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ARTICLES

RANDOM VS. SUSPICION-BASED DRUG TESTING IN THE PUBLIC SCHOOLS—A SURPRISING CIVIL LIBERTIES DILEMMA

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On March 21, 2001, the United States Court of Appeals for the Tenth Circuit decided the case of *Earls v. Board of Education*.[1] The Tecumseh School District had a policy that all students who wished to participate in extracurricular activities that involved some sort of competition had to agree to drug testing before the competition and then randomly thereafter.[2]

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1. Earls v. Bd. of Educ., 242 F.3d 1264 (10th Cir. 2001).
2. The program is described as follows:

> On September 14, 1998, the District adopted the Student Activities Drug Testing Policy . . . requiring drug testing of all students who participate "in any extra-curricular activity such as FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics.". . . Each student seeking to participate in such activities must sign a written consent agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion. The test detects amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines. It does not detect alcohol or nicotine.

In its split (3 to 2) decision, the Tenth Circuit panel ruled that such "random suspicionless urinalysis drug testing" was unconstitutional and invalid.[3] On November 8, 2001, the United States Supreme Court accepted this case for review.[4]

This article will review the legal concepts surrounding this decision and the options for school districts that wish to monitor their students so as to minimize drug activity on their school campuses. I conclude with an explanation of why I believe that suspicion-based drug testing is much more of a threat to the civil liberties and privacy rights of students than random testing.

APPLYING THE CONSTITUTION TO PUBLIC SCHOOLS

The basic constitutional principle prohibiting "unreasonable" searches and seizures by government officials,[5] of course, is found in the Fourth Amendment's prohibition of "unreasonable searches and seizures."[6]

This provision is, in fact, one of the bases for the broader privacy right of an individual to be free from unwarranted government intrusion.[7]

Until 1985, however, this Fourth Amendment protection against unreasonable searches did not apply to public schools. Teachers and

> Students subject to the Policy must pay a yearly fee of four dollars. Although the Policy does not expressly so state, it is undisputed that the Policy has in fact only been applied to those extracurricular activities involving some aspect of competition and which are sanctioned by the Oklahoma Secondary Schools Activity Association . . . .

Id. at 1267.

3. *Id.* at 1266.

4. Bd. of Educ. v. Earls, 122 S. Ct. 509 (2001).

5. The Fourth Amendment restrictions, of course, only apply to actions taken by government officials—described as "state action." Governments may have the right to regulate private entities, but the private entities, like private schools, are then governed by statutes and not federal or state constitutional doctrines. *See* Civil Rights Cases, 109 U.S. 3 (1883); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

6. U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

7. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

administrators acted *in loco parentis*—as if they were the parents. They were not bound by restrictions placed on other government agents.[8]

This "hands-off" policy ended with the United States Supreme Court decision in *New Jersey v. T.L.O.*[9] in 1985. The Court held that schoolteachers and administrators were government officials bound by the search and seizure limitations of the Fourth Amendment.[10]

The facts of *T.L.O.* illustrate the dilemma for schoolteachers and administrators. A high school teacher found two female students smoking in a bathroom, which was against school policy. Upon questioning by an assistant principal, one student (T.L.O.) denied smoking, and the administrator then asked for the student's purse, searched it, and saw a pack of cigarettes.[11]

He also saw a package of rolling papers and upon a further search found "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 that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing."[12] Based upon this evidence, juvenile delinquency charges were filed against T.L.O.[13]

T.L.O. filed a motion to suppress the evidence, arguing that it was unconstitutionally seized.[14] The Supreme Court found the traditional interpretation of *in loco parentis* to be "in tension with contemporary reality and the teachings of this Court."[15] The Court stated that "[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[16]

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8. J. Nathan Jensen, *Don't Rush to Abandon a Suspicion-Based Standard for Searches of Public School Students*, 2001 BYU L. REV. 695, 695-96.

9. 469 U.S. 325 (1985).

10. *Id.* at 336-37.

11. *Id.* at 328.

12. *Id.*

13. *Id.* at 329.

14. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (evidence seized in violation of standards established by the Fourth Amendment cannot be used against someone charged with a crime, in part or in full, because of the evidence seized). *See generally* Martin H. Belsky, *Criminal Procedure in Pennsylvania: The Pre-Trial Issues in Four Parts*, 78 DICK. L. REV. 209, 235-262 (1973).

15. *T.L.O.*, 469 U.S. at 336.

16. *Id.* at 336-37.

