Child and Family Law Journal

Volume 9 | Issue 1 Article 8

5-2021

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Cover Page Footnote

J.D. Barry University, Dwayne O. Andreas School of Law, 2022. I want to thank God for giving me the strength to get to this point, the leadership in the Barry Child & Family Law Journal for picking my article for publication, and my family for supporting me every step of the way. I hope this article is a worthy contribution to the discussion on students' Fourth Amendment rights.

The Current State of Students' Fourth Amendment Rights: How Implicit Bias Goes Unchecked in a Subjective Framework

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I. INTRODUCTION

In his article, *Implicit Racial Bias and Students' Fourth Amendment Rights*, Jason Nance argues that to correct the effect implicit racial bias has on searches, any changes to school officials' conduct need to be made per the Supreme Court's three-factor test that determines whether a student's Fourth Amendment rights have been violated.[1] Specifically, Nance argues for a more rigorous review of what constitutes an immediate government concern.[2] Instead of giving school officials the benefit of the doubt as to whether their schools have a drug problem, Nance argues that schools should have to give objective evidence that justifies their concern.[3] Nance also argues that courts should widen their scope when deciding what evidence is considered when evaluating whether a school security measure qualifies as an intrusion.[4] While Nance does not advocate for a totality of the circumstances test, his framework would let courts consider a school's specific circumstance to determine whether the safety concern justifies the extent of the intrusion placed by the security measure.[5]

This note argues that a larger recalibration is needed than what Nance proposes to fix the current problem within the protections of student's Fourth Amendment rights. It argues that to lessen the impact implicit racial bias plays in exacerbating the already poor protections the Fourth Amendment provides students, courts must allow the question of reasonableness to be relitigated after determining whether a security measure is reasonable. It also argues that objective evidence must carry more weight in this analysis to ensure that implicit biases do not allow intrusive searches to continue to occur due to the current subjective Fourth Amendment analysis applied to students. Section I will give a brief history of the current Fourth Amendment framework, as applied to students, highlighting the extent of drug or discipline problems the schools in these cases have experienced to get a better understanding of the scope the Supreme Court intended to be applied to searches. Section I will also give an overview of implicit racial bias and the role it plays in the use of suspicion-less search techniques in schools with larger minority populations. Section II will explain how schools are exploiting the current Fourth Amendment framework to conduct suspicionless searches on students without having the basis set by the Supreme Court

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[1] Jason P. Nance, *Implicit Racial Bias and Students' Fourth Amendment Rights*, 94 Ind. L.J. 47, 94 (2019).
[2] *See Id*. at 95.
[3] *See Id*.
[4] *See Id*. at 98.
[5] *See Id*. at 99.

at the time the standard was established. Moreover, it will explain how existing racial biases cause these searches to be used disproportionately against minority students, leading them to be treated more like prisoners than students. Section III will propose the solution to this problem is a recalibration of the current Fourth Amendment framework as applied to students that are stricter than the one Jason Nance advocates for. It will call for students to be treated more like adults in the Fourth Amendment context by requiring suspicion before a search can occur and for that suspicion to be supported by objective evidence. Section III will also analyze the effectiveness of Nance's adjusted framework and the extent to which stronger standards would increase the likelihood of the results he advocates for.

BACKGROUND

This section will primarily cover rulings the Supreme Court has made about a student's Fourth Amendment rights. It will look at the factors the Court took into account when initially deciding the standard for determining whether a school official's search and/or seizure was constitutional. Specifically, it will highlight how the Court weighed the interest of the school in maintaining order in light of a student's age. Additionally, this section will provide some evidence of the impact implicit racial bias has on the way schools employ security measures that lead to students being treated as if they are criminals.

II. STUDENT'S FOURTH AMENDMENT RIGHTS

A. Case Law

1. N.J v. T.L.O

T.L.O was a fourteen-year-old student who was caught smoking by a school official.[6] Suspecting that she had more contraband on her, the school official demanded T.L.O give him her purse.[7] After looking through the purse, the official discovered rolling papers as well as other drug paraphernalia that hinted towards marijuana usage.[8] *T.L.O* was the case where the Supreme Court initially decided that the standard for school searches would be reasonable suspicion rather than the probable cause standard applied to adults.

