

2. *Fourth Amendment — Search by School Officials.* — Perhaps the only thing more likely to get the public talking about jurisprudence than a salient case reaching the Supreme Court is a vacancy thereon. Last Term, in *Safford Unified School District No. 1 v. Redding*,<sup>1</sup> the Court found itself in both situations. *Safford*, which involved the strip search of a thirteen-year-old suspected of possessing over-the-counter pain pills, had attracted considerable attention in the press, with many commentators noting the sympathetic quality of the plaintiff's claim.<sup>2</sup> At the same time, following Justice Souter's announcement that he would retire at the end of the term, the American public began dissecting President Obama's statement that his first nominee to the Court would demonstrate "empathy."<sup>3</sup> Because Supreme Court precedent did not clearly cast the strip search as reasonable or unreasonable, the Court was right to treat the case as one of almost first impression. Conflicting empathetic impulses may have played a significant role in the Court's deliberations and, because the Fourth Amendment's reasonableness standard demands reference to external factors, this kind of debate is jurisprudentially sound.

*Safford*, Arizona is a town of just under ten thousand in the foothills of Arizona's Pinaleño Mountains.<sup>4</sup> In October 2003, in the town's middle school, eighth-grader Savana Redding was summoned from math class to the assistant principal's office.<sup>5</sup> Earlier in the day, acting on a tip from another student, Assistant Principal Wilson had confronted Savana's classmate Marissa Glines, searched her pockets and wallet, and discovered several 400-milligram ibuprofen pills, one 200-milligram naproxen pill, and a razor.<sup>6</sup> Pressed, she said she had gotten the pills from Savana.<sup>7</sup> When Savana reached his office, Wilson told her he had a report that she had distributed the pills to her classmates and showed her a day planner containing contraband that he had taken from Marissa.<sup>8</sup> Savana denied that she had distributed any pills

<sup>1</sup> 129 S. Ct. 2633 (2009).

<sup>2</sup> See, e.g., Editorial, *Too Often, "Zero Tolerance" Equals Zero Common Sense*, USA TODAY, Apr. 17, 2009, at 8A; Editorial, *Unreasonable Search*, N.Y. TIMES, Apr. 20, 2009, at A26.

<sup>3</sup> See Press Release, Office of the Press Sec'y, Remarks by the President on Justice David Souter (May 1, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-The-President-On-Justice-David-Souter](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-Justice-David-Souter).

<sup>4</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1075 (9th Cir. 2008) (en banc).

<sup>5</sup> *Safford*, 129 S. Ct. at 2638.

<sup>6</sup> *Id.* at 2640. Ibuprofen is a generic pain reliever (sold under the trade names Advil and Motrin); while 400-milligram pills are available by prescription only, 200-milligram pills are available over the counter. See *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 837 n.1 (9th Cir. 2007) (Thomas, J., dissenting). Naproxen is a generic anti-inflammatory (sold under the trade name Aleve) available over the counter. *Safford*, 129 S. Ct. at 2642 n.4.

<sup>7</sup> *Safford*, 129 S. Ct. at 2640. Marissa was not asked, nor did she reveal, when Savana gave her the pills or whether she thought Savana might have more. *Id.*

<sup>8</sup> *Id.* at 2640–41.

and said that the planner was hers but the material inside did not belong to her.<sup>9</sup> Nevertheless, she consented to a search of her backpack.<sup>10</sup> Finding nothing, Wilson next instructed an administrative assistant to take Savana to the school nurse's office to search her person.<sup>11</sup> There, the assistant and the nurse asked her to disrobe, ultimately instructing her to pull her bra and underpants away from her body, thereby exposing her breasts and pelvis.<sup>12</sup> Though this search, too, failed to reveal any pills, Savana was made to wait in the assistant principal's office for two more hours.<sup>13</sup>

