

**EXPLORING THE JUDICIAL USE OF THE ETHICS OF JUSTICE AND CARE
IN DECIDING FOURTH AMENDMENT CASES: IMPLICATIONS FOR
STUDENTS' RIGHTS**

A Record of Study

by

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ABSTRACT

This analysis examined the degree to which courts of law reveal non-traditional ethics in the manner in which the legal reasoning is crafted. The study focused specifically on opinions of the court rendered in cases that involved an educator, or his or her agent, conducting a search of a student's person or property while in the care of the school. This study sought to understand the level to which judges' opinions reveal an underlying ethical basis, either through justice or care, or perhaps a bit of both.

The need for this analysis is significant considering the shift toward increasingly stringent disciplinary practices and legislative agendas that more frequently involve the courts in the administration of student discipline. These increasingly stringent practices are intended to provide a safe and orderly school environment; however, they are contributing to a school and societal climate that is infringing on the constitutionally protected rights of students. A thorough review of available literature identified that little scholarly work has previously been conducted on this specific area.

Findings from the study fill an identified void in scholarship relating to the ethical posture of judges as they address student discipline. It was conclusively identified that the prevailing ethical posture of the judges is that of justice. An ethic of care was evidenced, but to a much lesser degree. The most significant finding from the study was the identification of a phenomenon in which courts, solely aligning to an ethic of justice, afford students in their court elements of care by applying a caring legal precedent. This phenomenon was identified as institutionalized care.

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CHAPTER I

INTRODUCTION

Purpose of the Study

This analysis examined the degree to which courts of law reveal non-traditional ethics in the manner in which the legal reasoning is crafted. Historically, court systems have relied largely on ideals of justice anchored in rationality and universality. The ethic of justice requires that we “govern ourselves by observing justice. That is to say, we treat each other according to some standard of justice which is uniformly applied to all our relationships” (Starratt, 1994, p. 49). Contrasting the rigid conformity of justice, Furman (2004) found, “The ethic of care is concerned less with fairness – the equitable distribution of resources and application of rules – and more with caring for individuals as unique persons” (p. 219). Starratt (2003) expresses that this ethical frame is primarily about the inherent worth of each person as an individual. Stefkovich and Begley (2007) identify that educators often consider numerous factors, such as the context of each scenario along with unique aspects of their school community, as they make principled decisions about what best serves their student. Driven by their pursuit of justice, courts make their determinations by primarily “weighing the facts of the case in the context of prevailing laws” (Stefkovich & Begley, 2007, p. 211). As the courts play a larger role in the arena of student discipline, it is critical to consider if their philosophical approach, and associate actions, fails to incorporate adequate care for the individual juvenile that is the subject of their review.

The study will focus specifically on opinions of the court rendered in cases that involve an educator, or their agent, conducting a search of a student's person or property while in the care of the school. Analyzing court rulings allow for ongoing interpretation and application of cases addressing students' Fourth Amendment protections, in an era largely framed by the cases of *New Jersey v. T.L.O.* (1985), *Vernonia v. Action* (1995), *Board of Education v. Earls* (2002), and most recently *Safford Unified School District v. Redding* (2009). This study aims to understand the level to which judges' opinions reveal an underlying ethical basis, either through justice or care, or perhaps a bit of both. Furthermore, the study will primarily search for a potential ethical bias as judges establish legal precedent in the form of case law and the issuance of rulings in either student disciplinary cases or in cases where an administrator has invoked qualified immunity as a defense of their actions. Societal pressure to "get tough" on juvenile violence and crime has led to the inclusion of various tactics that cumulatively have the potential to erode students constitutionally protected rights, namely those guaranteed by the Fourth Amendment (Torres & Stefkovich, 2003). Striking the balance between ensuring a disciplined school environment, by actively addressing student infractions, and ensuring the right of all students to have access to quality education presents a challenge (Yell & Rozalski, 2008). Understanding the various environmental influences is critical to understanding the courts legal interpretation and direct or indirect reliance on specific ethical principles.

In light of the progression of legal precedent associated with the four identified cases, the analysis seeks to understand to what degree if any judges apply traditional,

non-traditional, or a blend of ethics in a post *Safford v. Redding* (2009) era. The *Safford v. Redding* (2009) case, which was based on the strip search of a 13-year-old student, was appealed to the United States Supreme Court. The evaluation of the Justices was based largely on adherence to legal precedent; however, the developmental appropriateness of a search of a 13-year-old student was likewise articulated as a basis for consideration. Justice Stevens expressed on record, “It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.” Giving weight to the needs of the individual can be characterized in alignment with an ethic of care.

Conversely, previous cases were tightly aligned to the tenants of justice. As an example, the first of the landmark student fourth amendment cases, *New Jersey v. T.L.O.* (1985), was based on circumstances in which a student’s property was searched. Not only did the Supreme Court side with the school officials, affirming their right to search, the court established the precedent of “reasonable suspicion.” This practice effectively reduced the threshold required by school officials as they conduct the search of a student in the school context (Beger, 2002).

This paper seeks to provide greater context to the judicial processes by exploring various influences on student discipline in a post-Columbine society. This study includes the following: (a) the utilization of student searches; (b) zero tolerance disciplinary practices; (c) the rapidly increasing presence of police officers in school; and (d) the phenomenon known as the school to prison pipeline. These areas of study all culminate in an environment that, with increasing frequency, sees the judicial system

playing a more prevalent role in the administration of school-related discipline.

Although each item is largely inseparable from the other, the cumulative effect presents an environment that has the potential to erode the protections guaranteed to students with the escalation of more stringent practices focused on school safety and security.

Therefore, it is the intent of this study to explore the degree to which courts are giving greater weight to the human impacts resulting from privacy intrusions. This analysis is critical considering the rapidly expanding involvement of the courts in the administration of student discipline.

Involvement of the Courts

In light of numerous tragic school events, such as the mass shooting at Colorado's Columbine High School, public pressure regarding school safety rapidly grew and legislators and school officials responded with increasingly stringent disciplinary practices (Bocanfuso & Kuhfeld, 2011). The actors involved in responding to student discipline likewise broadened beyond the schoolhouse. The utilization of more school resource officers, formalized student searches and zero tolerance practices resulted in students' finding themselves increasingly confronted with legal repercussions (Fowler, 2011). In response, the judicial system as a whole was positioned to play a significantly larger role in managing student behavior (Hirschfield, 2008). The formal Juvenile Justice system originated in the late 1800s and was purposed to focus on the rehabilitation of children (Anderson, 2004). The informal nature of early juvenile courts was akin to the discipline administered by a parent that included an element of consequence but with a focus on rehabilitation (Mears et al., 2014).

The proliferation of increasingly stringent disciplinary tactics precipitated a shift in the court system's philosophical approach to student discipline. McCall (2011) found that "judicial behavior is dynamic and responsive to changing public perceptions of issue importance" (p. 136). As public concern for school safety increased, the juvenile justice system shifted their focus from rehabilitation to an institution that embraced the belief that the assignment of firm consequences was more effective (Nelson, Jolivet, Leone & Mathur, 2010). Additionally, the structure of the state based juvenile justice system has limited the development of "consistent philosophy, policy, or regulations that determine how youth are processed and treated" (Nelson et al., 2010, p. 71). Amid the pressure from a public calling for a "get tough" approach and the lack of a centralized philosophy focused on rehabilitation, the courts' focus began to shift.

Judges are inclined to respond more stringently to topics such as a case involving violence or even the threat of violence at schools. This inclination has the potential to impact not only the way in which judges render verdicts on individual cases but likewise on their evaluation of the appropriateness of investigatory tactics used to build a case that has resulted in the students' arrival in courts.

Nelson et al. (2010) advocate the need for a shift in the philosophical and behavioral approach of adults, including those associated with the courts. This analysis aims to determine if courts foster ethics of care or are they purely justice. The aspiration is to provide insight that will contribute to the development of systems and approaches that limit the negative aspects associated with punitive tactics, while also serving to address the issue of safety and security.

Background

Understanding the potential impact of societies' increased level of concern regarding school safety and security is, in isolation, worth further exploration; however, a series of reactionary phenomena makes this evaluation all the more significant. The heightened level of societal concern related to school violence has motivated both school officials and legislators to implement extreme measures, which, in some instances, have the potential to infringe on students' rights (Beger, 2002). Beger (2002) makes the assertion that "instead of safeguarding the rights of students against arbitrary police power, our nation's courts are granting police and school officials more authority to conduct searches of students" (p. 119). Often times, school administrators become so entrenched in insuring order and discipline that they embrace the ethic of justice, which according to Torres (2012), their motivation should be "driven primarily by the individual's seeking of reason and logic through equality of rights, laws, and human dignity" (p. 268). Nance (2015) asserts that in attempts to aid school officials with providing a disciplined and secure school setting, the courts, including the United States Supreme Court, have lessened the constitutional protections assured to students by the Constitution.

The construct of public education has been solidified as the "organization's congruence with wider societal values tends to become deeply internalized over time into organizational practices; values, beliefs . . . socialization methods; and cultural norms" (Crowson, 2003, p. 37). Crowson (2003) goes on to identify that the accepted norms associated with public education are jeopardized when the greater society is

experiencing a time of unrest, such as the turmoil and concern associated with school discipline and violence in a post Columbine era. It is important to understand fully the practices and implications that have come about as a result of this increased level of concern. Gaining an understanding of each responsive phenomenon individually is significant, but understanding the aggregate effect and the implications this environment has on students' rights is not only a worthwhile endeavor that may assist in finding opportunities for improvements at the school and systemic level, but even more significantly, this work has implications for protecting the constitutional rights of students. The increasing prevalence of student searches, the proliferation of zero tolerance disciplinary practices, growing police presence in school and the phenomenon known as the school to prison pipeline all contribute to the shifting disciplinary dynamic associated with public education.

Student Searches as a Mode of Discipline

The frequency of student searches in the school environment has become increasingly more common. Student searches take multiple forms such as locker searches, automotive searches, phone searches, personal searches which can be as invasive as strip searching, drug screenings and the use of canine drug dogs (Beger, 2003). Some schools have utilized a practice known as “blitz operations” in which groups of students are held in a hallway for the purpose of conducting random searches for the purpose of finding weapons (Beger, 2002). Beger emphasized that “the personal indignity of forcing students to submit to a suspicion less canine search is something no adult would tolerate” (2001, p. 123). The utilization of student searches in the school

environment and the evolving legal interpretation has direct implications for students' Fourth Amendment protections. This study will explore in detail each of the four landmark cases that established the legal precedents that have lessened students' protections (Stefkovich & Torres, 2003).

Zero Tolerance

Zero tolerance disciplinary practices call for mandatory consequences for various violations of school policy or law. Zero tolerance practices pre-date Columbine and became a national practice following the 1994 Gun-Free Schools Act, which calls for mandatory expulsion for students that bring a gun to campus (Price, 2009). Post Columbine, "Zero-tolerance policies have continued to expand at the local level and now apply to a variety of different behaviors including smoking, drinking, fighting, threats, and even swearing" (Price, 2009, p. 544). More than 90% of schools across the nation have implemented at least some form of zero tolerance practice (Anderson, 2004). Following the widespread use of this tactic, school suspension rates have doubled. The proliferation of zero tolerance practices jeopardizes the needs of students by limiting the educators' discretion and therefore requiring the administration of harsh consequences regardless of individual factors (Price, 2009).

Police in Schools

Another response that has proliferated in this "get-tough" environment on school violence has been the growing number of police officers assigned, full time, to the school setting (Beger, 2002). This response has produced an environment where students are subject to double jeopardy, initially receiving school consequences as

significant as suspension or expulsion while simultaneously being subjected to the criminal justice system (Anderson, 2004). Across the country, the rate of student arrests is on the rise and the majority of the addressed offenses are relatively minor as compared to the small percent of infractions that jeopardize student safety (Theriot, 2009). In a recent study conducted, he also found that in schools with School Resource Officers, “disorderly conducted” was the most common charge, which is an offense largely open to interpretation (Theriot, 2009).

School-to-Prison Pipeline

The school-to-prison pipeline is a term coined to represent the introduction of students to the criminal justice system as a result of misconduct in the school setting. This phenomenon emerges when school systems turn the discipline of students over to school resource officers, thereby, exposing them to the judicial process (Edmiston, 2012). The utilization and inclusion of zero tolerance disciplinary practices and the increasing involvement of police officers in the school setting have contributed to the expansion of the metaphorical pipeline (Price, 2009). As a result of these cumulative tactics, more students have been subjected to the punitive nature of the juvenile justice system, as opposed to the intended decline anticipated as these tactics were implemented as deterrents (Anderson, 2004).

Judicial Review and Student Discipline

The administration of student discipline in public schools has always garnered the attention and action of the court system. The original adoption of *in loco parentis* assigned educators the role of maintaining order in schools through the administration of

student discipline (Yell & Rozalski, 2008). The U.S. Supreme Court has ruled in numerous landmark cases that have substantial implications for both student discipline and students' rights. The assertion that "students do not shed their Constitutional rights . . . at the schoolhouse gate" was first articulated as part of the *Tinker v. Des Moines Independent Community School* (1969) case (p. 506). Yell and Rozalski also point to the Supreme Courts assertion that "school officials do not possess absolute authority over their students. . . . Students in school as well as out of school are 'persons' under the Constitution . . . possessed of fundamental [Constitutional] rights" (p. 8).

The increasing inclusion of the court system in the process of student discipline is worthy of scholarly analysis for a number of reasons. First, the alignment between a school's desire for student's personal and academic growth and rehabilitation seems to be inconsistent with the courts seeming transition to a more punitive approach (Woolard, Fondacaro, & Slobogin, 2001). Hirschfield (2008) notes that in recent years, many cases involving students have been referred to criminal courts, in lieu of juvenile courts, which has contributed to a shift toward a more punitive strategy when addressing these cases. This conflict is the basis for the studies aim to analyze the utilization of an ethic of care as well as the ethic of justice as judges issue rulings in various student discipline cases.

Cumulatively, the identified "get tough" practices have been initiated as an attempt to eradicate violence and improve school security. In the midst of this reactionary climate, the protection of students' rights has seemingly fallen by the wayside. "With respect to discipline in the school and classroom, students have two primary areas of legal rights: (a) students' right to privacy and freedom from

unreasonable searches and (b) students' right to due process" (Yell & Rozalski, 2008, p. 8). "Tragically, little if any Fourth Amendment protection now exists to shield students from the raw exercise of police power in public schools" (Beger, 2002, p. 120). In a 2008 article titled "Courtside: Outstripping Students Again," Zirkel (2008) references the ruling in *Safford v. Redding* (2009) and notes that as the most recent of the four marquee student Fourth Amendment cases, the ruling

is remarkable for more than one reason. First, it reflects rather poignantly the gradual but cumulatively significant shift from the student-rights era of *Tinker* to the pervasive safe/security climate fueled largely by Columbine, 9/11, Virginia Tech, and the warlike mentality extended from drugs to terrorism. (p. 439)

Later in this analysis, a historical overview of the four cases and their implications for students will be examined and will better illustrate this phenomenon.

Problem Statements

The changing political and societal influence has significant systemic implications for both the institution of public education and increasingly for the juvenile and criminal justice systems that have become increasingly entangled with the public interest regarding public education. Gaining clarity regarding the ethical approach utilized by the courts is critical. Courts have historically played significant roles in two broad areas related to public education "the processes employed by courts to decide and manage litigation and the substance of the policies enacted by other entities that are brought before the courts" (Superfine, 2010, p. 129).

Times of turbulence and social unrest have been the precipitous events that brought about change. In these times, leaders seldom find common ground; more often, they select one side of any of a dichotomous issue (Crowson, 2003). This study aims to determine if judges, during their growing involvement in school discipline issues, have likewise held firm to an ethic of justice, often associated with the judicial system, or has there been a shift or at least a progression toward an ethic of care, more frequently associated with educational organizations.

Significance of the Study

The emergence of the “get tough” era on student discipline has motivated policy makers, school administrators, and police officials to incorporate new tactics to combat school violence and misbehavior. These individuals’ employment and professional reputations depends upon how well they tackle the pertinent issues of public concerns, and with the recent media hype, “tackling” the issues has translated into drafting policies of zero tolerance and get tough on school discipline even when parents and communities have opposed zero-tolerance endeavors (Skiba & Peterson, 2000).

Existing research has documented the various elements associated with the “get tough” including the increased role of the courts; however, “we know little about how criminal court actors evaluate and attribute responsibility to adolescents prosecuted in criminal court” (Kupchik, 2003, p. 439). In their 2010 study, Krezmien, Leone, Zablocki, and Wells affirmed the increased referral of student misbehavior to the court system; however, they identified that additional scholarly analysis is needed to provide insight for the courts and educators that will ultimately benefit students. The one thing

that we do know is that a conflict exists between the intended rehabilitative nature of juvenile justice and the outlook held by legal officials accustomed to addressing adults in the criminal justice system (Kupchik, 2003).

The American Psychology-Law Society (APLS) has made assertions that affirm the need for an analysis that evaluates practices and philosophies utilized when responding to student discipline. In their characterizations, the APLS asserts that “(1) compared to adults, children are more treatable; (2) compared to adults, children are less culpable; and (3) compared to adults, children are less deterrable” (as cited in Woolard et al., 2001, p. 14). Nance (2013) referenced the call from sociologists and psychologists who assert that the negative aspects of these various practices erode the school by introducing an adversarial dynamic and mistrust. With this understanding, determining if an ethic of care or an ethic of justice frames the formal interactions between students and the courts will provide a basis of understanding the currently applied approach and potential trends. These understandings may ultimately lead to improved practice and outcomes that are more desirable and mitigate some of the less desirable effects that have been identified as an outcome of the “get tough” era.

The two models of justice systems, juvenile and criminal, typically differ in a number of critical areas. Kupchik (2003) has characterized the differences in three areas: “(1) evaluative criteria, (2) sentencing goals, and (3) formality of court proceedings” (p. 439). He goes on to identify that scholarly work has failed to identify which philosophical, or ethical frame, is strongest when juveniles are relegated to the criminal courts. Through this study, we aim to determine if judges, when addressing

cases with implications for constitutionally protected rights are more likely to apply an ethic of care or an ethic of justice. Gaining this understanding is critical as its awareness has implications for aligning the intent of rehabilitative juvenile justice with actual practice. Some scholars have identified that, in the face of growing public pressure, juvenile justice has become more punitive than their counterparts have in the adult judicial system (Feld, 1999). The increasing focus on punishment is concerning as “empirical evidence demonstrates that over-disciplining students and creating a punitive environment often alienates students, generates mistrust, and impedes the learning environment even more” (Nance, 2015, p. 12). Furthermore, research finds that

incarceration produces long-term detrimental effects on youth, including reinforcement of violent attitudes and behaviors; more limited educational, employment, military and housing opportunities; an increased likelihood of not graduating from high school; mental health concerns; and increased future involvement in the criminal justice system. (Nance, 2015, p. 7)

Over the years, activist have utilized the courts to bring about social change. The emergence of this trend was clear beginning with the landmark *Brown v. Board of Education* (1954) case, which established that separate but equal school facilities are not acceptable. Various other groups hoping for significant social change have taken a course of action that is intended to elicit similar change stemming from the courts response (Meyer & Boutcher, 2007). Understanding the significant societal influence and the precedent setting ability of the courts regarding individual rights, this study aims to provide clarity and context related to the interpretation of students’ Fourth

Amendment protections that will give insight regarding the courts' course of action that may, intentionally or inadvertently, have grave implications for students' rights.

Assumptions, Limitations, and Delimitations

The methods utilized in this study have some inherent limitations that should be referenced. An exhaustive study was not conducted on the details of each case that are the basis for this evaluation. The analysis is reliant on the language that was issued in the judges' ruling and opinions of the court issued at the culmination of the case. This language will be the basis for determining the judges' application of an ethic of justice or care; however, aspects of the actual trial were not accounted for in this analysis. If the court rulings do not include an exhaustive explanation by the judge, a considerable limitation will also exist.

Another limitation of this study is the philosophical outlook of the researcher constructing and conducting the analysis. As a career educator, the ethic of care aligns to my philosophy regarding student growth and development. As such, despite purposeful attempts to remain objective throughout this analysis, it is likely that elements of bias are present.

CHAPTER II

REVIEW OF LITERATURE

This study aims to evaluate the ethical frame commonly utilized by judicial officials in their interpretations of various cases, specifically those with implications for students' Fourth Amendment protections. The need for this analysis is significant considering the shift in increasingly stringent educational practices and legislative agendas that are more frequently left to the judicial system to interpret and evaluate. These increasingly stringent disciplinary practices are intended to provide a safe and orderly school environment; however, they are contributing to a school and societal climate that is infringing on the constitutionally protected rights of students.

To understand better the socio-political environment with which specific cases and subsequent interpretations have occurred, a review of relevant literature related to the “get tough” era of juvenile justice is essential. This understanding will not only give merit to the need for the study but it will also help articulate the way these system changes are infringing on students guaranteed rights. The four identified components associated with punitive discipline and the “get tough” era has numerous limitations and negative opportunity costs that have been substantiated through research. This evaluation will explore in more detail student searches, zero tolerance discipline, the increasing police presence in schools and the school to prison pipeline phenomenon as well as the way each way of these areas perpetuates an infringement on student rights.

The study will primarily focus the analysis on students' Fourth Amendment protections from unreasonable search and seizure. Further analysis of specific Fourth Amendment cases and the associated case law, as well as relevant literature will identify the progressions of legal interpretations related to students' Fourth Amendment search and seizure cases. The account of these landmark cases will serve not only as the initiation point for this analysis, but will also solidify the need for this study as a way to provide understanding and direction in light of the persistent ambiguity of previous court rulings. The analysis in this study will seek to determine the frequency of an ethic of care as well as an ethic of justice in the judicial renderings. A thorough analysis of these two constructs will serve to provide clarity and a conceptual working knowledge, which is aimed to support the development of a partnership that is more effective at reducing school violence and other significant discipline infractions while simultaneously meeting the developmental needs of children.

Overview

The role of public schools has grown and transformed since the time of its inception, which was originally driven by a pragmatic need to develop the requisite skills to support the economic interests of an increasingly industrial economy (Bowles & Gintis, 2000). Over the years, as economic and societal changes have occurred, the expectations placed on the construct of public education have expanded in scope to include social and cultural responsibilities, along with increased academic standards all while remaining responsive to ever changing legislative and public expectations (Levin, 2001).

Despite common misconceptions, schools have been tasked with dealing with disruptive and even violent behavior dating back to the early era of public education. Prior to 1840, hundreds of schools in the state of Massachusetts closed their doors in direct response to unruly student behavior (Greenberg, 1999). Rutgers History Professor David Greenberg (1999) identified that as early as the 1600s it has been documented that students cursed, used alcohol, engaged in sexual activity and even engaged in duels. Although present throughout the history of public education, school discipline began to draw the attention of the federal government and resulted in works such as “The Safe School Study by the National Institute of Education” conducted in 1978 and “Victimization in Schools” from 1985 began to heighten the collective awareness of discipline issues associated with public schools (Adams, 2000). Throughout the 1980s and 1990s a trend can be identified that placed an increasing focus on juvenile delinquency, which coincided with various pieces of legislation that strengthened the judicial response (McCall, 2011).

The continual changes associated with public education have largely been driven by criticism levied at the institution by varying public or political interests (Levin, 2001). Educators are increasingly conflicted by variables that are beyond their control yet demand increasing vigilance and attentiveness. In an era with increasing social attention related to public schools in general, educators are continually under pressure to increase student success, as identified by standardized test scores, all the while keeping a focus on the growing concerns related to school safety.

The expectation that school administrators maintain discipline and order is felt throughout school systems as well as society as a whole. Despite a downward trend in school violence (Fuentes, 2012), the tragic events that occurred at Columbine High School thrust the issue of school violence to the forefront of public consciousness overnight. A hypersensitive media who thrives on covering crisis to play on people's fears, in conjunction with a judicial system that is imposing harsher penalties for both adults and adolescents contributes to the changing dynamic under which school officials operate (Heitzeg, 2009). Columbine and other similar tragedies have caused people to reevaluate their confidence in public school systems (Ewton, 2014). Edmiston (2012) identified statistics, which prior to Columbine and the emergence of more stringent disciplinary practices, indicate violent juvenile offenses were cut in half around the turn of the century; however, the proliferation of media coverage provides the public with a perception to the contrary. An increased level of scrutiny is now placed on school administrators and their ability to keep children safe while in the care of the school. The context of society is changing, as is the public perception regarding public schools. The public has a false sense regarding the prevalence of school shootings based on the magnitude of national media coverage associated with each tragedy. As an example, gun violence occurring outside of schools, in a single week, exceeds the totality of gun violence within the school environment over the course of two years (Cornell, 2015). The concern over school safety has become associated with the existing concerns regarding the prevalence of drugs and their impact on the campus culture.

Despite the reduction of violent criminal activity dating back nearly 15 years, schools feel pressure to utilize increasingly aggressive disciplinary practices to maintain order (Kober & Usher, 2012). On a consistent basis, school administrators identify that two of their greatest professional responsibilities continue to be in the area of campus safety and discipline (Rosen, 2005). School administrators are impacted by a considerable number of outside influences from lawmakers, parents, and district officials; however, prevalent actions and policies fail to ensure care remains at the forefront (Noddings, 2002). School districts accept the implicit responsibility of ensuring that schools remain free of drugs and the negative aspects associated with their presence (Stader, Greicar, Stevens, & Dowdy, 2010).

The public's ever-increasing perception that schools are dangerous has driven school officials as well as legislators to employ increasingly drastic measures. The implementation of many of these stringent practices has their bases not only in practice but also in statute. Edmiston (2012) asserts the following:

In 1995, Texas legislators adopted Chapter 37 of the Education Code, which mandated a law-and-order approach to school discipline. Among other provisions, Chapter 37 enacted zero-tolerance policies and redefined several types of school misbehavior as class C misdemeanors. Most significantly, Chapter 37 authorized school districts to employ security personnel, called School Resource Officers (SRO) or to commission their own police forces.
(p. 185)

Get Tough Era's Impact on Students

Understanding the various attributes associated with the “get tough” era, such as the increasing use of student searches, expanded police presence, proliferation of zero tolerance practices and the school to prison pipeline is essential; however, even more critical to this analysis is gaining an understanding of how these various components create an environment that jeopardizes students’ rights.

The legal support and legislated origin of these practices even more affirms the relevance and significance of this study. Identifying that these practices have legislated support affirms the significance of judicial interpretation and extends the opportunity for reform beyond the realm of educators and scholars.

A closer look at each of the practices associated with the “get tough” approach to student discipline identifies significant consequences including those specifically associated with the infringement on students’ Fourth Amendment rights. The practice of utilizing student searches to ensure order and discipline has the most direct implications for students’ Fourth Amendment rights. The basis for this analysis will focus largely on cases involving student searches; however, to appropriately situate the application of this study and its findings, it is likewise critical to understand the relationship and implications of how zero tolerance disciplinary practices underscore the shift from a rehabilitative approach to a more punitive or justice oriented focus (Skiba & Peterson, 2000).

A review of the increasing utilization of police officers in the school setting is needed for multiple reasons. The practice of searching students and the associated

infringement to their Fourth Amendment rights has shifted, as the practice is not solely conducted by school administrators but increasingly by law enforcement agents.

Additionally, the expansion of police officers in the school setting has a direct correlation to the phenomenon known as the school to prison pipeline. The pipeline is a term assigned to the increasing criminalization of student behavior and the increasing involvement of the judicial system in the educational process. This expanding involvement of the judicial system is not only the focus of this analysis but also supports the significant need for scholarly work that illuminates both the context and implications of these practices.

Student Searches

It has become a common occurrence that school administrators utilize student searches as a tactic to maintain discipline on campus (Stefkovich & O'Brien, 1996). Proliferation of drugs, the occurrence of school-based violence, and the presence of prohibited items have all been articulated as the justification to increase the frequency of student searches (Yell & Rozalski, 2008). "These searches include random drug testing, dog sniffs, metal detector checks, and searches through students' belongings" (Nance, 2013, p. 370). Torres and Chen (2006) illuminate how "searches of students became more than a routine preventative option" (p. 185) amid the increased societal sensitivity to schoolhouse violence. Following the 1985 Supreme Court ruling in *New Jersey v. T.L.O.* (1985), which lowered the threshold for educators to conduct searches, the utilization of this practice rose steadily (Stefkovich & Torres, 2003). Despite students'

Fourth Amendment protections, Nance (2013) finds that “random, suspicionless searches of student’s belongings” occur often despite their questionable legality (p. 370).

