

THE PROBLEMS OF PROBABLE CAUSE: *MENESE* AND THE MYTH OF ERODING FOURTH AMENDMENT RIGHTS FOR STUDENTS

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. . . . "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Accordingly . . . maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures

—Justice Byron White¹

INTRODUCTION

Twenty-nine years ago in *New Jersey v. T.L.O.*, the United States Supreme Court held that school officials may search students when there are reasonable grounds to suspect the search will turn up evidence that the student violated the law or school policy.² In other words, “[T]he constitutional rule that a search warrant must be [obtained] before a search may be made”³ does not apply when school officials search students who are under their authority.⁴ However, the Court expressly refused to decide whether this exception covered school resource officers,⁵ or whether the traditional warrant requirement applied.⁶ Since 1985, numerous state and lower federal courts have considered whether school resource officers fall within *T.L.O.*’s “school official” exception, and accordingly can conduct searches based on reasonable suspicion, or whether such persons must meet the constitutional standard of obtaining a warrant by

1. *New Jersey v. T.L.O.*, 469 U.S. 325, 339–40 (1985) (citations omitted).

2. *Id.* at 341–42.

3. *Chambers v. Maroney*, 399 U.S. 42, 65 (1970) (Harlan, J., concurring in part and dissenting in part).

4. *T.L.O.*, 469 U.S. at 340.

5. “Resource officer” is used throughout this Note to refer to commissioned police officers who work full-time in schools, regardless of who employs or pays the officer and regardless of whether he is armed or in uniform.

6. *T.L.O.*, 469 U.S. at 341 n.7.

showing probable cause.⁷ Most cases hold that school resource officers need only reasonable suspicion to search students because they are “school officials.”⁸ Recently, however, the Washington Supreme Court decided, in *State v. Meneese*, that a school resource officer acted as “a law enforcement officer,” not as a “school official,” and accordingly “required a warrant supported by probable cause to search [students].”⁹ This Note examines the analysis, rationale, and practical consequences of *Meneese*. After examining *Meneese* and its practical consequences, as well as similar cases and the existing scholarship, it becomes clear that the probable cause standard is unworkable in schools, and that reasonable suspicion should apply to school resource officers.

Part I of this Note explains the facts, rationale, and analysis of *T.L.O.*, which is necessary to understand the context of *Meneese*. Part II examines the facts, rationale, and analysis of *Meneese*. Part III explains how courts categorize school search cases, and then dissects cases similar to *Meneese*—all of which hold that reasonable suspicion should be the standard for resource officers. Part IV begins the analysis by categorizing *Meneese* and comparing it to these similar cases in Section A. Section B analyzes arguments that support probable cause, while focusing heavily on student rights. Section C shows how school violence and drug use make the application of probable cause in schools unworkable. Part V provides a recommendation for determining whether reasonable suspicion or probable cause should apply. Finally, this Note concludes with a summary of the most important reasons why reasonable suspicion should be the legal standard for school resource officers who search students in school.

7. See Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1304 (11th Cir. 2006); Shade v. City of Farmington, Minn., 309 F.3d 1054, 1060 (8th Cir. 2002); Cason v. Cook, 810 F.2d 188, 193 (8th Cir. 1987); *In re William V.*, 4 Cal. Rptr. 3d 695, 699–700 (Cal. Ct. App. 2003); *M.D. v. State*, 65 So.3d 563, 566 (Fla. Dist. Ct. App. 2011); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); *Martens v. Dist. No. 220, Bd. of Educ.*, 620 F. Supp. 29, 32 (N.D. Ill. 1985); *In re Josue T.*, 989 P.2d 431, 436 (N.M. Ct. App. 1999); *Pacheco v. Hopmeier*, 770 F. Supp. 2d 1174, 1184 (D.N.M. 2011); *In re D.D.*, 554 S.E.2d 346, 351 (N.C. Ct. App. 2001); *State v. Alaniz*, 815 N.W.2d 234, 240 (N.D. 2012); *Commonwealth v. J.B.*, 719 A.2d 1058, 1062 (Pa. 1998); *State v. Meneese*, 282 P.3d 83, 87 (Wash. 2012) (en banc); *State v. Angelia D.B. (In re Interest of Angelia D.B.)*, 564 N.W.2d 682, 688 (Wis. 1997).

8. See *Bostic*, 458 F.3d at 1304; *Shade*, 309 F.3d at 1060; *Cason*, 810 F.2d at 193; *William V.*, 4 Cal. Rptr. 3d at 699–700; *M.D.*, 65 So.3d at 566; *Dilworth*, 661 N.E.2d at 317; *Martens*, 620 F. Supp. at 32; *Josue T.*, 989 P.2d at 439; *D.D.*, 554 S.E.2d at 351–52; *J.B.*, 719 A.2d at 1062; *Alaniz*, 815 N.W.2d at 239; *Angelia D.B.*, 564 N.W.2d at 688.

9. *Meneese*, 282 P.3d at 87–88.

I. *NEW JERSEY V. T.L.O*A. *Facts and Procedural History*

In 1985, the United States Supreme Court considered whether the Fourth Amendment¹⁰ applied, and if so, how, when public school officials search students.¹¹ The case arose after a teacher at Piscataway High School discovered T.L.O., a high school freshman, smoking in the restroom.¹² Because smoking in the restroom violated school policy, the teacher took T.L.O. to the assistant vice principal.¹³ When T.L.O. denied smoking, the principal demanded to see her purse.¹⁴ He opened the purse and discovered a pack of cigarettes and a package of rolling papers.¹⁵ The principal believed rolling papers were associated with the use of marijuana, so he decided to more thoroughly search the purse.¹⁶ The search yielded marijuana, a pipe, empty plastic bags, a substantial quantity of money, and an index card and two letters that implicated T.L.O. in marijuana distribution.¹⁷ After the Juvenile Court denied her motion to suppress the evidence on Fourth Amendment grounds, T.L.O. was convicted of drug distribution.¹⁸ Although the state appellate court affirmed the finding that there was no Fourth Amendment violation, the Supreme Court of New Jersey held that even if reasonable suspicion was the proper standard, the principal did not have reasonable suspicion because he lacked specific information that cigarettes were in T.L.O.'s purse.¹⁹ The State appealed to the United States Supreme Court.²⁰

B. *The Court's Analysis*

The Supreme Court noted that the Fourth²¹ and Fourteenth²² Amendments to the Federal Constitution prohibit unreasonable searches and seizures by state

10. "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." U.S. CONST. amend. IV.

11. *T.L.O.*, 469 U.S. at 332–33.

12. *Id.* at 328.

13. *Id.*

14. *Id.*

15. *Id.*

16. *T.L.O.*, 469 U.S. at 328.

17. *Id.*

18. *Id.* at 329–30.

19. *Id.* at 330–31.

20. *Id.* at 331.

21. "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." U.S. CONST. amend. IV.

officers, including public school officials.²³ The Court said that while school children have a legitimate expectation of privacy in the personal effects they bring to school, school administrators have a “substantial interest . . . in maintaining discipline . . . on school grounds.”²⁴ The Court explained that “in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”²⁵ As a result, the Court said:

The warrant requirement . . . is unsuited to the school environment: requiring a . . . warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.²⁶

Although recognizing that students have protected privacy interests, the Court said that the potential danger in schools and the substantial need to maintain order does not require strict adherence to the rule that searches be based on probable cause.²⁷ Rather, school officials may search students if it is reasonable under all the circumstances, which is determined by considering (1) whether “the action was justified at its inception,” and (2) whether it was “reasonably related in scope to the circumstances which justified the interference in the first place.”²⁸ A search is justified at its inception when “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated . . . either the law or the rules of the school.”²⁹ It is permissible in scope when the measures are “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”³⁰

The Court reasoned that the search was justified at its inception because if T.L.O. smoked and possessed cigarettes, she would most likely carry them in her purse.³¹ Thus, finding cigarettes in her purse would corroborate the claim that she violated school policy by smoking in the restroom.³² Additionally, the search was permissible in scope because the rolling papers in plain view gave the principal reasonable suspicion that T.L.O. was carrying marijuana in

22. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .” U.S. CONST. amend. XIV, § 1.

