 826–27.

not demonstrated a proven drug problem at the school.¹⁰³

The district court granted summary judgment for Pottawatomie, noting that although Pottawatomie did “not show a drug problem of epidemic proportions,” the district had a history of drug abuse problems starting in 1970 that presented “legitimate cause for concern.”¹⁰⁴ The Tenth Circuit reversed, determining that Pottawatomie’s random drug testing policy was unconstitutional because Pottawatomie had failed to demonstrate that there was an identifiable drug abuse problem among students participating in extracurricular activities.¹⁰⁵ The United States Supreme Court reversed the Tenth Circuit in a 5–4 decision.¹⁰⁶

Justice Thomas’s majority opinion largely mirrored Justice Scalia’s majority opinion in *Vernonia*, balancing the same three factors.¹⁰⁷ First, the Court held that students’ rights to privacy are necessarily diminished in light of the school’s custodial responsibility,¹⁰⁸ and students who participate in extracurricular activities already voluntarily submit to various intrusions of privacy associated with the respective activities.¹⁰⁹ Next, the Court explained that because the conditions imposed by the district’s drug testing policy were nearly identical to those in *Vernonia*, there was “negligible intrusion” on the students’ rights to privacy.¹¹⁰

Regarding the nature of Pottawatomie’s concerns, the Court, as in *Vernonia*, considered the need to prevent student drug use to be “important.”¹¹¹ The Court noted that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”¹¹² With respect to immediacy, the Court concluded that Pottawatomie “presented specific evidence of drug use.”¹¹³ For example, teachers

103. *Id.* at 827.

104. *Earls ex rel. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1287 (W.D. Okla. 2000), *rev’d*, 242 F.3d 1264 (10th Cir. 2001), *rev’d*, 536 U.S. 822 (2002).

105. *Earls*, 242 F.3d at 1278.

106. *Earls*, 536 U.S. at 824–25.

107. *Id.* at 830–38.

108. *Id.* at 830–31 (“A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.”).

109. *Id.* at 831–32.

110. *Id.* at 832–34.

111. *Id.* at 834.

112. *Id.*

113. *Id.*

testified that they observed students who appeared to be under the influence of drugs and teachers heard students speaking openly about drugs. Additionally, a drug-sniffing dog found marijuana near a school parking lot, police officers found drugs or drug paraphernalia in a student's car, and the school board president received calls by members of the community to discuss the "drug situation."¹¹⁴ However, the Court held that it was unnecessary for the district to identify a drug abuse problem before imposing a suspicionless drug testing policy, although "[a] demonstrated problem of drug abuse . . . [did] shore up . . . [the] special need for a suspicionless general search program."¹¹⁵ According to the Court, "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use."¹¹⁶

Justice Thomas's statements might lead one to conclude that it is not necessary for schools to present particularized evidence of a substance abuse or weapons problem before performing suspicionless searches on students.¹¹⁷ However, *Earls* did not address the standard that schools must meet in order to conduct searches considered to be "highly intrusive," such as searches of students' belongings.¹¹⁸ Additionally, *Earls*

114. *Id.* at 834–35.

115. *Id.* at 835–36 (internal quotation marks omitted).

116. *Id.* at 836.

117. Indeed, at least one state court and two other state court judges in concurring and dissenting opinions have so concluded in the context of evaluating school drug-testing policies. *See* *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 662 (N.J. 2003) (LaVecchia, J., dissenting) ("In addressing the 'immediacy' of the government's concerns, the Court accepted the school district's generalized assertion that 'the nationwide drug epidemic makes the war against drugs a pressing concern in every school.' The Court eschewed any requirement that a particularized degree of drug problem be demonstrated in the schools notwithstanding that seven years earlier the Court relied on such findings in its decision in *Vernonia*." (quoting *Earls*, 536 U.S. at 834); *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 88 (Pa. 2003) ("Although there are references in the *Earls* litigation to record evidence of drug use at the schools involved, a close reading of Justice Thomas's opinion suggests that the Court would have upheld the policy regardless."); *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995, 1009 (Wash. 2008) (Madsen, J., concurring) ("Rather than requiring that a school demonstrate an actual problem with student drug abuse, the Court essentially took judicial notice of the issue, observing that the 'war against drugs' is a 'pressing concern' in every school.") (citations omitted).

118. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38 (1985) ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380

did not address circumstances under which all students—not just athletes or those involved in other extracurricular activities—were potentially subject to these searches. Indeed, in a concurring opinion, Justice Breyer emphasized that the district’s drug testing program was justified because it did not subject the entire school to testing.¹¹⁹ Rather, the program “preserve[d] an option for the conscientious objector” to withdraw from his or her participation in extracurricular activities—an option less severe than expulsion from school.¹²⁰ Finally, *Earls* did not address a situation where school officials conducted searches of students’ belongings without presenting any evidence at all of a substance abuse or weapons problem.¹²¹ These open questions would be addressed by the Eighth Circuit a short time later.

D. Doe v. Little Rock School District

Two years after *Earls*, in *Doe v. Little Rock School District*, the Eighth Circuit evaluated a school district’s practice of conducting random, suspicionless searches of students’ belongings.¹²² The Eighth Circuit is the only federal circuit court to directly address this issue.¹²³ It held that these searches were unreasonable because Little Rock School District could provide no more than “generalized concerns about the existence of weapons and drugs in schools.”¹²⁴

In *Little Rock*, as part of Little Rock’s routine practice of subjecting students to random, suspicionless searches, Jane Doe and her classmates were ordered to leave their classroom after removing everything from their pockets and putting all of their belongings, including their backpacks and purses, on

F.3d 349, 354–55 (8th Cir. 2004) (holding that a search through a student’s belongings is “highly intrusive”).

119. *Earls*, 536 U.S. at 841 (Breyer, J., concurring). Justice Breyer’s concurrence was necessary to reach a 5–4 majority. *See id.* at 842.

120. *Id.*

121. *See* Robert M. Bloom, *The Story of Pottawatomie County v. Lindsay Earls: Drug Testing in the Public Schools*, in *EDUCATION LAW STORIES* 337, 356–57 (Michael A. Olivas & Ronna Greff Schneider eds., 2008) (explaining that *Earls* was not clear regarding how much of a drug problem a school must have to justify suspicionless drug testing because the Court did justify the district’s drug testing program, at least to some extent, on the district’s drug problem).

122. 380 F.3d 349.

123. A handful of district and state courts have also addressed this issue with mixed results. Outside of the California state appellate courts, they have generally followed the reasoning set forth in *Little Rock*. *See infra* note 144.

124. *Little Rock*, 380 F.3d at 356.

their desks.¹²⁵ While the students waited outside the classroom in the hallway, school officials scanned students' bodies with metal detectors and then searched, by hand, through the items that the students left behind.¹²⁶ During this search, a school official discovered marijuana in a container in Ms. Doe's purse.¹²⁷ Ms. Doe brought a class action, claiming that Little Rock's suspicionless search practices violated the students' Fourth Amendment rights.¹²⁸

The Eighth Circuit applied the framework developed in *Vernonia* and *Earls* to evaluate the constitutionality of Little Rock's search practice. First, the court examined the scope of students' expectation of privacy, acknowledging that public school students have lesser expectations of privacy than adults because of the government's responsibilities "as guardian and tutor of children entrusted to its care."¹²⁹ Nevertheless, the court recognized that students have a legitimate need to bring personal items into schools, where they are required to spend much of their time under compulsory attendance laws.¹³⁰ The court reasoned that unlike prisoners who have no legitimate expectation of privacy in their cells, "public school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools."¹³¹ Furthermore, while the court recognized that drug use and school violence have become major social problems nationwide, it held that the situation had not yet reached the point where students in schools have no legitimate expectations of privacy at all.¹³²

In connection with students' expectation of privacy, the court also highlighted the difference between conducting suspicionless searches on certain segments of the student population, such as student athletes or those involved in extracurricular activities, and conducting those searches on

125. *Id.* at 351.

126. *Doe ex rel. Doe v. Little Rock Sch. Dist.*, No. 4:99CV00386, 2003 U.S. Dist. LEXIS 26439, at *4 (E.D. Ark. Sept. 3, 2003).

127. *Little Rock*, 380 F.3d at 351.

128. *Id.*

129. *Id.* at 353 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995)).

130. *Id.*

131. *Id.*

132. *Id.*

public school students generally.¹³³ For example, the court pointed out that students participating in athletics and extracurricular activities “choose to participate in a ‘closely regulated industry,’ in that both groups voluntarily subject themselves to ‘intrusions upon normal rights and privileges, including privacy.’”¹³⁴ The court reasoned that by choosing to participate in athletics or extracurricular activities, students “waive certain privacy expectations that they would otherwise have as students in exchange for the privilege of participating in the activity.”¹³⁵ In contrast, general students have not made a “voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege.”¹³⁶

Second, the court considered the intrusiveness of the search, concluding that searching through students’ belongings was “highly intrusive.”¹³⁷ The court explained that students bring to school items of a personal or private nature in their pockets and bags and “must surely feel uncomfortable or embarrassed when officials decide to rifle through their personal belongings.”¹³⁸ Thus, any expectations of privacy interest retained by students were “wholly obliterated” by Little Rock’s search practices, because all of the students’ belongings may be searched at any time without notice, individualized suspicion, or limits.¹³⁹

Third, the court considered the nature and immediacy of the school officials’ concerns. While the court acknowledged that Little Rock’s concern to protect the safety and welfare of its students was “important enough,” it held that Little Rock had not demonstrated that its concerns were immediate.¹⁴⁰ Specifically, Little Rock had failed to put anything in the record “regarding the magnitude of any problems with weapons or drugs that it ha[d] actually experienced.”¹⁴¹ The court

133. *Id.* at 354.

134. *Id.* (quoting *Vernonia*, 515 U.S. at 657); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 831–32 (2002).

135. *Little Rock*, 380 F.3d at 354.

136. *Id.*

137. *Id.*

138. *Id.* at 355.

139. *Id.*

140. *Id.* at 355–56.

141. *Id.* at 356. The court noted that in both *Vernonia* and *Earls*, the school districts provided particularized evidence to “shore up” their immediacy concerns. *Id.* (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 835 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662–63 (1995)).

emphasized that generalized concerns about the existence of drugs and weapons were insufficient.¹⁴² All school officials have an interest in minimizing the effects of drugs and weapons in their schools, but having a “mere apprehension” of drugs and weapons does not entitle school officials to conduct suspicionless, full-scale searches of students’ personal belongings.¹⁴³ Thus, under the test set forth by the Supreme Court, Little Rock’s practice of searching through students’ belongings to prevent them from bringing drugs and weapons to schools was struck down as unconstitutional.¹⁴⁴

142. *Id.* In making this determination, the court distinguished *Thompson v. Carthage School District*, 87 F.3d 979, 982–83 (8th Cir. 1996). There, the Eighth Circuit upheld a blanket search similar to the searches conducted in *Little Rock* where school officials had received information that the students’ safety was in jeopardy, causing an immediate need for blanket, intrusive searches. Specifically, there were “fresh cuts” on the seats of a school bus, and students reported that there was a gun at school that morning. *Thompson*, 87 F.3d at 982.

143. *Little Rock*, 380 F.3d at 356.

144. *Id.* at 356–57. A number of district and state courts also have addressed this issue and, outside of the California state courts, they have followed the general reasoning found in *Little Rock*. For example, in *Hough v. Shakopee Public School*, 608 F. Supp. 2d 1087, 1109 (D. Minn. 2009), the court held that searches through students’ backpacks and purses attending a public special needs school were unconstitutional because the school could not establish that such intrusive searches were needed to maintain a safe and orderly classroom environment. In *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1197 (D.N.M. 2011), the court upheld the search through the belongings of a student attending a school prom because, similar to students participating in athletics or extra-curricular activities, students choosing to participate in the school prom have a more limited expectation of privacy than students who are compelled to attend school. In *In re F.B.*, 726 A.2d 361, 367 (Pa. 1999), the Pennsylvania Supreme Court determined that a random, suspicionless search of a student’s belongings was constitutional in light of the “alarming trend of the increased violence” in the Philadelphia School District, and given this alarming trend there was an immediate need to take such precautionary measures. However, in *In re Joshua E.*, No. B171643, 2004 WL 2914984, at *5 (Cal. Ct. App. Dec. 17, 2004), the California state appellate court held that a random, suspicionless search of a student’s backpack was constitutional in light of the school’s compelling interest to keep weapons off campus. There, the court did not discuss whether the school had particularized evidence of a drug or weapon problem, perhaps because the student did not bring this challenge or because it was obvious that the school experienced such issues. *See id.* In *In re Daniel A.*, No. B232404, 2012 WL 2126539, at *4 (Cal. Ct. App. June 13, 2012) (quoting *In re Randy G.*, 28 P.3d 239, 245 (Cal. 2001)), the California appellate court held that the school’s practice of searching students’ backpacks in randomly selected classrooms did not violate the Fourth Amendment because, although the school had failed to put forth evidence demonstrating a drug or weapons problem, the government’s interest in maintaining a safe and drug-free campus was of the “highest order.”

