Student Privacy and Strip Searches: Ninth Circuit Ruling Should Ring a Bell for Public School Officials

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Is a strip search to see if an eighth grade girl is in possession of "pills" an appropriate act by public middle school authorities? A recent decision by the U.S. Court of Appeals for the Ninth Circuit found that such a search violated the student's constitutional right to privacy, reaffirming that schoolchildren, as the Supreme Court recently observed once again, do not shed their constitutional rights at the schoolhouse gate.

More than two decades ago, in *New Jersey v. T.L.O.*,[1] the U.S. Supreme Court held that it was "beyond dispute" that the U.S. Constitution, by virtue of the Fourteenth Amendment, prohibited unreasonable searches and seizures by state officers, and that it was "[e]qually indisputable" that the Fourteenth Amendment protected the rights of students against encroachment by public school officials. As the Court stated, "[t]hat [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."[2]

To implement these principles, the Supreme Court established the standard for assessing the legality of searches conducted by public school officials. Whether school officials subject a student to a search of her

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purse, as in *T.L.O.*, or a search of another kind, the Court declared that the Constitution mandated the generalized requirement of "reasonableness, under all the circumstances, of the search."[3] The Court recognized that what was reasonable required a balancing of interests: "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."[4] Noting that "even a limited search of the person is a substantial invasion of privacy,"[5] the Court emphasized 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."[6] Weighed against the students' substantial interest in privacy was the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[7] To accommodate the school context, the Court concluded that the public interest was best served by a Fourth Amendment standard of reasonableness that stopped short of probable cause.[8]

The Court set forth a twofold inquiry to gauge reasonableness. First, it stated, one must consider whether the action "was justified at its inception." Second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[9] The Court further held that a search would be permissible in its scope when the measures adopted were "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."[10] The Court crafted this test to "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren."[11] However, the Court also emphasized that "the reasonableness standard" should ensure that the interests of students would be invaded no more than was "necessary to achieve the legitimate end of preserving order in the schools."[12]

Recently, the U.S. Court of Appeals for the Ninth Circuit applied this standard in the context of a search of a female middle school student. The appellate court's ruling, in *Redding v. Safford Unified School District* #1,[13]

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should serve as a reminder to public school officials about the importance of respecting student privacy — and about the need to understand the rules under which school authorities operate.

BACKGROUND

The *Redding* case arose in the small southeastern Arizona community of Safford. With a modest population of slightly under 10,000 residents, Safford maintains a single middle school that draws additional students from other neighboring small towns. In the late summer of 2003, a 13 year old female honor student (the "Girl") began a new school year as an eighth grader at Safford Middle School, along with approximately 200 other 13 and 14 year old classmates.

As the Ninth Circuit explained in its decision, on October 8, 2003, the Girl was attending math class when a male assistant principal opened the classroom door and instructed her to pack up her belongings and accompany him to his office. The Girl complied, gathered her things, and followed the assistant principal down the hallway. Upon arriving at the assistant principal's office, the Girl noticed a planner that she had lent a few days earlier to a female classmate (the "Classmate") sitting open on the assistant principal's desk. While the Girl immediately recognized the planner, she contended that she had not previously seen the objects allegedly contained in the planner, including knives, a lighter and a cigarette. The assistant principal then began interrogating her, first reminding the Girl of the importance of truth and then asking her who owned the planner. The Girl admitted that she owned the planner and had lent it to her Classmate. Upon further questioning, the Girl insisted that none of the objects contained in the planner belonged to her.

The Ninth Circuit explained that the assistant principal directed the Girl's attention to a few small white ibuprofen pills sitting on his desk. Possession of these pills violated school rule J-3050's prohibition against bringing any prescription or over-the-counter drug onto campus without prior permission. The assistant principal asked the Girl if she had anything to do with the pills. The Girl replied that she had never seen those pills before entering the assistant principal's office. Further, she assured

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the assistant principal that she had never brought any prescription pills into the middle school or provided any students with ibuprofen.

Dissatisfied with the results of his questioning, the assistant principal asked the Girl whether he could search her belongings; she agreed to this search. Along with his administrative assistant (a woman), the assistant principal looked through the Girl's backpack and found nothing. Nevertheless, the assistant principal asked his administrative assistant to take the Girl to the nurse's office for a second, more thorough search.

There, at the assistant principal's behest, the administrative assistant and the school nurse conducted a search of the Girl. According to the Ninth Circuit, the officials had her peel off each layer of clothing in turn. First, she removed her socks, shoes, and jacket for inspection for ibuprofen. The officials found nothing. Then, the administrative assistant asked the Girl to remove her T-shirt and stretch pants. The Girl complied and sat in her bra and underwear while the two adults examined her clothes. Again, the officials found nothing. Still progressing with the search, the administrative assistant instructed the Girl to pull her bra out to the side and shake it. The Girl followed the instructions, exposing her naked breasts in the process. The shaking failed to dislodge any pills. The administrative assistant next requested that the Girl pull out her underwear at the crotch and shake it.