We have held school officials subject to the commands of the First Amendment

After the Court indicated that restrictions on searches and seizures were appropriate, the next issue it addressed in *T.L.O.* was what constitutional standard to apply in evaluating the legality of the search and subsequent seizure.[17]

THE CONSTITUTIONAL STANDARD

The standards to determine the legality of a search were first defined in criminal cases.[18] Using the language of the Fourth Amendment, the Supreme Court held that ordinarily a warrant supported by "probable cause" was required for any search and seizure.[19] Exceptions were then carved out of this warrant requirement.[20]

A series of cases provided for a modification of the probable cause standard to one of "reasonable suspicion" in special circumstances. Certain situations merit a "balancing" of the need for a search and/or seizure with the degree of intrusion which the search entails.[21]

> and the Due Process Clause of the Fourteenth Amendment. *If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students*. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . *In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.*

Id. (citations omitted) (emphasis added).

17. *Id.* at 337.

18. In 1914, the Supreme Court ruled that, in federal criminal cases, evidence seized in violation of the Fourth Amendment would be excluded at trial. Weeks v. United States, 232 U.S. 383 (1914). It was not until 1961 that this exclusionary rule was extended to criminal cases in the state courts. *Mapp*, 367 U.S. at 643.

19. Probable cause is necessary for an arrest, a search incident to an arrest, and also for a search under a search warrant. Whiteley v. Warden, 401 U.S. 560, 564 (1971); Spinelli v. United States, 393 U.S. 410, 412-13 (1969).

20. Ordinarily a warrant is required for any search and seizure. There is a series of exceptions including search by consent, search in an emergency, seizure of items in plain view, search and seizure incident to a valid arrest (one supported by probable cause), stop and seizure of an automobile, and a "stop and frisk" based on "reasonable suspicion." *See* Belsky, *supra* note 14, at 235-36.

21. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 215-16 (3d ed. 2000).

First, certain health or safety needs justify warrantless searches based on information that may not rise to probable cause, but only an articulated individual suspicion.[22]

Second, where police have a reasonable suspicion that (1) criminal activity is afoot and (2) that the suspect is armed and dangerous, they may temporarily stop that suspect and perform a patdown for weapons ("stop and frisk") in order to insure their safety and the safety of third persons.[23]

Third, government officials only need a reasonable suspicion to stop a motorist near a border to ask his or her residential status,[24] or to stop a motorist to see the vehicle's license and registration.[25]

The difference between a probable cause standard and one of an articulated reasonable suspicion is substantial. Although it should not be applied too technically,[26] probable cause is a much more formal, objective test.[27] To support probable cause, there must be knowledge of sufficient facts and circumstances, gained through trustworthy information, to justify a person of reasonable caution to believe that evidence of illegal activity will be found.[28]

To support reasonable suspicion, all that is needed is a particularized and articulated basis, that is rational or reasonable, to believe that the particular person may be guilty of an offense or that evidence of a crime may be present.[29]

"Reasonableness" is the key—and this inquiry involves a case-by-case balancing of the need to search and seize on the one hand, against the degree of invasion of an individual's rights on the other.[30]

There may, the Supreme Court has said, even be cases where "special needs" eliminate (1) the warrant requirement, (2) the probable cause

22. *Compare* United States v. Biswell, 406 U.S. 311 (1972), *with* Camara v. Mun. Court, 387 U.S. 523 (1967), *and* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). *See* Jennifer E. Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 814-15 (2001).

23. Terry v. Ohio, 392 U.S. 1 (1968).

24. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

25. Delaware v. Prouse, 440 U.S. 648 (1979).

26. *See* Brinegar v. United States, 338 U.S. 160 (1949); Illinois v. Gates, 462 U.S. 213 (1983).

27. *See* Beck v. Ohio, 379 U.S. 89 (1964) (subjective good faith not enough).

28. *Brinegar*, 338 U.S. at 175-76; *see also Gates*, 462 U.S. at 213.