E. A Brief Legal Summary of the Foundational Cases

The Supreme Court has not directly determined the circumstances under which schools may perform suspicionless searches of students' personal belongings. Nevertheless, an analysis of *T.L.O.*, *Vernonia*, *Earls*, and *Little Rock* leads to the conclusion that schools should have particularized evidence of a substance abuse or weapons problem to justify performing these intrusive searches, unless the school official reasonably believes that students are in immediate danger.¹⁴⁵

As set forth in *Vernonia* and *Earls*, the framework for evaluating suspicionless searches conducted by school officials requires the balancing of three factors: (1) the students' legitimate expectations of privacy; (2) the intrusiveness of the search; and (3) the nature and immediacy of the school's concern.¹⁴⁶ While students have a lesser expectation of privacy than adults, they nonetheless retain an expectation of privacy

145. In most cases where courts have upheld intrusive, suspicionless searches as constitutional without particularization, the aspect of "danger" was present. For example, in *Thompson*, 87 F.3d at 982–83, the Eighth Circuit upheld a school-wide search where school officials had received information that their students were in danger. There, a school bus driver informed the principal "that there were fresh cuts on seats of her bus." *Id.* at 980. Fearing that a student was carrying a knife on school grounds, the school principal initiated a search of all male students in grades six to twelve. *Id.* The Eighth Circuit upheld the constitutionality of that search, concluding that the broad search for the knife was reasonable given the immediate, pressing concerns for students' safety. *Id.* at 982–83. Similarly, in *Brousseau v. Town of Westerly*, 11 F. Supp. 2d 177, 180 (D.R.I. 1998), the court upheld a broad, sweeping search in an effort to locate a 13.5-inch-long knife that was missing from the school cafeteria. When a cafeteria worker informed the assistant principal that the knife was missing, the assistant principal and the lunchroom workers conducted pat-downs on all the students present in the cafeteria. *Id.* The court, employing the framework discussed in *Vernonia* and *Earls*, concluded that the "school officials had ample reason to be concerned about the safety and welfare of the children entrusted to their care," and, under these circumstances, it could not "be disputed that immediate action was required . . . given the magnitude and immediacy of the potential threat." *Id.* at 182. See also *In re Freddy A.*, No. B192555, 2007 WL 1139955, at *4–5 (Cal. Ct. App. Apr. 18, 2007) (concluding that a random search of student was constitutional where there was a student riot on campus two days earlier, and the school had received a tip that someone may have had a knife on campus); *In re Isaiah B. v. State*, 500 N.W.2d 637, 644 (Wis. 1993) (upholding search of student's coat inside his locker where large, heavy object was felt inside the coat after several incidents involving guns on campus lead administration to conduct search of all lockers).

146. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 830, 832, 834 (2002).

in the personal items they bring to school.¹⁴⁷ And while students' expectations of privacy must be balanced against the state's need to maintain an orderly learning environment, as explained in *T.L.O.* and *Little Rock*, drug use and school violence have not become "so dire that students in the schools may claim no legitimate expectations of privacy" at all.¹⁴⁸

In addition, legitimate expectations of privacy are higher for students in the general population than for students engaged in athletics or extracurricular activities.¹⁴⁹ Students who compete in those activities voluntarily subject themselves to "intrusions upon normal rights and privileges, including privacy," and thereby waive certain privacy expectations that students otherwise enjoy.¹⁵⁰ In contrast, students who are required to attend schools under compulsory attendance laws make no such waiver.¹⁵¹ Further, students who fail or refuse to participate in a school-wide drug testing program are subject to suspension or expulsion from school—consequences that are much more severe than being excluded from participating in school athletics or extracurricular activities.¹⁵²

147. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) ("[S]choolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."); *id.* at 337–38 ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); *Vernonia*, 515 U.S. at 655–56 (acknowledging that "children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,'" students' constitutional rights, including those under the Fourth Amendment, are diminished to "what is appropriate for children in school") (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)); *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 353 (8th Cir. 2004) ("[P]ublic school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools."); see also *In re Adam*, 697 N.E.2d 1100, 1108 (Ohio Ct. App. 1997) ("Indeed, one cannot envision any rule which minimizes the value of our Constitutional freedoms in the minds of our youth more dramatically than a statute proclaiming that juveniles have no right to privacy in their personal possessions.").

148. *T.L.O.*, 469 U.S. at 338; *Little Rock*, 380 F.3d at 353.

149. See *Vernonia*, 515 U.S. at 656–57; *Little Rock*, 380 F.3d at 354; see also *Earls*, 536 U.S. at 841 (Breyer, J., concurring) (emphasizing that the school district's drug testing program was justified because it did not subject the entire school to drug testing).

150. *Vernonia*, 515 U.S. at 657; *Little Rock*, 380 F.3d at 354.

151. See *Little Rock*, 380 F.3d at 354.

152. See *Earls*, 536 U.S. at 841 (Breyer, J., concurring) (explaining that exclusion from extracurricular activities for refusing to be tested is serious but less severe than expulsion from school); see also Bloom, *supra* note 121, at 356

Regarding the character of the intrusion, searches of students' personal belongings are "highly intrusive," more so than random drug tests, metal detectors, or dog sniffs.¹⁵³ Drug tests, according to *Vernonia* and *Earls*, are relatively unobtrusive because the circumstances of those searches are almost identical to conditions commonly encountered in public restrooms.¹⁵⁴ Metal detectors or dog sniffs, according to *Little Rock*, are less intrusive because they do not involve rummaging through students' personal belongings by hand.¹⁵⁵ Conversely,

(arguing that the "costlier consequences of an all-student drug testing policy . . . add weight to the privacy intrusion side of the scale" because of the heightened penalties for failing a drug test).

153. See *T.L.O.*, 469 U.S. at 337–38 ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."); *Little Rock*, 380 F.3d at 355 (holding that students' privacy interests in their personal belongings brought to school are "wholly obliterated" when school officials search through students' bags, purses, or items in their pockets); *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1105 (D. Minn. 2009) (determining searches through students' backpacks and purses were "extraordinarily intrusive"); see also *In re F.B.*, 726 A.2d 361, 368 (Pa. 1999) (Flaherty, C.J., concurring) ("When one is forced to empty his pockets and to have his coat and baggage searched, the intrusion is anything but minimal.").

154. See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. *Earls*, 536 U.S. 822, 832–33 (2002); *Vernonia*, 515 U.S. at 658.

155. See *Little Rock*, 380 F.3d at 355 ("Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs."); see also *In re F.B.*, 726 A.2d at 366 (holding that the intrusion imposed by a search by means of a metal scanner was minimal because "[t]he actual character of the intrusion suffered by the students during the search is no greater than that regularly experienced by millions of people as they pass through an airport" or in government buildings); *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 887 (Cal. Ct. App. 1998) (determining that searches conducted using a hand-held metal detector were minimally intrusive); *Florida v. J.A.*, 679 So. 2d 316, 320 (Fl. Dist. Ct. App. 1996) (same); *Illinois v. Pruitt*, 662 N.E.2d 540, 545 (Ill. App. Ct. 1996) (same); *People v. Dukes*, 580 N.Y.S.2d 850, 852 (N.Y. Crim. Ct. 1992) (same). In fact, several courts have held that dog sniffs of property do not constitute searches at all. See *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (holding that a dog sniff of property did not implicate legitimate privacy interests under the Fourth Amendment); *Doran v. Contoocook Valley Sch. Dist.*, 616 F. Supp. 2d 184, 192 (D.N.H. 2009) (holding that a dog sniff of property of student did not amount to an illegal search under the Fourth Amendment). However, the evaluation of dog sniffs of students' person has caused a sharp division among the courts. Compare *Doe v. Renfrow*, 475 F. Supp. 1012, 1022 (N.D. Ind. 1979) (holding that random, suspicionless dog sniffs on students in their classrooms was not unconstitutional because dog sniffs did not constitute a search under the Fourth Amendment), *aff'd in part and rev'd in part on other grounds*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), with *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1999) (reasoning that because "the body and its odors are highly personal," dog sniffs on a person's body may be "highly intrusive" and holding that random, suspicionless dog sniffs of a student was unreasonable).

any privacy interests students have in personal belongings brought to school “are wholly obliterated” by suspicionless searches of students’ bags and purses. This is because such searches can be done “at any time without notice, individualized suspicion, or any apparent limit to the extensiveness of the search.”¹⁵⁶

Therefore, if school officials conduct suspicionless searches of students’ belongings from the general student body, school officials must have more than “generalized concerns about the existence of weapons and drugs in [their] schools.”¹⁵⁷ Rather, school officials must have particularized evidence to “shore up” their assertions of a special need to conduct those searches.¹⁵⁸

II. A NORMATIVE EVALUATION OF SUSPICIONLESS SEARCH PRACTICES

Keeping students safe and drug-free is a very important goal and, to be sure, a high priority for all school officials. As school officials are under pressure to tangibly demonstrate that they are taking measures to reduce school crime and maintain

without particularized evidence of a drug problem in the school), *and* *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 473 (5th Cir. 1982) (holding that sniffing of students by drug-detecting dogs constituted searches under the Fourth Amendment and were unreasonable in light of no individualized suspicion), *cert. denied*, 463 U.S. 1207 (1983), *and* *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 235 (E.D. Tex. 1980) (holding that random, suspicionless dog sniffs on general student population were unconstitutional searches under the Fourth Amendment), *and* *Commonwealth v. Martin*, 626 A.2d 556, 560 (Pa. 1993) (holding that dog sniffs on persons required probable cause that the search of a would produce contraband rather than reasonable suspicion).

156. *Little Rock*, 380 F.3d at 355.

157. *Id.* at 356; *see also* *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1999) (holding that because “the record here does not disclose that there was any drug crisis or even a drug problem at Quincy High,” the suspicionless searches of students were not justified under the Fourth Amendment); *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1109 (D. Minn. 2009) (concluding that intrusive suspicionless searches through students’ belongings for the purpose of removing distractions and dangerous items was unconstitutional); *cf.* *Gardner, supra* note 10, at 941 (“The cases departing from the individualized suspicion requirement share certain common features. In each instance, the courts perceive the unparticularized search to be minimally intrusive and necessary to achieve important governmental interests.”).

158. *Little Rock*, 380 F.3d at 356. Some scholars have gone even further, arguing that “[s]earches of a student’s person or belongings such as backpacks or purses require reasonable suspicion of a violation of a crime or school rules, and such searches probably also require individualized suspicion.” CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 115 (2010).

discipline and order, it is no surprise that they have resorted to strict security measures.¹⁵⁹ But absent extenuating circumstances, there are sound educational policy reasons for limiting the authority of school officials to conduct random, suspicionless searches of students' belongings. This section first discusses the negative consequences of relying on strict security measures to prevent school crime. Next, it discusses the particularly harmful consequences of disproportionately applying strict security measures to minority students.

A. Strict Security Measures Are Inconsistent with Students' Best Interests

Educational scholars, sociologists, and psychologists agree that strict security measures have several harmful effects on students. For example, aside from the obvious drawbacks of creating distractions and taking away instructional time, implementing strict security measures deteriorates the learning environment by alienating students and generating mistrust. Establishing trust between educators and students is vital for creating a healthy climate conducive to learning.¹⁶⁰ Yet, according to Paul Hirschfield, implementing strict security measures sends a negative message to students that educators are suspicious of students, which "sour[s] students' attitudes toward school and school authorities and undermin[es] a positive, respectful academic environment."¹⁶¹ Indeed, strict security measures produce formidable barriers between students and their schools and are "a frequent cause of disunity

159. See Torin Monahan & Rodolfo D. Torres, *Introduction to SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 2–3 (Torin Monahan & Rodolfo D. Torres eds., 2010) (reporting that even though school violence is in decline, "the threat of 'another Columbine' (or Virginia Tech, and so on) haunts the social imaginary, leading parents, policy makers, and others to the sober conclusion that any security measure is worth whatever trade-offs are involved in order to ensure safety").

160. See Roger D. Goddard, Megan Tschannen-Moran & Wayne K. Hoy, *A Multilevel Examination of the Distribution and Effects of Teacher Trust in Students and Parents in Urban Elementary Schools*, 102 *THE ELEMENTARY SCH. J.* 3, 3–4 (2001) (explaining that trusting in others is an important element to the learning process); Megan Tschannen-Moran & Wayne K. Hoy, *A Multidisciplinary Analysis of the Nature, Meaning, and Measurement of Trust*, 70 *REV. OF EDUC. RES.* 547, 547 (2000) (same).

