NEW MEXICO LAW REVIEW

Volume 50
Issue 2 *Summer*

2020

An Uncertain Balance: Student Privacy Rights in a Dangerous World

Jameson Rammell

AN UNCERTAIN BALANCE: STUDENT PRIVACY RIGHTS IN A DANGEROUS WORLD

Jameson Rammell*

INTRODUCTION

On a warm April morning, fifteen-year-old Danny Rorhbaugh stepped outside to eat lunch with his friends.[1] It was 11:19 a.m. at Columbine High School, and nothing seemed out of the ordinary. By 11:21 a.m., Danny lay dead on the sidewalk, murdered by two of his classmates.[2] Just minutes before, his attackers entered the school with duffel bags full of guns and homemade bombs.[3] Before their massacre finally ended, they murdered twelve of their classmates and one teacher.[4] A seemingly endless wave of questions lingered in the wake of the attack, but one in particular loomed large: *could it have been prevented?*

Since Columbine, schools throughout the country have implemented various policies and procedures designed to prevent this type of tragedy from reoccurring.[5] Unfortunately, such attacks seem more common than ever. Between 1999 and 2018, the United States averaged ten school shootings per year.[6] While these attacks varied in terms of motivation and severity, each involved a shooting on school property "immediately before, during or just after classes."[7] There were

---

* Jameson Rammell is an attorney at Parsons Behle & Latimer who specializes in complex civil litigation. Prior to joining Parsons, Jameson clerked for the Honorable David C. Nye, Chief Judge of the United States District Court for the District of Idaho. Jameson attended law school at Arizona State University, where he graduated magna cum laude in 2018 and was elected to the Order of the Coif. Jameson's wife, Anastasia, is a first-grade teacher, and they are the proud parents of a baby boy.

1. *The Columbine High School Shootings*, CNN, http://edition.cnn.com/SPECIALS/2000/columbine.cd/Pages/NARRATIVE.Time.Line.htm [https://perma.cc/7EP6-YFJM]; *Daniel Lee Rohrbough*, A COLUMBINE SITE, http://www.acolumbinesite.com/victim/dannyr.php [https://perma.cc/B53L-EZA2].

2. *The Columbine High School Shootings*, *supra* note 1; *Daniel Lee Rohrbough*, *supra* note 1.

3. *The Columbine High School Shootings*, *supra* note 1.

4. *Columbine High School Shootings Fast Facts*, CNN, https://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/index.html [https://perma.cc/5AK6-DVKF] (last updated Aug. 23, 2019).

5. *See infra* Part II.

6. Some sources have less restrictive criteria, and therefore claim school shootings are more prevalent than this number suggests. However, the cited source narrows its parameters to "only incidents that happened immediately before, during or just after classes. . . . Shootings at after-hours events, accidental discharges that caused no injuries . . . , and suicides that occurred privately or didn't pose a threat to other children were excluded, though many of these can be deeply disturbing. Gunfire at colleges and universities, which affect young adults rather than children, also were excluded." John Woodrow Cox & Steven Rich, *Scarred by School Shootings*, WASH. POST, https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?utm_term=.644f1f377872 [https://perma.cc/YZS5-HE29] (last updated Mar. 25, 2018).

7. *Id.*

eleven school shootings in the first three months of 2018 alone, including the Parkland, Florida shooting, in which seventeen people were killed.[8]

Naturally, this wave of school violence has pushed the topics of gun violence and school safety to the forefront of the national conversation.[9] Student activists are calling for more comprehensive gun control measures,[10] and on March 23, 2018, President Donald Trump signed a new spending bill that allocates $1.2 billion toward funding "physical school security measures, school police, and programs that train teachers and students to recognize and respond to concerns of violence."[11]

While increasing student safety and deterring violence are worthy goals, protecting student privacy rights must not be forgotten. This article examines those rights and considers the future of school security. It proceeds in three parts: Part I discusses the Fourth Amendment; how it has been applied to students; and where uncertainty still exists. Part II analyzes policies and procedures that require all students to submit to mandatory, suspicionless searches to determine whether such policies violate the Fourth Amendment; and Part III concludes that while the nation's increase in school violence may justify more intrusive and stringent security measures, individual suspicion should still be required to justify searches that go beyond quick scans by a metal detector or a brief glance at a student's personal belongings.

