RESPONSE

BAD FOR ADULTS, WORSE FOR K-12 STUDENTS: A RESPONSE TO JOSEPHINE ROSS'S *ABOLISHING POLICE CONSENT SEARCHES THROUGH LEGISLATION*

BARBARA FEDDERS*

This invited Response to Josephine Ross's Abolishing Police Consent Searches Through Legislation: Lessons from Scotland *applies Professor Ross's insights about consent searches to the context of K-12 schools. Even more than the adults she discusses, minors in schools are especially susceptible to state displays of authority. As a result, what police and courts refer to as "consent" to a search is more likely to be mere acquiescence. In school with students, as in public with adults, a consent search constitutes a legal fiction.*

Nonetheless, this Response suggests that abolition of consent searches in public schools is unlikely. Because administrators have a moral and legal obligation to keep students safe, they seem especially likely to rely on consent searches in responding to such alleged offenses as assault, larceny from the person, and drug distribution. However, school districts can and should create policies that prohibit administrators—except where they are statutorily obligated otherwise—from using the fruits of a consent search as the basis for a referral of a student for prosecution in juvenile or criminal court. Avoiding criminalization of school-based misconduct is essential for creating and maintaining the positive staff-student relationships on which successful schools depend.

---

* Reef C. Ivey II Excellence Fund Term Scholar and Associate Professor of Law, *University of North Carolina School of Law.* Thank you to Joseph Kennedy, Brandon Garrett, and the participants in the 13th Conference on Adversarial and Inquisitorial Systems at *Duke Law School* and *UNC School of Law* for helpful comments on an earlier draft. Thanks to the editors of the *American University Law Review Forum* for inviting this Response and for excellent editorial assistance.

TABLE OF CONTENTS

INTRODUCTION

In *Abolishing Police Consent Searches Through Legislation: Lessons from Scotland*,[1] Josephine Ross calls for the elimination through legislation of so-called "consent" searches by police. Because these searches relieve police of having to establish probable cause and obtain a warrant, law enforcement relies heavily on them; consent searches comprise an overwhelming majority of police intrusions of persons and property.[2] However, as Ross argues, rarely can individuals exercise meaningful choice about whether to allow a search when faced with armed officers.[3] What officers and courts describe as consensual is most often mere acquiescence; commentators therefore decry consent searches as a legal fiction.[4] Moreover, officers' ability to rely on consent enables them to search in a broader set of circumstances than would

1. *See generally* Josephine Ross, *Abolishing Police Consent Searches Through Legislation: Lessons from Scotland*, 72 AM. U. L. REV. 2017 (2023) (arguing that consent searches create a loophole for "otherwise blatantly unconstitutional searches").

2. *See* Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. ILL. L. REV. 1759, 1760 (2018) (finding that nationally, over ninety percent of police searches are accomplished through the consent exception to the Fourth Amendment).

3. Ross, *supra* note 1, at 2024–25.

4. *Id.* at 2026 n.40 (surveying critical scholarship).

otherwise be possible.[5] Officers frequently use this greater discretion in a racially biased manner.[6] Appropriately skeptical that this Supreme Court will eliminate or constrain consent searches, Ross proposes legislative reform at the local and state levels.[7] She argues that the recent elimination of police consent searches in Scotland offers useful lessons for U.S. criminal justice reform.[8]

This Response applies the insights from Ross's article to consent searches of K-12 students in U.S. public schools. The notion that minors can exercise voluntary consent in schools, where staff have broad supervisory and disciplinary authority, is especially fictitious.[9] At the same time, because schools are legally obligated to provide a safe educational environment for all students, speedy resolution by administrators of allegations of such offenses as assault, larceny from the person, and drug distribution is imperative.[10] Consent searches are an expeditious way to conduct an investigation when allegations involve suspicion of possession of contraband;[11] they can thus serve as a tool for school administrators seeking to fulfill their moral and legal obligation.[12] Any persuasive analysis focused on the rights of individual students to avoid the legal fiction of a consent search needs to account for this competing demand of school safety.[13] This Response argues that even though most students cannot give truly voluntary consent, school administrators are unlikely to abandon consent searches. However, except where statutorily mandated (as in the case of possession of dangerous weapons), schools should, as a matter of

---

5. *See id.* at 2020 (noting that consent searches allow police to stop individuals even if they have no reason to believe that that person is engaging in criminal activity).

6. *Id.* at 2022.

7. *Id.* at 2071–72.

8. *See id.* at 2057–58 (explaining that the United States should learn from Scotland's use of "legislation over courts to define the scope of police powers").

9. *See infra* Section II.B.

10. *See, e.g.*, Mitchell v. Cedar Rapids Cmty. Sch. Dist. 832 N.W.2d 689, 700 (Iowa 2013) (finding sufficient evidence to support jury's finding that school acted unreasonably and that its negligence increased risk of special education student's harm after student was sexually assaulted by another student after school hours and off school grounds); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1989) (holding that schools have a Title IX responsibility to address and respond to teacher-on-student sexual harassment at school); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 653–54 (1999) (applying holding to student-on-student harassment).

11. Bandes, *supra* note 2, at 1760–61 (noting that consent allows law enforcement to search individuals without a "warrant, probable cause, or reasonable suspicion").

12. *See infra* Section I.A.

13. *See infra* Section I.A.

policy, refrain from referring students to juvenile or criminal courts based on contraband recovered pursuant to a consent search.[14] Avoiding prosecution for school-based misconduct is essential to creating and maintaining the positive staff-student relationships on which successful schools depend.[15]

Part I analyzes the duty of supervision and power to discipline in schools as reflected in case law, school board policies, and statutes enacted through personal and electronic surveillance. This Part then surveys developmental psychology, discussed in Supreme Court cases, about the unique vulnerabilities of minors to shows of authority by state actors. It considers how this vulnerability exacerbates the coerciveness attendant to the highly rule-bound nature of schools. Part II examines case law pertaining to student searches. It analyzes the diminished expectation of privacy students have in schools and explains that, pursuant to the Supreme Court case *New Jersey v. T.L.O*,[16] school officials (including school police in many jurisdictions) may conduct searches based on reasonable suspicion rather than probable cause.[17] This Part then argues that the notion that students can give voluntary consent to school searches is a legal fiction even more heightened than that discussed in Ross's article. Part III explores the tension between schools' obligation to provide a safe learning environment for all students and the goal of avoiding the legal fiction of consent searches. It argues that the best way to resolve this tension, if administrators are determined to maintain consent searches, is for them to avoid referring students to juvenile or criminal court based on contraband recovered pursuant to a consent search. While a student's possession of certain dangerous weapons will obligate schools to notify law enforcement based on state statutory requirements, administrators can and should otherwise manage school-based misconduct with in-school consequences.[18]

---

14. *See infra* Part III.
15. *See infra* Part III.
16. 469 U.S. 325 (1985).
17. *Id.* at 341.
18. *See infra* Part III.

