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# Suspicionless Searches In Schools: Has In Loco Parentis Gone Loco?

Joseph Edward Zahner

The application of constitutional rights to states and individuals has expanded in the Twentieth Century. On the heels of that expansion, the courts began to convey some of those rights to children, who had previously held a protected status, shielded from both criminal liability and many of the constitutional rights enjoyed by adults. A dilemma was created in our public schools. A tension developed, which persists today. A tension between limiting the unconstitutional intrusion of public schools into the lives of our children, and those very same schools standing *in loco parentis*, helping to protect the health, safety and welfare of the children we entrust to them.

This article examines this dilemma and asks the question of whether the doctrine of *in loco parentis* in public schools is in jeopardy and how this affects parental choices. Specifically, it examines the application of the Fourth Amendment to the maintenance of safe and drug-free schools. Can our schools get away with suspicionless searches? Will random drug tested expand or contract? Does random testing work to ameliorate drug use? What role do parents have in demanding that schools provide a drug free environment or protect the rights of our children?

## Constitutional Rights of Children

With the advent of the progressive movement, children began to acquire special status in American society. In 1938, Congress passed the Fair Labor Standards Act, and the federal government embraced the idea that children are a distinct group requiring special treatment. The juvenile justice system was developed to shield children from harsh legal treatment and to foster rehabilitation.

By the 1960s, an era of significant social change and the rise of youth culture, the children's rights movement took hold. Child protection became viewed as an infringement on children's

rights. The question emerged: Are children entitled to the same fundamental constitutional rights as adults?

The Supreme Court laid the groundwork for the children's rights movement in 1943, during the height of our war against fascism.[1] In *West Virginia State Board Of Education v. Barnette*, a group of students refused to participate in the pledge of allegiance (asserting religious beliefs) and sought to enjoin the school from forcing students to participate on threat of expulsion of the student and prosecution of the parents for causing delinquency. The district court barred the school from forcing students to participate in the flag salute, and the Supreme Court affirmed that decision. The school board argued that the flag salute was essential to build national unity. Justice Jackson in his majority opinion stated, "That [the schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[2] Free speech was thus recognized for students.

Having established that fundamental constitutional rights are applicable to public school children, a line of cases began to refine the application. In the seminal 1965 *Tinker v. Des Moines Independent School District* decision, the Supreme Court reinforced students' rights to free speech in public school.[3] During the early days of the Vietnam War, the Tinker children wore black armbands to school in protest of the war. The school suspended the students for disrupting the school. The Tinkers sued to enjoin the school from disciplining the students, but the district court, while acknowledging the symbolic speech of the armbands as protected speech, held that the school's actions were reasonable to maintain discipline. The circuit court upheld

[1] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)
[2] Id. at 637.
[3] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)

the decision. The Supreme Court reversed the lower court, having found that "there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" [4]

The majority argued, "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk …."[5] Thus, the defense of students' fundamental constitutional rights was well on its way in the late 1960s.

The protection of first amendment rights of students in public schools is easily defensible. Parents generally cannot complain too much about schools permitting the free exchange of ideas among students and faculty. After all, our children are learning the fundamentals of American law and the rights of citizens in a free society. The application of the first amendment fits neatly into a parent's expectation of schools acting *in loco parentis.*

We run into trouble, however, when the application of constitutional restrictions on public schools begins to erode our expectation that schools provide a safe and healthy learning environment. The dilemma is that our schools serve as caretakers of our children. They stand *in loco parentis.* Public schools are also the state, and therefore subject to constitutional restraint according to the fourteenth amendment. Can we strike a balance, or walk a fine line between student welfare and their ostensible constitutional rights? Can we have the best of both worlds?

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[4] Id. at 509.
[5] Id. at 508.

## History of the Fourth Amendment

Should the government be permitted without a warrant, probable cause, or suspicion to search an individual and collect personal information from her for the purpose of discipline or corrective measures? I think most of us would say no. If, however, we dissect this question a bit further and ask whether our schools be able to test our students for illicit drug use in an effort to keep drugs out of schools, some parents would say yes, and some would say no. What if we apply a reasonableness standard? More parents would probably say yes.

Next ask yourself, as a parent, would you prefer that the school randomly test a selected group of some students, all students, or only those students suspected of doing drugs? This is a much tougher question to answer, depending on whether you believe that random testing is an effective deterrent or not; or whether you believe that your school has a drug problem that needs to be addressed.

"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."[6] The Fourth Amendment put an end to the English and early American writs of assistance, which permitted government officers to enter any establishment or home to seek smuggled goods. The early Americans were distrustful of government intrusion and arbitrary action and sought to protect their right to privacy.[7] Keep in mind that this article was enacted before modern police forces and duly organized government investigative agencies were established. The Fourth Amendment chilled arbitrary and capricious

[6] USCA CONST Amend. IV
[7] Shannon O'Pry, A Constitutional Mosh Pit: The Fourth Amendment, Suspicionless Searches, and the Toughest Public School Drug Testing Policy in America, 33 Tex. Tech L. Rev. 151, 159 (2001)

searches and seizures of police and investigators. Under the Fourth Amendment, if an investigator, having reasonable suspicion, could show probable cause to a distanced and arguably disinterested magistrate, that magistrate could issue a warrant permitting the search. The citizen is protected from arbitrary government search and seizure.

