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DOG-SNIFF SEARCHES IN MASSACHUSETTS PUBLIC SCHOOLS: HOW CLOSE IS TOO CLOSE?

I. INTRODUCTION

Many Massachusetts school districts are plagued by a perpetual and increasing trend of student drug use and inter-school violence.¹ Still other school districts that have not yet encountered such issues are well aware of the potentially devastating consequences that may result if preventative measures are not taken.² Consequently, many school districts have chosen to employ contraband-sniffing dogs in an attempt to reduce these unsettling problems and to prevent tragedy from occurring.³ The actual and proposed use of police-trained narcotic-sniffing dogs in some Massachusetts schools, however, has conjured images of vicious dogs “nipping” at innocent children’s heels as they sit in their classrooms.⁴ Massachusetts has a duty to prevent these mental images from becoming a reality as they have in other states’ school districts.⁵

¹ Tracy Jan, *Spike in Violence in Middle Schools Raises Concern*, THE BOSTON GLOBE, October 2, 2007, at A1 (discussing state-wide concern for increasing levels of violence and drug use in schools). According to the article, Massachusetts suburban and rural middle schools in 2005-06 had 4,750 reports of violence, including fights, sexual assaults, robberies, and threats of violence; 484 drug, alcohol, and tobacco offenses; 290 cases of sexual harassment, and 383 weapons found. *Id.*

² See *Suicide Brings Attention to Teen Prescription Drug Use*, Feb. 3, 2006, <http://www.jointogether.org/news/headlines/inthenews/2006/suicide-brings-attention-to.html> (last visited March 3, 2008) (describing Arlington school district’s consideration of employment of drug-sniffing dogs in wake of student’s suicide); see also Lauren DeFilippo, *Scent and Sensibility*, Wicked Local: East Bridgewater, February 6, 2008, <http://www.wickedlocal.com/bridgewater/news/x254763421> (reporting East Bridgewater School District’s plan to employ drug sniffing dogs to search school by end of 2008 school year). DeFilippo’s article notes that East Bridgewater school principal, Paul Vieira, stated that the contemplated dog-sniff searches were meant to be a “proactive, rather than a reactive approach to school safety.” *Id.*

³ DeFilippo, *supra* note 2 (discussing use of dog-sniff searches in West Bridgewater, Carver, Bridgewater-Raynham, Scituate, Rockland, and Abington school districts).

⁴ *Regional High School Considers Dog Search Policy*, MARTHA’S VINEYARD TIMES, Jan. 11, 2007, at 2. The article quoted the principal who explained that, “dogs do not sniff students, but rather their book bags, lockers, and cars. Students are cleared from a classroom before it is searched. ‘The whole image of kids sitting in the classrooms with dogs nipping at their heels is not what will happen,’ she assured the school committee.” *Id.*

⁵ See, e.g., *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 479 (5th Cir. 1982) (holding dog-sniff of students to be a Fourth Amendment “search”); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (holding dog-sniff of student’s person not a search); *B.C. v. Plumas Unified Sch.*

For thirty years, state and federal courts have struggled with the constitutionality of suspicionless dog-sniff searches in schools.⁶ Courts strive to achieve a balance between one's Fourth Amendment right to be free from unreasonable searches and a school administrator's ability to maintain a safe and productive school environment.⁷ Federal courts remain split as to whether close proximity dog-sniffs of students' individual persons are constitutional searches within the parameters of the Fourth Amendment, and many state courts, including Massachusetts, have yet to encounter this issue.⁸ Moreover, the Massachusetts Supreme Judicial Court ("Mass. SJC") has not yet determined whether Article Fourteen of the Massachusetts Declaration of Rights ("Article Fourteen") affords an individual more substantive protection in the educational setting than is afforded to them under the Fourth Amendment.⁹ Consequently, the Mass. SJC has yet to determine if broader protections will be extended to protect Massachusetts students against close proximity dog-sniffs while in school.¹⁰

The United States Supreme Court and other federal courts have repeatedly enforced the principle that students do not abandon their constitutional rights at the "school house gate;" however, courts have, with increas-

Dist., 192 F.3d 1260, 1267-69 (9th Cir. 1999) (holding suspicionless search of students unreasonable and unconstitutional); see also Jennifer Bradfield, Comment, *Vernonia Sch. Dist. 47J v. Acton: A Step Toward Upholding Suspicionless Dog-sniff-Searches in Public Schools*, 68 U. COLO. L. REV. 475 (1997) (discussing probability of Supreme Court upholding suspicionless dog-sniffs of students' lockers and persons).

⁶ See, e.g., *Horton*, 690 F.2d at 479 (holding dog-sniff of students is Fourth Amendment "search"); *Renfrow*, 631 F.2d at 93 (holding reasonable dog-sniff of students not a search); *Plumas*, 192 F.3d at 1267-69 (holding suspicionless search of students unreasonable and unconstitutional).

⁷ See *New Jersey v. T.L.O.*, 469 U.S. 325, 347-51 (1985) (holding search of student's purse not an unreasonable search); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (holding mandatory drug testing of all student athletes reasonable); *Brousseau v. Town of Westerly*, 11 F. Supp.2d 177, 183 (D. R.I. 1998) (holding search of student reasonable). In *T.L.O.*, the decision to search was based on reasonable suspicion of wrongdoing and, therefore, did not constitute an unreasonable search in violation of the Fourth Amendment. *T.L.O.*, 469 U.S. at 337. The *T.L.O.* Court employed a balancing test to determine reasonableness of search. *Id.* In reaching its decision, the *Vernonia* Court balanced the students' privacy interests against the government's interest in conducting the search. *Vernonia*, 515 U.S. at 664-65. In *Brousseau*, the court found that the compelling safety concerns that prompted the school official's search were sufficient to render the search reasonable in the absence of an effective alternative for addressing the concern. *Brousseau*, 11 F. Supp.2d at 183.

⁸ See *infra* note 34 and accompanying text (discussing various and disparate federal circuit court holdings).

⁹ See *infra* note 66 and accompanying text (discussing Mass. SJC's failure to determine extent of Article Fourteen in educational context).

¹⁰ See *infra* note 66 and accompanying text (discussing Mass. SJC's failure to definitively compare Article Fourteen with Fourteenth Amendment in context of Massachusetts public schools).

ing frequency, chosen to balance individual rights with the safety of the student body as a whole.¹¹ Part II of this note discusses the history of dog-sniff search litigation in the context of the Fourth Amendment.¹² Part III explores current Massachusetts law regarding dog-sniff searches beyond the education setting.¹³ Part IV discusses current Massachusetts law regarding searches of students and their belongings in schools without the use of police dogs.¹⁴ Finally, in light of a federal circuit split, and based on related prior Massachusetts holdings, Part V argues that the Mass. SJC should recognize a student's reasonable expectation of privacy and consequently prohibit invasive dog-sniff searches of students' persons absent reasonable suspicion.¹⁵

II. HISTORY OF DOG-SNIFF SEARCHES IN THE UNITED STATES

A. The Fourth Amendment: What Is A "Search"?

The Fourth Amendment guarantees all individuals, including children and students, the right to be free from unwarranted and unreasonable searches and seizures.¹⁶ A search occurs when the government intrudes on an individual's subjective and objective reasonable expectation of privacy.¹⁷ The Fourth Amendment generally requires the government to ob-

¹¹ See, e.g., *T.L.O.*, 469 U.S. at 339 (establishing that students maintain expectation of privacy, although lessened, while on school grounds); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that children do not "shed their constitutional rights . . . at the schoolhouse gate"); *Plumas*, 192 F.3d at 1267 (recognizing students' privacy interests while in on school grounds). The *T.L.O.* Court firmly established that a court must balance a student's reasonable expectation of privacy with the school's legitimate need to maintain a safe learning environment when determining the reasonableness of a search. *T.L.O.* at 340-42. In *Plumas*, after balancing the searched student's privacy interests with the school's interest in conducting the dog-sniff search to locate contraband, the court determined that the random and suspicionless search was unreasonable in the circumstances. *Plumas*, 192 F.3d at 1268.

¹² See *infra* notes 34-55 and accompanying text (outlining history of litigation involving dog-sniff searches).