PART I: THE FOURTH AMENDMENT IN PUBLIC SCHOOLS

The Fourth Amendment states, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "[12] In the American legal system, "[n]o right is held more sacred, or is more carefully guarded" than this.[13] However, the Constitution does not prohibit all searches and seizures.[14] It merely prohibits those that are unreasonable.[15] As such, when a warrantless search or seizure is challenged, courts conduct a balancing test to determine whether the government's conduct was reasonable.[16] The citizen's Fourth Amendment rights, and the manner in which those

8. *Id.*

9. *See* Alvin Chang, *Teenagers Are Doing the Impossible: Keeping America's Attention on Guns*, VOX, https://www.vox.com/policy-and-politics/2018/2/21/17033308/florida-shooting-media-gun-control [https://perma.cc/8RDK-TNWT] (last updated Feb. 22, 2018).

10. *Id.*

11. Evie Blad, *Federal School Safety Research Eliminated to Fund New School Security Measures*, EDUC. WEEK (Mar. 27, 2018, 5:14 PM), http://blogs.edweek.org/edweek/rulesforengagement/2018/03/federal_school_safety_research_eliminated_to_fund_new_school_security_measures.html [https://perma.cc/9KSB-XXCH].

12. U.S. CONST. amend. IV.

13. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

14. *See* Elkins v. United States, 364 U.S. 206, 222 (1960) ("It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").

15. U.S. CONST. amend. IV; *Elkins*, 364 U.S. at 222.

16. *See* Tennessee v. Garner, 471 U.S. 1, 8 (1985).

rights were intruded upon, is balanced against "the importance of the governmental interests alleged to justify the intrusion."[17]

Generally, searches and seizures conducted in the absence of a valid warrant based upon probable cause are *per se* unreasonable.[18] However, exceptions to this rule arise when "special needs" exist that "make the warrant and probable-cause requirement impracticable."[19] The Supreme Court has found such "special needs" exist in public schools.[20] This is primarily due to the unique relationship between schools and their students.

Schools are tasked with providing students with a safe and productive learning environment.[21] The Supreme Court has found that requiring a warrant or probable cause "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed" to fulfill this duty. [22] Additionally, most students are under the age of eighteen and subject to the control of their parents or guardians.[23] As such, they "lack some of the most fundamental rights of self-determination."[24] Common law has long embraced the notion that teachers and administrators stand *in loco parentis* over the children entrusted to them at school.[25] In other words, while students are at school, school officials stand in place of their parents.[26] This does not, however, extend all parental powers to school officials. Rather, it extends certain "custodial and tutelary" powers, which permit school officials to supervise students, and exercise a degree of control over them.[27] Thus, while students may have diminished rights, they do not lack *all* rights.[28]

i. Relevant Cases

Student privacy rights have been addressed by a number of Supreme Court decisions. While many of the general principles have been synthesized above, a closer examination of a few specific cases helps clarify what the reasonableness standard requires in a public-school setting.

---

17. *Id.* (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

18. *See* Katz v. United States, 389 U.S. 347, 357 (1967).

19. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

20. *Id.*

21. New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) ("Education 'is perhaps the most important function' of government and government has a heightened obligation to safeguard students whom it compels to attend school." (Blackmun, J., concurring) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954))).

22. *Vernonia Sch. Dist. 47J*, 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340).

23. *See id.* at 654.

24. *Id.*

25. *See id.* at 654□55.

26. *Id.*

27. *Id.* at 656.

28. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate.").

a. Searches Based on Individualized Suspicion

In *New Jersey v. T.L.O.*, two freshman students were accused of smoking in a school bathroom.[29] While one of the students admitted to the allegations, the other, referred to as T.L.O., denied any wrongdoing.[30] The principal took T.L.O. to his office and demanded to see her purse.[31] Upon opening the purse, he found a pack of cigarettes and noticed rolling papers that he believed were intended for marijuana use.[32] Based upon these findings, he proceeded with a more thorough search which revealed additional contraband.[33] The evidence was turned over to the police, and T.L.O. was charged with delinquency.[34]

At trial, T.L.O. moved to suppress the evidence obtained during the principal's search of her purse, claiming it violated her Fourth Amendment rights.[35] The trial court denied her motion, and T.L.O. was found guilty.[36] The Supreme Court eventually granted certiorari to address T.L.O.'s Fourth Amendment claim.[37] The Court first held that the Fourth Amendment applies to school officials,[38] and rejected the state's argument that students have "virtually no legitimate expectation of privacy" in the personal property they take to school.[39] It explained that although it took notice of the "difficulty of maintaining discipline in the public schools today, the situation is not so dire that students . . . may claim no legitimate expectations of privacy."[40]

However, the Supreme Court concluded that when balancing the privacy interests of schoolchildren against the school's substantial need of maintaining order, it was apparent that both the warrant and probable cause requirements were unduly restrictive.[41] As such, a less demanding standard was established for school searches to be considered reasonable. Specifically, the Court stated that "[u]nder ordinary circumstances, a search of a student . . . will be justified . . . 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."[42] In a later case, the Court would further clarify that this "lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing."[43] After applying this less demanding standard, the *T.L.O.* Court found that the principal's search was justified.[44]

---

29. 469 U.S. 325, 328 (1985).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 328–29.
35. *Id.* at 329–30.
36. *Id.* at 330.
37. *Id.* at 327.
38. *Id.* at 337.
39. *Id.* at 338.
40. *Id.*
41. *Id.* at 340–41.
42. *Id.* at 341–42.
43. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 371 (2009).
44. *See T.L.O.*, 469 U.S. at 343.

The Court was careful to note, however, that the scope of a school search must not be boundless.[45] Instead, it must be limited to measures that are "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[46]

The proper scope of a school search was revisited twenty-four years later in *Safford Unified School District No. 1 v. Redding*.[47] There, a thirteen-year-old girl named Savana was accused of bringing "forbidden prescription and over-the-counter [pain relievers] to school" and distributing them to her classmates.[48] The assistant principal called Savana into his office, where she denied any wrongdoing.[49] He then searched Savanna's backpack but found nothing.[50] However, the search did not stop there. A female employee was ordered to take Savana to the nurse's office to search her for pills.[51] Savana was required to remove her jacket, socks, shoes, and T-shirt.[52] She was then "told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found."[53]

Although the Court considered the assistant principal's initial suspicion to be reasonable—thereby justifying a search of Savanna's backpack and outer clothing—it found the strip search far too intrusive, and a violation of Savanna's Fourth Amendment rights.[54] Simply put, when the Fourth Amendment balancing test was applied, the school's interest in searching for common pain relievers was easily outweighed by Savanna's interest in not being subjected to a strip search at school, even in light of the lesser standard for school searches established in *T.L.O.*[55]

b. Suspicionless Searches

While *T.L.O.* and *Safford* both involved searches based upon individualized suspicion, the Supreme Court has also addressed suspicionless searches. In *Vernonia School District v. Acton*,[56] the Court reviewed a school district's mandatory, suspicionless drug testing policy for student athletes.[57] In analyzing this policy, the Court applied its Fourth Amendment balancing test.[58] It found the school's interest in deterring student drug use to be compelling because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[59] Such negative effects could disrupt the educational process—even for other students

45. *See id.* at 342.
46. *Id.*
47. 557 U.S. 364 (2009).
48. *Id.* at 368.
49. *Id.*
50. *Id.*
51. *Id.* at 369.
52. *Id.*
53. *Id.*
54. *Id.* at 373, 375–77.
55. *Id.* at 374–77. *See also* New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985).
56. 515 U.S. 646 (1995).
57. *See id.* at 648.
58. *Id.* at 652–53.
59. *Id.* at 661.

that do not use drugs.[60] These interests were compounded by the fact that the district had a serious drug problem among their student body, and student athletes had been identified as "leaders of the drug culture."[61]