29. United States v. Cortez, 449 U.S. 411 (1981).

30. Terry v. Ohio, 392 U.S. 1 (1968).

requirement, and (3) even the reasonable suspicion requirement.[31] For example, brief questioning of vehicle occupants at a border checkpoint is permissible without any individualized suspicion.[32] Similarly, the questioning of all incoming traffic at roadblock-type stops may be appropriate.[33] Thus, a sobriety checkpoint program does not need any suspicion basis to be established.[34]

Checkpoints are not the only basis to allow the balancing process of individual right of privacy and societal needs. Government employees who seek positions involving the interdiction of drugs or the carrying of a firearm can be required to take a drug test, without any basis for the test. There is a diminished expectation of privacy that is to be balanced against the possible endangerment of society.[35] Similarly, railroad employees who have been involved in a major train accident or incident can be compelled to undergo urine and breath testing, even without any suspicion that the particular employee tested was impaired.[36]

The balance is (1) the special danger presented by the performance of sensitive tasks while under the influence of drugs or alcohol, (2) the diminished expectation of privacy of employees in such sensitive positions, and (3) the elimination of discretion—and thus prejudice—in the selection of who is tested and when.[37]

APPLYING THE STANDARDS TO PUBLIC SCHOOLS

In *T.L.O.*, after deciding that the Fourth Amendment applied to searches of public school students,[38] the Court adopted the "balancing test" of "the individual's legitimate expectations of privacy and personal security" against the "government's need for effective methods to deal with breaches of public order."[39]

Schoolchildren have a legitimate expectation of privacy, but this expectation has to be weighed against "the substantial interest of teachers

31. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995).
32. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
33. Delaware v. Prouse, 440 U.S. 648 (1979). The Court in *Prouse* noted that such stops involve "less intrusion" and less "unconstrained exercise of discretion" than stopping individual vehicles. *Id.* at 663.
34. Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
35. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
36. Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602 (1989).
37. *Id.*
38. New Jersey v. T.L.O., 469 U.S. 325, 333-37 (1985).
39. *Id.*

and administrators in maintaining discipline in the classroom and on school grounds."[40]

The Court pointed to its cases on stop and frisk (*Terry v. Ohio*[41]), border searches (*United States v. Martinez-Fuerte*[42]), checkpoint searches (*Delaware v. Prouse*[43]), and administrative searches (*Camara v. Municipal Court*[44]) to stress that the balance here is not to require a warrant or probable cause.[45] The test would be "reasonableness, under all the circumstances, of the search."[46]

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a 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.[47]

40. *Id.* at 339.

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.

Id. (citation omitted).

41. 392 U.S. 1 (1968).
42. 428 U.S. 543 (1976).
43. 440 U.S. 648 (1979).
44. 387 U.S. 523 (1967).
45. *See T.L.O.*, 469 U.S. at 338-41.
46. *Id.* at 341.
47. *Id.* at 341-42 (citations & footnotes omitted).

Applying this "reasonableness" standard, the Court found that the search and seizure of the high school student's purse, applying a "step-by-step" approach, was reasonable.[48]

The Court specifically left open the issue of whether "individualized suspicion" was required for all school searches.[49] There may be cases "where the privacy interests implicated by a search are minimal and where

48. *Id.* at 343-48.

> The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marijuana.
>
> . . . .
>
> . . . T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. . . . T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking.
>
> . . . A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was [reasonable]. . . . [T]he requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . ." Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes.
>
> Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marijuana once the pack of cigarettes was located. The suspicion upon which the search for marijuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. . . . This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marijuana, a small quantity of marijuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marijuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence.

Id. at 343-47 (footnote omitted).

49. *Id.* at 342 n.8 (citation omitted): "Because the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules, we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion."

other safeguards are available to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field."[50]

"SUSPICIONLESS" SEARCHES

The question of suspicionless searches was specifically considered by the Court in 1995 in the case of *Vernonia School District v. Acton*.[51] In *Vernonia*, the Court reviewed the policy of a small Oregon school district that authorized random urinalysis drug testing of students who participated in any district athletic program. In a 6-to-3 decision written by Justice Scalia, the policy was found not to be in violation of the Fourth Amendment.[52]

Applying the reasonableness balancing test described in *T.L.O.* and other cases, the Court first articulated the "special needs" doctrine, which allows exceptions to traditional Fourth Amendment protections, and it noted that such special needs exist in the public school context.[53] In fact, there may be cases, determined after a balancing test is applied, where individualized suspicion is not required at all.[54]

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50. *Id.* (quotations omitted). Justice Brennan, joined by Justice Marshall, dissented. *See id.* at 353-70 (Brennan & Marshall, JJ., dissenting). Justice Stevens, joined by Justices Marshall and Brennan, also dissented. *See id.* at 370-86. They emphatically disagreed with the establishment of this new "reasonableness" balancing test standard.

51. 515 U.S. 646 (1995).

52. *See id.*

53. *Id.* at 653.