I. K-12 SCHOOLS: SUPERVISION, DISCIPLINE, AND VULNERABILITY

A web of federal and state laws, along with school board policies, govern the supervision, teaching, and disciplinary power of schools.[19] These are supplemented by personal and electronic surveillance. Section A outlines the supervisory and disciplinary features of K-12 public schools. Section B discusses minors' unique vulnerability to displays of authority by state actors, especially police, a characteristic that exacerbates the coerciveness that attends the highly rule-bound nature of schools.

A. Supervision and Discipline

As of 1918, every state in the nation has compulsory attendance laws that require all minors to attend school[20] up until a prescribed age.[21] This power arises from the *parens patriae* doctrine, which grants states the ability to restrict parental control to promote the "general interest in youth's well being."[22] While the Supreme Court has held that parents need not send their children to public school to comply with compulsory attendance laws,[23] over 80% of students nonetheless attend public schools.[24]

Because teachers and other school staff generally stand *in loco parentis*[25] to students, public schools owe a duty of supervision.[26] While

---

19. *See, e.g.*, Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U.L. REV. 919, 932–33 (2016) (noting that many states and schools have enacted laws and policies promoting zero tolerance modeled after the federal Gun-Free Schools Act).

20. William Galston, *Parents, Government, and Children: Authority over Education in a Pluralist Liberal Democracy*, 5 LAW & ETHICS HUM. RTS. 284, 291 (2011).

21. *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/JAH6-M4MB] (noting range of ages until which students must attend).

22. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

23. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (sustaining a parent's challenge under the First Amendment's Free Exercise Clause to a Wisconsin statute mandating public school attendance).

24. JACOB FABINA, ERIK L. HERNANDEZ & KEVIN MCELRATH, SCHOOL ENROLLMENT IN THE UNITED STATES: 2021, at 3 (2023), https://www.census.gov/content/dam/Census/library/publications/2023/acs/acs-55.pdf [https://perma.cc/D33M-T2QH]. The laws and policies governing private and home schools are beyond the scope of this Article.

25. Bethel Sch. Dist. No. 403 v. Fraser, 478 U. S. 675, 684 (1986).

26. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). As one state court held, "[c]ase law is replete with instances of schools, principals and teachers being

students famously do not "shed their constitutional rights . . . at the schoolhouse gate,"[27] this duty of supervision confers the authority to exercise "a degree of . . . control that could not be exercised over free adults."[28] Under controlling federal case law, students have a lessened expectation of privacy while they are in school.[29] Schools may engage in censorship, impose dress codes, and use corporal punishment.[30] Over the last three decades, concerns about violence (especially gun violence), bullying, and serious harassment have intensified a societal focus on schools' duty to keep students safe.[31]

Federal and state statutes, school board policies, and schools' use of personal and electronic surveillance facilitate schools' duty of supervision and concomitant imposition of discipline.[32]

---

required to reasonably fulfill their duty to supervise students." State v. Christie, 939 So. 2d 1078, 1079 (Fla. Dist. Ct. App. 2005).

27. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

28. *Acton*, 515 U.S. at 655.

29. *See id.* at 657 (citation omitted) (noting that "students within the school environment have a lesser expectation of privacy than members of the population generally").

30. The Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) noting that the First Amendment permits schools to regulate speech that goes against a school's educational mission; (2) speech, uttered during a class trip, that promotes "illegal drug use," see Morse v. Frederick, 551 U.S. 393, 409 (2007); and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, see Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) explaining that educators have greater control over this type of student speech. *See* Galen Sherwin, Linda Morris & Eleanor Wachtel, *4 Things Public Schools Can and Can't Do when It Comes to Dress Codes*, ACLU (Sept. 21, 2022), https://www.aclu.org/news/womens-rights/4-things-public-schools-can-and-cant-do-dress-codes [https://perma.cc/M8Q9-G6XD] (outlining limits under federal anti-discrimination law on the types of dress codes schools may maintain); Miguel A. Cardona, *Key Policy Letters Signed by the Education Secretary or Deputy Secretary*, U.S. DEP'T EDUC. (Mar. 24, 2023), https://www.ed.gov/policy/gen/guid/secletter/230324.html [https://perma.cc/PCD9-HL2U] (noting that corporal punishment in schools is permissible in 23 states).

31. *See* Patrick Wall, *With More Shootings and Guns on Campus, Schools Walk a Fine Line in Response*, CHALKBEAT (Apr. 5, 2023), https://www.chalkbeat.org/2023/4/5/23670535/shootings-guns-schools-violence-metal-detectors-police [https://perma.cc/RJ4C-V877] (noting increase in gun violence in schools and describing administrators' efforts to increase safety without making students feel afraid because of enhanced security).

32. *See infra* Section I.A (outlining how each different type of student regulation assists schools' supervisory abilities).

1. Federal and state statutes

While education is primarily a function of state and local governments,[33] one key federal law governs how schools must respond to certain kinds of in-school unlawful conduct. The 1994 Gun-Free Schools Act ("GFSA") mandates states, as a condition of receiving federal funding, to require local educational agencies to expel for at least one year any student found with a firearm in school.[34] This law reflected and reinforced the "zero tolerance" approach, popularized around the same time in criminal law, that emphasized mandatory imposition of penalties for a wide swath of offenses.[35]

In the wake of the passage of the GFSA—and amidst the widespread (if unwarranted) panic about youthful "superpredators"[36]—states and schools passed laws and policies mandating suspension and expulsion in circumstances that went well beyond that which was required by the GFSA.[37] These circumstances included such minor offenses as alcohol and tobacco possession, dress-code infractions, and fighting.[38] Studies showed that these policies dramatically increased suspension and expulsion rates across the country, especially among students of color and students with disabilities, without evidence of making schools safer.[39] While many states have moved away from such draconian disciplinary policies, they may also require certain allegedly criminal

33. *See* Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U.L. REV. 959, 968–69 (2015).

34. Gun-Free Schools Act of 1994, 20 U.S.C. § 7961(b)(1).

35. Nance, *supra* note 19, at 932–33.

36. *See generally* Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 CRIME L. & SOC. CHANGE 147 (1999) (summarizing empirical data to argue that schools are in fact extremely safe places for children).

37. Nance, *supra* note 19, at 932–33.

38. Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 891–92 (2018).