Hiding her head so that the adults could not see that she was about to cry, the Girl complied and pulled out her underwear, revealing her pelvic area, according to the Ninth Circuit. No ibuprofen was found. The school officials told the Girl to put her clothes back on and to accompany the administrative assistant back to the assistant principal's office. The Girl later indicated that she was "embarrassed and scared, but felt [she] would be in more trouble if [she] did not do what they asked." In her affidavit, she described the experience as "the most humiliating experience" of her life, and said that she felt "violated by the strip search."

BEFORE THE SEARCH

As reported by the Ninth Circuit, the route to the school's search of the Girl began at the school dance held to celebrate the beginning of the

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new academic year. There, school officials detected the smell of alcohol around a small group of students, including the Girl and her Classmate, and became concerned that they may have drunk alcohol either before or during the school function.

Increasing their suspicion of alcohol use that night, school officials found an empty bottle of alcohol, along with a pack of cigarettes, in the girls' bathroom. Nothing, however, specifically linked the Girl or any other individual student to the empty bottle. Nevertheless, school officials remained wary that students were violating school rule J-3050, which prohibited the possession of alcohol and the non-medical use, possession, or sale of a drug, among other school rules. Enforcement of these school regulations apparently drove the school officials' increased efforts toward rooting out the ibuprofen.

On October 1, nearly a month and a half after the dance, and a week before the search of the Girl, a middle school student and his mother requested a meeting with the principal and the assistant principal. During the meeting, the boy's mother recounted how her son had become violent and had gotten sick to his stomach a few nights earlier. She said that he had confessed to his mother that he had become sick after ingesting pills he had received from some unspecified student. More generally, the boy advised the school administrators that "certain students" brought drugs and weapons on campus. The boy apparently did not suggest that the Girl was among the students bringing drugs into the middle school. To the contrary, the boy brought up the Girl's name only to accuse her family of providing alcohol to other students before the opening dance, an allegation the family denied.

Before the opening bell on the day of the strip search, the boy approached the assistant principal with a small white pill. He explained that the Classmate — he did not mention the Girl's name — had just given him the pill, and that a group of students planned to take the pills at lunchtime. Consistent with events he recounted during his meeting with the assistant principal the previous week, the boy did not link the Girl with possession of any pills or the plan for their distribution that day. The assistant principal then walked down the hall to ask the nurse if she could identify the pill. The nurse recognized it as 400 mg ibuprofen,

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obtainable only by prescription. Ibuprofen is most commonly found in over-the-counter Advil or Motrin in 200 mg pills to treat headaches, muscle-aches, or, for many young women, menstrual cramps.[14]

The assistant principal then walked toward the Classmate's classroom to question her about the ibuprofen. Interrupting the class, he asked the Classmate to gather her things and accompany him to his office. As the Classmate collected her belongings, the assistant principal noticed a black planner in the desk situated next to her. He asked the classroom teacher to determine the owner of the planner. Opening the planner, the classroom teacher found small knives, a cigarette lighter and a cigarette. No pills, however, were found in the planner. The assistant principal took the planner and the Classmate to his office.

Once back in his office, the assistant principal asked his administrative assistant to observe while the Classmate followed his direction to turn out her pockets and open her wallet. According to the Ninth Circuit, this search revealed several white ibuprofen pills identical to the one turned over by the boy, along with a blue Naprosyn 200 mg pill.[15] The assistant principal asked the Classmate how she had obtained the blue pill. The Classmate allegedly responded, "I guess it slipped in when *she* gave me the IBU 400s." The assistant principal asked, "Who is *she*?" The Classmate responded by mentioning the Girl's name.

According to the Ninth Circuit, the Classmate, however, did not indicate to the assistant principal that the Girl currently had any pills on her person, or, more specifically, had hidden pills in a place where a strip search would locate them.

The assistant principal then asked his administrative assistant to escort the Classmate down to the nurse's office for a more intensive search for additional ibuprofen pills. The administrative assistant asked the Classmate to remove her socks and shoes so that they could be searched. The Classmate complied. Then she asked the Classmate to pull up her shirt and pull out the band of her bra. Finding nothing, she asked the Classmate to take off her pants and stretch out the elastic on her underwear. The search failed to reveal any additional ibuprofen. After this search, the assistant principal and the school officials turned their attention to the Girl.

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As the Ninth Circuit explained, the crucial link — indeed, the only link — between the Girl and the ibuprofen was the Classmate's statement upon being caught with the pills that the ibuprofen (and the blame) was not hers, but rather was the Girl's. Before the Classmate implicated the Girl, there had been no connection between the Girl and the circulating rumors of prescription drugs on campus. She had never been disciplined for any infraction of school rules, let alone possession or distribution of drugs. The tip provided by the boy only linked the Classmate to the ibuprofen and failed to include any mention of the Girl. Indeed, even the planner the Girl lent to the Classmate failed to provide any connection between the Girl and any ibuprofen because the pills had been found on the Classmate's person, not inside the planner. Nevertheless, as the Ninth Circuit explained, on the sole basis of the Classmate's attempt to shift the school officials' focus off herself and onto the Girl, and without additional questioning or investigation, the assistant principal directed his assistant and the school nurse to require the Girl to disrobe.