The operative phrase in the Fourth Amendment is protection against *unreasonable* search and seizure. The showing of probable cause, and the issuance of a warrant exhibit the highest form of reasonableness.[8] Under the probable cause standard, the "task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[9] However, to be lawful, a search merely need be reasonable and not even rise to probable cause.

It is common knowledge in our society that the police must obtain a warrant to search the home of a suspected thief or drug dealer. But is a search warrant required for the inspection of an apartment building for housing violations, or a meat packing plant for health violations? Must the government, in these administrative inspections, obtain a warrant based upon probable cause of a violation? The answer is a resounding …, maybe.

The court grappled with this idea. In *Frank v. State of Maryland*, the court upheld the conviction of a Baltimore City man who refused to allow city health inspectors to enter his home without a warrant to search for vermin. The inspectors were responding to credible reports by neighbors that rats were swarming the home. The Supreme Court held that the search was based on legitimate evidence of filth. It was important that the inspector was not permitted by law to

[8] Camara v. Mun. Court of City & County of San Francisco, 387 U.S. 523, 535, 87 S. Ct. 1727, 1734, 18 L. Ed. 2d 930 (1967)
[9] Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983)

force his way into a home, and that the privacy interests of the homeowner were respected during the search.[10]

In 1967, the court overturned *Frank* in its famous *Camara* decision.[11] A San Francisco apartment owner refused to allow a city housing inspector into his building without a warrant. The inspection was routine, and the inspector returned several times but was denied access each time. The apartment owner was arrested for refusing the inspection. The court held that the warrantless inspection was unconstitutional because there was no emergency, and the inspector had plenty of opportunity to secure a warrant.[12] Although the court established the rule that a warrantless inspection of a building by city inspectors without consent is unconstitutional, it nonetheless developed a new balancing test for administrative searches, the "Camara Test". The government's "special need" to prevent hazards to public health and safety must be balanced against the individual's legitimate expectation of privacy.[13]

The Camara Test was further revised a year later by the landmark *Terry v. Ohio* case.[14] In *Terry,* a police officer, suspecting that a crime was about to be committed by a group of suspicious men, stopped and frisked the men. The police officer searched the outer garments of the suspect, Mr. Terry, and discovered illegal guns. Here, Mr. Terry argued that the discovered weapons were inadmissible, due to lack of probable cause for arrest. The Supreme Court, however, held that the search and seizure was constitutional because it was reasonable, even without ant apparent probable cause for an arrest.

The court determined that the detective had sufficient reason to believe that a robbery was about to occur and that Mr. Terry and his cohorts were armed. Out of fear for the detective's and

[10] Frank v. State of Md., 359 U.S. 360, 366-67, 79 S. Ct. 804, 809, 3 L. Ed. 2d 877 (1959)
[11] Camara, at 540
[12] Id.
[13] Id.
[14] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

others safety, and based upon reasonable suspicion, the police could lawfully frisk the suspect in the absence of probable cause for an arrest (a "Terry Stop"). A "search for weapons in the absence of probable cause to arrest … must [nonetheless] … be strictly circumscribed by the exigencies which justify its initiation … [and] limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby…."[15]

This line of cases lays out those circumstances in which the government may search someone without probably cause and without a warrant. In *Terry*, the court set on a path to establish those "special needs" of the state that allow search and seizure without probable cause. Warrantless but nonetheless reasonable searches were soon allowed in those situations in which the special needs of the government outweigh an individual's reduced expectation of privacy. *Terry* forces us to ask the question of whether the search was reasonable. Was the search justified at its inception? Was the search reasonably related to its goal? In *Terry* the goal was to determine whether the suspect had dangerous weapons.

The principles derived from *Terry* and the modified Camara Test were applied in yet another landmark Supreme Court case, *New Jersey v. T.L.O.* (1985).[16] This is a public school case and is particularly important for establishing public schools as state actors subject to the restraints of the Fourth Amendment. Two 14-year-old girls were discovered smoking cigarettes in the public school restroom and sent to the principal's office. T.L.O., when questioned by the vice principal, admitted to violating the non-smoking rule but denied smoking in the bathroom at that particular time. The vice principal opened T.L.O.'s purse and discovered a pack of cigarettes. After he removed the cigarettes, he noticed rolling papers and suspected marijuana use. Based upon his suspicion, the vice principal dug further into T.L.O.'s purse and discovered "a small amount of

[15] Id. at 25-26.
[16] New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

marihuana, 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 marihuana dealing." The police and T.L.O's mother were notified. T.L.O. subsequently confessed to selling marijuana, and her confession and the evidence discovered by the vice principal were used as the basis for delinquency charges.

