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J.P. ex rel. A.P. v. Millard Public Schools: A Limit on School Authority and What It Means for Students' Fourth Amendment Rights in Nebraska

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Note*

*J.P. ex rel. A.P. v. Millard Public Schools*¹: A Limit on School Authority and What It Means for Students' Fourth Amendment Rights in Nebraska

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1. 285 Neb. 890, 830 N.W.2d 453 (2013).

I. INTRODUCTION

Each school day, millions of American children attend public schools where they are placed under the care and authority of teachers and administrators. These school officials are charged with educating, caring for, and disciplining this substantial segment of the American population. At the same time, these students are entitled to the protections afforded them under the U.S. Constitution. Despite the ubiquity of this paradigm, the U.S. Supreme Court has only addressed the relationship between school officials' authority and the applicability of the U.S. Constitution to students in the last fifty years.² Prior to that time, courts generally assumed that students, while in school, were entitled to virtually no Constitutional protection, although courts failed to agree as to why.³

Although the Supreme Court held in *New Jersey v. T.L.O.* that students were entitled to some constitutional protections in school, the Court's analysis regarding students' Fourth Amendment rights was problematic.⁴ Subsequent courts applying *T.L.O.* have essentially stripped students of any effective Fourth Amendment rights in school.⁵ The Nebraska Supreme Court confronted the limits of a school's constitutional and statutory authority to search students in *J.P. ex. rel. A.P. v. Millard Public Schools*.⁶ In holding that a school official's search of a student's car off school grounds exceeded school authority, the court confronted several of the most pressing issues regarding students' Fourth Amendment rights in school today.

This Note will analyze the court's ruling in the context of the overall development of Fourth Amendment jurisprudence as applied to searches of public school students while at school. This Note concludes that the Nebraska Supreme Court's opinion in *J.P.*, in addition to limiting school official's authority to school property and events, signals that the Nebraska Supreme Court will subject searches by school officials to some higher level of scrutiny than the virtual *carte blanche* afforded school officials in other jurisdictions. Part II will provide the relevant background regarding the Fourth Amendment, the U.S. Supreme Court's application of the Fourth Amendment to students in school in *T.L.O.*, and, finally, the facts and opinions of the Nebraska Supreme Court's decision in *J.P.* Part III will provide an analysis in

2. Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment: New Jersey v. T.L.O.*, 72 CORNELL L. REV. 368, 376-77 (1987).

3. *Id.* at 376-80. See *infra* notes 20-21.

4. 469 U.S. 325 (1985); see Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 919-25 (1988) (summarizing the academic criticism of the Court's reasoning in *T.L.O.*).

5. See *infra* notes 85-99 and accompanying text.

6. 285 Neb. 890, 830 N.W.2d 453.

four sections: (1) the state of students' Fourth Amendment rights in the wake of *T.L.O.*, (2) the court's opinion in *J.P.*, (3) the likely impact of the court's decision, and (4) the policy considerations that support the court's additional scrutiny of school searches.

II. BACKGROUND

A. Fourth Amendment Jurisprudence

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷

There are two discrete clauses within the amendment: the Reasonableness Clause, which applies to all searches and seizures, and the Warrant Clause, which applies only when prior approval by a judge is required for the search.⁸ Though not all searches and seizures require the prior obtainment of a warrant, those conducted without a warrant are regarded as *per se* unreasonable subject to only a few judicially articulated exceptions.⁹

The U.S. Supreme Court articulated the standard for general Fourth Amendment application in *Katz v. United States*.¹⁰ In his seminal concurrence, Justice Harlan described the majority's standard as a twofold requirement that a person have an expectation of privacy in the object being searched and that the expectation be one "that society is prepared to recognize as 'reasonable.'"¹¹ Under this standard, known as the Reasonable Expectation Test, Fourth Amendment protections are available only if the subject has demonstrated a reasonable expectation of privacy in the subject of the search.¹²

B. *New Jersey v. T.L.O.*¹³ and the Fourth Amendment in Public Schools

The U.S. Supreme Court established a substantially lower standard than the one described in *Katz* for searches of students by public

7. U.S. CONST. amend. IV.

8. Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 118 (1993). The State of Nebraska's Constitution contains a provision identical to the Fourth Amendment. See NEB. CONST. art. I, § 7.

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

10. *See id.* at 356-59.

11. *Id.* at 361 (Harlan, J., concurring).

12. *See id.*

13. 469 U.S. 325 (1985).

school officials in *New Jersey v. T.L.O.*¹⁴ In *T.L.O.*, two high school students were taken to the principal's office for smoking in a school restroom.¹⁵ After the students denied smoking, the principal opened one student's purse where he found a packet of cigarettes.¹⁶ Beneath the cigarettes was a small amount of marijuana and various items that linked the student to drug dealing.¹⁷ The school reported the evidence to the State, which subsequently brought a delinquency action.¹⁸ The defendant student sought to suppress the evidence from her purse on the grounds that the principal's search violated the Fourth Amendment.¹⁹

Prior to *T.L.O.*, it was unclear whether public school students were entitled to any Fourth Amendment protections while in school.²⁰ Historically, students had enjoyed almost no constitutional protections while at school, but the underlying reasoning for why was unsettled.²¹

In analyzing the validity of the search in *T.L.O.*, the Court first held that public school teachers and administrators are state actors for purposes of the Fourth Amendment.²² The Court rejected the State of New Jersey's argument that students do not possess a reasonable expectation of privacy in personal belongings voluntarily brought into school.²³ The Court noted that the item the student "voluntarily" brought into school was her purse, an object which generally contains "highly personal items [such] as photographs, letters, and diaries."²⁴

In addressing the appropriate standard for school searches, the Court considered separately whether school officials needed to obtain a warrant before searching the student and whether the search required probable cause.²⁵ In attempting to strike a balance between the "equally legitimate" interests of students and school officials, the Court held that the warrant requirement did not apply to school

14. *Id.*

15. *Id.* at 328.

16. *Id.*

17. *Id.*

18. *Id.* at 328–29.

19. *Id.* at 329.

20. Gardner, *supra* note 4, at 897 n.3 (noting that several lower courts prior to *T.L.O.* ruled that students were not entitled to Fourth Amendment protection while at school).

21. Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 *Miss. L.J.* 847, 847–48 (2011) (noting that courts had rejected Fourth Amendment protection for students on a variety of theories such as that school officials acted *in loco parentis* or, alternatively, as private citizens).

22. *T.L.O.*, 469 U.S. at 336–37.

23. *Id.* at 338–39 (noting that students "at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessities of personal hygiene and grooming").

24. *Id.* at 339.

