

I Plead the Fourth: The Unconstitutionality of X-ray Screeners in Public Schools

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Abstract

This Comment argues for an end to the unconstitutional use of x-ray machines that accompany metal detectors at schoolhouse gates. It analyzes the constitutional implications of school districts installing x-ray machines at public school entrances, where students are forced to relinquish their Fourth Amendment privacy rights and undergo coercive suspicionless searches. It explains how x-ray searches are more intrusive than metal detector searches, and distinguishes the Supreme Court's prior holdings that allow drug testing of students who consent to participate in extracurricular activities. In addition, it explains why, constitutional issues aside, the implementation of such expensive machines takes funding away from other effective means of deterring school violence. A Marshall-Brennan Fellow at American University Washington College of Law teaching Constitutional Law to DC high school students wrote this piece while watching them pass through such machines daily.

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I. INTRODUCTION

“Tell me: If you were a crazed teenager who hated the world, had been pushed around, had a history of making death threats, and wanted to go out in a blaze of glory, would you really go through the security checkpoint before you pulled out your .45s?” Nick Evans asked.¹ Hill Career Regional High School officials denied Evans, a sixteen-year-old junior, entry into his public high school building when he refused to submit to a blanket suspicionless metal detector search.² As schools become increasingly concerned² with protecting students from violence and decreasing the number of weapons brought into schools, administrators have implemented new devices to ensure safety.³

This Comment addresses the constitutionality of metal detector and x-ray screener searches in public schools. Particularly, this Comment analyzes whether public schools’ implementation and use of x-ray screeners at school entrances constitutes suspicionless searches that are not voluntarily consented to, are overly intrusive and unreasonable under the Fourth Amendment, even if metal detectors are constitutional on their own. Part II briefly examines the relevant Fourth Amendment cases, the constitutional implications of searches in schools, and the pervasiveness of school violence. Part III argues that metal detectors used to prevent metal objects from entering public schools are constitutional, but x-ray screeners eliminate students’ privacy interests, are overly intrusive, and thus violate students’ Fourth Amendment privacy rights in public schools. Part IV recommends alternative ways that school administrators can protect student safety without infringing on students’ constitutional rights.

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¹ See Rachel Harris, *New Metal Detectors Test the Mettle of New Haven’s Public School Students*, YALE HERALD, Oct. 6, 2006, available at <http://www.yaleherald.com/article.php?Article=4890> (reporting on a new policy in New Haven public schools, forcing Evans and his classmates to consent to suspicionless metal detector and bag searches prior to entering school).

² See *id.* (explaining that Evans argues that school officials lacked the requisite individualized suspicion to constitutionally conduct daily searches of students).

³ See Tod Schneider, *Newer Technologies for School Security*, CLEARINGHOUSE ON EDUC. POL’Y & MGMT. (College of Education, University of Oregon), Digest 145, Feb. 2001, at 1 (noting that schools protect students with keys, smart cards, metal detectors, alarm systems, and surveillance equipment).

II. BACKGROUND

A. Fourth Amendment Jurisprudence as Applied to Adults and Minors Outside of the School Environment

The Fourth Amendment to the United States Constitution guarantees:

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.⁴

The Supreme Court held that the Fourth Amendment requires searches to be carried out pursuant to a warrant based on probable cause when a search invades a reasonable expectation of privacy.⁵ The Court has diminished this Fourth Amendment right, deciding that searches may be conducted without a warrant when there is probable cause to search or when there is a reasonable suspicion to stop and frisk an individual.⁶ Furthermore, in *California v. Greenwood*⁷ and *Katz v. United States*,⁸ the Court held that searches and seizures of property that individuals do not seek to preserve as private, but are held in plain view or are discarded, cannot be considered unreasonable.⁹ Moreover, the Court found that canine sniffs do not require a warrant because there is no expectation of privacy in contraband.¹⁰

⁴ U.S. CONST. amend. IV.

⁵ See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing a two-part inquiry to determine whether a person has a constitutionally protected reasonable expectation of privacy by assessing: (1) if the individual has a subjective expectation of privacy in the challenged search; and (2) if society accepts the expectation as reasonable).

⁶ See *Terry v. Ohio*, 392 U.S. 1, 20-21, 29-30 (1968) (upholding limited searches without probable cause when an officer can point to specific and articulable facts to create reasonable suspicion that the suspect is armed and dangerous and the search is limited in scope to protect the officer and nearby citizens against the potential use of weapons).

⁷ 486 U.S. 35 (1988).

⁸ 389 U.S. 347 (1967).

⁹ *Greenwood*, 486 U.S. at 36-37 (upholding warrantless searches of bagged trash sitting at a curb because it was discarded in a public location that was easily accessible to strangers and there is no accepted societal expectation of privacy in trash); *Katz*, 389 U.S. at 351 (finding that objects that are knowingly exposed to the public are not subject to Fourth Amendment protections because individuals do not have legitimate privacy interests in what they hold in plain view); see also *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (maintaining that “a search is a search,” even if it only discloses serial numbers at the bottom of a turntable, because there is an important distinction between looking at a suspicious object in plain view and moving an object to expose a hidden item); *United States v. Henry*, 615 F.2d 1223, 1227 (9th Cir. 1980) (explaining that x-ray searches are more intrusive than metal detector searches because x-rays reveal items that the owner chose not to expose).

¹⁰ See *United States v. Place*, 462 U.S. 696, 707 (1983) (explaining that canine sniffs are not searches

The Court stated that there are extenuating circumstances and limited situations in which a search only requires a lower standard of “reasonableness” to pass constitutional muster. While these searches, known as “special needs searches,” were first mentioned in the public school setting,¹¹ the Court extended such searches to apply to adults where the warrant or probable cause requirement was impracticable and a compelling government interest justified suspicionless drug tests in *Skinner v. Railway Labor Executives’ Association*¹² and *National Treasury Employees Union v. Von Raab*.¹³ Yet the Court carefully limited special needs searches to situations where the primary purpose of the search went beyond normal law enforcement needs.¹⁴

B. Public School Students’ Constitutional Rights

1. Establishing Schools as a Special Need Location with Limited Student Rights

While students do not have much choice to attend school when it comes to compulsory education laws,¹⁵ it is well accepted that students retain constitutional rights, albeit limited, in schools.¹⁶ In *Tinker v. Des Moines Independent Community School District*, the Court first held that students and teachers do not “shed their constitutional rights . . . at

because there is no legitimate expectation of privacy in illegal items).

¹¹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (expressing that a “special need” exists in schools that exempts searches from probable cause and warrant requirements, as school officials must be able to immediately respond to behavior that threatens student safety).

¹² See 489 U.S. 602, 620 (1989) (finding that urine testing is a search because it invades legitimate privacy expectations by revealing private information contained in urine, such as epilepsy, diabetes, or pregnancy, but upholding the search, citing special needs in regulating railroad employees’ conduct, particularly those involved in railroad accidents, to ensure public safety, justifying a departure from the Fourth Amendment warrant requirement).

¹³ See 489 U.S. 656, 665 (1989) (upholding special needs drug testing of customs service employees because the search’s purpose was not for ordinary law enforcement needs, emphasizing that the results of the drug tests could not be turned over to a criminal prosecutor, but rather used only to ensure that those in charge of reducing illegal drug activity did not personally use drugs).

¹⁴ See *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (rejecting urinalysis testing of pregnant women for cocaine as special needs searches because the search was primarily for law enforcement prosecution, not to protect their fetuses).

¹⁵ See, e.g., CAL. EDUC. CODE §§ 48260, 48293 (2007) (outlining compulsory education requirements because the state requires students to attend school or face truancy charges); 24 PA. STAT. ANN. § 13-1333 (2007) (stating penalties, such as fines, for students who fail to attend school because students are mandated to comply with statutorily required schooling).

¹⁶ See CAL. CONST., art. I, § 28(c) (providing an inalienable right for students to attend safe, secure, and peaceful public schools); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (highlighting the fact that for over fifty years the Supreme Court has held that even in light of the special circumstances surrounding school environments, students and teachers retain their First Amendment rights of freedom of speech and expression).

the schoolhouse gate."¹⁷ Students' First Amendment rights in schools must be "applied in light of the special characteristics of the school environment."¹⁸

2. How the Supreme Court's Special Needs Findings in the School Environment Pertains to Students' Fourth Amendment Rights in Schools

To date, the Supreme Court has only heard three cases involving the Fourth Amendment's protection against unreasonable searches and seizures in public schools.¹⁹ In *New Jersey v. T.L.O.*, the Court held that a student's Fourth Amendment right to be free from unreasonable searches and seizures requires the government to show that the search conducted is reasonable.²⁰ The Court established a standard of reasonableness by distinguishing students from prisoners, stating that students retained legitimate expectations of privacy while in school.²¹

In *T.L.O.*, the Supreme Court upheld the vice-principal's search of a student's purse after a teacher discovered the student smoking in a bathroom, in violation of school policy.²² When T.L.O. denied that she was smoking in the lavatory, the vice-principal demanded to see her purse in which he found a pack of cigarettes and cigarette rolling papers.²³ Because the vice-principal's experiences led him to believe that possession of rolling papers was connected to marijuana use, he conducted a more-thorough search of the purse and found

¹⁷ 393 U.S. at 506, 509 (holding that students retain free speech protections in school so long as their actions do not materially and substantially disrupt classroom activity).

¹⁸ *Id.* at 506 (holding that because schools must maintain order in schools, students' free speech and expression rights may be limited).

¹⁹ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (upholding the use of suspicionless urinalysis tests for all students who consent to participate in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (finding that suspicionless drug tests are reasonable searches for athletes because the school's need to protect student safety and curb drug use outweigh individual student privacy interests); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (holding that school officials need only meet a standard of "reasonableness" in conducting searches in schools).

²⁰ See 469 U.S. at 341 (acknowledging that *Terry v. Ohio*, 392 U.S. 1 (1969) establishes that the reasonableness of any search involves a twofold inquiry analyzing: (1) whether the action was justified at its inception; and (2) whether the search conducted was "reasonably related in scope to the circumstances which justified the interference in the first place").

²¹ See *id.* at 338-39 (differentiating students' and prisoners' privacy rights because the safety situation in schools is not as dire as that in prisons nor have students been criminally convicted).

²² See *id.* at 344-46 (upholding the school's search as reasonable under *Terry* and the Fourth Amendment because the search was reasonably related to the school's objectives of enforcing school rules and were not overly intrusive because there was individualized suspicion to search T.L.O.).

²³ See *id.* at 328-29 (finding that the principal had reasonable suspicion to search the student's purse because she was caught smoking in the bathroom, which was bolstered by his discovery of cigarettes, indicating she may have lied about smoking in the lavatory in violation of school rules).

marijuana, a pipe, and evidence that T.L.O. was selling marijuana.²⁴ The Court in *T.L.O.* classified searches conducted by school officials as a special need, beyond normal law enforcement purposes, where the officials may search without a warrant based on a reasonable suspicion standard instead of the higher burden of probable cause.²⁵ Because the Court found that the vice-principal's search was based on reasonable suspicion, the Court sustained the constitutionality of the search.²⁶

While the Court in *T.L.O.* did not address whether individualized suspicion was a requirement to satisfy the reasonableness standard,²⁷ the Court addressed this issue in *Vernonia School District 47J v. Acton*.²⁸ In *Vernonia*, the school implemented a policy that required all interscholastic athletes and the parents of participating students to sign a form consenting to random suspicionless urinalysis testing.²⁹ The school conducted the tests in an empty locker room and a same-sex adult monitor accompanied the student.³⁰ An independent laboratory uniformly tested each student for amphetamines, cocaine, and marijuana, and mailed the written results to the superintendent, allowing only the superintendent, principals, vice-principals, and athletic directors access to the results.³¹

To determine the constitutionality of random suspicionless urinalysis drug testing of athletes, the Court assessed the policy's reasonableness by balancing the search's intrusion on the students' Fourth Amendment privacy interests against the search's promotion of

²⁴ See *id.* (listing other incriminating evidence found in T.L.O.'s purse).