Savana's mother, April Redding, filed a § 1983<sup>14</sup> action on her minor daughter's behalf against Safford Unified School District Number 1 and the three employees involved in the search, alleging a violation of the Fourth Amendment<sup>15</sup> as well as state law claims.<sup>16</sup> The United States District Court for the District of Arizona awarded summary judgment to all defendants on the constitutional claim and dismissed the state claims.<sup>17</sup> A panel for the Ninth Circuit affirmed.<sup>18</sup> Writing for the majority,<sup>19</sup> Judge Clifton first noted that, although public school students enjoy a selection of constitutional rights while at school,<sup>20</sup> that selection is "not automatically coextensive with the rights of adults in other settings."<sup>21</sup> Against this backdrop, the court held that the search was both justified at its inception and reasonably related in scope to the circumstances that justified it, and therefore that it satisfied both requirements of *New Jersey v. T.L.O.*,<sup>22</sup> the Supreme Court's leading case on student searches.<sup>23</sup> Judge Thomas wrote in

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<sup>9</sup> *Id.* at 2641. Inside the planner were "several knives, lighters, a permanent marker, and a cigarette." *Id.* at 2638.

<sup>10</sup> *Id.* at 2638.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Both the administrative assistant and the nurse were female.

<sup>13</sup> *Id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

<sup>14</sup> 42 U.S.C. § 1983 (2006).

<sup>15</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .").

<sup>16</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 831 (9th Cir. 2007).

<sup>17</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, No. 4:04-cv-00265-NFF (D. Ariz. Mar. 22, 2005) (order dismissing state law claims and granting summary judgment).

<sup>18</sup> *Redding*, 504 F.3d 828.

<sup>19</sup> Judge Hawkins joined the majority opinion.

<sup>20</sup> *Redding*, 504 F.3d at 831.

<sup>21</sup> *Id.* at 832 (quoting *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007)) (internal quotation mark omitted).

<sup>22</sup> 469 U.S. 325 (1985).

<sup>23</sup> *Redding*, 504 F.3d at 832. By ruling that the defendants did not violate Savana's Fourth Amendment rights, the majority did not reach the question of qualified immunity.

dissent, concluding that the facts in the record satisfied neither of *T.L.O.*'s conditions.<sup>24</sup>

The Ninth Circuit agreed to rehear the case en banc and ultimately affirmed in part, reversed in part, and remanded.<sup>25</sup> Judge Wardlaw wrote for the court,<sup>26</sup> concluding first that the opinion below erred in finding no violation of Savana's Fourth Amendment rights.<sup>27</sup> The court began its analysis by quoting the Supreme Court's guidance in *T.L.O.*, that "a search of a student . . . will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."<sup>28</sup> Because a strip search is a very invasive search, the court held that its use demands a commensurately high degree of suspicion.<sup>29</sup> Whereas *T.L.O.* concerned an initial search whose results suggested that a second, more invasive search would uncover more evidence, here the first search (of Savana's backpack) should have lowered, not raised, the administrators' suspicion.<sup>30</sup> Moreover, the court held, Marissa's uncorroborated tip that Savana had once given her ibuprofen did not make it especially likely that Savana was at that moment hiding ibuprofen in her underwear.<sup>31</sup> Viewing all evidence in the light most favorable to the party opposing summary judgment,<sup>32</sup> the court of appeals reasoned that the trial court should have viewed Marissa's tip in the context of its source, "a frightened eighth grader caught red-handed by a principal."<sup>33</sup>

Thus determining that the search was not justified at its inception, the court then moved to consider *T.L.O.*'s second requirement: that the search be "reasonably related in scope to the circumstances which justified the interference in the first place."<sup>34</sup> Here, the court referred to its precedent and the concerns of Savana's amici that strip searches can have dire psychological effects on those of a vulnerable age.<sup>35</sup>

<sup>24</sup> See *id.* at 838 (Thomas, J., dissenting). Like the majority, Judge Thomas did not consider qualified immunity.

<sup>25</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1089 (9th Cir. 2008) (en banc).

<sup>26</sup> Judges Pregerson, Fisher, Paez, Milan D. Smith, Jr., and N. Randy Smith joined the majority opinion.

<sup>27</sup> *Redding*, 531 F.3d at 1087.

<sup>28</sup> *Id.* at 1081 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985)) (internal quotation mark omitted).

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* In *T.L.O.*, a vice principal asked a student to open her purse after she had been caught smoking cigarettes in the bathroom. The vice principal saw rolling papers inside. This discovery prompted his active search through *T.L.O.*'s purse, which turned up marijuana and evidence that she had distributed it to classmates. See *T.L.O.*, 469 U.S. at 328.

<sup>31</sup> *Redding*, 531 F.3d at 1082.

<sup>32</sup> *Id.* at 1076 n.3.