25. *See id.* at 340–41.

searches because it was ill-suited to the “swift and informal” disciplinary environment of the school and was likely to “frustrate the governmental purpose behind the search.”²⁶ The Court held that such an exception was well-established in its case law.²⁷

Because the Fourth Amendment fundamentally requires that searches be reasonable under the particular circumstances, the Court held that the substantial needs of the school weighed in favor of requiring a standard lower than probable cause.²⁸ The Court cited to a number of cases where, in the majority’s opinion, the Court held that a standard short of probable cause was contextually appropriate.²⁹ This reasonableness approach consisted of a two-part inquiry: the search needed to be justified at its inception and be “reasonably related” in scope to the circumstances warranting the search.³⁰ The Court held that under normal circumstances a search of a student would be justified when there are “reasonable grounds” for suspecting the search would uncover evidence of a violation of school conduct.³¹ Further, “[s]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”³² As a matter of policy, the Court noted that a reasonableness standard would spare school officials the “necessity of schooling themselves in the niceties of probable cause” and could instead “regulate their conduct according to the dictates of reason and common sense.”³³

In the dissenting portion of his opinion, Justice Brennan noted that the majority did not cite any case “in which a full-scale intrusion upon privacy interests has been justified on less than probable cause.”³⁴ Justice Brennan additionally disputed the majority’s ratio-

26. *Id.* at 340 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 532–33 (1967)) (internal quotation marks omitted).

27. *Id.*

28. *See id.* at 340–41.

29. *Id.* at 341 (citing *Delaware v. Prouse*, 440 U.S. 648, 654–55 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968)).

30. *Id.* at 341.

31. *Id.* at 341–42.

32. *Id.* at 342.

33. *Id.* at 343.

34. *Id.* at 360 (Brennan, J., concurring in part and dissenting in part). Justice Brennan noted that the majority’s primary support in *Terry v. Ohio* was misplaced as that case did not authorize a full-scale search. *Id.* *Terry* authorized police officers possessing reasonable suspicion of a crime to momentarily stop a citizen to confirm or dispel the officers’ suspicion. Additionally, police may conduct a pat down search of the person for weapons if they suspect the person is armed in order to ensure officer safety, but not to uncover evidence of criminal conduct. *Terry*, 392 U.S. at 22–26.

nale for sparing school officials the burden of probable cause.³⁵ He instead noted that the Court had already grounded probable cause in a “nontechnical” and “easily applied” approach, which school officials should be capable of applying.³⁶

C. *J.P. ex rel. A.P. v. Millard Public Schools*

J.P. was a student at Millard West High School in Omaha, Nebraska.³⁷ On August 18, 2010, J.P. drove to school and parked on a public street opposite school grounds.³⁸ After his first class, J.P. attempted to exit the building but was stopped by the hall monitor, Lori Bishop, who denied him permission to leave.³⁹ Shortly after, Dennis Huey, a parking lot security guard, encountered J.P. walking through the lot with another student.⁴⁰ J.P. told Huey he needed to retrieve something from his truck.⁴¹ Huey accompanied the students and observed J.P. retrieve his wallet and sweatshirt.⁴²

Upon reentering the building, J.P. encountered Bishop, who inquired why he had left the building despite her directive not to do so.⁴³ J.P. claimed that he had left with Huey’s permission, which Huey denied.⁴⁴ Bishop sent J.P. to Vice Principal Harry Grimminger’s office.⁴⁵ During the meeting, Grimminger decided to search J.P. and his vehicle. He instructed J.P. to empty his pockets and searched J.P.’s bag.⁴⁶ Finding no violation of school policy, Grimminger proceeded to J.P.’s truck with J.P. and a school resource officer. J.P. refused to consent to the search, claiming his father did not want the truck searched.⁴⁷ Nevertheless, Grimminger searched the truck and found multiple items of drug paraphernalia.⁴⁸

35. *T.L.O.*, 469 U.S. at 356 (Brennan, J., concurring in part and dissenting in part).

36. *See id.* at 364–65 (quoting *Gates v. Illinois*, 462 U.S. 213 (1983)) (“[A]fter *Gates*, I would have thought that there could be no doubt that this ‘nontechnical,’ ‘practical,’ and ‘easily applied’ concept was eminently serviceable in a context like a school, where teachers require the flexibility to respond quickly and decisively to emergencies.”).

37. *J.P. ex rel. A.P. v. Millard Pub. Sch.*, 285 Neb. 890, 893, 830 N.W.2d 453, 457 (2013).

38. *Id.* The court noted that the school campus’s east side borders the street in question, 176th Avenue, and that around 15% of the students who drive to the high school park along this street. *Id.*

39. *Id.* at 893, 830 N.W.2d at 457–58.

40. *Id.* at 893, 830 N.W.2d at 458.

41. *Id.* at 893–94, 830 N.W.2d at 458.

42. *Id.* at 894, 830 N.W.2d at 458.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* J.P. manifested a clear unwillingness to consent, going so far as to place himself between Grimminger and the truck before eventually yielding. *Id.*

48. *Id.* at 894–95, 830 N.W.2d at 458.

The school suspended J.P. for nineteen days for violating two sections of the Millard West High School 2010–2011 Student Handbook: possession of drug paraphernalia on school grounds and disruptive behavior.⁴⁹ The school claimed its authority to discipline J.P. for the paraphernalia stemmed from section IX.V of the student handbook, which defined the school’s jurisdiction as existing on district property, in a vehicle owned by the district, at a school-sponsored activity, “or any other place where the governing law permits the District to discipline students for prohibited conduct.”⁵⁰

After the Millard School Board denied his appeal, J.P. brought an action through his father in the Douglas County District Court seeking the expunction of the suspension from his record on the grounds that the school’s search violated the Fourth Amendment.⁵¹ The district court found that an off-campus search of a student’s vehicle by a school official required probable cause.⁵² Because the search of J.P.’s person uncovered no violations, the school lacked probable cause to expand the search to his vehicle.⁵³ Millard Public Schools appealed the district court’s decision and the Nebraska Supreme Court assumed the case from the Court of Appeals’ docket.⁵⁴

The majority began its analysis by noting that a school district is a “creature of statute” with no authority beyond that granted by the legislature.⁵⁵ The court determined that this authority exists on school grounds, in school vehicles, and at school-sponsored activities.⁵⁶ The court noted that the warrant exception and reasonable suspicion standard handed down in *T.L.O.* had been “expanded” in subsequent cases to include searches of student’s cars on school property and searches of students occurring off school property during school-sponsored activities.⁵⁷ However, the court determined that *T.L.O.* did not apply be-

49. *Id.* at 895–96, 830 N.W.2d at 458–59. See MILLARD PUB. SCH., MILLARD WEST HIGH SCHOOL 2010–2011 STUDENT HANDBOOK §§ III.A & IV.F.

50. *J.P.*, 285 Neb. at 896, 830 N.W.2d at 459 (quoting MILLARD PUB. SCH., *supra* note 49, at 60). The school district found that J.P.’s car was “any other place” and that the school was required to act based on the truck’s proximity to the school and the school’s obligation to protect the learning environment. *Id.*

51. *Id.* at 896–97, 830 N.W.2d at 459.