39. ALYSSA RAFA, THE STATUS OF SCHOOL DISCIPLINE IN STATE POLICY (2019), https://www.ecs.org/wp-content/uploads/The-Status-of-School-Discipline-in-State-Policy.pdf [https://perma.cc/2FF4-NRFD]; *see also* Am. Psych. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools: An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852 (2008).

acts to be reported to law enforcement.[40] These include, for example, assaults resulting in injury, sexual offenses, and weapons offenses.[41]

2. School board policies

Incorporating and often extending beyond the requirements of state statutes, school board policies are the primary sources for operationalizing the duty to supervise and authority to discipline.[42] As the "superpredator" era waned and research mounted documenting the harmful effects of exclusionary discipline, schools backed away from zero-tolerance policies.[43] However, districts continue to grant administrations great latitude in crafting and administering discipline. Districts have retained, through school board policy, discretion to decide how and for what type of alleged misbehaviors to impose consequences.[44] Today, some school districts have moved away from punitive discipline and toward restorative practices aimed at keeping students in school and helping them learn from mistakes.[45]

---

40. *See* Catherine Winter, *Spare the Rod: Amid Evidence Zero Tolerance Doesn't Work, Schools Reverse Themselves*, APM REPS. (Aug. 25, 2016), https://www.apmreports.org/episode/2016/08/25/reforming-school-discipline [https://perma.cc/5TEJ-HNFC]; Bryan Kelley, Carlos Jamieson & Zeke Perez Jr., *50-State Comparison: School Discipline Policies*, EDUC. COMM'N STATES (May 17, 2021), https://www.ecs.org/50-state-comparison-school-discipline-policies [https://perma.cc/2BTV-KX3A].

41. *See, e.g.*, N.C. GEN. STAT. § 115C-288(g) (West 2023) ("When the principal has personal knowledge or actual notice from school personnel that an act has occurred on school property involving assault resulting in serious personal injury, sexual assault, sexual offense, rape, kidnapping, indecent liberties with a minor, assault involving the use of a weapon, possession of a firearm in violation of the law, possession of a weapon in violation of the law, or possession of a controlled substance in violation of the law, the principal shall immediately report the act to the appropriate local law enforcement agency.").

42. *Cf. The Board's Role in Student Discipline*, COLO. ASS'N SCH. BDS., https://casb.memberclicks.net/the-board-s-role-in-student-discipline [https://perma.cc/3K6L-953X] (noting that such policies are typically aimed at "avoiding disruption, maintaining a safe school environment or promoting learning").

43. *See, e.g.*, Winter, *supra* note 40.

44. *See, e.g.*, *infra* note 45 (detailing policies from school districts in Utah and New York that emphasize a goal of aiding in children's growth from misbehavior instead of mandating specific punishment).

45. Consider the language of this policy from a school district in Utah: "The purpose of the policy is to foster a safe, positive learning environment by teaching the practice of self-discipline, citizenship skills, and social skills. It is Weber District's philosophy that students learn these skills best through teaching and restorative practices rather than punishment." *Policies by Article: 5200 - Student Discipline Policy (Including Safe School Policy)*, WEBER SCH. DIST., https://policy.wsd.net/index.php/

Nationwide, however, research suggests practices like suspensions and the use of corporal punishment are still used to discipline students, even for acts that do not pose a threat to themselves or others.[46] Contemporary discipline policies might not prohibit, and may even expressly permit, the use of suspension for long periods of time and multiple suspensions per year.[47]

One standard provision in student codes of conduct is a requirement to follow adult orders.[48] Such a provision has intuitive appeal; after all, schools cannot function if students are doing just as they please. Nonetheless, this requirement is notable in how it affects students as learning to see themselves as rights-bearing individuals. While they have constitutional protection for certain speech acts, these protections do not extend if their speech is perceived as "adversarial"; in fact, students can be punished for talking back, or for being "confrontational."[49] Research shows that such sanctions—which require a subjective interpretation of behavior by a teacher—are meted out disproportionately and unfairly to Black students and students with disabilities.[50]

---

policies-by-category/11-article-5-student-conduct/1-5200-student-discipline-policy-including-safe-school-policy [https://perma.cc/7ANU-N33M]; *see also Student Bill of Rights*, NYC PUB. SCHS., https://www.schools.nyc.gov/get-involved/students/student-bill-of-rights [https://perma.cc/YTW2-JLPD] ("New York City public schools seek to cultivate a sense of mutual respect among students, parents and staff. City schools also aim to involve students in activities and programs, within and outside the school community, that stress a commitment to civic responsibility and community service. With the cooperation of all members of our school communities, students can reach educational excellence while enjoying a rich learning experience. This document serves as a guide for students as they strive to become productive citizens in a diverse society.").

46. U.S. DEP'T EDUC., GUIDING PRINCIPLES FOR CREATING SAFE, INCLUSIVE, SUPPORTIVE, AND FAIR SCHOOL CLIMATES 4 (2023).

47. *Three Things School Boards Should Do for Student Discipline*, SCH. BD. PARTNERS (Aug. 8, 2022), https://schoolboardpartners.org/blog/three-things-school-boards-should-do-for-student-discipline [https://perma.cc/8WV6-L7BG].

48. Barbara Fedders, *The End of School Policing*, 109 CAL. L. REV. 1443, 1492 (2021) [hereinafter Fedders, *The End of School Policing*]; *see also supra* note 47 and accompanying text.

49. *See, e.g.*, *Community Code of Character, Conduct and Support*, CHAPEL HILL-CARRBORO CITY SCHS., https://www.chccs.org/cms/lib/NC49000019/Centricity/Domain/1085/CHCCS-CodeOfConduct%2003.27.24.pdf [https://perma.cc/YX93-2TW2] (noting that students may be disciplined for "adversarial speech, confrontations, or back-talk").

50. U.S. DEP'T EDUC. & U.S. DEP'T JUST., RESOURCE ON CONFRONTING RACIAL DISCRIMINATION IN STUDENT DISCIPLINE 2 (2023).

In addition, school districts often permit disciplinary consequences for behavior occurring off campus, when that behavior can be interpreted as substantially disrupting operation of a school.[51] Given the ubiquity of students' use of social media and administrations' distribution of school-managed computers, administrators can see much of what students are doing when they are out of school.[52] As a result, young people are subject to the reach of the school's supervision and disciplinary authority even when not physically present within the school.[53]

3. Personal and electronic surveillance

Over the last twenty years, police officers have become a permanent part of the educational landscape.[54] The rise of school policing is arguably due as much to federal and state financial incentives and "security theater" concerns as it is to evidence of efficacy in promoting safety.[55] Moreover, government funding is available for school districts wishing to hire school resource officers ("SROs")—but typically not, or not at nearly the same level, for mental health services.[56]

Trained in community-policing techniques, these officers are encouraged to act not only as law enforcement agents but also as students' teachers and counselors.[57] The National Association of School Resource Officers promotes this multi-faceted role, arguing the

---

51. *Compare* N.C. GEN. STAT. § 115C-390.2(c) (West 2022) (authorizing disciplinary consequences "for conduct not occurring on educational property . . . if the student's conduct otherwise violates the Code of Student Conduct and the conduct has or is reasonably expected to have a direct and immediate impact on the orderly and efficient operation of the schools or the safety of individuals in the school environment"), *with* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) (noting that schools' interest in regulating off-campus speech is diminished and cannot be justified under *in loco parentis* doctrine).