54. *Id.*

> A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."
>
> We have found such special needs to exist in the public school context. There, the 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 on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, "'the Fourth Amendment imposes no irreducible requirement of such suspicion.'" We have upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction; and to maintain

First, the Court addressed what the legitimate expectation of privacy of students is in a public school and suggested a partial return to the *in loco parentis* power of school administrators.[55] This power does not extinguish application of constitutional constraints, but it does permit "a degree of supervision and control that could not be exercised over free adults," including "'enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.'"[56]

Children do not lose their constitutional rights, but "the nature of those rights is what is appropriate for children in school."[57] This means that rights can first be modified for all students, and then modified even more for special categories of students.

The long-recognized supervisory responsibilities of schoolteachers and administrators imply the right to impose controls over class activities, other campus events, and school procedures. This authority, by definition, reduces the legitimate expectations of privacy of *all students.*[58]

And, these expectations are further reduced when considering the "rights" and "privileges" of student athletes.[59] "[L]ike adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[60]

Also involved in the balancing of individual privacy and community (here school) rights is the nature of the intrusion here. The drug test is

> automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers.

Id. at 653-54 (citations omitted) (alteration in original).

55. *Id.* at 654-55.
56. *Id.* at 655 (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985)).
57. *Id.* at 656.
58. *Id.* at 657.
59. *See id.*
60. *Id.*

simple, similar to what is done in a public restroom,[61] limited in purpose and delivered to a limited set of officials.[62]

The final part of the balancing is the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it."[63] Stated in other terms, is the interest "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy"?[64]

Deterring drug use by our schoolchildren is certainly an important and maybe a compelling interest in general.[65] And, it is even more significant

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61. *Id.* at 658.

> Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

Id.

62. *See id.*

> The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.

Id. (citation omitted).

63. *Id.* at 660.

64. *Id.* at 661.

65. *Id.* at 661-62.

> That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen . . . . School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is

when applied to athletes, who may undertake substantial physical and psychological risks from taking drugs.[66]

The Supreme Court accepted the trial court's findings that there was a crisis in the Vernonia schools that was related to the drug problem.[67]

Finally, as to the "efficacy" and "harm" of random drug testing, the Court saw that a procedure that might seem less intrusive—suspicion-based testing—might in fact be more harmful.[68] Those selected for accusatory drug testing might be perceived to be wearing a "badge of shame" and be subject to the arbitrary whim of an administrator.[69]

The bottom line, said the Court, is "that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[70]

> depressingly poor." And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.

Id. (citations omitted).

66. *See id.* at 662.
67. *See id.* at 663.
68. *See id.* at 663-64.
69. *Id.* at 663.

> [P]arents who are willing to accept random drug testing for athletes [may not be] willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. [Suspicion-based testing] . . . brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.

Id. at 663-64 (citations omitted).

70. *Id.* at 665.

> Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

What happens in a school context, the Court noted two years later, might not be appropriate in other circumstances. Thus, in 1997, five of the *Vernonia* majority joined the dissenters to knock out a statute that required drug testing of candidates for elected offices in *Chandler v. Miller*.[71] Georgia required all candidates to certify that they had taken a drug test and that the results were negative. The Court said this situation did not fit into the special needs exception to the Fourth Amendment's requirement of "individualized suspicion of wrongdoing."[72] The Court distinguished this situation from *Vernonia* because of the unique nature of responsibility undertaken by school districts for students.[73]

In 2001, however, two judges of the Court of Appeals for the Tenth Circuit read the *Chandler* case more broadly and have used it to narrow the scope of a public school's ability to conduct random drug testing.

THE TENTH CIRCUIT'S *EARLS* RULE

Earls v. Board of Education[74] involved an attempt by a school district to take *Vernonia* one step further. *Vernonia* involved a rule requiring drug testing as a condition for participation in extracurricular competitive sports. *Earls* involves testing of all students who seek to participate in any extracurricular activities.

In *Earls*, the Tecumseh School District adopted a "Student Activities Drug Testing Policy" that required all students who wished to participate

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Id. (citation omitted). Justice Ginsburg concurred, limiting the scope of the case only to intercollegiate athletics. *Id.* at 666 (Ginsburg, J., concurring). Justice O'Connor dissented, joined by Justices Stevens and Souter. They argued that only individual suspicion-based testing should be allowed. *See id.* at 666-86 (O'Connor, Stevens & Souter, JJ., dissenting).

71. 520 U.S. 305 (1997).

72. *Id.* at 313; *see* discussion in *id.* at 313-17.

73. *Id.* at 316-17.