Upset after hearing what had happened to her daughter, the Girl's mother made an appointment with the school administrators. Apparently unsatisfied by the meeting, the family brought suit in a federal district court in Arizona against the school district, the assistant principal, the administrative assistant, and the school nurse.

The defendants filed a motion for summary judgment, asserting that the defense of qualified immunity precluded them from suit. Their motion relied solely on the argument that the search did not violate the Girl's Fourth Amendment rights, and "because there was no constitutional violation, no further inquiry is necessary." In a series of declarations, the assistant principal, the administrative assistant, and the school nurse sought to justify the strip search of the Girl with a general concern that "[t]he school has a history of problems with students using and distributing prohibited and illegal substances on campus," and a recounting of events leading up to the search.

The district court ruled for the defendants entirely on the basis that there was no violation of the Girl's constitutional right, as established by *T.L.O.*, to be free from unreasonable searches in school. It accepted as sufficient the defendants' representation that the Girl's decision to lend

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the Classmate her planner provided a sufficient nexus between the two girls to corroborate the Classmate's tip. The district court reasoned that this connection justified the strip search at its inception by providing the defendants with reasonable grounds for suspecting that a strip search of the Girl would turn up the ibuprofen. Moreover, the district court concluded that the need to locate the ibuprofen was sufficiently urgent that the strip search was "reasonably related" to the search's objective and was not "excessively intrusive."[16]

Upon appeal, a divided panel of the Ninth Circuit upheld the grant of summary judgment in favor of the defendants. The two judge majority concluded that "[a]mple facts" supported the Classmate's veracity as an informant, justifying the assistant principal's subsequent search of the Girl, including her ownership of the planner and the disputed allegations of her distribution of alcohol to students.[17] The majority found the strip search permissible in scope because "the strong interest" in protecting students from prescription drugs outweighed the intrusion caused by the search, which it found had been conducted in a "reasonable manner." A dissenting judge asserted that the majority had misapplied Supreme Court authority. While *a* search may have been justified, the dissent argued that the majority had failed to undertake "the appropriate inquiry [of] whether a *strip search* was justified."[18] Arguing that it was "unreasonable" to force a 13 year old girl to expose her breasts and pubic area to school officials while they searched for ibuprofen, the dissent concluded that the strip search had failed to meet constitutional muster under *T.L.O.*[19] The Ninth Circuit subsequently voted to vacate the panel's decision and reconsider en banc whether the search had violated the Girl's Fourth Amendment rights, and, if so, whether those rights had been clearly established in October 2003, when the school officials had conducted the search.

THE *EN BANC* MAJORITY DECISION

The majority decision, written by Judge Kim McLane Wardlaw, in which five other judges joined,[20] explained that there was a two step process to evaluate assertions of qualified immunity.[21] First, a court had to deter-

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mine whether "[t]aken in the light most favorable to the party asserting the injury,…the facts alleged show the officer's conduct violated a constitutional right."[22] If that question is answered in the affirmative, it then must be determined whether the violated right was "clearly established."[23]

The majority initially decided that there was no doubt but that the Safford school officials had conducted a strip search of the Girl, finding its designation of the Girl's search as a strip search to be supported by federal and state law, as well as by secondary authority. The majority declared that the Girl did not have to be completely naked for the school officials to have strip searched her. It pointed out that the Eleventh Circuit has considered a police officer's direction for someone to strip down to underwear to be a "strip search,"[24] the Fourth Circuit understands a search of an adult arrestee in his boxer shorts to be a strip search,[25] and the First Circuit recognizes that a strip search "may occur even when an inmate is not fully disrobed."[26]

Additionally, the majority found that statutes defining a strip search in several states confirmed its understanding of the term "strip search." California, for instance, defines the term as "requir[ing] a person to remove or arrange *some or all* of his or her clothing so as to permit a visual inspection of the *underclothing*, breasts, buttocks, or genitalia of such person."[27] It noted that the Fourth Circuit had recognized that this definition of a strip search was "uniform" throughout the country.[28] The majority added that *Black's Law Dictionary* defined a "strip search" as "[a] search of a person conducted after that person's clothes have been removed, the purpose usually being to find any contraband the person might be hiding."[29]

The majority stated that the Girl was required by public school officials to disrobe and expose the parts of her body underneath her underwear so that school officials could potentially find ibuprofen. It concluded that the Girl had been subjected to a strip search.

WAS THE STRIP SEARCH JUSTIFIED AT ITS INCEPTION?

Under ordinary circumstances, a search of a student by a teacher or

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other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[30] The majority opinion noted that reasonableness depends on context, and that "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness." It noted that what may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.[31] (Other circuit courts of appeals, including the Second Circuit, agree with this approach: "Although *T.L.O.* held that reasonable suspicion is the governing standard, the reasonableness of the suspicion is informed by the very intrusive nature of a strip search, requiring for its justification a high level of suspicion.")[32]

The majority stated that in this case, as in *T.L.O.*, the school officials engaged in two related searches: first, a search of the Girl's backpack and her pockets, which did not give rise to the claims in the complaint, and second, a strip search, which formed the basis of the complaint.[33] The majority then explained that a review of the facts found in *T.L.O.*, and the Supreme Court's reasoning regarding the progression of the first search of T.L.O. to the second, supported its conclusion that while reasonable suspicion may very well have justified the initial search of the Girl's backpack and the emptying of her pockets, it was unreasonable to proceed from this first search to a strip search.