52. *Id.* at 897, 830 N.W.2d at 460.

53. *Id.*

54. *Id.* at 897–98, 830 N.W.2d at 460.

55. *Id.* at 899–900, 830 N.W.2d at 461–62 (citing *Robertson v. Sch. Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997)).

56. *Id.* at 899–900, 830 N.W.2d at 461. In reaching this conclusion, the court held that this authority is granted pursuant to Section 79-267 of the Nebraska Revised Statutes. *Id.* (citing NEB. REV. STAT. § 79-267 (Reissue 2008)).

57. *Id.* at 900, 830 N.W.2d at 462 (citing *Anders ex rel. Anders v. Fort Wayne Cmty. Sch.*, 124 F. Supp. 2d 618 (N.D. Ind. 2000); *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003)).

cause the search by Grimminger did not occur on school grounds or at a school-sponsored activity.⁵⁸

Additionally, the court distinguished *Morse v. Frederick*, which addressed students' First Amendment rights while off campus.⁵⁹ In *Morse*, a high school permitted its students to assemble across the street from the school to watch the passing of the Olympic torch.⁶⁰ Once off-campus, a student unfurled a banner that read, "BONG HiTS 4 JESUS."⁶¹ The principal instructed the student to take the banner down. When the student refused, the principal suspended the student for promoting illegal drug use, a violation of the school's code of conduct.⁶² The U.S. Supreme Court held that the principal was within her authority to discipline the student because the incident occurred during a school-sponsored activity and the school district's rules specifically stated that students are subject to school authority during such events.⁶³

While the Court in *Morse* determined that the activity at issue was school-sponsored, the court in *J.P.* held that the activity—driving to school—was not school sponsored.⁶⁴ The court held that the school had no authority to conduct the search regardless of the level of suspicion possessed by school officials.⁶⁵ The court affirmed the lower court's order, expunging the suspension from J.P.'s record.⁶⁶

In contrast, the dissent argued the reasonable suspicion framework of *T.L.O.* was applicable.⁶⁷ In doing so, the dissent relied upon both *T.L.O.* and *Morse*.⁶⁸ The dissent disputed the majority's distinguishing *T.L.O.* by noting that the standard articulated in *T.L.O.* was not location specific and that the case did not discuss the boundaries of a school official's authority to conduct a search.⁶⁹

58. *Id.* at 901, 830 N.W.2d at 462.

59. *Id.* at 906–07, 830 N.W.2d at 465–66.

60. *Morse v. Fredrick*, 551 U.S. 393, 397 (2007).

61. *Id.*

62. *Id.* at 398.

63. *Id.* at 400–01.

64. *J.P.*, 285 Neb. at 907, 830 N.W.2d at 466.

65. *Id.*

66. *Id.* at 910–11, 830 N.W.2d at 468. In affirming the expunction, the court cited to subsection 79-291(2)(a) of the Nebraska Revised Statutes, which allows a court to reverse or modify a school's board decision when "substantial rights of the petitioner may have been prejudiced because the board's decision is . . . [i]n violation of constitutional provisions." *Id.* (citing NEB. REV. STAT. § 79-291(2)(a) (Reissue 2008)).

67. *Id.* at 913–16, 830 N.W.2d at 469–71 (Heavican, C.J., dissenting).

68. *Id.* The dissent would have remanded the case to the district court to determine whether reasonable suspicion existed. *Id.* at 912, 830 N.W.2d at 469.

69. *Id.* at 913–16, 830 N.W.2d at 469–71 (citing *Shade v. City of Farmington*, Minn., 309 F.3d 1054 (8th Cir. 2002); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); *Rhodes v. Guarricino*, 54 F. Supp. 2d 186 (S.D.N.Y. 1999)).

Additionally, the dissent applied *Morse* in order to understand the extent of school authority and students' constitutional protections beyond school grounds.⁷⁰ As the Court in *Morse* stated, "[the student] cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."⁷¹ The dissent found this statement applicable to the search of J.P.'s truck.⁷²

The dissent disputed the idea that the violation did not occur within the parameters of a school-sponsored activity.⁷³ More important to the dissent were the facts that the bulk of the rule-breaking conduct occurred on school grounds, that the school retained responsibility for J.P., and that the entire episode occurred during "the ultimate school-sponsored activity—attending school during regular school hours."⁷⁴ According to the dissent, the majority's focus on J.P.'s act of driving to school "ignore[d] the obvious."⁷⁵ J.P.'s attendance at school placed him under the school's authority and his sneaking out of the building during the school day to access his truck associated his truck with the rule-breaking conduct.⁷⁶

III. ANALYSIS

Although the Nebraska Supreme Court decided *J.P.* based upon the school's statutory authority, the U.S. Supreme Court's analysis in *T.L.O.* and its dissemination had substantial implications on the Nebraska Supreme Court's adjudication of *J.P.* An analysis of prior precedent is necessary to understand the court's holding.

A. Students' Fourth Amendment Rights After *T.L.O.*

T.L.O.'s adoption of a reasonable suspicion standard for school searches quickly incurred a bevy of scholarly criticism.⁷⁷ In the wake of the decision, one scholar speculated that, although counterintuitive, the Court's use of a balancing approach to apply the Fourth Amendment may actually result in fewer overall Fourth Amendment protections than if the Court had simply denied students Fourth Amendment protection entirely.⁷⁸ This same article notes, "While it

70. *Id.* at 914–15, 830 N.W.2d at 470–71.

71. *Morse v. Fredrick*, 551 U.S. 393, 401 (2007) (internal quotation marks omitted).

72. *J.P.*, 285 Neb. at 914–15, 830 N.W.2d at 470–71 (Heavican, C.J., dissenting).

73. *Id.* at 917, 830 N.W.2d at 472.

74. *Id.*

75. *Id.* at 918, 830 N.W.2d at 473.

76. *Id.*

77. *See Gardner*, *supra* note 4, at 919 ("Several critics have taken the Court to task for its misuse of prior precedent in attempting to justify the rejection of the probable cause standard in school searches in favor of the reasonable grounds, balancing approach.")