> The program's context was critical, for a local government bears large "responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." An "immediate crisis," caused by "a sharp increase in drug use" in the school district, sparked installation of the program. District Court findings established that student athletes were not only "among the drug users," they were "leaders of the drug culture." Our decision noted that "'students within the school environment have a lesser expectation of privacy than members of the population generally.'" We emphasized the importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field.

Id. (citations omitted).

74. 242 F.3d 1264 (10th Cir. 2001).

in *any* competitive extracurricular activity to sign a written consent "agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion."[75] The majority of the Tenth Circuit panel limited *Vernonia* to school athletes and found that the Tecumseh rule did not satisfy the special needs doctrine.[76]

Relying on *Chandler* and a previous Tenth Circuit decision,[77] Judge Anderson, joined by Judge Brorby, said the issue of special needs involved a two-step analysis:

> We held that *Chandler* requires courts to inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests. We defined that inquiry as two-fold: first, "whether the proffered governmental concerns were 'real' by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public"; and second, "whether the testing scheme met the related goals of detection and deterrence."[78]

Relying on *Vernonia*, the majority, it would appear reluctantly,[79] felt that it had to assume a special need here as this involved testing in a public school context.[80] The issue then is the balancing of the "government's (in

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75. *Id.* at 1267. "The test detects amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines. It does not detect alcohol or nicotine. Students subject to the Policy must pay a yearly fee of four dollars." *Id.*

76. *Id.* at 1278.

77. 19 Solid Waste Dep't Mechs. v. City of Albuquerque, 156 F.3d 1068 (10th Cir. 1998).

78. *Earls*, 242 F.3d at 1269.

79. *Id.* at 1270.

> Whether or not the Supreme Court has raised the special need bar in other contexts, we must assume, until the Court directs us otherwise, that its analysis in *Vernonia* governs our analysis in this case. Thus, we agree that the District has demonstrated that there is a special need for a relaxation of the Fourth Amendment's standards in this case . . . .

Id.

80. *Id.* The Court did state:

> Were we to agree with the plaintiffs that *Chandler* and *19 Solid Waste*

this case, the school's) interest in conducting the particular search in question against the privacy interests of those subject to the search."[81]

Vernonia involved a documented drug problem and disciplinary problems—athletes who "'were the leaders of the drug culture,'" and a resulting disciplinary situation of "'epidemic proportions.'"[82] Moreover, *Vernonia* involved a situation where there was an "immediate crisis."[83]

Nothing even close to that factual situation was occurring in the Tecumseh School District, said the majority, with the very large group of students who were involved in competitive extracurricular activities.[84]

Simply stated, Judge Anderson felt that there was no drug problem at Tecumseh, let alone one described as a crisis or one involving discipline problems of epidemic proportions.[85]

The majority then proceeded to balance this "non-problem" with the privacy interests of the students. Athletes have a lower expectation of privacy.[86] But, extracurricular activities are "an integral part of the educational experience," and so involvement is not truly voluntary.[87] Even if there is some reduced expectation of privacy, it is only marginally less. When weighed against the lack of immediacy and concern of harm involved in non-physical after-school activities, the balance goes against allowing suspicionless testing.[88]

> *Mechs.* have raised the special need bar in all cases, including those involving public school contexts, we would still conclude that the District has demonstrated the existence of a special need.
>
> . . . [W]e think a school concerned about drug abuse among its students has adequately demonstrated the existence of a special need.

Id. at 1270 n.4.

81. *Id.*
82. *Id.* at 1271.
83. *Id.* at 1272.
84. *Id.* at 1272-74.

> [I]n the 1998-99 year, of the 486 students who participated in the . . . extracurricular activities, two students, both also athletes, tested positive. And of the 311 students participating in . . . the first semester of the 1999-2000 year, only one student, apparently an athlete and not involved in any of the listed extracurricular activities, tested positive.

Id. at 1273.

85. *Id.* at 1275.
86. *Id.* at 1276.
87. *Id.*
88. *Id.* at 1276-78.

> Additionally, given the paucity of evidence of an actual drug abuse problem

The bottom line, the two-judge majority said, is that a school district must have some reasonable suspicion on an individualized basis to do a drug test.[89]

Judge Ebel dissented. He stated that despite the majority's claim that it was not imposing a requirement that no particularized special need had to be shown, it in fact did so.[90] This goes directly against *Vernonia*.