23. *T.L.O.*, 469 U.S. at 334.

24. *Id.* at 339.

25. *Id.*

26. *Id.* at 340.

27. *Id.* at 341.

28. *T.L.O.*, 469 U.S. at 341.

29. *Id.* at 341–42.

30. *Id.* at 342.

31. *Id.* at 345–46.

32. *Id.* at 345.

addition to the cigarettes.³³ Therefore, the Court concluded that “the search for mari[j]uana [was not] unreasonable in any respect.”³⁴

Significantly, however, the Court expressly declined to decide “the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies.”³⁵ That omission has placed the burden on state courts and lower federal courts to decide which standard applies to school resource officers.³⁶

II. *STATE V. MENESE*

One of the most recent cases that considered which standard applies to school resource officers was the 2012 case of *State v. Meneese*, which departed from the trend and ultimately held that searches by school resource officers require a warrant supported by probable cause.³⁷

A. *Facts and Procedural History*

Officer Fry, a law enforcement officer employed by the Bellevue Police Department, worked at the local high school as a school resource officer since the late 1990s.³⁸ In consideration for his services, and those of five other officers, the school paid the police department \$90,000 per year.³⁹ Officer Fry was required to “create and maintain a safe, secure, and orderly learning environment for students, teachers, and staff, through prevention and intervention techniques.”⁴⁰ He could not administer school discipline, suspensions, or expulsions, and he drove a marked police car to and from school.⁴¹ He wore a standard issued police uniform, and “on a rare occasion,” he assisted other officers with incidents unrelated to his duties at the school.⁴²

One day, Officer Fry walked into the restroom and discovered Meneese standing at the sink holding a bag of marijuana and a medical vial.⁴³ He confiscated the marijuana and escorted Meneese and his backpack to the dean’s office.⁴⁴ Once there, Fry arrested Meneese and requested a patrol car to

33. *T.L.O.*, 469 U.S. at 347.

34. *Id.*

35. *Id.* at 341 n.7.

36. *See* *Cason v. Cook*, 810 F.2d 188, 193 (8th Cir. 1987); *M.D. v. State*, 65 So.3d 563, 566 (Fla. Dist. Ct. App. 2011); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); *Pacheco v. Hopmeier*, 770 F. Supp. 2d 1174, 1184 (D.N.M. 2011).

37. *State v. Meneese*, 282 P.3d 83, 88, 90 (Wash. 2012) (en banc) (Stephens, J., dissenting).

38. *Id.* at 84–85 (majority opinion).

39. *Id.* at 85.

40. *Id.*

41. *Id.*

42. *Meneese*, 282 P.3d at 85.

43. *Id.*

44. *Id.*

transport Meneese to the police station.⁴⁵ While waiting for the patrol car, Fry noticed Meneese's backpack was padlocked, which made him suspicious that the backpack contained additional contraband.⁴⁶ When he asked for the key, Meneese claimed he left it at home.⁴⁷ This made Fry more suspicious, so he handcuffed and searched Meneese, found the key, and, upon searching the backpack, discovered a BB gun.⁴⁸ Meneese was then charged with carrying a dangerous weapon at school.⁴⁹ After the trial and appellate courts ruled that the *T.L.O.* school exception⁵⁰ applied and denied his motion to suppress, Meneese appealed to the Washington Supreme Court, arguing that Fry lacked the necessary search warrant.⁵¹

B. The Washington Supreme Court's Analysis

Although the court acknowledged *T.L.O.*⁵² as binding, it concluded that "in light of the overwhelming indicia of police action, Fry was a law enforcement officer," and therefore, the school exception did not apply.⁵³ The majority claimed the holding was guided by the school exception rationales that (1) "teachers and administrators have a substantial interest 'in maintaining discipline . . . on school grounds' that often requires swift action" and that (2) the warrant requirement is "particularly 'unsuited to the school environment.'"⁵⁴ The court claimed to recognize that "the extra burden of requiring a warrant for school searches undermines the need for swift discipline to maintain order, the very purpose behind the search" and that the "holding is contrary to several . . . jurisdictions that have [considered the issue]."⁵⁵ However, the court cited only one case and one secondary source in support of its holding that school resource officers are "police officers" who require probable cause in order to search.⁵⁶

The court relied on a formalistic consideration of four factors in concluding that Fry was a police officer, not a school official. First, the court said Fry was a uniformed police officer that was employed to control crime,

45. *Id.*

46. *Id.*

47. *Meneese*, 282 P.3d at 85.

48. *Id.*

49. *Id.*

50. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

51. *Meneese*, 282 P.3d at 85.

52. *T.L.O.*, 469 U.S. at 325.

53. *Meneese*, 282 P.3d at 86, 88.

54. *Id.* at 86.

55. *Id.* at 86–87.

56. *Id.* at 87 (citing *Patman v. State*, 537 S.E.2d 118 (Ga. Ct. App. 2000); Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25, 67–69 (1999)).

not to administer school discipline.⁵⁷ Second, the court noted that Fry arrested and handcuffed Meneese before searching his backpack.⁵⁸ The court then asserted, without authority, that “[a]n ordinary school official could not have arrested a student [if the student was caught with a bag of marijuana] and, most likely, could not have handcuffed a student either.”⁵⁹ Since Meneese was already under arrest, the court rationalized that “there was no need for swift discipline to maintain order.”⁶⁰ Third, the court said the search of Meneese was unrelated to education or safety because it occurred after he was arrested, unlike in other cases where a pre-arrest search was conducted to protect the school environment.⁶¹ The court argued that because the search was unrelated to education, the policy behind the school exception did not apply.⁶² Finally, the court relied on the fact that the city, not the school, employed Fry.⁶³

C. *The Dissent*

The dissent joined the majority of jurisdictions that have considered the issue and concluded that reasonable suspicion should apply to school resource officers due to the special nature of the school environment.⁶⁴ Essentially, Justice Stephens wrote, schools “simply delegate[] their recognized authority to resource officers who, by virtue of their training, are adept at detecting misbehavior and maintaining order.”⁶⁵ The dissent concluded that school resource officers may search students “so long as it is related to school policy and not merely a subterfuge for unrelated law enforcement activities.”⁶⁶ Justice Stephens attacked the majority for its four-factor analysis, and explored the policy implications of the majority decision.⁶⁷

First, he argued that “whether one qualifies as a school official should not depend on dressing the part.”⁶⁸ Rather, the fact that Fry was a uniformed police officer without power to discipline students was irrelevant, especially because only the superintendent had that power.⁶⁹ The dissent essentially argued that, under the majority’s analysis, only the superintendent was a “school official” because only he could discipline students. Second, the majority’s assertion that

57. *Id.*

58. *Meneese*, 282 P.3d at 87.

59. *Id.*

60. *Id.*

61. *Id.* at 88.

62. *Id.*

63. *Meneese*, 282 P.3d at 88.

64. *Id.* at 88, 95 (Stephens, J., dissenting).

65. *Id.* at 91.

66. *Id.* at 88.

67. *Id.* at 90–94.

68. *Meneese*, 282 P.3d at 91 (Stephens, J., dissenting).