The New Jersey juvenile court denied T.L.O.'s motion to suppress the evidence and, while applying the Fourth Amendment to the school, held that the search was nonetheless reasonable. The appeals court agreed that no Fourth Amendment violation had occurred, but the New Jersey Supreme Court reversed, holding that the search was unreasonable. The U.S. Supreme Court granted *certiorari* and held the school to be subject to the Fourth Amendment, but held that the search itself was reasonable and therefore constitutional.[17]

T.L.O. *in dicta* claims to represent a departure from the jurisprudence of *in loco parentis* to that of the Fourth Amendment. In the majority opinion, Justice White stated, "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."[18] The court, however, applies what is arguably a watered down approach in its determination of what it considers a reasonable search. It balanced "the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."[19] Here, the Terry standard is applied, which allows reasonable searches to be conducted below the standard of probable cause, but in this case no life-or-death or property-loss emergency exists.

[17] Id. at 347.
[18] Id. at 336-337 (*emphasis added*).
[19] Id. at 340.

The court tries to strike a balance between permitting the school to continue to function *in loco parentis*, while paying lip service to the Fourth Amendment. Justice White opined that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[20] The court strikes a compromise of sorts by applying the Terry standard, which "neither unduly burden[s] the efforts of school authorities to maintain order in their schools nor authorize[s] unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."[21] Clearly the court seeks to preserve as much of the status of schools as caretaker of children, while inserting a modicum of Fourth Amendment restraint.

The court applied *Terry* to justify the search. Interestingly, the application of the reasonableness standard according to Terry is analogous to the standard a parent might apply to its child. The court applied the following test. First, was the search "justified at its inception"?[22] Any parent detecting cigarette smoke emanating from the bathroom is justified in searching his child's purse. Second, was "the search as actually conducted … reasonably related in scope to the circumstances which justified the interference in the first place" and not excessively intrusive?[23] Again, any reasonable parent searching for evidence to support the conclusion that

[20] Id.
[21] Id. at 342-43.
[22] Id. at 341-42.
[23] Id.

his child was smoking would not intrude excessively (*i.e.,* no strip search or tearing apart a child's bedroom), but would merely search for the cigarettes. Any reasonable parent upon discovering of drug paraphernalia would reasonably attempt to find more evidence to support a conclusion of drug involvement. The key here, the court says, is that the inception of the search was justified and the follow-up search reasonable in scope.

The cornerstone of Fourth Amendment jurisprudence is the individual's legitimate expectation of privacy. In their concurrence, Justices Powell and O'Connor asserted that students in a "school environment have a lesser expectation of privacy than members of the population generally … [and that] teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps *in the relationship between parent and child*."[24] Here, the court appears to state outright that schools, while being the government, nonetheless continue to enjoy a special status of standing *in loco parentis*.

Interestingly, the *T.L.O.* court seems to set the stage for the eventual allowance of random drug testing in schools. In *T.L.O.*, the search was based upon reasonable suspicion. The court, however, went out of its way to tell us that "the Fourth Amendment imposes no irreducible requirement of such suspicion ... Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where '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.'"[25] These words herald the coming of random suspicionless searches in the public schools.

[24] Id at 348.
[25] Id at 385.

## The Advent of Suspicionless Searches

Can the state search an individual, not only without probable cause, but also without any reasonable suspicion of wrongdoing? Yes, but within certain limits, which remove the discretion of the investigator and avoid the danger of arbitrariness. Random searches are constitutional as long as there is a compelling government interest at stake.

The state of Delaware in the 1970s passed a law allowing police to stop vehicles to check for proper licensing and registration. The state justified the law as promoting its legitimate interest to ensure the safety of its roadways. In *Delaware v. Prouse*, the state argued that this interest out weighed any intrusion of motorists' privacy.[26] Mr. Prouse was pulled over by a Delaware patrolman, who noticed the smell of marijuana, and observed marijuana in plain view. The patrolman seized the marijuana. At trial, Mr. Prouse moved to suppress the evidence as unlawful under the Fourth Amendment. The patrolman testified that he "was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General", but that the stop was nonetheless routine.[27] The trial court held that the "stop and detention [were] wholly capricious and therefore violative of the Fourth Amendment."[28]

The Supreme Court upheld the trial court's suppression of the evidence, holding that "stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment", unless "there is at least articulable and reasonable suspicion that the motorist is unlicensed."[29] The court, however,

[26] Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)
[27] Id at 650.
[28] Id at 651.
[29] Id at 663.

failed to provide guidance as to what would constitute a constitutional suspicionless search. "[M]ethods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion[, such as the] questioning of all oncoming traffic at roadblock-type stops" would be considered not violative of the Fourth Amendment.[30] Here the court appears to sanction the constitutionality of non-selected searches, when the special needs of the government outweigh the legitimate but reduced privacy expectations of the individual. This non-selectivity aspect (in some cases random, in other cases everyone within a specific narrow group) removes the arbitrariness and capriciousness of suspicionless searches.