²⁵ See *id.* at 340 (recognizing that maintaining security and order in schools requires flexibility in disciplinary procedures and compelling a warrant before a teacher could search a student suspected of violating school policy would unduly interfere with these procedures).

²⁶ See *id.* at 345-46 (holding that the vice-principal searched T.L.O.'s purse based on individualized suspicion that she violated the school's no-smoking policy because a teacher reported seeing her and another student in the lavatory smoking).

²⁷ See *id.* at 342 n.8 (noting that exceptions to the individualized suspicion requirement are appropriate only where the search implicates minimal privacy interests and other safeguards are present to ensure that the student's reasonable privacy expectation is not left to the officer's malleable discretion).

²⁸ 515 U.S. 646, 648-49 (1995) (upholding random suspicionless drug testing of student athletes, who allegedly led the drug problem in school, because their use increased the risk of sports-related injuries due to slowed reaction time on the field).

²⁹ See *id.* at 650 (stating athletes were drug-tested at the season's start and randomly thereafter).

³⁰ See *id.* (describing the administration of the drug test, where selected male students produced a sample at a urinal while remaining fully clothed with their backs to the monitor). The administrator could watch the student while he produced the sample and listened for normal urination sounds. *Id.* Girls produced samples in an enclosed bathroom stall, where they could be heard, but not observed. *Id.*

³¹ See *id.* at 651-52 (noting that the school does not reveal the identity of a particular student to the laboratory and that the laboratory's procedures were 99.94 percent accurate).

legitimate government interests.³² The Court held that the Fourth Amendment only protects against searches that intrude on subjective expectations of privacy that society recognizes as “legitimate.”³³ While the Court permits school authorities to act *in loco parentis*, the Court has not recognized nor suggested that public schools have such control of students as to give rise to a “duty to protect.”³⁴

The Court found that student athletes have a lower expectation of privacy than other students because they voluntarily subject themselves to communal undress, showers, and additional rules and regulations, such as required physical exams.³⁵ After considering the scope of the students’ expectations of privacy, the Court looked at the character of the intrusion of urinalysis testing, which it determined to be negligible.³⁶ Although the Court noted that urine samples ordinarily can reveal very private information, such as pregnancy, epilepsy, and diabetes, the Court explained that these tests were constitutional as conducted because: (1) the findings were limited to drugs, and the same restricted tests applied uniformly to all students subjected to testing; (2) the test results were disclosed only to limited school personnel on a need-to-know basis; and (3) the results were not given to law enforcement officers or used for any internal disciplinary function.³⁷ In addition, students did

³² See *id.* at 653 (finding that the special needs in public schools overcome the need for probable cause, a warrant, and even individualized suspicion at times because school’s need to protect student safety outweighs a minimally intrusive search).

³³ See *id.* at 654-55 (explaining that legitimate expectations vary and privacy expectations may depend on the individual’s relationship with the state). Here, the individuals were children committed to the temporary custody of the state while in school, where officials had a degree of supervision and control that could not be exercised over adults. *Id.*

³⁴ See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989) (holding that there is no affirmative right to governmental protection from another private citizen, even when necessary to secure life, liberty, or property interests); *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361, 374-75 (6th Cir. 1998) (explaining that teachers have a responsibility to watch out for student safety because they act as a substitute for parents and guardians during school hours).

³⁵ See *Vernonia*, 515 U.S. at 657 (citing *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 627 (1989) comparing students who voluntarily participate in school sports to adults who choose to participate in a “closely regulated industry,” because they all elect to participate and understand that they have a lower expectation of privacy).

³⁶ See *id.* at 658 (explaining that while obtaining urinalysis samples intruded on “an excretory function traditionally shielded by great privacy,” the manner in which the samples were obtained was nearly identical to public restroom use and thus minimally intrusive).

³⁷ Compare *id.* (articulating that the searches constitute a “special need” because they were conducted for prophylactic and non-punitive purposes, such as deterring drug use and protecting students from drug-related athletic injuries), with *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (rejecting that the urinalysis testing of pregnant women for cocaine were special needs searches because the search’s

not face school suspension or criminal charges.³⁸

The Supreme Court in *Vernonia* considered the nature and immediacy of the governmental concern at issue and the efficacy of the means addressing it, explaining that a compelling state interest justified the urinalysis testing of athletes for drug use.³⁹ The Court emphasized that deterring student drug use is a compelling state interest because users affect the entire student body and faculty, and disrupt the learning process.⁴⁰ The Court found that the government's concern was pressing and immediate because the student athletes subject to testing were among those students who displayed problems of drug use and rebellion.⁴¹ Furthermore, the Court upheld the search's efficacy because the school effectively targeted the drug problem by narrowly tailoring the testing to the group with a documented history of drug use: the student athletes, who acted as role models and increased the risk of sports-related injuries.⁴² For the foregoing reasons, the Supreme Court upheld the suspicionless drug testing of athletes who signed a consent form in *Vernonia*.⁴³

In *Board of Education v. Earls*, the Supreme Court expanded its decision in *Vernonia* by requiring all students participating in any extracurricular activity to submit to suspicionless drug testing because the school's policy reasonably served the school's important interest in detecting and preventing drug use among students while only detecting illegal drug use.⁴⁴ Because the search was a special needs administrative search, the Court applied a reasonableness test by balancing the nature of the intrusion on the individual's privacy

primary purpose was for law enforcement prosecution).

³⁸ See *Vernonia*, 515 U.S. at 651 (citing the penalties for failing drug tests as non-academic: participation in an assistance program, or suspension for the remainder of the current season and the next).

³⁹ See *id.* at 661 (arguing that the drug testing was valid because a compelling state interest exists when a government interest appears "*important enough*" to justify the search conducted in light of its intrusiveness on a genuine expectation of privacy).

⁴⁰ See *id.* (citing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) and *Skinner*, 489 U.S. at 628 to suggest that preventing drug use in children is at least as important as preventing it in customs service employees and train engineers).

⁴¹ See *id.* at 662-63 (finding that the situation was "an immediate crisis of greater proportions" than in *Von Raab* or *Skinner* because the student athletes subject to testing had a documented history of drug use).

⁴² See *id.* (noting that psychological and physical effects increase the risk of injuries when student athletes use drugs).

⁴³ See *id.* at 663 (holding that searches need not be the least intrusive means to be held reasonable under the Fourth Amendment).

⁴⁴ See 536 U.S. 822, 826, 838 (2002) (stating that tests were limited because they only revealed amphetamines, marijuana, cocaine, opiates, and barbituates, and that the school did not test for medical conditions or the presence of prescriptions).

against the promotion of legitimate governmental interests.⁴⁵

The Fourth Amendment does not require individualized suspicion where the school's interest is sufficiently compelling to justify the search's intrusion on the students' privacy interests.⁴⁶ The Court determined that students' privacy interests are limited in a public school environment, where the government is responsible for maintaining discipline, health, and safety.⁴⁷ Students participating in extracurricular activities have a lower expectation of privacy at school because of the school's custodial responsibility and authority.⁴⁸ The Court emphasized that "students who participate in . . . extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes."⁴⁹ The Court, applying the same analysis as in *Vernonia* regarding the degree of intrusion when conducting urinalysis tests, found the intrusion on students' privacy interests to be even less than "negligible."⁵⁰ Furthermore, the test results were only revealed on a need-to-know basis, were not turned over to any law enforcement officials, and did not lead to any disciplinary or academic consequences.⁵¹

When considering the nature and immediacy of the government's concerns and the efficacy of the school's policy in meeting them, the Court rearticulated the importance of preventing student drug use and noted its rising prevalence since 1995.⁵² The Court also found drug testing of students who participate in extracurricular activities to be a reasonably

⁴⁵ See *id.* at 828 (discussing that the government need only seek to prevent the development of hazardous conditions to conduct special needs administrative searches).

⁴⁶ See *id.* at 829 (explaining that when the state needs to discover or deter compelling conditions, schools can infringe upon students' privacy rights without requiring individualized suspicion).

⁴⁷ See *id.* at 831 (discussing how schools sometimes require students to submit to physical exams and vaccinations, and stating that securing student safety sometimes requires schools to subject students to greater controls than those appropriate for adults).

⁴⁸ *Id.* at 831 (dismissing students' arguments that they have a stronger privacy expectation than the athletes in *Vernonia*, who were expected to participate in regular physicals and communal undress, because the Court's decision in *Vernonia* depended upon the school's parental responsibility, and not the expectation of privacy).

⁴⁹ See *id.* at 831-32 (acknowledging that extracurricular activities "have their own rules and requirements for participating students that do not apply to the student body as a whole").

⁵⁰ See *id.* at 833 (noting that this particular urine sample collection procedure provided even more protections than in *Vernonia* because male students could produce their samples behind closed stalls as opposed to open urinals).

⁵¹ See *id.* at 833-34 (explaining that the only consequence of failing the drug tests was a limit on participation in the extracurricular activity).

⁵² See *id.* at 834 (stating that the worsening drug epidemic makes deterrence and reduction of health and safety risks important interests in every school).

effective means for the school officials to address their legitimate interests in preventing, detecting, and deterring drug use.⁵³ Thus, because the school's interest in protecting the health and safety of the students outweighed the students' privacy interests, the Court upheld the suspicionless drug testing of all students who *choose* to participate in extracurricular activities as constitutional.⁵⁴

In *Earls* and *Vernonia*, the Court filled in some details of *T.L.O.*'s reasonableness test; it provided for a balancing of students' interests in privacy and the character of the search's intrusion against the nature and immediacy of the government's concerns and the efficacy of the school's policy. The Supreme Court's 2002 decision in *Earls* was the last time the Court ruled on a search's reasonableness in public schools, and its holding was limited to evaluating the constitutionality of suspicionless drug tests of a specific group of students.⁵⁵

3. Lower Court Metal Detector Search Cases

Even though, to date, the Supreme Court has not addressed the constitutionality of blanket searches of all students in the context of metal detectors or x-ray machines to prevent school violence, five state courts and one circuit court have upheld random weapons searches in schools. The California Court of Appeals held that random metal detector weapons searches of high school students do not violate the Fourth Amendment's ban on unreasonable searches and seizures.⁵⁶ The Illinois Court of Appeals decided that individualized suspicion was not required to render reasonable metal detector screenings,⁵⁷ and the Pennsylvania Supreme Court upheld the validity of searching all high school students

⁵³ See *id.* at 837 (explaining that there is no requirement that a school test the group of students most likely to use drugs because it would not be less intrusive, would place an additional burden on teachers, and would lead to targeting of "unpopular" groups).

⁵⁴ See *id.* at 838 (upholding the policy's constitutionality without deciding whether it was made in good judgment because the policy reasonably furthered the school's important interest in deterring drug use).

⁵⁵ See *id.* (restricting permissible suspicionless drug testing to individuals who consented to participate in extracurricular activities because these students subjected themselves to additional rules and therefore had lowered privacy expectations than the general student body).

⁵⁶ See *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 887 (Cal. Ct. App. 1998) (upholding the use of metal detector searches as reasonable because the need to keep weapons off campuses is substantial).