69. *Id.*

school officials could not detain or handcuff students was incorrect. “[S]chool officials *can* detain or handcuff students in certain circumstances.”⁷⁰ For example, if a student possessed the amount of marijuana that Meneese did, then “teachers and school staff may forcibly restrain the student.”⁷¹ Third, the fact that Meneese was under arrest and was to be transported to the police station was not relevant to the analysis. As the Supreme Court noted in *T.L.O.*, a school search is justified at its inception when there are reasonable grounds to believe that a student violated the law.⁷² Clearly—whether or not Meneese was under arrest—Fry had reasonable suspicion to believe Meneese violated the law when he observed him holding a bag of marijuana.⁷³ Next, the dissent discredited the majority’s view that the search was unrelated to education. The majority noted the “unchallenged finding . . . that Fry’s primary duty [was] to ‘help the school district meet its goal of . . . maintaining a safe, secure, and orderly learning environment.’”⁷⁴ In that role, Fry’s search was “*in accordance* with school disciplinary policy and was an expected, ‘normal part’ of any search of a student caught with drugs.”⁷⁵ Obviously, a school employee could have unilaterally searched the bag, so requiring a resource officer to obtain a warrant to search the same bag was illogical, especially when he was in the presence of the dean.⁷⁶

The dissent also suggested that policy considerations undercut the majority’s approach. Justice Stephens noted that the probable cause standard for resource officers will “encourage teachers and school officials, who generally are untrained in proper pat down procedures . . . to conduct a search of a student suspected of carrying a dangerous weapon . . . without the assistance of a school liaison officer.”⁷⁷ Additionally, because the majority’s analysis gives resource officers less authority than teachers to enforce regulations and investigate misconduct, schools have no incentive to even employ resource officers because teachers could more easily conduct searches.⁷⁸ Rather, schools will resort to assigning untrained, non-law enforcement personnel to police the halls, which is “an expenditure of resources schools can ill afford.”⁷⁹

70. *Id.*

71. *Id.* at 92.

72. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

73. *Meneese*, 282 P.3d at 93 (Stephens, J., dissenting).

74. *Id.* at 92–93.

75. *Id.* at 93.

76. *Id.*

77. *Id.* at 94.

78. *Meneese*, 282 P.3d at 93 (Stephens, J., dissenting).

79. *Id.*

Finally, the dissent tied its conclusion to the fact that schools have a legal duty to protect students.⁸⁰ Yet, “[o]ne need not ‘search beyond recent . . . headlines to understand that schools are . . . often turned into places in which children are subjected to grave and even life-threatening dangers wherein the split-second vigilance of teachers and administrators . . . is absolutely critical.’”⁸¹ The argument is, in effect, that a violent catastrophe could potentially erupt in the time it takes to obtain a warrant.

III. SIMILAR CASES

The context of *Meneese* cannot be understood without considering some similar cases and exploring the distinctions that exist between them. There are three types of cases where a student challenges as unconstitutional a search of his person or property.⁸² First, *T.L.O.*’s reasonable suspicion standard⁸³ is applied when a school employee conducts a search unilaterally, or where school resource officer involvement is minimal.⁸⁴ The same reasonable suspicion standard is applied in the second category of cases where a school resource officer, acting on his own initiative or under his own authority, unilaterally searches a student.⁸⁵ Under the third category,⁸⁶ courts apply the probable cause standard when an “outside”⁸⁷ police officer initiates a search as part of his or her own investigation, or when school officials act at the behest of such officers.⁸⁸

The following is a brief overview of cases in the first two categories. *Meneese* most likely falls into the second category⁸⁹ because the resource

80. *Id.* at 88–89.

81. *Id.* at 89 (citing *Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 378 n.23 (6th Cir. 1998)).

82. *In re Josue T.*, 989 P.2d 431, 436 (N.M. Ct. App. 1999).

83. *See supra* notes 21–36 and accompanying text.

84. *Josue T.*, 989 P.2d at 436.

85. *Id.*

86. Because *Meneese* involved a school resource officer contracted by the school, the third category of cases where “outside” police officers are involved is factually distinguishable. As a result, this category is not discussed in this Article. For an example of this type of case, *see F.P. v. State*, 528 So.2d 1253, 1255 (Fl. Dist. Ct. App. 1988) (holding that the school exception to the probable cause requirement did not apply when a school resource officer searched a student at the direction of an “outside” police officer who was on school grounds only to investigate an unrelated burglary).

87. “Outside” police officer is used throughout this article to refer to police officers who are not school resource officers, but who are “traditional” police officers that patrol neighborhoods, investigate crimes in the community, and respond to distress calls. These “outside” police officers are not employed or contracted by the schools, and they have no connection to, or responsibility for, the school environment (other than the presence of the school in the city the officer serves).

88. *Josue T.*, 989 P.2d at 436–37.

89. *See discussion infra* Part II.B.

officer unilaterally initiated the investigation and conducted the search.⁹⁰ However, one could arguably place *Meneese* into the first category⁹¹ because the dean was present when the resource officer conducted the search.⁹² As will be seen, though, whether *Meneese* is a category one or two case is not relevant because courts apply reasonable suspicion in both circumstances. Because *Meneese* is undoubtedly not a category three case, the court should have applied reasonable suspicion.

A. *Category One—Minimal Police Involvement*

*In re Josue T.*⁹³ falls into the first category of cases. There, the school was assigned an armed and uniformed resource officer who was employed by the local police department.⁹⁴ One day, a school employee noticed the odor of marijuana emanating from a student.⁹⁵ To investigate possible drug possession, the employee interviewed students who rode to school with that particular student, including the defendant.⁹⁶ When the defendant was removed from class, he was evasive and smelled of marijuana.⁹⁷ It was at this point that the resource officer joined the school employee, and they escorted the student to the employee's office.⁹⁸ They noticed that the student was atypically quiet, kept his hands in his pocket, and had a large object in his pocket.⁹⁹ At the employee's office, the employee notified the defendant that he would be searched and instructed him to empty his pockets.¹⁰⁰ Despite repeated requests, the defendant refused to empty his pocket or remove his hand from the pocket.¹⁰¹ The employee then became concerned about safety, and instructed the resource officer to search the defendant.¹⁰² The officer reached into the defendant's pocket, and discovered a firearm.¹⁰³ After the trial court denied the defendant's motion to suppress the evidence, he was convicted of unlawfully carrying a firearm.¹⁰⁴

90. *State v. Meneese*, 282 P.3d 83, 85 (Wash. 2012) (en banc).

91. See discussion *infra* Part II.A.

92. *Meneese*, 282 P.3d at 85.

93. *Josue T.*, 989 P.2d at 431.

94. *Id.* at 434.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Josue T.*, 989 P.2d at 434.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Josue T.*, 989 P.2d at 434.

104. *Id.*

In holding that reasonable suspicion applied when school employees initiate an investigation, the court noted that any other conclusion would be illogical and dangerous.¹⁰⁵ Specifically, the court said a probable cause standard would encourage teachers, who are untrained in pat-down procedures and in neutralizing dangerous weapons, to unilaterally search students.¹⁰⁶ The court relied on the fact that the officer merely assisted the school employee to protect student welfare, and that the employee, not the resource officer, initiated and conducted the entire investigation.¹⁰⁷ In fact, the resource officer became involved only after the employee rightfully became concerned about safety.¹⁰⁸ The court concluded that the search was justified at its inception because the defendant was suspected of possessing marijuana and because he refused to empty his pockets.¹⁰⁹ The search was also permissible in scope because it was limited to the pocket where the large bulge was located.¹¹⁰

*State v. Angelia D.B.*¹¹¹ also falls into the first category of cases. As in *Meneese* and *In re Josue T.*, it involved a city-employed resource officer.¹¹² When a student informed the assistant principal that there might be a knife concealed in the defendant's backpack, the principal called the resource officer.¹¹³ The officer and the dean of students escorted the defendant out of class, where the officer patted her down.¹¹⁴ They also looked inside her backpack and searched her locker according to school policy.¹¹⁵ When these searches yielded nothing illegal, the officer searched the defendant's jacket, and lifted the bottom of her shirt.¹¹⁶ The officer discovered a knife tucked inside the defendant's waistband.¹¹⁷ After the trial court suppressed the evidence, the State appealed and the court of appeals certified the question for the Wisconsin Supreme Court.¹¹⁸

In holding that reasonable suspicion applied when resource officers act in conjunction with school authorities, the court noted that students have a reduced expectation of privacy at school.¹¹⁹ Additionally, because school attendance is compulsory, schools have a heightened duty to protect students

105. *Id.* at 437.