78. *See id.* at 920 (arguing that the risk of the Court subsequently extending "sliding-scale" analysis beyond the school context may mean that the court would have

may eventually turn out that the Court's new school-search standard has some real fourth amendment [sic] teeth, its application in *T.L.O.* provides little basis for such hope."⁷⁹

This skepticism has proven accurate, as *T.L.O.* has received "a warm reception" by lower courts.⁸⁰ Casting aside the weight of scholarly commentary on the issue, courts have treated *T.L.O.* as applicable to virtually all searches conducted by school officials.⁸¹ Additionally, the Court's articulation of reasonable suspicion has proven to be an exceedingly low threshold for school officials to meet.⁸² These two judicial trends, the wide application of *T.L.O.*'s framework and the seemingly ever-present nature of reasonable suspicion, call into question whether students enjoy any substantive Fourth Amendment protection at school.⁸³

Contributing to this uncertainty is the fact that the Court in *T.L.O.* explicitly declined to rule on four related issues: (1) whether the exclusionary rule is an appropriate remedy for Fourth Amendment violations by school officials; (2) whether a student has a reasonable expectation of privacy in lockers, desks, and other school provided storage; (3) what the appropriate standard for evaluating searches conducted by school officials in conjunction with law enforcement is; and (4) whether individualized suspicion is required for a search of a student.⁸⁴ Leaving so many questions unanswered afforded lower

better ensured individual Fourth Amendment protections by holding the school context a special exception to the Fourth Amendment entirely).

79. *Id.*

80. Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School Search Exception*, 66 N.Y.U. L. REV. 1077, 1078 (1991).

81. *Id.*

82. Schreck, *supra* note 8, at 122 (1993) (noting that of the twenty-three school search cases in the eight years following *T.L.O.*, reasonable suspicion was found to be lacking in only three, whereas four such cases were found to lack reasonable suspicion in the year prior to *T.L.O.*); see also Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools – A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U.L. REV. 1, 19–20 (2002) (outlining the broad, seemingly all-encompassing, sources of student behavior from which officials may derive reasonable suspicion); Joseph M. Sanchez, *Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After T.L.O.*, 21 J.L. & EDUC. 381 (1992) (noting that the reasonable suspicion standard in the six years after *T.L.O.* had been "diluted to a point where the flimsiest of excuses . . . can precipitate invasions of students' legitimate expectations of privacy").

83. In addition to the low threshold for reasonable suspicion, courts afford extreme deference to school officials in undertaking actions they view as necessary to maintain the school's environment. Jacqueline A. Stefkovich, *Student's Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass?*, 69 ST. JOHN'S L. REV. 481, 512 (1995). See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) ("[T]he courts should, as a general matter, defer to [a school official's] judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.").

84. Schreck, *supra* note 8, at 121.

courts wide latitude in applying *T.L.O.* A body of scholarly analysis in the years immediately following *T.L.O.* sought to extrapolate a more illuminative jurisprudence from the Court's holding.⁸⁵

For example, Stuart Berman argues that the Court's restraint in constructing its ruling in *T.L.O.* meant that the decision should be read narrowly rather than as a complete abandonment of the warrant requirement and of probable cause standards in school searches.⁸⁶ According to Berman, because the Court arrived at its conclusions regarding the warrant exception and the applicable standard for student searches separately, it would follow that lower courts should employ the same bifurcated analysis—weighing separately the appropriateness of each component against the needs of the school.⁸⁷

Rather than this nuanced treatment, however, lower courts have read *T.L.O.* quite broadly—almost always applying *T.L.O.*'s warrant exception and reasonable suspicion standard to searches of students by school officials.⁸⁸ Essentially, these courts have held that the two components of *T.L.O.*'s analysis—clearly separated by the Court and treated so differently in Justice Brennan's concurrence—are inextricably intertwined and jointly applicable.

Since the Court's decision, the reasonable suspicion standard and warrant exception have been applied to searches of students' automobiles,⁸⁹ lockers and desks,⁹⁰ students' hotel rooms on school trips,⁹¹

85. See Gardner, *supra* note 4, at 922–23; M. Teresa Harris, *New Jersey v. T.L.O.: New Standard of Review or New Label?*, 9 AM. J. TRIAL ADVOC. 157 (1985); Schreck, *supra* note 8, at 121; Berman, *supra* note 80; J. Chad Mitchell, Comment, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students' Rights with School Safety*, 1998 BYU L. REV. 1207 (1998).

86. Berman, *supra* note 80, at 1079.

87. *Id.* at 1099–1100. Under this analysis, a court will likely reach one of three conclusions when considering the appropriate standard for a school-related search of a student. A court may: (1) require a warrant issued upon probable cause, (2) dispense with the warrant requirement but require probable cause, or (3) except the warrant requirement and reduce the requisite standard to reasonable suspicion. *Id.* According to Berman, the more the facts of a particular search differ from those in *T.L.O.*, the more willing a court should be to adopt a stricter standard to validate the search and to require the school to obtain a warrant. *Id.*

88. *Id.* at 1078.

89. See, e.g., *State v. Best*, 959 A.2d 243 (N.J. Super. App. Div. 2008), *aff'd*, 987 A.2d 605 (N.J. 2010).

90. See *In re Dumas*, 515 A.2d 984 (Pa. 1986) (holding that the *T.L.O.* reasonableness standard applies to lockers). School districts commonly have policies that desks and lockers can be searched for any reason because schools retain control of desks and lockers as school property. Thus, students have no privacy interest in items kept inside. Amy Vorenberg, *Indecent Exposure: Do Warrantless Searches of a Student's Cell Phone Violate the Fourth Amendment?*, 17 BERKELEY J. CRIM. L. 62, 71 (2012). See, e.g., MILLARD PUBLIC SCHOOLS, MILLARD WEST HIGH SCHOOL 2011–2012 STUDENT HANDBOOK 38 (2011) (stating that lockers and desks, as school property, may be searched at anytime without notice or the student's consent), archived at <http://perma.unl.edu/WW69-G5ZG>.

students attending field trips and off-campus classes,⁹² and strip searches of students.⁹³ Without a particularized suspicion requirement, *T.L.O.*'s framework has been applied to metal detectors in schools,⁹⁴ as well as to random drug testing of student athletes,⁹⁵ students in extracurricular activities,⁹⁶ and students driving to and from school.⁹⁷ Even in a case where the Court found that a student's Fourth Amendment rights were violated when she was strip searched by school officials, the Court found the case law sufficiently ambiguous to entitle the school officials to qualified immunity.⁹⁸ Thus, the student was denied relief from the officials for the violation.⁹⁹

Essentially, the approach by subsequent courts has been all or nothing. Either *T.L.O.* applies, in which case there is no warrant requirement and a school official needs only reasonable suspicion, or *T.L.O.* is inapplicable and a search is only valid with a warrant supported by probable cause. This all-or-nothing approach to Fourth Amendment jurisprudence in school searches left the Nebraska Supreme Court with a stark choice in evaluating *J.P.*: either expand school officials' already extremely broad constitutional powers to allow searches of students (and their vehicles) beyond school property, or require the search to be conducted by law enforcement and supported by probable cause.