As the majority pointed out, in *T.L.O.*, a high school teacher discovered two Girls smoking in a lavatory in violation of a school rule.[34] In response, the teacher brought the two Girls down to the principal's office to discuss the infraction with the high school's vice principal. While T.L.O.'s friend admitted to smoking, in violation of a school rule, T.L.O. denied the allegation.[35] To determine whether to believe the denial, the vice principal brought T.L.O. into his private office and asked to see her purse.[36] As he opened the purse, the vice principal found a pack of cigarettes.[37] Reaching in for the cigarettes, the vice principal further discovered a package of rolling papers, closely associated with the use of marijuana.[38]

Having discovered indications that T.L.O.'s previous denial was false

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and that she possessed drug paraphernalia, the vice principal began a second and more intrusive search of T.L.O.'s purse.[39] This second search revealed a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.[40]

The Supreme Court reasoned that the initial search of T.L.O.'s purse was reasonable because a teacher had reported that this particular student was smoking in the bathroom.[41] This report gave the vice principal reason to suspect T.L.O. had cigarettes on her person, and "if she did have cigarettes, her purse was the obvious place in which to find them."[42] This first search revealed not only corroboration of the vice principal's suspicion that T.L.O. was carrying cigarettes, but, by the discovery of rolling papers, also provided additional reasonable suspicion that T.L.O. may possess marijuana, thereby justifying a second, more intrusive search. Because the first search revealed information that supported reasonable suspicion that she possessed contraband, the Supreme Court concluded that "further exploration of T.L.O's purse" was justified.[43]

The majority in *Redding* reasoned that the causal link permitting the vice principal to proceed from his first, less intrusive search to a second, more thorough search — in *T.L.O.*, the discovery of cigarettes and rolling papers — was entirely absent in its case. It noted that the initial search of the Girl's backpack (which, like T.L.O.'s purse, was "the obvious place" to find pills) did not turn up any ibuprofen. The *T.L.O.* Court concluded that the second search was reasonable because the preliminary search provided physical evidence supporting the vice principal's suspicion. Of course, the discovery of cigarettes also provided the vice principal with good reason to discount the veracity of T.L.O.'s denials. In *Redding*, the majority emphasized, no such causal link existed. To the contrary, the initial search of the Girl revealed nothing to suggest she possessed pills or that she was anything less than truthful when she emphatically stated she had never brought pills into the school. Following the logic of *T.L.O.*, the *Redding* majority ruled that the initial search of the Girl's backpack and her pockets may have been constitutionally permissible. It then considered whether the subsequent strip search was justified

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at *its* inception.

The majority stated that absent the sort of physical evidence found in *T.L.O.*, the primary purported justification for the strip search was the Classmate's statement that the Girl had given her the ibuprofen that she was caught with in violation of the school's rule. It ruled that this "self-serving statement," which shifted the culpability for bringing the pills to school from the Classmate to the Girl, did "not justify initiating a highly invasive strip search of a student who bore no other connection to the pills in question." The majority explained that all informants' tips were not treated as equal in their reliability.[44] Rather, it stated, when a court was considering whether an informant's tip was sufficient to support a finding of probable cause or reasonable suspicion, the court must employ a "totality-of-the-circumstances approach" taking into consideration the informant's "veracity" or "reliability" and the informant's "basis of knowledge."[45] The majority added that it was "most suspicious" of self-exculpatory tips that might unload potential punishment on a third party.[46] Indeed, it stated, its concerns were heightened "when the informant is a frightened eighth grader caught red-handed by a principal" — particularly when the student implicated another who had not previously been tied to the contraband and, more generally, had no disciplinary history whatsoever at the school. More succinctly, majority ruled that the "self-serving statement of a cornered teenager facing significant punishment" did not meet "the heavy burden" necessary to justify a search that could be described as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant [and] embarrassing."[47]

The majority stated that, at a minimum, the assistant principal should have conducted additional investigation to corroborate the Classmate's "tip" before directing the Girl into the nurse's office for disrobing.[48] It added that this need for further investigation was particularly heightened in the *Redding* case because the initial tip provided no information as to whether the Girl possessed ibuprofen pills or was hiding them in a place where a strip search would reveal them.[49] According to the majority, several avenues were available for the assistant principal to follow up on the Girl's general statement, including discussions with her teachers, conversations with her parents, or further questioning of other students. The only

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"corroboration" the assistant principal received — the Girl's adamant denial of possessing ibuprofen and a "fruitless search" of her backpack — did "not serve to bolster the tip's reliability to a degree sufficient to justify a further and more intrusive search," according to the majority.