Drugs, he reminded the court, are a serious problem in all schools—students are subject to peer pressure and there is potential "virulent health damage."[91] He read *Vernonia* as a recognition of the special obligation of public schools as *in loco parentis* to protect its wards from

> among those subject to the Policy, the immediacy of the District's concern is greatly diminished. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished. While the Court in *Vernonia* had no trouble identifying the efficacy of a drug testing policy for athletes when the athletes were at the heart of the drug problem, we see little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem.
>
> In sum, applying the factors identified by the Supreme Court in *Vernonia*, we conclude that the testing Policy is unconstitutional.

Id. at 1277-78 (citation omitted).

89. *Id.* at 1278.

> [A]ny district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.

Id. The majority acknowledged that its decision was inconsistent with the two other circuit courts of appeal cases that had addressed the issue. *Id. See* Todd v. Rush County Schs., 133 F.3d 984 (7th Cir. 1998); Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999). The *Miller* case was later vacated as moot. *Earls*, 242 F.3d at 1278 n.14 (citing *Miller*, 172 F.3d at 574, *vacated* (June 15, 1999)). The majority noted that the Fifth Circuit will probably address this issue soon because two district courts have addressed this issue. It also noted that the Colorado Supreme Court has found suspicionless drug testing of members of a marching band unconstitutional. *Id.* For a discussion of these cases, see Smiley, *supra* note 22, at 826-35.

90. *Earls*, 242 F.3d at 1281 (Ebel, J., dissenting). Judge Ebel cites the majority's conclusion that such testing is only permissible with a "demonstrat[ion] that there is some identifiable drug abuse problem among a sufficient number . . . such that testing . . . will actually redress [the] . . . problem." *Id.*; *see also id.* at 1283.

91. *Id.* at 1280.

interference by drug users with other students' rights "to learn and grow" and from general harm, including drug use.[92]

Vernonia's facts are "not much more compelling than those presented in this case."[93]

He also rejected the weighing process used by the majority.[94] Despite its claims to the contrary, the majority put substantial weight on the privacy rights of the students. It minimized the exigent need of all school districts to act as guardians for their wards and to discourage, in the strongest manner possible, drug use, before there is a crisis. It substituted its judgment as to efficacy for that of those in charge. It disregarded the fact that the policy only applied to students who voluntarily seek to be involved in extracurricular activities while neglecting to note the very limited nature of the intrusion.[95]

THE IMPACT OF *EARLS*

I believe the result in *Earls* is wrong not only as a matter of law but also as a matter of civil liberties policy. It is clear that at least five Justices of the Supreme Court, as indicated in *Vernonia*, felt that public schoolteachers and administrators, acting as "guardian[s] and tutor[s] of children entrusted to [their] care,"[96] could set conditions on participation in extracurricular activities and perhaps even regular school activities.[97]

92. *Id.*
93. *Id.* at 1282.
94. *Id.* at 1283-86.
95. *See id.*

> Here, the information collected during the drug test is shared only with selected school officials on a need-to-know basis, and is never turned over to law enforcement officers or used to justify academic sanctions against students who test positive for illegal drug use. Further, if a student does not want to submit to a drug test, the school district cannot compel submission under the challenged Policy. Any student may refuse to submit to a drug test. The only consequence of that decision is the student's subsequent ineligibility to participate in a voluntary extracurricular activity because of his or her failure to satisfy one of the preconditions to participation in that activity.

Id. at 1287.

96. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 665 (1995).

97. The Court only added as an additional comment the limitation that this case involved athletes. The sixth vote—by Justice Ginsburg—limited the cases to athletics. Even there, Justice Ginsburg noted that the only remedy involved was to exclude the student from such activities. *Id.* at 666. She only left open whether the school could apply a drug testing policy to all students required to attend school. *Id.* In *Earls* the only issue was whether students

This has recently been reaffirmed by the Court in *Ferguson v. City of Charleston*, decided on March 21, 2001.[98] That case involved a motion to suppress evidence in a criminal drug case. The Court disallowed drug testing of all obstetric patients when it was done specifically to benefit law enforcement and, in fact, results were given to the police.[99] *Chandler* stands for the proposition that special needs have to be determined on a case-by-case basis. *Chandler* involved a drug testing policy where there was no indication of any drug problem unique to political candidates. *Ferguson* involved a general interest in crime control—and thus no special need.[100] This distinguishes *Vernonia*—and by logical extension *Earls*—where there was a recognized problem of drug use among students and where the purpose was not law enforcement, but only school discipline management.[101]

Justice Kennedy in his concurrence again stressed that *Vernonia* focused on two distinct goals—the first, "[d]eterring drug use by our Nation's schoolchildren" and the second, the special focus on student athletes.[102]

Earls has the potential of great abuse. Justice Scalia appropriately pointed out that suspicion-based testing could cast a badge of shame and make the process subject to the arbitrary whim of an administrator.[103]

Justice O'Connor rejected this argument, saying, "[A]ny distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential."[104]

Anyone who has worked in a student setting must know how naive this statement is.