⁵⁷ See *People v. Pruitt*, 662 N.E.2d 540, 547 (Ill. App. Ct. 1996) (upholding metal detector searches to scan students for weapons because the purpose was to "maintain a proper educational environment for all students").

for weapons as a pre-condition to entry.⁵⁸ Similarly, the New York County's Criminal Court found that an administrative search for weapons at a high school was reasonable under the Fourth Amendment despite the lack of consent, as the intrusion of the search was not greater than necessary to satisfy the governmental interest underlying the need for the search.⁵⁹ The Florida Court of Appeals held that the public school board's policy authorizing random, suspicionless weapons searches of public high school students was reasonable and constitutional.⁶⁰ The Eighth Circuit upheld a search of students after a school bus driver reported slashes on a bus seat;⁶¹ in a later case involving school safety, however, the Circuit rejected a random suspicionless search as violating the Fourth Amendment when school personnel searched student purses and backpacks.⁶²

C. Prevalence Of School Violence

With twenty-one homicides and seven suicides of students ages five to eighteen, one homicide or suicide occurred per every two million students enrolled in the 2004-2005 school year.⁶³ Despite increased news coverage of a large number of school shootings, students face "less than one in a million chance of suffering a school-associated violent death."⁶⁴

⁵⁸ See *In the Interest of F.B.*, 726 A.2d 361, 366 (Pa. 1999) (upholding a blanket search of students with a hand-held metal detector, citing sufficient student and parent notice through the student manual, mailings, and postings, and underscoring the need to keep weapons out of schools).

⁵⁹ See *People v. Dukes*, 580 N.Y.S.2d 850, 852-53 (N.Y. Crim. Ct. 1992) (approving the use of hand-held metal detectors to scan students' persons and belongings, noting the increased use of such metal detectors in courthouses and airports).

⁶⁰ See *State v. J.A.*, 679 So. 2d 316, 318-19 (Fla. Dist. Ct. App. 1996) (upholding random suspicionless searches of high school students with hand-held metal detectors because: (1) students have a lesser expectation of privacy at school; and (2) the state has custodial and tutorial authority over students).

⁶¹ See *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 983 (8th Cir. 1996) (finding that a hand-held metal detector search in which students had to remove their jackets, shoes, socks, and empty their pockets was minimally intrusive and constitutional).

⁶² See *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352 (8th Cir. 2004) (invalidating the search of students' bags because subjecting students to a full-scale suspicionless search effectively eliminated the students' privacy interests in the personal items they brought with them to school).

⁶³ See Rachel Dinkes et al., *Indicators of School Crime and Safety: 2006*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., Dec. 2006, at 6, available at <http://nces.ed.gov/pubs2007/2007003a.pdf> (discussing how the twenty-eight school deaths during the 2004-2005 school year is higher than the eleven homicides that occurred during 2000-2001, but lower than most school years in the 1990s).

⁶⁴ *1999 Annual Report on School Safety, Safe School Initiative*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., 1999, at 2, available at http://www.secretservice.gov/ntac/ssi_final_report.pdf; see also Rebecca N. Cordero, Comment, *No Expectation of Privacy: Should School Officials Be Able to Search Students' Lockers Without Any Suspicion of Wrong Doing? A Study of In re Patrick Y. and its Effect on Maryland Public School Students*, 31 U. BALT. L. REV. 305, 305 (2002) (pointing out the chance that a student will be murdered at school is less than that of being struck by lightning).

Many candidates, however, addressed school violence in the 2006 midterm election after recent shootings in Pennsylvania, Vermont, North Carolina, Wisconsin, and Colorado.⁶⁵

While some politicians advocated controversial solutions to address school violence, schools continue to implement less publicized weapons searches that largely infringe on students' constitutional rights.⁶⁶ But school violence is not new, nor is it significantly worse now than in United States history.⁶⁷

III. ANALYSIS: APPLYING THE EARLS STANDARD TO METAL DETECTORS AND X-RAY MACHINES

When balancing the students' significant privacy interests and the search's intrusion on students' privacy against the government's legitimate interest in providing safe schools, a court should find that metal detector searches are constitutional, but that x-ray machine searches go too far because they constitute suspicionless searches that are involuntarily consented to, overly intrusive, and, therefore, are unreasonable and violate students' Fourth Amendment privacy rights.

A. Students' Privacy Interests are Significant and Warrant Fourth Amendment Protections

The Supreme Court has appropriately held that students do not shed their constitutional rights when they enter public schools, but their privacy interests are more limited than their rights on public streets.⁶⁸ A student's Fourth Amendment right to be free from unreasonable searches and seizures, preserved through a lower standard of reasonableness, is tested when a student is required to pass through metal detectors and x-

⁶⁵ See, e.g., Cynthia Burton, *Hot Senate Race Attracting Heavies*, PHILADELPHIA INQUIRER, Oct. 24, 2006 (discussing candidates who proposed mandatory criminal background checks for school volunteers and contractors, more funding for security plans, and increased after-school, mentoring, and job training programs).

⁶⁶ See *Your World With Neil Cavuto: Interview With Oklahoma Superintendent of Schools Candidate* (Fox News Network television broadcast Oct. 24, 2006) (explaining a candidate's theory that textbooks should be used to stop school shooters' bullets); *Wisconsin Lawmaker Urges Arming Teachers*, ASSOCIATED PRESS, Oct. 5, 2006 (suggesting that lawmakers should pass bills to arm and train teachers with guns to prevent shootings).

⁶⁷ See Bill Dedman, *Does Every School Need a Metal Detector? Experts Say Schools Rely Too Much on Physical Security*, MSNBC.COM, Oct. 3, 2006, at 3, <http://www.msnbc.msn.com/id/15111439/> [hereinafter Dedman, *Every School*] (noting that the worst school attack occurred in 1927 when a 45-year-old male killed 45 people, including 38 children, in Michigan).

⁶⁸ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.")

ray machines upon entering school.⁶⁹ Schools that require every student to pass through metal detectors or place their belongings on x-ray screeners to enter the building infringe on students' privacy rights because students have a reasonable expectation of privacy in the things they do not expose to the public.⁷⁰ Students retain a legitimate expectation of privacy in personal items, such as condoms, tampons, and certain medications, that they conceal on their person or in their bags because it is within their subjective expectation of privacy, an expectation that society accepts as reasonable.⁷¹

Despite the Court's holding in *Earls*,⁷² metal detector and x-ray screener searches are more expansive searches than the previously upheld urinalysis testing because they are not limited to students who voluntarily participate in extracurricular activities and have already subjected themselves to additional intrusions on their privacy. But rather, these metal detector searches are mandatory for all students in the general student body absent individualized suspicion and despite any voluntary consent.⁷³

1. Students, Unlike Prisoners, Retain Privacy Interests

Critics suggest that students are left feeling less civically inspired and likened to incarcerated individuals when schools teach students about their constitutional rights and liberties while infringing on them.⁷⁴ However, students and schools are not equated with

⁶⁹ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (articulating the reasonableness of a school search requires a balancing of interests: the individual's legitimate privacy expectations and personal security, against the school's need to effectively deal with breaches of public order).

⁷⁰ Cf. *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (upholding warrantless searches of trash because there is no expectation of privacy in items held out to the public or that have been discarded).

⁷¹ See *T.L.O.*, 469 U.S. at 339 (rejecting the notion that students waive all of their privacy rights in items merely by bringing them onto school grounds because they may need to carry with them a variety of legitimate, noncontraband items); see also Cordero, *supra* note 64, at 305 (advocating that students need to have the freedom to bring personal items to school without constant fear that school officials will search them).

⁷² See *Earls*, 536 U.S. at 831 (finding that conducting urinalysis drug testing on students participating in non-athletic extracurricular activities was a valid search).

⁷³ See, e.g., *Spring Independent School District: Technology*, SPRING INDEPENDENT SCHOOL DISTRICT, available at <http://www.springisd.org/default.aspx?name=suppserv.pd.tech> (last visited Oct. 26, 2007) ("Random metal detector screening is conducted at least twice weekly at all secondary schools to help reduce the presence of weapons or other contraband on the campuses."); see also Myrna G. Baskin & Laura M. Thomas, Note, *School Metal Detector Searches And the Fourth Amendment: An Empirical Study*, 19 U. MICH. J. L. REFORM 1037, 1057 (1986) (asserting that blanket student body searches without a particularized suspicion that the students possess weapons or contraband is precisely the type of privacy intrusion that the Fourth Amendment guards against).

⁷⁴ See David Schimmel, *Legal Miseducation? The Bill of Rights and the School Curriculum*, RUTHERFORD

prisoners and prisons, and students retain a legitimate privacy interest in the bags they bring with them to school.⁷⁵ Unlike prisoners, who do not retain legitimate expectations of privacy in their cells after they have been convicted and imprisoned, public school students are entitled to have some privacy in their personal belongings.⁷⁶ Because students are not prisoners, limited searches substantially invade students' privacy interests,⁷⁷ even taking into consideration a school's custodial responsibility and authority.⁷⁸

Just as the *T.L.O.* Court recognized that searches of closed personal belongings are intrusions on protected Fourth Amendment privacy interests,⁷⁹ searching students' closed personal belongings upon entering a building, even in a school setting, is undeniably a significant violation of their subjective expectations of privacy.⁸⁰ The Court dismissed the government's argument that children have no legitimate need to bring personal items into school, citing that students must bring keys, money, personal hygiene and grooming items, as well as school supplies.⁸¹

When school officials also require students to place their belongings on x-ray machines prior to school entry, they are unreasonably stripping students of their privacy

INST., Dec. 20, 2002, *available at* http://www.rutherford.org/articles_db/legal_features.asp?article_id=29 (explaining that students may feel "victimized by school authorities and alienated towards [the] law, and they are likely to become passive, nonvoting citizens" because of "the way schools develop, interpret, and apply school rules," which are "taught in an authoritarian manner and seems to hypocritically contradict what students learn about constitutional rights in the classroom"); *see also High School Student Makes "Inmate" Shirts*, WWAY NEWSCHANNEL 3, Oct. 12, 2007, http://www.wwaytv3.com/high_school_student_makes_inmate_shirts/10/2007 (reporting on a student who responded to a new school policy by making t-shirts for her classmates with the word "inmate" on the front and "Topsail High prison" on the back).

⁷⁵ See *T.L.O.*, 469 U.S. at 338-39 (holding that schools and prisons need not be equated because the level of difficulty in maintaining safety existing in prisons is absent in schools).

⁷⁶ See *id.* at 339 (distinguishing prisoners, who are criminally convicted, from students, who have compulsory school attendance); *see also Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 353 (8th Cir. 2004) (explaining that students should possess some "modicum of privacy," to the extent that the recognition of such privacy interests do not significantly interfere with the school's duty to maintain security and order).

⁷⁷ See *T.L.O.*, 469 U.S. at 337 (citing *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967), and noting that limited searches that invade one's subjective expectations of privacy infringe on one's privacy interests); *see also Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (explaining that "a search is a search").

⁷⁸ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 840 (2002) (discussing *in loco parentis*, stating that schools have the burden of providing meals, medical and psychological services in a safe and encouraging learning environment, because schools have a parental duty over students while students are in school).

⁷⁹ See *T.L.O.*, 469 U.S. at 337 (stating that the Fourth Amendment grants a privacy interest to the owner in every container he or she conceals).

⁸⁰ See *id.* at 337-38 (explaining a student's subjective privacy interests is no less than an adult's).