106. *Id.*

107. *Id.*

108. *Josue T.*, 989 P.2d at 437.

109. *Id.* at 438.

110. *Id.* at 439.

111. *State v. Angelia D.B. (In re Interest of Angelia D.B.)*, 564 N.W.2d 682 (Wis. 1997).

112. *Id.* at 684.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Angelia D.B.*, 564 N.W.2d at 684.

117. *Id.*

118. *Id.* at 684–85.

119. *Id.* at 689.

from danger.¹²⁰ Accordingly, probable cause, if the standard, would promote the unreasonable risk of encouraging untrained teachers to search students suspected of possessing dangerous weapons.¹²¹ Therefore, under the reasonable suspicion standard, the search was justified at its inception because a student witnessed the defendant with a knife.¹²² The scope of the search was also permissible because the officer only searched for the reported knife, and only searched places where the defendant could have reasonably concealed the knife.¹²³

B. Category Two—Resource Officer Acting Unilaterally

Although the dean in *Meneese* was present when the officer conducted the search, *Meneese* falls within the second category because the officer unilaterally initiated the investigation and conducted the search.¹²⁴ As will be shown, though, courts apply the same reasonable suspicion standard in category two cases, even when resource officers search students under their own authority, without the direction of school employees.¹²⁵

*In re William V.*¹²⁶ is a category two case. There, a city-employed resource officer worked in uniform at the school full-time.¹²⁷ As the officer walked down the hallway, he observed the defendant with a bandanna hanging from the back of his pants, which often signified gang affiliations and violated school policy.¹²⁸ When the defendant noticed the officer, he became nervous, started pacing, and denied knowing that he had a bandanna.¹²⁹ Because the defendant violated school policy, the officer planned to take him to the principal's office.¹³⁰ Before doing so, however, the officer patted down the defendant because he believed, based on his experience, that the bandanna signified an imminent confrontation.¹³¹ During the pat down, the officer detected a bulge in the defendant's waistband, and then lifted his shirt and discovered a knife.¹³² After he was convicted, the defendant appealed the trial court's denial of his motion to suppress the knife.¹³³

120. *Id.*

121. *Angelia D.B.*, 564 N.W.2d at 690.

122. *Id.* at 691.

123. *Id.* at 692.

124. *State v. Meneese*, 282 P.3d 83, 85 (Wash. 2012) (en banc).

125. *In re Josue T.*, 989 P.2d 431, 436 (N.M. Ct. App. 1999).

126. *In re William V.*, 4 Cal. Rptr. 3d 695 (Cal. Ct. App. 2003).

127. *Id.* at 696–97.

128. *Id.* at 697.

129. *Id.*

130. *Id.*

131. *William V.*, 4 Cal. Rptr. 3d at 697.

132. *Id.*

133. *Id.*

The court held that, regardless of where the officer was employed, the need to preserve order and safety did not permit a standard of probable cause, even when a resource officer acted unilaterally.¹³⁴ The court rejected the argument that a distinction existed between resource officers and school personnel because that would mean “the extent of a student’s rights would depend not on the nature of the asserted infringement but on the . . . status of the employee who . . . investigated the misconduct.”¹³⁵ The court said this distinction was irrational and that the relationship between students and school police was no different simply because the officer was employed by the city, not the school.¹³⁶ Additionally, the court noted that if school resource officers had less authority than school employees to investigate, there would be no reason for schools to employ or delegate their safety responsibilities to resource officers.¹³⁷ After determining that the resource officer was a “school official” and that reasonable suspicion was the standard, the court said the search was justified because the bandanna violated school policy and likely symbolized an imminent confrontation.¹³⁸ Additionally, the search was permissible in scope because it was limited to the waistband.¹³⁹

*People v. Dilworth*¹⁴⁰ also falls into the second category of cases. The school liaison officer, like in *Meneese* and *In re William V.*, was employed by the city but assigned to the school—in this case an alternative school.¹⁴¹ He had arrest power and could also give detentions, but not suspensions.¹⁴² One day, two teachers asked him to search a student that they overheard talking about drugs.¹⁴³ After the search yielded nothing illegal, the officer escorted the defendant back to his locker.¹⁴⁴ At this point, the officer observed the defendant and another student giggling and looking at him as if he had been “played for a fool.”¹⁴⁵ The officer then noticed a flashlight in the defendant’s hand, which the officer thought violated school policy and could potentially contain drugs.¹⁴⁶ The officer then unilaterally grabbed the flashlight, unscrewed the top, and discovered cocaine.¹⁴⁷ After his motion to suppress the

134. *Id.* at 698.

135. *Id.* at 699 (quoting *In re Randy G.*, 110 Cal. Rptr. 2d 516, 526 (2001)).

136. *William V.*, 4 Cal. Rptr. 3d at 699.

137. *Id.*

138. *Id.* at 700–01.

139. *Id.* at 701.

140. *People v. Dilworth*, 661 N.E.2d 310 (Ill. 1996).

141. *Id.* at 313.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Dilworth*, 661 N.E.2d at 313.

146. *Id.*

147. *Id.*

cocaine was denied, the defendant appealed.¹⁴⁸ When the appeals court reversed, the State appealed to the Illinois Supreme Court.¹⁴⁹

The court held that reasonable suspicion applies when a school resource officer conducts a search under his own initiative and authority.¹⁵⁰ The court reached this conclusion because “[s]tudents within the school environment have a lesser expectation of privacy than members of the population generally.”¹⁵¹ Additionally, the court noted that the officer had individualized suspicion that drugs were in the flashlight, and that schools have a substantial interest in maintaining schools free from “the ravages of drugs.”¹⁵² The court also rejected any assertion that probable cause should apply because the city, not the school, employed the officer.¹⁵³ Based on the reasonable suspicion standard, the court concluded that the search was justified because two teachers overheard the defendant state that he possessed drugs, and because the defendant possessed a container that could be used to conceal drugs.¹⁵⁴ It was also permissible in scope because the officer limited his search to the flashlight, which is where he believed that drugs were concealed.¹⁵⁵

IV. ANALYSIS

A. *The Trend of Similar Cases*

As stated above, *Meneese* likely falls within the second category¹⁵⁶ because the school resource officer unilaterally discovered and searched the student without the involvement of school employees.¹⁵⁷ However, one might argue that it falls within the first category¹⁵⁸ because the dean was present during the resource officer’s search.¹⁵⁹ However, whether *Meneese* is a category one or two case is not legally significant because the same legal standard applies. The trend is clear that the reasonable suspicion standard applies in category one cases, such as *Josue T.*¹⁶⁰ and *Angelia D.B.*,¹⁶¹ and in

148. *Id.* at 314.

149. *Id.*

150. *Dilworth*, 661 N.E.2d at 317.

151. *Id.* at 320 (citing *New Jersey v. T.L.O.*, 469 U.S. 341, 348 (1985)).

152. *Id.* at 318.