As the practice of student searches increases, the interpretation and response of the courts is critical. Stefkovich and Torres (2003) determined that state courts hear the prevalent number of these cases and “students lost 70% of the cases litigated” (p. 267). Later in this chapter, a review and evaluation will be conducted on the most significant court cases that resulted in the precedent setting case law. Largely, this series of cases has progressively provided clarity, although ambiguity still persists, regarding students’ Fourth Amendment rights and the relationship to the legality of various searches.

When evaluating the appropriateness of various student searches, Fourth Amendment implications are most frequently identified as the main concern. It is important to note that additional negative effects are correlated with the practices, many of which seemingly erode the care afforded to students. Nance (2013) found that schools with a diverse student body are more likely to implore the practice of searching students while also failing to articulate a rationale or suspicions. Nance also noted that this inequity not only perpetuates racial inequity, but also likewise is counter to sound educational practices.

Police in Schools

The inclusion of police officers in the public school systems has been increasing over the past 25 years (Edmiston, 2012). As referenced above, state legislators enthusiastically embraced and laid the groundwork to expand systemically the use of police in the school setting. Recently, officers assigned to work in schools are

increasing at a rate faster than other areas of law enforcement (Edmiston, 2012). The initial goal of school resource officers was to provide students with an increased level of security at school (Weiler & Cray, 2011). The growing police presence does in fact lend itself to an increased level of vigilance but is likewise associated with an increased inclination to punish which has, in similar regard, grown alongside additional punitive measures such as the push for zero tolerance policies (Casella, 2003). The increasing number of police officers assigned to school has been linked to escalating student arrest rates for behaviors that are not considered serious or dangerous (Fuentes, 2012). Students committing relatively minor offenses are likely to find themselves with criminal charges (Cornell, 2015).

The proliferation of officers in the education environment is having an impact on the understood allocation of authority that relegates students to the lower rungs (Forbes, 2011). Staff members are becoming increasingly reliant on officers to become involved in the discipline process, resulting in the criminalization of behavior that the campus principal would have previously addressed.

This increased level of police presence is likely to cause tension between law enforcement officers that largely work from the ethic of justice, and the educators that are inclined to find motivation from the ethic of caring (Sughrue, 2003). The conflicting nature of these two ethics will play a significant role in this study and will be explored at length in the coming pages.

Zero Tolerance

As the attention paid to disciplinary practices has grown, so has the implementation and adherence to zero tolerance practices. Hoffman (2014) cites the U.S. Department of Education as defining zero tolerance policies “as a school or district policy that mandates predetermined consequences or punishments for specific offenses” (p. 18). In other words, zero tolerance calls for the administration of obligatory disciplinary responses to certain behaviors regardless of the students’ intent or previous disciplinary history. The inherent punitive nature of this approach again illustrates the emerging conflict between justice-oriented practices and the ethical frame of care, more akin to an educational environment. “Finding spaces for caring is becoming increasingly difficult as administrators, teachers, and students are pushed toward preordained goals set by distant bureaucrats” (Cassidy & Bates, 2005, p. 66). This philosophical shift associated with zero tolerance illustrates the need for further exploration of the relationship between justice and care in the judicial process.

The origin of zero tolerance practices, like the emergence of police in schools, found its roots in legislation. These types of policies were first introduced during the war on drugs initiative of the Regan presidency and increased through the Drug-Free Schools and Communities Act of the mid-1980s, and later increased during President Clinton’s tenor alongside the 1994 Safe and Gun-Free Schools Act (Fuentes, 2012).

The originally narrow and clearly defined focus of these practices has expanded rapidly amid the rising concern for school safety in our post-Columbine society. “Fear of crime in schools has trumped reality and common sense in shaping policies at the

state and local school board levels. Zero tolerance, once focused on drugs, alcohol, and guns, now targets an ever-expanding range of behaviors” (Fuentes, 2012, p. 19).

Legislators, law enforcement officials, along with a concerned public sentiment have called for an application of zero tolerance standards associated with the enforcement of school discipline (Kennedy-Lewis, 2014).

The trend toward a mandatory disciplinary response has resulted in significant negative consequences that the scholarly analysis identified. Skiba and Rousch (2006) identified that schools that implore zero tolerance practices are likely to find a reduction in student academic performance, increased dropout rates, a negative impact on the culture of the campus as well as the consequences that have a tendency to remove students of color from their academic setting at a disproportional rate of their white counterparts. Cornell (2015), likewise, affirms the same negative impacts of these practices, which are even more troubling considering his findings that the intended improvements to campus security have not been realized.

Walker and Greene (2009) affirm that there is little evidence to support the assertion that suspensions produce a positive result on student behavior. In a separate analysis, Moore (2010) identified that locating data to support the effectiveness of zero tolerance practices was challenging to find; however, it became clear that more students left school from dropping out and furthermore the rate of incarceration was climbing. Various groups including the American Bar Association and “youth advocacy groups” have taken an oppositional stance against the use of zero tolerance practices (Nance, 2015). Despite the findings of research, which fail to support the efficacy of zero

tolerance disciplinary practices, the trend has continued to spread (Skiba, 2001).

Kennedy (2014) goes as far as to pose the question that in the era of zero tolerance legislation, “Do we really want to leave no child behind.”

Although research has failed to identify increased levels of security as a result of zero tolerance practices, the correlation to the removal of students from the instructional setting is rooted in scholarly analysis. Each year, more than 3.25 million K-12 students are suspended at least once (Losen, 2011). During the 2009-2010 school year, Texas alone is cited as assigning 1.6 million suspensions for the 4.7 million-pupil population (Fuentes, 2012). In a specific study conducted in an urban district serving 24,000 students, Hoffman (2014) found that the proliferation of zero tolerance practices had a direct correlation to the number of students receiving suspensions from their academic placement, and the number of suspensions for black students was disproportionately larger.

The impact of zero tolerance practices has continued to exacerbate negative trends in public education. These trends include such things as the perpetuation of racial and other inequities related to school discipline and increased rates of students missing instructional time as a result of their disciplinary placements. These ultimately have a correlation to the attrition rate of students that most desperately need considerable interventions (Heitzeg, 2009). How would the community receive the expulsion of an elementary school student for forgetfully bringing a knife of some kind to school (Stefkovich & O’Brien, 1997)? Not only did Hoffman’s (2014) study find a significant increase of negative impacts in his study, the intended result of producing a deterrent

effect from strict consequences failed to be achieved. The American Bar Association found that “zero tolerance is a perversion of mandatory sentencing . . . [that] takes no account of what we know about child and adolescent development” (as cited in Moore, 2010, p. 9). Moore (2010) elaborated that the entire education process is supposed to recognize the growth and learning of each student, sometimes which can easily be lost under zero tolerance. But perhaps most important to consider is the punishment mentality’s monopoly over behavior modification. After exposing adolescents to the “degradation ceremonies” involved in state-sponsored punishment, young offenders internalize messages of rejection and failure: they find themselves searching for havens of acceptance and nurturing. If little or no effort is made to simultaneously reconnect them to social systems, if positive redirection and reinforcement remain absent, stigmatization may ensure, propelling juveniles to find solace in antisocial forums (Anderson, 2004). Acknowledging the negative effects associated with the increase of these disciplinary practices should be noted by scholars and practitioners alike and beg the question what other unintended outcomes are befalling students as a result of no holds bar approach to ensure order and security in the school house.

School-to-Prison Pipeline

The emergence of rigid zero tolerance disciplinary practices, coupled with the increasing rate of police in school systems across the nation have caused a significant increase in the introduction of juveniles to the judicial system. Edmiston (2012) expressed that along with the increased police presence in schools, districts have tended to embrace the use of involving the courts system to respond to behavioral issues. This

phenomenon continues to cause an increase rate in which school behavior has been criminalized and thrust juveniles into experiences with the criminal justice system. This systematic process by which school systems turn the discipline of students over to school resource officers, and thereby, exposing them to the judicial system has been referenced as the school to prison pipeline (Edmiston, 2012).

A study conducted by Hjalmarsson (2008) found “a strong negative correlation between high school graduation and arrest and incarceration” (p. 628). The same study also concluded that involving the judicial system in the disciplinary process significantly increases the likelihood that a student will dropout, which will have a lifelong impact on the student.

Increased Role of the Courts

The increased levels of public scrutiny placed on public school safety, along with the associated increase in school policing along with the proliferation of zero tolerance disciplinary practices have affected the relationship between the educational and judicial systems. According to Heitzeg (2009):

The juvenile justice system shifted sharply from its’ original rehabilitative, therapeutic and reform goals. While the initial Supreme Court rulings of the 1960’s – Kent, in re Gault and Winship – sought to offer juveniles some legal protections in what was in fact a legal system, more recent changes have turned the juvenile justice system into a “second class criminal court that provides youth with neither therapy or justice. (p. 5)

By the last decade of the 20th century, every state had passed legislation that supported a punitive approach and blurred the line between juvenile justice and the criminal justice system (Howell et al., 2013). The last two decades of the twentieth century ushered in legislation focused on “punishment, deterrence, and incapacitation”; however, the response of the court system was more varied (Curtis, 2014, p. 1265). Curtis (2014) found that some juvenile courts began to embrace a punitive, objective response while some remained committed to a model that focused on the best interest of the child. Courts now treat school discipline matters more often in a criminal-like manner, whereas in the past juvenile courts handled these matters like delinquency cases with children enjoying protections for their status, receiving treatment – including education – as opposed to punishment (Hanson, 2005). Rothchild (2013), when referencing the U.S. Supreme Court’s ruling in *Roper v. Simmons* (2005) and *Graham v. Florida* (2010), found that the Supreme Court “shift[ed] the jurisprudential paradigm of juvenile justice from an adult-centric calculation of harms to a child-centric evaluation of harms, benefits, and the unique status of children” (p. 85).

Edmiston (2012) made the assertion that the increasing numbers of students entering criminal courts are being evaluated through the lens of discipline as opposed to rehabilitation, which is historically more prevalent in the juvenile justice courts. Howell et al. (2013) referenced various scholarly works and found that that the criminalization of juvenile courts includes “expanding adversarial procedures, increasing the role of prosecutors, formalizing due process, eliminating confidentiality, routinely gathering fingerprints, using ‘blended sentencing,’ and emphasizing offense-based sanctions rather

than rehabilitative dispositions in juvenile courts” (p. 12). Furthermore, the increased level of criminalization and judicial involvement contributes to tension between law enforcement officials that largely work from the ethic of justice and the educators that are inclined to find motivation from the ethic of caring.

As the introduction of students into the criminal justice system has increased, it is critical to evaluate treatment of the students to ensure that despite the escalating approach to school discipline that their constitutionally protected rights do not slowly erode, as a new relationship between schools and the judicial system quickly become the new norm. Likewise, as the courts have shifted the frequency and even the approach to addressing juvenile cases, exploring the motivating ethic is a worthwhile endeavor. This study aims to evaluate the tactics utilized on students, namely those that have Fourth Amendment implications, and the driving ethical philosophy utilized in the judicial system. Gaining a deeper understanding in these areas will help develop a system that honors student individual rights while establishing a more meaningful partnership between schools and the courts.

Fourth Amendment Case Law

The current disciplinary school climate has far-reaching implications that go beyond the negative educational impacts that some students may experience. The current environment, including the inclusion of more police officers and zero tolerance practices, has broad implications including most significantly the potential infringement on students’ rights, some of which the United States Constitution guarantees. Considering the unique nuances of maintaining order in a school, protection of students’

individual rights may be compromised depending on the societal climate that places varying levels of emphasis on the eradication of weapons and drugs from campuses (Stader et al., 2010). Most notable to this analysis is the increasingly aggressive searches of students and the associated implications for students' Fourth Amendment protections.

The Fourth Amendment to the United States Constitution ensures “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” (U.S. Const. amend. IV). This excerpt iterates that citizens have protection from searchers that could be deemed as “unreasonable.” Protections granted by the Fourth Amendment have historically been invoked as a mainstay in criminal defense proceedings; however, the application to students' rights, in the arena of public education, had not been examined thoroughly prior to 1985 (Russo, 2008). Since that time, a series of court cases have produced increasing levels of guidance through rulings and the subsequent establishment of case law. Judicial opinions provide insight into the interpretation of law and are frequently referenced to provide insight into future legal application (Ryesky, 2002). Over time, the Supreme Court has noted that the Bill of Rights is not solely intended to apply to adults; however, rulings in recent cases have established a “juveniles are different” precedent (Forbes, 2011). Gaining a better understanding of how the courts have interpreted the rights of students is critical for both scholars and educators. A series of litigated court cases focused on student searches, frequently put at odds the parents who claim their children's rights were violated and school administrators who assert their actions were in the interest of student safety, are

the basis for current precedents (Yell & Rozalski, 2008). A careful review of the four preeminent cases will grant the greatest level of insight and provide a basis for further evaluation regarding the application of ethical care and justice in subsequent proceedings.

Administrative History: Four Court Cases

The United States Supreme Court has rendered rulings in four individual cases that have established the precedent by which school leaders should adhere when addressing issues involving elements of search and seizure (Torres, 2012). The four preeminent cases that substantially affect the Fourth Amendment application in public schools are *New Jersey v. T.L.O.* (1985), *Vernonia School District v. Acton* (1995), *Board of Education v. Earls* (2002), and *Safford v. Redding* (2009). Two of the cases, *New Jersey v. T.L.O.* (1985) and *Safford v. Redding* (2009), have direct implications related to interpretation of the reasonableness standard. The earlier ruling in the *Tinker v. Des Moines Independent School District* (1969) highlighted that there must be a balance between the responsibilities of the school to ensure order while not depriving students of their guaranteed rights. The four referenced cases have provided some guidance for both school administrators and judicial officials as they determine the appropriate disciplinary, and specifically search and seizure actions, in the school context.

The following section will provide an overview of each case. These outlines will illustrate the implications that the rulings had on Fourth Amendment practices within the public school environment.

New Jersey v. T.L.O. (1985)

A New Jersey high school assistant principal confronted two students, one of which was T.L.O., following a report that they had been smoking in the restroom. When questioned by a teacher about smoking in a bathroom, T.L.O. adamantly denied any participation and asserted that she was not a smoker. The assistant principal proceeded to search her purse, and quickly identified cigarettes “in plain view,” which motivated a more thorough search of her purse. The search not only uncovered cigarettes but also “a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card containing a list of those students who owed the student money, and two letters that implicated the student in marijuana dealing” (*New Jersey v. T.L.O.*, 1985, p. 325).

Various courts evaluated the extent of T.L.O.’s criminal liability. Initially, a juvenile court in New Jersey evaluated the admission of evidence and proceeded to express that when reasonable suspicion associated with criminal activity, or to maintain order or to support a policy, a school official may search a student (*T.L.O.*, 1985). The lower court determined the search in this case was permissible based on these criteria. The trial court found fault with the student and assigned T.L.O. with a year of probation, based largely on her admission of guilt.

The appeals court took an alternative stance. Their analysis considered whether T.L.O. purposefully conceded her Fourth Amendment protections prior to confessing to distributing marijuana. When relegated to the New Jersey Supreme Court, the assertion

was made that opening T.L.O.'s purse deprived her of her Fourth Amendment rights and likewise ruled that the acquired evidence was not admissible.

The United States Supreme Court considered, on certiorari, the search in the T.L.O. case from various perspectives. In the opinion shared by Justice O'Hern (1985) it was stated, "The issues here are (1) whether the Fourth Amendment exclusionary rule applies to student searches made by public school administrators; and (2) what standard determines the reasonableness of the search if the exclusionary rule does not apply."

The Justices acknowledged that the Fourth Amendment prohibits unreasonable searches of students while at school; however, they acknowledged the unique and challenging task of maintaining discipline in a school and found that some flexibility was needed for this purpose. The majority opinion affirmed that school officials are not obligated to adhere to the process of acquiring a warrant, nor are they bound by the high standard of probable cause. School officials conducting a search must adhere to the consideration of reasonableness and in this case, they found the actions of the school administrator were appropriate.

The precedent established in *New Jersey v. T.L.O.* (1985) cemented this case as the prevailing guide by which to determine the appropriateness of a search. The outcome did establish a two-prong test to guide school leaders in ensuring searches of students is legal. Following the Supreme Court's consideration of the appeals made by T.L.O., they established the following two-prong test to assess the reasonableness of the search.

1. “The search should be justified at inception;
2. The search should not be excessively intrusive in light of the age and sex of the student and the nature of the infraction” (Beger, 2002, p. 125).

In the findings of T.L.O., the judges specified that students have “legitimate expectations of privacy and personal security” (Torres, 2012, p. 1088). The “reasonableness standard” was established as part of the T.L.O. ruling to ensure the expectation of privacy is maintained. The standard states that a search must be “justified at its inception” and must be “permissible in scope” (Healy, 2010, p. 125). To be justified at its inception, a reasonable person would suspect that conducting the search would reveal evidence implicating a student in wrongdoing. Ultimately, T.L.O. reduced the threshold needed for searches in school from probable cause to reasonable suspicion.

In the opinion of the court, Justice White reiterated the intent of the reasonableness standard as follows:

The standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools. (*T.L.O.*, 1985, pp. 342-343)

The Court was also charged with determining if the acting administrator was personally liable for conducting the search. The Court determined that the administrator in question was protected by qualified immunity. According to Healy (2010), qualified immunity is a “defense for an official who is being sued in his or her individual capacity for damages” (p. 55). It is intended to protect public officials that are required to make judgment calls in their professional capacity. T.L.O.’s claim of a civil rights violation was not supported (Healy, 2010).

Although the T.L.O. ruling provided an initial precedent to guide the actions of school officials, ambiguity remained. This related to the following: (a) school resource officers; (b) application of the standard to groups versus individuals; (c) the appropriateness of searching school property in the care of a student; and (d) the admissibility of evidence that was obtained through inappropriate searches (Torres, 2012; Torres & Chen, 2006). The creation of this test provided a resource by which to assess the appropriateness of a student search. Although a standard was provided, the determination of when to search a student is still dependent on individual circumstances and interpretation of “reasonableness” and therefore no clearly defined guidance is provided.

Vernonia School District 47 J v. Acton (1995)

The schools in Vernonia ISD implemented a policy that required drug testing for students that sought to play school sports. This practice was initiated after school officials noted that the use of illegal drugs was increasing. The district articulated that the use of illegal drugs could increase the likelihood of sports related injuries. Prior to

the Board formally adopting the practice, a parent input meeting was held and those in attendance gave unanimous support for conducting urinalysis testing on student athletes.

A seventh-grade student, James Acton, was interested in participating in the school football team; however, his parents objected to providing consent for the random drug testing. The parents of James Acton brought “suit seeking declaratory and injunctive relief from enforcement of the policy on the grounds that it violated the Fourth and Fourteenth Amendments (*Vernonia v. Acton*, 1995).

The case was initially filed in a trial court; however, they dismissed the case taking no action. The U.S. Ninth Circuit reviewed the case and determined that the school was in violation of the Fourth Amendment. Upon review by the United States Supreme Court, the determination of the district court was overturned. When assessed by the Supreme Court, they determined that because the policy was reasonable it was constitutionally permissible (Torres, 2012b). The Court asserted that students are not guaranteed the entirety of Fourth Amendment protections. Students’ rights are balanced with the state’s legitimate interest of ensuring the drug use was not prevalent among students. Likewise, the Court asserted that by participating in a discretionary activity, such as athletics, students have a “decreased expectation of privacy” (*Vernonia v. Acton*, 1995, p. 664).

A basis for the court’s opinion was the reduced expectation of privacy associated with school athletics. Justice Scalia referenced the practice of undressing before and after athletic competitions, and even the practice of communal showering which is frequent with school athletics. It was also noted that students subjected themselves to

increased regulation when they voluntarily participate in school athletics. Students are required to receive a physical examination prior to participation and they agreed to adhere to increased expectations for conduct and academic performance. It was also noted that the procedures used to obtain the urine sample have implications for reasonableness; however, the practices in Vernonia did impose a concern for the intrusiveness of the process. The findings from the urinalysis are shared only with a small number of pertinent staff members and are not subsequently shared with law enforcement.

Justice Scalia issued the opinion of the court in which he affirmed the established precedent that “reasonableness” is the determining consideration regarding appropriateness of a search. He further asserted the reasonableness “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests” (*Vernonia v. Acton*, 1995, p. 653). It was also noted, in line with cases such as “Skinner” and “Von Rabb” that the administration of a search without individualized suspicion must be done as the result of a compelling need. In this instance, Scalia affirmed that a “special need” exists for public schools to ensure order and discipline and for that reason the standard of probable cause is not required. Schools having “custodial and tutelary responsibility for children” must consider reasonableness in that context. In this case, the increased proliferation of drug use, by the student body as well as among athletes, along with increased discipline and rebellion issues validated the special need. In light of all of the factors referenced

above, the Court found Vernonia's policy of suspicionless drug testing to be "reasonable and hence constitutional" (*Vernonia v. Acton*, 1995, p. 665).

The implications of this case are significant. The court affirmed that students are not entitled to the full protections of the Fourth Amendment in the context of a school environment. In the opinion of the Court, Justice Scalia referenced the responsibility of the school to act "as guardian and tutor of children entrusted to its care" (*Vernonia v. Acton*, 1995, p. 665). This increased level granted to schools is noteworthy; however, it is also noteworthy to acknowledge the expectation that schools are acting with care for the child, in much the way is expected from a parent. In the closing word of the Court's Opinion, Justice Scalia referenced that the practice of randomly drug testing student athletes was supported by the majority of parents and was initiated based on consideration for the interests of the children. This acknowledgement is critical particularly in light of increasingly stringent disciplinary practices associated with the "get tough" era.

Board of Education of Independent School District 92 of Pottawatomie County v. Earls (2002)

The Board of Education of Independent School District 92 of Pottawatomie County instituted a policy of conducting random drug screenings of all students that participated in competitive extracurricular activities. A band student sued as he "alleged that the drug testing policy violated the Fourth Amendment to the Federal Constitution" (*Board v. Earls*, 2002, p. 2563). In his suit, the student "requested injunctive and declaratory relief" (2002). A District Court initially reviewed the case and found in

favor of the School District; however, on appeal, the United States Court of Appeals for the Tenth Circuit asserted that the policy was in violation of the Fourth Amendment.

This case provided an opportunity for the Supreme Court to review their previously established stance on student drug testing in schools. The Court focused heavily on the decision made in *Vernonia v. Acton* (1995). In the Opinion of the Court, Justice Thomas stated that students participating in extracurricular activities should not expect the same degree of privacy as others. The court determined that the practices utilized by the district were not intrusive and did not infringe on the students' privacy. Justice Thomas affirmed the states that "securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults" (p. 2656). The Court specifically considered the nature and immediacy and referenced the previous stance that protective students from the negative effects associated with drug use are a legitimate concern. In conclusion, Justice Thomas shared, "We hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its school children" (*Board v. Earls*, 2002).

Safford Unified School District No. 1 v. April Redding (2009)

In 2003, a middle school in Arizona was struggling to find solutions that would prevent students from continuing to use prohibited substances, including the misuse of prescription medications. Policy placed a strict prohibition on the use, or possession, of any medications by students while at school.

Assistant Principal Kerri Wilson, along with the campus principal, was told by a student named Jordan that he received a pill, which made him ill, from Marissa. Wilson escorted Marissa from class. Marissa was in possession of her day planner that had been reported to contain the pills. Wilson asked Marissa to expose the contents of her pockets and her wallet. The wallet contained an over-the-counter pill. Marissa expressed that the pill was Savana's. Marissa was searched further, including inspection of her underwear; however, no additional pills were located.

Assistant Principal Wilson then sent for Savana Redding. Savana was a thirteen-year-old student at Safford Middle School in 2003. Savana was shown the day planner and she acknowledged it was hers; however, she claimed that she lent it to Marissa and the contents, including knives and pills, were not hers. Wilson proceeded to exhibit four white prescription-strength ibuprofen pills and one over-the-counter blue naproxen pill. Wilson informed Savana that other students indicated she was distributing pills at schools. She denied this assertion and allowed for a search of her belongings. Wilson and Administrative Assistant Romera searched Savana's backpack revealing no additional contraband. Wilson then escorted Savana to the school nurse, Peggy Schwallier. Savana was instructed to remove her outerwear garments and instructed to extend her bra and waistband of her panties. To some extent, this caused exposure of her breasts and pelvic region. This additional search did not produce any additional contraband.

Savana's mother brought suit against the Safford School District, Wilson, Romero, and Schwallier claiming that the strip search was a violation of her Fourth

Amendment protections. The named petitioners all claimed qualified immunity. The District Court's initial determination found that the search Savana was subjected to did not violate her Fourth Amendment rights. The Ninth Circuit Court of Appeals asserted, with a split vote, that Redding's rights were violated. The court asserted that the legal precedent had been established well in advance of the search and therefore Wilson was not entitled to the protections of qualified immunity. The court did grant the protections to Schwallier and Romero as they were under the direction of Wilson.

The Supreme Court ultimately reviewed the case with an acute focus on two areas:

(a) Did the search of Savanna's bra and undergarments by school officials, act on reasonable suspicion that she had brought prohibited prescription and over the counter drugs to school, or did it violate the Fourth Amendment? And (b) Is the official who ordered the search entitled to qualified immunity. (Stader et al., 2010, p. 110)

The Supreme Court ruled, 8-1, that the search of Redding's undergarments was a violation of her constitutionally protected rights (Stader et al., 2010).

Justice Souter delivered the Opinion of the Court. Acknowledging the assertion of T.L.O., Souter pointed out that the unique aspects of the school setting do not require the threshold of probable cause to conduct a constitutional search further stating that a school search. He further stated that a school search "will be permissible in its scope when the measures adopted 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.” (p. 2639). The use of the reasonableness standard was again affirmed.

When responding to the details of the case, Souter acknowledged that the level of suspicion was enough to warrant the search of Savanna’s backpack and outer clothing; however, expanding the search to the student’s undergarments was “constitutionally unreasonable” (*Safford v. Redding*, 2009). This aspect of the search was identified to be in violation of “reasonable societal expectations of personal privacy” (*Safford, v. Redding*, 2009, p. 2636). This type of search would require “distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings” (*Safford v. Redding*, 2009, p. 2636).

In the Opinion of the Court, Justice Souter expanded the explanation between legally established precedents and spoke to the individual and development needs of children. It was stated, “Adolescent vulnerability intensified the patent intrusiveness of the exposure” (*Safford v. Redding*, 2009, p. 2636). The act of a strip search was referenced as “degrading.” The account referenced sources from School Psychology and the National Association of Social Workers, which speak to significant emotional damage, associated with strip-searching adolescents.

In his dissenting opinion, Justice Stevens states, “This is a case in which clearly established law meets clearly outrageous conduct” (*Safford v. Redding*, 2009, p. 2644). Moreover, Justice Stevens expressed, “It does not require a constitutional scholar to conclude that a nude search of a 13-year old child is an invasion of constitutional rights of some magnitude” (*Safford v. Redding*, 2009, p. 2643).

The U.S. Supreme Court was also charged with determining if Assistant Principal Wilson was eligible to invoke the protection of qualified immunity. The Opinion of the Court is as follows: “A school official searching a student is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment” (*Safford v. Redding*, 2009, p. 2643). The court referenced the contrasting interpretations of the lower courts regarding the application of the T.L.O. test. The majority opinion indicated that lower courts have not been clear on their stance and therefore the ambiguity does not provide clear guidance that should have been known by assistant principals. For that reason, the Court asserted that the protections of qualified immunity were justified.

The Safford ruling provided additional clarity to the dilemma of conducting invasive searches, particularly strip searches, of students while at school. Prior to conducting such a search, the administrator should minimally suspect that there is an element of danger and they must have a specific reason to believe the student may be concealing contraband in their underwear. Additionally, Safford defined suspicion as “a moderate chance of finding evidence of wrongdoing” (Healy, 2010, p. 59). The rulings in *Safford Unified School District No. 1 v. Redding* (2009) established precedent by which searches could be invalidated; however, the ruling affirmed that under certain contexts searches would be permissible (Russo, 2008).

The opinion of the court issued by Justice Souter was unique in the fact that the court formulated their stance, at least in part, based on the developmental needs of the individual child. As will be illustrated in more details in the coming section, the

construct of care utilized as the student was given consideration based on age and individual circumstances. This marked a transition where Justices applied elements of care in their rulings and findings. This transition will serve as the basis for much of the analysis in this study.