She also rejects the idea of potential abuse of discretion. Yet, she does note that "[i]n most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and

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wishing to participate in an extracurricular activity had to take a test before such participation. The Tecumseh Public Schools did not have a policy requiring all students to take a drug test or be banned from attendance in school.

The dissenters in *Vernonia* stressed that they saw no logical reason to select out athletes, other than "a belief in what would pass constitutional muster." *Id.* at 685 (O'Connor, Stevens & Souter, JJ., dissenting).

98. Ferguson v. City of Charleston, 532 U.S. 67 (2001).
99. *See id.*
100. *Id.* at 80-82.
101. *See id.* at 74 n.7, 76.
102. *Id.* at 87 (alteration in original).
103. *See supra* note 69.
104. *Id.* (O'Connor, J., dissenting).

administrators and coaches, be it in classrooms, hallways, or locker rooms."[105] Thus, with a suspicion-based test, any good teacher or administrator could find *something* to form a basis for suspicion. Smell, singing and dancing, statements by a student that he was "high on life," admits Justice O'Connor, would all be enough to form a reasonable suspicion.[106]

In other words, a teacher or administrator can legitimately pick and choose via his or her observations students to be tested, and that selection would be given deference as being reasonable.[107]

The potential of a badge of shame and real arbitrariness should cause concern for civil libertarians. An individualized suspicion test could be used by a teacher or an administrator to go after an individual based on personal dislike, including racial, religious, or other animus. It would be difficult to prove that the basis was other than legitimate—especially if done by a skilled enforcer.

How easily is the "reasonable suspicion" test met? Behavior, hearsay, seemingly innocent comments, and observations can all form legitimate bases for action. The courts will most likely accept *any* articulated basis for a showing of reasonableness.[108] What are some articulated bases for suspecting alcohol or drug use?

- A student is sullen; a student is boisterous.[109]

105. *Id.* at 678.

106. *Id.* at 679.

107. *See* Jensen, *supra* note 8, at 709 (footnotes omitted):

> Public school students are under constant supervision, scrutiny, and observation in hallways, parking lots, lunchrooms, classrooms, and locker rooms by administrators, teachers, coaches, and fellow students. Teachers, administrators, and coaches in a public school context are in a position to observe and detect behavior sufficient to establish reasonable suspicion of conduct that is either criminal or in contravention of school rules. Further, students often supply specific information about the activities of other students. Therefore, it appears that an individualized suspicion requirement would be very effective in the public school context.

108. *See, e.g.*, United States v. Arvizu, 122 S. Ct. 744 (2002).

109. *See, e.g.*, Cornfield v. Consol. High Sch. Dist. 230, 1992 U.S. Dist. LEXIS 2913, at *17 (N.D. Ill. Mar. 13, 1992) (student's sullenness a ground for reasonable suspicion); Hedges v. Musco, 33 F. Supp. 2d 369, 373 (D.N.J. 1999) (student's sudden gregariousness a ground for reasonable suspicion).

- A student is unusually quiet; a student is unusually noisy.[110]
- A student seems overtired; a student seems overactive.[111]
- A student withdraws from his or her associates; a student tries to push his or her associates too hard.[112]
- A student shows up late for an extracurricular activity; a student shows up unusually early for an activity.[113]
- A student seems sloppy or careless; a student seems too meticulous.[114]
- A student seems too accommodating; a student seems too rigid.[115]
- A good student's grades go down; an average or poor student's grades go up.[116]
- A student's eyes seem glazed; a student's eyes seem too focused.[117]
- A student can't look you straight in the eye; a student stares at you fixedly.[118]

110. *See, e.g.*, Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 367 (employer's drug-testing policy enumerating "changes in personal traits" as ground for suspicion); Stockett v. Muncie Ind. Transit Sys., 221 F.3d 997, 1000 (7th Cir. 2000) (unusually calm demeanor a ground for reasonable suspicion).

111. *See, e.g.*, Kraslawsky v. Upper Deck Co., 56 Cal. App. 4th 179, 190 (Ct. App. 1997) (lethargic demeanor a ground for reasonable suspicion); Hill v. Koon, 732 F. Supp. 1076, 1079 (D. Nev. 1990) (hyperactivity a ground for reasonable suspicion).