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91. *See Rhodes v. Guarricino*, 54 F. Supp. 2d 186, 192 (S.D.N.Y. 1999) (holding that *T.L.O.*'s reasonableness standard controls searches of students' rooms on school trips).
92. *See Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002) (holding a search of high school students traveling in a van from class off-campus was reasonable because the teacher knew someone in the group possessed a knife but was unsure of which student it was).
93. *See Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (holding a strip search of a student for drugs was reasonable).
94. *See People v. Pruitt*, 662 N.E.2d 540, 545 (Ill. App. Ct. 1996).
95. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).
96. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 838 (2002) (holding that *T.L.O.*'s reasonableness standard allowed for policy of drug testing students involved in any extracurricular activity).
97. *See Todd v. Rush Cnty. Sch.*, 133 F.3d 984, 984–86 (7th Cir. 1998) (holding that under *T.L.O.*, drug testing students who drove to and from school was reasonable); *Joye v. Hunderton Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 655 (N.J. 2003) (holding that policy of drug testing students seeking parking privileges was reasonable under the Fourth Amendment).
98. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378–79 (2009) (“We think [the] differences of opinion from [the Federal Courts of Appeals] are substantial enough to require immunity for the school officials in this case.”).
99. *Id.* at 379.

B. *J. P. ex rel. A.P. v. Millard Public Schools**1. Section 79-267 of the Nebraska Revised Statutes and the Rejection of the “Nexus to the School” Analysis*

In many ways, *J.P.* is an extended and, at times, contentious debate on when a student is or is not “at school.” While such a question seems elementary, the facts of the case are well-suited to confound any articulable qualification of when a student is present in the school context. *J.P.*’s car was off-campus, but *J.P.* was attending class when he violated school policy. *J.P.* left school grounds to reach his truck, but he never left the control of the school.

Section 79-267 of the Nebraska Revised Statutes grants authority to school officials to punish conduct in three circumstances: when the conduct occurs (1) on school grounds, (2) in a school vehicle, or (3) at a school-sponsored activity.¹⁰⁰ In applying Section 79-267 to *J.P.*’s case, the dissent and majority diverged as to what specific conduct should be analyzed. The majority identified *J.P.*’s driving to school as the relevant conduct, while the dissent emphasized *J.P.*’s attempts to leave the building to access his car.¹⁰¹

The dissent argued the school had legal authority to investigate and punish the conduct because it suspected *J.P.* of attempting to bring contraband from his truck into the school.¹⁰² *J.P.* “associated his vehicle with his unauthorized exit and reentrance into the school.”¹⁰³ According to the dissent, this association “changed the status of privacy rights” *J.P.* had in his car because it was now associated with a school-sponsored activity—the school day.¹⁰⁴ Under this analysis, the school had authority to search because the conduct occurred on school grounds and at a school-sponsored activity.¹⁰⁵

The majority labeled the dissent’s association analysis as a “nexus to the school standard.”¹⁰⁶ In addition to expressly rejecting this stan-

100. *J.P. ex rel. A.P. v. Millard Pub. Sch.*, 285 Neb. 890, 917, 830 N.W.2d 453, 472 (2013) (Heavican, C.J., dissenting).

101. *See supra* text accompanying notes 64, 72–76.

102. *J.P.*, 285 Neb. at 912, 830 N.W.2d at 469 (Heavican, C.J., dissenting) (stating that the case should be remanded to determine if reasonable suspicion existed to support the search). The school district framed the issue as one of a continuing threat to the school environment. *See* Brief for Appellants at 23, *J.P. ex rel. A.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013) (No. S-11-000777) (arguing that the District believed it was obligated to search *J.P.*’s truck because not doing so would allow *J.P.* to “move contraband between the school and his truck, which would . . . threaten the safety and security of the school”).

103. *J.P.*, 285 Neb. at 918–19, 830 N.W.2d at 473 (Heavican, C.J., dissenting).

104. *Id.*

105. *Id.* at 917, 830 N.W.2d at 472 (“*J.P.*’s conduct occurred during the ultimate school-sponsored activity—attending school during regular school hours.”).

106. *Id.* at 908, 830 N.W.2d at 467 (majority opinion). This nexus to the school argument appears to be the majority’s synthesis of three highly similar arguments: (1) the dissent’s association argument, (2) the Appellant’s argument, and (3) the

dard on policy grounds,¹⁰⁷ the majority stated, “[p]ermitting school officials to search a student’s vehicle based upon a nexus to the school because a student drove the vehicle to school is overly broad.”¹⁰⁸ The dissent posited that the relevant conduct, rather than J.P.’s driving to school, was his attempts to reach his car during the school day.¹⁰⁹

The majority’s and dissent’s differing interpretations of the relevant conduct at issue results from the specific facts of *J.P.* Three facts are noteworthy for the majority: (1) J.P. was intercepted before reaching his truck after his first class, foreclosing the possibility that he snuck out to his truck prior to that point; (2) a school officer observed J.P. remove items from his truck, thus J.P. could neither have deposited nor collected any contraband at that time; and (3) Grimminger’s search of J.P. revealed no contraband, therefore making it extremely unlikely that J.P. had possessed contraband on school property at any point during the day.¹¹⁰ Thus, the only act of which the school could have suspected J.P. was possession of contraband in his truck, and the only relevant conduct, according to the majority, was driving to school with the contraband in his truck.¹¹¹

The majority arguably could have arrived at the same place by holding that possessing contraband in one’s vehicle off-campus was not a violation of school policy and thus conferred no authority to search.¹¹² But focusing on J.P.’s drive to school refutes the appellant’s argument because none of the characteristics of school-sponsored activities enumerated by the appellant are present for the drive to school.¹¹³

nexus to the school standard articulated in *Commonwealth v. Williams*. See Brief for Appellants, *supra* note 100, at 25; *Commonwealth v. Williams*, 749 A.2d 957, 963 (Pa. Super. Ct. 2000).

107. The majority rejected the nexus to the school standard out of concern it would lead to “confusing inquiries.” *J.P.*, 285 Neb. at 908, 830 N.W.2d at 467. This sentiment resembles the Court’s reluctance in *T.L.O.* to entrust school officials to competently adjudicate the probable cause standard. See *supra* text accompanying note 33.
108. *J.P.*, 285 Neb. at 908, 830 N.W.2d at 467.
109. *Id.* at 918, 830 N.W.2d at 473 (Heavican, C.J., dissenting).
110. *Id.* at 908, 830 N.W.2d at 466 (majority opinion) (“There was no evidence that the contraband was ever placed on school property.”).
111. See *id.* (“The relevant conduct (having contraband in the truck) occurred off school grounds.”).
112. The court noted that section III.A.2.a of the Millard West High School Student Handbook required a “citation or admission” to punish a student for off-campus conduct. Furthermore, section III.A.1.c of the handbook required that legal authorities be contacted when drug contraband was discovered. *Id.* at 895, 830 N.W.2d at 458–59. It is unclear from the court’s opinion whether the school contacted authorities and J.P. was given a citation. The issue does not affect the school’s authority under Section 79-267 of the Nebraska Revised Statutes.
113. See Brief for Appellants, *supra* note 102, at 16 (asserting that the search occurred “in a public school setting” and that J.P. was in the “temporary custody and care” of the school at the time).