153. *Id.* at 320.

154. *Id.* at 321.

155. *Dilworth*, 661 N.E.2d at 321.

156. *In re Josue T.*, 989 P.2d 431, 436 (N.M. Ct. App. 1999).

157. *State v. Meneese*, 282 P.3d 83, 85 (Wash. 2012) (en banc).

158. *Josue T.*, 989 P.2d at 436.

159. *Meneese*, 282 P.3d at 85.

160. *Josue T.*, 989 P.2d at 431.

161. *State v. Angelia D.B. (In re Interest of Angelia D.B.)*, 564 N.W.2d 682 (Wis. 1997).

category two cases,¹⁶² such as *William V.*¹⁶³ and *Dilworth.*¹⁶⁴ It is equally clear that *Meneese* is not a category three case,¹⁶⁵ where probable cause should apply, because no “outside” police officers initiated the search as a part of their own investigation, nor did Officer Fry or the dean act at the behest of “outside” officers.¹⁶⁶ Fry was not an “outside” officer because he was a school resource officer who was contracted by the school to work full-time at the school.¹⁶⁷ He did not act at the behest of “outside” officers because he unilaterally walked into the bathroom, discovered Meneese with marijuana, then escorted him to the dean’s office before he searched his backpack.¹⁶⁸

Because *Meneese* falls into one of the first two categories,¹⁶⁹ the court should not have departed from the clear trend by applying the probable cause standard. Rather, the court should have conducted a *T.L.O.* reasonableness analysis.¹⁷⁰ Had the court done this, it would have found that the search was justified at its inception because there were reasonable grounds to believe that the search would produce evidence that Meneese violated the law.¹⁷¹ Officer Fry caught him with marijuana in plain view and then noticed that the backpack was locked with apparently no key in sight.¹⁷² Such a claim would certainly give rise to suspicion that the backpack contained additional contraband, especially because, without a key, the student would be unable to access his books and notes inside the backpack. Additionally, the court would have found that the search was permissible in scope because it was reasonably related to the objective of the search.¹⁷³ The objective of the search was to seize and remove illegal contraband from school property.¹⁷⁴ The search was clearly related to this objective because Fry limited the search to the place where he reasonably believed Meneese concealed additional contraband. Had the court applied the correct standard, it would have found that the search was reasonable and affirmed Meneese’s conviction.

162. *Josue T.*, 989 P.2d at 436.

163. *In re William V.*, 4 Cal. Rptr. 3d 695 (Cal. Ct. App. 2003).

164. *People v. Dilworth*, 661 N.E.2d 310 (Ill. 1996).

165. *Josue T.*, 989 P.2d at 436.

166. *State v. Meneese*, 282 P.3d 83, 84–85 (Wash. 2012) (en banc).

167. *Id.*

168. *Id.* at 85.

169. *Josue T.*, 989 P.2d at 436.

170. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

171. *Id.*

172. *Meneese*, 282 P.3d at 85.

173. *T.L.O.*, 469 U.S. at 342.

174. *Meneese*, 282 P.3d at 85.

B. Student Rights

While it is evident that the *Meneese* court departed from the clear trend by applying the probable cause standard, one must also consider whether probable cause *should* be the preferred standard. While most courts readily apply reasonable suspicion to school settings, the academic literature to date argues forcefully for probable cause. This section examines various problems that would arise from a standard of probable cause in school settings, while pointing out why reasonable suspicion should be preferred.

In 1999, Andrea Bough asserted that “no clear case law exists” as to whether probable cause or reasonable suspicion should apply to school resource officers.¹⁷⁵ A few months later, *Josue T.*, which contained the court’s explanation of the three categories of cases, was decided.¹⁷⁶ If no clear case law existed in 1999, it certainly does in 2014. The trend is now clear— notwithstanding *Meneese*, courts almost universally apply the reasonable suspicion standard to school resource officers when no “outside” officers are involved.¹⁷⁷

Based on her assertion that “no clear case law exists,” Ms. Bough argued that probable cause should apply in schools much of the time.¹⁷⁸ In support of this argument, she said that because resource officers work full-time in schools, they develop relationships with students and learn their behavioral patterns.¹⁷⁹ As a result, she said, it will be easy for resource officers to develop probable cause.¹⁸⁰ While this may be true, Ms. Bough ignores the essence of the Fourth Amendment—that when probable cause is the standard, “no warrants shall issue, but upon probable cause, supported by oath or affirmation.”¹⁸¹ In other words, regardless of how easily a resource officer can develop probable cause, he or she will still have to wait an unreasonable amount of time—at least in the educational environment where “swift and

175. Andrea G. Bough, *Searches and Seizures in Schools: Should Reasonable Suspicion or Probable Cause Apply to School Resource/Liaison Officers?*, 67 UMKC L. REV. 543, 544 (1999).

176. *In re Josue T.*, 989 P.2d 431, 436–37 (N.M. Ct. App. 1999). The case clearly explained that there are three categories of cases, as well as how courts treat cases from each category. *Id.* First, reasonable suspicion is applied when school employees unilaterally conduct the search, or when police involvement is minimal. *Id.* at 436. Second, reasonable suspicion is applied when school resource officers unilaterally conduct the search under their own authority. *Id.* Third, probable cause is applied when “outside” police officers conduct a search, or when school employees or resource officers search at the behest of “outside” police officers. *Id.* at 436–37.

177. See discussion *supra* Part III and *supra* note 8.

178. Bough, *supra* note 175, at 544, 563.

179. *Id.* at 546–47.

180. *Id.* at 547.

181. U.S. CONST. amend. IV.

informal disciplinary procedures [are] needed”¹⁸²—for a warrant to issue.¹⁸³ This greater need for swiftness in the educational environment, as opposed to other environments, comes from the “responsibility [of schools] to protect student safety and preserve an orderly educational environment.”¹⁸⁴ Ms. Bough also argued that, in many situations, school officials should not delegate their responsibility to school resource officers.¹⁸⁵ Rather, “[i]f there is suspicion of criminal activity, school officials should be the primary figures in conducting an investigation.”¹⁸⁶ The problem with prohibiting teachers from delegating their safety responsibilities, though, is that it would create situations where “teachers . . . who are generally untrained in proper pat down procedures or in neutralizing dangerous weapons . . . conduct a search . . . without the assistance of a school resource officer” and therefore would place teachers unnecessarily in danger.¹⁸⁷

Ms. Bough also suggested that the determination of which standard applies should depend on where the officer is employed, while at the same time she argued that the place of the officer’s assignment is irrelevant.¹⁸⁸ The argument appears to be that if the school employs the resource officer, then reasonable suspicion should apply because he or she is responsible to the school.¹⁸⁹ If, however, he or she is employed by the city or some other entity, then probable cause should apply because the officer is responsible only to that entity.¹⁹⁰ A few sentences later, the article stated that reasonable suspicion should not apply merely based on the officer’s assignment at a school because that would somehow be arbitrary.¹⁹¹

There are several problems with basing the determination of which standard applies on employment status. First, assuming that it is arbitrary to base the determination on the officer’s assignment, it is no less arbitrary to base the same determination on who hired the officer and signs his paycheck. Second, there is authority, for example *In re William V.*, that rejects the proposition that the standard should be determined by who employs the officer.¹⁹² The dissent in *Meneese* also expressly rejected this distinction,

182. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

183. See discussion *infra* Part IV.0.

184. *State v. Meneese*, 282 P.3d 83, 88–89 (Wash. 2012) (en banc) (Stephens, J., dissenting).

185. Bough, *supra* note 175, at 563.

186. *Id.*

187. *State v. Angelia D.B. (In re Interest of Angelia D.B.)*, 564 N.W.2d 682, 690 (Wis. 1997).