An early test of the suspicionless drug test was in *Skinner v. Railway Labor Executives' Ass'n.* Under the Railroad Safety Act of 1970, the Federal Railroad Administration promulgated rules requiring railroads to test blood and urine of workers involved in railway accidents. When a significant accident occurs, such as one involving loss of life, or over $500,000 in damages, or the release of hazardous materials, the workers involved are required to be tested for drugs and alcohol, *regardless of any individualized suspicion*. A worker could also be subjected to a drug or alcohol test if two supervisors suspected the worker of being impaired. The testing involves breath tests, urine tests, or blood tests. If a positive result is discovered, the individual is notified and given an opportunity to respond.[31] The Railway Labor Executives Association sued to enjoin the implementation of these rules.

The district court granted the petition, and held that the regulations violated the Fourth Amendment privacy rights of the workers. The court of appeals reversed in part, and held that the emergent nature of the problem required prompt action, thus precluding a warrant. The appeals court also held that the significant safety concerns of the government outweighed any

[30] Id.
[31] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 609, 109 S. Ct. 1402, 1409, 103 L. Ed. 2d 639 (1989).

privacy interests of the workers, thereby obviating the probable cause standard.[32] The circuit court nonetheless held that particularized suspicion was still required, and rejected the suspicionless part of the regulations. The second part of the regulations, the suspicion-based part, was held to be constitutional.

The Supreme Court confirmed that the "compelled intrusio[n] into the body for blood" and "the chemical analysis of [either the urine or blood] to obtain physiological data" are deemed a Fourth Amendment search and an "invasion of the tested employee's privacy interests."[33] The court weighed the test's "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."[34] It considered the government's interest in promoting railroad worker safety as a "special need" that justifies departure from the warrant and probable-cause requirements.[35] The court reasoned that, under the warrant procedures, the magistrate functions to protect the privacy interests of the individual by narrowly constraining the scope of the search. Here, the regulations themselves were deemed to have narrowly constrained the situation in which the search occurs, rendering moot the need for the magistrate.[36]

Most importantly, the *Skinner* court allowed suspicionless searches to be conducted by the government. The majority argued "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable but in circumstances] where the privacy interests … are minimal, and where an important governmental interest … would be

[32] Id. at 613.
[33] Id. at 616-17.
[34] Id. at 619.
[35] Id. at 620.
[36] Id. at 622.

placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[37] The *Skinner* decision is just the beginning.

The constitutionality of suspicionless drug tests was further expanded in *National Treasury Employees Union v. Von Raab*, which was decided on the same day as *Skinner*. The United States Customs Service establishing a rule requiring an individual seeking a position having direct involvement in drug interdiction or any position that required carrying a firearm to first pass a drug test. The federal employee's union petitioned the district court for an injunction against enforcing the rule, which the court granted. The circuit court vacated the lower court's decision, stating that the search was reasonable given the government's strong interest in detecting drug use in those covered situations, and in view of the narrow scope of application.[38] The Supreme Court affirmed the circuit court's ruling, reasoning that the *compelling government interest* in deterring drug use among those in the covered positions outweighed the *reduced expectation of privacy* of the individuals.[39] Regarding the legitimate expectation of privacy of the workers, the court reasoned that "Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot

[37] Id. at 624.
[38] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 663, 109 S. Ct. 1384, 1389, 103 L. Ed. 2d 685 (1989)
[39] Id. at 666.

reasonably expect to keep from the Service personal information that bears directly on their fitness."[40]

Justices Scalia and Stevens argued in the dissent that, unlike the case in *Skinner*, the facts here did not support a persistent dangerous alcohol and drug problem in the Customs Service or the covered positions. According to Justice Scalia, "neither frequency of use [of drugs] nor connection to harm is demonstrated or even likely" in this case.[41] *Von Raab* represents the softening of what is to be considered a compelling government interest, and a lowering of the bar for what may be considered the "special needs" of government, according to the dissent.

## Suspicionless Searches in Public Schools

We have seen the application of fundamental constitutional rights to students in the classroom, while witnessing the erosion of the probable cause standard for search and seizure. On the one hand, schools have become restricted in their censure of student's free speech and subject to the requirements of the Fourth Amendment. On the other hand, we have seen the acceptance of suspicionless and warrantless searches by the government, and the lowering of the bar as to what is considered a special need of the government. So where does this leave us as far as a student's expectation of privacy in public schools?

In the mid-1980s, the sleepy logging town of Vernonia, Oregon, faced what it considered to be a drug crisis. Parents and teachers observed a marked increase in drug use and a more than two-fold increase in the number of disciplinary problems in the schools. They documented significant drug use among student athletes. Several sports injuries were attributed to drug use. Concerned about the health, safety and well being of the children charged to its care, the school

[40] Id. at 672.
[41] Id. at 681.

district responded by increasing drug education programs and employing drug sniffing dogs on state property. The problem nonetheless continued to worsen.