In the Court's view, the government's interests outweighed the privacy expectations of student athletes.[62] It explained that the privacy expectations of student athletes are even less than the already reduced privacy expectations of students generally.[63] This stems from the nature of school sports. By choosing to participate in school athletics, students "have reason to expect intrusions upon normal rights and privileges, including privacy."[64] According to the Court, these activities "are not for the bashful" and that "[t]hey require 'suiting up' before each practice or event, and showering and changing afterwards."[65] Additionally, the nature of the deprivation of privacy was negligible. While students were required to urinate in a container, the conditions were similar to what one would encounter in any trip to a public restroom.[66] At most, a school official would be standing a reasonable distance behind the student, waiting for him or her to finish his or her task.[67]

Just a few years later, the Court extended this line of reasoning to a more far-reaching policy in *Board of Education of Independent School Dist. No. 92 v. Earls*.[68] There, the Court addressed a drug testing policy similar to Vernonia School District's.[69] However, rather than applying just to student athletes, the policy applied to all students engaged in "competitive extracurricular activities."[70] This included organizations such as the choir, the Academic Team, and Future Homemakers of America.[71]

The Court began by explaining "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion."[72] While individualized suspicion is *normally* required, it may be unnecessary when "the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify . . . conducting such searches without any measure of individualized suspicion."[73]

The Government's compelling interest in preventing student drug use, coupled with the school's responsibility to maintain "discipline, health, and safety"

60. *Id.* at 662.
61. *Id.* at 648–49.
62. *See id.* at 664–65.
63. *Id.* at 657.
64. *Id.*
65. *Id.*
66. *Id.* at 658.
67. *See id.*
68. 536 U.S. 822 (2002).
69. *See id.* at 825–26.
70. *Id.* at 825.
71. *Id.* at 826.
72. *Id.* at 829 (alteration in original) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).
73. *Id.* at 829 (quoting other sources).

for its students, weighed heavily against finding a constitutional violation.[74] When considering the students' expectation of privacy, the Court found that, like student athletes, students who participate in any extracurricular activity voluntarily subject themselves to intrusions on their privacy.[75] Specifically, many of these extracurricular groups required occasional "off-campus travel and communal undress" and also had "their own rules and requirements . . . that do not apply to the student body as a whole."[76] When weighed against the school's interests noted above, the students' expectations of privacy were found insufficient, and the drug testing policy was upheld.[77]

ii. Remaining Uncertainty

It is clear that individualized suspicion is not always necessary to justify a search.[78] However, in school settings, the Supreme Court has only applied this reasoning to cases that involve drug testing specific groups of students, such as those participating in extracurricular activities.[79] It is less clear when it is justified to search any member of the student body without individualized suspicion.[80] Likewise, it is unclear when a suspicionless search of a student's backpack or other belongings is proper.[81]

The Eighth Circuit has most directly addressed these questions. In *Doe ex rel. Doe v. Little Rock School Dist.*, the court considered the constitutionality of a school district's practice of conducting random, suspicionless searches of students' belongings.[82] Specifically, the school district had a practice of randomly selecting a classroom and then ordering all of the students "to leave the room after removing everything from their pockets and placing all of their belongings, including their backpacks and purses, on the desks in front of them."[83] Then, while the students waited in the hallway, "school personnel searched the items that the students had left behind."[84] A class action lawsuit challenging this practice eventually reached the Eighth Circuit.

Ultimately, the court found the searches of students' belongings to be "highly intrusive," because students "often carry items of a personal or private nature."[85] As a result, searching students' belongings in this manner could lead to discomfort and embarrassment.[86] When weighed against the government's "generalized concerns about the existence of weapons and drugs in its schools," the

74. *Id.* at 830.

75. *Id.* at 831–32.

76. *Id.*

77. *See id.* at 838.

78. *Id.* at 829 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

79. *See* Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 391–92 (2013).

80. *See id.*

81. *Id.*

82. 380 F.3d 349, 351 (8th Cir. 2004).

83. *Id.*

84. *Id.*

85. *Id.* at 354–55.