161. Paul Hirschfield, *School Surveillance in America*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 38, 46 (Torin Monahan & Rodolfo D. Torres eds., 2010).

or discord within the school community.”¹⁶² Martin Gardner explains, “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.”¹⁶³ Gardner posits that searches that take place in schools are much different than searches in other environments, such as airports. He reasons:

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 [through] a checkpoint. Far from ‘morally neutral,’ school searches are instead particularly rife with moral overtones.¹⁶⁴

Jen Weiss reports that after interviewing students subject to such security measures, she found that these measures caused students to “feel consistently watched [and] to distrust, hide from, and avoid authority figures.”¹⁶⁵ She concludes that instead of feeling a greater sense of safety at school, students felt disillusioned and scared.¹⁶⁶ She reports that “[s]tudents in these schools experience, firsthand, what it is to be monitored, contained, and harassed, all in the name of safety and protection.”¹⁶⁷ She further reports that such measures “caused students to be less inclined to speak out or organize in response to issues that bother them.”¹⁶⁸ She maintains that strict security measures are “counterproductive to safety[,] . . . foment violence” in some cases, “negatively impact a school’s culture and reputation, and contribute to the loss of good teachers and good students.”¹⁶⁹ Many leading scholars agree with her conclusions.¹⁷⁰

162. *Id.*

163. Gardner, *supra* note 10, at 943.

164. *Id.*

165. Jen Weiss, *Scan This*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 213, 227 (Torin Monahan & Rodolfo D. Torres eds., 2010).

166. *Id.* at 213.

167. *Id.*

168. *Id.* at 227.

169. *Id.* at 213, 227.

170. *See supra* note 16 and accompanying text.

In addition, strict security measures are part and parcel of an overall exclusionary ethos designed to push low-performing and disruptive students out of schools to make more resources available to students who school officials believe have a better chance to succeed.¹⁷¹ Under zero-tolerance policies, when school officials discover students carrying contraband, students are suspended, expelled, and sometimes arrested.¹⁷² The result is that many students spend more time away from school or are funneled into the juvenile justice system.¹⁷³ Scholars Catherine Kim, Daniel Losen, and Damon Hewitt describe the detrimental impact arrests and law enforcement referrals have on students and on the public generally. They report:

[An arrest] nearly doubles the odds of dropping out of school and, if coupled with a court appearance, nearly quadruples the odds of dropout; lowers standardized-test scores; reduces future employment prospects; and increases the likelihood of future interaction with the criminal justice system. These arrests and referrals also have a negative impact on the larger community. Classmates who witness a child being arrested for a minor infraction may develop negative views or distrust of law enforcement. Juvenile-court dockets and detention centers become crowded with cases that could be handled more efficiently and more effectively by school principals. And the community pays the costs associated with an increase in dropouts, crime, and unemployment, and, in extreme cases, the incarceration of children.¹⁷⁴

This exclusionary ethos stands in stark contrast to an inclusionary ethos, the aim of which is to grant low performing, disruptive, or misguided students extra attention and

171. Hirschfield, *supra* note 161, at 45.

172. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 328 (1985) (using marijuana found in school search to prosecute student); Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 351 (8th Cir. 2004) (using marijuana found in search to prosecute student); Hough v. Shakoppe Pub. Sch., 608 F. Supp. 2d 1087, 1093–96 (D. Minn. 2009) (using marijuana, a lighter, and weapons found in school search to prosecute students); *In re* F.B., 726 A.2d 361, 363 (using knife found in school search to prosecute student in juvenile proceeding); *see also* KIM ET AL., *supra* note 158, at 112 (“Evidence seized in the course of school searches and statements made during school interrogations may be used against students in court proceedings.”).

173. KIM ET AL., *supra* note 158, at 112–13.

174. *Id.* at 113.

resources to meet their needs.¹⁷⁵

Strict security measures also skew students' mindsets about constitutional values and the role of government in their lives, causing students to discount important constitutional rights. As Betsy Levin explains, schools play a critical role in helping students learn skills and values that enable them to exercise the responsibilities of citizenship and benefit from participation in a free economy.¹⁷⁶ Those values include the right to privacy.¹⁷⁷ If schools do not honor students' constitutional rights, schools cannot effectively teach students about those rights.¹⁷⁸ This principle has been observed by the

175. See Hirschfield, *supra* note 161, at 45.

176. Levin, *supra* note 10, at 1648; see also *T.L.O.*, 469 U.S. at 373 (Stevens, J., dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.").

177. Levin, *supra* note 10, at 1648.

178. Justice Brennan stated it this way: "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." *Doe v. Renfrow*, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting from denial of certiorari); see also *id.* at 1027 ("We do not know what class petitioner was attending when the police and dogs burst in [and sniffed her], but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey.") (Brennan, J., dissenting from denial of certiorari); *In re Adam*, 697 N.E.2d 1100, 1108 (Ohio Ct. App. 1997) ("It is hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and violate its basic tenets in the afternoon."); Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 833 (1992) ("Students learn about the liberty, privacy, and security guaranteed by the Fourth Amendment more through actions than words. Consequently, students are more likely to learn how to resolve conflicts between personal liberty and public safety from witnessing bookbag searches than from passively completing their reading assignments."); Feld, *supra* note 10, at 953 ("Schools are the incubators of future citizens, and school officials convey moral lessons by their actions. Providing young people with real Fourth Amendment protection and meaningful enforcement mechanisms will better socialize them to participate effectively in a democratic society as adults."); Martin R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955, 997 (2011) ("Teaching students to obey society's laws is surely a fundamental aspect of their learning the meaning of good citizenship."); Roger J.R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 247–48 (1997) ("Students do not benefit from learning that safety requires intrusive policing under authoritarian and arbitrarily enforced rules."); Levin, *supra* note 10, at 1649 ("[I]f 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."); Samantha Elizabeth Shutler, *Random, Suspicionless Drug Testing of High School Athletes*, 86 J. CRIM. L. & CRIMINOLOGY 1265, 1302–03 (1996) ("In

Supreme Court as early as 1943 when it stated: “That [schools] 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.”¹⁷⁹ Furthermore, school officials’ treatment of students in schools socializes students to tolerate and expect similar treatment by government officials outside of schools.¹⁸⁰ If students encounter drug sniffing dogs, metal detector checks, frisks, and authorities rummaging through their personal belongings on a regular basis, these practices will seem normal to them.¹⁸¹ The citizenry now may have divergent views regarding individual privacy rights and the role the government should play in our personal lives, but as the rising generation becomes more accustomed to more intrusive invasions, it is possible that those healthy debates may shift towards greater acceptance of strict security measures or disappear altogether.¹⁸²

Finally, many studies cast doubt on whether strict security measures effectively reduce school crime.¹⁸³ Even strong supporters of security measures readily concede that such measures cannot prevent shootings or other acts of violence in schools.¹⁸⁴ In fact, many researchers conclude that implementing strict security measures *increases* student behavioral issues and crime by alienating students instead of forging a school climate based on collective responsibility and mutual respect.¹⁸⁵

order to preserve Constitutional reverence among a youth that is rapidly losing respect for many of the traditional underpinnings of our society, courts must not assist in eroding what little respect remains for the Constitution and the rights it provides.”).

179. *Barnette*, 319 U.S. at 637.

180. KUPCHIK, *supra* note 16, at 7.

181. *Id.*

182. *Id.*

183. *See supra* note 17 and accompanying text.

184. *See* NAT’L SCH. SAFETY & SEC. SERV., *Metal Detectors and School Safety*, http://www.schoolsecurity.org/trends/school_metal_detectors.html (last visited Sept. 22, 2012) (“There is no single strategy, or for that matter even a combination of strategies, that can provide 100% guarantee that there will not be a shooting or other act of violence at a school. School officials must therefore exercise caution to avoid overreaction, knee-jerk reactions and/or the temptation to throw up security equipment after a high-profile incident primarily for the purpose of appeasing parents and relieving parental, community and media pressures. Doing so may very well create a false sense of security that will backfire on school officials in the long haul.”).

185. *See* KUPCHIK, *supra* note 16, at 15–18 (2011) (explaining that student

Rather than resorting to coercive methods that rely on punishment and fear, there are more effective measures to reduce school violence and drug abuse.¹⁸⁶ These methods include counseling, mentoring, and programs that help students become integrated in their neighborhoods and communities.¹⁸⁷ They also include mental health services; after-school programs; and programs that develop character, conflict resolution skills, and anger management.¹⁸⁸ For example, School-wide Positive Behavioral Interventions and Supports is a well-respected, data-driven program that defines, teaches and supports appropriate behavior to create strong learning environments for an entire district or school.¹⁸⁹ Its

misbehavior is likely to increase rather than decrease when students perceive they are treated with disrespect and unfairly); Anderson, *supra* note 19, at 343–46 (finding that coercive forms of punishment are less effective than humanistic forms of punishment); Beger, *supra* note 16, at 340 (citing several studies demonstrating that “aggressive security measures produce alienation and mistrust among students”); Easterbrook, *supra* note 16, at 56 (providing evidence that strict security measures alienates students); Edwards, *supra* note 18, at 250 (“[I]ntrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence.”); Mayer & Leone, *supra* note 18, at 352 (finding that student disorder and victimization were higher in schools using strict security measures than in schools that did not use such measures); Noguera, *supra* note 16, at 190–91 (1995) (arguing that a “get tough” approach does not create a safe environment because coercive measures creates mistrust and resistance among the student body).

186. See Noguera, *supra* note 16, at 206; see also DANIEL J. LOSEN & JONATHAN GILLESPIE, CTR. FOR CIV. RIGHTS REMEDIES AT THE CIV. RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 43–45 (Aug. 2012), <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crr-research/losen-gillespie-opportunity-suspended-crr-2012.pdf> (describing several practices for improving student behavior and reducing student crime in schools that do not rely on coercion, punishment, or fear).

187. See Amanda Paulson, *Why School Violence Is Declining*, THE CHRISTIAN SCIENCE MONITOR (Dec. 6, 2004), available at <http://www.csmonitor.com/2004/1206/p01s01-ussc.html> (describing alternative methods schools have employed to decrease crime such as involving community members to develop students’ character and ability to manage anger); Brian Wallace, *School Crime Declines Here*, LANCASTER ONLINE (Mar. 14, 2012), available at http://lancasteronline.com/article/local/605005_School-crime-declines-here.html (reporting that school violence declined because of programs that help students improve their behavior, develop conflict resolution skills, and improve their ability to have positive social interactions among all students).

188. Paulson, *supra* note 187; see also LOSEN & GILLESPIE, *supra* note 186, at 43–45.

189. See OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, *School-wide PBIS*, <http://www.pbis.org/school/default.aspx> (last visited on Oct. 4, 2012) (describing school-wide PBIS); see also LOSEN & GILLESPIE, *supra* note 186, at 43.

major components include identifying expected behaviors; teaching, modeling, and practicing those behaviors with students; praising appropriate behavior publicly and privately; and having clear consequences for targeted behavior.¹⁹⁰ This program has successfully improved behavior and reduced crime in all settings, including urban schools and in the juvenile justice system.¹⁹¹ Other alternative measures include restorative justice programs.¹⁹² The central concept of restorative justice programs is to help the offender repair the harm caused to victims and make communities whole.¹⁹³ Restorative justice programs “place responsibility on students themselves, using a collaborative response to wrongdoing.”¹⁹⁴ Researchers maintain that these programs foster in students “a strong sense of community as well as a strong sense of safety.”¹⁹⁵ Schools that have implemented these alternative programs can attest to their effectiveness.¹⁹⁶ For example, West Philadelphia High School, one of Pennsylvania’s most dangerous schools, reported that the number of violent incidents decreased by 52 percent the year after implementing its restorative justice program.¹⁹⁷ The next year the number of violent incidents decreased again by 45 percent.¹⁹⁸ As Pedro Noguera explains, in schools that have effectively addressed student crime and violence, there “is a strong sense of community and collective responsibility. Such schools are seen by students as sacred territory, too special to be spoiled by crime and violence, and too important to risk one’s being excluded.”¹⁹⁹ The existence of these schools provides tangible evidence that there are more effective alternatives to combat

190. OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, *supra* note 189.

191. *See* OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS EFFECTIVE SCHOOL-WIDE INTERVENTIONS, *Frequently Asked Questions*, http://www.pbis.org/school/primary_level/faqs.aspx (last visited on Oct. 4, 2012).

192. *See* LOSEN & GILLESPIE, *supra* note 186, at 44–45.

193. *Id.*

194. *See* Laura Mirsky, *SaferSanerSchools: Transforming School Culture with Restorative Practices*, RESTORATIVE PRACTICES E-FORUM 1 (May 20, 2003), http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/ssspilots.pdf.

195. *Id.*

196. *See generally id.* *See also* LOSEN & GILLESPIE, *supra* note 186, at 44–45.