The Vernonia school district considered implementing a drug testing policy and floated the idea across the community. The parents unanimously approved. The Student Athlete Drug Policy was implemented in the fall of 1989, the stated purpose of which was to "prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[42] The policy required students wishing to participate in extra-curricular athletics to submit to a pre-season drug test, and consent to random drug testing throughout the athletic season. Each month, ten percent of the athletes were to be randomly selected for testing. No non-random selection method was permitted to be used.

Here, the urine sample is obtained from the student in discreet a manner as practicable. In the case of males, the student remains clothed with his back to the monitor. In the case of females, the student enters a private stall, and the monitor remains outside the stall. Samples are labeled with an anonymous number and the key is kept with the school administration. Strict chain of custody protocol is followed. If a student tests positive, he or she is given a second test. If the second test is negative, that student is deemed to have passed the test. If the student fails the drug test, his or her "parents are notified, and the school principal convenes a meeting with the student and his [or her] parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season."[43]

In 1991, seventh grader James Acton signed up for football at one of the grade schools. He refused to subject himself to the urinalysis and was denied access to the football program. He

[42] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650, 115 S. Ct. 2386, 2389, 132 L. Ed. 2d 564 (1995).
[43] Id. at 651.

petitioned the district court to enjoin implementation of the policy, which the district court denied. The Ninth Circuit reversed, holding that the policy violated the Fourth Amendment. [44] The Supreme Court applied its "special needs" analysis of *T.L.O.* to the rubrick of *Skinner* and *Von Raab* and reversed the circuit court.

In its special needs analysis, the Supreme Court applied three factors. The first factor examined whether the degree of intrusiveness of the search violated the legitimate expectation of privacy of the individual. The first factor was analyzed in two elements: the nature of the relationship between the searcher and the one being searched; and the degree to which the voluntary nature of the act can reduce the individual's expectation of privacy. The second factor examined whether the government's interest in the search was sufficiently compelling. The third factor, based upon the exigency of the situation, examined whether the need was immediate and whether other less intrusive but equally effective methods were available. The fourth factor examined whether the government acted arbitrarily, by asking whether the search was justified at its inception, as in *T.L.O.,* and whether the target and scope of the search were sufficiently and justifiably narrow.[45]

The Supreme Court seemed to focus here on the reduced legitimate expectation of privacy suffered by student athletes. Student athletes invariably share locker rooms and shower stalls and thererfore, the court argued, "legitimate privacy expectations are even less with regard to student athletes…. Public school locker rooms … are not notable for the privacy they afford."[46] Athletic programs are also voluntary programs. The court reasoned "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges,

[44] Id. at 652.
[45] O'Pry, S. (2001) at 174-175.
[46] Id. at 657.

including privacy", not unlike the adults in *Skinner* "who choose to participate in a 'closely regulated industry.'"[47]

Probably most importantly, the court also considered the special relationship between the school and the child in its privacy analysis. "*Central*, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the *State as schoolmaster*…. When parents place minor children in private schools for their education, … those schools stand *in loco parentis* over the children entrusted to them."[48] However, while admitting "children assuredly do not "shed their constitutional rights ... at the schoolhouse gate,'" the court "acknowledged that for many purposes 'school authorities ac[t] in loco parentis.'"[49]

The court next examined whether the government's interest was sufficiently compelling to justify the urinalysis. Citing scientific and medical literature regarding the detrimental effects of drugs on school age children, and the negative effects of a drug-infested school "upon the entire student body and faculty", the court held that the government's interest in deterring drug use was "at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab*, … or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner*."[50]

The court next examined the level of intrusion of the search, in this case, urinalysis. The privacy of the students was deemed to be optimized (the students remained clothed or shielded in a stall) and the information obtained was narrowly focused on specific drugs and access to the

[47] Id.
[48] Id. at 654 (*emphasis added*).
[49] Id. at 655.
[50] Id. at 661.

information restricted. Thus the court concluded "that the invasion of privacy was not significant."[51]

Finally, the court examined the nature and immediacy of the problem, and the effectiveness of the means to address that problem. Quite simply, the majority felt that the drug problem in the Vernonia school district was "an immediate crisis of greater proportions than [that which] existed in *Skinner.*" The court agreed with the trial court, which found that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, that disciplinary actions had reached epidemic proportions, and that the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture."[52] But was the urinalysis an appropriate effective means for dealing with this obvious crisis? That court held that is was.