Challenges for School Officials

Despite the added clarity provided by the four referenced cases, administrators and judicial officials are left to apply these guiding standards related to reasonableness in varying and unique contexts that do not always fit nicely within the established case law. Reasonableness is the “central tenet determining the constitutionality of the Fourth Amendment” (Torres, Poenitzsch, & Burke, 2011, p. 79); however, Stader, Greicar, Stevens, and Dowdy (2010) find that reasonableness “is not simple or fixed, but is rather an overall consideration of the context of the search, the reason for the search, and the extent to which the search is reasonably related to its objective” (p. 110). Furthermore, the construct of reasonableness is likened to the assurance of a “moderate chance” that a policy violation has occurred (*Safford Unified School District No. 1 v. April Redding*, 2009). Healy (2010) further substantiated that the term “reasonable suspicion” is too broad and susceptible to different court interpretations (p. 57). The lack of clarity affects all aspects of the public school process including students, administration and their decisions and the development of policy (Torres & Stefkovich, 2009).

The varied interpretations of how to apply appropriately the reasonableness standard have led to considerable debate in both the classroom and courtroom. As an example, the cases addressed by the United States Supreme Court were not unanimous

in their rulings and the contrasting viewpoints foreshadow the continued dilemma experienced by school administrators as they seek to determine the appropriateness of a search (Taylor, 2009). Torres and Chen (2006) illustrate how a dissenting Justice articulated concern that the reasonableness standard could deprive students of their entitled rights. In his opposition to the T.L.O. ruling, Justice Stevens expressed concern that school administrators' authority would not be sufficiently limited and could be exploited to search students for menial policy violations. The lack of consistency between judges and even Supreme Court Justices illustrates the difficulty for administrators to interpret and apply the standards established by case law. Scholars Gluckman and O'Hara (2006) assert that administrators should closely evaluate the level and seriousness of the infraction and should apply a great level of protection to the students if the aim is to criminalize the act.

According to Torres et al. (2011), the failure of the court to provide a clearly articulated guideline has caused "protracted legal battles and an occasional unwillingness to comply with the spirit of the ruling" (p. 44). Although T.L.O. sought to provide an element of guidance to those that may be confronted with conducting searches of students at school, they neglect to clarify critical terms such as "reasonable grounds," "excessively intrusive," or "whether the measures adopted are reasonably related to the objectives of a search" (Healy, 2010, p. 57). "Supreme Court rulings in the Fourth Amendment realm lack sufficient clarity to bring uniformity of practice for their implementation within schools" (Torres, 2012, p. 1104). The lack of a clearly defined directive limits the usefulness of the ruling as school leaders attempt to apply the

standard in varying contexts, particularly in communities that have diverse student populations (Torres, 2012a).

A study conducted by Torres (2012) finds various student groups receiving different types of treatment particularly in instances that involve student searches and the involvement of the police. The fact that inequities are identified in the treatment of students highlights how the ambiguity of the current system causes societal conflict. This is particularly alarming in light of findings that students socio-economic status and race can have implications for the rate at which police are notified of policy or legal violations (Torres & Stefkovich, 2009).

The guidelines related to reasonableness fail to provide clear, definitive directives that establish a clear course of action for future scenarios that do not strictly align to the specifics of these cases. Furthermore, despite their ruling, the Supreme Court failed to provide a rendering that has implications for all contexts. The rulings failed to provide guidance for situations, which may include “canine searches, less intrusive searches such as locker searches, searches more intrusive than a purse search, (e.g., strip searches), searches without individualized suspicion (i.e., group searches), and searches involving police officers” (Nance, 2013, p. 35). According to Torres, (2012) students will be deprived of their rights unless a more clearly established judicial precedent is established.

The judicial system has a tendency to side with the administrative officials and their pursuit of educational order, and as such, students’ individual rights have slowly, yet steadily, begun to diminish (Hanson, 2005, p. 323). In a 2012 study conducted by

Torres, it was identified that courts found students culpable in more than 80% of cases involving searches that were not identified as exceedingly invasive; however, the courts still found students criminally liable in nearly 65% of cases involving searches that were personally invasive.

Based on the fact that courts largely support the school districts, it can be assumed that schools are correctly applying the T.L.O. Standard; conversely, the findings could be interpreted to mean the threshold to meet is low (Stefkovich & Torres, 2003). “In reality, judges faced with drugs or weapons cases may sense a societal compulsion to rule by the requirements of criminal statutes and give less merit to the reasonableness of a search” (Torres, 2012, p. 1033). Elevating the call to apply justice in the school setting may cause school disciplinarians to pursue a disciplinary action depriving a student of their individual rights. School officials develop an inflated feeling of “legitimacy” that may empower administrators to act in an overly zealous manner that would infringe on students’ rights (Torres et al., 2011). School administrators must be mindful that ensuring an orderly and safe campus is a critical task and deliberate indifference to policy violations could have substantial repercussions.

The ethical implications for an ambiguous and sometimes subjective, legal guideline can be problematic. As a result of the recalcitrant ambiguity, a conflict persists between the “ethical and legal perspectives involving strip searches” (Torres, Brady, & Stefkovich, 2011, p. 3). This study seeks to provide educational officials, policy makers and judicial officials increased levels of insight regarding the ethical

frame, either justice or care, from which the courts have typically evaluated cases with Fourth Amendment implications for students.

Ethics: Justice and Care

The construct of public education should be deeply rooted in a philosophy that strives for a strict adherence to ethical standards, which, in turn, will guide all aspects of policies, organizations and institutions that support and perpetuate the cause of student success. “Ethics focuses on questions of right and wrong, what is humanly good, and why practices are moral or important” (Stefkovich, 2013, p. 3). “It is incumbent on school leaders to make ethical decisions that truly reflect the needs of students and not their own self interests” (Stefkovich, 2013, p. 25). Public Education is called to accomplish many objectives with students including education, socialization and instilling a sense of ethical behavior (Lowe, 2000). “Foundationally, ethical relationships are built on the assumption that an inherent obligation compels action to support others and not solely secure individual securities” (Joldersma, 2011, p. 443).

As the public concern over student safety has grown, the expectation of public schools has been put at odds. Joldersma (2011) references the ethical notion of being called to support others; however, what happens when educators are conflicted by serving an individual student who may have made a questionable decision versus a call to serve the student body whose safety may have been jeopardized by the actions of an individual. Consider the nuances of an individual student’s infraction of policy or law. Would the ethical obligation of serving a victim of wrongdoing justify the denial of ethical consideration for the perpetrator of the wrongdoing? The hypothetical conflict

identified in this scenario illustrates the contrasting viewpoints associated with approaching student discipline from an ethic of justice versus an ethic of care. The various groups served by the institution of public education begs the question, which group should be the recipient of the ethical obligation of service as outlined by Joldersma's call to ethical action.

Although educators in general would likely claim to associate with an ethic of care, Stefkovich (2013) noted that ethics, when applied to the field of student discipline, typically conjures connotations of justice. This study aims to provide a thorough analysis of both the ethic of justice and the ethic of care in hopes of asserting if a shift is occurring within the court system as students are more frequently introduced to the system.

Ethic of Justice

The ethic of justice is the frame most commonly applied within the judicial system. Justice is "rule focused, and guided by a commitment to obligation, tradition, equity, and fairness through the application of rules and established standards (Caputo, 2000, p. 71). John Rawls states that the

conception of justice is similar to . . . arguing that the fairest decisions must be made behind a veil of ignorance, in which the decider imagines that they do not know where they would be personally situated in the spectrum of people impacted by the decision (as cited in Kohlmeier & Saye, 2012, p. 411).

Kohlmeier and Saye (2012) stated the following:

The ethic of justice provides an important framework for applying democratic principles to complex public issues that are applicable across numerous groups and individuals. When applying this frame, decisions are made from a distance and in the abstract without the consideration for the practical implications to individuals (p. 416).

Kohlmeier and Saye identify that the application of an ethic of justice allows for educators across schools, districts, and states to maintain a level of continuity in the way they apply disciplinary practices; however, the limitation is that individual students are not afforded individualized consideration based on their unique circumstances.

These definitions clearly express that with a strict adherence to justice, the judge should remove all connotations and known context associated with the scenario to avoid bias in the evaluation process. According to Caputo (2000):

Considerations of punishment for the “justice voice” should theoretically focus on equity in the distribution of penalty (treating like offenders alike), the application of established rules (or the normative standard), fairness in treatment, and the maintenance of social contracts (responding to violations of law and victimization). (p. 79)

The descriptions above illustrate that the aim of applying the justice frame is the pursuit of equal penalties for various individuals that have conducted like infractions of law or policy. Joldersma (2011) states the following:

The ethical relation to any one other human is always in the contact of others, third parties we call them. This takes understanding beyond the individual ethical relation, into the realm of justice. Justice is a question of treating each other responsibly in the context of all the others. Justice requires comparison between others, even though each is unique and incomparable. . . . Justice is the collective call of each other on oneself, and by thoughtful extension, on each other human. (p. 444)

Joldersma asserts that justice can only be administered in a comparative manner where each individual is reviewed in light of others. This assertion is somewhat binary in nature. Did the individual in question do what most people would do or did they act outside of the accepted norm? The application is void of context or individual circumstances that may have contributed to behavior identified outside of the realm of normalcy.

Despite the desire for consistency and equitable application, analysis reveals that disproportionality is evident in the way justice is rendered. Furthermore, adherence to this philosophy of justice is at odds with an outlook that would take into consideration individual circumstances and context of the individual and this ethical lens may be at odds with the very framework that drives an institution such as public education. Stefkovich (2013) points out that adhering to the explicit language of the law does not necessarily follow an ethical or moral course of action.

McLaughlin (1997) states, “Political decisions based on justice can perpetuate unfair policies by overly emphasizing abstract principals and ignoring the implications

for people impacted by the policies” (as cited in Kohlmeier & Saye, 2012, p. 413). An application of school discipline with a focus on justice places the infraction and the reactionary response above the consideration for the individual student. In addition, “Impersonal and abstract dilemmas lend themselves to justice ethics while more personal dilemmas led to the use of care ethics” (Kohlmeier & Saye, 2012, p. 412). The aim of this study is to gain a better understanding of the prevailing ethics applied during the judicial evaluation of student discipline.

Ethic of Care

The construct of public education calls for a large, regulated organization to care for students as individuals. “The ethic of care, with its stress on emotionality and relationship, is regularly contrasted to an ethic of justice, with its stress on rationality and individualism” (Goodman, 2008, p. 234). Gilligan and Attanucci (1988) assert that an ethic of care should not be considered inferior to an ethic of justice. Care is “contextually focused and emphasized by the desire to maintain connection in relationships and to respond situationally and compassionately to the needs, feelings, and desires of others” (Caputo, 2000, p. 71).

In the context of educating a child, the ethic of caring necessitates “dialogue, listening, modeling, providing practice, and attributing the best motives to the student,” and “pedagogical caring, then, clearly contains significant elements from an ethic of care” (Hawks & Lyons, 2008, p. 322). The most experienced and proficient teachers have been documented to prioritize the need to display care for their students (Agne, 1999). Further accentuating this point, Bakhtin states, “Ethical decision making assumes

a relationship among individuals and groups and requires the reasoned to imagine a dialogue between ourselves and those who would receive our decision” (as cited in Kohlmeier & Saye, 2012).

Ethical decision making from a care standpoint necessitates that relationships with individuals are fostered and the ability to exert empathy is clearly present. Providing the opportunity to reflect on the officials’ position when caring describes ethical behavior as being evidenced when an individual charged with the well being of another takes personal responsibility for the care shown to that individual (Torres, 2012). Kohlmeier and Saye (2012) assert that when adhering to an ethic of care the individual circumstances surrounding an event must be considered prior to passing judgment.

In an approach that blends theory with practice, Cassidy and Bates (2005) describe care as “an interactive process involving attentiveness, responsiveness, and competence (p. 68).” For Rauner (2000), caring is not a mechanism but rather a context for healthy development, one that promotes social connections, creates possibilities for students, and leads to positive outcomes. Cassidy and Bates went on to express that “caring is seen as embedded in relationships, as needing to be recognized by the receivers of care, as individually focused, and as being a response to students’ needs as whole beings” (p. 95). Students expressed that caring included “teachers to listen to them, to be a good person and a friend, to take a personal interest in them, to treat students with respect, to help them succeed, and to show care” (Cassidy & Bates, 2005, p. 94).

“The ethic of care encourages empathy and careful consideration of the individuals at the heart of any ethical dilemma” (Kohlmeier & Saye, 2012, p. 430). The ethic of care points to the inherent obligation decisions makers have to consider the individual when making decisions that have implications that will have a direct impact on that person. Incorporating an ethic of care into student discipline calls for “sympathy, empathy, sensitivity and responsiveness” (Goodman, 2008, p. 235). Furthermore, Hawks and Lyons (2008) express that pedagogical care requires “dialogue, listening, modeling, providing practice, and attributing the best motives to the student” (p. 322). According to Noddings (2002), two essential elements of caring for one another include “apprehending the other’s reality” and “being committed to caring action on the other’s behalf” (p. 16).

Caring is not a culmination but a series of continual actions that are “relational, contextual, and concrete” (Hawk & Lyons, 2008). Again, authentic caring is more about the process as opposed to the product. Hawk and Lyons (2008) go on to state that a “caring attribute focuses on helping the other to grow in his or her unique ways and pace.” Further characteristics include ‘sensitivity’, as manifest in teachers noticing and attending to the mood and focus of students; ‘empowering’ students by fostering self-esteem and self-reliance within them; and infusing such relationships with feelings and sentiments (Owens & Ennis, 2005, as cited in Jones, 2009).

As a construct, the “ethic of care” is a series of actions or behaviors as opposed to a culminating item to possess (Hawks & Lyson, 2008). The ethic of care, when applied to school discipline, is not solely focused on determining innocence or guilt, but

ensuring that the actions taken by the administrator are appropriate considering the context of public education with a mind toward growing the student that is receiving the attention from the investigation. As an example, a student brings contraband to school and becomes the object of an inquiry and depending on the applied ethic the intent maybe to assign guilt or conversely to provide experiences to redirect the behavior toward alternative solutions. The school administrator who embraces an ethic of care identifies that all students have value, and should be treated with such dignity. In the eyes of a caring school official, students do not absolve themselves of personal needs and worth because they have potentially violated a policy or law and the school official (Hawks & Lyson, 2008; Jones, 2009; Noddings, 1984). In similar fashion, a school official applying a caring ethic does not relinquish their responsibility of ensuring school policies and legal mandates are adhered with (Hawks & Lyson, 2008).

Goodman (2008) states the following:

Care, then, is neither opposed, nor even complementary, to justice. A parent does not approach her child with equal measure of care and justices. Rather, parental caring is an indivisible melding of gratifying and restraining responses.

Under a best-interest criterion, words such as benevolence, empathy, nurturance, and attentiveness contain aspects of both orientations. (p 246)

Through the analysis in this study, we aim to determine if judges have transitioned from an ethic of justice to a model that incorporates or blends characteristics of care.

Conflict Between Justice and Care

“When we are dealing with children, we expect to intervene regularly not only to prevent harm to others but also to shape the character and personality of the child” (Noddings, 2003, p. 63). All individuals or organizations that are charged with providing oversight of children, for considerable amounts of time, should consider their physical and emotional needs. “Providing a protective, nurturing relationship is pivotal to the child’s successful development, and hence the primary parental responsibility” (Goodman, 2008). “The positive social, emotional, and academic development of children and adolescents depends, to a considerable degree, on whether the contexts in which they develop, including schools, are reliable sources of caring relationships” (Cassidy & Bates, 2004, p. 66). Hanson (2005) asks the questions, “What has happened to the “best interests of the child” approach that recognizes that at least some children need treatment and not necessarily punishment for delinquent and antisocial acts” (p. 324). Understanding the implications these attributes have on a child’s development, have the courts considered the value of imploring an ethic of care, particularly considering their increased role in the disciplinary process?

As noted, the ethic of justice is frequently the applied lens through which school administrators and police officers evaluate student behavior as they seek to ensure safety through rigid adherence to rules. Schools are also seen as agents of the community that seek to foster positive relationships both internally and externally, while maintaining organizational structure and order. As such, the emergence of a conflict between the contrasting ethic of care and the ethic of justice is likely. Because the collective desire

for public schools is not a singular aspiration, it is understandable to expect conflict (Goodman, 2008). School leaders are left to struggle with this philosophical polarization when approaching various circumstances with both a concern for the rights of the individual student in question while simultaneously being charged with supporting the rights of the greater student body (Stefkovich, 2013).

Kohlmeier and Saye (2012) state the following:

In making an ethical decision, the ‘one caring’ should call upon remembrances of their most generous feelings of caring for someone they love, but also consider the impact of the decision on the one ‘cared for’ and what they would want.

Because each relationship and ethical situation will be unique, applying universal [justice] principles to ethical decision-making has potential for dividing relationships, rather than sustaining them. (p. 412)

Consider the implications that this has as students are being educated amid zero tolerance disciplinary practices and a judicial system that embraces a strict adherence to an ethic of justice.

As the construct of public education transitions to meet the needs of a dynamic and global society, it is critical to keep in mind the foundational elements that we collectively expect from the institution of public education (Lowe, 2000). The overarching concept of education that bridges context states, “Education is the contingent, non-instinctual, formative, dynamic development of understanding what occurs as we live with others in order to dwell together justly” (Joldersma, 2011, p. 444). If the intent of educating our youth is their growth and development in an ever-changing

context in such a way as to prepare them for social responsibility, should we assign finality to students' actions or behaviors or should we use those experiences to help them gain a better sense of collective partnership where they exhibit current deficiencies?

Moreover, as police officers and the judicial system are increasingly involved in schools, should their motives aim to accomplish the same goals as the educational system? Should the focus be on punitive reactions or something more akin to the instructional practice of formative assessments that aims to facilitate continual growth and development? In the article, *Building Cultures of Integrity*, Mirk interviewed superintendent from New Jersey states, "People always think you should use a legalistic approach when it comes to the other guy's issues or complaints. But when it comes to my issue or to my child, then I want you to have a heart, to understand their transgressions and to consider all the circumstance" (Mirk, 2011, p. 1).

Gaining a better understanding of the ethical approach applied in the context of student discipline has significant implications, which are all the more vital for student populations that need the greatest levels of support. The failure of school systems and the societal institutions that fundamentally support their efforts, contribute to the reinforcement of marginalization of disadvantaged student populations through unjust bureaucratic practices (Atkinson, 2009).

In contrast to the tenets of an ethic of care, a deficit organizational outlook tends to place fault with those that are raised without socio-economic resources or social capital that have been identified as components that, when present, greatly improve the likelihood of school completion (Cassidy & Bates, 2005). Cassidy and Bates (2005)

assert that these organizations may embrace the tendency of blaming the youth that already has many hurdles to overcome. “Help for students who are members of disadvantaged groups must begin with recognizing the societal challenges they face and then altering the structural impediments in the community and in the school so that learners may thrive” (Cassidy & Bates, 2005, p. 70). If research has identified that these barriers exist, and likely will reduce the probability of graduation, we must gain a clearer understanding of how the system views and approaches student discipline.

Gaining a better understanding of the limits of justice, coupled with the goals society holds for public education, we need to understand how structural or societal responses produce the support or detract from the desired outcomes with children or adolescents. This study intends to determine if the judicial system, with their increased role in student discipline, has become more inclined to apply an ethic of care or has their approach stayed true to the rigid application of justice?

Developmental and Other Needs of Students

This study aims to evaluate if a shift in the ethical approach has been occurring as the courts have become increasingly involved in the disciplinary process. In Stefkovich’s (2012) analyses of studies that evaluated the ethical implications of students’ rights, she found that the scholars she evaluated unanimously made the assertion that it is imperative for school leaders to act in the best interests of the students. As judges increasingly act as de facto school administrators, understanding their renderings will have implications for both identifying and improving the way in which the system addresses students.

A precedent does exist in which the United States Supreme Court considered the developmental differences of children when issuing significant rulings. “Two recent US Supreme Court decisions have fundamentally altered juvenile justice practices in the United States. In 2005, the Supreme Court struck down the execution of minors in *Roper v. Simmons*” (Rothchild, 2013, p. 91). In delivering the opinion of the court, Justice Kennedy expressed that life without the possibility of parole was in violation of prohibition of cruel and unusual punishment as outlined by the Eighth amendment, largely based on the variance in adolescent development (Rothchild, 2013).

Hanson (2005) makes the assertion that zero tolerance disciplinary practices and the corresponding strategies can be tantamount to child abuse. To accentuate his point that these policies have a psychological effect on children, he calls for a consideration of strategies utilized when “a police S.W.A.T. team, armed with guns and a drug-sniffing dog, to enter school property, put the students on lock-down, and subject them to strip searches, pat downs, and lay downs, just like street criminals” (Hanson, 2005, p. 325). He further expressed that in some instances, strip searches have resulted in students exhibiting symptoms of post-traumatic stress syndrome.

Center (2012) reiterates that it is the responsibility of school leaders to find a balance that limits the impact of subjective disciplinary consequences rendered to students while still providing a supportive learning environment. It is important to note that “the challenge for school administrators and teachers is to perceive opportunities to care, to find ways to enact care so that caring is received and benefits the receiver, and to

do this in an era of competing expectations and pressures” (Cassidy & Bates, 2005, p. 99).

Stefkovich (2013) asserted the following:

Moral imperative for educational leaders . . . to act in the best interests of students; however, it should be remembered that this relies on context, takes into account students’ voices, and begins with the assumption that school officials will engage in active inquiry and self-reflection in order to make decisions that are truly in the best interests of the student rather than self-serving or merely expedient. (p. 29)

Many of the changes called for by groups opposed to strict and legal disciplinary responses focus on legislative action; however, various elements of their agenda call for practitioners to implement practices that adhere more closely to an ethic of care, as opposed to the ethic of justice more commonly associated with the judicial system. The philosophical pull caused by the desire to implement effective disciplinary procedures and the protection of student’s individual rights causes a growing dichotomy in the public education arena and further illustrates the need to gain a more comprehensive understanding of the ethical frame utilized by the judicial system.

CHAPTER III

METHODOLOGY

Introduction

A careful review of relevant literature illustrates how the climate surrounding student discipline and the overlap with the criminal justice system has been going through a rapid transition. As this shift has occurred, the available research fails to provide both scholars and practitioners with the necessary insight into the shifting phenomenon. This study will carefully scrutinize the language utilized by judges as they rendered their formal opinions of the court in cases that have implications for students' Fourth Amendment protections. Qualitative content analysis methodology will be used to provide insight into the ethical frame used by judges as they review and consider cases that have implications for students' Fourth Amendment rights.

Purpose of the Study

This analysis intends to broaden the depth of knowledge related to the growing involvement of the justice system in responding to student discipline, primarily in cases that involve a school official conducting a search of a student's person or their property. Cases that fit these specific criteria will be the basis for evaluation as they may shed light on the implications for students' Fourth Amendment protections.

As noted in the corresponding literature review, increasingly aggressive processes, notably the increased utilization of police officers in schools, zero tolerance practices, the school to prison pipeline and the increasing use of student searches, have

created an environment that jeopardizes students' constitutional protections, notably those guaranteed by the fourth amendment of the United States Constitution. Creswell (2012) asserts that "qualitative research . . . should contain an action agenda for reform that may change the lives of participants, the institutions in which they live and work, or even the researchers' lives" (p. 26). As such, this study aims to provide insight and recommendations that will improve the practice of responding to student misbehavior through a greater understanding of judges' underlying and motivating ethical lenses. This study intends to have significant implications for educational leaders and judicial officials alike; therefore, the topic and analyzed resources require the consideration of methodologies beyond those types most commonly associated with educational research.

As the courts have played an expanding role in the discipline of school children, a gap in the literature regarding the judges' ethical application persists. This gap in literature is concerning considering reflective action requires an understanding of current actions. Norms and commonplace practices are frequently unbeknownst to those that work within a system, such as the judicial system. New participants in the system quickly accept that the predetermined course of action is the ideal based largely on the fact that a specific process has always been utilized; therefore, the assumption is made that the practice must be correct. This outlook has significant limitations as it discourages innovation and thoughtful analysis, which allows purposeful modifications to practice (Berger, Luckmann, & Zifonun, 2002).

Historically, courts have taken an interest in research focused on various areas such as the discriminatory application of various laws or the extent to which the practice

of conducting checkpoints to either identify or discourage drunk driving has allowed for improvements and innovations (Acker, 1998, p. 7). This study aims to provide the courts and educators with insight into the administration of student discipline. Specifically, the aim is to determine if courts solely apply an ethic of justice in their rulings, or has an ethic of care become more prevalent in the courts handling of students. Again, this is of particular value considering the rapidly increasing involvement of the courts in the student discipline process.

Krippendorff (2013) observed that organizations tend to maintain adherence to processes and procedures until the point where there is an evident failure in the system. As evidenced in the previous chapters, the emergent practices associated with student discipline have exhibited various negative effects on students. Although it could be argued that the system has not reached the point of absolute failure, these negative trends justify the need for conducting a study that provides better insight into the philosophies driving the interpretation of decision makers, namely judges.

In light of these organizational characteristics, this study aims to go beyond simply determining the extent to which the phenomenon of judicial involvement occurs, but moreover, aims to provide an understanding of the perspectives and motivations applied by judicial officials in their rulings. Obtaining a more comprehensive understanding of the driving forces behind decisions will provide the basis to consider, more appropriately, the various opportunities to make improvements to the system, as opposed to simply accepting these limitations as inevitable. Although the primary analysis will focus on determining the theoretical lens and the associated application of

an ethic of care or ethic of justice in the administration of juvenile justice, the intended purpose of the study goes beyond just theoretical understanding. The evaluation intends to lay the groundwork that will provide sufficient knowledge that will pragmatically have an impact on the way in which student discipline is considered and addressed.

Review of Methodologies

A careful review of various methodological approaches was critical to ensure the process utilized in this analysis provides meaningful insight and contributes to the body of scholarly knowledge. A methodology, by definition, intends to help a scholar identify a research process that will allow thorough and rigorous analysis that adheres to broadly accepted scholarly practices for the purposes of producing findings that will serve as a benefit to a broader understanding of the topic under review (Krippendorff, 2012). Gerbic and Stacey (2005) assert that researchers have at their discretion the ability to employ a methodology as designed or they are able to make modifications to “existing theories, concepts or models” (p. 45). Considering both the legal and educational fields associated with this study, special consideration of both was necessary. Hall and Wright (2008) reference that scholars in the legal arena have borrowed methodologies from a vast area of other fields. These scholars conducted a study of their own, Systemic Content Analysis of Judicial Opinions, in which they used a content analysis to review judicial opinions in such a way that they identified themes and drew inferences. They selected this methodology as they felt it was “a way of generating objective, fallible and reproducible knowledge about what courts do and how and why they do it” (Hall & Wright, 2008, p. 64).

The initial consideration of methodologies evaluated the benefits and limitations of quantitative and qualitative processes. Quantitative methods have long been valued in the arena of multiple content areas including scientific research. However, qualitative research has proven valuable in research focused on various areas including “foreign propaganda, in psychotherapeutic assessments, in ethnographic research, in discourse analysis” (Krippendorff, 2012, p. 25) among other areas. The analysis in this study aligns most closely to an ethnographic analysis and discourse analysis, where the intent is to derive meaning from the provided texts.

After reviewing the various methodologies aligned to the designated research emphasis, a qualitative content analysis method will serve as the ideal approach. This selection was affirmed by DiChristina’s (2000) claim that quantitative methods should not be given preference over qualitative approaches for research focused on criminal justice by referencing the contributions that social sciences have brought to the legal arena. Research that employs legal methodologies typically consider a specific case as the focal point and further evaluates variables to identify how they were applied. As an example, a legal analysis of a strip search case may utilize the concept of “reasonable suspicion” and could be “analyzed to determine whether the search was legal by examining the factors that influence the court’s decision” (Nolasco et al., 2010, p. 8). Conversely, this study is not acutely focused on the factors or even the outcome of a specific case, but rather the process and considerations utilized as the various judges made their determinations.

As noted above, a qualitative approach is being used with the intent of determining the beliefs and associated adherence to ethical frames that drive judges' interpretations and application of law. "Qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them" (Denzin & Lincoln, 2011, p. 3). This methodological approach is ideal as the analysis focuses on drawing inferences from the official opinions of the court rendered in cases associated with the search of a student. The applied method allows the researcher to evaluate the subjective expressions of various individuals in the specific context in which they were applied to gain a greater depth of knowledge (Creswell, 2012).

The use of a qualitative approach, in this instance, is ideal as it allows for the exploration of concepts, such as ethical frames, that are not easy to count or evaluate (Creswell, 2012). Additionally, a qualitative approach is useful in instances where limited research has previously been conducted and an "exploratory" approach is needed to gain an initial depth of knowledge regarding the area of exploration (Creswell, 2003). Following an extensive review of the existing literature, scholars have yet to fully delineate which frame, either care or justice, judges use in their application of law when it pertains to students' Fourth Amendment Protections.