52. Barbara Fedders, *The Constant and Expanding Classroom: Surveillance in K-12 Public Schools*, 97 N.C. L. REV. 1673, 1673 (2019) [hereinafter Fedders, *The Constant and Expanding Classroom*].

53. *Id.* at 1674.

54. *Id.* at 1445.

55. *Id.* at 1447.

56. *Id.* at 1460–62. The Community Oriented Policing Services program, created by Title I of the Violent Crime Control and Law Enforcement Act of 1994, provides hundreds of millions of dollars in grants each year to bolster the ranks of officers across the nation, including in schools. *See generally* NATHAN JAMES, COMMUNITY ORIENTED POLICING SERVICES (COPS) PROGRAM (2024), https://crsreports.congress.gov/product/pdf/IF/IF10922.

57. Fedders, *The End of School Policing*, *supra* note 48, at 1475–76, 1479.

appropriateness of SRO's instructing students in gun safety, drug abstinence, and even helping students with their homework.[58] In a deposition for a 2013 federal wrongful termination case, a supervising police officer characterized the school police mission as "primarily [acting] as . . . mentor[s] to the students . . . [to] show the kids that police officers aren't the enemy, they're your friends."[59] Perhaps because of some schools' belief that SRO's are benign forces, they permit SRO's to become involved in managing misbehaviors teachers once handled themselves; this is true even though schools have the authority to enter into memoranda of understanding with police demarcating responsibilities such that officers stay out of such classroom management.[60]

In addition to this personal surveillance of students, many districts engage in regular monitoring of their students through electronic surveillance. This monitoring takes several forms. First, student codes of conduct allow for confiscation of student cell phones if used improperly in schools.[61] Even if not done for explicit surveillance purposes but instead to facilitate attention and minimize disruption,[62] confiscating students' phones can lead to a sense of diminished privacy.[63] Second, the COVID-19 pandemic accelerated the movement toward digital learning, through which teachers employ technology in

---

58. *Id.* at 1476, 1478.

59. Moriarty v. Bd. of Cnty. Comm'rs, 931 F. Supp. 2d 1142, 1146 (D.N.M. 2013).

60. Fedders, *The End of School Policing*, *supra* note 48, at 1483. For a discussion of an example of a school-police memorandum of understanding, see Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 577–79 (2016).

61. *See, e.g.*, *Policy Code: 4318 Use of Wireless Communication Devices*, ALEXANDER CNTY. SCHS., (Aug. 11, 2020), https://www.boardpolicyonline.com/bl/?b=alexander#&&hs=364298 [https://perma.cc/LXG3-BXVC] (authorizing students to have phones at school as long as they are not "activated, used, displayed or visible during the instructional day or as otherwise directed by school rules or school personnel" and noting that "[t]eachers and administrators may authorize individual students to use the devices for instructional purposes," and establishing as consequences that phones may immediately be confiscated if "on, used, displayed or visible" and noting further that they "will be returned only to the student's parent").

62. Research suggests a correlation between increased cell phone use in schools and declining test scores. *See, e.g.*, Derek Thompson, *It Sure Looks like Phones Are Making Students Dumber*, ATL. (Dec. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/12/cell-phones-student-test-scores-dropping/676889 [https://perma.cc/X76T-QDXA] (noting that the global PISA test scores have been in a decline since at least 2014 and arguing that students who spend more time on their cell phones perform worse in school).

63. Fedders, *The Constant and Expanding Classroom*, *supra* note 52, at 1698.

their curriculum.[64] It also prompted districts to purchase computers for their students to use to access remote classes.[65] Many schools advise that all work on the internet and with digital devices is subject to monitoring, whether students are in school or not.[66] In addition, school districts rely on third-party so-called "safety management platforms," which use natural-language processing to sort through student-generated content.[67] The products are programmed to alert schools when students type words schools have indicated might suggest self-harm or harm to others.[68] Finally, schools might also scan student social media accounts, whether the postings are done with school computers or on school time.[69]

While the evidence base for each of these disciplinary and surveillance mechanisms might not be robust, districts can point to their need to keep students safe as justification for them. The resultant surveillance regime does not regularly operate equitably, instead producing disproportionate harms to students of color and LGBTQ+ students.[70] Moreover, the above-discussed laws, policies, and practices combine to reduce students' actual and perceived autonomy and privacy.[71]

---

64. *See, e.g.*, Elementary and Secondary Education Act, 20 U.S.C. § 7112(3) (defining digital learning); J.S. Gopika & R.V. Rekha, *Awareness and Use of Digital Learning Before and During COVID-19*, INT'L J. EDUC. REFORM, May 8, 2023, at 8 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10183331/pdf/10.1177_10567879231173389.pdf [https://perma.cc/HXV6-LGAG] (noting acceleration of use of digital learning tools in the pandemic).

65. *See, e.g.*, *Policy Code: 3225/4312/7320 Technology Responsible Use*, CHAPEL HILL-CARRBORO CITY SCHS. (May 12, 2023), https://boardpolicyonline.com/bl/?b=chaphill&s=142550 [https://perma.cc/K3WS-D5B] (enabling students to complete remote learning with "[d]istrict-provided technology").

66. *See, e.g.*, *id.* ("The school system may, without notice, (1) monitor, track, and/or log network access, communications, and use; (2) monitor physical and virtual data storage; and (3) access, review, copy, store, delete, or disclose the content of all user files, regardless of medium, the content of electronic mailboxes issued by the school system, and system outputs, such as printouts, at any time for any lawful purpose.").

67. Fedders, *The Constant and Expanding Classroom*, *supra* note 52, at 1687.

68. *Id.*

69. *Id.* at 1690.

70. *Id.* at 1716–17.

71. *Id.* at 1707.