197. Laura Mirsky, *Building Safer, Saner Schools*, 69 EDUC. LEADERSHIP 45, 49 (2011).

198. *Id.*

199. Noguera, *supra* note 16, at 207.

violence and drugs than employing intrusive security measures.²⁰⁰

B. Strict Security Measures Disproportionately Applied to Minority Students Are Particularly Harmful

Empirical studies measuring the use of strict security measures in schools are scarce.²⁰¹ The few studies that exist suggest that strict security measures are applied disproportionately to schools with high minority populations. For example, in another empirical study, I found that schools with higher percentages of minority students were more likely to use certain combinations of strict security measures than other schools, even after taking into account school crime, neighborhood crime, and school disorder.²⁰² Similarly, Aaron Kupchik and Geoff Ward found that, after controlling for school crime, neighborhood crime, and school disorder, schools with larger proportions of minority students were more likely to use metal detectors than other schools.²⁰³ The findings from these empirical studies are consistent with many ethnographers' experiences that directly observe schools.²⁰⁴ For example, Torin Monahan and Rodolfo D. Torres explain:

Perhaps not surprisingly, racial minorities are disproportionately subjected to contemporary surveillance and policing apparatuses [That is,] students in poorer inner-city schools are subjected to more invasive hand searches and metal-detector screenings, while students in more affluent schools tend to be monitored more discreetly with video surveillance cameras.²⁰⁵

200. *Id.*

201. See KUPCHIK & WARD, *supra* note 29, at 4.

202. See Jason P. Nance, *Students, Security, and Race* 27–32 (2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214202 (finding that the odds of using a combination of strict security measures that included metal detectors, surveillance cameras, random sweeps, locked gates, and law enforcement officers were greater in schools serving higher percentages of minority students than in other schools, even after taking into account school crime, neighborhood crime, and school disorder).

203. KUPCHIK & WARD, *supra* note 29, at 20–26; see also Hirschfield, *supra* note 161, at 40 (citing data that “urban schools composed largely of minority students made up 14 percent of the nation’s middle and high schools yet represent 75 percent of the surveyed middle and high schools . . . that scan their students with metal detectors daily”).

204. KUPCHIK & WARD, *supra* note 29, at 4, 20–26.

205. Monahan & Torres, *supra* note 159, at 2.

The disproportionate use of strict security measures to minority students is particularly harmful for at least two reasons. First, researchers observe that there already exist high levels of mistrust between minority students and educators.²⁰⁶ Thus, strict security measures, especially those that appear to be applied unfairly, may negatively impact the educational environment at schools with high minority populations in a particularly severe manner.

Second, several leading social scientists and criminologists are concerned that the presence of strict security in minority schools perpetuates racial inequalities.²⁰⁷ Loic Wacquant argues that poor inner-city schools have “deteriorated to the point where they operate in the manner of *institutions of confinement* whose primary mission is not to educate but to ensure ‘custody and control.’”²⁰⁸ As a result of this “custody and control” approach to education, low-income minorities often have very different educational experiences than affluent, white students.²⁰⁹ For example, Aaron Kupchik and Geoff Ward argue that strict security measures sour minorities’ attitudes towards the government and limit their future opportunities.²¹⁰ They write:

206. See, e.g., Julia Bryan, *Fostering Educational Resilience and Achievement in Urban Schools Through School-Family Community Partnerships*, 8 PROF. SCH. COUNSELING 219, 222 (2005) (“Positive relationships between schools and families in many urban schools are infrequent because parents often do not trust the schools and school professionals in turn do not trust minority and low-income families and communities.”); Constance Flanagan et al., *School and Community Climates and Civic Commitments: Patterns of Ethnic Minority and Majority Students*, 99 J. OF EDUC. PSYCHOL. 421, 423 (2007) (studies have shown that minority groups have reported “a lower sense of school belonging than . . . their European American peers.”); Noguera, *supra* note 16, at 201 (describing the sentiment in many black communities that black children are being treated unfairly in schools); Susan Rosenbloom & Niobe Way, *Experiences of Discrimination among African American, Asian American, and Latino Adolescents in an Urban High School*, 35 YOUTH & SOC. 420, 434 (2004) (“When African American and Latino students were asked about their experiences with discrimination, they described hostile relationships with adults in positions of authority such as . . . teachers in school”).

207. See KUPCHIK & WARD, *supra* note 29, at 3–10 (describing the negative effects of implementing strict security measures to minority students); see also Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 189–90 (David Garland ed., 2001).

208. Wacquant, *supra* note 207, at 189–90.

209. See KUPCHIK & WARD, *supra* note 29, at 6–7.

210. *Id.* at 6.

Marginalized youth are presumed to be young criminals and treated as such through exposure to criminal justice oriented practices (e.g., police surveillance and metal detectors), while youth with social, political and cultural capital are presumed to be well-behaved, treated as such, and empowered to be productive citizens. Furthermore, this disparity in school security can have profound consequences on students' social mobility, since suspension, expulsion and arrest each limit their future educational and employment prospects.²¹¹

Similarly, Paul Hirschfield argues that the resulting disproportionate use of strict security measures prepares urban minority students for certain positions in the postindustrial order, "whether as prisoners, soldiers, or service sector workers."²¹² While conceding that the purpose of these measures may be laudable—to prevent contraband from entering schools—strict security measures stand as a "daily reminder of how little power students have over those in whom they entrust their futures and, in turn, how powerless their trusted guardians are to secure for the students a dignified, timely, and safe passage into school (and adulthood)."²¹³

III. EMPIRICAL EVIDENCE SUGGESTS THAT SOME SCHOOLS MAY BE CONDUCTING UNCONSTITUTIONAL SEARCHES

The objective of this Article's empirical study was to identify the number of schools potentially performing unconstitutional searches of students' belongings and the demographics of those schools. First, this section describes the 2009–2010 and 2007–2008 SSOCS datasets used for the empirical analysis, including how schools were selected to participate in the study and the types of questions the survey asked.²¹⁴ Next, it provides a brief national snapshot of the types of searches schools perform.²¹⁵ Then, it provides a detailed analysis of the particular search practice of interest here, namely, searches of students' belongings.²¹⁶ In short, it

211. *Id.* at 7.

212. *See* Hirschfield, *supra* note 161, at 40.

213. *Id.* at 51.

214. *See infra* Sections III.A–B.

215. *See infra* Section III.C.

216. *See infra* Sections III.C–D.

determines that, although additional research is needed to draw clearer conclusions, the results of this analysis raise concerns that some schools may be violating students' civil rights by conducting suspicionless searches on students' belongings without having particularized evidence of a substance abuse or weapons problem.²¹⁷ Finally, it reports the demographics of schools that are performing those potentially unconstitutional searches.²¹⁸ The results of a binary logistic regression demonstrate that schools with higher minority populations are more likely to conduct these suspicionless searches than schools with lower minority populations.²¹⁹ These findings hold true even when taking into account school officials' perceptions of crime levels where students live and where the school is located.²²⁰

A. *Data and Sample*

Data for this study came from two restricted-use datasets: the SSOCS for the 2007–2008 school year and the SSOCS for the 2009–2010 school year. These are the two most recent databases available to researchers.²²¹ Both datasets were published by the U.S. Department of Education's National Center for Education Statistics (NCES).²²²

1. The SSOCS 2009–2010 Dataset

The data from the SSOCS 2009–2010 restricted-use dataset became available to researchers that met certain conditions in June 2011.²²³ NCES used the 2007–2008 school

217. *See infra* Section III.D.

218. *See infra* Section III.E.

219. *Id.*

220. *Id.*

221. Although the restricted datasets are not available to the general public, *see supra* note 21, datasets that contain less sensitive data for the 2007–2008 school year are available for the general public. *See* NAT'L CTR. FOR EDUC. STAT., *Data Products*, http://nces.ed.gov/surveys/ssocs/data_products.asp (last visited Sept. 27, 2012).

222. *See* NAT'L CTR. FOR EDUC. STAT., *About Us*, <http://nces.ed.gov/about/> (last visited Sept. 27, 2012) (The NCES “is the primary federal entity for collecting and analyzing data related to education in the United States and other nations.”).

223. NCES defines “restricted-access” data as data that contains “individually identifiable information that are confidential and protected by law. This information is not publicly released.” *See* NAT'L CTR. FOR EDUC. STAT., *Statistical Standard Program*, http://nces.ed.gov/statprog/instruct_gettingstarted.asp (last visited Mar. 7, 2012).

year Common Core of Data Public Elementary/Secondary School Universe File (CCD)²²⁴—the most complete list of public schools available—as a sampling frame²²⁵ to generate schools to participate in the study.²²⁶ After the sample frame was stratified, or subdivided into subsets to ensure that subgroups of interest would be adequately represented,²²⁷ schools were randomly selected to participate in the study.²²⁸ Of the approximately 3,480 public schools that were selected to participate,²²⁹ approximately 2,650 public schools submitted usable questionnaires for a response rate of about 76 percent.²³⁰ NCES collected the data from February 24, 2010 to June 11, 2010.²³¹

224. The Common Core of Data “is an NCES annual census system that collects fiscal and non-fiscal data on all public schools, public school districts, and state education agencies in the United States.” RUDDY ET AL., *supra* note 22, at 8; see also Helen M. Marks & Jason P. Nance, *Contexts of Accountability Under Systemic Reform: Implications for Principal Influence on Instruction and Supervision*, 43 EDUC. ADMIN. Q. 3, 10–11 (2007) (describing the Common Core of Data). The CCD includes regular schools, charter schools, and schools that have magnet programs in the United States. NAT’L CTR. FOR EDUC. STAT., 2009–2010 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): RESTRICTED-USE DATA FILE USER MANUAL 8 (2011) [hereinafter 2009–2010 RESTRICTED-USE MANUAL] (on file with author). It excludes schools in the U.S. outlying areas, such as American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico, as well as overseas Department of Defense schools, newly closed schools, home schools, Bureau of Indiana Education schools, non-regular schools, ungraded schools, and schools with a high grade of kindergarten or lower. *Id.*

225. A “sampling frame” is a list of units that could be selected for study. See RICHARD L. SCHEAFFER ET AL., *ELEMENTARY SURVEY SAMPLING* 43 (5th ed. 1996).

226. See 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 8.

227. See *id.* at 9–10. The sample was stratified by instructional level (e.g., elementary school, middle school, high school), locale (e.g., rural, suburban, urban), enrollment size, and region (e.g., Northeast, Midwest, South, and West). *Id.* The sample frame was also stratified by percent of combined student population as Black/African American, Hispanic/Latino, Asian, Native Hawaiian/Other Pacific Islander, or American Indian/Alaska Native. *Id.*

228. *Id.* at 10.

229. *Id.*

230. *Id.* at 1, 9–13. A response rate of 76 percent is very good. See EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 256 (9th ed. 2001). A high response rate reduces bias in the data. *Id.* NCES notes that some schools were more likely than others to respond to the survey. For example, schools more likely to respond included rural schools, schools with fewer students, combined schools, or those with a low percent of combined Black/African American, Hispanic/Latino, Asian, Native Hawaiian/Other Pacific Islander, and American Indian/Alaska Native students. 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 9–10. While no category had a response rate lower than 69 percent, see *id.* at 13, using a sample weight to analyze the data helped ameliorate the effects of discrepancies in the response rates. See *id.* at 1.

231. 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 1.

2. The SSOCS 2007–2008 Restricted-Use Dataset

The data from the SSOCS 2007–2008 restricted-use dataset became available in June 2009 for researchers who met certain conditions.²³² NCES used the 2005–2006 CCD²³³ as a sampling frame²³⁴ to generate schools for the study.²³⁵ After the sample frame was stratified,²³⁶ schools were randomly selected to participate in the study.²³⁷ Of the 3,484 public schools that were selected to participate in the study,²³⁸ 2,560 public schools submitted usable questionnaires for a response rate of just over 77 percent.²³⁹ NCES collected the data from February 25, 2008 to June 17, 2008.²⁴⁰

B. Research Instrument

The 2009–2010 and 2007–2008 SSOCS datasets provided a unique opportunity to view, on a national scale, the types of searches school officials perform. In both the 2009–2010 and 2007–2008 surveys, school principals were asked a number of questions relating to school security, the number of crime-related incidents occurring on school grounds, and school demographics.²⁴¹ For example, principals were asked if it was a practice in the principal’s school to:

232. For a description of what constitutes “restricted-use” data, see *supra* note 21 and accompanying text.

233. See *supra* note 224 and accompanying text for a description of the CCD.

234. See *supra* note 225 for a definition of the term “sampling frame.”

235. See NAT’L CTR. FOR EDUC. STAT., 2007–2008 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): SURVEY DOCUMENTATION FOR RESTRICTED-USE DATA FILE USERS 8 (2009) [hereinafter 2007–2008 RESTRICTED-USE MANUAL] (on file with author).

236. See *id.* at 9. The sample was stratified by instructional level, locale, enrollment size, region, and student race. *Id.* at 9–11; see also *supra* note 223 and accompanying text.

237. 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 10.

238. *Id.*; see also 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 9.