112. *See, e.g.*, Willis v. Anderson Cmty. Sch. Corp., 158 F.3d 415, 423 (7th Cir. 1998) (isolation and drug use); *Hedges*, 33 F. Supp. 2d at 373.

113. *See, e.g.*, Bertram v. Pennesbury Sch. Dist., 1999 U.S. Dist. LEXIS 7916, at *25 (lateness a ground for reasonable suspicion); *Knox*, 158 F.3d at 367 (changes in behavior—including showing up unusually early—a ground for reasonable suspicion).

114. *See, e.g.*, United States v. Taylor, 956 F.2d 572, 582 (6th Cir. 1992) (Keith, J., dissenting) (fact that deplaning passenger was more sloppily dressed than other passengers a ground for reasonable suspicion); *Kraslawsky*, 56 Cal. App. 4th at 190 (excessive meticulousness a ground for reasonable suspicion).

115. *Compare Knox*, 158 F.3d at 367 (changes in behavior a ground for reasonable suspicion).

116. *See, e.g.*, *id*.

117. *See, e.g.*, Earls v. Bd. of Educ., 242 F.3d 1264, 1273 (10th Cir. 2001) (glazed eyes a ground for reasonable suspicion); United States v. McRae, 81 F.3d 1528, 1531 (10th Cir. 1996) (intensely focused eyes a ground for reasonable suspicion).

118. *See, e.g.*, Cornfield v. Consol. High Sch. Dist. 230, 1992 U.S. Dist. LEXIS 2913, at *17 (avoiding eye contact a ground for reasonable suspicion); *McRae*, 81 F.3d at 1528 (fixed stare a ground for reasonable suspicion).

- A student wears unusual clothes or suddenly changes his clothing style; the student wears the same clothes day after day.[119]
- A student's friends or associates tell a faculty or administrative advisor that the student "seems to be out of it;" a student's friends or associates refuse to talk to the advisor about anything having to do with the student.[120]

Obviously, there can be other examples where any articulated basis of suspicion will be accepted as reasonable. The courts have indicated that, of course, there cannot be a pattern of conduct where it can be shown that selection is based on race, religion, disability, or some other illegitimate criterion. Yet proof of use of such improper bases would be difficult if not impossible to find.[121] The courts will continue to defer to and not second-guess school administrators.[122]

A school official would be able to pick out one, two, five, ten or twenty students over a one-day, one-week, one-month or longer period and articulate the justifications for his or her suspicion. With the discretion given to the official, this articulation would satisfy the test set out by the Tenth Circuit in the *Earls* case. Yet the prejudice attached to such a selection far outweighs the injury to students from a broad random testing policy.

Of course, random testing does not eliminate the potential for suspicion-based testing, but it does lessen its likelihood. Such testing can often satisfy concerns about drugs in the school and reduce the likelihood of an administrator being able to justify selecting out some students and applying minimally based suspicion.

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119. *See, e.g.*, *Taylor*, 956 F.2d at 582 (Keith, J., dissenting) (unusual clothes offered as a reason to justify search).

120. *See, e.g.*, Alabama v. White, 496 U.S. 325 (1990) (hearsay evidence can be used to establish reasonable suspicion).

121. It is unlikely that courts would be willing to read in improper motives from a choice to test certain students. *Compare* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

122. *See* New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985) (citing school discipline cases); *id.* at 343 (applying "dictates of reason and common sense"); *id*. at 352 (Blackmun, J., concurring) (special need for flexibility).

This issue of discretion given to school administrators may be analogous to that given police officers on traffic stops. The possibilities of abuse in both situations are obvious. *See* Harris, *supra* note 121.

This is the surprising civil liberties conclusion. *Earls*, at best, could have only a symbolic impact of the need for individualized suspicion, while still giving administrators almost total power to pick and choose those to be tested. It will have little practical effect and will not reduce the testing of students.[123] At worst, the case may have the strong negative effect of stigmatizing an individual or a selected group of individuals.

123. For a discussion comparing the philosophical and practical aspects of a court decision, see Martin H. Belsky, *Whither Miranda?*, 62 TEX. L. REV. 1341 (1984) (book review), and Martin H. Belsky, *Living with Miranda: A Reply to Professor Grano*, 43 DRAKE L. REV. 127 (1994). *See also* Martin H. Belsky, *The Burger Court & Criminal Justice: A Counter-Revolution in Expectations in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 131 (B. Schwartz ed., 1998).