188. Bough, *supra* note 175, at 561–62.

189. *Id.* at 561.

190. *Id.*

191. *Id.* at 562.

192. See *In re William V.*, 4 Cal. Rptr. 3d 695, 699 (Cal. Ct. App. 2003) (there is no difference in the relationship between the student and school-employed officers and between the student and city-employed officers who work full-time at the school).

stating that who paid the officer's salary is a constitutionally insignificant factor that causes one to lose sight of the officer's function at the school and of the special nature of the school.¹⁹³ However, even if the "who-paid" distinction were adopted, the *Meneese* court still got it wrong. Although Officer Fry was technically employed by the city, the school district paid the police department \$90,000 per year in consideration for his services, as well as those of other resource officers.¹⁹⁴ In this way, the school district *did* pay Fry, albeit indirectly. Therefore, even if the "who-paid" distinction were adopted, there is a legitimate argument that reasonable suspicion applied to Fry.

The final problem is the implicit assumption that officers who are not employed by the school are not responsible to it. Fry was under contract with the school district, and had a contractual obligation to "creat[e] and maintain[] a safe, secure, and orderly learning environment for students, teachers, and staff, through prevention and intervention techniques."¹⁹⁵ As a result, although Fry was responsible to the police department, he was also accountable to the school district because he had a legal obligation to protect both the students and their learning environment.

Ms. Bough's most significant and seriously flawed argument is her assertion that reasonable suspicion will inevitably lead to the erosion of students' constitutional rights.¹⁹⁶ This contention, originally argued in the *Dilworth* dissent,¹⁹⁷ requires careful consideration, and makes it necessary to examine the constitutional rights of students. It has long been established that "students do not shed their constitutional rights . . . at the schoolhouse gate."¹⁹⁸ At the same time, "students in school do not possess the same breadth of constitutional rights as parties in other settings."¹⁹⁹ Although students retain constitutional rights in school, those rights are "limited by the circumstances of [the school's] special environment."²⁰⁰

For example, students have reduced freedom of speech rights while in school.²⁰¹ Similarly, students have reduced freedom of the press rights.²⁰²

193. *State v. Meneese*, 282 P.3d 83, 93 (Wash. 2012) (en banc) (Stephens, J., dissenting) (citing *William V.*, 4 Cal. Rptr. 3d at 695).

194. *Id.* at 85.

195. *Id.*

196. Bough, *supra* note 175, at 561–62.

197. *Id.*

198. *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 493 U.S. 503, 506 (1969)).

199. *M.D. v. State*, 65 So.3d 563, 565 (Fla. Dist. Ct. App. 2011).

200. *Pethel v. Dennison*, No. 2.07-CV-62, 2008 WL 859034, at *6 (S.D. Ohio Mar. 31, 2008).

201. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–84 (1986) (holding that schools may prohibit the use of vulgar speech at school, partially because of the school's interest in protecting children from such language).

While no student has brought suit asserting the right to assemble, it is unlikely that any court would give students the freedom to assemble in the hallway (or anywhere other than his or her assigned classroom) during the school day while classes are in session. Additionally, students have limited freedom of religion rights.²⁰³ In fact, the only First Amendment²⁰⁴ right that students seem to universally possess is the freedom to petition. As for the Second Amendment,²⁰⁵ it is without question that students enjoy no right to possess firearms while at school.²⁰⁶ Additionally, students have reduced Fourth Amendment²⁰⁷ rights in school,²⁰⁸ and have no Twenty-first Amendment²⁰⁹ right to possess alcohol in school.²¹⁰ Finally, students, until they reach the required statutory age, are required to attend school, and thus lack the freedom to do as they please while school is in session.²¹¹

202. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that schools may exercise editorial control over the style and content of student speech in school-sponsored publications so long as the school can articulate a valid educational purpose).

203. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 298–99, 312 (2000) (holding that a student may not pray before football games using the school’s public address system because it has the improper effect of coercing those present to participate in an act of religious worship).

204. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

205. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

206. *State v. J.M.*, 255 P.3d 828, 829 (Wash. Ct. App. 2011), *rev’d on other grounds en banc*, *State v. Meneese*, 282 P.3d 83, 88 (Wash. 2012) (en banc) (a student was arrested for possessing an air pistol at school, and was subsequently convicted of unlawfully possessing a dangerous weapon at school).

207. “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.” U.S. CONST. amend. IV.

208. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (holding that school employees may search students with reasonable suspicion alone, with no warrant, when the search is justified at its inception and when it is reasonably related in scope to the circumstances which justified the interference in the first place); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996) (applying *T.L.O.*’s reasonable suspicion standard to school resource officers).

209. “The eighteenth article of amendment to the Constitution of the United States [which prohibited the manufacture, sale, or transportation of any intoxicating liquor] is hereby repealed.” U.S. CONST. amend. XXI, § 1.

210. *State v. E.K.P.*, 255 P.3d 870, 871 (Wash. Ct. App. 2011) (affirming the conviction of a student who was convicted of possessing alcohol at school).

211. Every state has compulsory school attendance laws. *Ingraham v. Wright*, 430 U.S. 651, 660 n.14 (1977). *See also Dilworth*, 661 N.E.2d at 318 (students are “routinely required to do a variety of things.”) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

In short, it is accepted that students, as minors in a compulsory educational system, do not and cannot enjoy the same constitutional rights as their older counterparts. Applying the reasonable suspicion standard to school resource officers—the same standard that courts readily apply to school employees—does not erode the rights of students. Rather, the reasonable suspicion standard is entirely consistent with the other constitutional rights that students enjoy.²¹² It will not produce a slippery-slope or erode student rights, just as limiting the right of students to use abusive language in school has not produced a slippery-slope of silencing student speech or of eroding student rights.²¹³ Instead, just as limiting abusive language in schools protects minor students from such language, applying a reasonable suspicion standard in schools protects children from violence and drug use that, unfortunately, so often accompanies public school systems.²¹⁴

C. School Violence and Drugs

In *T.L.O.* the Supreme Court recognized the most important reason why probable cause should not apply to school searches. The Court stated that “in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”²¹⁵ Unfortunately, the trend of drugs and violence in schools continues twenty-nine years later. This section examines current school violence and drug problems, explores arguments that promote probable cause despite these problems, and explains why reasonable suspicion is the better standard for schools.

A 2012 Center for Disease Control survey revealed that twelve percent of students engaged in a physical fight on school property within the previous year, while nearly six percent did not go to school one or more days within the previous month because they felt unsafe at school.²¹⁶ Even more troublesome, nearly five and one-half percent of students carried a gun, knife, or club to school within the month prior to the survey, and nearly seven and one-half percent were threatened or physically injured with such a weapon on school property within the prior year.²¹⁷ The Center for Disease Control also calculated that between 1999 and 2006, 116 students were killed in 109

212. See *supra* notes 198–211 and accompanying text.

213. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

214. See discussion *infra* Part IV.0.

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

216. *Youth Violence Facts at a Glance, 2012*, CENTER FOR DISEASE CONTROL (May 28, 2013), <http://www.cdc.gov/ViolencePrevention/pdf/YV-DataSheet-a.pdf>.