<sup>33</sup> See *id.* at 1083.

<sup>34</sup> *Id.* at 1085 (quoting *T.L.O.*, 469 U.S. at 341) (internal quotation marks omitted).

<sup>35</sup> See *id.* at 1085–86.

Considering the “nature of the infraction,” the court refused to rule categorically that any search for any drug could be justified by simple appeal to the War on Drugs.<sup>36</sup>

The court’s ultimate answer to the Fourth Amendment question — that “common sense”<sup>37</sup> was sufficient to show a strip search was uncalled for in this situation — framed its consideration of qualified immunity.<sup>38</sup> The court began by observing that the qualified immunity defense is available for all cases but those in which “it would be clear to a reasonable officer [at the time of the unlawful act] that his conduct was unlawful in the situation he confronted.”<sup>39</sup> In this case, the court noted, the *T.L.O.* standard governing searches at school had been in place since 1985, and frequently interpreted since then.<sup>40</sup> Even without a specific precedent on point,<sup>41</sup> the court held that the search would have appeared clearly illegal to a reasonable public officer at the time it was carried out, and thus that the individual defendants were not protected by qualified immunity.<sup>42</sup>

In dissent, Judge Gould<sup>43</sup> agreed with the court that the search had violated the Fourth Amendment, although he felt that *T.L.O.* instructed the court to consider first whether *any* search was justified at its inception, and only then to consider whether the search was reasonable as it was actually carried out.<sup>44</sup> His material disagreement with the court was on the second question facing it: Judge Gould argued that the presence of judicial disagreement in the rehearing and the opinions below implied that “the law heretofore did not give adequate guidance to the school officials.”<sup>45</sup> Separately, Judge Hawkins<sup>46</sup> offered a comprehensive dissent from both of the court’s holdings.<sup>47</sup> First, he argued that the court had not properly balanced the school district’s need for order and safety with Savana’s expectation of pri-

<sup>36</sup> *Id.* at 1086 (quoting *T.L.O.*, 469 U.S. at 342) (internal quotation mark omitted).

<sup>37</sup> *Id.* at 1085.

<sup>38</sup> *See id.* at 1086–87.

<sup>39</sup> *Id.* at 1087–88 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)) (internal quotation marks omitted). The qualified immunity doctrine is meant to satisfy “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

<sup>40</sup> *Redding*, 531 F.3d at 1088.

<sup>41</sup> The court did, however, cite a strikingly similar case from the Ninth Circuit. *Id.* (“It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude.” (quoting *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1999)) (internal quotation mark omitted)).

<sup>42</sup> *See id.* at 1089.

<sup>43</sup> Judge Silverman joined Judge Gould’s dissent.

<sup>44</sup> *Redding*, 531 F.3d at 1090–91 (Gould, J., dissenting).

<sup>45</sup> *Id.* at 1091.

<sup>46</sup> Chief Judge Kozinski and Judge Bea joined Judge Hawkins’s dissent.

<sup>47</sup> *Redding*, 531 F.3d at 1091 (Hawkins, J., dissenting).

vacy, as *T.L.O.* commanded.<sup>48</sup> On the question of scope, Judge Hawkins would have deferred to the school's categorical ban on drugs and the individual defendants' judgment in the heat of the moment.<sup>49</sup> A premise underlying this deference, that the law did not clearly forbid the search, led Judge Hawkins to conclude that the law was not clearly established and thus that qualified immunity should have been available.<sup>50</sup>

The Supreme Court affirmed in part, reversed in part, and remanded.<sup>51</sup> In what would become his final opinion for the Court, Justice Souter<sup>52</sup> held that the search violated the Fourth Amendment. The Court began by noting that *T.L.O.* required "reasonable suspicion,"<sup>53</sup> and confirmed that the facts apparent to the school administrators clearly rose to this level for the original, uncontested search of Savana's backpack.<sup>54</sup> Nevertheless, the Court held that the *T.L.O.* factors indicated that the second search was unjustified even in light of this suspicion.<sup>55</sup> To frame its discussion of the search's reasonableness, the Court cited evidence that coerced exposure can have even more serious psychological effects on young people than on adults.<sup>56</sup> And while it declined to second-guess the school's policy banning all drugs,<sup>57</sup> it nevertheless found that Assistant Principal Wilson "must have been aware of the nature and limited threat" of the drugs he suspected Savana of concealing.<sup>58</sup> Finally, though a student could conceivably hide pills in her undergarments, the administrators had no reason to suspect Savana of doing so.<sup>59</sup> The sum of these factors, the Court concluded, outweighed even the high level of deference it owed the school's judgment. Therefore, the search of Savana was unreasonable and illegal under the Fourth Amendment.<sup>60</sup>

<sup>48</sup> *Id.* at 1092 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

<sup>49</sup> *See id.* at 1104–08.