Framing the issue in terms of J.P.'s drive to school further serves to rebut the dissent's application of *Morse*. To the dissent, *Morse*, like *J.P.*, involved a student stepping just off school grounds and claiming to be beyond the reach of school discipline.¹¹⁴ Yet in *Morse*, the Court found that the student was still subject to school authority.¹¹⁵ As the dissent notes, in both cases the school retained control and responsibility over the student.¹¹⁶ If the relevant conduct is J.P.'s attempt to leave the school, *Morse* appears analogous to J.P.'s case.¹¹⁷ However, if the relevant conduct is driving to school, then there was no school-created environment and no control over J.P. while he drove to school. Furthermore, viewing J.P.'s case within this framework accentuates the similarities between this case and the majority's primary supporting precedent—*Commonwealth v. Williams*.¹¹⁸

2. *Undesirable Outcomes*

Complicating the analysis of J.P.'s case is the fact that both the majority and dissent can point to undesirable outcomes resulting from deciding the case either way. A hypothetical scenario illuminates the considerations.

A student is off school grounds and participating in a school-sponsored activity. The student sneaks away from the group without permission and sets down his book bag before returning to the school group. A school official intercepts the student and, suspecting the student of sneaking away to dispose of contraband, accompanies him to retrieve his book bag. There would be little question that the official in this case would be within her authority to search the book bag if she had reasonable suspicion. Yet there does not seem to be a clear way to distinguish this case from J.P.'s without conceding that a school official's authority is more restricted during the school day, the "ultimate school-sponsored activity," than at other school-sponsored activities.¹¹⁹

114. *J.P.*, 285 Neb. at 918–19, 830 N.W.2d at 473 (Heavican, C.J., dissenting) (citing *Morse v. Frederick*, 551 U.S. 393 (2007)).

115. *Morse*, 551 U.S. at 400–01.

116. *J.P.*, 285 Neb. at 919, 830 N.W.2d at 473 (Heavican, C.J., dissenting).

117. See *Shade v. Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002) ("The nature of administrators' and teachers' responsibilities for the students entrusted to their care, not school boundary lines, renders the Fourth Amendment standard in the public-school context to be less onerous.")

118. 749 A.2d 957 (Pa. Super. Ct. 2000). In *Williams*, a case in which the court found a police officer similarly exceeded authority, the defendant was never on school property before a school officer searched the car and found illegal firearms. *Id.* at 958–59.

119. One counterargument is that the amorphous boundaries of an off-campus school activity, such as an out-of-town, high-school trip, requires this flexibility because there is no clear delineation of authority (such as the school's property line). This is a valid point but to apply this reasoning in every case of off-campus activities is

The alternative is to decide that school officials may exercise their authority beyond the school's property line when certain conduct "associates" their suspicion with a location off campus. This has potentially extreme constitutional implications. As the appellee noted in its brief, such a holding would theoretically allow a school official, with nothing more than reasonable suspicion, to search J.P.'s house if, instead of parking across the street, J.P. lived in close proximity to the school.¹²⁰ Of course, the heightened privacy of the home may be enough for a court to distinguish the situation,¹²¹ but this scenario presents a constitutional dilemma that cannot be adequately addressed through *T.L.O.*'s framework and its subsequent interpretations. Unleashing school officials' authority beyond school grounds presents a substantial reduction of Fourth Amendment protection for all citizens in the name of school discipline. There is simply no readily identifiable limiting principle to be found in *T.L.O.* or its progeny.

C. Impact of the Court's Decision

The court's decision will likely have several ramifications for how school officials regard their authority to search students and how the court will analyze school search cases in the future. Three areas of Nebraska law appear likely to be particularly affected by the decision: (i) the extent of schools' authority over students on school-sponsored activities, (ii) the court's interpretation of reasonable suspicion, and (iii) the court's treatment of the school's need to maintain order and ensure student safety.

1. School-Sponsored Activities

Despite *J.P.*'s extensive treatment of the issue of school-sponsored activities, the court's holding is not likely to end questions regarding

to dismiss the weight of potentially heightened student-privacy concerns, such as on overnight trips. See Berman, *supra* note 80, at 1120–21 (arguing that, with fewer numbers of students, the need to reduce constitutional protections to maintain order diminishes and that student privacy expectations rise, especially on overnight school-sponsored trips). But see Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1080 n.15 (5th Cir. 1995) (citing Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987)) ("School field trips often present greater, not lesser, challenges to school officials trying to maintain order and discipline than do the relatively orderly confines of a school."). The ease with which both arguments can be framed to show the legitimate need of the official illuminates the primary reason reasonable suspicion has proven such an easily met standard. When the situation involves groups of schoolchildren, any articulable safety concern can readily appear serious and substantial enough to override a student's limited constitutional protections.

120. Brief for Appellee at 10, *J.P. ex rel. A.P. v. Millard Pub. Sch.*, 285 Neb. 890, 830 N.W.2d 453 (2013) (No. S-11-000777).

121. See *Wilson v. Layne*, 526 U.S. 603, 612 (1999) (identifying the right to residential privacy as the "core of the Fourth Amendment").

the definition of such activities. Whether a search occurred during a school-sponsored activity will be a pivotal issue in future cases. If the search occurred during a school-sponsored activity, then a school official needs only reasonable suspicion to conduct a search. However, if the court determines the search occurred outside the bounds of a school-sponsored activity, the school official's search is likely to be found statutorily impermissible under Nebraska law.

The majority held that school-sponsored events described in the relevant precedent were events where the school "created an environment for students, gave them permission to enter that environment, and took responsibility for their safety in that environment."¹²² Though the court does not say so explicitly, each clause appears to be a required element of a school-sponsored activity in the eyes of the Nebraska Supreme Court. The act of driving to school met none of these enumerated elements, but what if an activity meets only one or two of the elements? For example, how does this definition apply to retreats by school organizations, car-wash fundraisers supervised by faculty, or off-campus, after-school artistic performances in which the school furnishes tickets but students provide transportation? Certainly a wide variety of school-sponsored activities exist on a continuum, but future cases regarding school-sponsored activities will require a "yes" or "no" determination. Given the court's apparent requirements, it appears that schools should interpret school-sponsored activities somewhat narrowly, likely reserving the designation for activities that meet all three elements.¹²³

2. *The Court's Interpretation of Reasonable Suspicion*

Because the court determined that the school officials did not possess statutory authority to search students' vehicles off school grounds, it did not decide whether the facts of the case provided school officials with reasonable suspicion to conduct the search.¹²⁴ However, the majority's examination of reasonable suspicion in dicta indicates a willingness to subject school searches to a higher level of scrutiny than the virtual *carte blanche* afforded school districts in other jurisdictions.¹²⁵

The court did not expressly say that reasonable suspicion was lacking, but it repeatedly expressed skepticism that the school possessed reasonable suspicion to search J.P.'s car, even if such a search were

122. *J.P.*, 285 Neb. at 907, 830 N.W.2d at 466.