239. *Id.* at 1, 9–11. A response rate of 77 percent is very good and reduced bias in the data. See BABBIE, *supra* note 230, at 256. Similar to the 2009–2010 SSOCS, some categories of schools were more likely than others to respond to the survey. *Id.* No category had a response rate lower than 67 percent, and using a sample weight helped ameliorate the effects of the discrepancies in the response rates. *Id.* at 11. See also *infra* note 222 and accompanying text.

240. 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 1.

241. See 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25.

- Require students to pass through metal detectors each day;
- Perform one or more random metal detector checks on students;
- Use one or more random dog sniffs to check for drugs;
- Require drug tests for athletes;
- Require drug testing for students in extracurricular activities other than athletics;
- Require drug testing for any other students; and
- Perform one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.²⁴²

In addition, school principals were asked to report the number of incidents that occurred at school during the school year relating to:

- Robbery with a weapon;
- Physical attack or fight with a weapon;
- Threats of physical attack or fight with a weapon;
- Possession of a firearm or explosive device;
- Possession of a knife or sharp object;
- Distribution, possession, or use of illegal drugs;
- Inappropriate distribution, possession, or use of prescription drugs; and
- Distribution, possession, or use of alcohol.²⁴³

C. Overall Descriptive Data

Table 1 presents the descriptive data for secondary schools' search practices in both the 2009–2010 and 2007–2008 school years. It includes estimates of how many schools nationwide performed random metal detector checks, used random dog sniffs to check for drugs,²⁴⁴ required students to undergo drug

242. 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5. Each answer required a yes or no answer. *Id.*

243. 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 11; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25. Unlike the 2009–2010 SSOCS QUESTIONNAIRE, the 2007–2008 SSOCS QUESTIONNAIRE did not ask principals to report the number of incidents relating to the “inappropriate distribution, possession, or use of prescription drugs.” *See id.*

244. Some courts have concluded that dog sniffs on items such as backpacks and purses, as opposed to the students themselves, are not considered searches

testing, required students to pass through metal detectors each day, and performed random sweeps for contraband. It presents the raw sample numbers and percentages,²⁴⁵ as well as the population estimates based on a sample weight provided by the NCES.²⁴⁶

TABLE 1: Descriptive Data for Search Practices in Public Secondary Schools in 2009–2010 and 2007–2008²⁴⁷

Search Practice	2009–2010	2007–2008
Required students to pass through metal detectors each day.	60 (3.0%) 1060 (3.1%)	60 (3.1%) 855 (2.5%)
Performed one or more random metal detector checks on students.	210 (10.7%) 3340 (9.9%)	220 (11.3%) 3313 (9.8%)
Used one or more random dog sniffs to check for drugs.	1020 (52.0%) 16,979 (50.2%)	970 (50.0%) 16,043 (47.4%)
Performed one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.	450 (23.0%) 8204 (24.2%)	460 (23.7%) 7843 (23.2%)
Required drug testing for athletes.	250 (12.8%) 4325 (12.8%)	240 (12.5%) 4444 (13.1%)
Required drug testing for students in extra-curricular activities other than athletics.	170 (8.7%) 3215 (9.5%)	150 (7.7%) 2978 (8.8%)
Required drug testing for any other students.	140 (7.1%) 2261 (6.7%)	120 (6.2%) 2153 (6.4%)

The descriptive data show that use of strict security

under the Fourth Amendment. *See supra* note 148.

245. Pursuant to the guidelines for presenting results from the restricted-use databases, I rounded sample numbers to the nearest ten. U.S. DEP'T. OF EDUC., RESTRICTED-USE DATA PROCEDURES MANUAL 20 (2011), <http://nces.ed.gov/pubs96/96860rev.pdf>.

246. Sample weights compensate for unequal probabilities of selection, minimizes bias associated with responding and non-responding schools, reduces sampling error, and calibrates the data to known population characteristics to produce optimal national estimates. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 13; 2007–2008 RESTRICTED USE MANUAL, *supra* note 235, at 13 (describing the specific weighting procedures employed); *see also* U.N. Group of Experts Meeting to Review the Draft Handbook on Designing of Household Sample Surveys, Dec. 3, 2003–Dec. 5, 2003, U.N. Doc. ESA/STAT/AC.91/5, at 5–3 (Nov. 3, 2003) (prepared by Ibrahim S. Yansaneh), http://unstats.un.org/unsd/demographic/meetings/egm/Sampling_1203/docs/no_5.pdf.

247. N = 1960 for the 2009–2010 SSOCS; N=1940 for the 2007-2008 SSOCS. The results are reported as raw numbers (rounded to the nearest ten); percentages are in parentheses; weighted results are reported in bold. Weighted results provide an estimate of the total number of schools in the United States that have listed the search practice.

measures in secondary schools is not uncommon. During the 2009–2010 school year, over 10 percent of public secondary schools performed one or more random metal detector checks on students; approximately 52 percent used one or more random dog sniffs to check for drugs; and many schools required drug testing for either athletes, students in extracurricular activities, or any other students.²⁴⁸ There were only slight changes in the number of schools conducting these searches from 2007–2008 to 2009–2010.²⁴⁹

Important for the purposes of this study, approximately 23 percent of secondary schools in both school years performed “one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.”²⁵⁰ It is not entirely clear how school officials interpreted this question, and NCES should consider revising this question in future questionnaires to avoid ambiguity.²⁵¹ School officials could have interpreted “random sweeps for contraband” to mean searches through students’ belongings, especially because this is the only method school administrators have to search for drugs without using drug sniffing dogs.²⁵² Indeed, the number of cases reporting that school officials routinely search through students’ belongings demonstrate that this search practice is not at all uncommon.²⁵³

248. See *supra* Table 1.

249. See *supra* Table 1.

250. See *supra* Table 1.

251. See *infra* Section IV.C.

252. See 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5. While it is possible that some of these principals may have reported that their schools performed “random sweeps for contraband” when only scanning students’ personal belongings using a hand wand, that assumption is undermined by the fact that a separate question already exists addressing whether school officials “perform[ed] one or more random metal detector checks on students.” 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5.

253. See, e.g., *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 351–53 (8th Cir. 2004) (explaining that school officials had a practice of selecting a classroom at will, ordering students to remove everything from their pockets and place their backpacks and purses on the desks in front of them, marching them out into the hallway, scanning students’ bodies with metal detectors to ensure that nothing metal was leaving the classroom, and searching through by hand students’ belongings left behind); *Hough v. Shakoppe Pub. Sch.*, 608 F. Supp. 2d 1087, 1103–04 (D. Minn. 2009) (explaining that school had a daily search practice of asking students to remove their shoes and socks, turn down the waistband of their pants, empty their pockets, turn over their backpacks and purses to be searched, and sometimes submit to a pat down); *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1179–80 (D.N.M. 2011) (describing search tactics at the entrance of a prom where a security officer touched female students’ arms and

Alternatively, school officials could have interpreted “random sweeps for contraband” to imply random locker searches. In *T.L.O.*, the Supreme Court declined to address whether students have a legitimate expectation of privacy in their lockers,²⁵⁴ and there is no consensus among lower federal and state courts regarding this issue.²⁵⁵ Nevertheless, as many courts have recognized, there is no logical legal rationale supporting the assertion that students should lose their expectation of privacy in their personal belongings simply because they place them in their lockers.²⁵⁶ Thus, potential

stomachs; cupped and shook students’ breasts; lifted their dresses to mid-thigh level and touched legs; took their shoes, shook them, and hit them on the table; passed a wand around students; then dumped the contents of their purses on a table to look for contraband); *In re Wilson P.*, No. B196854, 2008 WL 521149 (Cal. Ct. App. Feb. 28, 2008) (explaining that school official searched through students’ pant pockets stored in a gym locker); *In re Joshua E.*, No. B171643, 2004 WL 2914984 (Cal. Ct. App. Dec. 17, 2004) (describing that school official conducted random, suspicionless searches of students and their belongings in three designated classrooms); *In re T.A.S.*, 713 S.E.2d 211, 212 (N.C. App. Ct. 2011) (describing that to enter school, “students must pass through a metal detector, at which time their book bags, purses, and coats are also searched); *In re F.B.*, 726 A.2d 361, 368 (Pa. 1999) (describing school district’s practice of conducting random, suspicionless search of a student’s belongings).

254. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336 n.5 (1985) (“We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies.”).

255. For example, many courts have affirmatively held that students retain an expectation of privacy in their lockers. *See, e.g.*, *State v. Jones*, 666 N.W.2d 142, 146 (Iowa 2003) (holding that students have a reasonable expectation of privacy in their school lockers); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1366 (Mass. 1992) (same); *S.C. v. State*, 583 So. 2d 188, 191 (Miss. 1991) (same); *Commonwealth v. Cass*, 666 A.2d 313, 315–17 (Pa. Super. Ct. 1995) (same); *State v. Joseph T.*, 336 S.E.2d 728, 736–37 (W. Va. 1985) (same); But other courts have held that students have no reasonable expectation of privacy in their lockers. *See In re Patrick Y.*, 746 A.2d 405, 408 (Md. 2000) (holding that student had no reasonable expectation of privacy in locker in light of state statute stating that lockers are school property); *In re Isaiah B.*, 500 N.W.2d 637, 667–68 (Wis. 1993) (same). For a more extended discussion on the disagreement among courts regarding whether students possess an expectation of privacy in their lockers, see Feld, *supra* note 10, at 933–37; KIM ET AL., *supra* note 158, at 115–17.

256. *See In re Adam*, 697 N.E.2d 1100, 1107 (Ohio Ct. App. 1997) (explaining that “a student does not lose his expectation of privacy in a coat or book bag merely because the student places these objects in his locker”); *Cass*, 666 A.2d at 317 (stating that “a student’s expectation of privacy in a jacket or purse was not lost merely because the student placed the jacket or purse in his or her locker.”); *In re Dumas*, 505 A.2d 984, 985–86 (Pa. Super. Ct. 1986) (applying the reasoning of *T.L.O.* and refusing to uphold search of a student’s jacket inside of his locker because the student retained a reasonable expectation of privacy within his jacket, stating, “We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in [a]

locker searches that include searching through students' personal belongings stored inside a locker such as book bags, purses, jackets, folders, or gym bags, arguably also should be deemed as highly intrusive. While more research is needed to precisely measure how many schools are searching through students' belongings, either through more carefully crafted questionnaires or through personal observations, these preliminary results suggest that many schools could be performing these intrusive searches, which, as explained above, are justified only under appropriate circumstances.²⁵⁷

D. Random Sweeps for Contraband Disaggregated by Particularized Evidence of a Substance Abuse or Weapons Problem

Random, suspicionless searches of students' personal belongings are considered to be highly intrusive and are justified under the Fourth Amendment only when certain conditions are present.²⁵⁸ Under the current legal framework, school officials must have particularized evidence of a substance abuse or weapons problem in their schools to justify conducting these searches, unless a school official reasonably believes that students are in immediate danger.²⁵⁹

In both the 2009–2010 and 2007–2008 SSOCS, principals were asked to report the total number of incidents that occurred at school during the school year relating to robbery with a weapon; physical attack or fight with a weapon; threats of physical attack or fight with a weapon; possession of a firearm or explosive device; possession of a knife or sharp object; distribution, possession, or use of illegal drugs; inappropriate distribution, possession, or use of prescription drugs; and distribution, possession, or use of alcohol.²⁶⁰ The

school locker provided to the student for storage of personal items"); *c.f.* MINN. STAT. ANN. § 121A.72 (West 2008) ("The personal possessions of students within a school locker may be searched only when school authorities have a reasonable suspicion that the search will uncover evidence of a violation of law or school rules."); *see also* KIM ET AL., *supra* note 158, at 116 ("[E]ven in jurisdictions where students are held to have no privacy interest in lockers, it does not follow that items stores *inside* lockers, such as book bags and coats, may automatically be searched just because the locker itself is subject to search.").

257. *See supra* Section I.E.

258. *See id.*

259. *See id.*

260. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 11; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5. Unlike the 2009–2010 SSOCS

number of incidents relating to students' use or possession of weapons, alcohol, or drugs is an indicator of the ability of school officials to provide particularized evidence of a drug, alcohol, or weapons problem in their schools.

Of course, the number of incidents relating to students' use or possession of weapons, alcohol, or drugs is by no means a perfect indicator for at least three reasons. First, although school officials are assured that their individual answers for the SSOCS will not be publicly disclosed,²⁶¹ it is possible that some school officials may have underreported the number of incidents relating to drugs, alcohol, and weapons. This may be because they do not have an accurate reporting system²⁶² or because it may be advantageous to underreport those incidents pursuant to certain state or federal reporting requirements.²⁶³ Second, the reported number of incidents relating to drugs, alcohol, or weapons does not take into account other observations that possibly could be used by school officials to establish a drug or weapons problem such as observing a marijuana cigarette or a beer can in the school parking lot or overhearing students talk about drug use.²⁶⁴ Third, principals were asked to report the total number of incidents that occurred at school during the school year, not prior years. Although the Supreme Court has not addressed this issue, school officials possibly could establish an immediate need to conduct these searches based on a substance abuse or weapons problem during prior school years.