<sup>50</sup> *Id.* at 1108.

<sup>51</sup> *Safford*, 129 S. Ct. 2633.

<sup>52</sup> Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito joined the Court's opinion in full, and Justices Stevens and Ginsburg each joined as to Parts I–III, in which the Court discussed the Fourth Amendment issue.

<sup>53</sup> *Safford*, 129 S. Ct. at 2639.

<sup>54</sup> *See id.* at 2639–41.

<sup>55</sup> *Id.* at 2642–43.

<sup>56</sup> *Id.* at 2641–42 (citing Brief of Amici Curiae Nat'l Ass'n of Soc. Workers et al. in Support of Respondent at 6–14, *Safford*, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 870022; Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998)).

<sup>57</sup> *Id.* at 2640 n.1.

<sup>58</sup> *Id.* at 2642. While ibuprofen, like any substance, is toxic in excessive doses, the administrators had no reason to think that Savana possessed or would distribute such a high volume of the medicine. *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 2642–43.

With the underlying claim adjudged for the plaintiff, it fell to the Court to consider whether the defendants could claim qualified immunity. As in the opinions below, the Supreme Court observed that immunity is available when “clearly established law does not show” that the illegal act was in fact illegal.<sup>61</sup> Unlike the en banc court of appeals, however, the Court determined that the law was not suitably established in 2003. Although it recognized that “outrageous conduct obviously will be unconstitutional,”<sup>62</sup> the Court implicitly concluded that the search in this case did not rise to that level of outrageousness.<sup>63</sup> Instead, the Court cited pre-2003 opinions from a number of intermediate appellate courts that had found strip searches justified under *T.L.O.*, adjudging their majorities and dissents “well-reasoned” enough that the state of the law could have been in doubt.<sup>64</sup>

Justice Stevens<sup>65</sup> concurred with the Court’s holding that the search violated the Fourth Amendment, but dissented from its holding that this rule was not clear at the time it was carried out.<sup>66</sup> He would have held that, because the *T.L.O.* framework was established well before 2003 and because the Court merely applied that framework to the facts of Savana’s case, the law had not changed.<sup>67</sup> Because qualified immunity was meant to save defendants from having “to predict the *future course* of constitutional law,” Justice Stevens would have affirmed the court of appeals on both issues.<sup>68</sup> Separately, Justice Ginsburg concurred in part and dissented in part to register her reading of the facts before the Court: that Assistant Principal Wilson’s behavior was “abusive,” and that no reasonable official could have thought the search he carried out was reasonable.<sup>69</sup> Thus, Justice Ginsburg concluded that, *pace* the Court, the search should foreclose qualified immunity.<sup>70</sup>

Justice Thomas concurred in the judgment in part and dissented in part. He would have reversed the court of appeals not only regarding qualified immunity, but also regarding the underlying constitutional claim.<sup>71</sup> Justice Thomas placed considerable weight on schools’ discretion to pursue policies that promote discipline.<sup>72</sup> In his view, the Court

<sup>61</sup> See *id.* at 2643 (quoting *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009)).

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 2643–44.

<sup>64</sup> *Id.* at 2644.

<sup>65</sup> Justice Ginsburg joined Justice Stevens’s opinion.

<sup>66</sup> *Safford*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part).

<sup>67</sup> *Id.* at 2644–45.

<sup>68</sup> See *id.* at 2645 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (emphasis added)) (internal quotation marks omitted).

<sup>69</sup> See *id.* at 2646 (Ginsburg, J., concurring in part and dissenting in part).