123. Conceivably, the vast majority of activities where one element is present will have the other two as well.

124. *Id.* at 909, 830 N.W.2d at 467 ("For the search of J.P.'s truck to be reasonable, the District must have authority to conduct the search.").

125. *See id.* at 904-05, 830 N.W.2d at 464-65.

statutorily authorized.¹²⁶ The majority distinguished a host of cases that allowed searches of students' vehicles because in those cases the vehicle was parked on school grounds and there was a "link between the student and contraband allowing school officials to reasonably suspect that the student possessed contraband."¹²⁷ The "link" in those cases included a drug dog alerting officials to a student's car¹²⁸ and the knowledge that students had previously used tobacco in the school parking lot.¹²⁹ Based on these statements, it appears that the court will henceforth require a specific, articulable link between the student searched and the suspected violation, rather than a mere showing that the student violated an unrelated, or tenuously related, school policy.¹³⁰ Specific to student searches for contraband, a school official will likely need information linking the student to the contraband sought before the search is undertaken.

3. Halting the "Parade of Horribles"

If the *T.L.O.* framework is to be understood as a balance between students' constitutional interests and the need for school safety and order, then inarguably the scale has come down most often in favor of school order.¹³¹ In evaluating school needs, courts frequently engage in superficial policy discussions regarding threats to school security.¹³² Conversely, courts tend to undervalue student constitutional

126. *Id.* at 904–08, 830 N.W.2d at 464–67.

127. *Id.* at 905, 830 N.W.2d at 464. See *Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735 (S.D. Tex. 2001); *Anders ex rel. Anders v. Fort Wayne Cmty. Sch.*, 124 F. Supp. 2d 618 (N.D. Ind. 2000); *State v. Best*, 959 A.2d 243 (N.J. Super. App. Div. 2008), *aff'd*, 987 A.2d 605 (N.J. 2010); *State v. Slattery*, 787 P.2d 932 (Wash. Ct. App. 1990).

128. See *Bundick*, 140 F. Supp. 2d at 738 (holding that a search of student's car was supported by reasonable suspicion where a drug-sniffing dog "alerted to" the student's car).

129. See *Anders*, 124 F. Supp. 2d at 621.

130. This requirement is consistent with several of the rare court opinions where searches by school officials lacked reasonable suspicion. See, e.g., *In re William G.*, 709 P.2d 1287, 1295–97 (Cal. 1985) (noting that reasonable suspicion requires "articulable fact"); *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 455–57 (E.D. Mich. 1985) (holding that a search for drugs was not supported by reasonable suspicion where the student was found out of class when not allowed, lying about her identity, and in possession of re-admittance slips against school policy).

131. See Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 337 (2003); Jessica Feierman, *The Decriminalization of the Classroom: The Supreme Court's Evolving Jurisprudence on the Rights of Students*, 13 J.L. Soc'y 301, 303 (2011).

132. See *Stefkovich*, *supra* note 83, at 512; see also Beger, *supra* note 131, at 338 (noting the exaggerated view of school violence held by the public due to widely-publicized but infrequent examples); Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 317

rights possibly, in part, because of the historical lack of constitutional protections afforded students at school.¹³³

While ensuring student safety is one of the most critical missions of school officials,¹³⁴ courts seem to find that the general threat of school safety overrides almost any concern for students' constitutional rights.¹³⁵ The idea of crime in schools, often identified as either drugs or weapons, is occasionally portrayed as a new or unprecedented threat, which requires special vigilance by schools and courts.¹³⁶ Statistical evidence, however, indicates that America's schools remain exceptionally safe environments for students.¹³⁷

The Nebraska Supreme Court emphatically rejected the dissent's warning of the dangerous consequences of the majority's holding.¹³⁸

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- (2011) (“[T]he narrative of youth criminality as a serious threat to society remains a potent theme in American culture and a driving force of public policy.”).
133. For example, the doctrine of *in loco parentis*, expressly rejected by *T.L.O.*, has continued to sporadically influence judicial thinking. Under this standard, school officials act under the delegated authority of the student's parents, and the student enjoys no Fourth Amendment protection in school. See Alysia B. Koloms, *Stripping Down the Reasonableness Standard: The Problem with Using In Loco Parentis to Define Students' Fourth Amendment Rights*, 39 HOFSTRA L. REV. 169, 189 (2010); see also *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 383 (2009) (Thomas, J., dissenting) (arguing the search in question should be upheld under an *in loco parentis* standard or, alternatively, under *T.L.O.*'s reasonable suspicion framework); *Morse v. Frederick*, 551 U.S. 393, 410–25 (2007) (Thomas, J., concurring) (stating that the Court should overturn prior constitutional limits imposed on public school officials conduct and replace it with an *in loco parentis* standard); *Webb v. McCullough*, 828 F.2d 1151, 1157 (6th Cir. 1987) (holding that a school principal's search of a student's hotel room on school-sponsored trip did not need to be supported by reasonable suspicion because the principal was acting *in loco parentis*). But see *Rhodes v. Guarricino*, 54 F. Supp. 2d 186, 192 (S.D.N.Y. 1999) (rejecting Webb's *in loco parentis* analysis in regards to chaperone's search of student's room on school-sponsored trip).
134. See W. David Hatkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety with Students' Rights*, 69 MISS. L.J. 641, 645 (1999) (noting that school safety remains a significant concern despite statistical reductions in violent occurrences).
135. Beger, *supra* note 131.
136. The Court in *T.L.O.* considered recent “particularly ugly forms” of school disorder such as drug use and gang violence. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). But this language should be read in the context of the 1980s when crime in schools reached its zenith. See Forman, *supra* note 132, at 315; see also Stefkovich, *supra* note 84, at 119 (noting that courts tend to erroneously treat drug and weapon possessions as equally immediate threats).
137. Beger, *supra* note 131, at 338 (citing a number of empirical studies to demonstrate that school violence rates dropped significantly over the course of the 1990s); Hatkins & Hooks, *supra* note 134, at 644 (noting that less than one percent of homicides and suicides among school-aged youth nationwide occur in the school context).
138. *J.P. ex rel. A.P. v. Millard Pub. Sch.*, 285 Neb. 890, 909–10, 830 N.W.2d 453, 467–68 (2013) (“The facts of this case demonstrate the fallacy of the dissent's suggested parade of horribles.”) (internal quotations omitted).

The court noted that the school was able to adequately investigate whether J.P. was endangering the school environment and that the school could have contacted law enforcement with further suspicion of off-campus contraband.¹³⁹ This is sound policy by the court; too often in prior cases the effectiveness of standard law enforcement procedure, applicable to all citizens, has been overlooked in safeguarding students.¹⁴⁰ The court's language indicates that a cursory fear of school disorder will no longer be sufficient to automatically override students' constitutional rights.

