Social Education 71(1), pp. 27–32

Search and Seizure in the Schools

Kari Staros and Charles F. Williams

The Fourth Amendment to the U.S. Constitution protects the people of the United States from unreasonable searches and seizures. On first reading, these protections seem clearly defined. The text reads:

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

The amendment was meant to protect Americans from the kinds of random searches and seizures that the colonists experienced under British colonial rule. Under British law, "writs of assistance" gave British soldiers broad discretion to search colonists' homes for evidence of crimes.

Brew, a police drug dog, sniffs at lockers in Austin High School during a random surprise search on March 17, 2006, in Decatur, Alabama. (AP Photo/*The Decatur Daily*, Emily Saunders)

Perhaps the first thing to note about the Fourth Amendment is that it is not concerned with every search and seizure. It only applies to "unreasonable" searches and seizures, and even then only restricts police or other governmental officials who are acting in their official capacities. Thus, in a school setting, teachers and school administrators may be governed by the Fourth Amendment, while a student's parents (or classmates) would not be.

Moreover, what constitutes a "search" within the meaning of the amendment can differ dramatically from the ordinary sense of the word. On the one hand, in *Kyllo v. United States*, 533 U.S. 27 (2001), the U.S. Supreme Court ruled that a Fourth Amendment search includes hi-tech surveillance in which no police officer ever rummages through anyone's "houses, papers or effects" but rather simply drives down the street and points a thermal imaging device at the outside of a house. And on the other hand, activities that would surely be deemed a "search" in the everyday sense of the word might not be considered a search at all for Fourth Amendment purposes. In *California v. Greenwood*, 486 U.S. 35 (1988), for example, the Court ruled that police are not conducting a search within the meaning of the Fourth Amendment when they go through the contents of a homeowner's curbside garbage bags to look for evidence of drug use.

This is so because what constitutes a Fourth Amendment search depends not on what the activity looks like, but on

Christian Balden, right, an Enid High School junior who opposes a drug testing policy, speaks with a campus security officer while passing out flyers to students arriving to take a urinalysis, August 3, 2005, in Enid, Oklahoma. A voluntary drug screening is required of senior high students before participating in any extracurricular school activities.
(AP Photo/*Enid News & Eagle*, Andy Carpenean)

whether it can be said to have invaded one's "reasonable expectation of privacy." And this expectation of privacy must be "reasonable" in more than one sense. When someone claims that a government search has violated his privacy rights, courts will ask (1) whether that person has exhibited an actual subjective expectation of privacy, and (2) whether that subjective expectation is one that society is prepared to recognize as objectively reasonable. See *Katz v. United States*, 389 U.S. 347 (1967).

Thus, although the Court has said the Fourth Amendment is meant to "protect people, not places," where we are—in our car, on a crowded bus, or in our office at work—affects the reasonableness and strength of our expectations of privacy. In American law, no place offers a greater expectation of privacy than one's own home. The classic formulation of this core principle has been repeated in one way or another in countless judicial opinions. It was dusted off once again just last term by the Supreme Court in *Georgia v. Randolph*, 126 S. Ct. 1515 (2006):

> Since we hold to the centuries-old principle of respect for the privacy of the home, it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown." (Internal quotes and citations omitted.)

Due to these substantial privacy interests, the Supreme Court has consistently held that, with only a few exceptions, the Fourth Amendment requires police to have probable cause and a search warrant before searching a private residence. Different privacy expectations arise outside the home, however, and it wasn't until after the 1950s rise of a youth subculture—fueled largely by cinematic representations, other media sources, and consumerism—that the groundwork was set for an assertion of student rights under the Fourth Amendment. The concept of the American "teenager"—the term was not widely used in the United States until the end of World War II—was followed by the development of separate social mores and rules for juveniles. By the end of the 1960s, there was an increasingly assertive American youth and new rules governing juvenile justice. There was also an increase in gang violence and drug use among high school students, which remain serious problems today. A joint report, prepared by the Bureau of Justice Statistics and the National Center for Education Statistics in December 2005, reported a recent decline in student violent crime victimization, and cited the following statistics:

> In 2003, students ages 12-18 were victims of about 740,000 violent crimes and 1.2 million crimes of theft at school. Seven percent of students ages 12-18 reported that they had been bullied, 29 percent of students in grades 9-12 reported that drugs were made available to them on school property, and 9 percent of students were threatened or injured with a weapon on school property.[1]

Schools' countermeasures likely played a role in the improved statistics, but at a cost to student privacy. In 1999-2000, for example:

> Six percent of schools required clear book bags or banned book bags altogether, but this practice ranged from 2 percent of primary schools, to 13 percent of middle schools, and 12 percent of secondary schools. Between 3 and 4 percent of primary schools reported performing one or more random metal detector checks on students, using one or more random dog sniffs to check for drugs, and performing one or more random sweeps for contraband (not including dog sniffs). In comparison, 15 percent of secondary schools reported random metal detector checks,

> half reported random dog sniffs, and one-quarter reported random sweeps for contraband. In 1999-2000, 14 percent of primary schools, 20 percent of middle schools, and 39 percent of secondary schools used one or more security cameras to monitor the school.[2]

Most recently, a slew of highly publicized campus shootings have caused new concerns. Because the Fourth Amendment text does not designate a separate category of protections for minors, the courts have faced numerous questions regarding the protections it affords students: Do school officials have the authority to order random searches of students' lockers or book bags? Can they require random drug testing of athletes or other students?