⁸¹ See *id.* at 339 (suggesting that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items").

rights in what they bring with them to school.⁸² As each item passes through the x-ray screener, a school official or security officer working under the school's direction watches the machine to ensure that students are not bringing weapons or drugs into the school.⁸³ But as these school officials look through students' belongings, they see additional highly personal non-contraband and non-disruptive items that students may wish to carry, such as letters, diaries, and photographs, and this infringes on the students' reasonable expectations of privacy because, just as the *Tinker* Court stated, students do not relinquish their rights when they walk through a school entrance.⁸⁴

2. Prior Notice Alone Does Not Reduce Privacy Expectations

If students knew of the search prior to being subjected to it, this would not change the fact that they are coerced into such searches because they are required to attend school or face disciplinary action for their absence.⁸⁵ When school officials conduct weapons screenings, students and parents typically do have prior notice that students will be subject to metal detector and x-ray machine searches.⁸⁶ While mere school attendance does not implicate a lowered expectation of privacy, students are provided notice not only by receiving a student handbook or attending district meetings informing them of the additional security methods, but also by observing classmates pass through these machines every day.⁸⁷ Yet,

⁸² Compare Students: Search & Seizure, New York City Department of Education, Regulation of the Chancellor, No. A-432, Sept. 13, 2005, <http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A432.pdf> (discussing how each student parcel will be scanned using an x-ray baggage screeners like those used in airports), with *T.L.O.*, 469 U.S. at 337-39 (stating that the search of a student's closed bag is "undoubtedly a severe violation of subjective expectations of privacy").

⁸³ See Capt. Keith Williams, Remarks to American University Marshall-Brennan Fellows (Nov. 15, 2006) (explaining that the Metropolitan Police Department works with the school administration to effectively detect contraband using security equipment and detailing the process used in District of Columbia Public Schools).

⁸⁴ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students do not "shed their constitutional rights . . . at the schoolhouse gate").

⁸⁵ See, e.g., CAL. EDUC. CODE §§ 48260, 48293 (2007) (stating that students who fail to comply with the compulsory education requirement without a valid excuse are considered truant and face penalty).

⁸⁶ See, e.g., DCPS School Safety Advisory, District of Columbia Public Schools, *available at* www.k12.dc.us/DCPS/emergency/emergprephome.html (last visited Oct. 27, 2006) (informing parents and guardians of the city's policy to use metal detectors at each school entrance as a safety and security measure).

⁸⁷ See *In the Interest of F.B.*, 726 A.2d 361, 366 (Pa. 1999) (finding that the student's expectation of privacy is minimal because the students and parents had prior notice of such searches, through manuals, postings, and notices mailed home).

mere notice is not sufficient to cure an overly intrusive search.⁸⁸ To pass constitutional muster, a court must also find that the search is not overly intrusive, in addition to finding that the students' privacy interests do not overcome the government's important interest in protecting student safety when applying the *Earls* Court's balancing test.⁸⁹

B. X-ray Screener Searches are Overly Intrusive on Students' Legitimate Privacy Interests

Even though students' privacy interests in walking through a metal detector or placing their belongings on an x-ray screener may seem minimal, the degree of intrusion is actually greater than requiring students to take drug tests, because the urinalysis tests are conducted in private, restrict in the content reveals, and limited to testing human waste.⁹⁰ Even though one can argue that tests of bodily fluid are more intrusive than a search of someone's person or something outside of the body, searches of students' bags are actually more intrusive because of (1) the manner in which the search is conducted, (2) the contents revealed by the search, and (3) the type of items searched. A urine sample is produced alone in the bathroom, the search is limited to detecting contraband, and the bodily fluid tested in urinalysis tests is equivalent to abandoned trash. To the contrary, x-ray screeners allow for searches of a student's belongings in a very public manner, which may reveal highly personal items, and the bags searched provides access to items the student intends to keep private.

First, while urinalysis tests are produced in the privacy of a bathroom stall, metal detector and x-ray screener searches are performed in a public hallway.⁹¹ Walk-through metal detectors, which are equivalent to walking through a doorway, are significantly less intrusive because the search does not require the students to unveil all the items they

⁸⁸ See *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352-53 (8th Cir. 2004) (overturning the district court's holding that notice was sufficient to overcome the students' presumptively legitimate privacy interests, when administrators rummaged through their belongings, because full-scale suspicionless searches eliminate virtually all of the students' privacy in their belongings and special circumstances to justify such an invasive intrusion failed to exist).

⁸⁹ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 832, 834 (2002) (considering the character of the intrusion imposed by the policy, as well as the nature and immediacy of the school's concern, when determining if the search is reasonable).

⁹⁰ See *id.* at 832-33 (explaining that the Court considers how the student produced the sample and whether the process was exposed to other students in determining the character of the intrusion).

⁹¹ Compare *id.* (explaining that the drug testing occurs behind a closed stall of an empty bathroom), with *In the Interest of F.B.*, 726 A.2d at 363 (detailing that weapons searches at entry points are conducted in crowded hallways in front of fellow students).

maintain on their person.⁹² Only if a student sets off the machine, he or she may then have to empty his or her pockets, removing metal objects from his or her person.⁹³ Security personnel may run hand-held metal detector wands, which are used more often than walk-through detectors because they are less expensive, over areas that the student holds private and personal, and thus are more intrusive than walk-through metal detectors.⁹⁴ Most intrusive, however, is an x-ray search of a student's belongings because the nature of the search permits officers and sometimes other students to automatically see the private contents of a student's bag in a public hallway, visible to the entire student body.⁹⁵

Second, even though urine tests ordinarily can reveal private information, school urine tests are limited to detecting contraband in which students do not have a reasonable expectation of privacy.⁹⁶ Metal detector searches are not intrusive because they are also targeted searches intended to reveal metal objects that students should not conceal in school.⁹⁷ Some proponents of metal detector searches equate the level of intrusiveness regarding walk-in metal detectors to canine sniffs.⁹⁸ Like the *Place* Court's finding that canine sniffs are not intrusive because they are limited to detecting illegal substances in which people have no expectation of privacy, metal detector searches are not intrusive because they are limited to revealing metal items in which students do not have a privacy interest in

⁹² See *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 886 (1998) (noting that students were only required to reveal the contents of their pockets if they set off the metal detector).

⁹³ See *id.*

⁹⁴ See *Schneider*, *supra* note 3 (stating that metal detector wands are more cost-effective, as they are significantly cheaper than standing metal detectors); *cf.* *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968) (explaining that an officer's careful exploration of all of the outer surfaces of a one's body to find weapons, as one stands helpless, is a serious intrusion that may cause embarrassment).

⁹⁵ See *In the Interest of F.B.*, 726 A.2d at 363 (noting that other students may see the search as it is conducted).

⁹⁶ See, e.g., *Earls*, 536 U.S. at 826, 838 (explaining tests were limited in detecting illegal drugs); see also *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that there is no legitimate expectation of privacy in illegal items).

⁹⁷ See *In re Latasha W.*, 70 Cal. Rptr. 2d at 887 (upholding a metal detector search because it was a limited, permissible, intrusion, as students were not physically touched during the search); see also *Place*, 462 U.S. at 707 (explaining that canine sniffs are not considered searches because they only reveal contraband that adults are not entitled to possess).

⁹⁸ See Ronald Susswein, *The New Jersey School Search Policy Manual: Striking The Balance Of Students' Rights of Privacy And Security After the Columbine Tragedy*, 34 NEW ENG. L. REV. 527, 556 (2000) (stating that the Pennsylvania Supreme Court implicitly found that canine sniffs are more intrusive than metal detectors searches by requiring particularized suspicion before allowing the use of drug dogs in *In the Interest of F.B.*).

carrying to school.⁹⁹ If students set off the metal detectors and thus provide reasonable suspicion, then they may be required to take off their belts and empty their pockets. While canine sniffs and metal detectors are searches that are significantly limited in the contents they can reveal, x-ray screeners detect a much wider array of contents and items without individualized suspicion, which is even more intrusive and unconstitutionally impedes on students' privacy rights.¹⁰⁰

While metal detectors are designed to only reveal items that will conduct an electrical current and focus on metal objects that students should not possess in school, x-ray machines are not narrowly tailored and allow school officials to view all of the contents of a student's bag, instead of just metal contraband.¹⁰¹ Even though metal detectors sometimes pick up metal belts, watches, and/or jewelry, which are permitted in schools, many times security personnel dismiss these items as objects that commonly set off the metal detector, and then allow students into the school without a further search. Other times, students must remove the metal items that are setting off the machine, but can enter the school without a significant intrusion on the students' privacy.

Searches conducted with x-ray machines automatically reveal the contents of the students' bags and are not narrowly tailored to detecting illegal drugs or metal objects. X-ray machines allow officials to invade the students' legitimate privacy interests because they are suspicionless searches of personal items, potentially revealing letters, diaries, and photographs, an expectation that society accepts as reasonable.¹⁰² These machines are not

⁹⁹ See *Place*, 462 U.S. at 707 (holding that canine sniffs are not considered searches because they are limited in both the manner that the information is obtained and in the content revealed).

¹⁰⁰ See *United States v. Henry*, 615 F.2d 1223, 1227 (9th Cir. 1980) (explaining that the x-ray scan is more intrusive than a metal detector search because it automatically reveals items that the owner has chosen to conceal from public view).

¹⁰¹ Compare Daniel Morgan, *Aviation Security Technologies and Procedures: Screening Passengers and Baggage*, CRS REPORT FOR CONGRESS, Oct. 26, 2001, http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31151_10262001.pdf (discussing how bags are screened and an image of the bag's contents are displayed where nonmetallic and metallic objects are visible to the screener), with Mary W. Green, *The Appropriate and Effective Use of Security Technologies in U.S. Schools: A Guide for Schools and Law Enforcement Agencies*, NAT'L INST. OF JUSTICE, Sept. 1999, at ch.3, http://www.ncjrs.gov/school/ch3a_2.html (detailing how metal detectors create a magnetic field to detect any conductive material).

¹⁰² Cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (upholding students' privacy interests in the items they carry to school); *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352 (8th Cir. 2004) (invalidating a

even limited searches of students' belongings, but rather, these searches are automatic snapshots into the students' lives and bags, where students may conceal several non-disruptive and highly personal items, such as tampons, condoms, or birth control, in which students hold a subjective expectation of privacy.¹⁰³ Further, if something looks suspicious in a student's bag, the administrator then has the authority to rummage through the student's entire bag to look for the suspect item in front of any and all students present.¹⁰⁴

Third, when schools implement drug testing, they are conducting tests on urine, which is bodily waste that the student flushes down the toilet.¹⁰⁵ The urine tested is not saved, but abandoned, discarded as waste in public restrooms, which is distinct from the very private information contained in students' bags, which students intend to keep.¹⁰⁶ Not only are students keeping the items in their bags, but they are not holding their private items out for public viewing either; therefore, x-ray screener searches are unlimited searches revealing private information in a very public way.

While a search is not barred merely because less intrusive means exist than those actually utilized, applying the Supreme Court's balancing test articulated in *Earls*, a search that is overly intrusive and impedes on students' legitimate constitutional protections may be held unconstitutional.¹⁰⁷ Students maintain a legitimate expectation of privacy in many items they bring to school and the Supreme Court has upheld students' legitimate privacy rights under the Fourth Amendment in public schools.¹⁰⁸ X-ray screener searches violate a

search that eliminated the students' privacy interests in the personal items they brought with them to school).

¹⁰³ See *T.L.O.*, 469 U.S. at 339 (acknowledging that students may carry highly personal items, including photographs, letters, diaries, and personal hygiene and grooming products, with them to school).

¹⁰⁴ See *People v. Dukes*, 580 N.Y.S.2d 850, 851 (N.Y. Crim. Ct. 1992) (explaining that the officer asks the student to open the container or bag so the officer can search the parcel further for weapons only after the student's bag appears to have a suspicious item in it).

¹⁰⁵ Cf. *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (upholding warrantless searches of trash left at the curb because society is not prepared to accept an expectation of privacy in trash).