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[6] N.J. v. T. L.O., 469 U.S. 325, 328 (1985).
[7] Id.
[8] *Id.*

In *T.L.O*, the Court recognized that there is a competing interest between schools and students when it comes to searches.[9] On one hand, schools use searches to enact discipline to carry out their educational duties; on the other hand, students should not be exposed to intrusive searches.[10] In ruling out the probable cause standard for determining whether a search is valid, the Court reasoned they would not require school officials to engage in too complex legal analysis that would hinder their ability to enforce the rules on campus.[11] Instead, the Court felt that a reasonableness standard would sufficiently safeguard students from intrusive searches while giving school officials the latitude needed to enforce the campus rules concerning drugs and contraband.[12] This test was composed of the following steps: (1) whether the initial action was justified and (2) whether the search reasonably occurred within the bounds of the initial suspicion.[13]

2. Vernonia School District v. Acton

Vernonia expands the scope of searches set by the Supreme Court's ruling in *T.L.O* by allowing schools to enact suspicionless drug tests for student-athletes.[14] In this case, a seventh-grade student claimed that the school policy, which required students to give the school consent to conduct random drug tests to any student who wanted to participate in their athletic programs, violated his Fourth Amendment rights.[15] At the time the policy was enacted, the school was experiencing a rampant drug problem that persisted despite the school's multiple attempts to resolve it.[16] The attempts made by the school included creating classes and inviting guest speakers to teach the students of the dangers of drugs.[17] Upon discovering that drug use and drug use culture was directly related to student-athletes,[18] the school then proposed to parents and faculty the idea of requiring student-athletes to undergo random drug tests; they ultimately agreed to have the policy implemented into the school.[19]

In *Vernonia,* the Court explained that while *T.L.O* established that students have Fourth Amendment rights, there is a diminished

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[9] *See Id.* at 338.
[10] *Id.*
[11] *See Id.* at 340.
[12] *See* N.J. v. T. L. O., 469 U.S. at 342.
[13] *See Id.* at 341.
[14] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995).
[15] *See Id*. at 651.
[16] *See Id*. at 649.
[17] *Id*.
[18] *See Id*.
[19] *See Id*. at 650.

expectation of privacy amongst the students given that while on school grounds students are under the control of faculty.[20] Moreover, student-athletes had an even lower expectation of privacy because the student-athletes share changing rooms and showers.[21] These factors led the Court to conclude that using suspicionless drug tests were not unconstitutional, so long as the school's interest in having the drug tests was important enough to justify the extent of the intrusion.[22] Here, the Court found compelling the fact that school officials were not required to watch the students while they produced the urine sample and determined that the drug test was a low-level intrusion on the students.[23] Also, given that the drug problem was so extensive at the school, the school had an important enough interest in enacting the policy that the Court determined that the suspicion-less drug test in this context was constitutional.[24] As a result, the Court created a new three-factor test for determining whether a school official's search was justified. This test requires courts to balance the following factors: (1) "the scope of the legitimate expectation of privacy at issue," (2) "the character of the intrusion that is complained of" against, and (3) "the nature and immediacy of the governmental concern at issue . . . and the efficacy of this means for meeting it."[25]

3. Safford United School District v. Redding

In *Safford*, the Supreme Court found a school conducting a strip search on a thirteen-year-old female student to be unconstitutional.[26] Before conducting the strip search the school had received information from several students that thirteen-year-old Savana gave them prescription painkillers, which per school policy, were not allowed to be possessed by a student without the school's permission.[27] After bringing Savana into the principal's office, the principal showed her a planner that contained a cigarette, knives, lighter, and a permanent marker.[28] Savana claimed she borrowed the planner from a friend and that none of the contraband belonged to her.[29] The principal then showed her the painkillers that the other students claimed they got from her, but Savana denied giving drugs to them as well. Savana then consented to the