The researcher in a qualitative study is able to broaden the available understanding related to a specific topic, based on the process utilized during the analysis of the identified text (Creswell, 2012). The written opinion serves as the ideal

document by which a content analysis will be able to derive insight into the applied ethical frame.

Content Analysis

The analysis in this study will be conducted by utilizing the methodological approach associated with a content analysis. Content analysis is the oldest practice for evaluative testing in the social arena; however, a uniformly accepted criterion for what constitutes a content analysis has been lacking (Titscher et al., 2000). This qualitative approach is more than half a century old and was defined in the 1961 Webster's Dictionary as an "analysis of the manifest and latent content of a body of communicated material (as a book or film) through classification, tabulation, and evaluation of its key symbols and themes in order to ascertain its meaning and probable effect" (Krippendorff, 2012, p. 1). Since the inception of the content analysis methodology, the specific methods have been refined and scholars have associated three specific practices with the research approach. White and Marsh (2006) have outlined the various components associated with this method, first of which indicates that the findings, which can either be presupposed or following conclusions of the analysis, are identified through observation of the material under review. Kohlbacher (2006) references the work of Ritsert who identifies the benefits of a qualitative as opposed to a quantitative content analysis. The qualitative methodology allows the researcher to consider "the context of text components, latent structures of sense, distinctive individual cases, (and) things that do not appear in the text" (Kohlbacher, 2006, p. 12). The methodology has been applied to many different contexts and "has become an efficient alternative to

public opinion research, a method of tracking markets, political leanings, and emerging ideas; it is used as a way to settle legal disputes and as an approach to the exploration of individual human mind” (Krippendorff, 2012, p. xiii). As such, this methodology is appropriate in this study as the inquiry aims to identify if an ethical bias exists in judicial rulings.

The practice has been identified as “probably the most prevalent approach to the qualitative analysis of documents” and it comprises a searching-out of underlying themes in the materials being analyzed (Kohlbacher, 2006, p. 392). The practice is used in research designs in which the scholar is attempting to identify meaning from a specific text (Hsieh & Shannon, 2005).

The goal of this analysis is to assess both the overt and “latent content” embedded in various judges’ opinions of the court in order to ascertain the extent to which a theme is present. In this particular case, the themes we will search for are those associated with an ethic of care as opposed to an ethic of justice. Simply put, the content analysis methodology will be used to derive meaning from the language expressed by judges following their respective rulings.

In this instance, the research design intends to allow the researcher to make reasoned inferences about the ethical frame judges apply as they make various legal determinations. The value of a content analysis is that “it bridges the gap between descriptive accounts of texts and what they mean, refer to, entail, provoke, or cause” (Krippendorff, 2012, p. 85). This process is conducted by assigning various elements of a particular narrative in to categories or themes (Weber, 1990).

For the purposes of this study, characteristics of an ethic of care and conversely an ethic of justice provide the context by which language of the judges' opinions of the court will be coded. Although the study will identify various aspects of the individual cases that are being evaluated, the analysis and associated judgments will be based on the way in which the judges identify and explain the elements of their decisions and explanations.

Research Questions

The development of appropriate research questions is critical to produce findings that will have usefulness and applicability for both educators and legal officials. For this particular study, which will utilize content analysis research methodologies, the research questions will be the basis by which inferences are drawn and knowledge is broadened (Krippendorff, 2012). The development of appropriate research questions enables the focus of the analysis to remain on the intended area and helps prevent the researcher from deviating into other areas as they progress through the research process (White & Marsh, 2006).

The research question is framed by the understanding that judicial officials historically have been motivated by an ethic of justice as they make determinations about the legality of various cases. The primary research question is posed in the context of the expanding role of the courts and judicial officials in the process of administering student discipline.

Primary Research Question: To what extent does the language used to craft an opinion of the court represent alignment to a specific ethical posture when responding to

cases with fourth amendment implications for students? The ethical frames of justice and care will be the basis for this evaluation.

Creswell (2012) identifies that qualitative research allows for modifications to the research questions to respond better to the emerging findings and the associated research problems. As such, the secondary research questions will be more clearly articulated as the analysis commences; however, the responses are not anticipated to be as overt regarding these four areas. The viability of conducting a dynamic evaluation is further substantiated by Creswell's (2003) work that references the desired type of findings can dictate the process, or it can evolve as the research progresses.

Theoretical Framework

Qualitative research designs begin with the adherence and reliance on interpretive or theoretical frameworks that “inform the study of research problems addressing the meaning individuals or groups ascribe to social or human problems” (Creswell, 2012, p. 44). This particular study is no different. As referenced above, this analysis will utilize the ethic of care and the ethic of justice as the framework by which the analysis will be conducted.

The application of an identified framework is intended to serve a number of purposes. According to Krippendorff (2013), “The prescriptive purpose is to guide the conceptualization and design of practical content analytic research” (p. 35). Potter and Levine-Donnerstein (1999) further substantiate that a theory or frame is used to establish a coding mechanism that allows for responsive inferences. In this case, the ethic of care and the ethic of justice have been identified as the focus of the analysis and are intended

to provide insight into the way in which judges approach their rulings. The framework also serves as the basis for the analysis and the focal point of the evaluation. The framework of this study is not as rigid as may be found in a quantitative counterpart. Creswell (2003) expresses that theory may shift as various realizations are discovered through the analysis; however, the ethical lens of care and justice will remain the predominate frame through which the analysis is conducted. The utilization of this framework is intended to “provide an explanation for behavior and attitudes, and it may be completed with variables, constructs, and hypotheses” (Creswell, 2003, p. 131). The final attribute of the framework is “to point to performance criteria and precautionary standards that researchers can apply” in their analysis (Krippendorf, 2004, p. 29). As applied to this study, the framework will help to identify elements of an ethic of care or ethic of justice that can help characterize various elements in the judges’ opinion of the court.

Ethic of Justice

An ethic of justice is focused largely on the rules. An actor that is making a decision from the standpoint of this frame will feel an obligation to make decisions that are fair and replicable (Caputo, 2000). The intent is to strip away context that may skew a decision maker’s consideration and strive to render similar rulings for like offenses (Caputo, 2000). Rawls references the importance of a veil of ignorance that allows the decision maker to make judgments that are not influenced by the individuals in the case (1971).

In similar regard, Kohlmeier and Saye (2012) assert that an ethic of justice motivates decision makers to assess their judgments from a standpoint by which they are personally removed, and do not give acute attention to the impact of their ruling on the individual. Joldersma (2011) asserts that justice requires the administration of rulings or decisions in a particular scenario in light of all similar scenarios. The focus of a judgment is the infraction or violation of the law or policy, with little consideration given to the individual student (Kohlmeier & Saye, 2012).

Ethic of Care

An ethic of care calls for a decision maker or judge to consider the impact of the decision on the individual student. Clement asserts that the construct embraces emotion and relationship (Clement, 1996). The application of an ethic of care calls for the decision maker to consider context as well as the details surrounding the event that is under review (Kohlmeier & Saye, 2012) and to render decisions that are compassionate and mindful of the “needs, feelings, and desires of others” (Caputo, 2000, p. 71). As the needs of the individual are considered it is important to note that dialogue, listening, and modeling are all aspects that are associated with an ethic of care (Noddings, 2012). Noddings (1988) identifies that “ethical agents adapting this perspective do not judge...acts solely based on their conformity to rule or principle” (p. 219). Cassidy and Bates (2005) further identify that a decision maker applying an ethic of care is attentive and responsive and considers all aspects of the individual under review, and not just the details surrounding the alleged infraction. Goodman (2008) and Noddings (2002) also accentuate the critical nature of considering the individual holistically.

The key characteristics of both an ethic of justice and an ethic of care will serve as the basis by which the content analysis coding will be conducted. A summarized version of these two constructs is provided in the coding section of this chapter

Role of the Researcher

The particular methodology implored in this content analysis has significant implications for the role of the researcher. Qualitative research methodologies, such as a content analysis, have been referred to as “interpretive” based largely on the role the researcher takes in the research process. The scholar is called to thoroughly review a particular text and through an interpretive process based on the coding of content, identifying themes and constructing a new account. This new narrative will illustrate the analysis associated with the literary review (Krippendorff, 2012; White & Marsh, 2006). The researcher develops this new narrative as they “collected open-ended, emerging data with the primary intent of developing themes from the data” (Creswell, 2003, p. 18). These newly constructed narratives, as well as the associated conclusions derived, are based on the researcher’s personal analysis and the judgments.

As the researcher conducts the coding process, the role of the research is to identify various themes that appear. Frequently, this interpretive process is associated with the researchers coding of various phenomenon that occur within the text. Based on this process, the researcher is able to derive meaning in light of the design of the analysis. Furthermore, the researcher is called upon to interpret these emerging themes and identify the meaning that is derived (Kohlbacher, 2006). It is important to note that

the researcher must recognize that all readers will derive meaning from a text and it may differ from the meaning derived from the structured analysis (Krippendorff, 2012, p. 27).

The researcher is also responsible for sharing their findings in such a way that it contributes to the general body of knowledge. The researcher “support(s) their interpretations by weaving quotes from analyzed texts and literatures about the contexts of these texts into their conclusions, by constructing parallelisms, by engaging triangulations, and by elaborating on any metaphors they can identify” (Krippendorff, 2012, p. 89). Ultimately, the researcher is called to share the findings by providing a comprehensive response to the designated research question, which again focuses on the formal opinions of the court (White & Marsh, 2006).

Data Collection

The practice of purposefully selecting cases based on these established criteria are acceptable, and even preferential in legal scholarship (Nolasco et al., 2010). For that reason, cases that have been considered by the United States Supreme Court were given preference. Additionally, preeminent cases that have established the guiding case law regarding students’ Fourth Amendment protections will be included in the analysis.

Opinions of the Court

The content analysis methodology is built on the careful review and coding of a particular text or series of texts. This analysis will focus on the formal opinions of the court rendered in the selected cases. Opinions of the court are simply the method in which judges are able to explain their decision (Acker, 1998). For the purposes of this study, the case study will look broadly at court cases that have implications for students’

Fourth Amendment rights as a result of a search and seizure. Hall and Wright (2008) suggest selecting a limited number of cases that address the topic, and hold similar legal weight.

The court archives and indexes opinions in a way that researchers are able to find the cases that are most pertinent to their analysis. Scholars that focus their efforts on judicial opinions have seen an expansion of the resource starting in the latter half of the 1970s that broadened beyond cases reviewed by the U.S. Supreme Court. Scholars frequently utilize Westlaw and their National Reporter System to located opinions of the court associated with State courts (Acker, 1998). For the purposes of this analysis, the Westlaw Database will serve as the platform for collecting data in the form of court opinions. Their filtering features will also allow for the delineation of cases based on the criteria set forth in the purposeful maximal sampling. Filtering through the cases and identifying the selected sample for review was conducted by utilizing the process known as purposeful maximal sampling. Creswell (2006) expresses that cases should be selected purposefully based on the type of exploration that is being conducted.

The first criteria identified for the purposeful maximal sampling was based on the era in which the cases were litigated. The selected cases cover a breadth of time following the ruling that was rendered in the United States Supreme Court case *Safford v. Redding* (2009). The *Safford* case was particularly notable as it marked a seeming shift where the Supreme Court Justices took into consideration reasonableness and considered the appropriate developmental needs of the child, thus incorporating an element of care into an otherwise legal arena.

The overall intent of this study is to identify if a consistent transition has occurred following the most recent landmark Supreme Court ruling, *Safford v. Redding* (2009), where an ethic of care played a role in the evaluative process. The identification of this trend, or the lack thereof, is intended to provide academic insight to both judicial officials as well as educational administrators. Based on this research intent, the second set of criteria utilized in the purposeful random sampling is based on the legal jurisdiction of the presiding court. In other words, the analysis intends to review rulings that have the greatest impact or broadest reach, from both a legal and precedent-setting standpoint.

The structure of the United States court systems has implications for the cases that will be purposefully sampled for this analysis. “The court system, both for state and federal, is structured in a hierarchy where the initial court of review is the trial court which typically has subsequent appellate courts” (Acker, 1998, p. 3). Again, preference will be given to cases that have the broadest implications. For example, rulings established by the United States Supreme Court are valuable as the jurisdiction of the court covers the nation and these rulings establish precedent by which subsequent rulings are made (Acker, 1998).

The federal court system is also of significant importance; however, the structure of the court system is divided into 12 judicial courts. The decisions rendered in district courts only have implications for the geographic area they cover. In some instances, district courts issue conflicting rulings and the U.S. Supreme Court has the authority to decide if the issue warrants their involvement (Acker, 1998).

The cases selected for analysis in this study serve as the fourth amendment cases, in a post *Safford* era, that have been reviewed by the nation's highest courts. These cases play a significant role in the establishment and affirmation of precedent and case law applicable across the nation. Since the 2009 *Safford v. Redding* case, the United States Supreme Court has not reviewed any cases involving students' Fourth Amendment rights or search and seizure cases involving students. In light of the realization that additional U.S. Supreme Court cases are not available, purposeful random sampling will be conducted with the use of a process known as shepardizing. This term has become synonymous with the process that attorneys utilize to review legal cases surrounding a specific topic, while considering the jurisdiction or level of the court and evaluate the applicability of the ruling in light of subsequent rulings (Payne, 2013). LexisNexis and Westlaw both have their own process for shepardizing cases. For the purposes of this study, Westlaw and the KeyCite process will be utilized.

Through the process of shepardizing, the identified cases stem from a student that was the subject of a search conducted by school personnel and the student or their representative subsequently claimed a violation of their Fourth Amendment protections. Through the use of purposeful random sampling, the study will focus on cases that have the broadest implications.

The sampling of cases includes those heard by the United States appellate courts, as well as a sampling of cases from various federal circuit courts of appeal that have heard cases with details similar to those heard by the United States Supreme Court as

they reviewed *Safford v. Redding* (2009). The analysis of this study will utilize the opinions of the court from the following cases as the basis for evaluation.

***D.H. by Dawson v. Clayton County School District* (2006) 904 F.Supp.2d 1301 (2012).** This case, reviewed by the United States Court of Appeals, Eleventh Circuit, was brought before the court based on the allegation that the strip search of a 12-year-old male student, conducted by an assistant principal, violated the student's Fourth Amendment protections. Westlaw identified that this case is distinguished by negative treatment when reviewing the precedent established by *Safford v. Redding* (2009).

***A.M. v. Holmes* (2016) 830 F.3d 1123, 10th Cir. (N.M.), July 25, 2016.** In this case, a student's mother brought allegations stemming from the search that occurred following the student's arrest. The mother brought claims of violations of the student's rights as guaranteed by the First, Fourth, and Fourteenth Amendments. The United States Court of Appeals considered this case for the Tenth Circuit. Westlaw identified that this case is distinguished by negative treatment when reviewing the precedent established by *Safford v. Redding* (2009).

***T.S., Appellant, v. STATE of Florida, Appellee* 100 So.3d 1289, 37 Fla. L. Weekly D2710.** In this case, a student was the subject of a search and subsequently received charges related to the possession of drug paraphernalia and marijuana. In this case, the District Courts of Appeal of Florida, Second District, determined that the search, conducted by the school counselor, was a violation of the student's protections guaranteed by the Fourth Amendment. Westlaw identified that this case is distinguished

by negative treatment when reviewing the precedent established by *Safford v. Redding* (2009).

***Foster v. Raspberry* (2009) 652 F. Supp.2d 1342 (M.D. Ga. 2009).** In this case, a high school student was the subject of an alleged strip search while at school and the student's parents brought claims that the student's Fourth Amendment rights were violated by the respective action. This case was reviewed by the United States District Court, M. D. Georgia, Columbus Division.

***John Doe and Jane Doe, as Parents and Next Friends of D.M., a minor, Plaintiffs v. Champaign Community Unit 4 School District, et al., Defendants* (2015) 2015 WL 3464076, C.D.Ill., May 29, 2015.** This case, reviewed by the United States District Court, C.D. Illinois, Springfield Division, stemmed from the search of the student after the principal received the report that a strong marijuana odor was present. The search, of which the intrusiveness is contested, did not produce any drugs or paraphernalia. Claims were brought against the principal and school board representatives citing that they violated the students protected rights.

***In re D.H.* (2010) 306 S.W.3d 955, 256 Ed. Law Rep. 455.** The final case in this analysis was considered by the Court of Appeals of Texas, Austin. The student attempted "a pre-trial motion to suppress" evidence regarding her charge of "possession of marihuana in a drug-free zone." This motion was not accepted and the student pled guilty; however, she later appealed claiming that the methods utilized to secure the evidence was done in such a way that it was a violation of her Fourth Amendment protections.

Data Recording and Coding

The benefit of conducting a content analysis is derived from the practice of “coding and categorizing of the data” (Stemler, 2001, p. 3). In this instance, the process of coding will focus on making determinations about textual content that is associated with an ethic of care or an ethic of justice; however, text references that could be considered in both categories will not be categorized (Stemler, 2001). For the purposes of this study, language provided in the opinion of the court will be categorized as either aligning to an ethic of care or an ethic of justice. The coding will be based on the prevailing elements of both an ethic of care and justice that have been explored extensively in chapter two’s review of relevant literature. The prevailing characteristics of each ethical frame are provided in Table 1.

Table 1

Prevailing Characteristics of Ethical Frame

Frame	Prevailing Elements and Sources
Ethic of Justice	<p>Rules Focused (Caputo, 2000; Kohlmeier & Saye, 2012)</p> <p>Absent of Context (Caputo, 2000; Kohlmeier & Saye, 2012; Joldersma, 2011; Rawls, 1971)</p> <p>Little consideration of individual actors (Rawls, 1971; Caputo, 2000; Kohlmeier & Saye, 2012)</p> <p>Consistent Across Scenarios (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012)</p> <p>Focused on Fairness & Equity (Caputo, 2000; Joldersma, 2011)</p> <p>Comparative in light of all others (Joldersma, 2011)</p>
Ethic of Care	<p>Considers impact on the individuals (Clement, 1996; Caputo, 2000; Cassidy & Bates, 2005; Goodman, 2008; Noddings, 1984, 2002, 2012; Kohlmeier & Saye, 2012; Hawks & Lyons, 2008; Jones, 2009)</p> <p>Considers context and extenuating circumstances (Kohlmeier & Saye, 2012; Cassidy & Bates, 2005)</p> <p>Values Emotion (Clement, 1996; Goodman, 2008)</p> <p>Values Relationship (Clement, 1996; Caputo, 2000; Bakhtin, 1986; Cassidy & Bates, 2005; Noddings, 1988, 2002; Hawks & Lyons, 2008)</p> <p>Empathy (Kohlmeier & Saye, 2012; Goodman, 2008; Noddings, 2002)</p> <p>Focused on the process (as opposed to the outcome) (Hawk & Lyons, 2008)</p> <p>Focused on Growth (Hawk & Lyons, 2008)</p>

Qualitative content analysis methodologies assert that the process of coding textual evidence is aimed at answering the primary research question of the study (White & Marsh, 2006, p. 39). A content analysis is “essentially a coding operation” (Babbie, 2001, p. 309) with coding being identified as “the process of transforming raw data into a standardized form”. The act of coding in this study will serve as a critical element of the analysis, as opposed to the coding of a quantitative analysis, where the analysis

comes later (White & Marsh, 2006, p. 39). This particular study will utilize the process referred to as “a priori coding” in which “the categories are established prior to the analysis based upon some theory” (Stemler, 2001, p. 4). The identified frameworks, the ethic of care and the ethic of justice, will serve as the basis for the coding. As such, the coding will be based on the previously identified characteristics of an ethic of care or an ethic of justice.

Conducting a content analysis over a broad and often lengthy body of text can be daunting. This study will adhere to the guidance provided by Elo and Hyngäs (2007). The authors reiterate that the basis of the coding in a qualitative content analysis is the research question. It is paramount that the focus of the question remains the benchmark for selecting the content to be coded. Other content, while it may be interesting, should be left for future analysis.

Coding is a significant part of the research design and as it calls for the researcher to use analysis and judgment as aspects of the text are assigned various attributes and this process is known as “the heart and soul” of the content analysis methodology (Kohlbacher, 2006). The coding operations conducted in this study align to the process outlined by White and Marsh (2006). They expressed that it is common for researcher to read through the designated text numerous times. Once a conceptual understanding has been developed, the researcher begins to “tag key phrases and text segments that corresponds” (White & Marsh, 2006, p. 37) to the primary research questions. The processes of abstraction will be utilized as categorical development occurs (Elo & Hyngäs, 2007). It should be noted that the researcher must remain cognizant that textual

references with similar elements should not automatically be characterized together as they may not both fit the overarching group (Elo & Hyngäs, 2007). “Deductive category application works with previously formulated, theoretically derived aspects of analysis, which are brought into connection with text” (Kohlbacher, 2006, p. 20) will serve as the basis by which themes and therefore meaning is derived. Mayring (2000) asserts that the intent is to identify explicit descriptions for each criteria of the deductive categories that will be used for the purpose of creating codes and themes.

As the researcher begins to read the opinions of the court and identifies concepts and patterns, the established codes are susceptible to the hermeneutic loop based on the dynamic nature of the research design as the ongoing process of “decontextualizing, reinterpreting, and redefining the research until some kind of satisfactory interpretation is reached” (White & Marsh, 2006, p. 36).

As textual elements from the opinions of the court are associated with either an ethic of care or an ethic of justice, the analysis will go beyond the overt and explicit interpretation of text. Extensive analysis and evaluation will be conducted to interpret latent meanings in the court’s opinions (Hall & Wright, 2008). Neuendorf (2002) expresses that “it is perhaps more useful to think of a continuum from ‘highly manifest’ to ‘highly latent’ and to address issues of subtlety of measurement for those messages that are very latent” (p. 23). The structure that is utilized to apply the coding and the associated application of various themes is the process that enables a content analysis to be an effective practice (Krippendorff, 2012). Berring (1994) identifies that “reading and rigorous analysis to draw abstract principles out of judicial decisions, so that the

process of reasoning and analogy used by the judges and professors can be emulated” (p. 13).

A text does not have inherent meaning; rather, the researcher evaluates both the overt and latent meaning of the text (Potter & Levine-Donnerstein, 1999) in light of the theory or frame that is used to establish a coding mechanism which allows for responsive inferences. In regards to this study, the research design calls for the researcher to apply interpretations to the text, specifically rendered opinions of the court, and assign those to the designated themes, ethic of care or justice. It should be noted that the meanings derived from a scholar conducting a content analysis might differ from those inferred by a general reader (Krippendorff, 2012). This is a key point for this analysis, as the numerous judges that authored the various opinions of the court were not intending the explicit alignment to an ethic of justice or an ethic of care; however, the methodology and frame will allow the researcher to observe and identify these specific characteristics.

Data Analysis

The data analysis conducted in this study will be done in light of the constructs associated with an ethic of care and an ethic of justice. Developing a theory is critical to ensure that the study allows for careful consideration and review of the theory (Yin, 2003). In this analysis, the theory can be characterized by the assumption that judges are driven to make ethical decisions and that the ethic most commonly at play in the legal arena has been that of an ethic of justice. The theory of this analysis is that with the increasing involvement of courts in the discipline process, judges may be more inclined

to incorporate the tenants more commonly associated with an ethic of care. A thorough review of these two constructs was provided in the literature review section of the study. A summarized version of the key characteristics is available in the coding section of this chapter and these characteristics will be the basis for the analysis.

Research questions in a content analysis study are answered as inferences are drawn from the evaluation of the designated text. This methodology places value in the inferences drawn by the researcher and the conclusions they draw as they select from amongst the various hypothetical conclusions that may be plausible. The articulated research question allows the scholar to make determinations regarding phenomena that have previously remained somewhat obscure (White & Marsh, 2006). As related to this study, the methodological approach allows for a thorough inquiry much deeper than evaluating the outcomes of cases. Insight will be gained by inquiring beyond the face value of the expressed words and looking for text that supports the existence of an ethical bias or leaning. A content analysis allows the researcher to “select valid answers to questions concerning their contexts” (Krippendorff, 2012, p. 83). The use of a content analysis methodology for this particular study will give insight into the specifics of each case, how the respective judge evaluated them, the adherence to procedures, and the rationale that led to the ultimate decision (Hall & Wright, 2008).

Inferences will be drawn following the evaluation and coding of the designated text. This methodology places value in the inferences drawn by the researcher and the themes drawn as various plausible hypothetical conclusions are considered. The articulated research question for this study allows the researcher to make determinations

regarding phenomena that have previously remained somewhat obscure (Krippendorff, 2012). The use of a content analysis methodology, for this particular study, will give insight into the specifics of each case, how the respective judge evaluates them, the adherence to procedures, and the rationale that led to the ultimate decision (Hall & Wright, 2008). The research design is also intended to allow the researcher to identify various trends in the courts' opinions that align to elements of an ethic of justice or an ethic of care.

By nature, a content analysis is a somewhat dynamic and flexible methodology. The intent is to allow the researcher to make inferences that take into consideration the “holistic qualities of texts” and this may require the scholar to analyze previously reviewed sections of text in light of insight gained from the subsequent analysis (Krippendorff, 2012, p. 88). The analysis is able to combine “statistical knowledge, theory, experience, and intuition to answer their research questions from available texts” (Krippendorff, 2012, p. 43). The process of analyzing text cannot be formally standardized and is a time intensive processes that limits the scope of text that a researcher is able to evaluate (White & Marsh, 2006).

The context for which a content analysis is designed is critical and renders the process a meaningful practice for deriving meaning. In the light of a particular context, “the diversity of interpretations may well be reduced to a manageable number, sometimes to one” (Krippendorff, 2012, p. 29). It is understood that a single text is susceptible to various interpretations by various readers or research designs. The researcher has an obligation to identify explicitly the applied context, which is the basis

for their judgments (Krippendorff, 2012). The inferential component of a content analysis is the aspect of the methodology that provides value (Hsieh & Shannon, 2005).

Validating Findings

The design of this study has purposefully included various elements to ensure the findings are valid and provide an academic and practical benefit. By nature, formal research methodologies provide specific processes by which the study's findings can support the establishment of "replicable and valid inferences from texts" (Krippendorff, 2012, p. 24). This study is no different and a number of established processes have been incorporated into the design of this study. They include "disconfirming evidence," "researcher reflexivity," and the inclusion of a "thick, rich description" (Creswell & Miller, 2000, p. 24). Each of these practices will contribute to the reliability of the findings in this study.

The design of this study lends itself to the use of the disconfirming evidence processes. This procedure calls for the researcher to identify, at the onset of the study, the themes that will be used in the analysis. In this instance, the ethical frameworks of justice and care serve as the basis for the study. The process for disconfirming evidence then calls for the researcher to review the data in light of these identified themes and work to disconfirm these themes (Creswell & Miller, 2000). The nature of conducting this type of content analysis with legal data nature enables this procedure to be used effectively. The judicial system has historically utilized an ethical frame of justice. During the process of analyzing and coding content, the researcher will look for any textual elements that align to an ethic of justice. Continuing with the practice of

disconfirming evidence, the researcher will confirm that valid codes and themes have emerged by ensuring that the coded text does not likewise align to justice.

Ensuring that a “thick, rich description” is provided is “another procedure for establishing credibility in a study” (Creswell & Miller, 2000, p. 128). Denzin (1989) characterizes thick, rich descriptions as “deep, dense, detailed accounts. Thin descriptions, by contrast, lack detail, and simply report facts” (p. 83). Following the initial analysis, coding and subsequent establishment of themes, the researcher will provide the findings in the form rich narrative that provides insight into the context of the study and the findings. This detailed narrative provides the reader with full context by which they can evaluate and characterize the findings. “As content analysis researchers, we must do our best to explicate what we are doing and describe how we derive our judgments, so that others – especially our critics – can replicate our results” (Krippendorff, 2012, p. 5). Providing the reader with this opportunity speaks to the validity of the study and the research design.

As noted, affording the reader the opportunity to personally evaluate the study for validity is accomplished by providing thick, rich descriptions, but it will also be accomplished in this study by ensuring that the biases of the researcher are fully disclosed. A process known as researcher reflexivity will be utilized. “This is the process whereby researchers report on personal beliefs, values, and biases that may shape their inquiry” (Creswell & Miller, 2000, p. 127). Providing the reader with an account of the “assumptions, beliefs, and biases” (Creswell & Miller, 2000, p. 127)

allows the reader to understand the lens by which the study is conducted and evaluate the findings in light of that understanding.

Limitations

One limitation of this research methodology is based on the interpretive nature of the research design. The individual biases of the researcher will manifest in the interpretations and characterizations that will be drawn as the study is conducted. Various aspects of the researcher's life, including experiences, beliefs, and perspectives, affect these judgments. The influence associated with these personal characteristics is referred to as naturalistic generalizations (Stake, 1995). Methodologies associated with this type of qualitative research have an understanding that the analysis and the development of a new account or narrative will include, by design, the researcher's interpretations which are driven and framed from their personal experiences and perspectives (Creswell, 2012). As noted in the preceding section, researcher reflexivity will be utilized to mitigate these limitations.