On the other hand, this data may overestimate the ability

QUESTIONNAIRE, the 2007–2008 SSOCS QUESTIONNAIRE did not ask principals to report the number of incidents relating to the “inappropriate distribution, possession, or use of prescription drugs.” *See id.*

261. *See* NAT'L CTR. FOR EDUC. STAT., 2007–2008 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): SURVEY DOCUMENTATION FOR PUBLIC-USE DATA FILE USERS B-2 (2010) (assuring principals that their answers are “protected under the Education Sciences Reform Act of 2002,” meaning that the answers “may only be used for statistical purposes and may not be disclosed, or used, in identifiable form for any other purpose, except as provided for in the Patriot Act”).

262. *See* SNELL, *supra* note 2, at 24 (describing some school districts' problems with data collection); *see also* NAT'L SCH. SAFETY & SEC. SERV., *School Crime Reporting and School Crime Underreporting*, http://www.schoolsecurity.org/trends/school_crime_reporting.html (last visited on Sept. 28, 2012).

263. *See* SNELL, *supra* note 2, at 22–23 (describing the political complexities schools and states face when reporting violent incidents pursuant to No Child Left Behind); *see also* NAT'L SCH. SAFETY & SEC. SERV., *School Crime Reporting and School Crime Underreporting*, *supra* note 262 (arguing that school administrators underreport school crime for political or image purposes).

264. *See* Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 854–55 (2002).

of school officials to establish a substance abuse or weapons problem. My own analysis of the restricted SSOCS databases shows that many incidents cited by principals relating to drugs, alcohol, or weapons were not reported to the police, indicating that perhaps some of these incidents were not serious. For example, the restricted data from the 2009–2010 SSOCS show that 790 secondary schools in the sample reported at least one incident relating to alcohol, but only 600 of those schools reported at least one incident relating to alcohol to the police.²⁶⁵ Similarly, 680 secondary schools reported at least one incident relating to the unauthorized use of prescription drugs, but only 580 of those schools reported at least one incident relating to the unauthorized use of prescription drugs to the police. In another example, 1020 secondary schools in the sample reported at least one incident relating to a knife or sharp object, but only 830 of those schools reported at least one incident relating to a knife or sharp object to the police. While principals may not be reporting incidents to the police in order to avoid adverse attention from the media or community or to avoid involving students in the juvenile justice system, as explained above, an alternative explanation is that some of these incidents may not have been serious, such as the recovery of a scout pocketknife, scissors, plastic butter knives, or harmless over-the-counter medication.²⁶⁶ Less serious incidents, of course, would make it more difficult for schools to show that they have a substance abuse or weapons problem.²⁶⁷

Figure 1 presents data from 2009–2010 and 2007–2008

265. Pursuant to the guidelines for presenting results from the restricted-use databases, raw numbers have been rounded to the nearest ten. U.S. DEPT. OF EDUC., RESTRICTED-USE DATA PROCEDURES MANUAL, *supra* note 245, at 20.

266. See Mary Nash-Wood, *Are School Zero-Tolerance Policies Too Harsh?* USA TODAY (Dec. 4, 2011), available at <http://usatoday30.usatoday.com/news/nation/story/2011-12-04/zero-tolerance-policy/51632100/1> (reporting that a student was severely disciplined for giving her friend a single Midol pill); *Zero Tolerance: States 'Add a Little Common Sense'*, EDUC. REP., June 2009, available at <http://www.eagleforum.org/educate/2009/june09/zero-tolerance-states.html> (reporting that a student was arrested for bringing a plastic butter knife to school); *id.* (reporting that an honors student was punished for a small cutting implement used to sharpen her pencil).

267. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662–63 (determining that Vernonia's concern was immediate in light of the "large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that disciplinary actions had reached "epidemic proportions," and that "the rebellion was being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture") (quoting *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1357 (D. Ore. 1992)).

regarding schools that conducted random sweeps for contraband disaggregated by the number of reported incidents relating to drugs, alcohol, or weapons. The table is divided into six categories of schools that have conducted random sweeps for contraband: those reporting no incidents relating to drugs, alcohol, or weapons; one or fewer instances; two or fewer; three or fewer; four or fewer; and five or fewer. I present the data in this manner because it is not clear how much evidence schools need to provide to demonstrate that they have a substance abuse or weapons problem. For example, suppose the only evidence schools can produce to substantiate a drug problem is the recovery of one marijuana cigarette from one student. Or suppose the only incident relating to alcohol is identifying one student at a football game who had been drinking. Or what if the only evidence of a weapons problem is the recovery of a pocket knife? Such particularized evidence may not be sufficient to establish an immediate need to conduct suspicionless searches of students' belongings.²⁶⁸

Figure 1: Schools in Sample

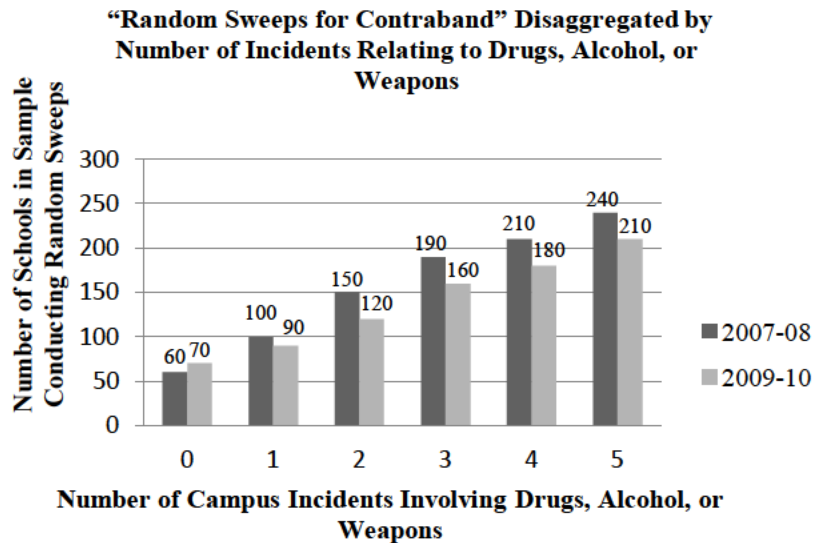


Figure 1 demonstrates that approximately seventy schools in the 2009–2010 sample and approximately sixty schools in the 2007–2008 sample conducted random sweeps for contraband without reporting any incidents relating to drugs,

268. See *supra* note 267.

alcohol, or weapons during the school year. That number climbs to ninety and one hundred, respectively, for schools that reported one or fewer instances of drugs, alcohol, or weapons, and to 120 and 150, respectively, for schools that reported two or fewer incidents. The number of schools that may have searched students' belongings or persons steadily increased as schools reported more incidents, topping out at 210 and 240, respectively, for schools that reported five or fewer instances of drugs, alcohol, or weapons.

**Figure 2: Estimate of Schools Nationally
“Random Sweeps for Contraband” Disaggregated by
Number of Incidents Relating to Drugs, Alcohol, or
Weapons**

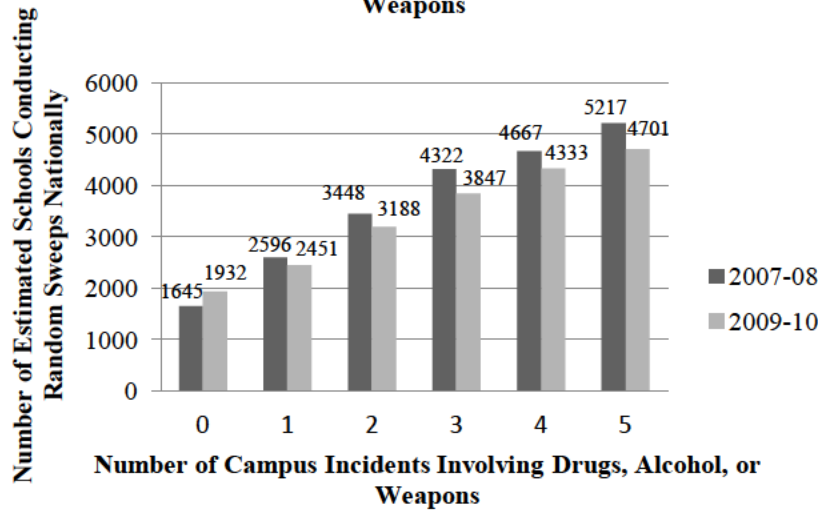


Figure 2 provides an estimate of the number of schools nationally that conducted random sweeps for contraband disaggregated by the number of incidents involving drugs, alcohol, or weapons.²⁶⁹ These findings raise concerns that some schools may be conducting unconstitutional searches, but additional study is needed to draw clearer conclusions because of the interpretative limitations of the data. As explained above, researchers must not only craft better questions to measure whether schools conduct searches on students' belongings, but they must also seek to identify the conditions

269. Estimates were created from the sample weights provided by NCES. 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 13; 2007–2008 RESTRICTED USE MANUAL, *supra* note 235, at 13.

under which schools conduct such searches. For example, it is possible that school officials performed a random sweep in response to a legitimate concern that caused school officials to believe that students were in immediate danger, such as receiving a bomb threat or information from a credible informant that an unknown student had a dangerous weapon.²⁷⁰ In addition, school officials could have performed random sweeps to uncover stolen money or instruments used to deface school property. Or, perhaps school officials conducted these searches on a subset of the student population that had a reduced expectation of privacy such as athletes or students involved in extracurricular activities.²⁷¹ Under these circumstances, it may have been appropriate for school officials to conduct suspicionless searches on students' belongings even where there had been no prior incidents relating to weapons, drugs, or other contraband.²⁷² Nevertheless, despite these ambiguities, these preliminary empirical results raise concerns that some schools may be violating students' Fourth Amendment rights, warranting further research on these issues. Further, even if these searches are not unconstitutional, the fact that many schools perform suspicionless searches without reporting any incidents relating to weapons, drugs, or alcohol raises serious pedagogical concerns.²⁷³

270. See, e.g., *Thompson ex rel. Lea v. Carthage Sch. Dist.*, 87 F.3d 979, 982–83 (8th Cir. 1996) (upholding school-wide search where a bus driver informed the principal that there were “fresh cuts on seats of her bus”); *Koontz ex rel. Sorenson v. Dustin*, No. 5:09-cv-147-Oc-10GRJ, 2010 WL 3788870, at *6 (M.D. Fla. Sept. 24, 2010) (holding that search of students' backpacks after rumor of a bomb inside the school bus did not violate the Fourth Amendment); *Brousseau ex rel. Brousseau v. Town of Westerly ex rel. Perri*, 11 F. Supp. 2d 177 (D.R.I. 1998) (upholding search of all students in cafeteria when a cafeteria worker informed a school official that a 13½ inch-long knife was missing from the school cafeteria).

271. To be clear, the Supreme Court has not addressed whether the Fourth Amendment permits school officials to conduct intrusive searches on athletes, such as searching through their belongings in a gym bag. However, *Vernonia* and *Earls* suggest that whether these searches are justified is a closer question than if such searches were performed on students from the general student body. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831–32 (2002).

272. See, e.g., *supra* note 144 and accompanying text.

273. See *infra* Section IV.

E. Predictors for Schools That Conduct Random Sweeps With No Particularized Evidence of a Substance Abuse or Weapons Problem

The SSOCS data also provide insight regarding the demographics of secondary schools that conduct random sweeps without reporting any incidents relating to drugs, alcohol, or weapons. To examine those demographics, I conducted a binary logistic regression analysis²⁷⁴ where the dependent variable was whether schools “perform[ed] one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.”²⁷⁵ The independent variables included factors that possibly influenced school officials to conduct random sweeps, such as how principals perceived the level of crime where their students lived,²⁷⁶ how principals perceived the level of crime where their school is located,²⁷⁷ the

274. Binary logistic regression is a method for examining the relationship between independent variables and a binary dependent variable. See THE MEASUREMENT GRP., *Logistic Regression*, http://www.themeasurementgroup.com/datamining/definitions/logistic_regression.htm (last visited Sept. 28, 2012); see generally JOSEPH F. HAIR, JR., ET AL., *MULTIVARIATE DATA ANALYSIS* 276–81 (5th ed. 1998) (providing an overview of logistic regression analysis). Logistic regression is similar to linear regression except that the dependent variable is binary and the influence of the independent variables on the dependent variables is assessed by odds-ratios. See THE MEASUREMENT GRP., *supra*; see generally Raymond E. Wright, *Logistic Regression*, in *READING AND UNDERSTANDING MULTIVARIATE STATISTICS* 217–44 (Laurence G. Grimm & Paul R. Yarnold eds., 1995) (discussing the similarities between logistic regression and linear regression). To make a stronger inference about the population from which the sample was drawn, I used a sample weight for the logistic regression. See *supra* note 235. I adjusted the sample weight created by NCES by dividing it by its mean to create a mean weight of one. This is a recommended procedure when employing logistic regression analysis using SPSS. See Marks & Nance, *supra* note 224, at 14; Patty Glynn, *Adjusting or Normalizing Weights “On the Fly” in SPSS*, U. OF WASH., <http://staff.washington.edu/glynn/adjsps.pdf> (last updated July 8, 2004).