86. *See id.*

policy was struck down as unconstitutional.[87] The court added that such searches would only be justified if "school officials had received specific information giving them reasonable grounds to believe that the students' safety was in jeopardy."[88]

This outcome seems both reasonable and consistent with the Supreme Court's precedent. However, *Little Rock* was decided in 2004. Since that time, school violence has grown more prevalent, and calls for increased security measures have grown more fervent. Until the Supreme Court specifically addresses these unanswered questions, a shroud of uncertainty will remain.

PART II: PRIVACY OR SAFETY?

Entire books could be written about the efficacy of different school safety proposals. Rather than delving into those arguments, this article simply asks whether school policies that allow for mandatory, suspicionless searches of all students and their belongings run afoul of the Constitution. To make that determination, the Supreme Court's Fourth Amendment balancing test must be applied.

i. Student Privacy Rights

As set forth above, all students have reduced expectations of privacy while at school.[89] However, in *T.L.O.* the Court rejected the argument that students have no legitimate expectations of privacy because "the situation [was] not so dire" as to hold otherwise.[90] But does that statement still hold true today? It has been over thirty years since *T.L.O.* was decided, and an argument could be made that in that timespan, the "situation" *has* become so dire that students should no longer have a legitimate expectation of privacy at school. Over the past twenty-five years, an average of ten students have died in school shootings each year, with more recent years showing an increase in school violence.[91]

While that trend is alarming, it should also be put into perspective. In 2019, more than fifty million students enrolled in public schools in the United States alone.[92] While school shootings are horrific tragedies, the number of students killed in these incidents represents a miniscule percentage of the overall student population. If the above statistics hold true, in an average year, less than one out of every five million students will be killed in a school shooting. By comparison, 772 teenagers in

87. *Id.* at 356–57.

88. *Id.* at 356.

89. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507–10 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of . . . school officials . . . to prescribe and control conduct in the schools.").

90. New Jersey v. T.L.O., 469 U.S. 325, 338 (1985).

91. *See* James Fox, *School Shootings Are Not the New Normal, Despite Statistics that Stretch the Truth*, USA TODAY (Feb. 20, 2018, 6:38 PM), https://www.usatoday.com/story/opinion/2018/02/19/parkland-school-shootings-not-new-normal-despite-statistics-stretching-truth-fox-column/349380002/ [https://perma.cc/6PJT-S2TK] ("Since 1990, there have been 22 shootings at elementary and secondary schools in which two or more people were killed . . . . [F]ive of these incidents have occurred over the past five-plus years since 2013 . . . .").

92. *Back to School Statistics*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=372 [https://perma.cc/T7AL-ZCZR].

the U.S. died as a result of a drug overdose in just 2015, which equates to 3.7 out of every 100,000 teens.[93]

Additionally, statistics on school violence can be misleading. For example, Everytown for Gun Safety—an organization that began tracking school shootings in 2013—identified 405 incidents of gunfire on school grounds between 2013 and 2018, including "260 [that] occurred on the grounds of an elementary, middle, or high school, resulting in 109 deaths and 219 injuries."[94] Such reports paint a bleak picture of school violence in America and are often shared in the news without important context, such as the fact that the majority of these shootings were "completed or attempted suicides, accidental discharges of a gun, or shootings with not a single individual being injured. Of the remainder, the vast majority involved either one fatality or none at all."[95]

To be sure, even a single student death is one too many, and incidents of gunfire on school grounds should not be downplayed. At the same time, they "should not be conflated with the most deadly but rare events."[96] Although school shootings seem increasingly common, and garner a great deal of attention and publicity, the situation is not "so dire" that it now warrants the extreme step of depriving students of *any* expectation of privacy.