The way in which the coding is conducted, and the associated process for making inferences, speaks to the reliability of the study. A common challenge is that researchers conducting the analysis have been so close to the concept that they identify assumed meanings, which jeopardizes the reliability. Stemler (2011) suggests that researchers develop a series of detailed guidelines for interpretation that will help ensure validity. A series of prevailing characteristics for both an ethic of care and an ethic of justice have been developed and outlined in the coding section of this paper. This list will serve as

the basis for evaluating the identified text; however, subjective interpretation is still required by the researcher (Stemler, 2011).

Narrative

After the researcher has conducted the analysis on the identified opinions of the court, coded the text, and established themes, a new narrative outline the process and findings must be constructed. This new narrative has been characterized as a comprehensive overview of findings that provides both details of the identified themes as well as additional issues or trends identified through the analysis (Creswell, 2012). These are called “assertions” by Stake (1995) or building “patterns” or “explanations” by Yin (2009). Creswell (2012) urges scholars to “think about these as general lessons learned from studying the case(s)” (p. 99). As noted by Neuendorf (2002):

Often the result of qualitative analysis is a composite picture of the phenomenon being studied. The picture carefully incorporates the context, including the population, the situation(s), and the theoretical construct. The goal is to depict the “big picture” of a given subject, displaying conceptual depth through thoughtful arrangement of a wealth of detailed observations. (p. 23)

The development of this narrative provides the basis by which the study contributes to the body of scholarly knowledge. The goal of the study is to provide academic insight to both judicial officials as well as educational administrators. This compressive narrative will address the court’s adherence to a specific ethical posture when responding to cases with fourth amendment implications for students. The comprehensive narrative will provide both a deep and rich description of the analysis but

will also provide textual quotes to support the findings (Neuendorf, 2002). In summary, the new narrative will be the basis by which other schools and professionals are able to find applicability.

CHAPTER IV

FINDINGS

Overview

The researcher investigated how the courts' invoked ethical reasoning in six court cases with implications for student's Fourth Amendment protections. Each of the selected cases was appealed, at least in one instance, and the associated analysis has been conducted on the opinion of the court holding the highest authority. An overview of each case will be provided based on the details deemed most appropriate by the presiding judge(s) as noted by inclusion in their opinion of the court. Additionally, an overview of legal standards shared by each judge will be identified; particularly those referenced as holding significant weight for the material matters of the case as well as the judge's ruling. Following this summarized overview of the case details along with relevant legal alignment, each case will be evaluated using content analysis methodologies to assess various elements of textual content that have alignment to the prevailing characteristics of an ethic of justice or conversely to an ethic of care (Creswell, 2012). A representative subset of language aligned to justice will be provided and discussed. As noted extensively through the review of literature, the ethic of justice is the prevailing ethic most commonly associated with the judicial process. Therefore, the inclusion of each justice-oriented statement would be extremely extensive and would not provide additional insight or value to the study. Conversely, the study aims to identify if the inclusion of any elements aligning to an ethic of care have been referenced

in the judges' language. For this reason, these references will likely be more infrequent and therefore will be explored in a more comprehensive manner. For each referenced case, a summary will be provided which will depict the individual alignment to an ethic of care or an ethic of justice. A process of coding will be conducted in which codes will be assigned to textual exemplars that are aligned to elements of an ethic of care or an ethic of justice. The primary research question will guide the evaluation of trends have emerged (White & Marsh, 2006). Again, the ethic of justice and its rigid adherence to rules and uniform application (Starratt, 1994) is the frame most frequently associated with the judicial system. The content analysis methodologies including coding and the subsequent analysis used in this study will allow the researcher to determine if the ethic of care and its associated characteristics that are more inclined to respond to the needs of the individual (Starratt, 1994) have emerged as a basis of consideration in the judicial process. This analysis will seek to determine if the use of various ethical frames and any related trends emerge regarding the use of the contrasting frames. Following these processes, a narrative will be developed that provides readers with greater clarity and insight into the analysis along with an overview of findings.

D.H. by Dawson v. Clayton County School District (2006) 904 F.Supp.2d 1301 (2012)

The overview provided for this particular case is more exhaustive than the summary provided for the subsequent cases evaluated in the study. The intent is to provide readers with an exemplar that will provide an understanding of how cases are often summarized and referenced in the formal opinion of the court. Providing a thick and rich description in the overview of the first case will give readers context to

understand how these court opinions are considered and evaluated (Creswell & Miller, 2000). A thorough, but slightly less exhaustive, case overview will be provided for the remaining cases. These summaries remain thorough enough to provide readers adequate to provide readers appropriate insight into the events of the case.

Case Overview

This case was ultimately heard by the United States Court of Appeals for the Eleventh Circuit and Judge Hull provided the corresponding opinion of the court. The mother of a minor student that attended Eddie White Academy initially brought this case forward. The mother alleged that a strip search of her child was a violation of his rights, specifically the right to be “free from unreasonable searches and seizures,” as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution” (as cited in *Dawson v. Clayton*, 2006, p. 1). The United States District Court for the Northern District of Georgia initially heard the case; however, the ruling, which granted elements of the plaintiff’s request for summary judgment and denied the assistant principal’s claim of qualified immunity, was appealed.

The Opinion of the Court issued by Judge Hull began with a procedural history of the case. On February 8, 2011, Assistant Principal Tyrus McDowell received a report that indicated 12-year-old student, D.H., was in possession of marijuana. McDowell brought D.H. into the office and conducted a strip search, which serves as the basis of the suit. Angela Dawson, the mother of D.H., brought suit under 42 U.S.C. 1983, which will furthermore be referred to as Section 1983. Section 1983 is referred to as civil action for deprivation of rights and it serves as the legal standard by which individuals

are able to seek recourse for the deprivation of rights (42 U.S.C. 1983). Dawson brought suit against McDowell, as well as the prior chief of the Clayton County Sheriff's Office, Kemuel Kimbrough; school resource officer, Ricky Redding as well as the Clayton County School District. The suit "alleged that the defendants deprived D.H. of his rights to privacy, to be secure in his person, and to be free from unreasonable searches and seizures as protected by the Fourth and Fourteenth Amendments of the United States Constitution and the Georgia Constitution" (*Dawson v. Clayton*, 2006). The claims against Kimbrough and Redding were both dismissed by the district court. In November of that year, McDowell filed a motion for summary judgment based on the protections of qualified immunity, the school district filed a motion for summary judgment asserting they were not responsible for McDowell's search and D.H. filed motions for summary judgment against McDowell and the District. The School District was supported in their request for summary judgment; however, McDowell's motions for protections of immunity under both federal and state laws were denied. Following this ruling in September 2014, it was left for the trial court to determine the appropriate damages that McDowell owed D.H. In October 2014, McDowell filed "a notice of interlocutory appeal from the district court's September 20, 2014 order" (*Dawson v. Clayton*, 2006, p. 2).

Upon this appeal, Judge Hull recounted the details of the case in the light most favorable to the plaintiff. The facts were outlined in the formal opinion of the court. The events began on the morning of February 8, 2011 when Deputy Ricky Redding was notified by an EWA student that D.V. was in possession of marijuana and had

subsequently shared it with other students while at school. The officer shared this information with Assistant Principal Ratcliff who stated, “The presence of marijuana in an elementary school is a ‘very serious problem’” (*Dawson v. Clayton*, 2006, p. 2). Ratcliff searched D.V.’s backpack and no drugs were found; however, the student implicated his classmate R.C. as having drugs. This was confirmed when his backpack was searched. D.V. then made the claim that his classmate T.D. was also in possession. After being brought to the office and being asked a question by Deputy Redding, “T.D. voluntarily unbuttoned his pants, faced away from Ratcliff, and pulled a small plastic bag containing marijuana out of what appeared to be his underpants” (*Dawson v. Clayton*, 2006, p. 2). Considering the marijuana was retrieved from what appeared to be the underwear of T.D., Assistant principal Ratcliff called for assistance from Assistant Principal McDowell. McDowell arrived to assist under what was later claimed to be a misunderstanding. Under the subsequent court proceedings, McDowell made the claim that he was of the “understanding that marijuana had already been found in the waistband of the underwear of one or both students who had already been searched” (*Dawson v. Clayton*, 2006, p. 3). McDowell conducted a more thorough search in which D.V. “removed his shoes and socks, removed his polo shirt, turned his pockets inside-out, and pulled down his pants” (*Dawson v. Clayton*, 2006, p. 4). When a small amount of marijuana was discovered, D.V. made the claim that D.H. also had drugs in his possession.

After recounting the details of the case up to this point, Judge Hull made the statement that “the specific details of the search of D.H. are important to our analysis in

this case” (*Dawson v. Clayton*, 2006, p. 4). Ratcliff escorted D.H. from the classroom to Deputy Redding’s office. To this point, D.H. did not have knowledge that any prohibited items had been located on his peers. Six individuals were in the office including Deputy Redding, McDowell and the four students. After D.H. denied having any drugs on his person, he was informed by McDowell that a search would need to be conducted. This search began by emptying the contents of the student’s backpack, which produced no drugs. D.H. was then instructed to remove his shoes and the contents of his pockets and to remove his pants. The student complied and revealed that he was wearing boxer shorts. As this was occurring, R.C., who was still present, told McDowell that his friend was not in possession. Following the instruction of McDowell, D.H. then removed his shirt and socks.

The following events are a point of contest between McDowell and D.H. D.H. made the claim that he was instructed to remove his underwear and he requested to do this in the privacy of the restroom. D.H. asserts that his claim was denied and he proceeded to drop his boxer shorts to his ankles. Conversely, McDowell claims that his instruction was solely to extend the elastic waistband of his under garment, which “still resulted in D.H. exposing his genitals to McDowell,” thus confirming no contraband was present. The opinion of the court references that McDowell later affirmed that performing the search in a restroom would have been feasible. Additionally, it was noted that the search did not include an inspection of the student’s lockers or desk and it was also noted that no recollection of student strip-search in the district exists. In

response to these conflicting accounts, Judge Hull reiterated that the court would consider the facts most favorable to D.H.

In his opinion of the court, Judge Hull relied primarily on legal standards to guide his analysis. In his introduction to this section, Hull expressed that “because McDowell raised the defense of qualified immunity, we first consider whether McDowell’s search of D.H. deprived the student of a constitutional right. We then discuss whether the law was “clearly established” so as to justify imposition of § 1983 liability (*Dawson v. Clayton*, 2006, p. 9). The section of the court document is titled “Legal Standards Governing Student Strip Searches.” The summary of the referenced legal precedent will not be fully exhaustive; however, it will include a representative subset of the significant laws that were utilized to render a judicial opinion in the case.

Judge Hull referred to precedent by referencing the protections of the Fourth Amendment and he cited “[t]he right of the people to be secure in their persons...against unreasonable searches and seizures” (*Dawson v. Clayton*, 2006, p. 3). Application of the Fourth Amendment in the school setting is addressed by the United States Supreme Court in the case *New Jersey v. T.L.O.* (1985). This case, which was not based on a strip search, established the two-prong test utilized to evaluate the constitutional reasonableness of a search conducted by school officials. Judge Hull identified that this precedent requires a search to be “justified at its inception” and the search must be “reasonably related to the circumstance which justified the interference in the first place” (*Dawson v. Clayton*, 2006, p. 9). Hull referenced the application of this standard in the case *Thomas v. Roberts* (2001) when the eleventh circuit concluded that it was

unconstitutional to search a group of elementary students to locate a missing \$26. Judge Hull went on to express that the T.L.O. standard designates that “a school official must have ‘reasonable grounds’ for suspecting that a student is guilty of a violation of school rules or the law” (*Dawson v. Clayton*, 2006, p. 5) and that the vast majority of circumstances require individualized suspicion. The only exclusion would be when “the privacy interests implicated by the search are minimal, ... and important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion” (*Dawson v. Clayton*, 2006, p. 5). This determination was made with reference to *Skinner v. Railway Labor Executives’ Association* (1989). This standard was later affirmed in *Thomas*, 261 F.3d at 1168 which designated that the search of students “were ‘highly intrusive’ and did not advance a ‘truly important’ government interest, this court concluded they were not justified absent individualized suspicion” (*Dawson v. Clayton*, 2006, p. 6).

Judge Hull then referenced the landmark case in *Safford v. Redding* (2009). In this case, a school official conducted a strip search of a student including the expansion of the elastic in undergarments. In their ruling, the Supreme Court noted, “that a student has a subjective expectation of privacy against a strip search, which is an inherently embarrassing, frightening, and humiliating ordeal” (*Dawson v. Clayton*, 2006, p. 6). The Supreme Court asserted that a search must have “a moderate chance of finding evidence or wrongdoing” and requires the support of reasonable suspicions of danger to resort to underwear for hiding evidence of wrong doing before a search can “reasonably make the

quantum leap from outer clothes and backpacks to the exposure of intimate parts”

(*Dawson v. Clayton*, 2006, p. 6).

Following the review of these precedent-setting cases, Judge Hull then applied the standards of *T.L.O.* (1985) and *Safford* (2009) to the case at hand. He referenced that the details most favorable to D.H. crossed the threshold based on the unique details of a more invasive strip search, which require “distinct elements of justification” (p. 2641). As such, Judge Hull identified that “we consider below (1) whether McDowell’s strip search of D.H. contained the ‘distinctive elements of justification...for going beyond a search of outer clothing and belongings,’ and (2) whether the execution of that search was excessive in scope” (*Dawson v. Clayton*, 2006, p. 7). In his evaluation, Judge Hull first sought to determine if the search was justified at its inception and he did so by listing out a series of material facts. These include the presence of drugs on a school campus including three of D.H.’s classmates, one of which identified D.H. as having drugs on his person. Additionally, it was referenced that drugs had previously been found in the elastic of a student’s underwear, and McDowell was under the impression that this had occurred multiple times. Judge Hull contrasted the facts of the search deemed unconstitutional in the *Safford* (2009) case with the search at hand. McDowell was searching for illegal drugs, as opposed to over the counter medication. Additionally, McDowell had specific reason to believe that the student’s underwear may contain drugs, as opposed to the *Safford* search where there was no cause for considering underwear.

In light of these facts, Judge Hull made the statement, “the ‘distinct elements of justification’ that were required to conduct a strip search of D.H.” were present (*Dawson v. Clayton*, 2006, p. 8). Judge Hull went on to express that “we are hard pressed to identify what more McDowell would have needed to know in order to ‘make the quantum leap from outer clothes and backpacks to exposure of intimate parts’” (*Dawson v. Clayton*, 2006, p. 8).

Once Judge Hull identified that the search was justified at its inception, the evaluation then transitioned to the scope of the search. This analysis largely focused on the search being conducted in front of D.H.’s peers. It was expressed that “the Fourth Amendment still requires the execution of the search to be reasonable in school” (*Dawson v. Clayton*, 2006, p. 8) and the strip search, as conducted, was unconstitutional. It was further added that conducting the search in front of the other students did not provide any value and McDowell would have been prudent to affirm the request of D.H. to have the search conducted in privacy. Therefore, the way in which the search was conducted “subjected D.H. to a significantly higher level of intrusion” thereby “exponentially intensify(ing) the ‘embarrass[ment], fright, and humiliate[on]’ a student experiences when undergoing a strip search” (*Safford* as cited in *Dawson v. Clayton*, 2006, p. 9). The Judge supported concern over the level of intrusion by citing the request made by D.H. to have the search occur in private (*Dawson v. Clayton*, 2006).

In summary, Judge Hull asserts that the facts supported the decision to search D.H. was justified at its inception. Conversely, failing to conduct the search in privacy, where only participants of the search were present, elevated the level of intrusion

thereby making the search excessive in scope, and as such, it is considered unconstitutional (*Dawson v. Clayton*, 2006). Based on this determination, the Judge identified that the next order of business was to determine if established legal precedent had been established which should have more appropriately guided McDowell's actions.

Judge Hull identified that when considering qualified immunity, "Case law with indistinguishable facts clearly establishing the constitutional right, a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right, or conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law" (*Dawson v. Clayton*, 2006, p. 10) are the determinates of identifying if a right has been clearly established. Judge Hull identified that the second criteriaon calls for the court to determine if "a reasonable government official in McDowell's position such as an Assistant Principal could have believed that requiring D.H. to strip down to his fully naked body in front of several of his peers was lawful in light of clearly established law" (*Dawson v. Clayton*, 2006, p. 10). The court ruled in *Safford v. Redding* (2009) that "a student search, even if justified in its inception, must be "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" (*Safford* as cited in *Dawson v. Clayton*, 2006, p. 10). For that reason the court denied McDowell's ability to apply qualified immunity; however, it was identified that a jury trial would be needed based on the variance of facts between D.H.'s claim and those of McDowell. Judge Hull identified that the contested material facts have implications for the violation of established constitutional law and therefore a jury must evaluate this

matter as well as damages, in contrast to the view of the district court. A jury must determine if McDowell instructed the student to expand the elastic of his underpants, which would entitle him to qualified immunity, or if the instruction was to lower his underpants.

Alignment to an Ethic of Justice or Care

The following section will be based on the coding of Judge Hull's language that aligns to an ethic of care or an ethic of justice. An ethic of justice is the prevailing ethical frame in judicial opinions and for that reason will be referenced extensively. A representative subset of this frame will be shared to show how the judge's language frequently illustrated tenants of that particular ethical frame. The study is intended to evaluate the extent to which an ethic of care is evidenced as the court made its final ruling. Elements of care will be shared in a more exhaustive manner considering that these occurrences are likely to be invoked far less. This process will be applied not only to this first case but, likewise, for the remainder of the cases that serve as the basis of analysis in this study. Again, content analysis coding processes will be based off of the prevailing elements of each construct as referenced previously in the study.

As we begin the analysis, we will initially focus on the elements of the text that align to an ethic of justice. It is notable to identify that the structure of Judge Hull's opinion of the court, and most for that matter, include a significant section titled, "Legal Standards Governing Student Strip Searches" (*Dawson v. Clayton*, 2006, p. 5). The nature of the term "legal standard" has implications for the rules focused (Caputo, 2000; Kohlmeier & Saye, 2012) nature of justice ethics. This formatting also illustrates the

courts systemic predisposition to be closely aligned to an ethic of justice. Judge Hull frequently utilized language such as, “This Court applied these T.L.O factors in the context of a school strip search” (Dawson v. Clayton, 2006, p. 5). This language clearly asserts that the legal standard will be the basis of evaluation as opposed to specific case factors and precipitating events. Justice ethics lack an application of context (Caputo, 2000; Kohlmeier & Saye, 2012; Joldersma, 2011; Rawls, 1971). In this reference, Judge Hull reference details of the search; however, additional context as related to the violation was not specifically referenced as the T.L.O. standard was invoked.

As Judge Hull continued his analysis, he framed his consideration with the statement, “We now apply the *T.L.O.* and *Safford* principles to this case” (Dawson v. Clayton, 2006, p. 7). This was further substantiated by the statement, “We consider whether McDowell’s strip search of D.H. was justified at its inception” (Dawson v. Clayton, 2006, p. 7) again affirming that the analysis is rules focused (Caputo, 2000; Kohlmeier & Saye, 2012) and therefore aligned to justice ethics. In this consideration of precedent, Judge Hull referenced specific factors including that drugs had been found at the campus and specifically on D.H.’s classmates and it had been alleged that D.H. was in possession of the drug, and even more specifically, that it had been found in the elastic of another student’s underwear.

At first glance, these factors could be considered to align to the ethic of care’s consideration of context; however, Hull’s corresponding statement that “these facts demonstrate that McDowell’s decision to conduct a strip search of D.H. was reasonable at its inception” (Dawson v. Clayton, 2006, p. 7) fail to suggest care was a motivating

factor. Rather, these specific details were shared to ensure the motivations for the search met the legal standard of reasonableness. Furthermore, the account of these events gave little consideration to the individual actors (Caputo, 2000; Kohlmeier & Saye, 2012; Rawls, 1971), which would be a critical component with language associated with an ethic of care.

Further applying the *Safford* standard, Hull expressed, “McDowell reasonably suspected that his strip search of D.H. was needed and would “pay off” (*Dawson v. Clayton*, 2006, p. 8). Judge Hull stated, “We are hard pressed to identify what more McDowell would have needed in order to ‘make the quantum leap from outer clothes and backpacks to exposure of intimate parts” (*Dawson v. Clayton*, 2006, p. 8). The previous statement, including the use of the phrase “hard pressed” is related to the legal precedent associated with *Safford* and places the weight of analysis on the legal threshold and not on the impact a search with the potential of “exposure of intimate parts” would have on an individual child (*Dawson v. Clayton*, 2006).

When making reference to the inception prong, Judge Hull stated, “the fact that McDowell could have asked D.H. to pull the waistband of his underpants away from his body, rather than drop his underpants; is not the touchstone of our analysis” (*Dawson v. Clayton*, 2006). This statement again shows that the legal precedent or rules, as opposed to context (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012; Rawls, 1971) or the impact of the individual (Caputo, 2000; Kohlmeier & Saye, 2012; Rawls, 1971) weighed most heavily.

In the subsequent paragraphs, it will be shown how the judge's language had limited elements with characteristics of an ethic of care when considering the appropriateness of the searches scope. Although a caring ethic played a limited role, the final decision was made based almost exclusively on the adherence to legal standards. The prevailing basis of this determination was made using the legal standard from *Safford* (2009).

Regarding alignment to elements of care, the first reference was made when Judge Hull cited the Supreme Court ruling from *Safford* (2009). Hull expressed, "After restating the applicable T.L.O factors, the Supreme Court in *Safford* (2009) noted that a student has a subjective expectation of privacy against a strip search, which is inherently embarrassing, frightening, and a humiliating ordeal" (*Dawson v. Clayton*, 2006, p. 6). An ethical alignment to care focuses heavily on the impact to individuals (Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyson, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012). Judge Hull referenced the nature of a strip search impacting the individual student considering that the student would likely be embarrassed, frightened, and humiliated. This language illustrates how the *Safford* (2009) standard encourages courts to consider caring elements such as the impact on the individual.

Judge Hull's consideration of the search's scope was more closely aligned with care than the preceding consideration regarding the inception of the search. This section of the court's opinion began with the statement, "While McDowell's strip search of D.H. was justified at its inception, we readily conclude that forcing D.H. to strip fully naked

in front of his peers was unconstitutionally excessive in scope” (*Dawson v. Clayton*, 2006, p. 8). Both the overt and latent content of this statement are relevant. The judge’s use of the phrase “forcing D.H. to strip fully naked in front of his peers” (*Dawson v. Clayton*, 2006, p. 8) is relevant considering that the terminology shows the judge’s emotion relating to the specific context. The judge could have selected alternative language that was not as forceful such as a term such as request. The judge also weighed the context of the search with the statement “McDowell’s decision to have D.H. fully remove all of his underclothing in front of D.H.’s peers bore no rational relationship to the purpose of the search” (*Dawson v. Clayton*, 2006, p. 9). The inclusion of this particular reference shows that it was not solely the act of the search but moreover the context of searching the student in front of his peers that escalated the invasiveness. In his explanation, Judge Hull states “McDowell’s arbitrary decision to require D.H. to completely remove his underwear in front of his peers unnecessarily subjected D.H. to a significantly higher level of intrusion” (*Dawson v. Clayton*, 2006, p. 9). Judge Hull’s use of the words “arbitrary” and “unnecessarily” illustrate how this process was needless to secure the desired outcome of the search and needlessly subjected the student to an increased level of embarrassment. The Judge’s decision to characterize the administrator’s actions as “arbitrary” illustrates his empathetic concern for the individual student. This empathetic consideration is further substantiated with the statement “a fully nude strip search in the presence of one’s peers would exponentially intensify the ‘embarrass[ment], fright, and humiliation’ a student experiences when undergoing a strip search.” This was further affirmed with the Judge’s statement that McDowell “should

have heeded D.H.'s request to perform the strip search in the privacy of the bathroom” (*Dawson v. Clayton*, 2006, p. 9).

The language expressing that McDowell should have obliged the student's request for a private search is the most significant example. The statement could have firmly admonished the administrator for the type of search but rather specifically responded to the student's request thereby valuing the context and extenuating circumstances (Cassidy & Bates, 2005; Kohlmeier & Saye, 2012). Later in the opinion, Judge Hull explicitly affirmed consideration for the individual student when referencing the escalating intrusion in light of “adolescent vulnerability” by stating that “the elevated sense of intrusion was made apparent by D.H. when he asked that the search be conducted in the bathroom so that he was not forced to expose his genitals in front of his peers” (*Dawson v. Clayton*, 2006, p. 9). This reference is again based on empathetic concern (Goodman, 2008; Kohlmeier & Saye, 2012; Noddings, 2002) for the individual student, and is affirmed with the statement “we see no reason in this record why the other students could not have been removed from Deputy Redding's office before commencing the strip search of D.H.” (*Dawson v. Clayton*, 2006). These statements align to an ethic of care based on their empathetic concern for the student as opposed to solely adherence to a legal standard.

In summarizing the events of this case, Judge Hull most frequently applied an ethic of justice as he made his determinations regarding the application of legal standards in the case. Regarding the aspect of the case that most significantly jeopardized the student, the strip search, the judge was empathetic and did show concern

for the impact on the individual student. Although the search was evaluated solely in light of the legal standard known as the two-prong test, the consideration of scope was not only based in law but also with consideration of context and of how the search was conducted and even with concern for the fact that the student had made a request to have the search conducted in a more private environment.

The content analysis of this case unveiled a unique relationship between the interchange of an ethic of care and an ethic of justice. The ethic of justice was most frequently identified through the majority of the evaluation; however, the unique posture of the *Safford* standard institutionalized a caring perspective in to legal precedent. In the *Safford* ruling, the U.S. Supreme Court referenced the emotional impact of an invasive search on a juvenile. Based on the significant impacts an invasive search has on an adolescent, the Supreme Court initiated the sliding scale, which balances invasiveness and intent of the search. Judge Hull cited this language founded in caring; however, as it now serves as the basis of prevailing legal precedent. As such, a justice-oriented stance continues to ensure the legal standard is applied; however, the individual student receives the benefit of care that was used in the development of the standard.

Moving forward through this analysis, the phenomenon of adhering to legal precedent that was constructed with foundational elements of care will be referred to as institutionalized caring. This term has been selected to differentiate between care that is evidenced explicitly in the language of the presiding judge and the application of a legal standard that results in the student receiving the secondary benefit of the caring legal standard incorporated in established case law. Institutionalized caring is further

differentiated by the fact that the legal precedent has been institutionalized by previous and prevailing case law that must be adhered to in relevant scenarios.

***A.M. v. Holmes* (2016) 830 F.3d 1123, 10th Cir. (N.M.), July 25, 2016**

Case Overview

The case, which was heard before the 10th Circuit United State Court of Appeals with Chief Judge Tymkovich and Circuit Judges Gorsuch and Holmes presiding. Circuit Judge Holmes provided the opinion of the court. The case was brought forward by A.M., mother of minor child F.M., and was filed against three individuals, the Cleveland Middle School Principal Susan LaBarge and Assistant Principal Anne Holmes as well as Albuquerque Police Officer Arthur Acosta. The suit was based on two occurrences, an arrest of F.M. that stemmed from disruptive behavior in a P.E. class and an unrelated search of F.M. All three defendants made the claim of qualified immunity, which were granted by the district court. A.M. appealed this ruling (*A.M. v. Holmes*, 2016).

The events that serve as the basis of the suit began in May of 2011. The student F.M. was placed in the hallway for burping and laughing despite the teacher's request to cease. This behavior continued even after the student was placed in the hallway. The teacher called for assistance and school resource officer Acosta arrived to the classroom. The teacher expressed that her continued redirection of F.M., along with his actions, were disrupting the class. F.M. asserts that these allegations are not true. The student was escorted to the administrative offices by Officer Acosta and informed that he was going to be arrested for the misdemeanor offense of interfering with the educational process.

The officer made the decision to arrest the student based on the teachers claim that the student was disrupting class and his observation that instruction had ceased because the teacher was dealing with F.M. The officer informed Principal LaBarge that the student was going to be arrested and she assigned the student a one-day suspension and completed the associated disciplinary paperwork. The officer made attempts to contact A.M. however the listed phone numbers were not functioning (*A.M. v. Holmes*, 2016).