275. See 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 5; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 5.

276. Principals were asked to “describe the crime level in the area(s) in which your students live.” See 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 17; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 17. The possible responses included “high level of crime,” “moderate level of crime,” “low level of crime,” and “[s]tudents come from areas with very different levels of crime.” See 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 17; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 17. I merged these four categories into two categories: “low level of crime” and “moderate, high, or mixed levels of crime.” I dummy-coded these variables, using “low level of crime” as the reference variable.

277. Principals were asked to “describe the crime level in the area where your school is located.” The possible responses included “high level of crime,” “moderate level of crime,” and “low level of crime.” See 2009–2010 SSOCS QUESTIONNAIRE,

racial composition of the student population,²⁷⁸ school level,²⁷⁹ school enrollment size,²⁸⁰ school location,²⁸¹ region of the country,²⁸² and the number of students eligible for free and reduced student lunch.²⁸³ The independent variables also included whether juvenile justice agencies were involved in the school's efforts to promote school safety and drug-free

supra note 25, at 17; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 17. I merged these three categories into two categories: “low level of crime” and “moderate or high level of crime.” I dummy-coded “moderate or high level of crime,” using “low level of crime” as the reference variable.

278. NCES categorized schools as having a white student population of more than 95 percent, more than 80 to 95 percent, more than 50 to 80 percent, or 50 percent or less. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 29; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 43. Racial data for the 2009–2010 SSOCS came from the 2007–2008 CCD school data file. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 29. Racial data for the 2007–2008 SSOCS came from the 2005-06 CCD school data file. *See* 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 43. Although there was a two-year difference, it is highly unlikely that over that period a school would have shifted into a new racial category. A major racial shift in the student population for a school over a two-year period would require an extraordinary event such as a desegregation court order. I dummy-coded these variables, using “50 percent or less white enrollment” as the reference variable.

279. NCES categorized secondary schools as a middle school, high school, or combined school. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 28; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 46. I dummy-coded these variables, using “high school” as the reference group.

280. NCES categorized schools as having fewer than 300 students, between 300–499 students, between 500–999 students, or 1,000 or more students. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 28; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 47. I dummy-coded these variables, using “less than 300 students” as the reference group.

281. NCES categorized schools as being located in a city, suburb, town, or rural area. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 28–29; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 47. I dummy-coded these variables, using “rural” as the reference group.

282. NCES categorized schools as being located in a western, midwestern, northeastern, or southern state. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at 25; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at 47. I dummy-coded these variables, using “southern state” as a reference group.

283. Free and reduced lunch is a common proxy for student poverty. *See, e.g.,* NAT'L CTR. FOR EDUC. STAT., *Concentration of Students Eligible for Free-or-Reduced-Price Lunch*, http://nces.ed.gov/programs/coe/indicator_pcp.asp (last visited Oct. 12, 2012) (“The percentage of students eligible for the free or reduced-price lunch (FRPL) program provides a proxy measure for the concentration of low-income students within a school.”). Here, the categories for this variable include: 0 to 20 percent of the student population eligible for free or reduced lunch; over 21 percent to 50 percent of the student population eligible for free or reduced lunch; and over 50 percent of the student population eligible for free or reduced lunch. *See* 2009–2010 RESTRICTED-USE MANUAL, *supra* note 224, at C-63; 2007–2008 RESTRICTED-USE MANUAL, *supra* note 235, at H-4. I dummy-coded these variables, using “over 50 percent” as the reference group.

schools,²⁸⁴ and if the school had a security guard, security personnel, or law enforcement officer present at the school at least once a week.²⁸⁵ I present the results of the binary logistic regression in Table 2.

TABLE 2: Factors Predicting Whether Public Secondary Schools Conducted “Random Sweeps for Contraband”²⁸⁶

Item	2009–2010			2007–2008		
	Beta	p	Exp(B)	Beta	P	Exp(B)
Percent of minority students²⁸⁷						
Between 0 – 5%	-1.01	.07*	.37	-1.28	.04**	.28
Between 5 – 20%	-1.39	.00**	.25	-.76	.21	.47
Between 20-50%	-2.05	.00**	.13	.28	.58	1.32
School enrollment size²⁸⁸						
Between 300-499	-.66	.07*	.52	-.40	.34	.67
Between 500-999	-.75	.08*	.47	-.30	.52	.74
Over 1000	-1.09	.28	.34	.65	.47	1.92
School Level²⁸⁹						
Middle school	-.72	.05**	.48	-.68	.14	.51
Combined school	-.75	.06**	.47	.60	.21	1.82
[Table continued on next page]						

284. Principals responded “yes” or “no” to this question. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 7; 2007–2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 7. I dummy-coded this variable, making the reference category “no.”

285. Principals responded “yes” or “no” to this question. *See* 2009-2010 SSOCS QUESTIONNAIRE, *supra* note 25, at 8; 2007-2008 SSOCS QUESTIONNAIRE, *supra* note 25, at 8. I dummy coded this variable, making the reference category “no.”

286. *b* is the coefficient for the independent variables. “The coefficient for the [independent] variable estimates the change in the dependent variable for any one-unit increase in the independent variable.” Wright, *supra* note 274, at 22. *p* is the probability that *b* coefficient is zero. *See id.* at 227. Exp(B) is the odds ratio, which represents the change in the odds of principals conducting random sweeps for a one-unit increase in the predictor. *Id.* at 223. With respect to categorical variables, it represents the change in the odds of principals conducting random sweeps when that condition is present. *Id.* at 233.

287. Schools with a minority population of 50 percent or higher is the variable against which each of the subcategories is compared.

288. “Schools having less than three hundred students” is the variable against which each of the subcategories is compared.

289. High school is the variable against which each of the subcategories is compared.

Urbanicity²⁹⁰						
Urban	-1.40	.02**	.25	-2.00	.00**	.13
Suburban	-1.36	.03**	.26	-1.18	.05**	.31
Town	-.23	.58	.80	-.44	.35	.64
Percent eligible for free and reduced lunch²⁹¹						
Between 0-20%	-.54	.32	.58	-1.17	.07*	.31
Between 21-50%	-.07	.84	.93	-.09	.82	.91
[Table continued on next page]	[Table continued on next page]					
Region of country²⁹²						
Western state	-1.24	.02**	.29	-1.50	.01**	.22
Northeastern state	-1.32	.02**	.27	.57	.30	1.78
Midwestern state	-.46	.20	.63	.03	.94	1.03
High, moderate, or mixed crime rates where students reside	-.02	.97	.98	.82	.07*	2.27
High or moderate crime rates where school is located	-.30	.60	.74	.81	.17	2.25
Juvenile justice agency involved	.44	.14	1.56	.91	.01**	2.48
Law enforcement officer on campus	.22	.50	1.25	.74	.05**	2.10

**p < .05; * p < .10 (approaching significance)

A few key predictors emerged from the analysis. First, the data show that the odds of conducting random sweeps without reporting any incidents relating to substance abuse or weapons were greater for schools with higher minority populations than for schools with lower minority populations. Specifically, the odds for schools with minority populations of over 50 percent were more than 2.7 times greater in 2009–2010, and more than 3.6 times greater in 2007–2008, than for schools with minority populations of between 0 and 5 percent.²⁹³ This holds true even when taking into account other factors that may influence

290. Rural schools are the variable against which each of the subcategories is compared.

291. Schools having more than 50 percent of its students eligible for free or reduced lunch is the variable against which each of the subcategories is compared.

292. Southern states are the variable against which each of the subcategories is compared.

293. See *infra* Table 2. Because the coefficients are negative, the probabilities are found by dividing one by the odds ratio (Exp(B)). See MICHAEL H. KATZ, MULTIVARIABLE ANALYSIS: A PRACTICAL GUIDE FOR CLINICIANS 130 (1999) (explaining procedure for computing the odds ratio for a negative coefficient).

school officials to conduct these searches, such as their perceptions of the crime levels where students reside and where the school is located, the percent of students eligible for free and reduced lunch, school level, school enrollment size, and school location.²⁹⁴ In 2009–2010, the odds of conducting these searches were four times greater for schools with minority populations of over 50 percent than for schools with minority populations between 5 and 20 percent.²⁹⁵ Also in 2009–2010, the odds were 7.7 times greater for schools with minority populations of over 50 percent than for schools with minority populations between 20 and 50 percent.²⁹⁶ More research is needed to discover the reasons behind the different results across school years and why, in 2009–2010, the greatest odds emerged from comparing schools with minority populations of 20 and 50 percent to schools with over 50 percent. Nevertheless, the general finding that emerged from this analysis is clear: the odds of conducting random sweeps without reporting any incidents relating to substance abuse or weapons were greater for schools with higher percentages of minority students than for schools with lower percentages of minority students.

Second, in both 2009–2010 and 2007–2008, the odds for conducting these searches without reporting any incidents relating to substance abuse or weapons were over three times greater in rural schools than in urban schools or suburban schools.²⁹⁷ Third, the data indicate that these searches primarily occurred in schools located in the south.²⁹⁸ In both 2009–2010 and 2007–2008, the odds were over three times greater in schools located in southern states than in schools

294. This is done by statistically controlling for the effects of these other variables. See Philip B. Stark, *Glossary of Statistical Terms*, UNIV. OF CAL. BERKELEY, DEPT OF STAT., <http://statistics.berkeley.edu/~stark/SticiGui/Text/gloss.htm#c> (last modified Mar. 19, 2012) (“To control for a variable is to try to separate its effect from the treatment effect, so it will not confound with the treatment. There are many methods that try to control for variables. Some are based on matching individuals between treatment and control; others use assumptions about the nature of the effects of the variables to try to model the effect mathematically, for example, using regression.”).

295. See *supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. See KATZ, *supra* note 293, at 130.

296. See *supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. See KATZ, *supra* note 293, at 130.

297. See *supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. See KATZ, *supra* note 293, at 130.

298. See *supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. See KATZ, *supra* note 293, at 130.

located in western states.²⁹⁹ Likewise, in 2009–2010, the odds were over three times greater in schools located in southern states than in schools located in northeastern states.³⁰⁰

Other variables were significant in either 2009–2010 or 2007–2008, but not across both school years. For example, in 2007–2008, the odds for conducting these searches were over three times greater for schools having over 50 percent of their students qualify for free or reduced lunch than for schools having between 0 and 20 percent qualify for free or reduced lunch.³⁰¹ In 2007–2008, the odds were over two times greater in schools that involved juvenile justice agencies in the school's efforts to promote safe and drug-free schools than in schools that did not involve those agencies.³⁰² Also in 2007–2008, the odds were over two times greater in schools that had a security guard, security personnel, or sworn law enforcement officer present at their schools at least once a week than in schools that did not.³⁰³ In 2009–2010, the odds were over two times greater in high schools than in middle or combined schools.³⁰⁴ Also in 2009–2010, the odds were greater in schools with smaller student populations than in schools with mid-size student populations.³⁰⁵ More research must be conducted to determine why these factors were not significant in both school years and whether they will be significant in the future.

IV. DISCUSSION OF FINDINGS AND RECOMMENDATIONS

This section discusses the implications of the empirical findings against the legal and normative analyses set forth in Sections I and II. It then provides recommendations based on the empirical findings. It concludes by providing a roadmap for further research projects on these issues.

299. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. *See KATZ, supra* note 293, at 130.

300. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. *See KATZ, supra* note 293, at 130.

301. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. *See KATZ, supra* note 293, at 130.

302. *See supra* Table 2.

303. *See supra* Table 2. Because the Beta weights are negative, the probabilities are found by dividing 1 by $\text{Exp}(B)$. *See KATZ, supra* note 293, at 130.

304. *See supra* Table 2.

305. *See id.*

A. *Discussion of Findings*

An analysis of the SSOCS data raises concerns that some school officials may be violating students' civil rights by conducting suspicionless searches of students' personal belongings without having particularized evidence of a substance abuse or weapons problem. If constitutional violations are indeed taking place, schools are undermining one of the missions of educational institutions, which is to transmit common values that enable students to exercise the responsibilities of citizenship and benefit from participation in a free economy.³⁰⁶ As Justice Brennan reasoned, "[s]chools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."³⁰⁷ Moreover, if such violations are taking place, they put schools at risk of costly, time-consuming lawsuits.