¹³ See *infra* notes 56-64 and accompanying text (discussing history of Massachusetts dog-sniff search litigation).

¹⁴ See *infra* notes 65-75 and accompanying text (examining history of Fourth Amendment and Article Fourteen search litigation in Massachusetts public schools).

¹⁵ See *infra* notes 76-137 (explaining why Massachusetts should find random close proximity dog-sniff searches of students unconstitutional).

¹⁶ U.S. CONST. amend. IV. The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated." *Id.*

¹⁷ MASS. CONST. art. XIV (stipulating that a search occurs when one's reasonable expectation of privacy is violated); see also *Commonwealth v. Montanez*, 571 N.E.2d 1372, 1380 (Mass. 1991) (defining method used to evaluate one's reasonable expectation of privacy). The court

tain a search warrant supported by the probable cause that a crime has occurred before a search can be conducted.¹⁸ Exceptions to the warrant and probable cause requirements exist, however, when "special needs beyond the normal need for law enforcement make the warrant and probable-cause requirement[s] impracticable."¹⁹ In such circumstances, a special and important governmental need may justify an intrusion into an individual's otherwise protected reasonable expectation of privacy.²⁰ When a situation renders the need for a warrant and probable cause impracticable, the search must, instead, satisfy a "reasonableness" standard.²¹ To determine the reasonableness of a warrantless search, a court balances the government's need to perform a search against the magnitude of the privacy invasion

stated that a constitutionally protected reasonable expectation of privacy has both a subjective and objective component: (1) whether the defendant has manifested a subjective expectation of privacy in the object of the search; and (2) whether society is willing to recognize that expectation as reasonable. *Id.*

¹⁸ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (holding warrant and probable cause requirements unnecessary for student searches); see also *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (setting forth definition of constitutional arrest and probable cause). See generally *Terry v. Ohio*, 392 U.S. 1, 27-31 (1968) (holding warrant and probable cause requirements unnecessary for "stop and frisk" search where reasonable suspicion is present). The *Beck* court hinged the constitutionality of the arrest on whether at the time of the arrest, "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Id.* at 91.

¹⁹ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding random and suspicionless drug testing of student athletes); see also *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding search of defendant's home, in absence of warrant and probable cause, constitutional); *Almeida-Sanchez v. United States*, 413 U.S. 266, 285 (1973) (holding warrantless search of defendant's car without probable cause to be an unreasonable search and seizure due to case's specific circumstances); *Camara v. Mun. Ct.*, 387 U.S. 523, 538 (1967) (holding regulatory scheme need not conform to warrant and probable cause requirements when searches meet "reasonable legislative or administrative standards"). The Fourth Amendment requires that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search . . . in certain limited circumstances neither is required." *Almeida-Sanchez*, 413 U.S. at 277.

²⁰ See *Chandler v. Miller*, 520 U.S. 305, 317-18 (1997) (finding mandatory drug testing of public office candidates unconstitutional); see also *Nat'l Treasury Employee's Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (holding mandatory drug testing of certain employees constitutional). The special needs exception to individualized suspicion usually involves an immediate or serious public risk and this need must outweigh the need for individualized suspicion. *Miller*, 520 U.S. at 317-18. The court determined that the government's compelling interest in ensuring that its employees were not drug users outweighed those drug tested employees' privacy interests. *Von Raab*, 489 U.S. at 665-66.

²¹ See *Vernonia*, 515 U.S. at 652 (considering constitutionality of governmental search in school). The *Vernonia* Court determined that, in accordance with the text of the Fourth Amendment, reasonableness must be considered when determining the constitutionality of a governmental search. *Id.*

caused by the search regardless of whether probable cause exists.²²

B. What Constitutes A "Search" In The School Context

The Supreme Court has held that it is impracticable to require a school administrator to obtain a warrant or to have probable cause before searching a student for drugs or other contraband.²³ Because a warrantless search of this type is based on the special need to protect the entire student body, a search must, therefore, only be considered "reasonable" to be constitutional.²⁴ To be "reasonable," the need to perform the search must outweigh any privacy interest that a student may enjoy under the Fourth Amendment.²⁵ Conversely, when a search is random, includes a broad base of students, and pertains to a compelling school need such as drug-use prevention, individualized suspicion is not required.²⁶

In 1995, in *Vernonia School District 47J v. Acton*, the Supreme Court developed a modified "reasonableness" test for random, suspicionless searches in schools.²⁷ The court applied a three-factor analysis for

²² See *Camara*, 387 U.S. at 536-39 (holding administrative search of residence by health and safety inspectors to be reasonable). Although the Court held that residence searches are significant intrusions upon privacy interests protected by the Fourth Amendment, the warrantless searches were considered reasonable because the governmental interest in preventing the development of hazardous conditions outweighed any individual privacy invasion. *Id.* at 535.

²³ See *Vernonia*, 515 U.S. at 653 (recognizing warrant and probable cause requirements impracticable in public school context). The Court stated, "[T]he warrant requirement would 'unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" *Id.* (quoting *T.L.O.*, 469 U.S. at 340-41).

²⁴ See *T.L.O.*, 469 U.S. at 337 (recognizing reasonableness of a search depends upon context of search).

²⁵ *Id.*

²⁶ See *Vernonia*, 515 U.S. at 652-53 (1995) (establishing balancing test to determine "reasonableness" of search). In *Vernonia*, the Court held that suspicionless urinalysis testing of student athletes for illegal drugs did not constitute an unreasonable search. *Id.* at 657. The Court reasoned that a blanket drug search of all student athletes was constitutional because an interest existed that was sufficiently important to justify the need for the search. *Id.* But see *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting) (disagreeing with majority's reasoning and decision). Justice O'Connor argued that the Court's decision to dispense with individualized suspicion was wrong. *Id.* She rejected the majority's reasoning that a "broad-based search regime" diluted the accusatory nature of the search. *Id.* Justice O'Connor counter-argued that blanket searches, because they can involve "thousands or millions" of searches, "pose a greater threat to liberty" than do suspicion-based searches because suspicion-based searches only "affect one person at a time." *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 365 (1987)); see also *Bd. of Educ. v. Earls*, 536 U.S. 822, 827-28 (2002) (applying *Vernonia* balancing test and upholding random drug testing on students in extra-curricular activities).

²⁷ See *Vernonia*, 515 U.S. at 649 (discussing standard for determining reasonableness of

balancing the students' privacy interests against the school administrator's interest in conducting the search.²⁸ The three factors include 1) the nature of the privacy interest; 2) the character of the intrusion; and 3) and the nature and immediacy of the governmental concern paired with the efficacy of the search method.²⁹

In *New Jersey v. T.L.O.*,³⁰ the Supreme Court considered school searches that were not random, and held that searches in schools, a unique setting, require a modified level of suspicion to justify a search.³¹ To determine the reasonableness of a search, the *T.L.O.* Court introduced a two-part reasonableness inquiry which considered 1) whether the search was justified at its inception, and 2) whether the search was reasonably related in scope to the circumstances that originally justified the search.³² Although greatly lessened, a student's expectation of privacy in the school environment is not entirely eliminated.³³

searches in school context).

²⁸ *Id.* at 664-65.

²⁹ See *Vernonia*, 515 U.S. at 664-69. The *Vernonia* Court applied a three-factor analysis to reach its decision enforcing the constitutionality of random drug testing of all student athletes. *Id.* at 649. The three factor-analysis includes: 1) the nature of the privacy interest; 2) the character of the intrusion; and 3) the nature and immediacy of the governmental concern and the efficacy of the search-method in addressing the concern. *Id.* at 654-66. With respect to satisfaction of the first factor, the Court reasoned that a public school assumes "custodial and tutelary" responsibility for its students. *Id.* at 655-57. According to the second factor, the Court concluded that the privacy interests compromised by the process of obtaining urine samples from students were negligible because the conditions under which the samples were collected were practically identical to those experienced in public restrooms. *Id.* at 658-60. As to the third factor, the Court held that the nature of the governmental concern, to quell and prevent student drug abuse, was important and compelling. *Id.* at 660-62.

³⁰ 469 U.S. 325 (1985).

