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THE REASONABLENESS STANDARD: WHY SCHOOL STRIP SEARCHES REQUIRE A MORE DEFINITIVE LEGAL PRECEDENT

by Brandon S. Healy*

I. INTRODUCTION

Qualified immunity is “a defense for an official who is being sued in his or her individual capacity for damages.” It “allows public officials to carry on their duties without the fear of liability or the burdens of litigation” and often applies in Fourth Amendment cases where an official’s capacity to search, seize, or detain when acting reasonably in the line of duty is called into question. The guidelines that govern the application of qualified immunity are well-established in terms of legal precedence in general cases. However, for school searches, the concept is defined by just a few cases contesting Fourth Amendment rights, most notably New Jersey v. T.L.O.3

New Jersey v. T.L.O. involved two girls in a New Jersey high school who were caught smoking cigarettes in the restroom. One of the girls, named T.L.O., denied smoking until the vice-principal

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searched her purse and found marijuana, a pipe, rolling paper, a wad of dollar bills, and a list of students to whom she had dealt marijuana. After T.L.O. filed suit, lower courts determined that her rights were violated by the search. However, the decision was appealed to the Supreme Court in 1985, who ruled that the vice-principal was justified in her search due to qualified immunity, and that T.L.O.’s rights had not been violated.

For the first time in history, *New Jersey v. T.L.O.* separated qualified immunity from the explicit language of the Fourth Amendment to provide for the unique circumstances of school searches. The case explained that school administrators are required to have “reasonable suspicion” to search or detain students without a warrant, rather than the stricter “probable cause” required by the text of the Fourth Amendment. This means that school administrators are less liable than police officers while conducting searches for contraband on school grounds during school hours because states have a preeminent responsibility to ensure the safety of public school students.

*T.L.O.* likewise established a set of guidelines for assessing where “reasonable suspicion” applies. These guidelines were collectively named the “reasonableness standard.” According to the reasonableness standard, a search must be “justified at its inception,” meaning that an official needs “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.” Second, a search needs to be “permissible in scope,” such that “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”

The purpose of this article is to explain how *T.L.O.*’s reasonableness standard is too ambiguous and subjective to sufficiently determine reasonable suspicion, a problem which has precluded and will

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4 *Id.* at 341.
5 *Id.* at 341.
6 *Id.* at 342.
7 *Id.* at 342.
continue to preclude students from Fourth Amendment protection against invasive search and seizure.

II. AMBIGUITY OF \textit{NEW JERSEY v. T.L.O.}

\textit{T.L.O.}'s reasonableness standard is too vague to sufficiently assess reasonable suspicion in school strip search cases due to its lack of definitive content. “Reasonable suspicion,” a term created by the reasonableness standard, is too broad and susceptible to different court interpretations.

When \textit{T.L.O.} created “reasonable suspicion,” it completely separated the term from association with “probable cause,” \textsuperscript{8} which was the previous justification for strip searches. Justice Brennan, in a dissenting opinion of \textit{T.L.O.}, argued that its ruling “sanctions school officials to conduct fullscale searches on a ‘reasonableness’ standard whose only definite content is that it is not the same test as the ‘probable cause’ standard found in the text of the Fourth Amendment.” \textsuperscript{9} If this is true, the content of reasonable suspicion should not directly draw from the precedence of probable cause. Thus, when the concept of reasonable suspicion was created, it lacked definitive precedence to help clarify its meaning or determine how and when it could apply.

Additionally, \textit{T.L.O.} did not include any definitive clarification of the most fundamental phrases in its reasonableness standard: “reasonable grounds,” “excessively intrusive,” or “whether the measures adopted are reasonably related to the objectives of a search.” \textsuperscript{10} This ambiguity has led courts across the nation to disagree on how to apply the reasonableness standard. Since the \textit{T.L.O.} ruling, reasonable suspicion has been used as the standard for school searches, but in the past twenty-five years, lower courts have “reached divergent conclusions regarding how the T.L.O. standard applies.” \textsuperscript{11} This divergence has often lead to a paradox in which defendants who are

\begin{itemize}
  \item \textsuperscript{8} Id. at 341.
  \item \textsuperscript{10} \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 342 (1985).
  \item \textsuperscript{11} \textit{Safford Unified Sch. Dist. No. 1 v. Redding}, 129 S. Ct. 2633, 2643 (2009).
\end{itemize}
found guilty of violating the Fourth Amendment are granted qualified immunity and exonerated.\textsuperscript{12}

\textit{Ornelas v. United States} interpreted the standards for reasonable suspicion as “fluid concepts that take their substantive content from the particular contexts.”\textsuperscript{13} A more recent ruling read the standard as “a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other,” rendering it impossible “to establish clearly the contours of a Fourth Amendment right...[in] a wide variety of possible school settings different from those involved in T.L.O” itself.\textsuperscript{14} Adhering to this reasoning should compel courts to discontinue the use of \textit{T.L.O.}’s reasonableness standard in a majority of strip search cases, limiting its use to cases whose circumstances closely match those of \textit{T.L.O.}