As Officer Acosta walked F.M. to the car, he notified the student that when they reached the car, he would pat the student down and place him in handcuffs. No contraband was found on the student and he was left at the detention center. A.M. picked the student up an hour later and proceeded to the campus to have a meeting with the principal. The parent expressed frustration claiming that the student was suspended without a hearing. The student did not return to the campus for the remainder of the school year. The arrest made the local media and A.M. was interviewed on numerous broadcasts. In response, Officer Acosta made the statement that the arrest “was on the airways quite a bit” (*A.M. v. Holmes*, 2016, p. 2) and this bothered the campus administrators.

F.M. returned to the campus at the beginning of the following school year. One day in November, a student reported that he had observed a drug deal which involved about five students. The student was not able to name the students involved; however, a description of location was provided. Principal Holmes notified Officer Acosta of the report and he pulled surveillance footage, which allowed the administrators to identify

the involved students. The students were brought to the office and their parents were notified that the school would be conducting a search.

Despite their attempts, A.M. was not available by phone. The students were taken to a conference room to be searched. During the time of the search, students were present as well as “Ms. LaBarge, Ms. Holmes, Officer Acosta, a male teacher, and APD Officer Kiel Higgens” (*A.M. v. Holmes*, 2016, p. 3). The staff made an audio recording of the first four searches, which consisted of asking the students to take off their shoes and remove the contents of their pockets. Two of the students stated that they had seen marijuana at the school that day and another claimed that they had seen F.M. with money. The search of the first four students did not produce any contraband (*A.M. v. Holmes*, 2016).

During the search of F.M., Officer Higgin’s lapel camera was used to record the interaction. When F.M. emptied his pockets, \$200 was produced including a \$100 bill. F.M. acknowledged that he was in possession of a marijuana-leaf belt buckle. The search of his backpack revealed the belt buckle as well as a red bandana, which was considered by the school to be prohibited gang-related clothing. “Later that day, Ms. LaBarge met with A.M. to explain the search and suspension. She subsequently stated that A.M. ‘stormed out’ after ‘rufus[ing] to listen’ and saying her attorney would contact [the school]” (*A.M. v. Holmes*, 2016, p. 4).

Following the summary of events, Judge Holmes provided a procedural review, which began with the initial suit filed in the New Mexico state court in November of 2011. In the suit, A.M. argued that F.M.’s civil rights were deprived. The claim

referenced a fourth amendment violation based on the fact that F.M. was handcuffed and a “reasonable officer ‘should have known that burping was not a crime’ and that ‘no force was necessary’ to facilitate the arrest” (*A.M. v. Holmes*, 2016, p. 4). In addition to the Fourth Amendment claims, A.M. also made the statement that “Ms. LaBarge’s ‘strip-searching’ of F.M. was unreasonable” (*A.M. v. Holmes*, 2016, p. 4).

The case was moved to a federal court and Ms. LaBarge and Ms. Mines-Hornbeck asserted their claim of qualified immunity. Although this was initially opposed by A.M., she later dropped the claims against the teacher and the claims against the principal. Ms. LaBarge maintained her stance of qualified immunity. The court found that qualified-immunity was appropriate considering that the search was not deemed to be a constitutional violation. By taking this stance, the court applied the precedent established by the Supreme Court in *Safford* (2009) and *T.L.O.* and found that the search was justified at its inception and it was “conducted in a manner that was reasonably related...to the circumstances which justified the search in the first place” (*A.M. v. Holmes*, 2016, p. 4).

Prior to conclusion of the initial suit in 2013, A.M. brought another suit in state court again stemming from the search in 2011. In this suit, A.M. claimed that the search was unreasonable and therefore a Fourth Amendment violation and also claimed a First Amendment violation stating that the search was retaliation for A.M. speaking to the media. The final claim was that the search of F.M. treated him differently than “other similarly situated students” (*A.M. v. Holmes*, 2016, p. 4) and was thereby a violation of the Equal Protection Clause of the Fourteenth Amendment.

The case was moved to the Federal Court, and “Ms. Holmes moved for summary judgment on the grounds of qualified immunity and collateral estoppel” (*A.M. v. Holmes*, 2016, p. 4). The latter is claiming that this suit was identical to the previous claim. The court affirmed this motion and asserted A.M. had addressed the Fourth Amendment claim in the previous suit. The First Amendment claim was dismissed due to the fact that a clearly established precedent had not been set regarding student searches as retaliation. The equal-protection claim was dismissed because inadequate evidence showed the search was materially different from the other searches (*A.M. v. Holmes*, 2016).

A.M. called for summary-judgment in her claim against Officer Acosta in which she asserts two Fourth Amendment violations, one based on the arrest and second based on the use of handcuffs. The court affirmed Officer Acosta’s right to qualified immunity and they assert that neither of the claims were a constitutional violation. A.M. appealed the claim of qualified immunity for all three defendants (*A.M. v. Holmes*, 2016).

In the opinion of the court, Judge Holmes next provided a standard of review, or overview of the relevant laws or case law that are pertinent to the facts of the case and each claim made by A.M. This overview focused largely on the application of qualified immunity and the associated expectation of clearly established law. Additionally, the review addressed Fourth Amendment claims and the two-prong test relying heavily on *Safford* and *T.L.O.* This review addressed a number of additional areas including the use of excessive-force, the use of handcuffs, retaliation, First Amendment protections, and the equal-protection clause among others. The content analysis will focus largely on this

section of the opinion of the court. The analysis will also take into consideration the dissenting opinion provided by Circuit Court Judge Gorsuch.

Alignment to an Ethic of Justice or Care

This case will be treated in similar fashion to the analysis of the previous case. Language aligning to an ethic of justice will be explored and a representative subset will be discussed. A more exhaustive overview of content adhering to an ethic of care will be explored.

An ethic of justice was first evidenced by the question posed to consider if the actions of the school resource officer were in line with the established legal standard. The first evaluative statement shared by Judge Homes was framed by citations from the cases of *Safford v. Redding* (2009) and *New Jersey v. T.L.O.* (1985). These cases were cited as the basis by which the two-prong test would be applied. A justice orientation was affirmed when citing that the complaints would be dismissed because she “did not violate a clearly established right in searching F.M.” (*A.M. v. Holmes*, 2016, p. 5). This statement showed no consideration of the individual student (Caputo, 2000; Kohlmeier & Saye, 2012; Rawls, 1971) and solely referenced adherence to legal precedent.

The application of qualified immunity was a critical matter in this case. Judge Holmes expressed that this was a matter of legal procedure and stated, “The onus is on the plaintiff to demonstrate” (*Quinn*, as cited in *A.M. v. Holmes*, 2016, p. 6) that the actions were a constitutional violation and that legal guidance was “clearly established.” It was further stated that the referenced law, established clearly in 2011, would not have been guidance to “a reasonable law-enforcement officer in Officer Acosta’s position that

F.M.'s conduct in Ms. Mines-Hornbeck's class fell outside of the scope" (*A.M. v. Holmes*, 2016) of the law. This judgment was again based on adherence to law and not specific context or impact to the individual student.

An ethic of justice strives to be consistent across scenarios (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012) and is focused on fairness & equity (Caputo, 2000; Joldersma, 2011). This was evidenced when Judge Holmes expressed:

When assessing whether an officer had probable cause to arrest an individual, courts examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. (*A.M. v. Holmes*, 2016, p. 9)

This standard was routed in the legal standard of probable cause and was referenced in such a way that universal and equitable application is possible.

As conclusive evidence of alignment to an ethic of justice, Judge Holmes made the declarative statement, "We conclude that A.M. has not demonstrated that, under extant clearly established law, a reasonable officer ... would have..." (*A.M. v. Holmes*, 2016, p. 10). This stance was further substantiated with the statement "in our view, such an officer could have reasonably believed—even if mistakenly—that the officer possessed probable cause under section 30-20-13(D) to arrest F.M." (*A.M. v. Holmes*, 2016, p. 10). Both of these statements show that the rendered decision was based on matters of law and done in such a way that the conclusions could be equitably replicated. This posture illustrates how tenants of justice-oriented ethics are illustrated throughout the court's opinion.

In another conclusive statement, Judge Holmes asserts, “We expressly ground our decision on the second prong of the qualified-immunity rubric” (*A.M. v. Holmes*, 2016, p. 20). This overt statement indicates that the court’s ruling is based on application of law, and thereby closely aligned to an ethic of justice. The vast majority of the narrative provided in this case is based on the application of various legal precedents in light of the mother’s claims and therefore aligning most significantly to an ethic of justice.

There were references shared by Judge Holmes that could be categorized according to the tenants of an ethic of care. When responding to the claim that handcuffing the student was unconstitutional, Judge Holmes cited various cases that affirm that handcuffing a child has been upheld as an appropriate practice. The Judge went further to cite an example from *Gray ex rel. Alexander v. Bostic* (2006) that states, “Deputy Bostic’s purpose in handcuffing [the child] was simply to punish her and teach her a lesson. Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable” (*A.M. v. Holmes*, 2016, p. 24). This citation illustrates elements of care based on the fact the court referenced the inappropriate nature of handcuffing a juvenile based on the intent being a punitive process. The consideration of context and the motivation for action, as opposed to the action itself, served as the basis for decision. This is further affirmed by the fact that the legal standard referenced from *Gray v. Bostic* (2006), was not applied to the matters of this case and yet the conclusion considered the context and impact on the student. As an example, the judge could easily have entirely omitted the example from *Gray* (2006), the

associated language, and the admonishment of the officer as unreasonable if they employ the practice for punitive purposes.

In similar fashion, Judge Holmes referenced the legal standard that was founded in an application of care. When considering the Fourth Amendment implications of this case, the court referenced the ruling in *Safford* (2009). One of the aspects of the case referenced by Judge Holmes was that “[The student’s] subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating” (*A.M. v. Holmes*, 2016, p. 28). An ethic of care frequently considers the impact on the individuals (Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyson, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012) and this assertion does just that with concern for the student’s emotional status. Once again, the caring standard from *Safford* (2009) was formalized as a legal standard and therefore its application in this case is categorized as institutionalized caring.

This particular case has a unique nuance in contrast to the other analyzed cases. A panel of three judges reviewed the case and the formal opinion of the court includes a dissenting opinion provided by Circuit Judge Gorsuch. Although not specifically relevant to the matters of this case, it is noteworthy to mention that Judge Gorsuch was sworn in as a justice of the United States Supreme Court on April 10, 2017. This dissenting opinion included a number of references that apply consideration that illustrate various elements aligning to an ethic of care. The tone of the introductory paragraph can be interpreted to show little value for the court’s ruling as well as

concerns regarding the shared opinion of the court. Judge Gorsuch began by expressing the question, “If a seventh grader starts trading fake burps for laughs in gym class, what’s a teacher to do?” (*A.M. v. Holmes*, 2016, p. 36). This view weighs the context of the events against the interpretation of the law. Considering the context in evaluating the events is a prevailing characteristic of caring ethics. After providing additional narrative which references the arrest of a student for this behavior, the introductory paragraph of the dissenting opinion concludes with the statement “My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that’s so. Respectfully, I remain unpersuaded” (*A.M. v. Holmes*, 2016, p. 36). Although the dissenting opinion does not conclude with explicit alignment to an ethic of justice or care, it sets the tone for the subsequent narrative.

Judge Gorsuch’s opinion begins by addressing legal precedent; however, the tone is much different than the overall opinion of the court. When citing *State v. Silva* (1974), Gorsuch states, “The New Mexico Court of Appeals long ago alerted law enforcement that the statutory language on which the officer relied for the arrest in this case does not criminalize ‘noise[s] or diversion[s]’ that merely ‘disturb the peace or good order’ of individual classes” (*A.M. v. Holmes*, 2016, p. 36). Additionally, Gorsuch went on to characterize this behavior as “classroom antics” (*A.M. v. Holmes*, 2016, p. 36). This characterization along with the preceding phrase “merely disturb” shows the intent of the language is to minimize the perception of the behavior. These two references are most closely aligned to an ethic of care considering that Judge Gorsuch is considering the context and extenuating circumstance (Cassidy & Bates, 2005;

Kohlmeier & Saye, 2012) of the student's behavior. This is further substantiated by Gorsuch's claim that, "Respectfully, I would have thought this authority sufficient to alert any reasonable officer in this case that a now compliant class clown for burping was going a step to far" (*A.M. v. Holmes*, 2016, p. 36). Again, the characterization of a class clown shows the judges interpretation of the events in light of the context and not solely in light of the legal standards. This language illustrates the judge's view of the events and his attempts to contextualize them to show the courts application of legal standards that are too harsh for the events.

As the dissenting opinion was being drawn to a close, an ethic of care was further evidenced by showing value to the relationship (Bakhtin, 1986; Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Hawks & Lyons, 2008; Noddings, 1988, 2002) between the school and the student as well as focusing on the process (Hawk & Lyons, 2008) of educating children. Gorsuch stated, "disciplining children who temporarily distract classmates and interrupt lessons 'is simply part of [traditional] school activity' and part of its 'lawful mission...or function'" (*A.M. v. Holmes*, 2016, p. 36). The tone of the dissenting opinion was intended to express frustration with the sole reliance on justice oriented interpretations and applications of the law and lack of consideration of the context in which the behavior was conducted. The closing paragraph of the dissenting opinion best illustrates this intent.

Judge Gorsuch began the closing paragraph by citing a line from *Oliver Twist*, authored by Charles Dickens. The selected line reads, "Often enough the law can be "a ass – a idiot" (*A.M. v. Holmes*, 2016, p. 37). This was purposefully structured to connect

to his closing statement. Prior to which, it was expressed that the role of judges is to apply the law as it is currently written by representative legislators, regardless of the judge's personal opinion or preference. The concluding line of the dissenting opinion reads:

So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands – and in that I see the best of our profession and much to admire. It's only that, in this particular case, I don't believe the law happens to be quite as much of an ass as they do. I respectfully dissent. (*A.M. v. Holmes*, 2016, p. 37)

The creative way that Judge Gorsuch summarized his dissent, affirms his frustration with the way his colleagues solely applied an ethic of justice with little attention given to care, specifically the characteristics that values context. His reference to the fundamental role and function of school shows a focus on the educational process and growth, which Hawk and Lyons (2008) identify as a key component associated with the construct of ethical care.

***Foster v. Raspberry* (2009) 652 F. Supp.2d 1342 (M.D. Ga. 2009)**

Case Overview

This case was heard in the United States District Court, M.D. Georgia in the Columbus Division. District Judge Clay D. Land presided over the case. The mother of Maci King, a high school student, who was searched as school officials were on the hunt for a missing iPod, brought this suit forward. The student's mother brought claims of Fourth Amendment violations as a result of the search, along with state claims, which

include “assault, battery, false imprisonment, and intentional infliction of emotional distress” (*Foster v. Raspberry*, 2009, p. 1345). The Fourth Amendment allegation is classified as a 42 U.S.C. § 1983 claim. In response to the claims, the defendants filed a motion seeking a summary judgment (*Foster v. Raspberry*, 2009).

Judge Land began his opinion of the court by outlining the legal precedent established for summary judgment. He cited federal precedent asserting that for this procedure to be utilized the material facts must not be contested and the ruling is based on a matter of law. Several cases were cited that affirm the party seeking the summary judgment carries the weight of responsibility for making their case. In response to the information provided, the other party has the responsibility to show that “there is a genuine issue of material fact” (*Foster v. Raspberry*, 2009, p. 1345). It was further expressed that to cross the designated threshold, the facts must have a bearing on the potential outcome. Based on the understanding of the process, Judge Land provided an overview of the relevant facts (*Foster v. Raspberry*, 2009).

The iPod in question was the basis for this investigation. The events transpired in November of 2007 and one day, seven students were attending the junior ROTC class under the direction of the defendant Sidney Raspberry. It was stated, in violation of the campus Parent & Student Handbook, student Maci King brought her cell phone and iPod to class. During the class, King allowed fellow classmate, Tiara, to remove the iPod from her bag, which led her to begin listening to music and ultimately, began dancing around the room. From his office area, Raspberry noticed the dancing student and subsequently confiscated the iPod and placed it in the drawer of his desk. Later in the

class, the teacher stepped out of the room, which provided the opportunity for Thomas, another classmate, to remove the electronic device from the teacher's desk. The teacher noticed that the device was missing and requested that the members of his small class produce the device. When this was not successful, the teacher called the office for assistance (*Foster v. Raspberry*, 2009).

School Resource Officer and Security Guard Eddie Sullivan, also a defendant, arrived to the classroom and despite his demands, the class failed to identify the individual that had possession of the iPod. As the events in the classroom escalated, Assistant Principal (A.P.) Tyrone Kellogg and his secretary Mary Perryman, both defendants, reported to the class. With the administrative team present, Sullivan left and the teacher returned to the classroom office. A.P. Kellogg provided the opportunity for the students to share what had occurred; however, the students failed to provide any substantive information. In response to the lack of cooperation, the administrative team "moved forward with a more aggressive physical search for the missing iPod" (*Foster v. Raspberry*, 2009, p. 1347).

Judge Land's overview of events transitioned to look specifically at the search. "Kellogg initially instructed everyone in the classroom to open their book bags, pull out their pockets, and untuck their shirts" (*Foster v. Raspberry*, 2009, p. 1347). This initial search uncovered King's cell phone; however, no iPod was produced. The search did motivate Tish, a classmate, to confidentially notify the Assistant Principal that Thomas had removed the iPod from the desk. Kellogg sought to maintain anonymity of his informant; therefore, he waited to address Thomas.

In a continued effort to keep the identify of Tish concealed, Kellogg instructed Perryman to “take the [five] girls in the class individually into a storage closet to the side of the classroom and have them shake out their blouses and roll down their waste [sic] bands in an effort to locate the missing iPod” (*Foster v. Raspberry*, 2009, p. 1347). Judge Land acknowledges that the details from this point forward differ between the two parties; however, in summary judgment proceedings, the court will base their determination on the account of the plaintiff. As such, King makes the allegation that the search was far more invasive and included the removal of pants in addition to the removal of underwear. Judge Land went on to affirm that the search did not produce an iPod on King and that “no evidence exists that Defendants Jenkins, Byrd, Sullivan, or Raspberry actually participated in the search of King” (*Foster v. Raspberry*, 2009, p. 1347).

The opinion of the court next focuses on the claims made by the plaintiff, which allege that the removal of King’s clothes, in the pursuit of a missing iPod, was a violation. Claims were brought against the aforementioned actors: Raspberry, Sullivan, Perryman, Kellogg as well as against Principal Byrd, Superintendent Jenkins and the School District. The claims made against the individuals were brought in their personal and official capacities. Judge Land expressed that he would first address the § 1983 constitutional rights violations made against the defendants and then would address the claims against the school district (*Foster v. Raspberry*, 2009).

The judge made the initial determination that summary judgment was entitled for Defendants Jenkins, Byrd, Sullivan, and Raspberry considering that they did not

participate in the search. As substantiation for this determination, it was expressed that the Plaintiff provided “no evidence in the record that would lead a reasonable factfinder to conclude that these Defendants supervised or directed the search of King, or were on notice of a history of widespread abuse and failed to correct it” (*Foster v. Raspberry*, 2009, p. 1348). Kellogg and Perryman assert that their conduct was both “justified at its inception and permissible in its scope” (*Foster v. Raspberry*, 2009, p. 1348) and therefore was not a constitutional violation. Additionally, their belief that had a violation occurred, qualified immunity was appropriate based on a lack of a clearly established precedent. Judge Land responded to these claims by providing an overview of relevant legal precedents.

The claims allege that the protections guaranteed by the Fourth Amendment to the United States Constitution were deprived. The often-referenced citation of *Safford* (2009) affirms that “this protection is available to students who are subjected to unreasonable searches by public school officials” and the threshold of reasonableness as defined by *T.L.O.* (1985) was expressed. Furthermore, Judge Land cited *Thomas* (2001) as stating that in the vast majority of circumstances, “the school officials must have reasonable grounds for suspicion that the particular students searched possesses the contraband in order for the search to be fundamentally sound” (*Foster v. Raspberry*, 2009, p. 1349). Judge Land subsequently identified that the search of King was not based on assumptions that the iPod posed any danger and furthermore “Kellogg and Perryman had no individualized suspicion that King had the iPod in her possession” (*Foster v. Raspberry*, 2009, p. 1349). It was reiterated the individualized suspicion

pointed to another student all together. As such, individualized suspicion was not present at the onset of the search and a jury must determine if a strip search occurred, which would be a constitutional violation.

The matter of qualified immunity was still outstanding and thus served as the basis for Judge Land's next point of discussion. The precedent from *Hope v. Pelzer* (2002) was referenced which claims that "for a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (*Foster v. Raspberry*, 2009, p. 1350). Judge Land referenced the three ways in which a right may be clearly established per *Lewis v. City of West Palm Beach, Fla.* (2007). Judge Land referenced that *Thomas* (2001) had previously established this guiding precedent. Despite the defendants' attempts to differentiate their course of events, the court maintained that the events were similar and provided adequate notice, and therefore the defendants were denied summary judgment (*Foster v. Raspberry*, 2009).

Regarding the claim against Randolph County School District, Judge Land referenced *Monnell v. Dep't of Soc. Servs.* (1978) which asserts that "a municipality cannot be held liable under § 1983 unless the official policy or organizational custom, driven by someone with the capacity to establish policy, violates a constitutional protection" (*Foster v. Raspberry*, 2009, p. 1353). In response to these events, Judge Land found that the Plaintiff failed to show that Kellogg was in an official capacity that allowed him to set policy for RCSD. As such, the school district was entitled to

summary judgment. Additionally, the court found that the defendants were entitled to summary judgment for each of the state claims brought against them.

Alignment to an Ethic of Justice or Care

As with the preceding cases, the subsequent analysis will outline representative examples of language aligning to an ethic of justice while the references to an ethic of care, while occurring less frequently, will be referenced comprehensively. Aside from the summarized order of the court, Judge Land began his opinion by expressing “summary judgment may be granted only...” (*Foster v. Raspberry*, 2009, p. 1345) and then outlined the legal standard. His expression of the term “only” narrowed the scope of judicial autonomy and affirmed that law dictates the process of evaluation. Most significantly, this expression was utilizing the legal guide to ensure the application of the standard was uniformly consistent across scenarios (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012). Although this matter is regarding procedures, the expression foreshadows the prevailing ethical alignment to justice and its nature of being focused on rules (Caputo, 2000; Kohlmeier & Saye, 2012) and giving little weight to context (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012; Rawls, 1971).

As the opinion of the court transitioned into the evaluative section, Judge Land expressed that the “plaintiff failed to point the Court to any evidence to support the contention...” (*Foster v. Raspberry*, 2009, p. 1348). This expression illustrates that the evaluation would not be based on an emotional consideration of the impact on the plaintiff, but rather would adhere to the referenced legal precedent from *Goebert v. Lee*

County (2007). Land's reference of this case further affirmed the legal precedent outlining the plaintiff's burden of responsibility regarding constitutional violations.

The language referenced by Judge Land in his evaluation of constitutional violations was extensive with significant citations of legal doctrines including the US Constitution and the case law from numerous court cases. The guarantees of the Fourth Amendment were quoted and then application in the school context was affirmed with a reference to *Safford* (2009). Judge Land then made the assertion that the reasonableness standard of *New Jersey v. T.L.O.* (1985) is "the standard for determining the validity of a search by school officials" (*Foster v. Raspberry*, 2009, p. 1349). This language is a confirmation of a justice-oriented approach. A standard, by nature, allows for scenarios to be compared in light of others (Joldersma, 2011) and in such a way as to be consistent (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012). Furthermore, the referenced standard is deeply rooted in legal precedent, or rules (Caputo, 2000; Kohlmeier & Saye, 2012). Additional affirmation of this posture was evident as Judge Land outlined the aspects of the *T.L.O.* (1985) two-part test and requirements of individualized suspicion.

Judge Land then connects the events specific to this case with the outlined precedent. Judge Land expressed, "The school officials allegedly forced a teenage girl to strip of her clothes so that they could find an iPod. No evidence has been submitted that the iPod was dangerous (or even that it included any subversive tunes)" (*Foster v. Raspberry*, 2009, p. 1349). In consideration of the prevailing ethic, this statement is significant. The strong language "forced a teenage girl to strip" is a significant matter in that it has the potential to elicit an emotional response (Clement, 1996; Goodman, 2008)

based on the impact the referenced experience may have on the individual student (Cassidy & Bates 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyon, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012). Despite this potential, the language failed to reference any of these characteristics associated with care, namely the emotional impact to the student. In contrast, the subsequent statement referenced the innocuous nature of the iPod with no consideration given to the student (Caputo, 2000; Kohlmeier & Saye, 2012; Rawls, 1971).

In a subsequent reference to the search, the Judges characterized the events as “an intrusive strip search that involved removal of both her pants and underwear” (*Foster v. Raspberry*, 2009, p. 1349). Once again, the evaluation of appropriateness was based on the invasiveness of the search in comparison to the nature of the iPod and not the impact to the student. It was evident that the precedent outlining the flexibility when addressing “an important governmental interest” identified in *Skinner v. Ry. Labor Executives’ Ass’n* (1989), and the requirements of individualized suspicion were the critical points of consideration. Again, adhering to the rules (Caputo, 2000; Kohlmeier & Saye, 2012), or legal standard, was the impetus for evaluation and thereby shows alignment to an ethic of care.

Despite language characterizing the search as intrusive, with an account of clothing removal including underwear, the legal evaluation of this matter fell solely within the arena characterized by justice, as did the consideration of qualified immunity. When evaluating the appropriateness of qualified immunity, Judge Land cited the case *Hope v. Pelzer* (2002) and the precedent that “qualified immunity protects government

officials performing discretionary functions from liability as long as their conduct does not ‘violate clearly established statutory or constitutional rights of which a reasonable person would have known’” (*Foster v. Raspberry*, 2009, p. 1350). In light of this precedent, Judge Land articulated that the “‘salient question’ is whether the state of the law at the time of the incident gave defendants ‘fair warning that their alleged [actions were] unconstitutional’” (*Foster v. Raspberry*, 2009, p. 1350). Again, this question affirms that the basis by which Judge Land makes his determination is rooted in the law and thereby driven by an ethical posture of justice.

Many additional references to pertinent law were expressed and Judge Land actively compared relevant events to those cases. In one such instance, Land stated, “There are at least three factual differences between *Thomas* and this case” (*Foster v. Raspberry*, 2009, p. 1351). This example shows the decision was being made in such a way as to be comparative in light of all others (Joldersma, 2011), which is again a tenant of justice.

As Judge Land drew his conclusion to a close, he expressed that the contraband iPod “does not present such an extreme threat to school discipline or safety that [King] [could] be subject to [an] intrusive strip search [] without individualized suspicion” (*Foster v. Raspberry*, 2009, p. 1351). Again, evaluation was based on the nature of the contraband with no reference made to the impact of the events on the student.

In summary, the judicial evaluation outlined by Judge Land in the opinion of the court was solely aligned to ethical characteristics associated with justice. Throughout the entirety of his written opinion, Judge Land made no reference to the impact of an

invasive search on the student. Although his language referenced the search as intrusive, this was solely to evaluate the legal appropriateness based on the nature of the contraband.

John Doe and Jane Doe, as Parents and Next Friends of D.M., a Minor, Plaintiffs v.

Champaign Community Unit 4 School District, et al., Defendants (2015) 2015 WL

3464076, C.D.Ill., May 29, 2015

Case Overview

This case was heard before the United States District Court, C.D. Illinois, Springfield Division with U.S. District Judge Sue E. Myerscough presiding. According to Judge Myerscough's formal opinion of the court, the case was based on the search of a 16-year-old student, D.M., by Academic Academy Principal Rhonda Howard. One morning in January of 2011, a campus staff member notified the principal that the smell of marijuana was present in the hallway near Room 113. The official school start time was 9 a.m. and the principal entered room 113 at that time to find only four students present. Not immediately locating the source of the odor, the principal checked room 112 as well as other rooms in the area. The involved parties contest what time D.M. arrived at school. D.M.'s mother recalls that the student was dropped off at 9:30 a.m.; however, the principal claims he was there by 9:15 a.m. Upon arrival, D.M. arrived to his first class, which was held in Room 113. D.M. entered the room, left his coat on the hook by the door and took his seat near the entryway. Still searching for the source of the odor, Principal Howard re-entered the room and noted a jacket that she thought may be the culprit. She asked the students who owned the coat to which D.M. acknowledged

ownership. Principal Howard proceeded to observe the class for a number minutes and she asserts that observed that D.M. “had ‘droopy, puffy’ eyes and that he was laughing and giggling” (*D.M. v. Champaign*, 2015, p. 1). Following these events, Howard brought D.M. to the office along with his coat and backpack (*D.M. v. Champaign*, 2015).

Regarding these events, the Plaintiff’s contest that the coat did not smell of marijuana. Additionally, they contest that the student’s eyes were not red, that he was not “laughing or coughing” (*D.M. v. Champaign*, 2015, p. 5) and that eye puffiness was due to the student recently waking up. They also assert that Howard arrived at the classroom and immediately removed D.M. without observation.