It added that it also was not persuaded that either the Girl's admission that she had lent the Classmate the planner or any disputed allegation that she had served alcohol six weeks earlier provided reasonable grounds to believe that a strip search of the Girl would reveal ibuprofen. The planner that the Girl lent to the Classmate had not been used by the Classmate to conceal ibuprofen. The ibuprofen, rather, had been concealed in the Classmate's pockets, consistent with the information provided by the boy linking the Classmate alone to the ibuprofen. That the Girl lent a planner to the Classmate — in which the Classmate concealed objects that violated Safford school rules — did not make it significantly more likely that the Girl had anything to do with the pills carried in the Classmate's pockets, the majority reasoned. To conclude that the planner cemented the Girl's friendly relationship with the Classmate, and therefore made the Girl's involvement in pill distribution more likely, was nothing more than "guilt-by-association," according to the majority, and "certainly too thin of a reed for such a substantial intrusion" into the Girl's expectations of privacy.[50]

Moreover, according to the majority, the Classmate's compounding number of school rule violations should reasonably have cast more suspicion on her own culpability, further undermining the reliability of her accusation of the Girl. Further, the Girl's mother had denied the family's involvement in providing alcohol to any student before the school dance. The majority also stated that even if the Girl had provided alcohol to students before the dance, that event did "not make it more likely that an October strip search would reveal ibuprofen pills hidden in [the Girl's] underwear."[51]

The majority then compared the facts leading to the Girl's strip search to justifications offered for similar searches examined by other circuit courts of appeals, finding further support for its conclusion that this strip search was not justified at its inception. In *Cornfield ex rel. Lewis v. Consolidated High School District No. 230*, the Seventh Circuit found justifiable at its inception a strip search of a 16 year old male enrolled in

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a high school behavioral disorder program.[52] There, a disinterested teacher's aide observed that the student was "too well endowed," suggesting that the student might be "crotching" drugs.[53] Information from third parties buttressed this observation, including another student's report that the student had brought drugs onto campus, and a teacher's report that the student admitted he had previously dealt drugs as well as "crotched" drugs during a police raid at his mother's house.[54] Moreover, the local police had reported to the school that they received information that the student was selling marijuana to other students.[55] Perhaps most importantly, the information provided a basis to believe that a strip search was necessary to reveal the contraband. The majority in *Redding* found that these factors — teacher observations indicating the contraband was hidden in the student's underwear, tips from impartial students, police reports, and previous student admissions — all distinguished that student's search from that of the Girl, whose only tie to the ibuprofen in question was the Classmate's statements, which in this context, the majority found to be unreliable.

The majority added that in *Phaneuf v. Fraikin*,[56] the Second Circuit struck down as unjustified a strip search of an 18 year old girl as unjustified with what the *Redding* majority stated were facts "far more favorable to the school officials than those present" in *Redding*. In *Phaneuf*, a disinterested student provided a tip to a teacher that a student with a history of disciplinary problems planned to stuff marijuana down her pants that day to take along with her on the senior class picnic.[57] Although the school had a specific tip that the student was hiding drugs where only a strip search could discover them, and the school called the student's mother to perform the search, the Second Circuit determined that a student tip, even when not seeking to shift blame, justified only further inquiry and not a "step as intrusive as a strip search."[58] The *Redding* court stated that the circumstances the public school officials confronted in *Redding* provided "even less justification than those rejected in *Phaneuf*," considering the source of the tip, the content of the tip (including no information that the Girl possessed pills in a place where a strip search would reveal them), and the history of the student in question.

The majority then declared that the school initiated a strip search of

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the Girl on the basis of an unsubstantiated tip from the Classmate, "a student seeking to shift blame" from herself to the Girl. Other facts marshaled by the school district — allegations of alcohol use months earlier, the boy's tip that the Classmate provided him with a pill, and the Classmate's hidden contraband in a planner the Girl lent her — were "logically unrelated" to a reasonable belief that the Girl was hiding pills on her person. For these reasons, the majority then held that the strip search of the Girl was unjustified at its inception.

WAS THE STRIP SEARCH REASONABLE IN SCOPE?

The majority also ruled that the strip search was not "reasonably related in scope to the circumstances which justified the interference in the first place."[59] It noted that the scope of a search was permissible only if "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.*"[60] Here, it found, the public school authorities adopted a disproportionately extreme measure to search a 13 year old girl for violating a school rule prohibiting possession of prescription and over-the-counter drugs. It therefore concluded that the strip search was not reasonably related to the search for ibuprofen, as the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra (or that the Girl's classmates would be willing to ingest pills previously stored in her underwear). According to the majority, "[c]ommon sense" informed it that directing a 13 year old girl to remove her clothes, partially revealing her breasts and pelvic area, for allegedly possessing ibuprofen, an infraction that it stated posed an "imminent danger to no one, and which could be handled by keeping her in the principal's office until a parent arrived or simply sending her home," was "excessively intrusive."