217. *Id.*

separate incidents, with sixty-five percent of those homicides resulting from a gunshot wound.²¹⁸

During the 1990s, there were numerous school shootings in the United States. A small sample of these incidents include Luke Woodham, who murdered his mother before killing two students at school in Pearl, Mississippi in 1997; Andrew Golden and Mitchell Johnson, who killed one teacher and four students in Jonesboro, Arkansas in 1998; and Eric Harris and Dylan Klebold, who killed a teacher and twelve students, while injuring numerous others, at Columbine High School in Littleton, Colorado in 1999.²¹⁹ This trend has also continued into the twenty-first century. For example, Jeffery Weise killed nine people, including his grandfather, in school in Red Lake, Minnesota in 2005; Charles Carl Roberts IV killed five girls execution style in a schoolhouse before taking his own life in Nickel Mines, Pennsylvania in 2006;²²⁰ Seung-Hui Cho killed thirty-three people on the campus of Virginia Tech in 2007;²²¹ and Adam Lanza killed twenty-seven people, including twenty students, in Newtown, Connecticut in 2012.²²²

Nor has student drug use subsided since 1985. The Boston Globe recently quoted one superintendent who said “[d]rugs are everywhere—in the smaller schools, rich towns, poor towns, urban, and suburban. If you want it, it’s there.”²²³ Another superintendent indicated that drugs are the “biggest obstacle that . . . schools face.”²²⁴ In fact, twenty five percent of students in one high school admitted to using marijuana.²²⁵ The U.S. News recently reported that seventeen percent of students abuse drugs during the school day, forty-four percent of high school students know a fellow student who sells drugs at

218. *Youth Violence Facts at a Glance, Summer 2009*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 28, 2013), http://www.cdc.gov/violenceprevention/pdf/yv_datasheet_summer2009-a.pdf.

219. 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, 617–18 (2000).

220. Jennifer L. Jack, *The 10 Deadliest U.S. School Shootings*, U.S. NEWS & WORLD REPORT (Apr. 16, 2007), <http://www.usnews.com/usnews/news/articles/070416/16deadliest.htm>.

221. Christine Hauser & Anahad O’Connor, *Virginia Tech. Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all&r=0>; Emily Friedman, *Va. Tech Shooter Seung-Hui Cho’s Mental Health Records Released*, ABC NEWS (Aug. 19, 2009), <http://abcnews.go.com/US/seung-hui-chos-mental-health-records-released/story?id=8278195#.UaWHAJyQPKc>.

222. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?hp&r=0>.

223. Steven A. Rosenberg, *Fighting drugs in schools*, BOSTON.COM, (Sept. 9, 2012), http://www.boston.com/yourtown/newton/articles/2012/09/09/growing_drug_problem_is_being_addressed_at_high_schools/.

224. *Id.*

225. *Id.*

school, and sixty-one percent of students report that their schools are “drug infected.”²²⁶ Additionally, one Missouri school district suspended sixty-eight high school students between 2011 and 2012 for violating the district’s drug and alcohol policy.²²⁷

Despite the incredible prevalence of guns, violence, and drugs in American schools, many still argue that the Fourth Amendment should apply equally inside and outside of schools.²²⁸ Put differently, many people believe the applicability of the warrant requirement should not depend on one’s status as a student. The arguments advanced in support of the warrant requirement, though, are seriously flawed, and undermine the conclusion that probable cause should apply. For example, Donald Beci argues that students will learn more about the dichotomy of public safety and individual liberty by watching backpack searches than they will by reading about the Constitution.²²⁹ The argument is that, by witnessing and living what Mr. Beci views as the suppression of student rights, students will grow to suppress the rights of others. However, as noted above, the reasonable suspicion standard does not suppress student rights—it is merely consistent with the other rights that students enjoy.²³⁰ Additionally, even if one were to equate the reasonable suspicion standard with the suppression of student rights, there is no evidence that students will mature to suppress the rights of others. It is equally possible that the education system will work—that students will learn to identify and remedy injustices.

Mr. Beci also attacked the reasonable suspicion standard using a slippery-slope argument. He questioned whether reasonable suspicion would apply to parents who are on school grounds for legitimate purposes.²³¹ In other words, he questioned whether a teacher or resource officer could search a parent at school with only reasonable suspicion. The answer, though, is obvious. Courts should employ a bright-line test so that all teachers, officers, and administrators can easily identify which standard applies.²³² If students are present—even just one student—the school’s legal duty to protect them remains, even if an adult poses the threat. As a result, reasonable suspicion

226. Amanda Gardner, *Many Teens Drinking, Taking Drugs During School: Survey*, U.S. NEWS (August 22, 2012), <http://health.usnews.com/health-news/news/articles/2012/08/22/many-teens-drinking-taking-drugs-during-school-survey>.

227. Mary Shapiro, *Parkway District Gives OK to Canine Drug Searches*, ST. LOUIS POST-DISPATCH, Nov. 26, 2012, http://www.stltoday.com/suburban-journals/metro/education/parkway-district-gives-ok-to-canine-drug-searches/article_efeb157c-2f7c-5560-be82-a23a83b1f45a.html.

228. Donald L. Beci, *School Violence: Protecting our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 835 (1992).

229. *Id.*

230. *See supra* notes 198–211 and accompanying text.

231. Beci, *supra* note 228, at 835.

232. *See infra* text accompanying notes 239–41.

should apply to adults while students are present. However, when students are not present at school or when school officials reasonably believe that students are not present, such as during weekend parent-teacher conferences, school employees have no duty to protect students. Since there is no duty to protect students when no students are present, probable cause should apply in these circumstances.

Stefkovich and Miller argue that, just as is the case outside the school environment, probable cause should apply unless there are exigent circumstances—like a threat of guns or violence—in which case the standard would revert to reasonable suspicion.²³³ The problem with relying on exigent circumstances to justify warrantless searches is that it will often call for an after-the-fact determination of which standard applies, since it is often unclear whether exigent circumstances exist.

Consider *In re Josue T.* where the smell of marijuana led to the discovery of a firearm in school.²³⁴ While the presence of marijuana did not constitute an emergency, the presence of a gun certainly did. Or, consider *In re William V.* where the pat down of a student who was displaying a bandanna led to the discovery of a knife in school.²³⁵ Clearly, the bandanna was harmless, but the knife was deadly.

The point is, sometimes it would be unclear whether exigent circumstances exist, so resource officers would often not know which legal standard applies to the search. In such cases, the resource officer, who is likely not a criminal attorney, must either conduct the search and risk having the evidence suppressed at trial, or take the time to apply for a warrant and risk the safety of students.

Others, like Dodd, argue that because statistics indicate that violence in schools is declining, then a probable cause standard is sufficient to curb violence.²³⁶ However, the fact that violence and guns in schools are decreasing does not make them absent.²³⁷ Rather, “violent crime in the schools . . . [is a] major social problem[].”²³⁸ Even if there is decreased school violence, it is necessary to apply the reasonable suspicion standard to deter students. If students know that they can be searched with only reasonable suspicion, they will be less likely to carry contraband onto school property. Conversely, if students know that a warrant must be obtained before they can be searched,

233. Stefkovich & Miller, *supra* note 56, at 25, 67–69.

234. *In re Josue T.*, 989 P.2d 431, 434 (N.M. Ct. App. 1999).

235. *In re William V.*, 4 Cal. Rptr. 3d 695, 696–97 (Cal. Ct. App. 2003).

236. Victoria J. Dodd, *Student Rights: Can We Create Violence-Free Schools that Are Still Free?*, 34 NEW ENG. L. REV. 623, 625–26 (2000).

237. See *supra* text accompanying notes 216–22.

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

they will be more tempted to bring contraband to school because they would have a reduced chance of being caught.

It is clear that guns, drugs, and violence are an unfortunate part of the American school system. It is equally clear that educators and resource officers have a legal duty to protect students while in school. A probable cause standard would frustrate the fulfillment of the resource officer's duty, make it harder for schools to keep contraband off school property, and make it easier for students to conceal drugs or weapons at school. This high standard will not mitigate drug and gun problems, but will make them worse. It will force educators and resource officers to take the time to apply for a warrant instead of immediately addressing a perceived threat—time that in some circumstances, could literally be the difference between life and death. Reasonable suspicion, though, allows educators and resource officers the flexibility to search without wasting time obtaining a warrant, and discourages students from bringing contraband to school. As a result, reasonable suspicion should apply when no “outside” officers are involved.