³¹ See *id.* at 340 (stipulating legality of search depends on reasonableness of search in all circumstances). The Court adopted a "totality of circumstances" test to determine if a search is reasonable. *Id.* at 365. This test is less stringent than the Fourth Amendment probable cause test. *Id.* Furthermore, the Court determined that the search of a student by a school administrator is justified if there are reasonable grounds for suspecting that a search will uncover evidence of criminal activity or a violation of school rules. *Id.* at 341-42. The Court did not address whether "reasonableness" requires individualized suspicion before a search may occur. *T.L.O.*, 469 at 342 n.8.

³² *T.L.O.*, 469 US. at 326. The Court adopted a two-prong "reasonableness" test. *Id.* The prongs include 1) whether the search was justified at its inception, and 2) whether the search was reasonably related in scope to the circumstances that that originally justified the search. *Id.* The Court went on to state that, generally, a student search is considered "justified at its inception" where reasonable grounds exist for suspecting that the search will produce evidence that the student violated a law or school rule. *Id.* at 341. The search is "related in scope" when the adopted search methods are "reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction." *Id.* at 342.

³³ See generally *T.L.O.*, 469 U.S. 325 (1985) (holding search of student with less than probable cause constitutionally permissible); Bradfield, *supra* note 5 (discussing constitutionality of dog-sniff searches in public school arena).

C. Past Cases Involving Dog-Sniff Searches Of A Student's Person

For more than twenty years, courts have wrestled with the issue of whether the close proximity dog-sniffing of a student's person constitutes a search within the parameters of the Fourth Amendment.³⁴ In 1980, the Seventh Circuit decided *Doe v. Renfrow*,³⁵ a case involving the use of police dogs to sniff 2780 students while seated at their desks during school hours.³⁶ In this case, the *Renfrow* court reasoned that the purpose of utilizing dogs in the classroom was merely to assist with the police officials' observations of students; the court subsequently held that a close proximity dog-sniff of a student does not constitute a search and thus does not require a threshold of reasonable, individual suspicion.³⁷

In *Horton v. Goose Creek Indep. Sch. Dist.*,³⁸ a 1983 case sharing nearly identical facts with *Renfrow*, the Fifth Circuit reached an opposite decision.³⁹ In *Horton*, the Fifth Circuit held that close proximity dog-sniffing of a student's person is a Fourth Amendment search, particularly when the dog actually touches the student.⁴⁰ Consequently, a search of a student's person could not be justified as reasonable without individualized suspicion that a student engaged in unlawful behavior.⁴¹ The court considered the use of police dogs to not only be a "search," but more specifically, an unreasonable search because the up-close, sometimes touching, dog-sniffs were considered unjustified intrusions upon the students' dignity and security.⁴² Sixteen years later, in *B.C. v. Plumas Unified Sch. Dist.*,⁴³ the

³⁴ See, e.g., *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1999) (holding close proximity dog-sniff of students an unreasonable Fourth Amendment search); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 488 (5th Cir. 1982) (holding close proximity dog-sniff of students an unreasonable Fourth Amendment search); *Doe v. Renfrow*, 631 F.2d 91, 94 (7th Cir. 1980) (holding close proximity dog-sniff of students not a Fourth Amendment search).

³⁵ 631 F.2d 91 (7th Cir. 1980).

³⁶ *Renfrow*, 631 F.2d at 92.

³⁷ *Id.* at 92-94 (holding close proximity dog-sniff of students an unreasonable Fourth Amendment search). But see *Renfrow*, 631 F.2d at 94 (Swygert, J., dissenting) (arguing that close-proximity dog-sniff of students was a Fourth Amendment search). In his dissenting opinion, Justice Swygert emphasized facts indicating that the dogs placed their noses on the students' legs. *Id.* For this reason, Justice Swygert concluded that such actions constituted an unreasonable invasion upon personal security that would likely have long-lasting psychological repercussions. *Id.* (quoting *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)).

³⁸ 690 F.2d 470 (5th Cir. 1982).

³⁹ See *Horton*, 690 F.2d at 479. Police dogs were brought into random classrooms to sniff-search students sitting at their desks. *Id.*

⁴⁰ *Id.*

⁴¹ See *id.* at 480 (citing *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977)).

⁴² See *id.* at 482 (discussing reasonableness of canine sniff-search of students in classrooms). The court stated, "The intrusion on dignity and personal security that goes with the type of canine

Ninth Circuit reached a decision similar to the Fifth Circuit in *Horton*, and held that a random, suspicionless dog-sniff of a student's person infringes on a reasonable expectation of privacy and, hence, constitutes a search.⁴⁴

Most United States Circuit Courts of Appeals have agreed that "reasonableness" is generally contingent upon the level of offensiveness involved with the dog-sniff.⁴⁵ The courts have attempted to establish a distinction between what is considered offensive and what is considered an inoffensive student dog-sniff.⁴⁶ Most courts have implied that the action of merely walking police dogs up and down the aisles of a classroom while sniffing students at a reasonable distance for contraband may not be considered an unreasonable search.⁴⁷ These courts have only held that an unreasonable search occurs when the canine touches, or approaches touching the student.⁴⁸

inspection of the student's person . . . cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion, and we hold it unconstitutional." *Id.* at 481-82.

⁴³ 192 F.3d 1260 (9th Cir. 1999).

⁴⁴ See *Plumas*, 192 F.3d at 1266 (holding random, suspicionless dog-sniff-search of students unreasonable absent a drug problem in school). The court reasoned that any close proximity sniffing of a person is offensive and highly intrusive whether the "sniffer be canine or human." *Id.* at 1266 (quoting *Horton*, 690 F.2d at 479). The court upheld the district court's finding that the dog-sniff was highly intrusive because the body and its odors are highly personal. *Id.* at 1267. The court also recognized that dogs "often engender irrational fear," particularly when a search is sudden, unannounced, and involuntary. *Id.* (citing *Horton*, 690 F.2d at 483).

⁴⁵ See, e.g., *Horton*, 690 F.2d at 478-81 (holding random dog-sniffs of people indecent and demeaning and hence unreasonable); *Plumas*, 192 F.3d at 1266; *United States v. Kelly*, 302 F.3d 291, 294 (5th Cir. 2002) (holding dog-sniff-search of defendant during routine border stop reasonable). The *Kelly* court reasoned that "persons approaching an international border and checkpoint can reasonably expect to be stopped, questioned, and possibly searched." 302 F.3d at 294. It distinguished this case from *Horton*, emphasizing that "the Government's power to conduct searches for contraband in order to secure its international borders is significant." *Id.* at 295. Moreover, the court noted that "searches conducted at an international border are less likely to cause embarrassment or loss of dignity to the subject. In *Horton*, the court was particularly concerned about the impact of the public, in-class searches on young adolescents." *Id.*

⁴⁶ See *Horton*, 690 F.2d at 481-82 (holding sniff of student's person to be invasion of privacy and dignity); see also *Plumas*, 192 F.3d at 1266 (determining involuntary dog-sniff of students' persons to be invasion of privacy not outweighed by government interest to deter student drug use). In *Horton*, trained narcotic sniffing dogs touched students while assisting police officers searching for narcotics. *Horton*, 690 F.2d at 481. In *Plumas*, however, the dog did not "sniff around each student, touch the students in any manner, or display signs of excitement . . . the dog was always three to four feet from the students as they exited and re-entered the classroom." *Plumas*, 192 F.3d at 1270.

⁴⁷ See *Plumas* 192 F.3d at 1266 (holding that close proximity search of person always offensive); see also *Horton*, 690 F.2d at 479 (holding actions of sniffing around student, putting dog's nose on student to be intrusive in nature). The *Horton* court specifically reserved judgment on whether the "use of dogs to sniff people in some other manner, e.g., at some distance, is a search." *Id.* at 479.