B. Minors' Susceptibility to State Displays of Authority

Case law recognizes that children and adolescents are uniquely vulnerable to state displays of authority and thus deserving of heightened constitutional protections. Differences in brain development that render youth more impulsive, susceptible to peer pressure, and amenable to positive change have led the Supreme Court to do the following: prohibit capital sentences for individuals who commit crimes while under the age of eighteen;[72] ban juvenile sentences of life without parole for non-homicide crimes;[73] and eliminate state statutes mandating life without parole for juvenile homicide crimes.[74]

Moreover, the Court has applied these insights in the context of custodial interrogation. In *J.D.B. v. North Carolina*,[75] police questioned a child in a closed-door conference room at a North Carolina middle school.[76] Noting that "the differentiating characteristics of youth are universal," Justice Sotomayor held that the age of a child should inform courts' analysis of whether they were in custody for Fifth Amendment purposes.[77] The Court has also held that age informs the voluntariness analysis under the Fourteenth Amendment.[78] In *Haley v. Ohio*,[79] the Court reversed a homicide conviction after finding the child defendant's confession to be involuntary. It reasoned that "a 15-year-old lad, questioned through the dead of night by relays of police," is "an easy victim of the law."[80]

While the *J.D.B.* Court of course did not specifically address the holding's applicability in the Fourth Amendment context,[81] the

---

72. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that imposing a capital sentence on an individual under the age of eighteen at the time of the crime violates the Eighth and Fourteenth Amendments).

73. Graham v. Florida, 560 U.S. 48, 82 (2010).

74. Miller v. Alabama, 567 U.S. 460, 489 (2012). *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (finding that the holding in *Miller* is retroactive). In *Jones v. Mississippi*, the Court halted somewhat the progress toward actualizing the notion that children are categorically less culpable by holding that courts need not make factual findings that youth are "permanent[ly] incorrigib[le]" before sentencing them to life without parole. 141 S. Ct. 1307, 1321 (2021).

75. 564 U.S. 261 (2011).

76. *Id.* at 273.

77. *Id.* at 281 (remanding case for consideration of whether child was in custody).

78. Haley v. Ohio, 332 U.S. 596, 599 (1948).

79. 332 U.S. 596 (1948).

80. *Id.* at 597, 599, 601.

81. *J.D.B.*, 564 U.S. at 277.

underlying insights logically apply. After all, as Justice Kennedy opined in *Graham v. Florida*,[82] "[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[83] Moreover, as will be discussed in the next Part, the foundational case on consent searches of adults holds that age is a factor to be considered.[84] In addition, factors unique to students in school may play a role in a court's inquiry regarding the constitutionality of a non-consent search.[85]

The following Part takes up the doctrinal underpinnings of student consent searches.

II. THE REGULATORY ARCHITECTURE OF A STUDENT CONSENT SEARCH

The legal fiction of a consent search that Josephine Ross discusses in her article is heightened in the K-12 school setting.[86] As the previous Part discussed, the school environment is characterized by close supervision and a concomitant power to impose discipline. Because of their duty to protect students and ongoing concerns about gun violence, administrators often feel they must move quickly to respond to resolve student misconduct, and they sometimes involve school police to do so.[87] Moreover, students are uniquely vulnerable to state displays of authority, which heightens the coerciveness attendant to the highly rule-bound school environment.

For all of these reasons, youth are especially likely to acquiesce to a request to search without truly giving voluntary consent.[88] After describing the legal framework for all types of school searches, this Part

---

82. 560 U.S. 48 (2010).

83. *Id.* at 76.

84. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *see also* Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2014).

85. Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863, 870 (2018) (arguing that courts should consider a student's age, size, stature, and likelihood of a search inflicting trauma or harm in evaluating search's reasonableness).

86. Ross, *supra* note 1, at 2017.

87. ROBERT A. FEIN, BRYAN VOSSEKUIL, WILLIAM S. POLLACK, RANDY BORUM, WILLIAM MODZELESKI & MARISA REDDY, U.S. SECRET SERV. & U.S. DEP'T EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 18 (2004).

88. *See* Haley v. Ohio, 332 U.S. 596, 599–600 (1948) (highlighting the vulnerability of minors to interrogations).

illustrates the ways in which the notion of a consent search by a student in school is a legal fiction.

A. Doctrinal Backdrop

As context for consent searches on students in school, it is helpful to first understand the law governing other kinds of searches. The above-discussed supervision duties and disciplinary power of schools make them a paradigmatic "special needs" environment.[89] In such environments, the probable cause and warrant requirements do not apply, because "the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable."[90] This means that, for one, searches of groups of students may occur, in the absence of individualized suspicion, based on "balancing the need to search against the invasion which the search entails."[91] For example, metal detectors and wands are considered effective deterrents against students bringing weapons to school.[92] So long as schools give advance, written notice that they will be used, courts typically find the searches conducted with these devices constitutional, assuming they are "minimally intrusive."[93] The written notice requirement is intended to function as a means of conveying that students should now understand they have a reduced expectation of privacy (presumably reduced beyond what it already is because of

---

89. *See* New Jersey v. T.L.O., 469 U.S. 325, 351–52 (1985) (Blackmun, J., concurring) (holding that school searches are special needs searches because interests other than those of mere law enforcement are at issue); *see also* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

90. *In re* Latasha W., 70 Cal. Rptr. 2d 886, 887 (1998) (citations omitted).

91. Camara v. Mun. Ct., 387 U.S. 523, 536–37 (1967). The Court reviewed three factors in its analysis: (1) whether a particular type of search has a history of "judicial and public acceptance"; (2) whether a standard lesser than probable cause could lead to "acceptable results"; and (3) whether the search involved a "relatively limited invasion" of the individual's privacy. *See id.* at 537.

92. *See, e.g.*, L.A. UNIFIED SCH. DIST., BUL-5424.2, ADMINISTRATIVE SEARCHES TO ENSURE SCHOOL SAFETY 2 (2015), https://www.lausd.org/cms/lib/CA01000043/Centricity/Domain/318/BUL%205424.2%20ADMINISTRATIVE%20SEARCHES%20TO%20ENSURE%20SCHOOL%20SAFETY%20w%20attach.PDF [https://perma.cc/VB2L-2395] (establishing metal detector searches "to deter weapons such as guns, knives, or any other item which might cause harm or injury from being brought to schools").

93. *See In re* F.B., 658 A.2d 1378, 1381–82 (Pa. Super. Ct. 1995), *aff'd*, 726 A.2d 361 (Pa. 1999) (finding a search reasonable where it is no greater than necessary and there was advance notice).

being a minor).[94] Metal detectors do seem nonetheless constitutionally troubling. They are at odds, for example, with cases holding that suspicionless searches like sobriety checkpoints are constitutionally permissible because people can avoid them by staying off of highways; students, of course, cannot lawfully stay out of school.[95] Along with metal detectors, when schools believe circumstances warrant it and students are notified, properly trained police dogs may be used to sniff school property (though not students themselves).[96] Notably, in recent years, some students, their parents, and advocates have persuaded districts to abandon metal detectors and wands, as well as canine patrols, arguing that these techniques are disproportionately used against students of color who are made to feel as much like suspects as students.[97]

In addition, leaning on schools' "custodial and tutelary" responsibilities, the Court has also upheld universal drug testing of athletes[98] and participants in other extracurricular activities.[99] In *Board of Education v. Earls*,[100] the Court reasoned that just as public schools mandate vaccinations and medical evaluation for students' "own good and that of their classmates,"[101] so too may they sometimes conduct

---

94. Courts differ on whether students with a history of serious disciplinary infractions can be required to submit to regular, suspicionless searches as a condition for ongoing school attendance. *Compare In re* L.A.W., 348 P.3d 1005, 1010 (Nev. 2015) ("[T]he State could not constitutionally condition [appellant's] access to a public education on his waiver of his right to be free from unreasonable search and seizure."), *with In re* Stephens, 27 P.3d 170, 174 (Or. Ct. App. 2001) (finding a student's consent voluntary where it authorized searches as a condition of attendance).