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[20] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. at 656.
[21] *See Id*. at 657.
[22] *See Id*. at 661.
[23] *See Id*. at 657.
[24] *See Id*. at 661.
[25] *See* Vernonia Sch. Dist. 47J, 515 U.S. at 660.
[26] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377 (2009).
[27] *Id*. at 368.
[28] *Id*.
[29] *Id*.

principal's demand to search her bag.[30] After finding no drugs in her the principal sent Savana to the nurse's office so that they could conduct a more extensive search.[31] The nurse did not find any contraband after searching the outer layer of Savana's clothes.[32] The same resulted when they looked through Savana's jacket, shoes, and socks.[33] Despite the results of their previous searches, Savana was instructed to remove her pants and bra so that they could check her breast and pelvic area for any pills.[34] This search did not result in the discovery of any additional drugs.[35]

In *Safford,* the Court ruled against the school's search as a violation of the Fourth Amendment because the strip search exceeded the bounds of the suspicion the school had when they originally confronted Savana.[36] While the Court found that looking through Savana's bag and searching the outer layer of clothing was reasonable given the information given to administration by other students, the strip search was unreasonable because the administration did not receive any information that suggested Savana would be hiding drugs underneath her clothes.[37] The Court pointed to the fact that other students had only claimed to receive one pill from Savana which made the likelihood of the strip search revealing more pills unreasonable.[38]

4. Doe v. Little Rock School District

In *Doe*, the Eighth Circuit Court of Appeals struck down the Little Rock School District's policy which allowed suspicion-less searches of student's pockets and backpacks.[39] The school district policy in the student handbook for secondary school students stated that students' personal belongings brought to the school were subject to search at any time without notice or reason from the school.[40] The main justification the district court had for upholding the policy is that student's expectation of privacy in the belongings they brought to school was low

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[30] *Id*.
[31] *Id*. at 369.
[32] Safford Unified Sch. Dist. No. 1, 557 U.S. at 369.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*. at 375.
[37] *Id.* at 376.
[38] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 376 (2009).
[39] Doe v. Little Rock Sch. Dist., 380 F.3d 349, 354 (8th Cir. 2004).
[40] *Id*.

and that the Supreme Court in *Vernonia* allowed the school to conduct suspicion-less drug tests.[41]

The Eighth Circuit distinguished *Doe* from *Vernonia*, reiterating the Supreme Court's words from *T.L.O*, that while students had a lower expectation of privacy while at school it does not fall so low as to rob them of any privacy whatsoever.[42] Moreover, the reason suspicion-less drug tests were allowed in *Vernonia* was the difference in the privacy expectation levels between student-athletes and the general student body.[43] Compared to the general student body, student athletes voluntarily participate in athletic programs which results in a lower expectation of privacy when combined with the threat of drugs that the school district was facing in that case.[44] Here, Little Rock School District could not present actual evidence of a substantial drug problem requiring the need to subject the general student body to this kind of search.[45]

5. G.C. v. Owensboro Public Schools

In *G.C.*, the Sixth Circuit Court of Appeals discussed the situations where teachers could search a student's cell phone. In this case, the student, had a history of disciplinary problems and mental health issues.[46] After telling a school administrator that he used marijuana as a way to cope with his mental health issues the administrator looked through the student's phone in order to discover the extent of his mental health issues.[47] After the student continued to have disciplinary problems he was put on academic probation with the threat that any further problems would result in his expulsion from the school.[48] This threat would come to fruition after the student was caught violating the school cell phone policy by texting in class.[49] After confiscating his phone a teacher read several text messages from the student's phone because she was afraid that the student might lash out at other students or harm himself based on his previous issues with drugs.[50] When the student brought his Fourth Amendment claim he conceded that the first instance where his phone was searched was valid under the reasonableness standard because the search was prompted by the student's comments on

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41 *See Id*. at 352.
42 *See Id*. at 353.
43 *See Id*. at 354.
44 *See Id*.
45 Doe v. Little Rock Sch. Dist., 380 F.3d at 355.
46 *See* G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 627 (6th Cir. 2013).
47 *See Id*.
48 *See Id*. at 628.
49 *See Id*.
50 *See Id*.