III. \textit{Safford}’s Contributions to Qualified Immunity

\textit{Safford Unified School District No. 1 v. Redding}\textsuperscript{15} highlights the ambiguity and subjectivity of \textit{T.L.O.}’s reasonableness standard and provides additional evidence that the guidelines for assessing school strip searches remain insufficient today. \textit{Safford} involved a 13-year-old girl named Savana Redding who was strip searched when school administrators suspected her of drug distribution on school grounds. The vice-principal and school nurse who performed the search did not find any drugs. A lower court determined that her rights had been violated by this search. The decision was appealed to the Supreme Court in 2008, who agreed that Redding’s rights were violated based on \textit{T.L.O.}’s reasonableness standard. However, since the standard had a history of differing interpretations in lower courts and its legal precedence was therefore not yet

\begin{flushleft}
\textsuperscript{13} Ornelas v. United States, 517 U.S. 690, 696 (1996).
\textsuperscript{14} Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (CA11 1997) (en banc).
\end{flushleft}
“clearly established”\textsuperscript{16} in school search cases, the school administrators were granted qualified immunity.

Because the Supreme Court determined T.L.O.’s reasonableness standard was not “clearly established,” they created new directives and further defined the content found in the reasonableness standard’s “permissibility in scope” test\textsuperscript{17}. \textit{Safford} set the precedent in defining strip searches as “categorically distinct,” requiring “distinct elements of justification,” including at least a “suspicion that [the search] will pay off.”\textsuperscript{18} This suspicion includes two directives: 1) Was there reasonable suspicion of danger? and 2) Was there enough reason to resort to underwear for hiding evidence of wrongdoing before intimate body parts were exposed? \textit{Safford} also defined reasonable suspicion as “a moderate chance of finding evidence of wrongdoing.”\textsuperscript{19} None of these directives or definitions were outlined in the original reasonableness standard but were extensions of the scope of permissible searches.

\textbf{IV. Subjectivity of \textit{New Jersey v. T.L.O.}}

Assessing \textit{T.L.O.}’s reasonableness standard as it applied in \textit{Safford} yields evidence that the test both lacks definitive content and is inherently subjective. The evidence also suggests that despite \textit{Safford}’s efforts to clearly establish the law, courts will continue to be uncertain of the correct application of the reasonableness standard. \textit{Safford} showed that \textit{T.L.O.}’s reasonableness standard impels judges to give unequal attention to the different requirements within the reasonableness standard, which allows them to foster differing opinions based on subjective valuation.

\textsuperscript{16} \textit{Id.} at 2637.
\textsuperscript{19} \textit{Id.} at 2639.
A. T.L.O. Impels Judges to Give Unequal Attention to Different Requirements within the Reasonableness Standard

The judges in Safford assessed whether or not school administrators met the requirements of initiating a strip search according to the reasonableness standard. These requirements extended to the plausibility that Ms. Redding possessed dangerous drugs, the likelihood those drugs were in her underwear, and whether the testimonies of the witnesses involved were valid. Reasonable suspicion in all of these areas was required to initiate a strip search. Unfortunately, T.L.O.’s reasonableness standard forced the judges to give unequal attention to these criteria based on their personal preferences.

An example illustrates the subjective application of the reasonableness standard and shows that Safford has not necessarily solved it. Judge Clifton wrote the first Ninth Circuit majority opinion in Safford and determined that Redding’s rights were not violated. He found that administrators had sufficient reason to suspect Redding of drug possession because both witnesses in the case gave valid testimonies that Redding planned to distribute drugs to students. Justice Souter, who wrote the final opinion of the Supreme Court, determined that Redding’s rights were violated. He determined that administrators had “no [reason] to suspect the drugs presented a danger or were concealed in her underwear.”

In their opinions, both judges commented on the validity of the witnesses, the danger of the drugs, and their location on Redding’s person. However, Judge Clifton clearly prioritized the validity of witnesses, while Justice Souter gave more weight to the danger of the drugs and whether they were concealed in Redding’s underwear. If the reasonableness standard were a more objective test, it would allow judges to give equal consideration to all three criteria and require all of them to be thoroughly addressed before proceeding. Instead, the judges were allowed to choose which criteria they personally considered most important and ignore the others if they

20 Safford Unified Sch. Dist. No. 1 v. Redding, 531 F.3d 1071 (9th Cir. 2008).
22 Id. at 2642.
chose. Justice Souter dismissed the validity of the witnesses as a negligible reason in and of itself, but he could have just as easily dismissed the danger level of the drugs or determined reasonable suspicion based on an arbitrary or invented reason, such as Savana’s height or weight.

No legal precedent exists that establishes a formulaic hierarchy of situation-specific reasons to warrant suspicion of a strip search candidate. As previously noted, the standards for reasonable suspicion are “fluid concepts that take their substantive content from the particular contexts.”23 The reasonableness test needs to outline which reasons the judges are to assess before rendering a final judgment.