⁴⁸ See *Horton*, 690 F.2d at 477-79 (discussing offensive nature of close-proximity dog sniff

D. Current Law Regarding Dog-Sniff Searches Beyond The Educational Setting

The issue of the constitutionality of dog-sniff searches extends far beyond the educational context.⁴⁹ The Supreme Court has held that the use of well-trained narcotic-detecting dogs to reveal the location of contraband during a lawful traffic stop generally does not implicate Fourth Amendment privacy interests.⁵⁰ Conversely, when a dog-sniff results in direct contact with a person, the federal courts generally acknowledge that a search within the meaning of the Fourth Amendment has occurred.⁵¹ If,

searches); *see also* *Plumas* 192 F.3d at 1270 (reasoning that dog-sniffs that did not touch students were not offensive or unreasonable). The *Horton* court emphasized the impact of close proximity dog-sniff searches on students by stating, "One can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person." *Horton*, 690 F.2d at 479. *But see* *Plumas*, 192 F.3d at 1271-72 (Brunetti, J., concurring) (arguing close proximity search inoffensive and reasonable). Justice Brunetti noted, in relevant text:

Whether we or the public find government conduct offensive is irrelevant to Fourth Amendment analysis because Fourth Amendment analysis is not dependent upon whether government conduct is offensive. Instead, Fourth Amendment analysis depends on whether government conduct unreasonably invades a reasonable expectation of privacy . . . this [offensiveness] analysis . . . cannot satisfy the analytical standards Fourth Amendment jurisprudence prescribes.

Id.

⁴⁹ *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 408, 408-09 (2005) (examining constitutionality of dog-sniff search during routine traffic stop); *United States v. Place*, 462 U.S. 696, 707 (1983) (holding exposure of luggage to trained narcotic-sniffing dog not a Fourth Amendment search); *United States v. Beale*, 736 F.2d 1289, 1292 (9th Cir. 1984) (holding dog-sniff of luggage did not constitute search).

⁵⁰ *See Caballes*, 543 U.S. at 409 (holding dog-sniff search of car exterior not a search under Fourth Amendment); *see also* *United States v. Jacobsen*, 466 U.S. 109, 123 n.22 (1984) (reiterating that search occurs when one's reasonable expectation of privacy is infringed).

⁵¹ *See Horton*, 690 F.2d at 479 (holding actions of sniffing around student, putting dog's nose on student to be intrusive in nature); *Plumas*, 192 F.3d at 1266-67 (holding non-contact dog sniff of students at school constitutes Fourth Amendment search); *U.S. v. Reyes*, 349 F.3d 219, 223-24 (5th Cir. 2003) (holding non-contact dog-sniff of defendant passenger when exiting bus at station not a Fourth Amendment search); *see also* *Doe v. Renfrow*, 631 F.2d 91, 94 (7th Cir. 1980) (Swygert, J., dissenting) (arguing that where dogs physically touched students while sniffing an unreasonable Fourth Amendment search occurred). *But see Renfrow*, 631 F.2d at 92 (holding dog sniff of students where physical contact occurred not a Fourth Amendment search). In *Reyes*, the court considered both the *Horton* and *Plumas* decisions and recognized that "close proximity" is an "element" that should be considered when determining if a dog-sniff of a person constitutes a Fourth Amendment search. *Reyes*, 349 F.3d at 224. The *Reyes* court held that the defendant, who was located four to five feet away from the sniffing dog, was not in "close proximity" at the time he alerted police to the presence of cocaine. *Id.* Consequently, the sniff was considered "minimally intrusive" and did not constitute a Fourth Amendment search. *Id.*

however, the search-situation is one in which an individual has a lessened expectation of privacy, reasonable suspicion is the only requisite needed to commence such a search.⁵² The federal courts have affirmed that a close proximity dog-sniff of a person constitutes a Fourth Amendment search.⁵³ Moreover, courts generally agree that if the sniff search of an individual's person is deemed "reasonable," the search, thus, does not exceed the parameters of the Fourth Amendment.⁵⁴ Invasion of one's privacy and dignity during a search serves as the determinative factor when establishing a search's "reasonableness."⁵⁵

III. HISTORY OF DOG-SNIFF SEARCHES IN MASSACHUSETTS

Although Massachusetts courts have yet to make a decision regarding the propriety of random and suspicionless dog-sniffs of students' persons, they have ruled on the propriety of police dog-sniffs outside of the public school arena.⁵⁶ In *Commonwealth v. Feyenord*⁵⁷ [hereinafter *Feyenord II*], the Mass. SJC held that the exterior dog-sniff of a detained vehicle is not a "search" under the United States Constitution or under Ar-

⁵² See *Katz v. United States*, 389 U.S. 347, 351 (1967) (holding information that a person knowingly exposes to public is not protected by Fourth Amendment); see also *United States v. Kelly*, 302 F.3d 291, 295 (5th Cir. 2002) (holding dog-sniff-search of individual's groin reasonable because search occurred during "routine border search"); see also *United States v. Maldonado-Espinosa*, 767 F. Supp. 1176, 1187 (D.P.R. 1991) (determining dog-sniff not a search due to lessened expectation of privacy in airports). *Contra Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 234 (E.D.Tex. 1980) (holding dog-sniff-search in school not analogous to search in airport because school searches are mandatory for all students).

⁵³ See, e.g., *Horton*, 690 F.2d at 474-75 (discussing prior dog-sniff search related cases); *Plumas*, 192 F.3d at 1266 (discussing prior decisions relating to personal contact in dog-sniff searches in schools); *Kelly*, 302 F.3d at 295 (holding up-close sniffing at border constitutes a search).

⁵⁴ See, e.g., *Horton*, 690 F.2d at 474-75 (discussing prior dog-sniff search related cases); *Plumas*, 192 F.3d at 1266 (discussing prior decisions relating to personal contact in dog-sniff searches in schools); *Kelly*, 302 F.3d at 295 (holding up close sniffing at border search to be a search).

⁵⁵ See, e.g., *Horton*, 690 F.2d at 474-75 (discussing prior dog-sniff search related cases); *Plumas*, 192 F.3d at 1266 (discussing prior decisions relating to personal contact in dog-sniff searches in schools); *Kelly*, 302 F.3d at 295 (holding up close sniffing at border search to be a search); see also *Plumas*, 192 F.3d at 1271-72 (Brunetti, J., concurring) (arguing some close proximity searches inoffensive and reasonable); *Katz*, 389 U.S. at 353 (holding electronic recording and eavesdropping of petitioner's telephone booth conversation constituted Fourth Amendment search). The *Katz* court stated in relevant text, "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353.

⁵⁶ See *Commonwealth v. Feyenord*, 833 N.E.2d 590 (Mass. 2005) [hereinafter *Feyenord II*].

⁵⁷ 833 N.E.2d 590, 600 (Mass. 2005).

ticle Fourteen of the Massachusetts Declaration of Rights.⁵⁸ The court reasoned that the intrusion caused by the use of a dog-sniff is limited and, therefore, it logically follows that the searched individual is not subject to embarrassment or inconvenience that could otherwise render the search unreasonable.⁵⁹ Furthermore, the Mass. SJC stated that neither it, nor society, were prepared to recognize an individual's expectation of privacy with regard to the odors emanating from illegal contraband concealed on that person.⁶⁰ The Massachusetts Appeals Court's decision in *Feyenord* [hereinafter *Feyenord I*], which was ultimately upheld by the Mass. SJC, specifically stated that the act of sniffing or touching that can accompany a similar search might, in alternative circumstances, be considered a degrading intrusion that should outweigh any governmental justification.⁶¹ The Mass. SJC recognized that situations may exist where a dog-sniff would constitute a Fourth Amendment search, particularly when a dog is used to sniff the body of a person rather than, for example, his luggage or vehicle exterior.⁶² Prescriptively, the court emphasized that the constitutionality of a search depends on whether a trained dog intruded upon one's reasonable expectation of privacy.⁶³

⁵⁸ *Id.* at 594 (upholding lower court's decision that dog-sniff during lawful traffic stop was not a search); see also *Commonwealth v. Feyenord*, 815 N.E.2d 628, 635 (Mass. App. Ct. 2004) [hereinafter *Feyenord I*] (finding that dog-sniff-search did not intrude upon defendant's legitimate expectation of privacy).