V. RECOMMENDATION

The determination of whether reasonable suspicion or probable cause applies when a resource officer searches a student should hinge on a bright-line rule that school employees and police officers can easily apply and understand. This bright-line rule is necessary because, generally, neither school employees nor police officers are trained in the nuances and intricacies of the law.²³⁹ A bright-line test, then, will allow school employees and officers to know, before conducting the search, which standard applies, and will keep them from violating the rights of students while enabling them to efficiently disrupt criminal activity. As one Delaware court stated, “[U]nlawful police conduct will be deterred only if . . . police officers are aware of the standards to which they must be held.”²⁴⁰ The same reasoning applies to school employees. Additionally, this bright-line rule must be practical. It should not “elevate[] form over function” by considering arbitrary factors like who paid the officer's salary or where he was assigned.²⁴¹ Rather, the focus should be on the role of the person conducting the search.

Therefore, the rule should be based on the *In re Josue T.* classifications.²⁴² First, pursuant to *T.L.O.*, reasonable suspicion should apply when school

239. This is not to suggest that police officers have no legal training—certainly they do. But when a difficult balancing or factors test is applied, an officer without formal legal training may erroneously reach the wrong conclusion about which standard applies.

240. *State v. Siple*, Cr. A. Nos. IN94-12-1641 to IN94-12-1672, 1996 WL 528405, at *8 (Del. Super. Ct. July 19, 1996).

241. *State v. Meneese*, 282 P.3d 83, 93 (Wash. 2012) (en banc) (Stephens, J., dissenting).

242. *In re Josue T.*, 989 P.2d 431, 436–37 (N.M. Ct. App. 1999).

employees conduct a search, and when resource officers search in conjunction with school employees.²⁴³ It is crucial that resource officers are able to search at the request of school employees so as to not “encourage teachers and school officials, who generally are untrained in proper pat down procedures . . . to conduct a search of a student suspected of carrying a dangerous weapon . . . without the assistance of a school liaison officer.”²⁴⁴ Additionally, because resource officers can unilaterally search students when they develop reasonable suspicion,²⁴⁵ there will be no “silver platter”²⁴⁶ problems where resource officers coerce school employees into searching students based on a legal standard that does not apply to the officer personally.

Second, reasonable suspicion should universally apply when a school resource officer, acting on his own initiative or under his own authority, unilaterally searches a student.²⁴⁷ Reasonable suspicion should apply to resource officers because the focus should be on function, not form.²⁴⁸ Resource officers are fully commissioned law enforcement personnel that are often armed and in uniform. However, like traditional school employees, they also work full-time in a particular school, and are responsible for maintaining a safe, secure, and orderly learning environment for students.²⁴⁹ In this way, resource officers function more like school employees and less like “outside” police. This rule is also justified because schools are special due to the school’s custodial responsibility for students.²⁵⁰ Because of this, and the fact that for their own good, students are “routinely required [to do a variety of things],” they enjoy fewer rights while in school and should be subject to searches based only on reasonable suspicion developed unilaterally by resource officers.²⁵¹

Finally, probable cause should apply when “outside” police officers initiate their own search, or when school employees or resource officers search at the behest of such “outside” officers. These “outside” officers are different because, unlike resource officers, they do not work full-time in the unique school setting and are not responsible for maintaining an orderly educational

243. *Id.* at 436.

244. *Meneese*, 282 P.3d at 94 (Stephens, J., dissenting) (quoting *State v. Angelia D.B. (In re Interest of Angelia D.B.)*, 564 N.W.2d 682, 690 (Wis. 1997)).

245. *See infra* text accompanying note 247.

246. A “silver platter” problem is when police provide information to school officials and induce them to conduct a search under T.L.O.’s reasonable suspicion standard because the police, who ordinarily require probable cause, lack probable cause under the current circumstances. Barry C. Feld, T.L.O. and Redding’s *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies.*, 80 MISS. L.J. 847, 890 (2011).

247. *Josue T.*, 989 P.2d at 436.

248. *Meneese*, 282 P.3d at 93 (Stephens, J., dissenting).

249. *Id.* at 85 (majority opinion).

250. *People v. Dilworth*, 661 N.E.2d 310, 318 (Ill. 1996) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

251. *Id.*; *See also supra* notes 198–211 and accompanying text.

environment. Because they have no connection to, or responsibility for, the school environment (other than the presence of the school in the city the officer serves), the necessity for quick action that applies to resource officers does not apply to their “outside” counterparts. Additionally, because probable cause applies to “outside” officers, they should not be permitted to ask school employees or resource officers to search students. If they could request searches, “outside” officers would be tempted to ask school employees or resource officers to search with the lower reasonable suspicion standard, then hand the evidence over on a “silver platter.”²⁵²

When students are on an off-campus field trip, either resource officers or “outside” police could potentially search students. Resource officers should not need probable cause, because as agents or contractors of the school, they have a legal duty to protect students and maintain a safe educational environment. “Outside” police, however, have no legal duty specifically to students, or to the educational environment. As a result, just as under *In re Josue T.*’s third category, “outside” police should develop probable cause before searching, even if students are off-campus during the school day.

CONCLUSION

This Note does not seek to encourage the suppression of individual rights, liberty, or autonomy. There is no question that “students do not shed their constitutional rights . . . at the schoolhouse gate.”²⁵³ However, while society protects the rights of students, it must not forget to also protect their health and safety. American schools are experiencing substantial gun, violence, and drug problems that have no end in sight. It is the legal duty of schools and school resource officers to identify and resolve these problems—something they cannot do without the flexibility to quickly intervene and resolve dangerous situations. If probable cause were the standard, teachers and resource officers would be forced to apply for a search warrant to search students. Unfortunately, the time this would take could be the difference between life and death for students. With the reasonable suspicion standard, though, like what happened in *In re Josue T.* and *In re William V.*, schools will be safer because teachers and resource officers will be able to respond quickly and prevent violence before it occurs.

This standard does not reduce or suppress the Fourth Amendment rights of students. One must remember that students, by their very nature, have limited rights while in school. They must attend school, even if they object. Their First Amendment rights are significantly restricted while in school, and their Second

252. See *supra* note 246.

253. *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

Amendment rights are also extinguished. Additionally, their Fourth Amendment rights are limited according to *T.L.O.*, at least when school officials conduct a search or seizure. Applying reasonable suspicion, even to school resource officers who are agents or contractors of the school, is merely consistent with the other rights that students enjoy while in school.

Because *Meneese* is a category one or two case, the court should have applied the reasonable suspicion standard and affirmed Meneese's conviction for carrying a dangerous weapon at school. The search was justified at its inception because the officer caught Meneese with marijuana in plain view, and with a padlocked backpack. It was permissible in scope because the search was limited to where the officer reasonably believed contraband was hidden. However, with essentially no justification, the court applied probable cause and departed from the clear trend of cases that apply reasonable suspicion to school resource officers. Because the court did not clearly indicate the breadth of its holding, the case will generate confusion among judges, school administrators, and school resource officers—they will not know which standard applies. Until the court clarifies the rule, when school resource officers in Washington become suspicious of a student, they must decide which is the lesser of two evils: search the student and risk having the evidence suppressed or the conviction reversed, or apply for a warrant and hope the officer's suspicion does not come to fruition while the application is being processed. A better approach is to create a bright-line rule that every judge, school administrator, teacher, and resource officer can know and understand: reasonable suspicion applies in all category one and two cases, while probable cause applies in all category three cases.

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