The court weighed the merits of suspicion-based drug testing, and the narrow application of the random test, and, interestingly, also considered the views of parents. The court agreed with parents that a suspicion-based testing program ran the risk of stigmatizing children, while doing nothing to address the "role model effect" of ensuring that the athletes stay clean. Thus, the court held that the random suspicionless test was most effective in addressing the problem of drug use among athletes.[53]

Scalia, who dissented in *Von Raab,* wrote the majority opinion in *Vernonia*. This is particularly interesting because the facts of *Von Raab,* which permitted suspicionless drug testing for situations in which the individuals were volunteering for new positions, is closely analogous to *Vernonia*. According to Justice Scalia's dissent in *Von Raab*, no significant relevant data was presented to bolster the government's assertion that drug use was or could be problematic for the

[51] Id at 660.
[52] Id at 662-63
[53] Id at 664

covered positions. Whereas in *Skinner*, in which Justice Scalia was in the majority, the suspicionless tests were administered to workers involved in major accidents where drug use was linked to health and safety. The drug problem in *Skinner* was clearly documented and supported. The facts in *Vernonia* are most analogous to *Von Raab,* where no significant evidence is offered to prove that students volunteering for extra-curricular sports are more prone to illegal drug use or require to be "cleaner" than other members of the student body. Why Justice Scalia's about face here? His arguments are strained as he rationalizes that drugs are especially problematic for athletes. Perhaps what is really going on here is that the Supreme Court carved out a special public school exception to the Fourth Amendment, and a renewed bolster to the doctrine of *in loco parentis*.

The *Vernonia* court decided that random suspicionless drug testing of student athletes, who have a reduced expectation of privacy, was constitutional. In *dicta*, the court explains that public schools retain a special status, even though they are state actors and do not "officially" stand *in loco parentis*. "But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[54] Thus, *Vernonia* gives us a watered-down Fourth Amendment right co-extensive with a watered-down application of *in loco parentis.*

The trend toward preserving parent-like custodial powers of the public schools and the evisceration of the right to privacy of students under the Fourth Amendment continues. In 2002, the Supreme Court went even further in carving out a special place for public schools in Fourth Amendment jurisprudence. In the 5-4 *Earls* decision, Justice Thomas, writing for the majority with Justices Scalia, Rehnquist, Kennedy and Breyer joining, held that a school need not present

[54] Id. at 655.

evidence of drug problems in a covered group in order to subject that group to suspicionless drug testing.[55]

In 1998, the Tecumseh School District near Oklahoma City established the policy of requiring all students to submit to random drug testing "before participating in an extracurricular activity…."[56] The extracurricular activities included those "competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics."[57] The only repercussions of a positive test result were limited to counseling and suspension from participation in extracurricular activities for a limited time. No law enforcement authorities were notified, only the parents of the child. The child was not subject to any academic or disciplinary action.[58]

Students Lindsay Earls, a member of the choir, the marching band, the Academic Team, and the National Honor Society, and Daniel James, a member of the Academic Team, sought to block the implementation of Tecumseh's policy.[59] The District court upheld the policy, but the Tenth Circuit Court of Appeals reversed. The Tenth Circuit concluded, before a school district can implement a suspicionless drug testing program, it must first "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."* In this case the school

[55] Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S.Ct. 2559 (U.S.,2002)
[56] Id at 826.
[57] Id.
[58] Id at 833-834.
[59] Id at 826-827.

district "failed to demonstrate such a problem existed among Tecumseh students participating in competitive extracurricular activities."[60]

The Supreme Court applied the "special needs" doctrine established in *T.L.O.* and refined in *Von Raab* and *Vernonia.* The respondents argued that the legitimate privacy expectations are greater for those extracurricular activities that do not involve communal showering, as in this case compared to *Vernonia.* The majority conveniently explained, however, that the communal undress discussion "was not essential to [the] decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority." The majority argued that "students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes … [, such as] occasional off-campus travel and communal undress … [, and] a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities … further diminish[ing] the expectation of privacy among schoolchildren."[61] The court's overreaching is difficult to explain as it argues against its *Vernonia* precedent, in an effort to extend the suspicionless drug test to more and more students.

As discussed earlier, the touchstone of legitimate search and seizure is reasonableness. To be reasonable, a warrantless search must serve an immediate and important government interest (*i.e.,* "special needs"). The Tenth Circuit in *Earls* held that the Tecumseh district failed to present sufficient evidence to support an imminent drug problem specific to the covered group. The Supreme Court held otherwise. The majority contended, "the School District … presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students *who appeared to be* under the influence of drugs and that they had heard students speaking

[60] Id. at 828 (*emphasis added*).
[61] Id. at 831-32.

openly about using drugs…. A drug dog found marijuana cigarettes *near* the school parking lot. Police officers *once* found drugs or drug paraphernalia in a car driven by a Future Farmers of America member." This, according to the majority, constituted an immediate drug problem in the Tecumseh school district requiring the establishment of the drug testing policy.[62]

Regarding the effectiveness of the broad extracurricular drug testing in Tecumseh, the court merely waves its hands. "[T]esting students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use." It argued that the rationale it used in *Vernonia*, that the testing of athletes was effective given their status as role models and the group responsible for much of the drug problem, was "not essential to the holding."[63] Once again, we find the court selectively ignoring its own prior reasoning to support its present agenda, an agenda that appears to give public schools wide latitude in controlling student behavior, preserving as much of the doctrine of *in loco parentis.*