⁵⁹ See *Feyenord I*, 815 N.E.2d at 634 (emphasizing impersonal nature of dog-sniff search of vehicle exterior). The Massachusetts Appeals Court stated that embarrassment and inconvenience are two factors that may indicate a heightened level of intrusiveness. *Id.* (quoting *United States v. Place*, 642 U.S. 696, 707 (1983)). It also stated, "'We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.'" *Id.* (quoting *Place*, 462 U.S. at 707); see also *Feyenord II*, 833 N.E.2d at 601 (upholding the Massachusetts Appeals Court's decision).

⁶⁰ *Feyenord II*, 833 N.E.2d at 601 n.12 (citing the Massachusetts Appeals Court's decision in *Feyenord I*, 815 N.E.2d at 634).

⁶¹ See *Feyenord II*, 833 N.E.2d at 601, n.12 (referencing Appeals Court's decision to reserve judgment on issue of dog-sniff searches of individuals' persons). The Mass. SJC noted that the use of dog-sniffs in other settings, such as to sniff a person's body, was not at issue in this case and would require an independent constitutional evaluation. *Id.*; see also *Feyenord I*, 815 N.E.2d at 634 (emphasizing that the *Feyenord I* decision did not apply to constitutionality of close proximity dog-sniff searches). The court stated in relevant text,

The issues are different not because society is prepared to recognize an expectation of privacy in the odor of contraband concealed upon a person, as opposed to the odor of contraband concealed in a car, but because the very act of sniffing a person, and the touching that may accompany that sniffing, may be degradingly intrusive.

Id.

⁶² *Feyenord II*, 833 N.E.2d at 601 n.12.

⁶³ *Feyenord II*, 833 N.E.2d at 601 n.12 (Mass. 2005) (referencing Appellate Court's decision); see also *Feyenord I*, 815 N.E.2d at 634 (Mass. App. Ct. 2004) (considering constitutional-

IV. HISTORY OF FOURTH AMENDMENT SEARCHES IN MASSACHUSETTS SCHOOLS

The Mass. SJC has already encountered numerous cases implicating Fourth Amendment issues regarding the search of students, their belongings, and their lockers without the use of contraband sniffing dogs.⁶⁴ It is not clear, however, whether Article Fourteen of the Massachusetts Declaration of Rights⁶⁵ provides for a stricter reasonableness standard during school searches than does the reasonableness standard of the Fourth Amendment as defined by *New Jersey v. T.L.O.*; in other words, the Mass. SJC has yet to determine if school officials are required to have probable cause to believe a legal violation has occurred prior to conducting searches in schools.⁶⁶ In *Commonwealth v. Buccella*,⁶⁷ the Mass. SJC applied the

ity of close proximity dog-sniff searches of an individual's person). The Appeals Court stated, "The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy." *Id.* (quoting *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985)).

⁶⁴ See *Commonwealth v. Damian D.*, 752 N.E.2d 679, 682-83 (Mass. 2001) (holding search based on violation of school rule unrelated to possession of contraband or threat of violence was unreasonable); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1366 (Mass. 1992) (holding student had reasonable expectation of privacy in his locker); see also *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 663 (Penn. 2003) (holding students' legitimate expectation of privacy in lockers to be minimal); *Ex rel Isaiah B.*, 500 N.W.2d 637, 649-51 (Wis. 1993) (holding students do not have reasonable expectation of privacy in lockers). In *Snyder*, the court held that a school code stating that a student has a right not to have his or her locker subjected to unreasonable searches created a reasonable expectation of privacy in students' lockers. *Snyder*, 597 N.E.2d at 1366. Other state courts have also recognized a legitimate expectation of privacy in students' lockers absent a school policy to the contrary. See *Theodore*, 761 A.2d at 663; *Ex rel Isaiah B.*, 500 N.W.2d at 649-50. The *Theodore* court determined that a student's expectation of privacy in his or her locker is minimal where the locker is the school's property, the locker combination is kept on file by the school, and students are warned that their locker's may be subject to a "reasonable suspicion" search. *Theodore*, 761 A.2d at 663. The *Ex rel Isaiah* court reached the decision based on the fact that the public school system had a written policy retaining ownership and possessory control of school lockers and notice of this policy was given to the students. *Id.* at 649.

⁶⁵ MASS. CONST. art. XIV.

⁶⁶ MASS. CONST. art. XIV; see *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (adopting a "Fourth Amendment standard of reasonableness that stops short of probable cause"); see, e.g., *Commonwealth v. Buccella*, 751 N.E.2d 373, 383 n.9 (Mass. 2001) (explaining where defendant made no Article Fourteen violation, claims court could not address issue); *Damian D.*, 752 N.E.2d at 683 (noting that court's conclusion that search was unreasonable left residual Article Fourteen question unanswered); *Snyder*, 597 N.E.2d at 1366 (failing to compare reasonableness requirements of Article Fourteen with Fourth Amendment). Article Fourteen reads as follows:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property,

New Jersey v. T.L.O. “reasonable under all circumstances” test in the school context.⁶⁸ The court determined that a search must be reasonable at its inception and it must also be reasonably related in scope to the circumstances that justified the search at its inception.⁶⁹

Similarly, in *Commonwealth v. Snyder*,⁷⁰ the Mass. SJC emphasized that a student maintains a reasonable expectation of privacy in his or her locker.⁷¹ As a result of this expectation, the court held that, under Article Fourteen, probable cause is the maximum standard of reasonableness that a Massachusetts court could constitutionally require when a school search is performed.⁷² The Mass. SJC decided that a school’s legitimate

be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. art. XIV.

⁶⁷ 751 N.E.2d 373 (Mass. 2001).

⁶⁸ See *id.* at 384 (finding search satisfied both prongs of *T.L.O.* “totality of circumstances” test). A search is reasonably related in 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.” *Buccella*, 751 N.E.2d at 384 (Mass. 2001) (quoting *T.L.O.*, 469 U.S. at 342).

⁶⁹ *Buccella*, 751 N.E.2d at 384-85 (2001) (discussing constitutionality of searches in schools).

⁷⁰ 751 N.E.2d 1363 (Mass. 1992).

⁷¹ See *Snyder*, 597 N.E.2d at 1366 (holding students maintain reasonable and protected expectation of privacy in lockers). In *Snyder*, the court went on to state that because the defendant student had a reasonable expectation of privacy in his locker, he accordingly had a right to argue his Fourth Amendment right be free from an unreasonable search and seizure. *Id.* The *Snyder* court also acknowledged that the defendant had the right to make a similar argument under Article Fourteen because he had a reasonable expectation of privacy in his locker. *Id.* The *Snyder* court held, however, that because there was sufficient probable cause to believe the defendant had marijuana in his locker, the search of the defendant’s locker without the authority of a search warrant was reasonable; therefore the search was in compliance with the Fourth Amendment and *T.L.O.*’s “reasonable under all circumstances test.” *Id.* The *Snyder* court also went on to state that the search did not violate Article Fourteen because Article Fourteen allows for the dispensation of the search warrant requirement when probable cause to search exists. *Id.* at 1367. The *Snyder* court did not determine, however, whether Article Fourteen’s requirements impose a stricter standard on school searches than those of the Fourth Amendment; instead, the court side-stepped the issue by stating, “certainly, [Article Fourteen] imposes no higher standard than probable cause . . . if there was probable cause to search the locker when it was searched, the requirements of [Article Fourteen] were met.” 597 N.E.2d at 1367. But see *Ex rel Isaiah B.*, 500 N.W.2d 637, 641 (Wis. 1993) (holding student did not maintain reasonable expectation of privacy in lockers). In *Isaiah B.*, the court emphasized that students did not have a reasonable expectation of privacy in their lockers where the school had promulgated a locker policy retaining possessory control of lockers. *Id.*

⁷² See *Snyder*, 597 N.E.2d at 1366-67 (discussing whether search of student’s locker with probable cause was reasonable under both state and federal constitutions). The *Snyder* court’s decision suggested, however, that the standard of reasonableness that a Massachusetts court may impose on school searches under Article Fourteen could be less than probable cause in accor-

interest, combined with only a minor degree of intrusiveness caused by a search, renders a search “reasonable” when there is a threat to the student body’s safety.⁷³ In prior cases involving locker searches, including *Snyder*, the Mass. SJC found each respective search to be “reasonable” because probable cause was clearly established and supported with convincing evidence.⁷⁴ Consequently, the Mass. SJC has yet to address the issue of whether Article Fourteen imposes a stricter standard than the *T.L.O.* “reasonableness under all circumstances” standard that is necessary under the Fourth Amendment to conduct both random searches and searches supported by suspicion in schools.⁷⁵

V. MASSACHUSETTS SHOULD FIND CLOSE PROXIMITY DOG-SNIFFS OF STUDENTS’ INDIVIDUAL PERSONS TO BE UNREASONABLE SEARCHES

Massachusetts courts have yet to encounter the issue of whether a close proximity dog-sniff of a student’s individual person is a search, and if so, whether it is a reasonable search under the Fourth Amendment and Article Fourteen.⁷⁶ To be considered unreasonable, the Mass. SJC is encour-

dance with the “reasonable under all circumstances” test adopted by the *T.L.O.* Court. *Id.* at 1367.