drug use and suicidal thoughts.[51] However, the Sixth Circuit found that the second incident of a teacher looking through the student's phone was unconstitutional.[52] The court specifically pointed to the first step of the *T.L.O.* analysis, finding that there was no justification for the teacher to look through the student's phone.[53] Further, the Sixth Circuit did not think that the student's previous incident involving drugs could form the basis for a search when the reason it was confiscated was that it violated the school policy to use it during class time.[54]

6. N.J. v. Best

In *Best*, the Supreme Court of New Jersey adopted a reasonable suspicion standard for searching students' cars.[55] In this case, a vice-principal heard that one student bought a green pill from Best, another student.[56] After calling Best into his office and finding several white pills in his pockets, the vice-principal searched the Best's locker; after finding no drugs he ordered Best to take him to his car that he could search it.[57] The vice-principal discovered several pieces of drug paraphernalia and drugs inside Best's car and reported his discoveries to the school resource officer.[58]

The New Jersey Supreme Court relied on the rationale of the U.S. Supreme Court in showing deference to a school's interest to use searches as a way of advancing the school's educational purpose to hold that school officials only need reasonable suspicion to search a student's vehicle.[59] As a result, the reasonableness standard should be used for student vehicle searches because the presence of drugs can disrupt the school environment preventing teachers from being able to fulfill their roles.[60] Thus, when applied to the facts the Court found that the vice principal's search was reasonable because he found drugs on the student and because the student admitted to selling drugs to other students.[61]

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[51] *See Id*. at 632.
[52] *See* G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 632 (6th Cir. 2013).
[53] *See Id*. at 633.
[54] *See Id*. at 634.
[55] *See* N.J. v. Best, 201 N.J. 100, 109 (2010).
[56] *See Id*. at 104.
[57] *See Id*.
[58] *See Id*.
[59] *See* Id. at 112.
[60] *See Id* at 113.
[61] *See* N.J. v. Best, 201 N.J. 100, 109 (2010).

B. Implicit Racial Bias

This subsection will provide an overview of research that documents the role a school's demographics plays in the use of security measures at the school as well as how it affects the way teachers perceive their students. Specifically, a study conducted by Jason Okonofua and Jennifer Eberhardt gathered a group of teachers towards the end of the school year sought to determine if black students were punished more harshly than white students.[62] The study revealed that teachers placed greater weight on interactions they had in the classroom with black students than their white counterparts.[63] This means that if both students were to cause the same type of disturbance in the classroom, the teacher would be more likely to give greater weight to the disturbance of the black student when considering if punishment was warranted.[64] The study found that the teachers were more likely to consider the white students' behavior to be justifiable, rationalizing that the student themselves were not troublemakers, but rather having a bad day.[65]

Another study, conducted by Jason Nance, used data collected from the Department of Education on the security measures schools have taken, the number of suspicionless searches enacted, and the number of times the school had dogs conduct sniff tests.[66] The results revealed that these measures were about four times as likely to occur within schools with a population that was at least fifty percent minority students compared to schools whose population was made up of five to twenty percent minority students.[67] What is even more telling is that most of these searches did not result in any reports to a juvenile detention agency which suggests that either nothing was found, or the search did not turn up enough drugs to suggest that widespread distribution was occurring throughout the school.[68]

The subtleness of implicit racial bias's effects on one's attention is what makes it so dangerous.[69] Particularly with black Americans, it has caused there to be a strong association with.[70] This means that when

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[62] Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 617 (2015).

[63] *See Id*. at 620.

[64] *See Id*.

[65] *See Id*. at 621.

[66] Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. Colo. L. Rev. 367, 370 (2013).

[67] *See Id*. at 422.

[68] *See Id*. at 374.

[69] Nance, *supra* note 1, at 56.