But even if these searches are permissible under the current Fourth Amendment jurisprudence, they appear to be inconsistent with students' best interests. The empirical analysis indicates that many schools in the sample, and hundreds across the country, performed random sweeps for contraband during the school year even though they did not report a single incident relating to weapons, drugs, or alcohol during the school year.³⁰⁸ As explained above,³⁰⁹ education and sociology experts maintain that using strict security measures sends a powerful, adversarial message to students that they

306. Levin, *supra* note 10, at 1649; *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 373–74 (1985) (Stevens, J., dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."). As Betsy Levin observes, what the mission of schools should be and which values they should transmit has been the subject of much debate. *See* Levin, *supra* note 10, at 1649 ("The mission of schools as transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated and who is authorized to make these decisions. There is no consensus, for example, on whether schools should emphasize a common language, history, and culture promoting assimilationist and national norms, or emphasize pluralism and diversity."). For a thorough discussion of two competing missions of schools, *see* Dupre, *supra* note 10, at 64–69.

307. *Doe v. Renfrow*, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting); *see also id.* at 1027 ("We do not know what class petitioner was attending when the police and dogs burst in [and sniffed her], but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey.").

308. *See supra* Section III.D., Figure 2.

309. *See supra* Section II.

are suspect and are not to be trusted.³¹⁰ It sours students' attitudes, alienates students, creates discord and disunity, invades students' privacy that is necessary for a healthy self-esteem, and undermines a positive, healthy learning environment that can be very difficult to achieve in schools.³¹¹ In addition, there may be a real danger that some schools are socializing students to tolerate and expect this type of treatment by government officials.³¹²

The analysis also demonstrates that the odds for conducting these potentially unconstitutional searches are greater in schools with higher minority populations than in schools with lower minority populations, even after taking into account school officials' perceptions of the level of crime where students live and where the school is located.³¹³ This finding is consistent with other empirical studies that show that minority students more often are subject to strict security measures resembling prison-like conditions than white students.³¹⁴ The concerns associated with this finding are threefold.

First, this finding supports the theory that the primary mission of minority schools is not to educate, but to ensure custody and control.³¹⁵ This is demonstrated by the fact that schools with higher minority populations appear to be more willing to perform random sweeps than schools serving primarily white students, even in an educational environment that appears to be less hampered by school crime.³¹⁶ Second, as explained above,³¹⁷ such criminal-justice oriented practices perpetuate racial inequalities by conditioning minority students to expect intense surveillance by government authorities and limiting their future opportunities if they are arrested.³¹⁸ Third, applying strict security measures disproportionately to racial minorities teaches harmful lessons to both minorities and white students, sending the socially disturbing message to all students that white students are

310. See Gardner, *supra* note 10, at 943.

311. See Hirschfield, *supra* note 161, at 46; see also Weiss, *supra* note 165, at 213, 227.

312. See KUPCHIK & WARD, *supra* note 29, at 3–10.

313. See *supra* Section III.E.

314. See Nance, *supra* note 202, at 27–33; see also KUPCHIK & WARD, *supra* note 29, at 20–26.

315. See Wacquant, *supra* note 207, at 189–90.

316. See *supra* Section III.E.

317. See *supra* Section II.B.

318. See KUPCHIK & WARD, *supra* note 29, at 6–7.

privileged, that white students have greater rights to privacy, and that minorities are suspect and cannot be trusted. Not only do such messages alienate minority students from schools, promote disengagement from the community, and generate apathy towards the government and society,³¹⁹ but they also cause minorities to be skeptical about white society's desire for racial equality.³²⁰ Such skepticism feeds a cycle of racial tensions and anger that leads to an undesirable world for people of all races to live in.³²¹ As Sharon Rush explained, "[o]ur children are watching us. They learn about race and race relations from us. As adults, we must be careful not to promote a vision of social reality that teaches non-white children that they are racially inferior or that teaches white children that they are racially superior."³²²

Further, the analysis indicates that schools that perform these searches without reporting any incidents relating to drugs or weapons tend to be small, rural schools located in the south.³²³ This finding, at first glance, may appear surprising to some because many observe that strict security practices typically take place in inner-city schools.³²⁴ Indeed, another empirical study I conducted indicates that large, urban schools are more likely to implement intense security measures that simulate prison-like conditions than other schools.³²⁵ However, the focus in this Article is schools that reported no incidents relating to drugs, alcohol, or weapons during the school year, which is an uncommon occurrence for large, inner-city schools. But despite the different focuses, it is worth emphasizing that the results from both studies point to the same unfortunate fact: minorities more often are subject to strict security

319. *Id.* at 4 (explaining that students subject to strict security measures may become adults "who do not participate in mainstream political processes and are apathetic towards government policies and institutions, having experienced civic alienation or exclusion as part of their early educational experience").

320. See Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20–21 (1999) (describing how minorities are skeptical about the white society's commitment to racial equality based on the realities of the world they view).

321. See, e.g., *id.* at 31–39.

322. Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 33, 42 (1997).

323. See *supra* Section III.E.

324. See Wacquant, *supra* note 207, at 82. (arguing that poor inner-city schools have a carceral atmosphere to ensure custody and control); see also Hirschfield, *supra* note 161, at 40 (positing that intensive surveillance of urban minority students conditions students to be prisoners, soldiers, or service sector workers).

325. See Nance, *supra* note 202, at 27–33.

measures than white students in many types of environments.

The larger question, however, remains unanswered, which is *why* small, rural schools located in the South more often perform these intrusive measures without reporting any incidents relating to weapons or substance abuse. It is possible that school officials use security measures as a shortcut for addressing the real problem schools face: how to deal with troubled students who commit violent acts, are disorderly, or who promote substance abuse. Of course, these problems are difficult to address and require the assistance of mental health experts, counselors, behaviorists, and support from parents and the community. But, unfortunately, such costly resources are not always available to school officials, especially to those who work in small, rural schools with small budgets. Nevertheless, although the reasons small, southern, rural schools with high minority populations rely more on strict security measures are unclear, the results suggest that these schools may need targeted training and more resources to provide better educational experiences for students. And if additional training and resources do not promote needed changes, students and their parents from these areas may need help seeking legal redress to protect their rights.

B. Recommendations

School security measures and their implications involve complex, sensitive issues that should be addressed by state and federal legislatures, courts, school boards, school administrators, teachers, students, parents, business leaders, and members of the community. Based on these preliminary findings, this Article makes three primary recommendations to these constituencies.

First, this Article recommends that courts take a more assertive role in establishing a baseline standard for school officials to follow when deciding whether to engage in intrusive search practices. Although the current legal framework indicates that school officials should not be permitted to search students' belongings absent a serious substance abuse or weapons problem, the Supreme Court and all of the federal circuit courts, except the Eighth Circuit, have not yet directly addressed this issue. Accordingly, this Article urges courts around the country, and especially the Supreme Court, to follow the Eighth Circuit's lead and expressly require school

officials to provide concrete evidence of a serious substance abuse or weapons problem before permitting schools to engage in intrusive search practices and provide students with appropriate relief when schools do not. Courts generally are reluctant to interfere with school officials' day-to-day administrative practices,³²⁶ but they must set appropriate boundaries to protect students' Fourth Amendment rights, particularly in a setting where students are learning the contours of their civil rights and are forming views of themselves, their communities, and their place in society. Too often courts refuse to hold schools accountable for performing intrusive searches without having sufficient justification for doing so.³²⁷ This recommendation applies equally to state courts as well as federal courts. In fact, independent of how the Supreme Court decides this issue, states can interpret principles from their own constitutions to provide students with greater privacy rights than what students currently enjoy under the U.S. Constitution.³²⁸

Second, stronger court intervention cannot be the only means to rectify these issues, especially if the number of suits brought by parents of aggrieved students remains low.³²⁹ State legislatures should consider requiring state and local boards of education to employ an education ombudsman³³⁰ to act as an

326. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (holding that students' Fourth Amendment rights are abridged because the Court cannot disregard schools' custodial and tutelary responsibilities).

327. See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 379 (2009) (concluding that the school violated the Fourth Amendment by strip searching a student without sufficient justification, but denying relief because school official acted in good faith and did not violate a "clearly established" right); *B.C. ex rel. Powers v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999) (denying relief for a suspicionless search because school official acted in good faith and did not violate a "clearly established" right); see also *Feld*, *supra* note 10, at 947-52 (describing the limited remedies available to students for constitutional violations).

328. See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the Federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."); see also *Bloom*, *supra* note 121, at 356 (explaining that some states have interpreted their own laws to require particularized evidence of a drug problem before justifying random drug testing).

329. See *Feld*, *supra* note 10, at 950-52 (describing the impediments for bringing a civil suit to protect Fourth Amendment privacy rights).

330. An ombudsman is "a government official . . . appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials." MERRIAM-WEBSTER DICTIONARY, *Definition of Ombudsman*,

independent intermediary to resolve these and other complaints that arise among families and school officials. Some state and local school boards already have educational ombudsmen in place to resolve problems between families and schools, which could be used as a model for other schools.³³¹ If an ombudsman were readily available to students and parents at no cost and would maintain confidences, the ombudsman could ameliorate many problems students face to protect their civil rights.

Third, school officials and policymakers should consider alternative, more effective means for reducing school violence and drug abuse than resorting to methods that rely on coercion, punishment, and fear. As explained above, programs that promote a strong sense of community and collective responsibility more effectively reduce school crime and do not degrade the learning environment.³³²

C. A Roadmap for Further Research

These preliminary empirical findings provide sufficient justification for conducting further research on these important issues. One obvious place to begin is to reformulate the series of questions posed in the SSOCS. The U.S. Department of Education (DOE) might be well served to solicit the help of attorneys who have expertise in education law or criminal procedure to craft questions to reduce or eliminate ambiguity in their surveys. For example, it would be helpful to include questions that specifically target whether school officials randomly search through students' belongings, their lockers, their belongings stored in their lockers, their automobiles, or perform pat-downs on students. The DOE might consider asking other questions pertaining to these searches, such as how often they conduct these searches, who conducts these searches (i.e., principals, teachers, security guards, or law enforcement officers), the conditions under which these searches are conducted, and why they are conducted. Armed with this additional information, the DOE would be better

available at <http://www.merriam-webster.com/dictionary/ombudsman> (last visited Sept. 29, 2012).

331. See, e.g., WASH. ST. OFF. OF THE EDUC. OMBUDSMAN, *Welcome to the Office of the Education Ombudsman*, <http://www.governor.wa.gov/oeo/> (last visited on Sept. 29, 2012); PORTLAND PUBLIC SCHOOLS, *School Concerns? Talk to our new Ombudsman* (Nov. 18, 2011), <http://www.pps.k12.or.us/news/6711.htm>.

332. See *supra* Section II.A.

equipped to recommend appropriate training programs for school officials that would improve the educational climate of schools and help schools avoid costly litigation.

In addition to reformulating the SSOCS, other studies might seek to identify the types of search practices school officials believe they can conduct under various conditions. Those studies could identify particular gaps in school administrators' knowledge of constitutional law and provide crucial information that school district officials and other experts need to properly educate and train school administrators.³³³

Further, additional studies should seek to identify why school officials implement strict security measures, particularly in schools with high minority populations. Important questions that remain unanswered include: (1) Are under-resourced schools using these measures as a shortcut to provide an orderly environment instead of helping students change their behavior in more positive ways? (2) Are school officials responding to political or community pressures? (3) Do school officials believe that strict security measures are the most effective measures to reduce school crime? And (4) do school officials have implicit biases against minority students?

Finally, studies are needed to assess the long-term impact on students, both minorities and whites, who are subject to strict security measures. Such studies are difficult and costly, but they are an integral part of the cost-benefit analysis that school officials and other policymakers perform when deciding whether to implement these measures.

CONCLUSION

This Article provides a legal, empirical, and normative analysis of random, suspicionless searches of students' belongings. It argues that random, suspicionless searches of students' belongings are not permitted under the Fourth Amendment unless certain conditions are present in the school.

333. See Earl J. Ogletree & Nancy Lewis, *School Law: A Survey of Educators*, 35 DEPAUL L. REV. 259, 274-79 (1986) (providing empirical evidence that educators' understanding of students' Fourth Amendment rights is deficient); Jacqueline A. Stefkovich & Mario S. Torres Jr., *The Demographics of Justice: Student Searches, Student Rights, and Administrator Practices*, 39 ED. ADMIN. Q. 259, 276 (2003) ("[A] number of studies relative to educators' knowledge of the law show that administrators and teachers are deficient in their understanding of school law in general.").

It also argues that strict security measures are harmful to the educational climate and to students, especially when applied disproportionately to minorities. In addition, it provides empirical data which raises concerns that: (1) some public schools may be violating students' civil rights by conducting suspicionless searches on students' belongings without valid justifications; and (2) schools with higher minority populations are more likely to conduct those potentially unconstitutional searches than schools with lower minority populations.

These analyses should cause courts to strongly consider following the lead of the Eighth Circuit and require school officials to provide evidence of a substance abuse or weapons problem before permitting schools to engage in an intrusive search. Nevertheless, the most effective reform will occur if school officials themselves voluntarily agree to refrain from using measures that coerce and punish students and, instead, adopt measures that promote collective responsibility and trust. Such actions are more consistent with students' best interests, will preserve a healthy learning environment in which all children can learn more effectively, and will help create a better society to live in for people of all races.