⁷³ *Id.* (holding that sufficient probable cause rendered search of student’s locker reasonable).

⁷⁴ See *id.* at 1367-68 (finding knowledge of reliable information of student’s possession of marijuana in book bag to be sufficient probable cause); see also *Commonwealth v. Lawrence L.*, 792 N.E.2d 109, 113-14 (Mass. 2003) (determining odor of marijuana emanating from student, knowledge of prior incident, and student’s response to questions sufficient probable cause).

⁷⁵ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (adopting a “Fourth Amendment standard of reasonableness that stops short of probable cause”); see, e.g., *Commonwealth v. Buccella*, 751 N.E.2d 373, 383 n.9 (Mass. 2001) (explaining where defendant made no Article Fourteen violation, claims court could not address issue); *Commonwealth v. Damian D.*, 752 N.E.2d 679, 683 (Mass. 2001) (noting that court’s conclusion that search was unreasonable left residual Article Fourteen question unanswered); *Snyder*, 597 N.E.2d at 1366 (failing to compare reasonableness requirements of Article Fourteen with Fourth Amendment); see also *Snyder*, 597 N.E.2d at 1367. In *Snyder*, court stated,

The more substantial issue in this case is whether the search and seizure was unreasonable under Article Fourteen of the Declaration of Rights of the Constitution of the Commonwealth. In construing the Constitution of the Commonwealth, we are not bound to follow the standards that the Supreme Court of the United States has adopted in applying provisions of the Constitution of the United States that are similar or even identical to provisions in the Commonwealth’s Constitution.

Id. at 1367.

⁷⁶ See *supra* notes 61-63 and accompanying text (discussing the court’s reservation of judgment on the matter in *Feyenord I* and *Feyenord II* decisions); see also *supra* notes 66-75 (discussing the Mass. SJC’s failure to address extent of Article Fourteen’s application to school searches).

aged to find that each individual student's expectation of privacy in a close proximity dog-sniff search outweighs the school's need to protect the entire student body.⁷⁷ Furthermore, it is unclear whether Massachusetts would lower the "offensiveness" standard that has been set by the prior United States Appellate Courts decisions, and consequently find searches to be unreasonable in situations where other jurisdictions may consider the same search to be reasonable.⁷⁸ In light of prior decisions regarding general dog-sniffs and schools searches, the Mass. SJC could hold both suspicionless and non-suspicionless close proximity dog-sniff searches of students to be unreasonable searches, and hence, in violation of both Article Fourteen and the Fourth Amendment.⁷⁹

A. Massachusetts and Article Fourteen

Although the Mass. SJC established that a police dog-sniff of a car's exterior does not constitute a search as defined in *Feyenord II*, it is yet to be determined whether close proximity dog-sniffs of an individual's person constitutes a search.⁸⁰ Should the court decide this issue in the affirmative, the Mass. SJC should then also determine if Article Fourteen affords greater protections than those provided in the Fourth Amendment and in *T.L.O.*⁸¹ Ultimately, the court must decide if close proximity dog-sniffs require probable cause and individualized suspicion prior to conducting the search.⁸²

Based on the Mass. SJC's express acknowledgement of the intrusive nature of close proximity dog-sniffs in *Feyenord II*, it is reasonable to suggest that the Mass. SJC would find a close proximity dog-sniff of a student's individual person to constitute a search.⁸³ To do so, the Mass. SJC could find that the sniff intrudes on a constitutionally protected reasonable expectation of privacy.⁸⁴ The Mass. SJC has already unequivocally deter-

⁷⁷ See *supra* note 31-32 and accompanying text (discussing holding of *T.L.O.*).

⁷⁸ See *supra* notes 42-46 and accompanying text (discussing various court interpretations of "offensiveness" in context of in-school dog-sniff searches).

⁷⁹ See MASS. CONST. art. XIV (granting Massachusetts citizens the right to be free from unreasonable searches and seizures).

⁸⁰ See *supra* note 61 and accompanying text (indicating Mass. SJC would reach different decision in close proximity dog-sniff situation).

⁸¹ See *supra* note 66 and accompanying text (discussing possibility that Massachusetts may afford its students greater protection than other jurisdictions).

⁸² See *supra* notes 61-63 and accompanying text (expounding Massachusetts Appeals Court and Mass. SJC's prescriptive standard for close proximity dog searches).

⁸³ See *supra* note 63 and accompanying text (indicating the Mass. SJC's likely inclination to hold close proximity dog-sniff search of one's person unconstitutional).

⁸⁴ See *supra* note 17 and accompanying text (stipulating what is required to establish viola-

mined that students maintain a reasonable expectation of privacy in their lockers absent a school policy to the contrary.⁸⁵ These Mass. SJC holdings indicate that Massachusetts recognizes that students retain privacy interests in their personal belongings within the schoolhouse doors; logically, the Mass. SJC should favor the decision arrived upon in *Plumas* and extend Fourth Amendment and Article Fourteen privacy rights to the student's person as well.⁸⁶

If the Mass. SJC holds that a close proximity dog-sniff of a student's individual person constitutes a search, the court will then have to determine if that search is reasonable.⁸⁷ The Mass. SJC should expand the lessened standard of reasonableness adopted by the *T.L.O.* Court and, under a more protective Article Fourteen, require school administrators to have sufficient probable cause to believe that a crime or violation of school code has been committed before a search may be conducted.⁸⁸ In accordance with the Fourth Amendment, Article Fourteen, and the Supreme Court's reasoning in *Vernonia*, the Mass. SJC is encouraged to hold that any random, suspicionless, close proximity dog-sniffs of an entire student population that significantly implicate student privacy interests constitutes an unreasonable search.⁸⁹ An analysis under the Fourth Amendment, Article Fourteen, and *Vernonia* would also establish, however, that individualized suspicion is not necessary so long as the students' privacy interests implicated by the dog-sniff are minimal and the government or school administrator's interest in maintaining a safe student body would otherwise be compromised if individual suspicion was necessary.⁹⁰ The Mass. SJC is thus left with the difficult task of applying this analysis and determining which dog-sniff searches are considered "reasonable" intrusions, therefore

tion of one's reasonable expectation of privacy).

⁸⁵ See *supra* note 64-75 and accompanying text (delineating and describing Mass. SJC cases upholding reasonable expectation of privacy in lockers).

⁸⁶ See *supra* notes 64-75 and accompanying text (describing Mass. SJC's affirmation of the reasonable expectation students have in their lockers).

⁸⁷ See *supra* note 19 and accompanying text (expounding reasonableness requirement when probable cause and warrant are not required).

⁸⁸ See *supra* note 66 and accompanying text (explaining standard of reasonableness adopted by *T.L.O.* Court that stops short of probable cause); see also *supra* note 71 and accompanying text (expounding *Snyder* court's decision that Article Fourteen does not impose a higher standard than probable cause).

⁸⁹ See *supra* note 21-33 and accompanying text (indicating that unusual context of dog-sniff searches in schools requires careful consideration).