The first Supreme Court case to begin directly addressing some of these issues was *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). This case began when two girls were suspected of smoking in a restroom against school rules. The assistant vice-principal asked to see the purse of T.L.O. (whose full name was not given because of her juvenile status), one of the girls who had denied smoking. When he opened the purse, he found not only a pack of cigarettes, but also drug paraphernalia. Searching the purse more thoroughly, he found further evidence that she was likely selling marijuana, a crime in the state of New Jersey.

T.L.O. was charged with delinquency, and her lawyer argued that all of the evidence found in the young woman's purse was inadmissible in court since the vice-principal had obtained the evidence in violation of her Fourth Amendment rights. (Pursuant to the Court's "exclusionary rule," evidence seized in violation of the Fourth Amendment generally may not be used at trial.) The New Jersey Supreme Court agreed with T.L.O. It ruled that the Fourth Amendment did apply to student searches in the public schools and that T.L.O.'s rights had been violated. The case went to the U.S. Supreme Court, which also agreed that T.L.O. enjoyed Fourth Amendment protections against school administrators. The Court held that, although the typical Fourth Amendment case features police officers and adult criminal suspects:

> The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren. In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures.

But on the facts of the case before it, the justices concluded that the search by the school official in this case did not violate T.L.O.'s Fourth Amendment rights. In his opinion, concurring with the majority opinion authored by Justice White, Justice Blackmun explained that although children do have expectations of privacy in school, against these expectations must be weighed "the special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself." Thus school officials need to satisfy a "reasonableness" standard before searching their students or their belongings. But they do not need to obtain a warrant or even have probable cause.

The second case relating to Fourth Amendment rights of minors was decided in 1995. In *Vernonia School District 47J v. Acton*, 515 U.S. 646, the Supreme Court was faced with the question of whether random drug testing of athletes in high schools was reasonable. In the small town of Vernonia, Oregon, a 14-year-old student objected to the required drug test he would have to take to try out for the football team after an administration policy had been put in place to test all students participating in interscholastic athletics for drugs.

Writing for the Court, Justice Scalia relied on the *T.L.O.* case in declaring that searches unsupported by probable cause can be constitutional when "special needs" beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable. He noted that:

> We have found such "special needs" to exist in the public-school context. There the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and strict adherence to the requirement that searches be based upon probable cause "would undercut" the substantial need of teachers and administrators for freedom to maintain order in the schools.

The Court again concluded that although students do have limited Fourth Amendment rights, within a school setting they have a lesser expectation of privacy than adults, and their rights must be balanced against the school's interest in curbing the use of illegal drugs.

Then, in 2002, a case from Tecumseh, Oklahoma, asked the Supreme Court to again consider the Fourth Amendment in a school context. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), resulted in a 5-4 decision upholding a school's drug-testing policy. In 1998, the school district had passed a rule that required all middle and high school students to be tested for drugs if they wanted to participate in any extra-curricular activities, including Future Farmers of America, Future Homemakers of America, the Academic Team, and the National Honor Society. While the Court of Appeals struck down the rule because the school district had not shown proof of an ongoing drug problem at the school, the Supreme Court, in a decision written by Justice Thomas,

RESOURCES

The National Constitution Center's Interactive Constitution invites visitors to explore the words and meanings of the Constitution and its amendments. Visitors can search by article or amendment, keyword, topic, or Supreme Court case. By clicking on a specific phrase of the Constitution, visitors can get detailed explanations of its meaning. **www.constitutioncenter.org/constitution/details_explanation.php?link=132&const=11_amd_04**

The National Constitution Center also has a Supreme Court Simulation activity that allows students to learn key components of the Fourth Amendment and stage a mock trial with oral arguments. The site also includes downloadable materials for teachers to work with in their classrooms. **www.constitutioncenter.org/constitutionday/display/USCourtsP/Supreme+Court+Simulation+-+The+Fourth+Amendment**

Preview of United States Supreme Court Cases, published by the ABA Division for Public Education, includes a website detailing the cases reviewed by the Court during its 2005-2006 term, including four Fourth Amendment decisions. This site is especially useful for teachers wanting to introduce their students to actual case law and use Supreme Court cases to teach American government and politics. **www.abanet.org/publiced/preview/summary/2005-2006/f2.html**

The ABA Division for Public Education hosts an online program called *Conversations on the Constitution*, designed to encourage civil discussion about key concepts and clauses in the Constitution, including "unreasonable searches and seizures." The site also features a "Test Your Knowledge" interactive quiz on young people and the Constitution. **www.abanet.org/publiced/conversations/constitution/topics_searchandseizure.html**

reversed the ruling on these grounds:

> A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.

And he quoted Justice Powell's concurrence in *T.L.O.*:

> Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.