[70] *See* Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

people think of black Americans they unconsciously think of crime or violence.[71] Implicit racial bias does not only affect people's thoughts but also their decision-making.[72] It was found in one study where participants from multiple racial backgrounds were put into a scenario where they had to differentiate between armed and unarmed suspects and refrain from shooting the unarmed suspects.[73] The scenario contained both white and black suspects who were armed and unarmed.[74] The researchers also put in place a time limit and gave a financial incentive for correctly differentiating between armed and unarmed suspects.[75] The results showed that both black and white participants had a bias towards shooting the unarmed black suspects more often than the unarmed white suspects.[76] In a survey they conducted after the scenario they found that the participants were not acting on personal stereotypes but rather on cultural stereotypes they had heard about.[77]

III. ISSUE/PROBLEM

The primary problem with the current Fourth Amendment framework is that it sets a low standard for school officials to meet when determining whether a search is justified. Not only does this low standard lead to children being exposed to increased scrutiny and distrust in an environment meant to facilitate the learning process, but it also allows school officials to enact such measures without showing the dire circumstances the Supreme Court originally created the current test for.[78]

Looking first to *Vernonia*, one of the factors the Court weighed when evaluating the reasonableness of the suspicion-less drug test was how widespread the drug problem was at the school.[79] Additionally, the school in *Vernonia* used the implementation of the drug test as last resort to fix the drug problem at the school.[80] Schools today can legally use measures to conduct searches, such as metal detectors and random drug sweeps without having an extensive drug problem.[81] This is significant

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[71] *See* Id.

[72] Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1315 (2004).

[73] *See Id*.

[74] *See Id*. at 1317.

[75] *See Id*. at 1319.

[76] *See Id*. at 1321.

[77] *See Id*. at 1322.

[78] *See* N.J. v. T. L. O., 469 U.S. 325, 328 (1985).

[79] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995).

[80] *See* Id. at 649.

[81] *See* Nance, *supra* note 1, at 91.

because, as will be discussed below, the use of such measures can have negative impacts on a student's ability to learn.

The immediacy in which some schools attempt to take advantage of the current standard is depicted in the *Doe* case. In *Doe,* a school with no documented drug problem, tried to get parents to consent to a policy that would subject their children's belongings to being searched solely because they brought them on campus.[82] While the Eight Circuit in this case found the policy unconstitutional, this mentality that school officials are entitled to search students because of illegal things they might bring rather than because of actual wrongs committed shows the current framework is broken.[83] This is personified in the *Safford* case where the school felt justified conducting a strip search on a thirteen-year-old girl because of the accusations of other students.[84]

In *Safford* the true problem lies in the escalation of the search after the school repeatedly found nothing to confirm their suspicion that the student had drugs on their possession.[85] For the school to feel empowered to go on what is tantamount to a fishing expedition goes beyond the interest in enacting discipline the Supreme Court found school officials had in *T.L.O*.[86] As a result of the current standard, schools have become more akin to prisons than places of learning. Instead of looking to enforce a set of rules to better facilitate learning, schools are using the power to conduct searches and seizures to seek out criminal behavior akin to the role of the police. Even if school officials believe these measures are what are needed to keep students safe, the data does not support that position.[87] Moreover, the Department of Education recommends creating an environment where students feel comfortable talking about their feelings and wrongdoings in order to create a safe school environment.[88] Further, research suggests that a strong relationship between school staff and students leads to safer schools even if those schools are located in high crime and high poverty areas.[89] Measures such as metal detectors, dog sniffs, and other intensive security measures only serve to cause students to feel alienated and

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[82] Doe v. Little Rock Sch. Dist., 380 F.3d 349, 354 (8th Cir. 2004).
[83] *See Id*. at 355.
[84] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009).
[85] *See Id*. at 376.
[86] N.J v. T. L.O., 469 U.S. at 328.
[87] *See* AARON KUPCHIK, THE REAL SCHOOL SAFETY PROBLEM: THE LONG-TERM CONSEQUENCES OF HARSH SCHOOL PUNISHMENT 13 (U.C. 1st ed., 2016).
[88] *See* U.S. SECRET SERV. ET AL., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES (2004).
[89] *See* Nance, *supra* note 1, at 82.

mistrusted.[90] Thus, although the existing Fourth Amendment framework allows schools to implement these intensive security measures in order to combat their drug and violence problems, as an institution whose purpose is to educate students on how to operate in society, it is perhaps the worst way to approach the problem.