⁹⁰ See *supra* note 29 and accompanying text (discussing three-factor analysis used to determine "reasonableness" of suspicionless searches); see also *supra* note 51 and accompanying text (explaining *Reyes* court's holding that dog-sniff not performed in close proximity of defendant is minimally intrusive).

dispensing of the need for reasonable suspicion or probable cause.⁹¹

Accordingly, using the *Vernonia* test to determine the “reasonable-ness” of suspicionless dog-sniff searches in schools, the Mass. SJC could assess three factors: 1) the nature of the student’s privacy interest; 2) the character of the intrusion; and 3) the nature and immediacy of the governmental concern and the efficacy of suspicionless close proximity dog-sniff searches in schools for achieving this goal.⁹² An analysis of the first factor would require a consideration of a particular student’s age and the school’s custodial responsibility as temporary guardians.⁹³ When applying the second factor of the *Vernonia* test, the Mass. SJC should consider whether student privacy interests compromised by a close proximity dog-sniff searches are significant or negligible.⁹⁴ Finally, to consider the third factor and measure a sniff’s efficacy, the Mass. SJC should closely consider the physical, psychological, and addictive effects of drug use amongst the particular Massachusetts school districts’ students, combined with the affects of drugs on both the user and the entire student body.⁹⁵

In *United States v. Kelly*, the Fifth Circuit utilized the *Vernonia* test and identified the distinction between close proximity dog-sniff searches occurring at a border stop and those occurring in a school.⁹⁶ The *Kelly* court distinguished individuals who can expect to be searched when crossing the border from school students who generally have no reason to anticipate a dog-sniff search.⁹⁷ As to the first prong of the *Vernonia* test, the *Kelly* court, like the *Horton* court, emphasized the vulnerability of the student population and the need to protect students from embarrassing and potentially degrading dog-sniff searches.⁹⁸ Using *Kelly* and *Horton* as precedent, it is reasonable that the Mass. SJC should recognize that close proximity dog-sniff searches of public school students’ individual persons are not minimally intrusive or negligible due to the young age of such stu-

⁹¹ See *supra* note 29 and accompanying text (describing court’s application of first factor when analyzing particular facts of the *Vernonia* case).

⁹² See *supra* note 29 and accompanying text (expounding three-factor *Vernonia* test).

⁹³ See *supra* note 29 and accompanying text (delineating court’s application of three-factor analysis utilized in *Vernonia*).

⁹⁴ See *supra* note 61 (discussing Mass. SJC’s discussion of intrusive nature of close proximity dog-sniff searches in *Feyenord II* decision); see also *supra* note 29 and accompanying text (discussing court’s application of second factor to factual circumstances of *Vernonia*).

⁹⁵ See *supra* note 29 and accompanying text (discussing court’s application of third factor to factual circumstances of *Vernonia*).

⁹⁶ See *supra* note 45 and accompanying text (discussing facts and holding of *Kelly*).

⁹⁷ See *supra* note 45 and accompanying text (discussing *Kelly* court’s reasoning that students do not reasonably expect random searches while at school).

⁹⁸ See *supra* note 45 and accompanying text (emphasizing reasoning used in *Horton* decision and affirming need to protect students from such unreasonable searches).

dents in grades kindergarten through twelve as well as each student's ward-like status during school hours.⁹⁹ The Mass. SJC should protect Massachusetts's students from the potential embarrassment and loss of dignity that can be caused by a close proximity dog-sniff search of a student's body.¹⁰⁰

Additionally, as to the second prong of the *Vernonia* test, the *Kelly* court recognized that the government's need to perform close proximity dog-sniff searches to detect contraband and protect the United States outweighed the level of intrusion caused by the highly invasive dog-sniff search of the plaintiff.¹⁰¹ Quoting *Horton*, however, the *Kelly* court reasoned that the level of intrusion on dignity and personal security caused by a close proximity dog-sniff search in a school is not justified by the need to prevent drug or alcohol abuse absent individualized suspicion.¹⁰² The Mass. SJC is encouraged to adopt this reasoning and recognize that the highly intrusive act of a close proximity dog-sniff search of students far outweighs the government's need to perform the search; this need sharply contrasts with the same search's necessity in the context of a border search.¹⁰³ Consequently, the Mass. SJC could hold that a close proximity dog-sniff of a student's individual person fails the *Vernonia* test and is an unreasonable search under both the Fourth Amendment and Article Fourteen.¹⁰⁴

Not all close proximity dog-sniff searches, however, are random or suspicionless.¹⁰⁵ Applying the *T.L.O.* "reasonableness under all circumstances" test to a search of an individual student, the Mass. SJC should assess whether the search of each particular student was justified at its inception and reasonably related in scope to the circumstances that justified performance of the search.¹⁰⁶ To determine if a search is reasonably related

⁹⁹ See *supra* note 45 and accompanying text (discussing facts and respective holdings in *Kelly* and *Horton*).

¹⁰⁰ See *supra* note 45 and accompanying text (detailing potential "embarrassment and loss of dignity" that can be caused by close proximity searches); see also *supra* note 61 (expounding *Feyenord I*'s suggestions that close-proximity police dog-sniffs may be considered "degradingly intrusive").

¹⁰¹ See *supra* note 45 and accompanying text (discussing application of the offensiveness factor considered by the *Vernonia* test).

¹⁰² See *supra* note 45 and accompanying text (distinguishing *Kelly* from *Horton*).

¹⁰³ See *supra* note 45 and accompanying text (reasoning that government's need to perform border searches outweighs intrusive degree of dog-sniff search used on plaintiff).

¹⁰⁴ See *supra* note 29 and accompanying text (expounding *Vernonia* Court's application of three-prong analysis for determining constitutionality of random student searches).

¹⁰⁵ See *supra* note 31 and accompanying text (discussing *T.L.O.* holding that student search was not random).

¹⁰⁶ See *supra* note 32 and accompanying text (articulating the reasonableness test adopted in *T.L.O.*).

in scope, the Mass. SJC could assess whether the dog-sniff search satisfied the two-prong *T.L.O.* test.¹⁰⁷ First, the Mass. SJC would consider if the dog-sniff search is reasonably related to the objective of preventing drug use and violence.¹⁰⁸ Second, the Mass. SJC would consider whether the search was excessively intrusive in light of the age and genders of the students as well as the nature of the infraction.¹⁰⁹ Although dog-sniff searches are reasonably related to the prevention of drug abuse problems in schools, past Mass. SJC decisions indicate that it is reasonable for the Mass. SJC to hold that a close proximity dog-sniff search is excessively intrusive and thus fails the second prong of this test.¹¹⁰ The second prong of the “reasonableness under all circumstances” test may threaten the reasonableness of all close proximity dog-sniff searches in schools, particularly when performed on young children or when no existing or prominent drug problem exists in the school to create individualized suspicion.¹¹¹ For this reason, the Mass. SJC realistically could hold that, in most school settings, absent reasonable grounds to suspect an individual student, a highly intrusive, close proximity search fails the *T.L.O.* test.¹¹²

Federal circuit court holdings that have addressed the issue of the reasonableness of close proximity dog-sniff searches in schools remain inconsistent.¹¹³ Both *Horton* and *Plumas* involved search situations in which the respective courts determined that the drug sniffing dogs were unreasonably close to the students.¹¹⁴ In *Renfrow*, however, the court determined that because the dogs were only present in the classroom to assist the school official’s observation of the students, a sniff of students seated at their desks, during which the dogs physically touched the students, did not constitute a Fourth Amendment search.¹¹⁵ All Federal Circuit Courts that

¹⁰⁷ See *supra* note 32 and accompanying text (explaining definition of phrase “related in scope” articulated in *T.L.O.*).

¹⁰⁸ See *supra* note 32 and accompanying text (describing factors to consider when determining whether a search is “related in scope”).

¹⁰⁹ See *supra* note 32 and accompanying text (explaining definition of phrase “related in scope” articulated in *T.L.O.*).

¹¹⁰ See *supra* note 31-32 and accompanying text (describing the “reasonableness in all circumstances” test established in *T.L.O.*); see also *supra* note 61 (quoting *Feyenord I* court’s description of close-proximity dog-sniff search of individual persons as potentially “degradingly intrusive”).

¹¹¹ See *supra* note 32 and accompanying text (expounding two prongs of *T.L.O.*’s “reasonableness in all circumstances” test).

¹¹² See *supra* note 31-32 and accompanying text (discussing applicability of *T.L.O.*’s “reasonableness in all circumstances” test).

¹¹³ See *supra* notes 34 and accompanying text (discussing prior holdings reached by other circuits).