95. Joan E. Imbriani, *Metal Detectors in Public Schools: A Subtle Sacrifice of Privacy Interests*, 6 SETON HALL CONST. L.J. 189, 192 (1995) (arguing that metal detector searches constitute a "blatant disregard of fundamental constitutional safeguards").

96. *See, e.g.*, *Policy Code 4342: Student Searches*, CHAPEL HILL CARRBORO CITY SCHS. (May 16, 2024), https://boardpolicyonline.com/bl/?b=chaphill#&&hs=142665 [https://perma.cc/M6ZG-4GKP].

97. *See* VICTOR LEUNG, ANA MENDOZA & JESSICA COBB, HERE TO LEARN: CREATING SAFE AND SUPPORTIVE SCHOOLS IN LOS ANGELES UNIFIED SCHOOL DISTRICT 3 (2018), https://www.aclusocal.org/sites/default/files/aclu_socal_report_here_to_learn.pdf [https://perma.cc/B2BC-NKRU] (arguing the metal detectors are ineffectual and do not serve a deterrent effect).

98. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648, 655 (1995).

99. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 825 (2002).

100. 536 U.S. 822 (2002).

101. *Acton*, 515 U.S. at 656.

these kinds of suspicionless searches for purposes of deterring drug use.[102]

Along with suspicionless searches of large groups of students, case law also makes clear that individual searches are permissible on less than probable cause. As the Court held in *T.L.O.*, administrators possess a "substantial interest . . . in maintaining discipline in the classroom and on school grounds"[103] and this interest "requires a certain degree of flexibility in school disciplinary procedures."[104] Such flexibility, the Court reasoned, in turn necessitates an easing of the restrictions that would otherwise govern state intrusions of persons and property.[105] Put another way, schools must be able to respond to suspected rule- and law-breaking quickly and without administrators having first to obtain a search warrant.[106] Because education is compulsory, however, the Court held that administrators may not argue that parents have willingly made schools *in loco parentis*[107] and thus immune "from the strictures of the Fourth Amendment."[108] Students retain an expectation of privacy, albeit a diminished one, as

---

102. *See Earls*, 536 U.S. at 825, 830–31 ("Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."); *see also* RESTATEMENT OF CHILD. & THE LAW § 10.20 (AM. L. INST., Tentative Draft No. 3, 2021) ("A suspicionless search of a student in a public school is lawful only if it: (a) intrudes minimally on the privacy interest of the student; and (b) is justified at its inception by a purpose that reasonably is considered important to maintaining order, discipline, or safety in the school, and that reasonably is assumed to be advanced by the search.").

103. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

104. *Id.* at 340.

105. *Id.* at 339–40; *see, e.g.*, N.C. SCH. BDS. ASS'N, POLICY CODE 4342: STUDENT SEARCHES 1 (2013), https://www.ncsba.org/wp-content/uploads/2017/01/Policy-4342.pdf [https://perma.cc/G5DD-TBG9] ("A student or the student's possessions may be searched when a school official has reasonable suspicion that the search will turn up evidence that the particular student has violated or is violating a specific law or school rule. . . . The scope of the search and the methods used to conduct the search must be 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.").

106. *T.L.O.*, 469 U.S. at 340 (emphasis added) ("The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of *the swift and informal* disciplinary procedures needed in the schools.").

107. *See supra* notes 25–30 and accompanying text (discussing power this doctrine confers).

108. *T.L.O.*, 469 U.S. at 336–37.

explained above.[109] Balancing students' privacy interests against the need for schools to be able to maintain safety and order for all students, the *T.L.O.* Court held that staff may conduct searches when they are objectively reasonable.[110]

The reasonableness inquiry is twofold: searches must be "justified at [their] inception," and they must be "reasonably related in scope to the circumstances" precipitating them.[111] While the Supreme Court has never ruled on the issue, some state and federal lower courts have held that even when it is school police officers conducting searches in schools, reasonableness and not probable cause is the requisite legal standard.[112] In addition, because of the commingling of students' and schools' property during the course of the day—along with students' reduced expectation of privacy[113]—a search may extend beyond a student's person to include their desk, locker, car, and even their cell phone,[114] assuming the scope requirements are met.[115]

B. A Legal Fiction

Along with the above scenarios in which a search may occur, courts have also found that searches are permissible when a student

---

109. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("[Students do not] shed their constitutional rights . . . at the schoolhouse gate.").

110. *T.L.O.*, 469 U.S. at 339–41.

111. *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)); *see, e.g.*, N.C. SCH. BDS. ASS'N, *supra* note 105, § A (fleshing out that the "reasonable suspicion must be based upon specific and articulable facts, which have been acquired through reliable and/or corroborated information from employees, students, law enforcement officers, or other credible sources, or upon visual or other evidence (e.g., the smell of alcohol or marijuana, an alert from a metal detector or drug dog) viewed in light of the totality of the circumstances and the school official's professional judgment").

112. *T.L.O.*, 469 U.S. at 332 n.2, 341 (setting reasonableness as the legal standard for a search of a student and noting that a majority of courts have found that such a search "does not require strict adherence to the requirement that searches be based on probable cause").

113. *See supra* note 102 and accompanying text.

114. *See, e.g.*, N.C. SCH. BDS. ASS'N, POLICY CODE 4318: USE OF WIRELESS COMMUNICATION DEVICES 2 (2011), https://www.ncsba.org/wp-content/uploads/2022/03/Policy-4318.pdf [https://perma.cc/NG5M-LWZX] (addressing the circumstances under which searches of student cell phones and other electronic devices may be conducted); N.C. SCH. BDS. ASS'N, *supra* note 105, § A.1 ("School officials may search a student's desk, locker, and/or personal effects, including but not limited to purses, book bags, and outer clothing.").