<sup>70</sup> See *id.*

<sup>71</sup> *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>72</sup> See *id.* at 2646–47.

not only offered a vague and misguided standard for determining when a search violated the Fourth Amendment, but it also upset this time-honored deference.<sup>73</sup> Instead, he wrote, the Court should have seized the opportunity to revert to the common law doctrine of *in loco parentis*, under which parents are deemed to cede their own disciplinary authority to their children's schools.<sup>74</sup>

*Safford* was a difficult case, and this formal legal difficulty presents an exceptional environment in which to consider the role empathy may have played in the Court's deliberations. In one sense, the Supreme Court's discretionary jurisdiction ensures that none of the cases it hears are "easy."<sup>75</sup> But *Safford* was challenging on another, more subtle level: law alone could not answer the question whether the search was reasonable. Questions of reasonableness,<sup>76</sup> perhaps more than others,<sup>77</sup> can require courts to import a deciding factor from outside the law, and reasonableness is the crux of the Search and Seizure Clause.<sup>78</sup> Even against this backdrop, *Safford* stood out, because the Court's own precedent on suspicion-based school searches provided nothing more than a bare framework. The Court admitted as much when it cited no cases but *New Jersey v. T.L.O.* in determining that the search was unreasonable,<sup>79</sup> and it expressly held that *T.L.O.* was insufficient to "clearly establish[]"<sup>80</sup> the right to be free from the strip search at issue in this case.<sup>81</sup> Some evidence indicates that a certain variety

<sup>73</sup> See *id.* at 2647–55.

<sup>74</sup> *Id.* at 2655–57. Neither party nor their respective amici briefed this doctrinal shift; however, the *in loco parentis* doctrine may be a recent hobbyhorse for Justice Thomas. See *Morse v. Frederick*, 127 S. Ct. 2618, 2631–34 (2007) (Thomas, J., concurring).

<sup>75</sup> The Court has developed a number of practices to minimize the docket volume it expends on those legal questions it trusts lower courts to resolve. See, e.g., Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs — And an Alternative*, 107 MICH. L. REV. 711 (2009) (discussing the practice of summarily granting certiorari, vacating the decision below, and remanding).

<sup>76</sup> See, e.g., MARISA IGLESIAS VILA, *FACING JUDICIAL DISCRETION* 24–26 (2001) (discussing the "zone of reasonableness"). See generally MAYO MORAN, *RETHINKING THE REASONABLE PERSON* (2003) (cataloging the problems inherent in holding human behavior to an objective standard).

<sup>77</sup> Both sides of the positivist-interpretivist debate have recognized that the law cannot answer every question put to it. See RONALD DWORKIN, *LAW'S EMPIRE* 255–56 (1986); H.L.A. HART, *THE CONCEPT OF LAW* 126–29 (2d ed. 1994).

<sup>78</sup> U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches . . . shall not be violated . . ."). Notably, the Search and Seizure Clause includes the only reasonableness standard expressly prescribed in the Constitution's text.

<sup>79</sup> *Safford*, 129 S. Ct. at 2641–43. This omission is notable in light of the Court's subsequent acknowledgment, after it had resolved the Fourth Amendment issue, that the circuits below had split on the issue, *id.* at 2643–44, and that opinions on both sides were "well-reasoned," *id.* at 2644. The Court could not, therefore, rely on precedent alone to decide the case.

<sup>80</sup> *Id.* at 2643.

<sup>81</sup> *Id.* at 2643–44. The qualified immunity doctrine helped translate legal theory into praxis, in that it represented one of the first instances of the law acknowledging its own occasional indeter-

of empathy may have provided data that the Court could use to answer the legal question at hand.

In essence, practicing empathy means mentally assuming the role of another.<sup>82</sup> Justice Ginsburg's approach to the case appeared to exemplify this technique. Professor Dan Filler notes that, when the case was argued, the Court as a whole did not sound ready to find the search illegal under the Fourth Amendment.<sup>83</sup> Justice Ginsburg provided the only voice clearly favoring the respondent.<sup>84</sup> It may well be that her unique experience (as among the Justices) as a thirteen-year-old girl allowed her to identify with the ignominy of the search. Asked in a later interview whether it was important to have a woman's voice in *Safford*, she replied:

I think it makes people stop and think, [m]aybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed. I think many of [the male Justices] first thought of their own reaction. It came out in various questions. You change your clothes in the gym, what's the big deal?<sup>85</sup>

minacy. See Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1468–72 (1996).