The majority opinion in *Earls* and Justice Breyer's concurrence seem to promote the re-emergence of *in loco parentis* for public schools. According to the majority, "[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake".[64] Justice Breyer makes no bones about it, stating that public schools not only "teach the fundamentals", but "shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services…. [which] the law itself recognizes … with the phrase *in loco parentis*…."[65] Justice Breyer draws our attention to the fact that parents view

[62] Id. at 834-35.
[63] Id. at 837-38.
[64] Id. at 830.
[65] Id. at 840.

schools as having parental-like authority, regardless of whether the school is public or private. "A public school system that fails adequately to carry out its responsibilities may well see parents send their children to private or parochial school instead-with help from the State."[66]

The dissent is "wise to" the court's watering-down of reasonable search and seizure under the Fourth Amendment and its rejuvenation of the doctrine of *in loco-parentis*. Justice Ginsberg points out that drug risks "are present for all schoolchildren", not just those participating in extracurricular activities. "Vernonia cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them."[67]

Perhaps Justice Breyer provides the best argument for this expansion of random testing in *Earls*. The voluntary nature of extracurricular activities "preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school." [68] We later see that this "opting-out" doctrine is essential to the legality of suspicionless drug testing in New Jersey.

## When Is a Search Unreasonable?

In *Safford v. Redding*,[69] a search and seizure case based upon reasonable suspicion, the Supreme Court held the line in 2009 on what is considered an unreasonable breach of privacy. 13-year old Arizona middle-schooler Savana Redding, suspected of selling contraband ibuprofen, was pulled from her class room and sent to the principal's office. After a search of her backpack revealed nothing, Savana was sent to the nurse's office where her clothing was

[66] Id.
[67] Id. at 844.
[68] Id. at 841.
[69] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009).

searched. Still finding no contraband, the school nurse and an administrative assistant then asked Savana to pull out her bra and underwear waist band, which partially exposed her breasts and pubic area. Again nothing was found. Savana sued the school for violating her Fourth Amendment rights.[70] The district court granted summary judgment in favor of the school district and the Ninth Circuit panel affirmed, holding that no Fourth Amendment violation occurred. The Ninth Circuit, sitting *en banc* reversed, holding that "the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey v. T.L.O.*" [71] ,

In a 7-2 decision, the Supreme Court affirmed the Ninth Circuit's *en banc* holding. In doing so, the court refined the standard set forth in *T.L.O.*, which limits the extent to which a search may progress under "special needs" doctrine. Central to the court's reasoning was the fact that search was severely intrusive, "embarrassing, frightening, and humiliating"; and repugnant to "Savana's subjective expectation of privacy against such a search…." Her expectation of privacy against a strip search was reasonable, as "indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[72] The search violated the standard set forth in *T.L.O.*, which requires that "'the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place' [, and that the] scope will be permissible … when it is 'not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[73] In this case, the court held that "what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the … the drugs .., and any

[70] Id. at 368.
[71] Id. at 369.
[72] Id. at 374-75.
[73] Id. at 375-76 (quoting *T.L.O.* at 342).

reason to suppose that Savana was carrying pills in her underwear. The combination of those deficiencies made the search reasonable."[74] Thus, the most recent word from the Supreme Court on search and seizure of children in public schools is that the danger to the student body must be sufficiently high to warrant such an intrusive search, and it must be reasonably related to the scope of finding contraband.

According to *Safford*, "the content of the suspicion failed to match the degree of intrusion."[75] How does this apply to suspicionless searches? Would *Earls* be decided differently in view of *Safford*, or does the court apply a different standard to suspicionless searches? Should we not apply the standard to suspicionless searches as well? For suspicionless random drug testing, does the realistic degree of the harm to the student body match the degree of intrusion?

## Suspicionless Searches in New Jersey Public Schools

On August 6, 1985, the Carlstadt-East Rutherford School District adopted a policy requiring yearly on-premises drug screening as part of comprehensive student medical examinations. A urinalysis would be conducted, and the records kept confidential. The school district would enter those students with a positive drug result into a drug rehabilitation program. No civil or criminal penalties would be levied against those students showing a positive result, but the student could be referred to the Bergen county district office of the Division of Youth and Family Services for subsequent periodic testing.[76]

[74] Id. at 376-77.
[75] Id. at 375.
[76] Odenheim by Odenheim v. Carlstadt-E. Rutherford Reg'l Sch. Dist., 211 N.J. Super. 54, 55, 510 A.2d 709 (Ch. Div. 1985)

The school district took the position that the State permitted schools to ensure the physical fitness of all students, and that medical testing fulfilled that obligation.[77] The students and their parents brought suit, and argued that the suspicionless drug test violated their right against unreasonable search and seizure. The Superior Court of New Jersey, Chancery Division, Bergen County applied the then recent holding of *T.L.O.* and held the policy unconstitutional.