Ultimately, judges cannot be expected to consistently determine the reasonableness of a search if they are not giving equal priority to the same issues. While judges have the authority to disagree concerning the contours of a right,24 a standard should exist which requires them to assess all contours before coming to a decision. T.L.O.’s standard enables subjectivity because it lacks guidelines to equally assess all criteria. Safford achieved resolution because Justice Souter and the Supreme Court had the final say, but this disparity in the reasonableness standard was never addressed. Additionally, if judges have a difficult time determining reasonable suspicion, it will likely follow that school officials will have difficulty deciding how to proceed when faced with the option of performing a strip search.

**B. If Safford Was Hypothetically Retried, Its New Precedence May Not Have an Impact on the Judges’ Decision-making**

In the instances where Justice Souter and Judge Clifton gave equal attention to the criteria required by the reasonableness standard, they came to different conclusions concerning the criteria they assessed. If the case were retried, this outcome would likely repeat itself, despite Safford’s new precedence.

Justice Souter and Judge Clifton diverged on the issue of the danger level of the contraband from the beginning. The first rule of

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Safford’s new test requires courts to assess the danger level of any contraband that could potentially instigate a strip search. Both judges considered this element in depth but arrived at different conclusions.

Justice Souter concluded that the items of prescription medication, though banned by the school board, were not sufficiently dangerous to justify a strip search. He argued that the school administration “must have been aware”\(^{25}\) of that. Souter acknowledged that too much of anything is dangerous, but “[administrators] had no reason to suspect that large amounts of the drug were being passed around, or that individual students were receiving great numbers of pills.”\(^{26}\)

Judge Clifton, on the other hand, focused on the testimony of Shwallier, the school nurse, who informed administrators that the pill in question was prescribed. She made it clear that the distribution of the pill to students without a prescription was a serious matter. The administration had experienced a similar situation at the school earlier that year, in which Jordan, another student, had taken nonprescribed medication and had become “violent and sick to his stomach.”\(^{27}\) Jordan told administrators that students, including Redding, planned to distribute the drugs in large quantities.

Based on the preceding information, if Safford were retried under T.L.O.’s reasonableness standard in a future case, its new precedence would likely allow Justice Souter and Judge Clifton to reach the same disagreement as before. Thus, Safford’s new precedence was not aimed to specifically facilitate agreement among judges.

C. A *Reasonableness Standard Which Fails to Facilitate Agreement among Judges Is Not Ideal for Qualified Immunity Cases*

While many cases may not be threatened when judges disagree, and many more may be served by a diversity of viewpoints, qualified immunity presents a unique situation. When judges in qualified immunity cases both use the reasonableness standard and disagree about the contours of a right, problems arise.

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\(^{26}\) Id. at 2651.

\(^{27}\) Safford Unified Sch. Dist. No. 1 v. Redding, 504 F.3d 828 (9th Cir. 2007).
Disagreement can create a quandary in qualified immunity cases, as qualified immunity is denied only if “no reasonable official would have found the actions [of the defendants] justified.”\textsuperscript{28} Thus, if even one judge finds the actions of a defendant justified, qualified immunity should be granted. Because of the inherent nature of human preference (as illustrated by the track record of qualified immunity cases), qualified immunity is difficult to deny; it is far more likely to be granted in ambiguous or subjective situations. Since Safford vindicates judges who disagree about the contours of a right,\textsuperscript{29} and since T.L.O.’s reasonableness standard demonstrates ambiguity and subjectivity, it appears that the only solution is to alter the reasonableness standard itself.

If no amendments are made, Safford and other cases\textsuperscript{30} indicate that qualified immunity will continue to justify plaintiffs who are found guilty of violating students’ Fourth Amendment rights. To amend T.L.O.’s reasonableness standard such that its terms are clearly established and qualified immunity is not liberally granted to those who violate the Fourth Amendment, its subjectivity must be tempered.

V. CONCLUSION: ESTABLISHING CONTOURS

A strip search checklist may be a sensible solution to combat the vagueness and subjectivity of T.L.O.’s reasonableness standard. The checklist would be federally mandated in public schools, outlining a step-by-step process required of school officials before performing a strip search. I suggest that the minimum requirements follow the guidelines of T.L.O. and Safford, and specify the details Justice Souter and Judge Clifton disagreed upon according to the following criteria: (1) any contraband banned by the school board is considered sufficiently dangerous to warrant a strip search, and (2) at least one

reliable witness must specify that he or she saw the contraband hidden in the undergarments of the accused to warrant a strip search.

Although the checklist should be relatively extensive due to its specific nature, it should not limit additional prerogatives instituted by the state or school boards, including the ban of strip searches altogether. All prerogatives of the checklist should aim to explicitly define the circumstances under which school strip searches may be performed. This will allow public officers to be aware of the protections afforded by qualified immunity and allow students an awareness of their Fourth Amendment rights. Codifying directives will compensate for excess time spent by future courts wading through *T.L.O.*’s subjective standard. Unless the reasonableness standard is dismantled and rebuilt, there may be twenty-five additional years in which *T.L.O.*’s precedence is interpreted on a case by case basis.