¹⁰⁶ See *Vernonia School District 47J v. Acton*, 515 U.S. 646, 658 (1995) (explaining that even though urinalysis samples intrude on a bodily function, which is typically protected, the search here was a minimal intrusion because the samples were obtained through a means nearly identical to those followed when using a public restroom).

¹⁰⁷ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) (suggesting that requiring schools to use only the least restrictive means to conduct searches is not a realistic proposition because it conflicts with the flexibility administrators and teachers need to maintain order and discipline).

¹⁰⁸ See *T.L.O.*, 469 U.S. at 338 (dismissing the school's argument that students have virtually no

student's Fourth Amendment privacy rights under the *T.L.O.* Court's reasonableness test because they are even more intrusive than urinalysis tests and metal detectors; such blanket searches automatically reveal the contents of items in which students have a significant privacy interest, as they pass through the x-ray machine.¹⁰⁹

1. Students Do Not Voluntarily Attend School nor Voluntarily Subject Themselves to Such Searches

The voluntariness of the search may weigh in as a factor on the intrusiveness of the search.¹¹⁰ While students are not required to participate in extracurricular activities, students are required to attend school.¹¹¹ Students who elect to participate in school sports or club organizations do so voluntarily, and, therefore, subject themselves to diminished expectations of privacy and more intrusive searches as a pre-condition to participate.¹¹² In *Earls*, the Court upheld random suspicionless drug tests targeting only this self-selected portion of the student body.¹¹³ But much like Justice Ginsburg's finding that the general student body did not consent to additional rules, regulations, and requirements, the general student body does not consent to attend school or submit to x-ray screener searches in order to meet compulsory education requirements.¹¹⁴ Students do not elect to attend school; instead, if they fail to attend, they are subject to state discipline or truancy charges.¹¹⁵

legitimate expectations of privacy and privacy interests in the items they carry to school).

¹⁰⁹ See *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352-53 (8th Cir. 2004) (invalidating a full-scale suspicionless search because it eliminated students' presumptively legitimate privacy interests in their belongings).

¹¹⁰ See *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring) (noting that the Court's opinion applies only to searches when the students voluntarily participate in the activity requiring the search and not to all students required to attend school who would have no choice to opt out).

¹¹¹ See, e.g., 24 PA. STAT. ANN. § 13-1333 (2007) (providing compulsory education requirements that require students to attend school because, if they fail to, they face penalties for breaking the law).

¹¹² See *Earls*, 536 U.S. at 831-33 (noting that students accept diminished privacy rights by voluntarily participation in extracurricular activities); *Vernonia*, 515 U.S. at 657 (stating that students voluntarily choose to "go out" for the team).

¹¹³ See *Earls*, 536 U.S. at 831 (discussing that when students decide to participate in extracurricular activities they abide by additional rules and accept diminished privacy interests).

¹¹⁴ See *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring) (explaining that the Court's decision was limited to students who voluntarily participated on athletic teams and the Court did not consider the constitutionality of random searches of all students required to attend school).

¹¹⁵ See, e.g., 24 PA. STAT. ANN. § 13-1333 (stating compulsory education requirements and that failure to comply with the law can lead to fines for the student or their parents); see also Press Release, The School District of Philadelphia, City Launches Anti-Truancy Effort (Nov. 15, 2006), available at http://www.phila.k12.pa.us/offices/communications/press_releases/2006/11/15/truancy.html (discussing the district's plan to reduce students' unexcused absences from school by holding parents accountable

Although the Court has upheld similarly intrusive metal detector and x-ray machine searches to enter federal buildings and board airplanes, adults choose to access these places;¹¹⁶ students compelled to attend school are unlike freely-consenting adults. Students do not voluntarily choose to enter and attend school, but rather they are forced to attend and then they are coerced into submitting to metal detector and x-ray screener searches to enter the building while the school strips them of their legitimate privacy interests.¹¹⁷ Metal detector opponents may argue that courthouses also improperly require entrants to pass through detectors and submit to searches, because not all individuals who enter courthouses enter them on a voluntary basis; some jurors, witnesses, and defendants are subpoenaed and may face penal charges if they fail to appear.¹¹⁸ However, these individuals, who feel coerced to go to court, may elect not to bring anything with them into the courthouse and thus they can protect their belongings from any x-ray screener search. While adults can enter a federal building with just a wallet in their pocket and need not bring anything more, students are required to bring books and other items, which are difficult to carry without a bag. Students are also dissimilar to individuals who choose to fly on airplanes, enter federal buildings, or work in customs enforcement,¹¹⁹ because the general student body is not comprised of students who are freely and voluntarily consenting to attend school or engage in activities

through parent education).

¹¹⁶ See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (citing *United States v. Edwards*, 498 F.2d 296, 500 (2d Cir. 1974) to emphasize the constitutionality of metal detector searches in airports because individuals enter the airport on a voluntary basis and can just as easily elect not to fly if they wish to protect their Fourth Amendment privacy rights).

¹¹⁷ See, e.g., *The Code of Student Conduct: Your Rights and Responsibilities*, HOUSTON INDEPENDENT SCHOOL DISTRICT, 2005-06, at 7-8, available at <http://www.houstonisd.org/2301/images/CodeEngportal.pdf> (detailing that any student who refuses to cooperate in, or inters with, a random metal detector search may be suspended for three days, and if the student persists with such behavior the student may be placed in a Disciplinary Alternative Education Program).

¹¹⁸ See Susswein, *supra* note 98, at 555 (insisting that many adults are actually required to submit to metal detector searches at courthouses because they have been subpoenaed and face arrest or punishment for failing to appear).

¹¹⁹ *Cf. Von Raab*, 489 U.S. at 675 n.3 (upholding the drug testing of all Customs Service employees who were directly involved in drug interdiction and required to carry a firearm). The Court equated the government's compelling interest in ensuring that employees, who are directly involved in such activities, did not engage in drug use to the government's legitimate need to conduct searches in airports without individualized suspicion. *Id.* The Court determined that the searches were valid because the employees chose to engage in this profession, accepting diminished privacy rights. *Id.*

that require diminished privacy expectations.¹²⁰ Furthermore, as the Court in *T.L.O.* indicates, the situation of maintaining safety in schools is not so dire that students may claim no legitimate expectation of privacy; schools can still provide discipline and safety in the classroom.¹²¹

2. The Unreasonableness of the Search is Further Evident by the Fact That Students with Weapons Face Suspension or Expulsion, Which is Much More Severe Than Previously Accepted Searches

Taking the severity of the consequences of x-ray screener searches in conjunction with the highly intrusive manner in which these searches are conducted further emphasizes the unconstitutionality of such searches.¹²² In metal detector and x-ray screener cases, students face suspension and criminal charges unlike the students in *Earls*, who only faced limited privileges in extracurricular activity participation if they failed the drug tests.¹²³ Where students face severe penalties, including suspension from school, rather than limited penalties of prohibition from participating in voluntary extracurricular activities, the degree of

¹²⁰ Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring) (noting that the decision on the school's drug-testing policy applies only to students who voluntarily participate on athletics teams and does not assess the constitutionality of random drug tests of all students required to attend school, who did not submit to diminished privacy rights).

¹²¹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (distinguishing schools from prisons and finding that students should have some freedom to bring personal belongings into school without constant fear that school officials will be looking through their things); Bill Dedman, *10 Myths About School Shootings*, MSNBC.COM, Oct. 10, 2007, <http://www.msnbc.msn.com/id/15111438/> (explaining that school violence is not rampant, but rather extremely rare and school assaults and other violence have dropped by nearly half in the past decade); see also Crystal A. Garcia & Sheila Sues Kennedy, *Back To School: Technology, School Safety And The Disappearing Fourth Amendment*, 12 KAN. J.L. & PUB. POL'Y 273, 273 n.1 (2003) (discussing that schools today are at least as safe as they were in the 1970s; for example, in 1968 there were twenty-six homicides on school campuses while there were only eleven during the 1999-2000 school year); Jill F. DeVoe et al., *Indicators of School Crime and Safety: 2006*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., Oct. 2003, at 2, 30, available at <http://nces.ed.gov/pubs2004/2004004.pdf> (concluding that the violent crime victimization rate at school declined from forty-eight to twenty-eight per 1,000 students in school in 1992 and 2001, respectively; noting that in all survey years from 1993 to 2001, only between seven and nine percent of students reported being threatened or injured with a weapon on school property; and, finding that in each school year from 1992 to 2000, students, ages five to nineteen, were at least seventy times more likely to be murdered away from school than at school).

¹²² See *Bd. of Educ. v. Earls*, 536 U.S. 822, 833-34 (2002) (emphasizing the reasonableness of the suspicionless drug testing because failing the test did not result in academic or criminal consequences).

¹²³ Compare *In the Interest of F.B.*, 726 A.2d 361, 363 (Pa. 1999) (concerning a student who was arrested for bringing a weapon on school property), and *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 886 (1998) (involving a student who was charged with a crime of bringing a knife on school grounds after a metal detector search revealed she was hiding a knife), with *Earls*, 536 U.S. at 833-34 (limiting the consequences of failing a drug test to restrictions on extracurricular participation), and *Vernonia*, 515 U.S. at 658 (confining the consequences of producing a positive drug test to limited athletic participation).

intrusion is much greater.¹²⁴ In both *Earls* and *Vernonia*, the Supreme Court noted that the punishment imposed on students for failing the suspicionless drug tests were neither academic nor criminal.¹²⁵

Because metal detector searches are limited in the metal contents that they reveal, these searches lead to discovery of a narrow group of contraband, namely guns and knives, for which students face punishment.¹²⁶ X-ray searches, however, expose a more expansive group of items for which students may possess and face punishment, including cigarettes, fireworks, or pipes; items that would not be picked up during a metal detector search and may not even be illegal per se, but are banned by the school.¹²⁷ Furthermore, x-ray screener searches arguably fall outside of the realm of special needs searches because one of the primary purposes of these weapons searches is for law enforcement prosecution, which is evident by the penalties executed.¹²⁸ With the assistance of lawmakers, school administrators and officers have disregarded the Court's ruling and established overarching laws to protect students, at the expense of constitutional protections, even though the Court has previously held that there is no affirmative government duty to protect citizens.¹²⁹ This is not to say that school officials should abandon any duty to protect students or should not implement effective and constitutional procedures to keep students and teachers safe. But as they currently stand, these overly intrusive searches result in severe repercussions if students are caught with banned items, and are coercive and unreasonable under the Court's

¹²⁴ See Alicia C. Insley, *Suspending And Expelling Children From Educational Opportunity: Time To Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1064 (2001) (explaining that suspended and expelled students typically fall behind in school because they fail to receive assignments, receive little or no credit for their work, and are more likely to drop out of school).

¹²⁵ See *Earls*, 536 U.S. at 833-34 (finding the suspicionless testing reasonable because failing the test only led to limited privileges in extracurricular activity); *Vernonia*, 515 U.S. at 652 (upholding the constitutionality of the suspicionless drug testing of the athletes because the consequences of failing were only non-academic and, at most, restricted participation on the athletic teams).

¹²⁶ See Green, *supra* note 101, at ch.3 (explaining how metal detector searches are narrowly administered because they are limited to locating items that conduct an electrical current).

¹²⁷ See Bruce Schneier, *Failures of Airport Security*, SCHNEIER ON SEC., <http://schneier.com/blog> (Apr. 20, 2005, 9:22 PST) (explaining how x-ray machine operators have trouble distinguishing contraband and often mistake non-contraband items from permissible ones).

¹²⁸ *Cf. Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (testing pregnant patients for drug abuse were not considered special needs searches because the purpose of the search was based primarily on law enforcement prosecution).