Upon arrival to the office, it was shared that Howard told D.M. he had been removed from class as a result of being high. “D.M. responded by either laughing or smirking and told Principal Howard that he did not smoke marijuana” (*D.M. v. Champaign*, 2015, p. 2). D.M. was told that he was going to be searched and this was initiated by inspecting the contents of his pockets, coat, and backpack, which were all placed on a desk. Principal Howard inspected the student’s pockets by expanding the cloth outward and then instructed the student to take off his shoes, which she subsequently inspected. D.M. then rolled his socks down and his pant legs up (*D.M. v. Champaign*, 2015).

The following details are once again contested. D.M. asserts that the principal made him unlatch his belt and then fold down the tops of his jeans, which made his underwear visible. According to his account, D.M. then removed his shirt per instruction and the principal inspected the revealed areas. Howard asserts that she had the student

lift the shirt to inspect the waistline for contraband. She states that a search, as described by D.M., would be outside of her purview. The search did not produce any contraband and D.M. was returned to class (*D.M. v. Champaign*, 2015).

D.M. points out that he was the only student searched and the principal smelled only one other student, which was the other African-American student. Howard notified D.M.'s mother, Jane Doe, about the search; however, the details were limited. During lunchtime, D.M. spoke to his mother and expressed that he was extremely upset by the search. Doe requested a meeting with Howard. Prior to the meeting, D.M. visited his father, expressed that he was upset and confided in some religious mentors. D.M. also spoke with the campus counseling staff (*D.M. v. Champaign*, 2015).

The meeting occurred the following Tuesday and “present at the meeting were Ms. Doe and her brother (D.M.'s uncle), Principal Howard, and Orlando Thomas, a representative of the School. D.M.'s father, Plaintiff John Doe, was present by telephone. D.M.'s teacher and Principal Howard's assistant were also at the meeting” (*D.M. v. Champaign*, 2015, p. 3). The details of the meeting are contested. The Plaintiffs' claim that Howard confirmed that the odor of marijuana was not present on D.M.; Howard contests this. The Plaintiffs state that when asked, Howard was not able to give justification for the search and ultimately became distressed and began crying. Howard contests this. The Plaintiffs assert that School Board Member Thomas admitted that Howard's search was flawed and that Howard apologized. This is also contested and Howard states the apology was regarding the feelings of the parent and not a flawed search (*D.M. v. Champaign*, 2015).

These events were identified as the motivation for the suit, which was filed in September of 2011. “Mr. and Mrs. Doe filed suit against Principal Howard, Champaign Community Unit 4 School District, the Superintendent of Champaign Community Unit 4 School District, and all of the members of the Board of Education of Champaign Community Unit 4 School District (“the Board”)” (*D.M. v. Champaign*, 2015, p. 3). The Court dismissed the claims against Principal Howard, official capacity, and those against the Board. The § 1983 claims were brought with the assertion that Howard violated D.M.’s rights as guaranteed by the Fourth, Fifth, Fourteenth, and Second Amendment. In response, the Defendants sought summary judgment and invoked a claim of qualified immunity (*D.M. v. Champaign*, 2015).

In similar fashion to each of the aforementioned judicial claims, Judge Myerscough began an overview of the guiding legal principals. This was initiated with an explanation of summary judgment. It was once again reiterated that summary judgment is available when there are no matters of contested material fact and the burden is on the requesting party (*D.M. v. Champaign*, 2015). The 2001 precedent from the 7th circuit *was* shared with the affirming statement that “the court simply determines whether there is a genuine issue of fact for trial without weighing the evidence or evaluating the credibility of the parties and witnesses” (*D.M. v. Champaign*, 2015, p. 4). The applicability of qualified immunity and the previously referenced qualifying conditions were referenced (*D.M. v. Champaign*, 2015).

Following the establishment of this legal precedent, Judge Myerscough initiated her analysis. The first area of analysis was based on the *T.L.O.* standard of reasonable

suspicion. The judge asserted that with the assumption of facts most favorable to D.M. (i.e., the student did not giggle or smell of marijuana) and the failure of Howard to readily articulate rationale from the onset, a jury could be led to the conclusion that reasonable suspicion was not present. The second prong relating to scope was also evaluated given the interpretation of the facts most favorable to the defendants. As such, the *T.L.O.* standard coupled with the *Safford* precedent led the Judge to share that the appearance of a student's eyes does not warrant the search of the elastic of a student's underwear (*D.M. v. Champaign*, 2015).

Judge Myerscough next focused attention on the matter of determining if the legal precedent was readily established. Tying her rationale to the rulings in *T.L.O.* and *Safford*, the Judge asserted, "If a jury found that Principal Howard lacked reasonable grounds to begin searching D.M., Principal Howard would not be entitled to qualified immunity against D.M.'s claim that the search was unreasonable at its inception" (*D.M. v. Champaign*, 2015, p. 6). Additionally, Principal Howard's district training and the ruling in *Safford* (2009), both provided notice of the established precedent. In conclusion, it was asserted that qualified immunity was not granted to Howard.

Alignment to an Ethic of Justice or Care

Following the same methodological outline, examples of justice-oriented language will be explored and a representative set of these examples will be shared while all references to care will be explored. The opinion of the court, written by Judge Myerscough, began with a brief section titled "opinion" followed by an extensive section referenced as "Background." The title of the third section, which contains much of the

evaluative explanation, is titled “Legal Standards” (*D.M. v. Champaign*, 2015, p. 3). At the onset of the evaluation between justice and care, it is quickly evident that this title aligns directly to the rules oriented (Caputo, 2000; Kohlmeier & Saye, 2012) legal nature of justice. At the beginning of this section, Judge Myerscough identified the role of the court with a citation from *Outlaw* (as cited in *D.M. v. Champaign*, 2015) stating, “The court simply determines whether there is a genuine issue of fact for trial without weighing the evidence or evaluating the credibility of the parties and witnesses” (p. 4). This approach clearly illustrates that the consideration will, by design, fail to consider context (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012; Rawls, 1971), which is a major tenant of a care-oriented evaluation.

As Judge Myerscough begins to explain her process for evaluation, she identifies that a standard “two-part inquiry” (*D.M. v. Champaign*, 2015, p. 4), as identified in *Sallenzer v. Oakes* (2009), will be applied. The use of this standardized instrument is both rooted in legal rules (Caputo, 2000; Kohlmeier & Saye, 2012) and ensures consistency across scenarios (Gamput, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012), both of which are significant components of an ethical posture driven by justice.

The next section of the court’s opinion is simply titled “Analysis” (*D.M. v. Champaign*, 2015, p. 4). Judge Myerscough frames the analysis with the introductory statement, “First, Principal Howard may have violated D.M.’s constitutional rights by searching him without reasonable suspicion” (*D.M. v. Champaign*, 2015, p. 5). Once again, the legal standard of reasonableness, as legally specified by *T.L.O.* and *Safford*, serves as a driving principal upon which the analysis is conducted. This basis for

evaluation once again aligns to the rules oriented (Caputo, 2000; Kohlmeier & Saye, 2012) nature of an ethic of justice.

Judge Myerscough also expressed that Principal Howard may have violated constitutional protections “by carrying out a search that was impermissible in scope” (*D.M. v. Champaign*, 2015, p. 5), as outlined by the *T.L.O.* 2-prong test. By framing potential violations in this manner, Myerscough expresses that “if a search exceeds these bounds of reasonableness, it crosses the constitutional boundary” (*D.M. v. Champaign*, 2015, p. 5). Following her characterization of pertinent legal precedent, Myerscough cited additional language from the *Safford* conclusion stating, “the categorically extreme intrusiveness of a search down to the body of an adolescent is involved, general background possibilities [of finding contraband] fall short; a reasonable search that extensive calls for suspicion that it will pay off” (*D.M. v. Champaign*, 2015, p. 6). The selection of the term extreme does not, in isolation, cross the threshold from justice to care; however, Myerscough made connections with additional language from *Safford* (as cited in *D.M. v. Champaign*, 2015) which referenced the “degradation its subject may reasonably feel” (p. 6). This language references empathetic (Goodman, 2008; Kohlmeier & Saye, 2012; Noddings, 2002) consideration of the impact such a search may have on the individual (Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyson, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012). This reference is the initial language categorized as adhering to elements associated with an ethic of care.

Interestingly, this citation, which exhibits elements of care, was a citation from *Safford* (2009), which had set the pertinent legal standard. Although Myerscough opted to cite this excerpt in her opinion, she did not personally make references to the impact the search may have had on the individual student in her case. In fact, the conclusive statement from this section reads, “The court finds that under the scrutiny required by *Safford* (2009), the appearance of D.M.’s eyes, without more, does not amount to a specific reason to suppose that [D.M.] was carrying [marijuana] in [the waistband of his] underwear” (*D.M. v. Champaign*, 2015, p. 6). Although Myerscough previously referenced how the *Safford* (2009) case considered feelings, her evaluation was based solely on the legal elements that outline specific reason. Despite this brief caring reference that infringed on valuing ethical caring, an ethic of justice remains most prevalent.

The *Safford* (2009) case played a significant role in consideration of qualified immunity. Specifically, it was stated, “The exacting standard... put Principal Howard on notice that her search of D.M. could have been impermissible in scope” (*D.M. v. Champaign*, 2015, p. 7). Again, an ethic of justice emerges as legal the precedent of *Safford* (2009) outlines the rules to be followed (Caputo, 2000; Kohlmeier & Saye, 2012). Furthermore, Judge Myerscough’s justice oriented posture when comparing events (Joldersma, 2011) of the case with relevant case law ensures outcomes are consistent across scenarios (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012). This practice was illustrated when Myerscough expressed, “The court finds that the facts in *Safford* (2009) are sufficiently analogous to this case to put Principal Howard on

notice for the purposes of qualified immunity” (*D.M. v. Champaign*, 2015, p. 7). Again, alignment of the events to established law, or rules, was prevalent.

As the consideration of clearly established precedents relating to qualified immunity were drawing to a close, Myerscough referenced a noteworthy citation from *Cornfield v. Consolidated* (1993) (as cited in *D.M. v. Champaign*, 2015) which states, “The court also observed that ‘no one would seriously dispute that a nude search of a child is traumatic’ and that ‘the potential for a search to cause embarrassment and humiliation increases as children grow older’ – concerns that were implicated by Principal Howard’s search of D.M.” (p. 7). The selection of the word traumatic in the preceding quote is strong and is based on an elevated consideration for the individual (Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyson, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012). Furthermore, the reference to a child’s “embarrassment and humiliation” again considers the impact on the individual while valuing emotion (Clement, 1996; Goodman, 2008) along with empathy (Goodman, 2008; Kohlmeier & Saye, 2012; Noddings, 2002). These references show movement toward ethical care. The connection to the specific case was further affirmed when Myerscough made the connection that these elements are “concerns that were implicated by Principal Howard’s search of D.M.” (*D.M. v. Champaign*, 2015, p. 7). These concerns for the emotional well being of the student, which align to care, played a role as Myerscough demonstrated how the events in *Cornfield* warranted the acceptance of these negative implications; however, it was contrasted that the search in this case “may have violated D.M.’s clearly established

constitutional rights” (*D.M. v. Champaign*, 2015, p. 8). In fact, consideration of the context (Cassidy & Bates, 2005; Kohlmeier & Saye, 2012) along with the potential impact on the individual was the basis that led to the denial of Principal Howard’s protection of qualified immunity. In this way, an ethic of care played a limited role in the development of the rendered conclusion.

In a single instance, Judge Myerscough draws a direct correlation between these identified ill effects and the student that was searched in her case. When referencing the emotional impact of the invasive *Cornfield* search, Myerscough asserts these are “concerns that were implicated by Principal Howard’s search of D.M.” (*D.M. v. Champaign*, 2015, p. 7). In fact, the consideration of emotional impact such as trauma, humiliation and embarrassment have been incorporated into consideration in the form of institutionalized care.

In this case, an ethic of justice played the most significant role; however, citations from previous cases illustrate how elements of caring have been incorporated into established legal precedent. In numerous instances, Judge Myerscough referenced the embarrassment, degradation and humiliation experienced by the student. The majority of these caring references are associated with the previously determined cases and exhibit how institutionalized care is evidenced with reference is made to these precedents.

***In re D.H.* (2010) 306 S.W.3d 955, 256 Ed. Law Rep. 455**

Case Overview

This case was conclusively heard in the Court of Appeals of Texas located in Austin. The case presented before Judges Patterson, Puryear and Henson in March of 2010 after the ruling of the 98th Judicial District Court was appealed. The matters in question were initiated when student, D.H., was attending Reagan High School in the fall of 2006. While she was attending class, Assistant Principal Perez was escorting police officers to various classrooms for the purpose of conducting randomized searches by drug dogs. Upon entering the classroom, the administrator notified the classroom teacher of what was to occur and the students were asked to vacate the classroom. The students were not permitted to bring their belongings even if that was their expressed preference (*D.H.*, 2010).

Once D.H. and her classmates left the classroom, the police dogs walked throughout the room searching for contraband. When inspecting the backpack owned by D.H., the dogs signaled that they had found contraband. The officers then called the student back into the classroom and, upon informing her of her rights, searched her possessions. After locating a minimal amount of marijuana in the bag, the police officers charged the student with possession of marijuana in a drug-free zone (*D.H.*, 2010).

When the case first went to trial, D.H. sought to have the evidence suppressed claiming a violation of her constitutional Fourth Amendment protections. When this was denied, D.H. accepted a plea and received eight months of probation. D.H. later

appealed this outcome asserting that the evidence was not acquired lawfully (*D.H.*, 2010).

The specific Fourth Amendment claim brought forward in the appeal was unique and was not focused on the search of the backpack but rather on the mandate for D.H. to leave the classroom without her property. The appeal asserts that by failing to provide the opportunity for D.H. to personally keep her belongings constitutes a seizure of property. This claim was further substantiated with the statement that neither law enforcement nor the campus administration had any reason to believe that she, individually, was in violation of the law (*D.H.*, 2010).

As the court outlined their basis for analysis, they referenced cases such as *Maxwell v. State* (2002) and *Bishop v. State* (2002), which outline applicable the legal precedent the court should weigh in their consideration of the appeal. These cases affirm that the relevant evaluation for the court should focus on the suppression of evidence and not the facts of the case that were under the jurisdiction of the trial court. The court readily accepted that the search was absent of a warrant. For that reason, the burden of proof shifted from D.H. to State (*D.H.*, 2010).

As the court continued to outline their basis for analysis, they referenced that although applicable, the Fourth Amendment does not explicitly outline the appropriate application of law related to events that occur in a school. As a result, the court identified that previously established opinions of the court would serve as the basis identifying guiding their points of consideration. *Board v. Earls* (2002) was cited when identifying that a warrant is not necessarily required if a “special need” such as

eradicating drugs from a school is present. *Tinker v. Des Moines* (1969) and subsequent cases were used to affirm that students maintain constitutional protections while under the care of the school. Additionally, the need for reasonableness, as opposed to probable cause, was supported by references to cases such as *Safford v. Redding* (2009). The court further identified that appropriate evaluation by the court calls for consideration of the level of the searches intrusiveness and the intrusiveness as compared to the substance of the articulated “special need” that motivated the search (*D.H.*, 2010).

After outlining the legal basis for evaluation, the court discussed the specifics of the case in light of established case law. The court frequently referenced *Board v. Earls* (2002) as two major areas were explored. First, the student’s privacy rights and associated intrusion were considered. The court identified that preventing D.H. from bringing her backpack into the hallway was a minimal invasion of privacy. Secondly, the weight of the special governmental need, drug removal, was compared in light of the privacy invasion. Considering the court identified that the intrusiveness of the search was minimal, it was found that the need for the school to eradicate drugs was significant. In light of these considerations, the court ruled that the hold placed on the backpack was valid under the constitution (*D.H.*, 2010).

Alignment to an Ethic of Justice or Care

The analysis of this case was conducted in the same fashion as preceding cases. Relevant language from the court’s opinion was characterized as either aligning to elements associated with an ethic of care or an ethic of justice. The court’s written opinion began with an overview of case details and then transitioned to outlining the

applicable case law that was used to consider the appeal. Justice David Puryear formally authored the opinion of the court (*D.H.*, 2010).

In light of the other cases evaluated by this study, this case was unique in that the only identified ethical frame was that of justice. Although the basis of evaluation considered the level of intrusiveness and the level of embarrassment, the determinations were closely associated with established law. The consideration of embarrassment, which is a telling factor for considering intrusiveness, lacked individual concern and was solely based on assumptions that were made based on the details of the search. The judges made no reference to the student's expressions of embarrassment or any other types of emotion. This complete lack of consideration for D.H.'s emotional status, along with a strict adherence to legal precedent and rules (Caputo, 2000; Kohlmeier & Saye, 2012) illustrate the strong alignment to an ethic of justice (*D.H.*, 2010).

The court referenced that the Fourth Amendment lacks explicit instructions regarding the applicability to the school environment; however, quotes from *Board v. Earls* (2002) (as cited in *D.H.*, 2010) were used to identify the rule of law that would be applied. As an example, it was stated "a search unsupported by probable cause may be reasonable when special needs... warrant" (p. 957). Furthermore, it was quoted that strict adherence to the requirement that searches be based on probable cause 'would undercut' the substantial need of teachers and administrators the freedom to maintain order in the schools (*Acton*, 1995). These standards, absent of any specific context from the specific case, or the student's experience, were used to determine that the invasion

was “relatively minor” (*D.H.*, 2010, p. 959). This lack of context again affirms a strict alignment to an Ethic of Justice.

The court continued discussing the level of the student’s embarrassment. At first glance, it appears that alignment to an ethic of care may emerge considering ethic’s value placed on emotion (Clement, 1996; Goodman, 2008). This was quickly dispelled when the court’s language solely reviewed the factors of the case. The descriptions of the events were minimized by the use of the introductory word “only.” In full, the statement reads, “Only Perez, the dog, and the two officers were present when the dog alerted on D.H.’s backpack. Thus, D.H. was not exposed to embarrassment” (*D.H.*, 2010, p. 959). This assertion shows no concern for the student as an individual (Caputo, 2000; Kohlmeier & Saye, 2012; Rawls, 1971) and affirms that the search is situated within the legal parameters. Based on these determinations it is evident that the ethic of justice solely was evidenced in this courts determination (*D.H.*, 2010).

T.S., Appellant, v. STATE of Florida, Appellee 100 So.3d 1289, 37 Fla. L. Weekly

D2710

Case Overview

Judge Villanti in the District Court of Appeals of Florida, Second District, reviewed the final case in this analysis. The events began when a high school student, T.S., “was charged with possession of marijuana and possession of drug paraphernalia after a search of her bookbag by school officials turned up” (*T.S. v. State*, 2012, p. 1290) the aforementioned items. During the initial trial, T.S. claimed that the introduced

evidence should not be permitted, as the search of her property was not based on reasonable suspicion (*T.S. v. State*, 2012).

At the onset of his opinion, Judge Villanti provided an overview of the events. On the morning in question, T.S. and her mother arrived to school early for a meeting with the school counselor, Barbara Meshna. At the conclusion of the meeting, Meshna offered for T.S. to keep her bookbag in the office to avoid being in violation of the school's rule against bags in the hallway. Throughout the course of the day, T.S. approached Meshna four times asking to gain access to her bag. Meshna declined the request based on the school rule; however, suspicion grew due to the number of times the student sought access to the bag. Based on this alone, Meshna took the initiative to search the bag and uncovered the contraband, which consisted of marijuana and marijuana paraphernalia (*T.S. v. State*, 2012).

Judge Villanti directly transitioned in to outlining the guiding case law regarding student searches. It was stated that the Fourth Amendment is the preeminent standard for all search cases; however, in the educational environment, there are unique nuances relating to reasonable suspicion. Judge Villanti referenced *T.L.O* much like the aforementioned judges and went on to reference clarification from *A.H. v. State* (2002) that asserts, "A 'gut feeling' or hunch that something is wrong does not constitute a reasonable suspicion to justify the search" (*T.S. v. State*, 2012, p. 1292). The judge cited two separate cases in which uncovered drugs were found not permissible based on the search being motivated by less than reasonable suspicion. These cases were contrasted with *Safford* (2009) based on the fact that a statement that named the student that was

found to be in possession motivated the initial search. When contrasting these cases, Judge Villanti found that Meshna's suspicion, and subsequent search of T.S., bag fell short of reasonable suspicion. "T.S.'s interest in retrieving her bookbag, taken alone, is not a specific and articulable fact which reasonably warranted the search of the bookbag" (*T.S. v. State*, 2012, p. 1292).

The State made two attempts to support the inclusion of the evidence. The first was based on the violation of school rules consisting of having a bag in the halls of school. The court found that this was not applicable considering the fact that Meshna offered to hold the bag before T.S. had begun the school day. Secondly, the state made the claim that it was appropriate to consider previous disciplinary infractions of the student. Although the court acknowledged that this would have been warranted, Meshna never articulated it as rationale for the search. Based on the inability to support elements of reasonable suspicion, Judge Villanti found that the evidence should have been found as inadmissible (*T.S. v. State*, 2012).

Alignment to an Ethic of Justice or Care

The final case will be evaluated, as were the previous cases, in such a format where representative examples of language aligning to an ethic of justice will be provided while a more comprehensive overview of all references aligning to an ethic of care will be identified. In this opinion of the court, Judge Villanti began with an overview of the details that have been referenced above. In a fluid narrative, the court's opinion transitions into analysis and application of law with no formal transition of sections or headers.

Judge Villanti began his explanation by referencing the specific nuance of evaluating Fourth Amendment cases that were initiated when an educator searched a student. This was characterized by reference to a quote from *New Jersey v. T.L.O.* (1985) stating, “To justify the search of a student by a school official, there must be ‘reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school’” (*T.S. v. State*, 2012, p. 1291). Interestingly, Judge Villanti further explained this consideration by citing *A.S. v. State* (2003). The cited language asserts that for a search to cross the threshold of reasonableness, the actor must “elicit specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant the intrusion” (*T.S. v. State*, 2012, p. 1291). Judge Villanti goes on to express that a gut feeling or hunch are inadequate grounds to conduct a search. The reference to each of the former cases, and their associated precedents, serve as the basis for this court’s evaluation. The process utilized to ensure that the standard for evaluation aligns to legal standards, or rules (Caputo, 2000; Kohlmeier & Saye, 2012), substantiates that Judge Villanti is approaching evaluation from a posture aligning to an ethical frame of justice.

The next section of Judge Villanti’s opinion aligned with the ethic of justice goal of ensuring rulings remain consistent across scenarios (Caputo, 2000; Jaldersma, 2011; Kohlmeier & Saye, 2012) and focused on comparison (Joldersma, 2011) to other cases demonstrating similar events. Judge Villanti evaluated a similar search conducted by an assistant principal in the case *A.S. v. State* (1997). In this case, Villanti referenced that “the presence of money in the hand of one boy and [A.S.] ‘fiddling’ in his pocket is not

enough to amount to reasonable suspicion” (*T.S. v. State*, 2012, p. 1291). This was affirmed with the ruling that the search in *A.N.H.*, which was based on “bloodshot eyes and unusual behavior” (*T.S. v. State*, 2012, p. 1291), was also determined insufficient. Further substantiating adherence to establish legal precedent, these cases were contrasted by *Safford* (2009) in which it was determined a specific accusation from a fellow statement was sufficient.

As Villanti made the connection back to the details of this case, he used the comparative language: “Like the searches in *A.S.*, *A.N.*, and *R.S.M.*” (*T.S. v. State*, 2012, p. 1292). This reference was used to align the details of the search at hand with established legal precedents. This comparison was based on the reasonableness of the search with no consideration made for the individual impact to the various students involved. The quote was continued with the statement, “the search in this case was based on nothing more than Meshna’s unsupported hunch” (*T.S. v. State*, 2012, p. 1292). This reference to a hunch was a direct connection to the prior legal reference and aligns directly with adherence to the rules (Caputo, 2000; Kohlmeier & Saye, 2012) characteristic of justice.

The legal evaluation in this case was based on alignment to previously established legal precedents; however, Judge Villanti considered the context of the search and even posed hypothetical circumstances that were favorable to the student. In one such instance he stated, “T.S. clearly wanted something from her book bag during the school day, but something could have been any number of lawful items, such as change for a vending machine, feminine hygiene products, or a piece of gum” (*T.S. v.*

State, 2012, p. 1292). This hypothetical scenario was posed to show the inadequate nature of the reasonableness claim and illustrates how the specifics and context has a bearing on the legal evaluation. Although framed in alignment with justice-oriented precedents, this expression showed consideration for the context and unique circumstances (Cassidy & Bates, 2005; Kohlmeier & Saye, 2012), which is most commonly associated with an ethic of care.

In conclusion, Judge Villanti made the assertion that “the State presented insufficient evidence to establish that Meshna had reasonable suspicion that T.S.’s book bag would contain contraband” (*T.S. v. State*, 2012, p. 1293). The basis for the conclusion was largely aligned to legal precedent; however, editorialized comments and speculation by the judge showed how context, or even hypothetical context, had potential implications for the ruling. This language, which afforded the student a benefit of the doubt, played a role in the future outcome. The elements of an ethic of justice and ethic of care that are evidenced in the analyzed cases are summarized in Table 2.

Table 2

Elements of an Ethic of Justice and Ethic of Care That Are Evidenced in the Analyzed Cases

	Aligned to Justice	Structural Justice	Institutionalized Care	Aligned to Care
<i>Dawson v. Clayton</i>	X	X	X	X
<i>A.M. v. Holmes</i>	X		X	X
<i>Foster v. Raspberry</i>	X			
<i>D.M. v. Champaign</i>	X	X	X	X
<i>In re D.H.</i>	X			
<i>T.S. v. State</i>	X			X

Summary

The analysis outlined above serves as a basis by which to identify some trends that are prevalent in the ethical posture commonly used by judges. The primary research question in the study seeks to identify to what extent does the language used to craft an opinion of the court represent alignment to a specific ethical posture when responding to cases with fourth amendment implications for students. As noted in the review of literature, prior research has failed to address this area of scholarly inquiry in a meaningful way. The findings of this study specifically respond to cases that hold Fourth Amendment implications for students and provide clarity regarding how these ethical frames are used in the judicial evaluation and decision-making process.

Ethic of Justice

The application of an ethic of justice was clearly evidenced throughout each analyzed case. This ethical posture was so prevalent that each case evidenced references from most of the individual characteristics that make up the construct of an ethic of justice. The most prevalent characteristic evidenced throughout the analysis was alignment to the focus on rules (Caputo, 2000; Kohlmeier & Saye, 2012). Each case referenced legal precedent that both served to guide procedural processes as well as the establishment of legal precedent that guided consideration of the current factors. One such example found in *A.M. v. Holmes* (2016) was the claim that the search in question was justified at its inception by “applying the Supreme Court’s reasoning in *Safford* and *T.L.O.*” (p. 4). The most frequently referenced cases identified in the analysis are *Safford v. Redding* (2009) and *New Jersey v. T.L.O* (1985). It was clear that systemic adherence to legal precedent is the basis by which judge’s frequently base their determinations.

A conclusion drawn with an ethical application of justice is frequently absent of contextual consideration (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012; Rawls, 1971). This makes sense considering the heavy reliance on rules and established precedent. This was frequently evidenced throughout the analysis and one example is when Judge Myerscough cited *Outlaw v. Newkirk* (2001) as stating, “The court simply determines whether there is a genuine issue of fact for trial without weighing the evidence” (*D.M. v. Champaign*, 2015, p. 4). In other words, the judges evaluated in this study largely base their decisions on alignment to law an established case law.

One key characteristic closely associated with an ethic of justice is that the decision-making process gives little consideration to the individual actors (Caputo, 2000; Kohlmeier & Saye, 2012; Rawls, 1971). This was frequently the case in the selected cases and seldom did a judge reference a search's emotional impact on the student. One such example from the case *Foster v. Raspberry* (2009) illustrates this lack of connection with the statement, "the school officials allegedly forced a teenage girl to strip of her clothes so that they could find an iPod. No evidence has been submitted that the iPod was dangerous" (p. 1347). After making reference to a forced strip search of a female student, the conversation focused on the nature of the contraband, with no further reference made about the student.

Actions aligning to an ethical frame of justice desire to produce consistent conclusions across multiple scenarios (Caputo, 2000; Joldersma, 2011; Kohlmeier & Saye, 2012) and likewise ensure fairness and equity (Caputo, 2000; Joldersma, 2011). These two elements are tightly coupled with the focus on adhering to rules or precedents in the decision-making process. In *Foster v. Raspberry* (2009), it was stated that "the standard for determining the validity of a search by school officials" (p. 1349) is *New Jersey v. T.L.O* (1985). Adhering closely to the identified standard enables various courts to produce consistent results in cases with similar circumstances.