115. N.C. SCH. BDS. ASS'N, POLICY CODE 4318, *supra* note 114, § C (noting that searches "must be reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the suspected infraction").

consents.[116] In her article, Ross points out that consent-based searches are the most common way searches are undertaken by law enforcement;[117] while no data are available on school searches, logic suggests the same would be true in this context.[118] Ross catalogs the critiques of the doctrine of consent.[119] A voluminous body of research supports Ross's assertion that people's consent to requests to search is rarely truly voluntary.[120] They may cooperate, but they do so not from a place of agency and deliberation among equally plausible choices. This powerlessness is especially pronounced among Black and Brown people:

> Given the reality faced by the African-American community, a court's nimble assertion that a person can 'just say no' to a police request to search is a sorry, empty slogan . . . . [B]ecause of the experiences in their community, they will frequently—if not usually—feel coerced to forego their constitutional right to privacy.[121]

If it is true that adults in public feel—are—unable to usually give actual consent to police officers, it is true for students, whether the request to search is made by an administrator or a school police officer. In *Schneckloth v. Bustamonte*,[122] the Supreme Court ruled that whether a person voluntarily consented is to be assessed pursuant to a "totality of all the circumstances" test.[123] At first blush, this doctrine might seem robust. Consider that among the circumstances mentioned by the *Bustamonte* court is the age of the person searched.[124] Moreover, to qualify as consent, the request to the person searched must not have included express or implied coercion.[125] The State must prove by a

---

116. RESTATEMENT OF CHILD. & THE LAW § 10.10 cmt. j (AM. L. INST., Tentative Draft No. 3, 2021); *see also* Annitto, *supra* note 84, at 20–22 (highlighting various court approaches to the issue).

117. Ross, *supra* note 1, at 2026, 2026 n.41; *see also* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1962 (2019).

118. Annitto, *supra* note 84, at 12 (noting dearth of scholarship and case law on role of age in consent searches of minors).

119. Ross, *supra* note 1, at 2017.

120. *See, e.g.*, *id.* at 2024, 2024 n.31 (citing Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 244 (2001)) (arguing individuals accosted or detained by police have no agency or choice).

121. *Id.* at 2024 n.31.

122. 412 U.S. 218 (1973).

123. *Id.* at 227.

124. *Id.* at 226.

125. *Id.* at 228.

preponderance of the evidence that consent is intelligently and voluntarily given.[126] Mere acquiescence is not enough; in one case, for example, a Florida state court reversed a conviction where it found that a youth in a car pulled over by an officer simply mimicked the accompanying adult driver when she "consented" to putting her hands on the car.[127]

On closer examination, however, *Bustamonte* does not provide sufficient protection to account for the nature of schools and the vulnerability of students. In other words, the "consent" police attest to and courts often find is a legal fiction. As Professor Annitto argues, courts analyzing alleged Fourth Amendment violations in consent search cases of minors largely do not, though they should, *elevate* age over other factors.[128] In this way, Fourth Amendment doctrine on youthfulness lags behind Fifth Amendment doctrine, where courts recognize that age is a critical factor in assessing constitutionality of interrogations.[129]

Second, courts even permit some degree of involuntariness in a so-called consent search. Consider the student who wishes to play sports on a school team, who must agree to drug testing in order to do so. Courts are unbothered by the fact that declining to give consent will result in material disadvantage.[130] Indeed, courts have found that forfeiture of "the opportunity to obtain certain benefits is not so weighty as to constitute forced consent."[131] In *Acton*, the Court noted approvingly that students wishing to avoid drug testing could simply choose to not play sports.[132] So long as the student and their parent sign a waiver, presumably, consent exists.[133] The reasoning in *Acton* evinces little understanding of the centrality of school athletics to many

126. State v. Stevens, 806 P.2d 92, 104 (Or. 1991).

127. E.J. v. State, 40 So. 3d 922, 924 (Fla. Dist. Ct. App. 2010).

128. *See* Annitto, *supra* note 84, at 25–26 (arguing that age should be not just one factor among many but often, as *J.D.B.* suggested, determinative).

129. *Id.* at 25.

130. Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 981 (Ind. 2002); *see* Ferguson v. City of Charleston, 532 U.S. 67, 91 (2001) (Kennedy, J., concurring) ("The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.").

131. *Linke*, 763 N.E.2d at 981; *see also* Todd v. Rush Cnty. Schs., 133 F.3d 984, 986 (7th Cir. 1998) (finding extracurricular activities valuable but also finding it reasonable to condition valuable privileges on obligations like drug testing).

132. *Cf.* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650 (1995) ("Students wishing to play sports must sign a form consenting to the testing.").

133. *See id.*

students' well-being and no concern about potential gender, race, and class-based implications of its holding.[134] While students from middle- to high-income families could opt for club sports without drug-testing requirements, low-income students likely cannot.[135]

Some courts recognize and reject this formalistic reasoning regarding consent by youth. For example, in a case involving a search of a young person that uncovered illegal drugs, the State offered evidence that the young person consented.[136] An Oregon appellate court rejected this reasoning, distinguishing between true consent and mere cooperation.

> With regard to the issue of consent . . . once [the officer] told youth that he would be searched, "[Youth] was not faced with a decision whether to *consent* to the search; he was faced only with the decision whether to *cooperate* with a search. After speaking with his Mother, he chose to cooperate . . . but such cooperation is not 'consent to search.'"[137]

This Oregon opinion more accurately reflects the reality of youthfulness, consistent with the *Roper* line of cases, including *J.D.B.* It acknowledges that children are categorically different in their vulnerability to state actors. Such reasoning should, but does not, regularly apply to questions of consent searches in school. If the vulnerability of minors means that valid consent to searches conducted on the street is unlikely, children in the highly regulated, supervised school environment are especially unlikely to be able to do so.[138] Recall that students have no choice about whether to attend school in the first instance.[139] Consider, too, that a defining feature of school is that it can

---

134. NAT'L WOMEN'S L. CTR. & POVERTY & RACE RSCH. COUNCIL, FINISHING LAST: GIRLS OF COLOR AND SCHOOL SPORTS OPPORTUNITIES 6 (2015) (noting "long-term health benefits of sports participation").

135. *Id.* at 7 (noting "girls of color not only have unequal opportunities in terms of school-based sports, but also face obstacles to being physically active in their communities outside of school").

136. *In re* M.A.D., 202 P.3d 249, 251–52 (Or. Ct. App. 2009), *rev'd*, 233 P.3d 437 (Or. 2010).

137. *Id.* at 252.

138. Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762, 768 (1996) (approvingly citing cases "premised on the understanding that a juvenile has a less well-developed capacity to hypothesize and understand the consequences of consenting or not consenting to a search, and to resist the requests of authority figures in stressful situations").

139. *See supra* notes 20–21 and accompanying text.

impose punishment for the mildest of rule violations.[140] The idea that a student could give—or withhold—consent to a search by a school employee belies the very nature of being a K–12 student.[141]

The following Part offers thoughts for policymakers on how schools might fulfill their duty of supervision while minimizing the harms of consent searches.