¹²⁹ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (holding that the government does not have a constitutional duty to guard or protect children).

previously articulated standard, in spite of the school's custodial and tutelary responsibility.¹³⁰

Applying the *Earls* balancing test, the students have a significant privacy interest and the degree of intrusion is more than minimal, and while the nature and the immediacy of the schools' concerns of maintaining safety for all students is greater when schools use metal detectors, that concern is insufficient to overcome student's legitimate privacy interests when schools use overly intrusive x-ray machines.¹³¹

C. The Government's Interest in Protecting the Entire Student Body from Violence Justifies Conducting Metal Detector Searches, but the Government's Legitimate Interest Does Not Justify Using X-ray Screeners.

When administrators use targeted searches with individualized suspicion or metal detectors to conduct weapons searches, the students' interests in learning and school administrators' interests in maintaining safe schools outweigh the *minimal* intrusions on individual students' privacy interests.¹³² Fearing that their schools will be the next Columbine after the recent string of high school shootings in Wisconsin,¹³³ Colorado,¹³⁴ Pennsylvania,¹³⁵ and Ohio,¹³⁶ school administrators have established a legitimate interest in protecting student

¹³⁰ See *Earls*, 536 U.S. at 845 (discussing that even with a school's role as a guardian, a fact-specific balancing test that includes the intrusion on students' legitimate privacy interests and the severity of the punishment must be conducted to determine the search's reasonableness).

¹³¹ See *id.* at 834 (weighing the school's need to provide safety against the students' individual privacy interests to determine the constitutionality of urinalysis drug tests under the special needs reasonableness test applied in schools).

¹³² See *id.* (explaining that if the school's reasonable search of the students is conducted for the purpose of an important government interest, is an effective search, and is not overly intrusive, then it passes constitutional muster).

¹³³ See *Wisconsin Principal Dies After School Shooting*, USATODAY.COM, Sept. 30, 2006, http://www.usatoday.com/news/nation/2006-09-29-principal-shot_x.htm (announcing that a student shot and killed his principal after complaining that other students teased him and receiving a disciplinary warning from the principal for having tobacco); Posting of Jeffrey Broderson to Prevention Works, http://ncpc.typepad.com/prevention_works_blog/ (Nov. 16, 2006, 13:03 EST) (discussing that schools need the help of parents and students to ensure school safety, evident by the recent violent crimes occurring in schools).

¹³⁴ See *5th Girl Dies After Amish School Shooting: Shooter Took His Own Life; 5 More Victims Still in Critical Condition*, MSNBC.COM, Oct. 3, 2006, <http://www.msnbc.msn.com/id/15105305> (reporting on the execution-style deaths of five Amish schoolchildren in Pennsylvania).

¹³⁵ See *Details from Col. School Shooting Emerge: 53-year-old Shooter's Attack Was 'Sexual in Nature,' Sheriff Says*, MSNBC.COM, Sept. 28, 2006, <http://www.msnbc.msn.com/id/15041037> (discussing the 2006 Colorado school shooting that led to Emily Keyes' death after text messaging "I love you guys" to her family).

¹³⁶ See *Police: Suspended Boy Shoots 4 at Ohio School, 14-year-old Suspect Apparently Killed Himself After Attack, Police Say*, MSNBC.COM, Oct. 10, 2007, <http://www.msnbc.msn.com/id/21224357/> (noting

safety,¹³⁷ an interest important enough to justify metal detector searches. School administrators have an important, legitimate, and compelling interest to address school violence, and courts have appropriately emphasized this important interest while supporting school administrators.¹³⁸

For example, the Sixth Circuit Court of Appeals wrote that it imagined few governmental interests more important to a community than ensuring the safety and security of its children as they are entrusted to teachers and administrators for care¹³⁹ and the Pennsylvania Supreme Court stated that there was no logical argument to oppose a school board's decision to prohibit anyone from entering a school while possessing weapons.¹⁴⁰ Recognizing this overwhelming interest and the importance of student safety in schools, the California legislature amended the state constitution in 1982 to include a state constitutional right for students to attend safe schools.¹⁴¹

Just as the *Earls* Court further stated that it would be in poor judgment to require the school to wait for a substantial number of students to begin using drugs before taking action to deter drug use, it seems even more absurd to wait for students to display uncontrollable violence and jeopardize student health and safety before allowing school administrators to begin deterring such problems.¹⁴² While some schools may not have a documented problem of school violence, the Supreme Court upheld these special needs searches on a purely

that the SuccessTech Academy student who shot two students and two teachers before he killed himself made threats in front of students and teachers the week before).

¹³⁷ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (weighing the school's legitimate interest in providing safety and the search's efficacy to determine if the school's interest is important enough to justify the search).

¹³⁸ See, e.g., *State v. J.A.*, 679 So. 2d 316, 320 (Fla. Dist. Ct. App. 1996) (upholding the school's interest in safety because judges cannot ignore the alarming proportions of school violence).

¹³⁹ See *Knox County Educ. Assoc. v. Knox County Bd. of Educ.*, 158 F.3d 361, 374-75 (6th Cir. 1998) (explaining that teachers are responsible for ensuring student safety because they stand in place of the students' parents and guardians during school hours and at school-related events).

¹⁴⁰ See *In the Interest of F.B.*, 726 A.2d 361, 367 (Pa. 1999) (finding that weapons have no place in public schools and searching for them comports with the duty and responsibility of administrators to eliminate violence and ensure safety).

¹⁴¹ See, e.g., CAL. CONST., art. I, § 28(c) (stating that there is an inalienable right for public school students to attend campuses that are safe, secure, and peaceful).

¹⁴² See *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002) (advancing the necessity and immediacy for schools to act promptly because it would be too difficult to create, as well as administer, a test that required schools to demonstrate a drug problem, forcing schools to wait for a sufficient number of those subject to testing to be drug users before testing could begin).

preventative basis, without requiring a documented history of a problem.¹⁴³ The fact that there is a nationwide problem of school violence surmounts a requirement for the specific school to demonstrate a sufficient nexus between the students subjected to the suspicionless metal detector searches of students for weapons and those schools with a history of violence.¹⁴⁴

1. Because the Magnitude of Potential Harm is Significant, *Limited* Privacy Intrusions are Justified

The magnitude of the potential harm, should the school fail to detect the item searched for, is also an important factor in analyzing the constitutionality of metal detector and x-ray screener searches when applying the Supreme Court's balancing test.¹⁴⁵ The failure to prevent a gun or other dangerous weapons from entering a school may lead to disastrous consequences, including physical injuries and deaths, and also distracts students from learning because they fear for their own safety.¹⁴⁶

As the Court noted in *T.L.O.*, school administrators must be allowed flexibility when implementing policy decisions to maintain security and order directly affecting their students.¹⁴⁷ It is imperative, however, to follow the *Doe* court's lead and prevent a nation in fear to allow school officials to sift through concealed items in students' backpacks and unnecessarily infringe on student rights.¹⁴⁸

2. Although the Magnitude of the Potential Harm is Great, Because

¹⁴³ See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 673 (1989) (upholding suspicionless drug testing despite any recorded drug problem among the U.S. Customs employees subject to testing).

¹⁴⁴ See *Earls*, 536 U.S. at 838 (rejecting a test that requires schools to show that there is a drug abuse problem among a significant number of those subject to the testing so long as the search is constitutional, taking into consideration the public school's custodial responsibilities).

¹⁴⁵ See, e.g., *Knox County Educ. Assoc. v. Knox County Bd. of Educ.*, 158 F.3d 361, 376 (6th Cir. 1998) (observing that the balancing test must analyze the magnitude of harm that could result from failing to address the school's legitimate interest).

¹⁴⁶ See Michael A. Sprow, *The High Price of Safety: May Public Schools Institute a Policy of Frisking Students As They Enter The Building?*, 54 BAYLOR L. REV. 133, 163 (2002) (explaining that students will experience a decreased ability to focus on learning because of students' concerns that they may suffer harm or physical injuries).

¹⁴⁷ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1986) (discussing the need for flexibility in disciplinary procedures to maintain security and order in schools because of the value of retaining an informal student-teacher relationship that would not exist if there was a formal courtroom-type proceeding each time a student violates school policy).

¹⁴⁸ See *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352 (8th Cir. 2004) (invalidating a school's full-scale suspicionless search of students' belongings because the search eliminated the students' privacy interests in the personal items they brought with them to school).

X-ray Machines are Not as Effective or Reliable as Metal Detectors, Their Use is Unconstitutional

Because the *Vernonia* Court found that suspicionless drug testing was reasonably implemented to deter student athletes from using drugs, conducting walk-through metal detector searches of all students before entering the school is a reasonable, effective, and narrowly-tailored way to address the government's need to keep weapons out of public schools.¹⁴⁹ When used properly, metal detectors effectively detect illegal weapons and lead to the confiscation of contraband items, preventing their entrance into public schools.¹⁵⁰

As Justice Ginsburg wrote in her dissent in *Earls* that the school's testing targeted the population least likely to be at risk for drug use,¹⁵¹ opponents of metal detector searches argue that there is no indication that metal detectors are effective or preventative because if a student is intent on killing someone in school, the individual will find a way to follow through and succeed.¹⁵² Furthermore, the deterrence value is arguably limited because most school shooters are first-time criminals.¹⁵³ However, regardless of whether a school shooter is a first-time criminal or long-time delinquent, metal detectors are successfully able to detect metal weapons hidden on students.¹⁵⁴ Because metal detectors produce an alarm signal whenever a questionable item passes through the machine and accurately detect the presence of most firearms and knives, their use is a reasonable means to curb school

¹⁴⁹ See *In the Interest of F.B.*, 726 A.2d 361, 366 (Pa. 1999) (explaining the importance of using walk-through metal detectors as they efficiently achieve the goal of keeping weapons out of schools and are less intrusive than metal-detector wands, which invade personal space of very private body parts).

¹⁵⁰ See Robert S. Johnson, *Metal Detector Searches: An Effective Means to Help Keep Weapons Out of Schools*, 29 J.L. & Educ. 197, 200 (2000) (discussing the New York City Board of Education's presentation of evidence of over 2000 weapons recovered in the 1990-1991 school year and Chicago school records showing more than 500 weapons confiscated from 1990-1995).

¹⁵¹ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 843-46 (2002) (Ginsburg, J., dissenting) (arguing for the unconstitutionality of school searches that involve the general student body when there is no history of drug use, concluding that the search in *Vernonia* was constitutional because it was limited to those students who were shown to have a documented history of drug abuse).

¹⁵² See Michael Ferraraccio, *Metal Detectors In The Public Schools: Fourth Amendment Concerns*, 28 J.L. & Educ. 209, 226 (1999) (suggesting that metal detectors cannot prevent all guns from entering schools, and shooters can hit targets outside of the school building).

¹⁵³ See Timothy L. Jacobs, *School Violence: An Incurable Social Ill That Should Not Lead To The Unconstitutional Compromise Of Students' Rights*, 38 Duq. L. Rev. 617, 653-54 (2000) (rejecting mandatory expulsion or suspension policies for weapon possession because the stringent penalties do little to deter school shooters).