<sup>82</sup> While the debate over the President's use of the term has amply shown that "empathy" admits several meanings, the capability to take on the perspectives of others is fundamental to the concept. This definition also correlates highly with other measures of empathy. Mark H. Davis, *A Multidimensional Approach to Individual Differences in Empathy*, 10 JSAS CATALOG OF SELECTED DOCUMENTS IN PSYCHOL. 85 (1980), available at [http://www.eckerd.edu/academics/psychology/files/Davis\\_1980.pdf](http://www.eckerd.edu/academics/psychology/files/Davis_1980.pdf).

<sup>83</sup> Posting of Dan Filler to The Faculty Lounge, <http://www.thefacultylounge.org/2009/07/did-a-wise-woman-justice-change-the-outcome-of-safford-v-redding.html> (July 13, 2009, 9:40) (citing David G. Savage, *High Court Hears Strip-Search Case*, L.A. TIMES, Apr. 22, 2009, at A11). At argument, Justice Breyer's line of reasoning appeared to rule the day. See Transcript of Oral Argument at 58, *Safford*, 129 S. Ct. 2633 (2009) (No. 08-479), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-479.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-479.pdf) ("In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay?"). Justice Breyer went on to join the Court's opinion that strip searches can endanger a child's mental health. See 129 S. Ct. at 2641–42.

<sup>84</sup> See Posting of Lyle Denniston to SCOTUSBlog, <http://www.scotusblog.com/wp/analysis-a-fear-may-drive-a-decision> (Apr. 21, 2009, 11:29) (noting that most of the Court displayed apprehension about appearing to limit school officials' resources in combating drugs). Justice Ginsburg's questions, however, seemed to be focused on showing the search unreasonable. See, e.g., Transcript of Oral Argument, *supra* note 83, at 5, 9, 10 (highlighting the facts that the school had never found drugs during a strip search before and did not ask Marissa whether Savana had given her the pills at school); Robert Barnes, *Justices' Takes on Strip Search Vary*, WASH. POST, Apr. 22, 2009, at A14 ("[Justice Ginsburg] was addressing [respondent's counsel Adam B.] Wolf, but speaking more to her colleagues, when she said, 'I don't think there's any dispute what was done in the case of both of these girls . . . . It wasn't just that they were stripped to their underwear.'"); see also Posting of Dan Filler, *supra* note 83.

<sup>85</sup> Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 12, 2009, § 6 (Magazine), at 22. Justice Ginsburg's reference was to Justice Breyer's line of questions during argument, which compared a strip search to undressing in a locker room. See Transcript of Oral Argument, *supra* note 83, at 45 ("I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently . . . .



Of course, no one is entitled to empathy more than his or her opponent. If Justice Ginsburg was able to approach the facts of the case from the perspective of the plaintiff, Justice Souter was able to do so from the perspective of the defendants. Addressing the respondents' counsel, he observed that "the reasonableness analysis in the principal's mind is [']better embarrassment than violent sickness or death.['] What's wrong with that reasoning under the Fourth Amendment?"<sup>86</sup> Through his line of questioning, Justice Souter appeared attuned to the difficulties future school administrators would face if the Court did not consider how the new standard it would announce would play out in practice. Like Justice Ginsburg, Justice Souter has said that his experiences inform the way that he judges,<sup>87</sup> and like Justice Ginsburg, his experiences led him to an important consideration that may have aided in his determination of the case.

Following oral arguments, then, the Court was left with two reasonably compelling arguments and no uncontroversial means of choosing between them. How did it eventually reach a decision? Whatever the effect of the Justices' empathetic senses on their deliberation, the opinion itself does not sound in a particularly emotional key. The Court's sole reference to the search's special ignominy for those in Savana's position was clinical rather than emotive,<sup>88</sup> and it was quick to

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[H]ow bad is this, underclothes? That's what I'm trying to get at. I'm asking because I don't know.").

<sup>86</sup> Transcript of Oral Argument, *supra* note 83, at 49–50. Chief Justice Roberts was also able to see this point of view. *Id.* at 34 ("[I]f it depends whether it's a dangerous drug like crack or a relatively — not harmless, but a different one like ibuprofen, the search depends on that, how is the school administrator supposed to know?"). At least one scholar has posited a connection between the Chief Justice's managerial experience and his jurisprudence. See Akhil Reed Amar, *The Supreme Court, 2007 Term—Comment: Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 178–79 (2008).