D. Policy Considerations

Two policy considerations support the court evaluating reasonable suspicion with more scrutiny: (1) depriving students of all substantive Fourth Amendment rights is counterproductive to the educational mission of fostering healthy adults and functional citizens, and (2) the lack of constitutional protection has contributed to a national school system that sends too many of its students into the justice system before they have even graduated.

The schoolroom is where most Americans are taught the basic lessons of their civil rights and civic duties under the Constitution. Yet modern jurisprudence has immunized public school officials from respecting virtually any Fourth Amendment rights of their students.¹⁴¹ Often overlooked by adjudicating courts is the fact that, regardless of the school's needs, searches by officials remain intrusive and unpleasant for students, no matter the context surrounding the search.¹⁴² Those searched are generally teenagers, who are developing a still-nascent conception of individual privacy as adults.¹⁴³ There are seri-

139. *Id.*

140. See Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 385 (2012) (questioning why educational needs have been considered so exceptional as to merit lowered constitutional standards while public safety and criminal justice, both of comparably paramount importance, are sufficiently administered by law enforcement that is subject to standard Fourth Amendment restrictions).

141. See *supra* text accompanying notes 89–99.

142. See Gardner, *supra* note 4, at 946 (“[E]ducators should be especially careful to minimize privacy invasions as much as possible, not only because respecting a student’s privacy is conducive to his healthy psychological development, but also because invading a juvenile’s privacy ‘without adequate cause is to invite youthful hostility to authority’” (quoting Irene Merker Rosenberg, *New Jersey v. T.L.O.: Of Children and Smokescreens*, 19 FAM. L.Q. 311, 339 (1985))).

143. Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 488 (1983) (“[A]s children approach adolescence, privacy becomes important as a marker of independence and self-differentiation.”).

ous concerns about how a total lack of constitutional protection hinders students' growth in these areas.¹⁴⁴

Furthermore, these searches send conflicting, potentially dysfunctional signals about the Constitution to young citizens who are to be entrusted with ensuring the Constitution's continuing vitality.¹⁴⁵ Students are repeatedly taught in school about the benefits of the Constitution, yet every search is a hands-on lesson in just how fleeting and arbitrary those rights can be.¹⁴⁶ For example, what respect for the Constitution did the defendant acquire in *Safford Unified School District No. 1 v. Redding*¹⁴⁷ when she was strip-searched by her administrators and then denied relief by the Court, even though it found her Constitutional rights had been violated?¹⁴⁸

In addition, some have argued that reduced Fourth Amendment protections—in combination with other factors such as increased po-

144. See Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 396 (2013) (quoting Jen Weiss, *Scan This: Examining Student Resistance to School Surveillance*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* 213, 227 (Torin Monahan & Rodolfo D. Torres eds., 2010)) (noting that students subjected to "strict security measures" were less likely "to speak out or organize in response to issues that bother[ed] them").

145. See *New Jersey v. T.L.O.*, 469 U.S. 325, 354 (1985) (Brennan, J., dissenting) ("It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections."); *Doe v. Renfrow*, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting from denial of certiorari) ("Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1947) ("That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); Forman, *supra* note 132, at 332 ("A student can be taught a lesson about the Fourth Amendment's protections against search and seizure in the morning, forced to submit to a search in the afternoon, and charged with a crime resulting from that search the following day.").

146. See Donald L. Beci, *School Violence: Protecting our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 833 (1992) ("[S]tudents are more likely to learn how to resolve conflicts between personal liberty and public safety from witnessing bookbag searches than from passively completing their reading assignments.").

147. 557 U.S. 364 (2009).

148. See *supra* notes 98–99 and accompanying text; see also Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 943 (1997) ("Permitting strip searches of children sets a curious moral for the nation's youth.").

lice presence in schools¹⁴⁹ and school officials actively gathering evidence for use in criminal prosecutions against students—has created a “school-to-prison pipeline.”¹⁵⁰ This “criminalization of the classroom”¹⁵¹ has a substantial negative impact on school performance.¹⁵² Furthermore, the use of strict security measures that tend to generate evidence for criminal proceedings is more prevalent in lower income communities, which are disproportionately populated by minority students.¹⁵³ Thus, modern Fourth Amendment jurisprudence has served to disproportionately introduce minority students into the criminal justice system.¹⁵⁴ The Nebraska Supreme Court demonstrated its awareness of this constitutional shortcoming when it expressed its concern that allowing teachers to search off-campus vehicles would foreseeably lead to increased information gathering by school officials for law enforcement.¹⁵⁵

IV. CONCLUSION

Nearly thirty years after the U.S. Supreme Court handed down its decision in *New Jersey v. T.L.O.*, students’ Fourth Amendment rights in schools exist at a bare minimum. Rather than the nuanced, narrow interpretation of *T.L.O.* urged by the majority of scholarly research published in the decision’s immediate aftermath, courts have applied its framework far beyond its original facts, such as to situations involving school parking lots and student hotel rooms. While *T.L.O.* articulated a balancing approach for judging the reasonableness of searches of students, in application this approach has effectively provided school officials with *carte blanche* to search students while in school. This lack of constitutional protections has led to invasive and counterproductive search policies and contributed to a school-to-prison pipeline, particularly among the nation’s minority youth population.¹⁵⁶

149. Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1076–79 (2003).

150. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 347, 369–70 (2011).

151. Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 962 (2009).

152. Nance, *supra* note 144, at 396 (citing CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 113 (2010)) (noting the odds of a student dropping out of school double if he or she is arrested and quadruple if the arrest is coupled with a court appearance).

153. Nance, *supra* note 144, at 402.

154. See Majd, *supra* note 150.

155. *J.P. ex rel. A.P. v. Millard Pub. Sch.*, 285 Neb. 890, 908, 830 N.W.2d 453, 467 (2013).

156. See Gartner *supra* note 148.

In *J.P. ex rel. A.P. v. Millard Public Schools*, the Nebraska Supreme Court confronted many of the analytical flaws in modern Fourth Amendment jurisprudence as it pertains to searches of students by school officials. The court's interpretation of Section 79-267 of the Nebraska Revised Statutes disallows an expansion of *T.L.O.*'s reasonable suspicion standard beyond school grounds unless as a part of a school-sponsored activity. The decision, however, leaves school officials without substantial guidance in understanding what activities qualify as school sponsored. This is a significant shortcoming of the court's decision, as school officials' authority to conduct a search in the future will depend almost entirely upon this designation.

Although the court decided the case based on a school official's statutory authority under Nebraska law, the majority appears to signal that it will subsequently require a more detailed articulation of school officials' suspicion in order to find a search of a student reasonable. This is a potentially substantial increase in Fourth Amendment rights afforded students when compared with earlier courts' treatment of reasonable suspicion and school officials' authority. Even accepting this possibility, students will continue to enjoy far fewer Fourth Amendment protections while attending school than at virtually any other time during their lives.