As such, the principles established in *T.L.O.* and its successors should be upheld, and a student's expectations of privacy in his or her person and belongings—although reduced due to status as a student—should still be considered both legitimate and reasonable.

ii. The Government's Interest

The Supreme Court has specifically stated that individualized suspicion may be unnecessary when the government's need to discover "latent or hidden conditions" is sufficiently compelling.[97] An argument could be made that, in light of the increase in school violence, the government's interest in discovering weapons and preventing violence should now be considered sufficiently compelling to justify suspicionless searches of any student entering a school building. At the same time, it could also be argued that suspicionless searches of all students should only be allowed if the school has specific reasons to believe violence may occur. These arguments must be considered in light of a school's duties.[98]

School officials stand *in loco parentis* over their students.[99] While this endows them with a certain amount of parental power and control, it also includes the burden of ensuring student safety and providing a productive learning

93. The NIDA Blog Team, *Teen Drug Use Is Down—But Teen Overdoses Are Up*, NAT'L INST. ON DRUG ABUSE FOR TEENS (May 7, 2018), https://teens.drugabuse.gov/blog/post/teen-drug-use-down-teen-overdoses-up [https://perma.cc/QU9Z-HYA7].

94. NAT'L EDUC. ASS'N, KEEPING OUR SCHOOLS SAFE: A PLAN TO STOP MASS SHOOTINGS AND END GUN VIOLENCE IN AMERICAN SCHOOLS 8 (2019), https://everytownresearch.org/wp-content/uploads/2019/02/School-Safety-Report-FINAL.pdf [https://perma.cc/KKF4-JTGE].

95. Fox, *supra* note 91.

96. *Id.*

97. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829 (2002).

98. New Jersey v. T.L.O., 469 U.S. 325, 353 (Blackmun, J., concurring).

99. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995).

environment.[100] These are not responsibilities that the Supreme Court deems insubstantial. In fact, the overarching trend exhibited by the Court suggests that, particularly when student safety is at stake, it is more prone to expand the ability of schools to search their students than restrict it. For example, while *Vernonia* only allowed suspicionless searches of student athletes, *Earls* later allowed suspicionless searches of all students engaged in "competitive extracurricular activities"—a category that encompassed an extremely broad group of students.[101]

In short, the government's interest in protecting the safety of all schoolchildren is extremely compelling. In *T.L.O.*, Justice Blackmun wrote of the "special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself."[102] It seems unlikely that any court will ever find that this "special need" no longer exists. However, this interest must be weighed against students' legitimate expectations of privacy. Since both sides have compelling interests, the decisive factor in this balancing test will likely be the scope of the suggested search.

iii. The Nature of the Intrusion

Here, we must directly consider the specific searches at issue. For purposes of this article, only metal detector scans and physical searches of bags and backpacks will be considered. In *Little Rock*, the Eighth Circuit mentioned that metal detectors tend to be minimally intrusive.[103] This conclusion seems sound. Millions of Americans pass through metal detectors each day.[104] The task has become routine and carries little risk of causing fear or embarrassment.[105] Additionally, metal detectors do not specifically reveal what students are carrying in their bags or clothing. Instead, the device simply alerts officials to the presence of certain materials, which may then help establish individualized suspicion.[106] Many of a student's private possessions will not set off the alarm at all. Although this still constitutes a search, it is largely unobtrusive. As such, the government's compelling interest in ensuring student safety seems sufficient to justify this search without any degree of individualized suspicion.

Physically searching students' bags and backpacks without any individualized suspicion is less defensible. Having a school official rummage around in their personal belongings could cause students a great deal of stress and embarrassment. Students have a right to bring personal possessions to school, and a right to keep those possessions private.[107] Allowing a school official to physically search all bags significantly intrudes upon this privacy expectation.[108] Admittedly, school districts have a strong and compelling interest in ensuring student safety and

100. *See T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring).
101. *Compare Vernonia*, 515 U.S. at 664–65, *with Earls*, 536 U.S. at 825–26.
102. *T.L.O.*, 469 U.S. at 353.
103. *See* Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 355 (8th Cir. 2004).
104. *See* Nance, *supra* note 79, at 393.
105. *See id*. at 389, 393.
106. *See id.* at 393.
107. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).
108. *See* Nance, *supra* note 79, at 393–94.

preventing weapons from entering their buildings. However, without a specific and immediate threat to the school, even the government's strong interest in this area seems outweighed by student privacy interests.