As if the intensive security measures were not harsh enough on students, it has been found that the measures are used disproportionately on minority students.[91] This is concerning when studies show that teachers already tend to attribute a single instance of misconduct from a minority student as a sign that they are a troublemaker.[92] Crucially, this thinking makes it more likely that a teacher will respond harshly towards a minority student after a subsequent instance of misbehavior compared to their white counterparts.[93] With intensive security measures being four times likely to be used in schools with minority populations of fifty percent or more than schools with majority white populations it makes it easier to see the tangible effects of implicit racial bias on minority students.[94] It is no surprise then that adding the use of these intensive security measures by a teacher acting on their racial bias causes a minority student to have more interactions in the criminal justice system.[95]

Along with increased exposure minority students have to the criminal justice system, the increased scrutiny at school reinforces racial inequities resulting in lower high school graduation rates, disproportionate discipline, and lower academic achievement.[96] When looked at in conjunction with the previously discussed research on how intensive security measures cause students to feel alienated and mistrusted, minority students have this feeling amplified because of how teachers perceive them.[97] Not only do minority students internalize these feelings but they also reflect them in the form of distrust of government institutions that have treated them as inherently criminal.[98] Just as alarming is that this disparate treatment teaches minority students that

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[90] *See* Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003).

[91] *See* Nance, *supra* note 1, at 85.

[92] *See* Okonofua, *supra* note 62, at 620.

[93] *See Id.* at 621.

[94] *See* Nance, *supra* note 50, at 370.

[95] *See* Nance, *supra* note 1, at 85.

[96] *See* Nance, *supra* note 1, at 85.

[97] *See* Beger, *supra* note 90, at 340.

[98] *See* VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS, xiv, 74-75, 133-38 (NYU Press, 2011).

they are inferior to their white counterparts since the students are not looked at with the same level of distrust.[99]

Nance attributes some of the blame for this treatment towards minority students to the current balancing test allowing school officials' subjective beliefs to support a finding that they have an immediate government concern.[100] Nance also argues that another source of the problem is the narrow view courts have when determining whether a security measure is minimally intrusive.[101] Specifically, Nance argues that because they limit their analysis to whether the security measure brought before them is intrusive without taking into consideration other measures the school may already have in place, schools can implement new extensive measures without having to justify the ones already in place.[102]

IV. SOLUTION

This section will look at the solution Joseph Nance proposed to resolve the use of intrusive security measures without first presenting evidence of a substantial drug problem. It will also go through the strengths and weaknesses in his proposed framework while exploring the alternate solution of raising the required standard to search a student on school grounds. This section will also discuss where the proposed solution aligns with Nance's solution and where Nance's solution does not go far enough.

One of the instances where the proposed solution and Nance's solution align is that the courts should require schools to present objective proof of a drug or violence problem to meet the immediate government concern factor.[103] Another instance where the two proposed solutions align is that courts should broaden their analysis to include existing security measures at a school when evaluating the extent of the intrusion placed by such security measure.[104] Where the proposed solutions differ is that the solution proposed here calls for the security measures to be used as a temporary measure. Instead of the courts authorizing the measure and moving on, here, the solution proposes that they authorize it for a set amount of time and allow for the issue to be relitigated if the circumstances requiring the measure change. This will not only incentivize courts to scrutinize the measures used more closely

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[99] *See* Nance, *supra* note 1, at 86.
[100] *See Id*. at 95.
[101] *See Id*. at 98.
[102] *See Id*.
[103] *See Id*. at 95.
[104] *See Id*. at 98.

but also put schools on notice that if they misuse their security measure the courts can retroactively revoke their authorization.