PSYCHOLOGICAL TRAUMA

The majority stated that it, along with other circuits, had long recognized the psychological trauma intrinsic to a strip search. It declared that

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the feelings of "humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection" was "beyond dispute."[61] It added that the Tenth Circuit had explained, "[t]he experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state…can only be seen as thoroughly degrading and frightening."[62] That the Girl's search took place in a nurse's office in front of two women did not remove the sting of the procedure, the majority stated.[63]

The Ninth Circuit stated that these concerns, pressing and legitimate when strip searches were conducted on adults in prison, were "magnified" when strip searches were performed on schoolchildren. As adolescents enter puberty, "they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older."[64] In the Ninth Circuit's view, no one would seriously dispute that a nude search of a child was traumatic.[65]

The majority opinion emphasized that the search had been undertaken to find prescription-strength ibuprofen pills, and it then rejected the school district's effort to lump together these "run-of-the-mill anti-inflammatory pills" with "prescription drugs" in what the majority characterized as a "knowing effort to shield an imprudent strip search of a young Girl behind a larger war against drugs." It stated that nothing in the record provided any evidence that the school officials were concerned in this case about controlled substances violative of state or federal law, and it said that there was no legal decision that permitted a strip search to discover substances "regularly available over the counter at any convenience store throughout the United States."[66] And, it stated, contrary to any suggestion that finding the ibuprofen was an urgent matter to avoid a parade of horribles, even if the Girl had possessed the ibuprofen pills, "any danger they posed was neutralized" once school officials seized the Girl and held her in the assistant principal's office. The Girl had no means at that point to distribute the pills, and whatever immediately threatening activity the school may have perceived by the alleged possession of prescription-strength ibuprofen had been thwarted.

According to the Ninth Circuit, the school officials had only to send

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the Girl home for the afternoon to prevent the rumored lunchtime distribution from taking place — assuming she in fact possessed the pills on her person. It added that the lack of any immediate danger to students only further diminished the initial minimal nature of the alleged infraction of bringing ibuprofen onto campus. It pointed out that "a school is not a prison; the students are not inmates." It observed that even if the Girl had been accused of a federal crime, she would have been entitled to more legal protections that she received here.

The majority therefore concluded that approving the strip search in this case would "eviscerate" the Supreme Court's stated goal of developing a standard that ensured that the interests of students would be invaded no more than was necessary to achieve the legitimate end of preserving order in the schools.[67] It therefore concluded that the strip search was impermissible in scope and the public school officials had violated the Girl's Fourth Amendment rights.

WAS THE RIGHT OF A 13 YEAR OLD GIRL TO BE FREE FROM STRIP SEARCHES ON SUSPICION OF POSSESSING IBUPROFEN CLEARLY ESTABLISHED IN 2003?

Having determined that the strip search violated the Girl's constitutional rights, the majority then considered whether those rights had been clearly established at the time of the search. It explained that as of 1985, when the Supreme Court issued *T.L.O.*, the legal framework was clearly established that would put school officials on notice that a strip search was not a reasonable measure to use on a 13 year old girl accused by an "unreliable" student informant of having ibuprofen in violation of school rules. In *T.L.O.*, the Supreme Court carefully instructed school officials as to the twofold inquiry that must be made before they engage even in a minimally intrusive search: whether the search was justified at its inception and whether it was reasonable in scope in light of the nature of the infraction and the age and gender of the student.[68] The school district's authorities conducted their search in *Redding* almost 20 years after the Supreme Court's instructions in *T.L.O.* A reasonable school official,

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seeking to protect the students in his or her charge, did not subject a 13 year old girl to a traumatic search to "protect" her from the danger of Advil, according to the appellate court. It then held that the Girl's rights were clearly established at the time that the assistant principal, in his official capacity, initiated and directed the strip search. The appellate court ruled that the record left "no doubt" that it would have been clear to a reasonable school official in the assistant principal's position that the strip search violated the Girl's constitutional rights, and it therefore reversed summary judgment as to him and the school district.

However, it added, the school nurse and the administrative assistant acted solely pursuant to the assistant principal's instructions and not as independent decision-makers, and, thus, were entitled to summary judgment.

THE DISSENT

The minority would have reached a different result, relying primarily on other Supreme Court decisions. For example, it noted that in *Vernonia School District 47J v. Acton*, the Supreme Court rejected a Fourth Amendment challenge to a school district's policy of conducting random urinalysis drug testing on student athletes, which required those students to urinate under teacher supervision.[69] In doing so, the *Redding* minority pointed out that the Supreme Court had noted that T.L.O. emphasized that "the State's power over schoolchildren" was "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[70] In *Acton*, the school's role as a "guardian and tutor" was the "most significant element" in the Court's decision.[71] The *Redding* minority observed that, considering the government's interest in "[d]eterring drug use by our Nation's schoolchildren," the Court opined that "the nature of the concern is important — indeed, perhaps compelling — [which] can hardly be doubted."[72] Students were the most susceptible to the physical, psychological, and addictive effects of drugs,[73] and "of course 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."[74]

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The minority added that although the Court acknowledged that there was a less intrusive means of deterring drug abuse — "drug testing on suspicion of drug use" — *Acton* reiterated that there was no "least intrusive" requirement under the Fourth Amendment.[75] The suspicion-of-drug-use requirement was undesirable because it would "add[ ] to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation."[76]