¹⁵⁴ See Johnson, *supra* note 150, at 200 (explaining the effectiveness of weapons detectors because the U.S. Marshall Service has detected 350,000 weapons from 1987-1993 at federal courthouses alone).

violence and promote safety in schools.¹⁵⁵

Because school administrators cannot screen students as they dress for school and there is no way to learn if individual students have concealed guns or knives on their persons, metal detectors serve as a means to prevent weapons from entering schools through deterrence and confiscation.¹⁵⁶ Critics of metal detector searches contend that metal detector proponents rely on false perceptions of uncontrollable, widespread violence to justify their use, and metal detectors are just a band-aid approach to solving a nationwide problem of school violence.¹⁵⁷ These arguments, however, are not sufficient to overcome the constitutionality of their use because the school has a legitimate interest in preventing violence and these searches are limited intrusions on students' privacy interests, an intrusion that the *Earls* Court upheld.¹⁵⁸

If schools are required to wait until the weapons are displayed, it may be too late to prevent a tragedy.¹⁵⁹ When applying the *Earls* balancing test, the limited intrusions impeding on individual students' privacy rights weighed against the school's overwhelming immediate need to protect students from violence will result in favor of the constitutionality of metal detector searches.¹⁶⁰ Therefore, metal detectors are constitutional under the Court's Fourth

¹⁵⁵ See Green, *supra* note 101, at ch.3 (explaining that metal detectors work very well when the operator is properly trained because the metal detector locates anything that will conduct an electrical current by making an audible and/or visible signal); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (explaining that exceptions to the individualized suspicion requirement are appropriate only where the search implicates minimal privacy interests and other safeguards are present to ensure that the student's reasonable privacy expectation is not left to the officer's malleable discretion).

¹⁵⁶ Cf. *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 887 (1998) (finding that metal detector searches serve as an effective means of preventing students from concealing weapons on their person before attending school because there is no other less intrusive way to detect for weapons and keeping weapons out of schools).

¹⁵⁷ See Ferraraccio, *supra* note 152, at 227 (explaining that because guns are readily available in society, violence is merely brought into schools from the surrounding communities).

¹⁵⁸ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (articulating that the Court does not weigh in on the policy's wisdom, but rather holds that it is constitutional because the policy is reasonable to further its important interest of protecting students).

¹⁵⁹ See *In re Latasha W.*, 70 Cal. Rptr. 2d at 887 (rejecting a more suspicion-intense system because requiring reasonable suspicion would be ineffective when trying to ascertain those students concealing weapons).

¹⁶⁰ See *Earls*, 536 U.S. 830 (holding that the Court conducts a balancing test to determine the reasonableness of a school search because there is a legitimate school interest to provide student safety and a privacy right whose infringement must carefully be considered); *In re Latasha W.*, 70 Cal. Rptr. 2d at 886-87 (upholding the constitutionality of metal detector searches, as none of students were touched during the search and only had to reveal the contents of their pockets if they set off the metal detector).

Amendment reasonableness test because the government's interest in protecting the entire student body from violence is important, legitimate, and compelling.

But the government's interest in protecting students from violence is not so important, legitimate, or compelling that it permits stripping students of all their constitutional privacy rights in schools.¹⁶¹ Although the *Earls* Court explains the need to look at the effectiveness of the search to determine its reasonableness, it is difficult to do with x-ray screeners, as their effectiveness is less well-known because their use in public schools is much more recent and sporadic, due to their cost.¹⁶² Yet, because the use of x-ray screeners in schools is modeled after their use in airports, an examination of their success rates in airports may be an indication of their success rates in schools.¹⁶³ Unlike metal detectors, x-ray machines do not have an automatic metal sensor and the machines themselves cannot alert the operator that the parcel on the conveyor possesses contraband; instead, the x-ray machine relies on the operator to successfully detect weapons prior to the object's seizure.¹⁶⁴ The efficacy of an x-ray search is significantly lower because x-ray screener operators may easily err due to distractions by noisy students, improper use of the machine, non-contraband items, and pure human error.¹⁶⁵

Unlike metal detectors, x-ray machines are not failsafe and are only as good as their

¹⁶¹ See *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352 (8th Cir. 2004) (invalidating a suspicionless search of students' belongings because it stripped students of their privacy interests in all items they brought with them to school).

¹⁶² Compare Michael Fickes, *School Security in the Real World*, ACCESS CONTROL & SECURITY SYSTEMS INTEGRATION, Feb. 2001 (discussing that metal detectors and x-ray machines used in schools have been effective, with officers seizing approximately 400 assorted weapons a year; over the past three years, the program has virtually removed all guns from D.C.'s public schools), with *Teen Killed, Another Wounded at D.C. School Shooting*, CNN.COM, Feb. 2, 2004, <http://www.cnn.com/2004/US/South/02/02/school.shooting.ap/index.html> (reporting that one student was killed and another wounded in a shooting at a high school in D.C.'s public schools).

¹⁶³ See Schneier, *supra* note 127 (noting that no matter how much training airport screeners receive, they routinely fail to catch guns and knives packed in carry-on luggage); see also *Probe: Baggage Screeners Given Answers to Tests*, CNN.COM, Oct. 10, 2003, <http://www.cnn.com/2003/TRAVEL/10/09/airport.security.ap/index.html> (explaining that, upon hiring, perspective baggage screeners are given written tests and are never asked to show that they could identify dangerous objects inside luggage).

¹⁶⁴ See FirstLine Transportation Security, FIRSTLINE, http://www.firstlinets.com/job_security_scrn.htm (last visited Feb. 19, 2007) (emphasizing that the job requires screeners to identify dangerous objects and prevent them from being brought onto the airplane).

¹⁶⁵ See *id.* (discussing that security personnel face distractions, including people, noise, time pressure, and angry people, which affect their performance levels, and stressing the importance of identifying and locating deadly weapons).

operators.¹⁶⁶ While the *Vernonia* and *Earls* Courts permitted uniform random suspicionless drug tests of a portion of the student body, upon students' and parents' consent to participate in athletic and competitive non-athletic extracurricular activities, x-ray searches are the very essence of the searches prohibited under the students' Fourth Amendment rights because they are blanket searches of all students that provide for unlimited privacy intrusions on the items students bring with them to school.¹⁶⁷ Because students who are subject to x-ray machine searches are at the mercy of the officials in the field and they permit officials to view all of their personal and closed belongings, x-ray machine searches do not objectively address the harm.¹⁶⁸

Whereas metal detector searches are less subjective as the machine picks up all questionable items, x-ray machines allow for much more bias and abuse of the system because officials must make judgment calls based on experience and their opinion on what they see on the screen, ultimately allowing more targeted searches of "bad" kids.¹⁶⁹ Therefore, the government's interest in protecting the entire student body from violence is less important, legitimate, and compelling when schools use x-ray machines to conduct suspicionless searches of the entire student body. Weighing the students' legitimate privacy interests and the character of the intrusion when school's use x-ray screeners to conduct

¹⁶⁶ Compare Emily Chung, *Dogs vs. Machine, Nose to Nose*, TORONTO STAR, Aug. 7, 2005, at D1 (noting that the x-ray machine can only be as good as the officer operating it because the machine cannot detect weapons without an intelligent, well-trained person watching it), with Green, *supra* note 101, at ch.3 (explaining how metal detector devices on their own make audible or visible noises when questionable conductive material passes through the machine).

¹⁶⁷ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 844-45 (2002) (Ginsburg, J., dissenting) (distinguishing *Vernonia*, where the searches only targeted athletes because drugs create health risks, and did not permit invasive suspicionless testing of all students who attended school and reaffirming that students retain a reasonable subjective expectation of privacy in the personal items they bring with them to school); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring) (accepting a policy permitting searches when the students voluntarily participate in the activity requiring such a search or searches of individuals who choose to travel on airplanes only after submitting to a weapons search because they, unlike the general student body, chose this path); *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 352 (8th Cir. 2004) (invalidating full-scale suspicionless searches of students' bags because they stripped students of all their privacy interests in their belongings).

¹⁶⁸ See *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (explaining that exceptions to the individualized suspicion requirement are only appropriate where other safeguards are available to ensure that students' reasonable expectations of privacy are not subject to the field officer's discretion); cf. *Vernonia*, 515 U.S. at 651 (emphasizing that the tests were uniformly conducted by an independent laboratory and each sample was tested for identical drugs).

¹⁶⁹ Cf. *Vernonia*, 515 U.S. at 651 (noting the importance of *all* student athletes undergoing the same limited, anonymous testing at the laboratory).

searches, the government's interest is not important enough to strip students of the privacy interests in the personal items they bring with them to school.¹⁷⁰

IV. RECOMMENDATIONS

While x-ray screener searches are not constitutional in public high schools, in the face of fear, society would rather give up some of its civil liberties in exchange for some assurances of its safety.¹⁷¹ This, however, blatantly contradicts the very basis of our country's foundation.¹⁷² School violence and school shootings are tragic incidents that should garner attention, but also should be put in perspective considering that less than one percent of all homicides among students occur on or around school grounds, or on their way to and from school.¹⁷³ Additionally, teenagers aged thirteen to nineteen are much more likely to die in automobile accidents, as such crashes make up thirty-seven percent – the leading cause – of teen deaths.¹⁷⁴

Even if the Court found that x-ray machines are a constitutional means of providing school safety, school officials can implement more effective measures to ensure safe schools instead of forcing students and teachers to pass through prison-like x-ray screeners and metal detectors.¹⁷⁵ For starters, enabling a small group of security personnel, who work on behalf of the school, to not only serve as security personnel, but actually get to know students individually and in their social groups would provide a greater chance of preventing violence

¹⁷⁰ See *Earls*, 536 U.S. at 832 (applying the *Vernonia* Court's balancing of students' privacy interests and the school's legitimate interest in providing safety to determine the reasonableness and thus the constitutionality of the search implemented).

¹⁷¹ See *Policy Brief*, INST. FOR PUBLIC POL'Y & SOC. RESEARCH, Apr. 2002, at 3, available at <http://www.ippsr.msu.edu/Documents/PolicyBrief/911Briefing.pdf> (finding that forty-five percent of American citizens are willing to sacrifice civil rights and personal freedoms for greater safety and security).

¹⁷² See Benjamin Franklin, 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., Yale Univ. Press 1963) ("Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.").

¹⁷³ See Dedman, *Every School*, *supra* note 67, at 3 (citing the Center for Disease Control's findings that school violence has nearly halved since 1992).

¹⁷⁴ See *Fatality Facts 2005: Teenagers*, INS. INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST., http://www.iihs.org/research/fatality_facts/teenagers.html (reporting that 5,288 teenagers aged thirteen to nineteen died from motor vehicle crashes in 2005 alone, and that while teenagers make up twelve percent of motor vehicle deaths, they comprise only ten percent of the U.S. population).

¹⁷⁵ See Garcia & Kennedy, *supra* note 121, at 280-81 (explaining weapons screeners at school entrances can lead students and faculty to feel that schools are like prisons instead of learning institutions).

in schools.¹⁷⁶ While profiling does not work,¹⁷⁷ getting to know and understand individual students, as well as learning the buzz or gossip that is flowing throughout the school, enables administrators to know what is going on.¹⁷⁸ Thus, they can learn about a planned attack and stop a shooting before it happens. In addition, teachers and administrators can try to deal with students who appear troubled and attempt to get them the assistance they may need.¹⁷⁹ It is important for citizens, lawmakers, and school officials, not to let the fear of horrific and terribly tragic school shootings not only in high schools, but on college campuses like Virginia Tech¹⁸⁰ and Delaware State University,¹⁸¹ to produce a slinging of rhetoric and increased security systems without looking into the reason for each procedure's implementation, evaluating its effectiveness, and conducting a cost-benefit analysis.

Security systems are quick-fixes rather than long-term solutions to a serious and

¹⁷⁶ See Dedman, *Every School*, *supra* note 67, at 2-3 (providing research showing that school officials can discover attacks in the planning stages because shooters often disclose their plans to other students prior to fulfilling them); see also Diane Weaver Dunne, *Secret Service Report Targets School Violence*, EDUC. WORLD, Nov. 1, 2000, http://www.education-world.com/a_issues/issues139.shtml (explaining that school shooters do not commit the act spontaneously, but rather tell a classmate or friend prior to carrying out the attack).