A. Requiring Objective Evidence before Allowing Searches

One of the factors courts must evaluate in the current framework for student's Fourth Amendment rights is "the nature and immediacy of the governmental concern at issue."[105] To fulfill this requirement, school officials must present to the court an interest important enough to warrant the use of the intensive security measure.[106] In *Vernonia*, this standard was met by showing an extensive drug problem at the school.[107] A key difference between the school in *Vernonia* and schools today is that in when courts evaluate the extent to which a security measure is intrusive that *Vernonia*, the school was able to show tangible evidence of the drug problem at the campus.[108] Due to the way implicit racial bias unconsciously enforces a belief that minority students are involved in crime, this can create a false belief that a school with a high minority population has a problem and needs to implement these security measures.[109] Since implicit racial bias also affects decision making, the only way to ensure schools are not employing security measures unnecessarily is to require them to present objective evidence that substantiates their belief that there is a problem.[110] This evidence would include showing what percentage of the student body is using or distributing drugs, whether it is an organized effort or a series of isolated incidents, and whether any students have required medical attention as a result of the drug use. Such an approach would allow not only the courts but also the schools to have a better idea about the extent of their problem and evaluate if they have any additional tools to use besides the security measures.

Nance proposes that requiring objective evidence would not be inconsistent with the way the Supreme Court has ruled in *Vernonia*, thus, not require courts to change too much in their approach.[111] This approach would also be consistent with the way the Eighth Circuit ruled in *Doe* where they pointed to that schools lack an extensive drug problem as a reason that their suspicionless search policy was unconstitutional.[112] The

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105 *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 660 (1995).
106 *See Id*. at 661.
107 *See Id*. at 661-662.
108 *See Id*.
109 *See* Eberhardt, *supra* note 70, at 876.
110 *See* Correll, *supra* note 72, at 1315.
111 *See* Nance, *supra* note 1, at 96.
112 *See* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 354 (8th Cir. 2004).

downside of this approach is that schools could become more hesitant to enact security measures in drug situations. However, this would be preferable as long as that same school tries to develop a better relationship between the students and staff which has been shown to lead to a safer school environment.[113]

B. Broadening What Qualifies as Intrusive

Another factor the court balances when determining whether a security measure is reasonable is "the character of the intrusion that is complained of."[114] Courts only allow the security measure to be used when it is "minimally intrusive" to the students' expectation of privacy.[115] The problem with the way courts evaluates this factor is that they focus on the security measure as it is brought before them and not the context in which they are employed.[116] This leaves the door open for schools that are already abusing their ability to employ intensive security measures only having to justify one instance of their abuse instead of their system as a whole. Essentially this leads to a situation where a court is treating a school that employs only weekly pat-downs the same as a school that conducts regular dogs sniff, pat-downs, and requires students to walk through metal detectors. This means that the students of this second school would still be subjected to the negative effects of these intensive measures.[117]

Requiring courts to take into account other existing security measures will allow them to make a more informed decision which will ultimately benefit the students who must bear the consequence of their ruling. It will also reinforce the incentive requiring objective evidence creates by making schools more cautious when deciding to implement these measures. Nance also argues that this approach falls in line with a totality of the circumstances approach courts have applied to other areas of law.[118] Also, these adjustments to the current framework courts should allow for the reasonableness of these security measures to be reevaluated in the event the court finds them reasonable. This change would allow for the schools to use the measures to get the school under control so that they can begin to implement other methods that are better suited for a

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[113] *See* U.S. SECRET SERV. ET AL., *supra* note 88, at ii.

[114] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 ,660 (1995).

[115] *See* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 354 (8th Cir. 2004).

[116] *See* Nance, *supra* note 1, at 98 (discusses how courts have not considered how multiple security measures already being used when evaluating the specific one brought before them).

[117] *See* Beger, *supra* note 90, at 340.

[118] *See* Nance, *supra* note 1, at 100.

safer school environment. It would also make it clear that the schools are educational institutions first and enforcement only to the extent to fulfill their original purpose.

V. CONCLUSION

Students' Fourth Amendment rights have been severely lacking, and as a result, schools have become more prison-like. For minority students, the worst of this kind of environment has become a reality with many schools implementing measures that make the students feel that they are not trusted and alienated. This is not to say that officials in these schools are being intentionally discriminatory but that the existing framework allows for racial biases to cloud decision-making without accountability. By making these proposed changes courts and schools will have to confront these biases and think of ways to ensure that they are doing what is best for the students.