¹¹⁴ See *supra* note 34 and accompanying text (reiterating holdings of *Horton* and *Plumas*).

¹¹⁵ See *supra* note 34 and accompanying text (articulating holding in *Renfrow*).

have directly addressed the issue of whether a close proximity dog-sniff is an unreasonable search have placed considerable emphasis on the proximity of the dog to the student while the search is being conducted.¹¹⁶ Ultimately, based upon the consistency of all the Federal Circuit courts' decisions, as well as the reasoning employed by the Mass. SJC in the *Feyenord* decision, it is reasonable that the Mass. SJC could also hold that a dog-sniff that actually touches a student, comes close to touching a student, or at least poses a legitimate threat to the safety of the student, is always considered an unreasonable search under the Fourth Amendment and Article Fourteen.¹¹⁷

B. Offensiveness – Developing A Standard To Measure Reasonableness

Prior decisions provide little insight as to where a distinct line should be drawn between an “offensive” or “inoffensive” close proximity dog-sniff.¹¹⁸ In *Renfrow*, the Seventh Circuit determined that a search did not occur because students, who sat at their desks while drug-detecting dogs sniffed the air but not the students' persons, did not have a justified expectation of privacy; as a result, the court determined that a search did not occur.¹¹⁹ In *Horton*, students were physically touched by the sniffing-dogs, causing the court to hold such a search was unreasonable.¹²⁰ In *Plumas*, however, although students were not physically touched by the drug-sniffing dogs, the court held that the search was unreasonable and in violation of the Fourth Amendment.¹²¹ Consequently, precedent fails to establish a clear, bright-line rule for determining the level of intrusiveness necessary to deem a search offensive, and hence, unreasonable.¹²² Moreover, as the dissenting opinion in *Plumas* emphasized, there is no constitutional basis upon which “offensiveness” can be viably used as a method of gaug-

¹¹⁶ See *supra* notes 34-37 and accompanying text (detailing holdings of *Horton*, *Plumas*, and Justice Swygert's dissenting opinion in *Renfrow*).

¹¹⁷ See *supra* notes 44-46 and accompanying text (outlining reasoning employed by circuits in prior holdings); see also *supra* notes 59-61 (discussing factors considered by Massachusetts Appeals Court and Mass. SJC in *Feyenord I* and *Feyenord II* decisions).

¹¹⁸ See *supra* note 55 and accompanying text (expounding various opinions regarding offensive nature of searches).

¹¹⁹ See *supra* notes 35-37 and accompanying text (discussing reasoning used by *Renfrow* court in determining that dog-sniffs of students are not searches).

¹²⁰ See *supra* note 42 and accompanying text (noting reasoning used by *Horton* court).

¹²¹ See *supra* note 44 and accompanying text (delineating reasoning employed by *Plumas* court).

¹²² See *supra* note 46 and accompanying text (emphasizing discrepancies between prior court holdings).

ing the “reasonableness” of a search.¹²³ The dissenting opinion in *Plumas* went on to state that a proper Fourth Amendment analysis should only consider whether an individual’s “reasonable expectation of privacy” has been violated.¹²⁴

The Mass. SJC, however, has indicated that the search’s level of “offensiveness” does serve as an integral factor when determining whether one’s reasonable expectation of privacy has been violated.¹²⁵ In *Feyenord II*, the Mass. SJC determined that a dog-sniff of a properly stopped vehicle is not a search.¹²⁶ The Mass. SJC came to this conclusion after determining that the defendant’s expectation of privacy in the odor of illegal drugs emanating from his car was not one which society could recognize as reasonable.¹²⁷ Furthermore, the Mass. SJC determined that the sniff of a car’s exterior is so limited in nature that the property owner is not subjected to the embarrassment or inconvenience that may be caused by “less discriminate and more intrusive investigative methods.”¹²⁸

In reaching its decision in *Feyenord II*, the Mass. SJC was careful to emphasize that a distinction exists between dog-sniffs of a properly stopped vehicle and dog-sniffs in “other settings,” including the sniff of a person’s body.¹²⁹ The Mass. SJC noted that an issue arising from the dog-sniff of a person’s body would have to be “evaluated based on whether the privacy expectation in each of those settings is one society is willing to deem reasonable.”¹³⁰ Schools, however, are unique settings with regard to Fourth Amendment searches.¹³¹ Close proximity dog-sniffs within schools would, therefore, require close and careful consideration.¹³² Just as the Fifth Circuit *Kelly* court emphasized the differences that existed between

¹²³ See *supra* note 48 (quoting Justice Brunetti’s dissenting opinion in *Plumas*).

¹²⁴ See *supra* note 48 (discussing absence of “offensiveness” standard in proper Fourth Amendment analysis).

¹²⁵ See *supra* note 59 (discussing embarrassment and inconvenience as indicators of intrusive search).

¹²⁶ See *supra* notes 58-59 and accompanying text (discussing *Feyenord*’s facts and circumstances).

¹²⁷ See *supra* notes 58-59 (discussing reasonable expectation of privacy standard when determining constitutionality of dog-sniffs).

¹²⁸ See *supra* note 59 and accompanying text (emphasizing reasoning employed by *Feyenord II* court).

¹²⁹ See *supra* notes 62-63 and accompanying text (highlighting that issue of close proximity dog-sniffs is separate issue yet to be decided).

¹³⁰ See *supra* notes 61-63 and accompanying text (discussing potential standard to be used when determining offensiveness of close-proximity dog-sniff).

¹³¹ See *supra* note 23 and accompanying text (establishing special need exists in public school setting, thus dispensing of warrant and probable cause requirements).

¹³² See *supra* note 23 and accompanying text (discussing reasons for applying special need exception in public school searches).

close proximity dog-sniff searches performed at border stops and those performed at schools, the Mass. SJC will likely reach the same result when analyzing the facts of *Feyenord II* as compared to a sniff of a student's person in a school.¹³³ Consequently, in accordance with the consideration that the *Feyenord II* court gave to close proximity dog-sniff searches of individual people, the Mass. SJC will likely hold that a student's privacy expectation to be free from suspicionless dog-sniffs of his or her body is one that society is willing to recognize as reasonable.¹³⁴

VI. CONCLUSION

Massachusetts courts should find that a random close proximity dog-sniff of a student or group of students constitutes a search. To allow large dogs to approach innocent students and sniff each student's person in a highly intrusive and offensive manner is a violation of those individuals' Fourth Amendment and Article Fourteen rights. This type of dog-sniff search not only intrudes upon a student's subjective expectation of privacy, but also upon a socially recognized expectation of privacy.

Furthermore, Massachusetts should find that an up close dog-sniff search of an entire student population, which lacks individualized suspicion under the Fourth Amendment, is unreasonable. *T.L.O.* may have established a lessened expectation of privacy in schools, but it did not eliminate all Fourth Amendment rights belonging to students. A student's reasonable expectation of privacy to be free from highly intrusive and invasive canine searches outweighs a school administration's special need to perform this type of warrantless search.

Although *Vernonia* set a dangerous precedent by finding suspicionless drug searches of all student athletes to be reasonable, Massachusetts is not compelled to extend this decision to close proximity dog-sniff searches. The Mass. SJC has firmly established that students maintain a reasonable expectation of privacy in their lockers. To protect a student's material belongings, yet fail to extend the same protections to that student's actual body, would be entirely non sequitur.

Finally, the Mass. SJC should determine that the privacy protections guaranteed to students by Article Fourteen extend beyond those afforded by the Fourth Amendment. To do so, the Mass. SJC must protect Massachusetts' students from unreasonable searches that would not pass

¹³³ See *supra* note 45 and accompanying text (discussing factual differences between *Horton* and *Kelly*).

¹³⁴ See *supra* note 45 and accompanying text (considering differing analyses of *Horton* and *Kelly* courts).

Fourth Amendment muster outside the schoolhouse gates. Massachusetts has a duty to protect its vulnerable students from offensive, close proximity dog-sniff searches that would impede on any individual's sense of personal dignity. Consequently, Massachusetts, while recognizing the dire need to maintain a safe scholastic environment, must continue to protect the inherent privacy of its students.

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