More recently, the *Redding* minority continued, the Supreme Court upheld a similar urinalysis drug testing policy that applied not only to student athletes, but also to all students who participated in competitive *extracurricular activities. In Board of Educ. of Indep. Sch. Dist. No. 92 v. Earls*,[77] the Court explained that "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety," and cited as examples policies that require students to routinely "submit to physical examinations and vaccinations against disease."[78] Reiterating the problems of adolescent drug abuse in schools discussed in *Acton*, the *Earls* Court stated that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."[79] And, once again, the Court rejected the argument that the Constitution requires individualized suspicion before testing.[80] In addition to the reasons discussed in *Acton*, the Court offered an additional concern: "The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use."[81]

Finally, the *Redding* dissent noted, the Supreme Court held in 2007 that schools can "restrict student expression that they reasonably regard as promoting illegal drug use."[82] Drawing on school search cases, it restated that "'the nature of [schoolchildren's] rights is what is appropriate for children in school,'" and that "deterring drug use by schoolchildren is an 'important — indeed, perhaps compelling' interest."[83]

The *Redding* minority stated that 23 years after it was decided, *T.L.O.* remains good law. Students still have reduced expectations of privacy on campus, and school officials are still entitled to promptly and informally confront threats to school order. The minority emphasized that not only

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has the Supreme Court failed to strike down any searches under *T.L.O.*, it has gone even further, holding that schools can require students to provide urine samples under teacher supervision without any suspicion of drug use, and without any history of drug problems at the school.

CONCLUSION

Although a minority of the en banc court would have reached a different result, the majority ruling should be something to which public school officials pay particular attention. It seems clear that the *T.L.O.* decision does not tell courts to afford school officials' judgments unblinking deference. Nor does *T.L.O.* provide blanket approval of strip searches of 13 year olds remotely rumored to have had Advil merely because of a generalized drug problem. Rather, the *T.L.O.* decision and the *Redding* opinion make it clear that while school officials need not apply a probable cause standard to a purse search, they must act according to the dictates of "reason and common sense." At least in the view of the majority of the judges of the Ninth Circuit who considered the case en banc, the public school officials who strip searched the Girl acted contrary to all reason and common sense "as they trampled over her legitimate and substantial interests in privacy and security of her person." It is in public school officials' best interests to keep this ruling in mind when facing similar situations in their schools, at least until other courts or the Supreme Court, decide otherwise.

NOTES

[1] *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[2] *Id.* (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

[3] *Id.* at 341.

[4] *Id.* at 337.

[5] *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)).

[6] *Id.* at 337-38.

[7] *Id.* at 339.

[8] *Id.* at 341.

[9] *Id.* (citations omitted).

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[10] *Id.* at 342.
[11] *Id.* at 342-43.
[12] *Id.* at 343.
[13] No. 05-15759 (9th Cir. July 11, 2008).
[14] *See Physician's Desk Reference for Nonprescription Drugs, Dietary Supplements, And Herbs*, 725-26 (29th ed. 2008).
[15] Naprosyn, like ibuprofen, is used to treat pain and inflammation. *See Physician's Desk Reference* 2725 (62nd ed. 2008). It is most commonly found in Aleve, a popular over-the-counter choice to treat discomfort related to menstrual cramps.
[16] The conclusion that the Girl's constitutional rights were not violated rendered consideration of the second step of qualified immunity — whether the right was clearly established — unnecessary.
[17] *Redding v. Safford Unified Sch. Dist. #1*, 504 F. 3d 828, 834 (9th Cir. 2007), *r'hg en banc granted*, 514 F. 3d 1383.
[18] *Id.* at 837 (Thomas, J. dissenting).
[19] *Id.* at 838.
[20] Two other judges agreed with the majority that Supreme Court precedent and "common sense" showed that the strip search was unreasonable and unconstitutional, but dissented on the ground that the defendants were entitled to a qualified immunity from liability.
[21] *Saucier v. Katz*, 533 U.S. 194, 200 (2001).
[22] *Clement v. Gomez*, 298 F. 3d 898, 903 (9th Cir. 2002) (quoting *Saucier*, 533 U.S. at 201).
[23] *Id.*
[24] *See Justice v. City of Peachtree City*, 961 F. 2d 188, 190 (11th Cir. 1992).
[25] See *Amaechi v. West*, 237 F. 3d 356, 363 (4th Cir. 2001) (citing *United States v. Dorlouis*, 107 F.3d 248, 256 (4th Cir. 1997)).
[26] *See Wood v. Hancock County Sheriff's Dep't.*, 354 F. 3d 57, 63 n.10 (1st Cir. 2003).
[27] Cal. Penal Code § 4030 (emphasis supplied); *see also, e.g.*, Conn. Gen. Stat. § 54-33k; 725 Ill. Comp. Stat. 5/103-1; Mo. Rev. Stat. § 544.193; N.J. Stat. Ann. 2A:161A-3; Va. Code Ann. § 19.2-59.1; Wash. Rev. Code § 10.79.070.
[28] *See Amaechi*, 237 F. 3d at 365 n.15.
[29] *See Black's Law Dictionary* 1378-79 (8th ed. 2004).
[30] *See T.L.O.*, 469 U.S. at 341-42.