III. NAVIGATING THE TENSION: IF CONSENT SEARCHES ARE MAINTAINED, ELIMINATE UNNECESSARY CRIMINALIZATION

It seems clear that schools are unlikely to abandon consent searches of their students. The law does not require them to do so. Moreover, these searches likely prove exceptionally useful for administrators seeking to quickly address cases of disciplinary infractions and suspected law-breaking. Students are unlikely to contest court findings that consent was voluntary.[142] At the same time, the idea that students can provide voluntary consent is nearly always a legal fiction. The power differential between adults with supervisory and disciplinary authority and students with diminished legal rights is simply too vast.

To address this tension, Professor Annitto argues that consent searches of youth should be subject to additional legal constraints, such as requiring reasonable suspicion prior to any search; requiring a parent to provide consent along with a child; and ensuring that any putatively consensual searches are taped.[143]

While each of these reforms has merit, this Article suggests that an additional focus must be on breaking the connection between consent searches pursuant to school-based violations and criminalization. This proposition rests on both law and policy.

Recall that the logic underlying *T.L.O.* and its progeny is that a lower standard of suspicion is appropriate given that student-teacher

---

140. *See supra* notes 48–49 and accompanying text (highlighting how minor a violation could be, including talking back or being "confrontational").

141. *See* DesRoches v. Caprio, 156 F.3d 571, 572 (4th Cir. 1998) (noting that the student was suspended for refusing to consent to a search of his backpack).

142. Annitto, *supra* note 84, at 49–50 (discussing structural obstacles to juveniles appealing adverse suppression rulings on the question of consent).

143. *See, e.g.*, *id.* at 45 (advocating reasonable suspicion before requesting consent to search a minor). *But see Testimony of Eduardo R. Ferrer*, GEO. L. (Oct. 15, 2020), https://www.law.georgetown.edu/wp-content/uploads/2020/10/Comp-Policing-Justice-Reform-Testimony-GJJI-1.pdf [https://perma.cc/EAS2-RD8Q] (arguing that reforms such as these are insufficiently robust and arguing for legislative prohibition on using contraband recovered from consent searches for prosecution).

relationships are "informal" and that administrators, unlike police officers, occupy a "custodial and tutelary" role vis-à-vis students.[144] Expounding on the unique relationship between students and staff, Justice Powell wrote in concurrence:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils.[145]

Similarly, an Indiana court upheld the random urinalysis program at issue in a school precisely because of the lack of involvement of law enforcement, finding "[a] search conducted by a school corporation is substantively different than a search conducted to enforce the law. This is in no small part due to the different role played by law enforcers and teachers."[146] These relationships, and this role, cannot be maintained if the school converts itself into an arm of the criminal apparatus.[147]

This commonality of interests alluded to in *T.L.O.* facilitates the unique, democracy-promoting purposes of education. In *Bethel School District No. 403 v. Fraser*,[148] the Court held that "[p]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[149]

As I have argued elsewhere, when the personnel and practices of the criminal system pervade a school, the democracy-promoting values of public education are thwarted:

> Preparing students to participate in democracy should mean teaching them how to interact with people from differing backgrounds and with disparate abilities, and to respectfully disagree with peers and teachers. This process may not always unfold

144. New Jersey v. T.L.O., 469 U.S. 325, 336–37, 340 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

145. *T.L.O.*, 469 U.S. at 349–50 (Powell, J., concurring).

146. Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 978 (Ind. 2002).

147. *See* Wall, *supra* note 31 (noting need for balance between keeping students safe and avoiding converting schools into prisons).

148. 478 U.S. 675 (1986).

149. *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

> smoothly. Because it involves people who are growing and developing, conflict may occur. The presence of police officers beginning in elementary school communicates to students that this maturation process, even if not explicitly criminalized, is nonetheless the proper object of police surveillance.[150]

In other words, to learn the habits of democracy, one must be able to make mistakes that are not permanently life-altering. Consent searches can be maintained in a school consistent with its purposes only if the fruits of these searches do not subject the student in question to criminal consequences.

It is now established, from decades of research, that when schools subject their students to prosecution for misconduct, life-altering consequences can ensue. Likelihood of school pushout increases; graduation becomes less likely; and the potential for long-term criminal-system involvement is magnified.[151]

When these harms occur because school staff are able to take advantage of the asymmetrical relationship, having held out school as a site of social mobility and cohesion, it is particularly perverse.[152] If schools wish to conduct consent searches, they should refrain, as a matter of policy, from using the fruits of such searches as evidence in subsequent delinquency or criminal proceedings.[153] While a student's possession of certain dangerous weapons may obligate schools to notify law enforcement based on state statutory requirements, they can and should otherwise use non-criminal, school-based consequences to handle other instances where consent searches yield contraband.[154]

---

150. Fedders, *The End of School Policing*, *supra* note 48, at 1487.

151. *Cf.* Mary Ellen Flannery, *The School-to-Prison Pipeline: Time to Shut It Down*, NEA TODAY (Jan. 5, 2015), https://www.nea.org/nea-today/all-news-articles/school-prison-pipeline-time-shut-it-down [https://perma.cc/QNG8-LEMZ] (finding suspensions are the number-one predictor of whether children will drop out of school); MELANIE LEUNG-GAGNÉ, JENNIFER MCCOMBS, CAITLIN SCOTT & DANIEL J. LOSEN, LEARNING POLICY INSTITUTE, PUSHED OUT: TRENDS AND DISPARITIES IN OUT-OF-SCHOOL SUSPENSION, at v (2022), https://learningpolicyinstitute.org/product/crdc-school-suspension-report ("[S]uspended students are more likely to suffer academically, repeat a grade, and drop out of school. [They] are also less likely to graduate from high school and college and are more likely to be involved in the criminal justice system.").

152. *See supra* notes 57–59 and accompanying text (discussing how officers are encouraged to engage with students as teachers and mentors).

153. In testimony to the District of Columbia Committee on the Judiciary and Public Safety, Eduardo Ferrer made this argument with respect to fruits of consent searches conducted in the community. *Testimony of Eduardo R. Ferrer*, *supra* note 143.

154. *See supra* notes 40–41.

CONCLUSION

It cannot be denied that administrators have an interest in consent searches as a tool to maintain stability and ensure a safe learning environment for everyone. Suspected drug or weapons offenses should be handled expeditiously. Attempting to assess reasonable suspicion is of course the most obvious way for administrators to conduct a search. If teachers have done a good job of establishing trust, however, simply speaking with the student and trying to obtain their consent would be quicker.

Efficiency is only a value worth preserving, however, when school staff are committed to not relying on student-teacher relationships as a mechanism for extracting contraband, only to turn the student over for prosecution. Schools should create policies mandating that staff avoid, except when required by state statute, referring students to juvenile or criminal court for offenses arising out of evidence recovered pursuant to a consent search.