That said, a search of bags and belonging that is more limited in scope *might* pass constitutional muster. For example, merely glancing inside a backpack, rather than rummaging around and examining all of its contents seems more reasonable. If the scope was contained to quickly looking—rather than physically touching—areas of the bag where a weapon such as a gun or a knife could be concealed, the intrusiveness is diminished. Students could prepare for the search by placing private items (that if discovered could cause embarrassment or some other harm) in smaller pockets. Additionally, the duration of the search would likely be reduced, thereby making it less obtrusive. Finally, if a student sought to conceal large areas of his or her bag from view, that behavior could be used to establish individualized suspicion for a more intrusive search.

Admittedly, there are problems with this approach. First, while it may allow students to keep small items private (such as medication or personal hygiene products), private items are not always small. Nor are dangerous weapons always large. The unfortunate reality is no security measure can fully guarantee student safety, nor can students enjoy total privacy. Instead, schools must do everything they can to promote safety without robbing students of *reasonable* privacy.

Naturally, this requires compromise. Students must accept certain intrusions and inconveniences. Perhaps private items that are too large to conceal must be left at home. Alternatively, special arrangements could be made with school officials that allow a student to have his or her bags searched in private. While such arrangements do not fully protect a student's privacy interests, they should minimize the level of exposure and embarrassment a student suffers.

At the same time, schools must accept that there is no panacea for student violence. While a limited glance inside of bags may not detect every weapon, at the very least it makes it more difficult for weapons capable of quickly causing mass casualties to be smuggled into school buildings.

Another problem with this approach is trusting school officials to not abuse the process. As prior cases have demonstrated, despite compelling interests and good intentions, some school officials err on the side of intrusiveness. It does not require much imagination to think up various ways in which the practice of searching students' bags and belongings without individualized suspicion could be impermissibly expanded and abused.

However, assuming safeguards could be implemented to properly limit the scope of these searches to simply glancing inside students' bags, it is not inconceivable that such a policy could pass constitutional muster. As noted above, such a search does not entirely deprive students of their privacy because they could conceal essential personal items in small pockets or otherwise outside of plain view.

While this outcome would be at odds with the Eighth Circuit's decision in *Little Rock*, "the Fourth Amendment's reasonableness inquiry is a sliding scale: the more compelling the governmental interest, the more the government is justified in conducting serious intrusions on legitimate expectations of privacy."[109] Most would

109. State v. Williams, 521 S.W.3d 689, 704 (Mo. Ct. App. 2017).

agree that suspicionless searches of students' belongings intrude on legitimate expectations of privacy. Nonetheless, if rates of school violence continue to increase, that may be an intrusion the Supreme Court is willing to permit.

PART III: CONCLUSION

Requiring all students to submit to searches of their person and belongings may seem like an effective strategy to prevent school violence. However, these policies present clear privacy concerns. To overcome these concerns, a physical search of students' belongings must be carefully limited in both scope and duration. Requiring students to quickly pass through metal detectors presents only a slight intrusion on student privacy. Accordingly, such searches are likely to be found constitutional—even when no individualized suspicion exists.

Physical searches of students' belongings (i.e., rummaging through students' backpacks and purses) are more problematic. Students have a right to bring personal possessions to school, and a right to keep those possessions private.[110] As such, searches of bags and belongings carried out without individualized suspicion, or alternatively, without an immediate, credible threat to student safety, will likely be struck down as unconstitutional. However, if the scope of such a search was narrowly tailored to simply *glancing* inside of bags, the outcome may be different. Current caselaw provides little support for such a conclusion, but current caselaw is also devoid of any cases addressing a policy that is so narrowly tailored. If rates of school violence continue to increase, the Supreme Court may be willing to permit increased intrusions on student privacy in response.

Ultimately, a delicate balance must be struck between protecting student privacy rights and protecting student safety. Unfortunately, the proper balance remains uncertain. The world has undoubtedly changed since the Columbine attack. Yet each year students are still being murdered in school—a location where they should feel completely safe.[111] While this heartbreaking reality calls for immediate preventative action, student privacy rights should not be cast aside in the process.

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

111. *See generally* Cox & Rich, *supra* note 6.