Likewise, this type of adherence to rules allowed Judge Holmes to maintain fairness by stating that the consideration of probable cause should be "viewed from the standpoint of an objectively reasonable police officer" (*A.M. v. Holmes*, 2016, p. 18). This process laid the groundwork to make decisions that are comparative in light of all

others (Joldersma, 2011). Adhering to the previous precedents allowed Judge Tymkovich to make equitable comparisons with the statement, “in our view, such an officer could have reasonably believed – even if mistakenly – that the officer possessed probable cause” (*A.M. v. Holmes*, 2016, p. 10). As illustrated by the examples above, invoking a posture aligning to an ethic of justice is clear and was pervasive throughout the cases that were analyzed by this study.

Ethic of Care

The primary research question seeks to determine, to what extent does the language used to craft an opinion of the court represent alignment to a specific ethical posture when responding to cases with fourth amendment implications for students? Again, the ethical frames of justice and care are the basis for this evaluation. The preceding section outlines that an ethic of justice is the most commonly identified ethical posture. The evaluation of an ethic of care is a bit more nuanced and not nearly as prevalent.

Of the six cases that were analyzed, four had limited reference to an application of ethical care. Three of the cases, *Dawson v. Clayton* (2006), *A.M. v. Holmes* (2016), and *D.M. v. Champaign* (2015), referenced caring language in two forms. First, the judges in these cases cited language from *Safford v. Redding* (2009) or *Cornfield v. Consolidated* (1993) that align to the ethical construct of care. *Dawson v. Clayton* (2006) and *A.M. v. Holmes* (2016) also included caring language that was stated by the presiding judge. In the cases *D.M. v. Champaign* and *T.S. v. State*, an ethic of caring

was evidenced; however, only a single statement aligned based on the identified criteria of the construct.

The most frequently referenced characteristic aligning to an ethic of care is the consideration given to the impact a decision will have on the individual (Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyons, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012). One such example is found in *A.M. v. Holmes* (2016) when it was stated, “[The student’s] subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening and humiliating” (p. 28). This reference showed that the judge cared and valued the emotional impact the search had on the student.

Adherence to an ethic of care allows for consideration of context and extenuating circumstances (Cassidy & Bates, 2005; Kohlmeier & Saye, 2012). In *T.S. v. State* (2012), the Judge went as far as to consider hypothetical circumstances when he expressed “T.S. clearly wanted something from her book bag during the school day, but something could have been any number of lawful items, such as change for a vending machine, feminine hygiene products, or a piece of gum” (p. 1292). This claim illustrates how varying context can have implications for legal determinations. In similar fashion, the ruling in *Dawson v. Clayton* (2006) made an assertion that the student’s point of view should have been considered and that the assistant principal “should have heeded D.H.’s request to perform the strip search in the privacy of the bathroom” (*Dawson v. Clayton*, 2006, p. 9).

Another evidenced characteristic aligning to an ethic of care is focused on the process of growth (Hawks & Lyons, 2008) as opposed to the final outcome. In the six analyzed cases, there was only one reference closely aligned with this characteristic and it was expressed in Judge Gorsuch's dissenting opinion. Initially, he posed the question, "If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do?" (*A.M. v. Holmes*, 2016, p. 36). This characterization of the student's questionable behavior illustrates empathy and context. Gorsuch went on to assert, "Disciplining children who temporarily distract classmates and interrupt lessons 'is simply part of [traditional] school activity' and part of its 'lawful mission...or function'" (*A.M. v. Holmes*, 2016, p. 36). His statement asserts that correcting student behavior is part of the educational process and a critical component of the school environment. By framing his statements in this way, Gorsuch was considering the circumstances and implications through the lens of ethical care.

Institutionalized Care

The most significant finding regarding the application of an ethic of care was regarding the role-played by previous precedent case law that was established with precedent that included elements of care. Two cases were frequently referenced, *Safford v. Redding* (2009) was cited in each of the six analyzed cases and *Cornfield v. Consolidated* (1993) was cited in another instance. The opinions of the court in both cases speak about the emotional impact the search had on the individual student. In *Safford* (2009), the court spoke to the "degradation" that may be felt by the recipient of the search. Additionally, *Safford* (as cited in *Dawson v. Clayton*, 2006) noted that "a

student has a subjective expectation of privacy against a strip search, which is inherently embarrassing, frightening, and a humiliating ordeal” (p. 6). Additionally, *Cornfield v. Consolidated* (1993) also speaks to the impact of the individual student. In this case, “the court...observed that ‘no one would seriously dispute that a nude search of a child is traumatic’ and that ‘the potential for a search to cause embarrassment and humiliation increases as children grow older’” (p. 1321). This language is deeply rooted in an ethic of care as it pays particular attention to the impact the search has on the individual (Cassidy & Bates, 2005; Clement, 1996; Caputo, 2000; Goodman, 2008; Hawks & Lyons, 2008; Jones, 2009; Kohlmeier & Saye, 2012; Noddings, 1984, 2002, 2012). The way these cases were referenced and applied is the basis for the most a significant finding associated with this study

As noted, the caring language referenced in *Safford* (2009) was part of the justification that led the court to develop the sliding scale balancing the intrusiveness of a search with the severity of the suspected violation. This precedent is based on the caring consideration that weighs the impact and invasiveness of the search on the student; however, the precedent is now a legal standard that justice oriented courts will apply in subsequent cases. This phenomenon has produced legal precedents and interpretations that are now institutionally accepted, and frequently applied, care. By adhering to this established precedent, an individual judge exhibiting characteristics that solely align to an ethic of justice, would still impart an element of care as part of their consideration of established legal standards. For this reason, the term institutionalized care is used to describe this occurrence. Although each case referenced the standards established in

Safford or *Cornfield*, only one judge made an explicit connection to the negative emotional impacts on the student that had been searched in their respective case. The one exception was in *D.M. v. Champaign* (2015) when Judge Myerscough referenced the emotional impacts such as embarrassment and humiliation and stated these are “concerns that were implicated by Principal Howard’s search of D.M” (p. 7). This connection causes the narrative to fit within the outlined criteria associated with the ethic of care. The lack of direct connection in the other cases does not discount that caring considerations were plied as it would be counterintuitive to think the judges directly cited a caring narrative from previous cases and it had no impact on their thinking, even if it was not explicitly stated.

CHAPTER V

DISCUSSION, CONCLUSIONS, AND IMPLICATIONS

Introduction

The evolving societal focus on school safety continues to cause significant shifts to student disciplinary practices (Zirkel, 2008). In response, school officials, legislators, law enforcement officer and judges have initiated and implemented various disciplinary tactics largely motivated by a desire to get tough on discipline. The increased prevalence of student searches, the expansion of school resource officers, and zero tolerance practices have led to an environment that increasingly involves the judicial system in the administration of student discipline. This increasingly common phenomenon is frequently referred to as the school to prison pipeline (Edmiston, 2012). The courts rapidly increasing role in student discipline has significant implications for students' rights and this study sought to determine if judicial evaluation continues to be exclusively aligned to an ethic of justice, or have the courts incorporate elements associated with ethic of care in their considerations. To this point, scholarly analysis has failed to explore this area in a meaningful way (Stefkovich, 2012). This evaluation, as well as the associated findings and conclusions, provide greater clarity regarding this matter. This increased level of insight enables the development of more informed responses and systemic improvements to both student discipline practices and to the courts increasing role in this area. A thoughtful evaluation of the findings provides the basis by which to share recommendations for school leaders, lawmakers, and legislators.

This consideration of findings also provides the basis by which recommendations for future research areas are thoughtfully shared

Findings and Interpretations

The primary research question in this study seeks to determine to what extent the language used to craft an opinion of the court represents alignment to a specific ethical posture when responding to cases that have fourth amendment implications for students? The ethical frames of justice and care serve as the basis for this evaluation.

Ethics, when applied to the field of student discipline, typically conjures connotations of justice (Stefkovich, 2013). This presumption is affirmed by the findings of this study. The ethical frame found to be closely aligned with the judges' evaluation of the given case details, as well as the basis by which most decisions are made, is that of justice. The coding in this analysis was done based on the identified criteria that make up the constructs of ethical justice and care. Significant alignment to the ethical frame of justice was quickly identified based on the courts consistent inclination to apply and adhere to established rules or laws (Caputo, 2000; Kohlmeier & Saye, 2012). This alignment was evidenced throughout the analysis and based largely on the judge's evaluation and application of legal standards. Each legal consideration was clearly articulated and examples were given as to the established legal standard that was serving as the basis for the judges' decisions. Likewise, the judges universally reviewed the details of the specific cases and aligned relevant events to various "rules," or legal standards including those outlined by statutes, precedents from applicable case law and even assertions from the United States Constitution.

Adherence to legal standards (i.e., established rules) was the characteristic that most frequently affirms the court's prevailing posture as deeply rooted in an ethic of justice. Additionally, characteristics of justice were referenced in many of the cases; however, the omission of relevant language was just as insightful. An ethic of justice applies little consideration to context or the impact on the individual. Seldom did the judges reference the context of the relevant events as the basis for their decision. Seldom did the judges speak about the impact of the case events on the individual student. The exception to this finding came by way of the frequent and universal references to *Safford v. Redding* (2009). The judges not only made reference to the legal standard established by the case but selected citations from the case commonly reiterated the Supreme Court's concern for the impact of an invasive search on a child. Despite this reference to the caring standard established by the Supreme Court, the language of the current judges spoke to the application of the established legal standard. The frequent references to the application of established legal standards demonstrates how, with the use justice-oriented ethics, judges seek to provide consistency across various scenarios.

Language aligning to an ethic of care was explicitly evidenced in two cases; however, to a much lesser extent than the significant textual alignment with justice ethics. Two cases, *Foster v. Raspberry* (2009) and *D.H.* (2010), made no references that could be considered aligned to a single element care. In two other cases, characteristics aligning to an ethic of care were identified but only by a single statement from the entirety of the courts' narrative. Language associated with an ethic of care was more

nanced than the rigid and consistent reference to elements associated with the ethic of justice. Comparatively, references to care were sparse and did not exhibit a strong correlation to one specific characteristic of the caring frame. It should be noted that consideration of contextual circumstances and care for the individual were both identified in multiple cases; however, these limited examples did not serve as the critical points of consideration that led to the courts final determination.

The most significant finding in this analysis is related to the application of legal standards that were originally conceptualized amid discourse framed by ethical care. The ruling in *Safford v. Redding* (2009), serves as the primary example and is unique due to the fact that the court formulated the precedent, at least in part, based on concern for the developmental needs of the individual child, which aligns directly to an ethic of care.

Each of the six cases analyzed in this study referenced the *Safford* standard, and three cases explicitly cited the court's original language that was overtly caring. This occurrence presents a unique finding related to the primary research questions goal of better understand how elements of ethical care are evidenced. Only one case, *T.S. v. State* (2012), made an overt connection between the caring concern shared in *Safford* (2009) and an expressed concern for the emotional impact of the child in the analyzed cases. Although the articulated concern for each of the individual students did not emerge as the basis by which the final ruling was made, the *Safford* (2009) precedent, and its alignment with a caring ethical posture contributed to the final determinations. As such, the term *institutionalized care* has been identified to describe this phenomenon.

In this form, ethical care impacts many cases and has served as the basis for ongoing legal evaluations, even in those cases where the court approached their decision solely through the application of legal standards. Although an ethic of care currently plays a significantly lesser role in judicial considerations, at least in the appeals arena, the application of institutionalized care shows that the system has the capacity to embrace a more caring approach. This is of significant note as it has implications for bringing about systemic change without the burden of altering the driving ethical and philosophical frame embraced by the judicial system.

These findings are significant considering that they begin to fill the void of knowledge at the interchange of the role of the courts and their expanded role in student discipline, students' rights and the associated ethical implications. Stevkovich (2013) has written extensively about ethical applications as related to school leadership. In her text *Ethical Leadership and Decision Making in Education*, she asserts that a resource has not yet been produced that aligns the posture of judicial rulings with various ethical frames. Kupchik (2003) also notes that scholarly work has failed to evaluate the applied ethical frame that prevails when students are relegated to the criminal courts. The findings in this study serve as the introduction of scholarly insight as substantiate the assumption that the ethic of justice is the predominant ethical frame evidenced in the language of the judges in the reviewed cases; however, the system as currently constructed has the capacity to embrace institutionalized care.

Application of Findings

The relationship between schools, the courts, and public expectations of both institutions continues to shift. As such, the findings in this study have implications for academics, educational leaders, judges, and legislators. The findings, particularly those relating to institutionalized care, have implications for each group but should be thoroughly considered by legislators.

It has long been assumed, and now confirmed, that the ethical frame most commonly associated with the courts is that of justice. When referencing the relationship between an ethic of justice and an ethic of care, Goodman (2008) asserts that care “is neither opposed, or even complementary, to justice” (p. 246). The transformative nature of the *Safford* ruling, and its unchallenged precedent has legitimized the role that ethical care can play in the judicial arena. As such, “reevaluation and reconsideration” (Caputo, 2000, p. 80) are warranted as judges consider their approach to assigning criminal penalties. This is of significant importance in light of the vast research that shows rigid practices with little room for discretion have a negative impact on students. As one such example, Hjalmarsson (2008) addressed the increased likelihood that students that have been introduced to the courts, and their posture associated with an ethic of justice, have an increased likelihood of dropping out of school and facing future incarceration. This realization can now be framed with the understanding that, although not prevalent, an ethic of care has been legitimized and is not to be excluded from judicial discourse.

As judges increasingly act as de facto school administrators, the understanding of their current ethical posture provides the basis by which the system can be influenced and improved. Judges find themselves in the midst of a transitioning system that has shifted the juvenile justice system toward a “second class criminal court that provides... neither therapy or justice” (Heitzeg, 2009). This is affirmed by the finding of the study that confirms the role of ethical care is minimal at best. The current status of the courts, and their association to an ethic of justice, blurs the lines between juvenile justice and criminal courts. This is supported, and in some instances encouraged, by legislation enacted in every state (Howell et al., 2013). The increased level clarity provided by the findings in this study serves as the basis by which to begin meaningful conversations about the desired role of the courts in addressing students and their discipline. The findings also illustrate how the ethical posture of the courts and schools are objectively misaligned and warrant further consideration.

The findings in this analysis must be considered in light of existing scholarship that has identified many areas of concern with the current shift toward a more punitive and justice oriented disciplinary process. As such, academics may use these findings as a basis by which to further explore the causal effects that motivate judges to evaluate cases in ways directly aligning to elements of an ethic of justice. The findings in this study exhibit an even greater value when contextualized amid additional scholarly work such as Moore’s (2010) assertion that the entire educational process is supposed to recognize the growth and learning of each student, and this is lost under many punitive practices. The educational system is certainly called to ensure that all students are

provided a safe learning environment but likewise the schools actions should also be aimed at growing the character of each child (Noddings, 2003). Research has found, in numerous instances, that increasingly strict discipline practices actually estrange students, compound misbehavior and even encourage criminal activity (Nance, 2013). This is increasingly concerning in light of the findings of this study.

In a recent concurring opinion, unrelated to the cases analyzed in this study, Federal 10th Circuit Judge Lucero expressed concern that current disciplinary practices should be a matter public of concern, and although he advocates improved practices by educators, police, and the courts, he made the claim that the application of current law calls for the criminalization of student misbehavior and leaves administrators of the law little discretion. He goes on to express that based on these factors, the limitations of current laws need the intervention of legislators and those involved in the social sciences (*C.G.H. v. Sandy City*, 2014). Therefore, the findings in this study should be of significant importance to those that are responsible for legislatively intermingling the schools and the courts.

Legislators have participated in a trend that has increasingly moved certain violations from the jurisdiction and rehabilitative philosophy of juvenile authorities to that of the adult court system. This transition has constrained and limited the ability to apply caring methods to as the courts are structured to solely apply punitive measures (Hanson, 2005, p. 318). Considering the conclusive nature of this study's findings, it is likely that legislators, in the face of mounting political pressure, had little more than intuition as they penned their original legislation. The findings in this study assert, even

in instances that have implications for students' constitutional rights, that judges are primarily aligned to an ethic of justice and this may have significant implications regarding the potential for the rehabilitation and personal growth of the student.

The findings associated with the phenomenon of institutionalized care are likely the most significant for legislators. Understanding that the courts adhere closely, not only to an ethic of justice, but primarily to the notion of following rules and legal precedents, law makers should consider developing legislation that explicitly provides the courts with discretion that will benefit both the overall goal of education and the individual child. As noted by the United States Supreme Court and the *Safford* ruling, the court interpreted the ambiguity of the *T.L.O.* reasonableness ruling, and through this opportunity they incorporated institutionalized care. Legislators must be mindful that the role of the courts is to both interpret and apply the law; therefore, the language of potential legislation must afford the opportunity for courts to consider the individual context of a scenario in light of the violation thereby making the most prudent decision for all involved.

School leaders should likewise take note of the findings and how they fit within the current context of school discipline. These findings have both practical and moral implications for school leaders. As administrators make decisions about discipline practices, and the extent to which they will defer to school resource officers, the understanding that the prevailing ethical frame associated with a judicial response will likely be that of justice should factor into their consideration. The purpose of discipline is to teach. Thus, the goal of discipline should not "solely be punishment for problem

behavior but rather the elimination of problem behavior and the teaching of positive prosocial behaviors” (Yell & Rozalski, 2008, p. 14). School leaders, and those that set school policy, should use these findings as the basis by which to be reflective.

Although social influences are shifting toward more rigid, justice-oriented practices, educational leaders have been entrusted by parents to respond to the needs of each individual child. With the understanding that students are developmentally more responsive to treatment, educators must confront the notion that deferring to the punitive nature of the courts likely has long-term negative implications for the child (Woodard et al., 2001).

It is clear that the findings in this study affirm that the courts, at least in the evaluated context, have a tendency to be motivated by a posture predominantly aligned to an ethic of justice. Considering the social pressure and transitioning environment, these findings have implications and associated recommendations for various groups including judges, legislators, academics and educational administrators. Gaining a superficial understanding of these findings will not suffice to alter practice in a meaningful way. For these reasons, thoughtful consideration and purposeful action must be taken to bring about meaningful change to current practice.

Recommendations

Gaining a better understanding of how the courts approach their judicial responsibilities, along with a clearer understanding about the role of institutionalized care, has broad implications for practice. This growing level of insight has the potential to balance the societal call for a more punitive response to student discipline with the

overall need for education to grow students and build character (Hawk and Lysons (2008).

Based on the findings in this study, the primary recommendation for the judicial arena is intended to build a broader understanding for judges as they seek to find the balance between growth and care. As such, judges and lawyers are required to complete continuing education hours as part of their licensure requirements. Many of the judges now addressing student discipline issues have much of their experience focused on adults and their previous training is likely void of key elements needed to effectively address student discipline, including the role ethical care plays in the growth (Caputo, 2000).

By using the findings from this study as the basis by which to engage in meaningful educational experiences, coupled with the inclusion of reflective conversations, judges will be better equipped as they strive to find the balance between justice and care. Judges may be naïve to the developmental needs of children and therefore they do not understand how a prevailing adherence to an ethic of justice may actually produce detrimental effects. The findings in this case also present the opportunity to discuss how institutionalized care was formed out of the ambiguity left in previous case law. Courts make their determinations by primarily “weighing the facts of the case in the context of prevailing laws” (Stefkovich & Begley, 2007, p. 211); however, when responding to cases involving children, consideration should be given to the degree to which caring consideration should be applied while still adhering to the expectations of the court system.

The findings in this study are based on an analysis of appealed cases, which may have a tendency to be even more rigidly aligned to matters of rule and law. Even with this element unknown, it's worthwhile for lower court judges to note that with the ruling in *Safford* (2009), and the phenomenon identified as institutionalized care, the United States Supreme Court has legitimized the inclusion of caring ethics.

Although the study focused acutely on judges and their practices, the findings also have significant implications for legislators. The findings in this analysis were based on cases in which the search of a student, or their property, resulted in the formal involvement of the courts. The use of increasingly stringent disciplinary practices has the potential to violate the rights of student and as illustrated the increasing frequency with which student searches are conducted has direct implications for students' constitutional protections as guaranteed by the Fourth Amendment. It is critical to remember that the use of these practices is supported, and in some instances compelled, by the actions of legislators (Bacanfuso & Kuhfeld, 2011). Lawmakers must consider the role they placed in orchestrating the current environment that puts at ends the educational goal of student academic and emotional growth, and even disciplinary rehabilitation, with the role of the increasingly punitive judicial system and its impact on school children (Feld, 1999).

The findings in this study explicitly confirm, at least for the cases that were evaluated, that the courts, without exception, embrace a rules-focused approach that directly aligns to ethical justice. In light of this finding, lawmakers should consider authoring legislation that, by design, permits, or even compels judges to consider the

context associated with the legal violation, particularly when dealing with juveniles. Legislators must consider providing legislative philosophy not only because the implications for the involved students are significant but also because the overall societal outcomes may even be more dire without this intervention. Extensive research has identified that introducing students to the courts and subsequently to incarceration has long-term impacts including reduced educational attainment, increased unemployment, reduced access to adequate housing over the long-term and an increased propensity for future involvement in the criminal justice system (Nance, 2015). By legislatively supporting a zero tolerance philosophy, and writing laws that leave judges limited discretion as they interpret and apply the law, the efforts to eliminate troubling outcomes, may in fact, actually contribute to their realization.

The findings in this study illustrate how the intersection of current law and the court system has responded to student discipline with a philosophy increasingly aligned to an ethic of justice. With the newfound insight provided by this study, it would be prudent for legislators to commission a study on the real outcomes based on the policies of their state. It would be noteworthy to have the department of education, or similar state agencies, review trends associated with referrals to the criminal courts based on factors such as the type of infraction, age of the student involved and effectiveness of the action based on recidivism rates.

Finally, with the understanding that judicial officials will focus on the explicit standard of the law, and approach their judgment with an ethical stance aligning to justice, a review of legislation should be conducted and, where appropriate, advocate for

the inclusion of meaningful discretion when responding to matters of student discipline. As affirmed by the *Safford* ruling, and the associated identification of institutionalized care, it's shown that the courts have the propensity to embrace a more caring stance; however, they must be given the latitude either statutorily or within established case law to respond dynamically. Although not prolific, the element of care that was evidenced multiple times in the analysis was the consideration of the context surrounding the student's violation. Establishing policy that formally allows for evaluation of context would be a more in the right direction.

School leaders should also heed the findings regarding the courts pervasive adherence to the frame of ethical justice, and in the light of this understanding, reconsider their practices when it comes to involving law enforcement in matters that could be addressed in the principal's office. With the improved understanding that judges are primarily motivated by justice, even as they respond to students assigned to their courts, administrators should consider their role from a moral and practical standpoint. In leadership circles, it is often acknowledged that "culture trumps strategy" (J. Gilcrease, personal communication, August 25, 2016). In 2001, the Office of the Surgeon General released a report on youth violence in the United States, which summarized an extensive body of research. In this report, the Surgeon General concluded that to "more effectively prevent violence in schools, it is better to focus on improving the social context of the schools rather than attempting to change the individual students' attitudes and risky behaviors" (Nance, 2015, p. 36). Educators must take it upon themselves to ensure that their practices do not comprise the overall

institutional pursuit of public education focused on student growth and development. Educational leaders must remain mindful that care has been demonstrated to be of critical importance for a child's successful development (Goodman, 2008).

Effective professional learning must afford educators the opportunity to evaluate their practices and consider their role in growing students not only academically but also behaviorally. The escalation exhibited in student discipline has been embraced by society; teachers and administrators are not immune from the influence of these attitudes and practices. Professional learning should reference the findings from this study reiterating that the judicial approach to student discipline will be framed by an ethic of justice and will largely be void of caring characteristics that focus on the individual student as well as the process for growth.

Educators should engage in conversations about their driving ethical posture. Consensus should be gained regarding the benefits and limitations of both an ethic of care and an ethic of justice. Campus staff should collaboratively establish a set of beliefs that guide their response to student behavior. It should also be reiterated that a study conducted by the Secret Service and the U.S. Department of education affirmed that a campus culture focused on supportive and meaningful relationships between staff and students is the key to deterring campus violence (Nance, 2015). Once school resource officers and the courts have been incorporated as fundamental components in discipline management, opportunities to care will be lessened, and as identified in the study, the courts' and their adherence to an ethic of justice will prevail.

Suggestions for Future Research

This study was a step toward filling a gap that has persisted in this area of academic scholarship. Little work had previously been done to determine the extent to which an ethic of justice and an ethic of care factor into the decision-making process of judges (Stefkovich, 2012). Although the findings are beneficial and will be the basis to begin a more informed conversation, additional scholarship is needed to fully vet all the nuances of ethical care and justice in the judicial arena.

This study was framed in the context of the shifting environment associated with school discipline. These changes are characterized based on the increased use of student searches, zero tolerance practices, along with an increasing role of police officers and judges when responding to school discipline matters (Beger, 2002). The analysis in this study was designed to focus specifically on search and seizure cases with Fourth Amendment implications and the jeopardy placed on students' rights by shifting legislation and practice. This area of research was deemed as an ideal place to start considering the prevalence of immerging case law, including the most recent Supreme Court case, *Safford* (2009), that was unique in its inclusion of caring elements. The analysis focused on court cases that were initially based, to some extent, on the search of a student while at school.

Although this study did provide conclusive findings regarding the prevailing application of an ethic of justice and the confirmation of the phenomenon identified as institutionalized care, additional study is warranted. The content analysis methodology used in this study required analyzed cases to have a corresponding opinion of the court.

Largely, opinions of the court are included in rulings based in appeals courts or higher-level courts and are seldom provided in a local trial court. As such, the findings cannot fully be generalized to the lower level courts that will likely first hear a student's case. It has been noted that judicial renderings can be influenced by various factors including the language of the legislation but also political and social factors (Superfine, 2010). It would be worthwhile to explore whether dynamics in local communities have influences on the association of the court to a specific ethical posture.

A subsequent study should also seek to evaluate the role of an ethic of care and an ethic of justice in local trial courts. Appropriate methodologies will need to be considered since the availability of written opinions of the court are not likely available. Greater insight may be gained by interviewing judges and asking questions that seek to determine how they consider the various elements of their case that ultimately supported their rendered decisions. Developing questions based on the identified criteria associated with an ethic of care and an ethic of justice would prove useful.

It would be prudent for future studies to broaden the scope of the research beyond cases that have Fourth Amendment implications. An evaluation of cases that were relegated to the courts as a result of zero tolerance policies or laws, or conversely cases that ended up in the courts based purely on the subjective involvement of law enforcement would be noteworthy areas of scholarly exploration. It would be insightful to know if the adherence to the ethical posture of justice is just as fervent in both of these instances.

Exploring the long-term impacts of the courts inclination to apply an ethic of justice in cases involving juveniles is also warranted. Nance (2013) identifies that although these studies take considerable time and resources, understanding the outcomes associated with strict disciplinary measures, the associated laws, and the prevailing ethical posture would serve to help law makers and educators in their continued pursuit of improvement.

Summary and Conclusion

In summary, this analysis begins to fill an identified void in the scholarship relating to the ethical posture of judges as they address student discipline. It was conclusively identified that the prevailing ethical posture of the judges is that of justice. Specifically, the element of justice most frequently identified is focused on alignment to rules and laws. Throughout the narrative of each case, the judges framed their discussion and subsequent evaluation on stated legal standards, which were largely derived directly from statute or established case law.

An ethic of care was evidenced; however, to a much lesser degree. Adherence to particular criteria of an ethic of care was not as easily evidenced; however, an element of care was present in four of the six analyzed cases. This lack of a conclusive pattern or trend illustrates that the inclusion of an ethic of care is far more seldom, and less strategically incorporated, when compared to an ethic of justice.

The most significant finding from the study was identified by evaluating language aligning to an ethic of care; although, the findings posed a unique nuance. While all of the courts referenced the precedent in *Safford* (2009), three of the cases

quoted the caring language that was originally expressed by the Supreme Court. Again, all of the courts applied this standard; however, only one overtly made a connection to the impact of the search on the student involved in the specifics of the case being considered. Interestingly, this standard, founded in care, was applied in every case. The reference to the precedent did not fully align to an applied ethic of care considering the judge's expressed language was largely based on applying the legal standard. For that reason, the term institutionalized care was used to describe the phenomenon.

This identification of institutionalized care was notable for a number of reasons. First, it identified that care has been legitimized in the arena of judicial review; however, most judges rigidly adhere to an ethic of justice. Further, significant inclusions of care will likely require legislative flexibility and discretion as new laws are passed or modified.

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