<sup>87</sup> In his opening statement before the Senate Committee on the Judiciary that would vote on his nomination to the Supreme Court, then-Judge Souter said that he had learned two lessons as a New Hampshire trial judge:

The first lesson, simple as it is, is that whatever court we are in, whatever we are doing, whether we are on a trial court or an appellate court, at the end of our task some human being is going to be affected. Some human life is going to be changed in some way by what we do, whether we do it as trial judges or whether we do it as appellate judges, as far removed from the trial arena as it is possible to be.

The second lesson that I learned in that time is that if, indeed, we are going to be trial judges, whose rulings will affect the lives of other people and who are going to change their lives by what we do, we had better use every power of our minds and our hearts and our beings to get those rulings right.

I am conscious of those two lessons, as I have been for all of the years that I was on an appellate [court].

*Nomination of David H. Souter To Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 101st Cong. 51–52 (1990) (testimony of Judge David H. Souter).

<sup>88</sup> See *Safford*, 129 S. Ct. at 2641–42 (citing Brief of Amici Curiae Nat'l Ass'n of Soc. Workers et al. in Support of Respondent, *supra* note 56, at 6–14; Hyman & Perone, *supra* note 56, at 7, 13).

clarify that the fact that a strip search can have severe psychological impact on a student “does not, of course, outlaw it.”<sup>89</sup> Any effect that empathy had in gathering eight votes to find a violation of the Fourth Amendment must have happened entirely behind the scenes.<sup>90</sup> In the final calculation, deliberations of this kind are not only consonant with the Fourth Amendment; in cases like *Safford*, they are all but necessary.<sup>91</sup> Indeed, if judges did not permit themselves to understand another’s perspective, the Fourth Amendment would preserve not society’s reasonable expectations of privacy, but rather the federal judiciary’s.<sup>92</sup> Just as students do not “shed their constitutional rights . . . at the schoolhouse gate,”<sup>93</sup> the Court has long recognized that judges do not doff their humanity when they don their robes.<sup>94</sup> In this sense, the Court’s opinion in *Safford* may be a model of well-considered empathy in the law.

3. *Fourth Amendment — Search Incident to Arrest.* — The Supreme Court’s 1981 decision in *New York v. Belton*<sup>1</sup> was read for decades to allow police to conduct warrantless searches of cars after arresting the recent occupants, even when the occupants were already handcuffed and secured.<sup>2</sup> Last Term, in *Arizona v. Gant*,<sup>3</sup> the Supreme Court responded to persistent criticism of *Belton*<sup>4</sup> by holding that police may search a vehicle incident to arrest “only if the arrestee

<sup>89</sup> *Id.* at 2642. Indeed, its treatment of the circumstances of Savana’s search was significantly more detached and matter-of-fact than that of the en banc court of appeals that it affirmed.

<sup>90</sup> See Posting of Dan Filler, *supra* note 83; see also Bazelon, *supra* note 85, at 22 (“It matters for women to be there at the conference table to be doing everything that the court does. . . . If you want to influence people, you want them to accept your suggestions, . . . [i]t will be welcomed much more if you have a gentle touch . . . .” (quoting Justice Ginsburg) (internal quotation marks omitted)).

<sup>91</sup> When confronting the Fourth Amendment, empathy is the mechanism by which a judge takes the role of the parties before him or her and determines whether the claimant’s stated expectation of privacy was reasonable. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>92</sup> The two are very probably distinct. See Dan M. Kahan et al., *Whose Eyes Are You Going To Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 883 & n.113 (2009).

<sup>93</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>94</sup> See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009) (“In defining [standards for judicial recusal,] the Court has asked whether, ‘under a realistic appraisal of psychological tendencies and human weakness . . . the practice must be forbidden . . . .’” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))).

<sup>1</sup> 453 U.S. 454 (1981).

<sup>2</sup> See *Thornton v. United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (collecting cases).

<sup>3</sup> 129 S. Ct. 1710 (2009).

<sup>4</sup> *Id.* at 1716; see, e.g., *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 672–81; Carson Emmons, Comment and Note, *Arizona v. Gant: An Argument for Tossing Belton and All Its Bastard Kin*, 36 ARIZ. ST. L.J. 1067 (2004); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 268–76 (2004).