¹⁷⁷ See Dedman, *Every School*, *supra* note 67, at 2 (“[T]he attackers have been racially diverse, and had different family backgrounds, social standing and school achievement records. Too many innocent students will fit a profile, and too many attackers will not.”); Bill Dedman, *Deadly Lessons: School Shooters Tell Why*, CHICAGO SUN-TIMES, Oct. 17, 2000, at A1 [hereinafter Dedman, *Deadly Lessons*] (noting that school shooters are diverse: White, Black, Hispanic, Asian, and Native Alaskan). While shootings occurred at both public and private schools, *all* shooters have been boys and many were depressed. *Id.*

¹⁷⁸ See Dedman, *Deadly Lessons*, *supra* note 177, at A1 (discussing that shooters told their peers, who did not warn anyone, but if students tell someone or if adults took the time to ask, then perhaps attacks could be prevented).

¹⁷⁹ See, e.g., Emil Steiner, *Illinois Honor Student Arrested For Creative Writing*, WASHINGTONPOST.COM, http://blog.washingtonpost.com/offbeat/2007/04/illinois_honor_student_arreste_1.html (Apr. 30, 2007, 10:08 EST) (reporting on the school's response to a student who wrote a “disturbing” free write in a creative writing class: “Blood sex and Booze. Drugs Drugs Drugs are fun. Stab, Stab, Stab, S...t...a...b..., poke. . . . So I had this dream last night where I went into a building, pulled out two P90s and started shooting everyone..., then had sex with the dead bodies. Will (sic), not really, but it would be funny if I did.”).

¹⁸⁰ See Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, NYTIMES.COM, Apr. 16, 2006, <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html> (reporting that thirty-three people were killed that day on the Virginia Polytechnic Institute and State University campus “in what appears to be the deadliest shooting rampage in American history”).

¹⁸¹ See Mari A. Schaefer, Joseph N. DiStefano & Jeff Gammage, *Delaware Campus Shaken; After Two Delaware State Students Were Wounded, Police Identified Two Other Students as "Persons of Interest" in the Shootings*, PHILADELPHIA INQUIRER, Sept. 22, 2007, at A1 (reporting on a shooting on Delaware State University's campus, where two 17-year-old students were shot, one seriously).

pressing problem that infiltrates the nation's schools.¹⁸² It is imperative to understand that youth violence is not confined to schools; in fact, many children face greater risks of violence in their communities, and it is this community violence that spills into the school system.¹⁸³ Moreover, cutting funding for worthwhile programs that keep students safe and occupied after school, while increasing or maintaining security measures, does not solve the problem of school violence; rather, educating students and providing outlets for them to be engaged outside of the academic setting provides a more well-rounded lifestyle and a means for students to express themselves, perhaps through music, art, sports, or other activities that permit students to learn and grow.¹⁸⁴ Education is a means to persuade students that killing peers is not socially acceptable, which counteracts what students view on television or see in their neighborhoods.¹⁸⁵

Unfortunately, the effect of x-ray machines and other security measures implemented in the face of fear for student safety results in confused and unmotivated students. Instead of teaching "students to become knowledgeable, active, and responsible supporters of our legal system and constitutional democracy," students feel civically indifferent and isolated.¹⁸⁶ It is contradictory to teach students about the great freedoms of democracy and fundamental constitutional rights, while simultaneously disregarding their rights or failing to explain why certain, limited intrusions on their rights are absolutely necessary.¹⁸⁷ Students can

¹⁸² See Ron French, *Budget Cuts Threaten After-School Activities*, DETROIT NEWS, Apr. 30, 2002, at A1 (explaining that because people figure out how to bypass any type of security, schools should focus on more prospective solutions, such as mentoring, conflict-resolution, and after-school programs). Seventy-seven percent of the residents think that if politicians and school officials spend money on after-school programs, which provide adult supervision and school preparedness, it will have a greater impact on students and reduced violence than physical security measures. *Id.*

¹⁸³ See A. Troy Adams, *The Status of School Discipline and Violence*, 567 AM. ACAD. OF POL. & SOC. SCI. 140, 152 (Jan. 2000) (discussing that our schools are violent because we live in a violent society).

¹⁸⁴ See French, *supra* note 182, at A1 (explaining that Detroit residents concerned about youth violence feel that schools should spend money on after-school programs rather than on metal detectors because preventative program budget cuts, which have exceeded \$100 million, make detectors more necessary in time); Adams, *supra* note 183, at 152 (challenging the government for spending \$82 million on educational research compared to \$566 million on safe and drug-free schools in 1999 alone).

¹⁸⁵ See Jacobs, *supra* note 153, at 650 (explaining that students must recognize the moral implications of their conduct and only when society can educate students that shootings are unacceptable, will they cease).

¹⁸⁶ Schimmel, *supra* note 74.

¹⁸⁷ See Ferraraccio, *supra* note 152, at 213 ("[I]t would be ironic to, on the one hand, educate students in the virtues of citizenship, while on the other hand disregarding their constitutional rights.")

understand the application of policies to protect them when they are reasonable, explainable, legitimate, or even created collaboratively, but merely implementing policies because officials can come across as dictatorial, authoritative, and disengaging.¹⁸⁸

Furthermore, if schools are going to use metal detectors and x-ray machines, they must use them properly because improper use makes them less effective and the cost-benefit analysis makes their use worthless. For example, some students find that after they set off the metal detectors, due to time constraints and crowded hallways, they are told to go into the building without a further search or making a determination of what actually set off the machine.¹⁸⁹ In other schools, metal detectors are used at the front entrance, but back entrances are left wide open, so any student wishing to bring a weapon into the school merely has to use a back entrance that is not secure.¹⁹⁰ Schools must ensure that all open entrances are equipped with such security measures, side and back doors are not left open, and windows are not an alternative use of passing weapons into the schools by either keeping the windows closed or putting screens on them, because the effectiveness of this equipment is only as good as its actual implementation. Another student complaint that should be addressed, particularly if schools are going to opt for such security measures, is to ensure that school security officers look as if they are trained to protect students and have the ability to act on their training; some students have expressed that they feel the officers are more for show than actual protection. The officers are not armed and some appear unfit, making it easy for high school students to outrun or disregard these officers.

V. CONCLUSION

Americans have become desensitized to the violence on television that we subject

¹⁸⁸ See Schimmel, *supra* note 74 (explaining that a different approach to developing and teaching school rules “can capture student interest, teach democratic skills, and encourage students to become responsible and effective citizens”).

¹⁸⁹ See Tracy Jan, *Students Want Weapon Screenings, Advisory Group Seeks Stricter School Policies*, BOSTON GLOBE, Dec. 12, 2005, at A1 (explaining that too often metal detectors are activated, but students are ushered through without discovering the source only later to find that students see others with knives in class or during lunch).

¹⁹⁰ See Interview with Robin Wells, Roosevelt High School Marshall-Brennan Fellow, American University Washington College of Law, in Washington, D.C. (Nov. 1, 2006) (discussing how Roosevelt High School must leave their back doors open due to fire code regulations rendering metal detectors stationed at front entrances ineffective).

children to daily, and are unaware of the civil liberties we choose to relinquish every day we choose to enter federal buildings.¹⁹¹ We have become complacent in the face of fear. It is time to recapture the youth, not by installing metal detectors and x-ray screeners at every school or mall entrance, but rather by teaching students right from wrong and that violence is not the solution.¹⁹² By properly allocating money for teachers, textbooks, and facilities, rather than for unconstitutional barriers to entry, Americans can reduce youth violence.¹⁹³

Unfortunately, when terrible tragedies involving school violence occur, politicians too often turn to rhetoric to respond to constituent concerns and garner media attention rather than seek long-term solutions to curb violence and ensure safety.¹⁹⁴ Some security specialists and school administrators, however, look to new technology to patch weaknesses in the system.¹⁹⁵

Applying the Supreme Court's analysis in *T.L.O.*, *Vernonia*, and *Earls*, metal detector searches are constitutional searches under the Fourth Amendment because the

¹⁹¹ See TV Bloodbath: Violence on Prime Time Broadcast TV: A PTC State of the Television Industry Report, PARENTS TELEVISION COUNCIL, 2003, <http://www.parentstv.org/ptc/publications/reports/stateindustryviolence/ReportOnViolence.pdf> (finding that the average child spends twenty-five hours a week watching television, and by the age of eighteen, the child will have witnessed 200,000 acts of violence, including 40,000 murders).

¹⁹² See *Police Probe Motive of Bosnia-born Teen Shooter*, CNN.COM, Feb. 14, 2007, <http://www.cnn.com/2007/US/02/13/salt.lake.shooting.ap/index.html> (reporting on an eighteen-year-old murdering five people at a Utah mall).

¹⁹³ See Tony Favro, *American Public Schools Are Increasingly Providing a Wide Range of Social Services*, CITY MAYORS EDUCATION, July 22, 2006, http://www.citymayors.com/education/schoolservices_usa.html (suggesting that increased funding aims to provide full-service schools to economically and socially stabilize urban families and neighborhoods).

¹⁹⁴ See David Espo, *Reid Warns Against Rush on Gun Control: Sen. Harry Reid Cautions Against Rush on Stricter Gun Control Laws After Va. Tech Shootings*, ABC.COM, Apr. 17, 2007, <http://abcnews.go.com/Politics/wireStory?id=3050099&CMP=OTC-RSSFeeds0312> (quoting Senate Majority Leader Harry Reid as saying, "I think we ought to be thinking about the families and the victims and not speculate about future legislative battles that might lie ahead" the day after the shootings on the Virginia Tech campus, which left 33 people dead); see also *The Situation Room: Tracing the Virginia Tech Gunman; Gonzales Testifies on Capitol Hill*, CNN.COM, Apr. 19, 2007, <http://transcripts.cnn.com/TRANSCRIPTS/0704/19/sit.room.01.html> (criticizing White House spokesperson Dana Perino, who emphasized President Bush's commitment to the Second Amendment's right to bear arms just hours after the Virginia Tech tragedy, and any attempts to determine huge policy changes based on the horrific massacre as morally and strategically in poor taste, while praising Massachusetts Senator Kennedy, who refused to make the current event a political or policy debate despite losing two brothers to gun violence, because discussions would happen in the future, but now was purely a time of healing).

¹⁹⁵ See Julie Rawe, *Can We Make Campuses Safer?*, TIME.COM, Apr. 16, 2007, <http://www.time.com/time/nation/article/0,8599,1611164,00.html> (discussing the need to prevent campuses from becoming fortresses while still ensuring student safety).

government's interest in securing schools from violence outweighs the students' minimal privacy interests and the character of the intrusion.¹⁹⁶ But x-ray screener searches are unconstitutional under the Fourth Amendment as they constitute suspicionless searches that are not voluntarily consented to, are overly intrusive, and are unreasonable because they strip students of all their privacy rights in the items they bring with them to school.¹⁹⁷ Because the students' privacy interests are substantial and the character of the intrusion is great, the students' constitutionally protected interests in privacy prevail over the government's interest and ability to provide safety by using x-ray screeners.¹⁹⁸

¹⁹⁶ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (finding that a search is reasonable when the government's legitimate interest and the efficacy of the search outweighs the students' minimal privacy interests and the character of the intrusion).

¹⁹⁷ See *id.* at 834 (stating that the Court considers the government's interest in providing school safety and the means the government uses to meet this interest to determine the extent of the limitations on students' rights in schools).

¹⁹⁸ *Cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (detailing a search's constitutionality when the students' privacy interests and the character of the intrusion are minimal compared to the government's legitimate interest in providing safety and preventing students from using drugs).