Precisely how much "greater controls" students may be subjected to often depends on the specific scenario. If left to find its own course, this area of Fourth Amendment law will continue to develop as the courts consider new fact situations involving student searches and develop additional precedents.

A bill passed by the U.S. House of Representatives in September 2006 suggests how the legacy of *T.L.O.*, *Vernonia*, and *Pottawatomie* might continue to restrict students' Fourth Amendment rights in a school setting. Captioned the Student and Teacher Safety Act of 2006, and sponsored by Rep. R. Geoff David (R-KY), the bill (H.R. 5295) would have required that, as a condition for receiving federal money, every local school district develop a search policy for students reasonably suspected of possessing weapons, dangerous materials, or illegal narcotics. The bill cited statistics concerning the percentage of students who have regularly carried weapons to school or engaged in drug activity, maintained that school search policies protect students' health and safety, and provided that any full-time teacher or school official could

carry out a search anywhere on school grounds so long as the teachers or officials had a reasonable suspicion based on their own professional experience.

In support, the nation's largest teachers' union, the National Education Association, argued that the bill struck the proper balance between "ensuring the safety of students and educators and protecting student rights." In opposition, the American Civil Liberties Union cited the vagueness of legislative language, which it said could lead school officials to conclude that they have the authority to conduct "random, wide-scale searches of students without having any individualized suspicion that a particular student to be searched is participating in criminal activity or breaking the school rules." The bill failed to pass the Senate before the end of the 109th Congress, but students and teachers alike will want to stay tuned as the debate over the proper balance between the right to privacy and the right to school safety continues in Congress and the courts.

Notes

1. J.F. DeVoe et al., *Indicators of School Crime and Safety: 2005* (NCES 2006-001/NCJ 210697), prepared for the U.S. Departments of Education and Justice (Washington: GPO, 2005), ix. (The complete text of the report is available online at nces.ed.gov/pubsearch/pubsinfo.asp?pubid= 2006001).
2. Ibid., 60.

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TEACHING ACTIVITIES

James H. Landman

Introduction

In this activity, students will learn about key Fourth Amendment concepts and discuss the extent to which the Fourth Amendment's protections apply to their daily lives in and outside school.

Part One: Key Concepts

A. Begin class by asking students to read the text of the Fourth Amendment:

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

Ask students if there are any words they do not understand (such as "effects," "seizures," "warrant," "oath" or "affirmation"). Then ask students to identify what they think are the key clauses or concepts in the text of the amendment (e.g., right to be secure in one's person and home, protection against unreasonable searches and seizures, or need for probable cause to issue a warrant).

Be sure students understand that government authorities do not always need a warrant to make a reasonable search or seizure under the Fourth Amendment.

B. Explain to students the Supreme Court's holding in *Katz v. United States*, 389 U.S. 347 (1967). The *Katz* decision held that the Fourth Amendment "protects people, not places." The question of whether the Fourth Amendment was violated depends upon a person's reasonable expectation of privacy in a given situation.

In a concurring opinion in *Katz*, Justice Harlan defined a twofold test for determining whether a reasonable expectation of privacy exists:

1. A person must have exhibited an actual (subjective) expectation of privacy.
2. The expectation is one that society is prepared to recognize as "reasonable."

Ask students to discuss how well they think Justice Harlan's test conforms to the key Fourth Amendment concepts they identified in Part 1A of this exercise. Then ask them to apply this test to determine whether they think an individual should have a reasonable expectation of privacy in the following situations:

- In the living room of a private home;
- In a telephone conversation with another person made from a private home;
- In a cell phone conversation made on a quiet public street;
- In a cell phone conversation on a crowded bus;
- In an automobile parked in a private garage;
- In an automobile parked in a public parking lot;
- In an empty classroom at school;
- In an online chat room.

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TEACHING ACTIVITIES

Part Two: Students and the Fourth Amendment

A. Explain to students the Supreme Court's holding in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). That decision upheld a school policy that required all middle and high school students who participated in any extracurricular activity to consent to urinalysis testing for drugs.

Ask students to read the two following excerpts from the *Pottawatomie County* decision:

1. From Justice Thomas's opinion for the majority:
   A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. …Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.
2. From Justice Ginsburg's dissenting opinion:
   In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial [i.e., caretaking] obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary [i.e., teaching] obligations to their students require them to "teach by example" by avoiding symbolic measures that diminish constitutional protections.

B. Ask students to discuss the following questions.

1. What do the two statements from the majority and dissenting opinions have in common (e.g., both recognize the school's role as guardian of students, or both recognize that students might be subject to certain limitations on their rights in a school setting)?

2. What are the primary differences between the statements (e.g., Justice Ginsburg's argument that a school's obligations as guardian must be balanced with its obligation to teach)?

3. Do you agree with Justice Ginsburg's suggestion that schools must balance an obligation to care for their students' health or safety (a "custodial" obligation) with an obligation to "teach by example" on matters of constitutional rights (a "tutelary" obligation)? Why or why not? Would you give greater weight to either of these obligations? Why?

4. How would you define the term "reasonable expectation of privacy" for a student in a public school? In what circumstances, if any, do you think students should be able to have a reasonable expectation of privacy in a school setting?

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