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[31] It should be noted that at least seven states have concluded that strip searches of schoolchildren are never permissible for *any* reason. *See* Cal. Educ. Code § 49050; Iowa Code § 808A.2(4)(a); Okla. Stat. tit. 70, § 24-102; N.J. Stat. Ann. § 18A:37-6.1; S.C. Code Ann. § 59-63-1140; Wash. Rev. Code § 28A.600.230(3); Wis. Stat. § 948.50(3).
[32] *Phaneuf v. Fraikin*, 448 F. 3d 591, 596 (2d Cir. 2006) (citation omitted).
[33] *See T.L.O.*, 469 U.S. at 345 ("The incident that gave rise to this case actually involved two separate searches, with the first — the search for cigarettes — providing the suspicion that gave rise to the second — the search for marihuana.").
[34] 469 U.S. at 328.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Id at 345-46.
[42] *Id.* at 346.
[43] *Id.* at 347.
[44] *See Adams v. Williams*, 407 U.S. 143, 147 (1972).
[45] *See United States v. Rowland*, 464 F. 3d 899, 907 (9th Cir. 2006).
[46] *See Lilly v. Virginia*, 527 U.S. 116, 133 (1999) ("It is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those [categories of trustworthy statements].")
[47] *Mary Beth G. v. City of Chicago*, 723 F. 2d 1263, 1272 (7th Cir. 1983).
[48] *See Williams by Williams v. Ellington*, 936 F.2d 881, 888-89 (6th Cir. 1991) ("While there is concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted."); *Phaneuf*, 448 F. 3d at 598-99 ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search.")
[49] *See T.L.O.*, 469 U.S. at 346 (recognizing distinction between reasonable

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places to search — such as purses — and other, less reasonable places).

[50] *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) ("The technique is guilt by association — one of the most odious institutions of history….Guilt in our system is personal.")

[51] *See Phaneuf*, 448 F. 3d at 600 ("The school acted unreasonably in treating all contraband alike: Surely, a discovery of cigarettes cannot alone support a suspicion that a student is carrying a firearm or is bootlegging gin. Without further explanation, the school cannot vault from the finding of one type of (commonly used) contraband, to a suspicion involving the smuggling of another.")

[52] 991 F. 2d 1316 (7th Cir. 1993).

[53] *Id.*

[54] *Id.* at 1322.

[55] *Id.*

[56] 448 F. 3d 591 (2d Cir. 2006).

[57] *Phaneuf*, 448 F. 3d at 593.

[58] *Id.* at 599.

[59] *T.L.O.*, 469 U.S. at 341 (internal quotation mark and citation omitted).

[60] *Id.* at 342 (emphasis added).

[61] *Thompson v. City of Los Angeles*, 885 F. 2d 1439, 1446 (9th Cir. 1989) (challenging a strip search of an adult after arrest for grand theft auto).

[62] *Chapman v. Nichols*, 989 F. 2d 393, 396 (10th Cir. 1993) (challenging strip search policy of Oklahoma jail).

[63] *See Hunter v. Auger*, 672 F. 2d 668, 674 (8th Cir. 1982) ("Indeed, a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.")

[64] *Cornfield*, 991 F. 2d at 1321 n.1.

[65] In an amicus brief, the National Association of Social Workers explained that psychological research supported these judicial observations. "Clinical evaluations of the [young] victims of strip searches indicate that they can result in serious emotional damage, including the development of, or increase in, oppositional behavior." Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. School Psychology 7, 13 (1998). "Psychological experts have also testified that victims often suffered post-search symptoms including sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and devel-

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opment of phobic reactions, and that some victims have been moved to attempt suicide." Stephen F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991) (internal quotation marks omitted). Moreover, that the student is "viewed rather than touched, do[es] not diminish the trauma experienced by the child." Jess Ann White, *A Study of Strip Searching in Pennsylvania Public Schools and an Analysis of the Knowledge, Attitudes, and Beliefs of Pennsylvania Public School Administrators Regarding Strip Searching* 37 (2000) (on file with the Temple University Graduate Board).

[66] *See, e.g., Williams*, 936 F. 2d at 882 (considering a strip search to discover either cocaine or a vial of "Rush"); *Cornfield*, 991 F. 2d at 1323 (reviewing a strip search conducted to find marijuana or other controlled substances); *Phaneuf*, 448 F. 3d at 593 (rejecting a strip search to uncover marijuana).

[67] *T.L.O.*, 469 U.S. at 343.

[68] 469 U.S. at 341.

[69] 515 U.S. 646, 648, 650, 664–65 (1995).

[70] *Id.* at 655.

[71] *Id.* at 665.

[72] *Id.* at 661.

[73] *Id.*

[74] *Id.* at 662.

[75] *Id.* at 663.

[76] *Id.* at 664.

[77] 536 U.S. 822, 825 (2002).

[78] *Id.* at 830–31.

[79] *Id.* at 834; *see also Id.* at 835 ("[T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing.")

[80] *Id.* at 837.

[81] *Id.*

[82] *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

[83] *Id.* at 2627, 2628 (quoting *Acton*, 515 U.S. at 656, 661).

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