The court held the urinalysis "not reasonably related in scope to the circumstances which initially justified the interference", since school policy provided for the exclusion, expulsion or suspension of students involved in drugs.[78] The court also determined that the number of students referred to drug counseling "compared with the total student body [was] not reasonably related in scope to the circumstances which justified the … urinalysis in the first place."[79] Thus, the urinalysis violated reasonable privacy expectations of the school children. Furthermore, and perhaps most important to the disposition of this case, since students under school district policy face "disciplinary action involving possible imposition of serious sanctions, such as suspension or expulsion" as a result of drug violations, the comprehensive medical policy was held to violate students' due process rights under the Fourteenth Amendment.[80]

Since 1995, when *Odenheim* was decided in the chancery court, the U.S. Supreme Court had handed down its *Vernonia* and *Earls* decisions, which allowed suspicionless drug testing in schools despite the Fourth Amendment. In 2003, a year after *Earls* was decided, the New Jersey Supreme Court handed down its decision in *Joye v. Hunterdon*, which overturned *Odenheim* to allow suspicionless drug testing in New Jersey Schools.[81]

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[77] Id. at 58.
[78] Id. at 61.
[79] Id.
[80] Id. at 62.
[81] Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568, 826 A.2d 624 (2003)

The Hunterdon school district in 1997 implemented a policy requiring "all students who participate in athletic and non-athletic extracurricular activities (defined as any non-credit activity), or who possess school parking permits" to undergo *random* drug and alcohol testing.[82] Students covered by the policy were required to agree to be randomly tested by urine, saliva or breath testing. Each week, the vice principal would randomly draw identification numbers from a box. The parents of selected students were to be notified and permitted to attend the testing. The urine sample would be provided behind a closed door to minimize any loss of privacy. Parents would be notified of any positive test results, and an outside laboratory would conduct a second more accurate test.[83]

For a first "offense", the student would be suspended from the extracurricular activities or parking privileges, and required to undergo a five day drug education program, five counseling sessions, and pass a subsequent urinalysis. For a second "offense", the student would be suspended from extracurricular activities and lose his parking privileges for 60 days, and required to attend a five day drug education program, ten counseling sessions, and pass a subsequent urinalysis. The school would also have the right to conduct unannounced tests on any student who had committed a second offense. Pursuant to federal privacy laws, the school would maintain the privacy of all records and not share that information with any law enforcement agency.[84]

The plaintiffs (the parents of two students and a drug prevention task force member) sued the school district, seeking to enjoin the continued implementation of the drug-testing program. The trial court agreed and invalidated the policy over New Jersey's corollary to the federal Fourth

[82] Id. at 573.
[83] Id. at 579-80.
[84] Id. at 580-81.

Amendment. The appeals court overturned the trial court and the plaintiffs appealed to the New Jersey Supreme Court.[85]

Here, the New Jersey Supreme Court applied the analysis of the *Vernonia* decision. Importantly, it agreed with and applied the U.S. Supreme Court's emphasis that "[t]he most significant element in this case is the first we discussed: that the [drug 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*."[86] The court discussed Justice Breyer's concurrence in *Earls*, particularly noting the invocation of the doctrine of *in loco parentis* and the lower standard for privacy afforded to students. "The law itself recognizes these responsibilities with the phrase *in loco parentis*-a phrase that draws its legal force primarily from the needs of younger students ... and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child's or adolescent's school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions."[87] What exactly are those different dimensions?

The New Jersey Supreme Court here was a bit more open, a bit less coy about upholding and invoking the legitimacy of *in loco parentis*. "Consistent with those principles, this Court has observed that "[i]n a limited sense the teacher stands in the parent's place in his relationship to a pupil under his care and charge, and has such a portion of the powers of the parent over the pupil as is necessary to carry out his employment."[88] Here, the court agreed that the school district had "presented a special need to justify the privacy intrusions at issue absent individualized suspicion, … [and that] the requirement that school officials closely monitor schoolchildren

[85] Id. at 582.
[86] Id. at 585 (quoting *Vernonia* at 665; *emphasis added*).
[87] Id. at 588 (quoting *Vernonia* at 839; Brejer, J. concurring).
[88] Id. at 591 (quoting Titus v. Lindberg, 49 N.J. 66, 74, 228 A.2d 65 (1967)).

contributes to [this court's] view that students possess diminished privacy expectations, justifying a special-needs analysis."[89]

The special-needs analysis requires, however, that the government have a strong need to conduct the search in question. In this case, the school district went to some length to demonstrate a "pervasive" drug problem and provided some *anecdotal* evidence that the random drug testing actually reduced drug use among student athletes. Nationwide statistics were reported as well as personal observations of Hunterdon school staff. For example, the principal testified "that she 'personally became aware of two students snorting heroin on school premises' and that coaches, teachers, and other administrators similarly reported 'their concern about what they perceive to be a growing problem.'"[90] Maybe the respondents provided sufficient evidence to indicate the existence of a real problem. But is the random drug test the right answer?

Is the random suspicionless drug testing program effective? The court says yes. First, it cites the requirement for counseling of students who test positive. Second it cites a study that *suggests* that over 50% of students believe "parental disapproval would deter them from illegal drug use."[91] Third, the court cites four surveys, some of which support random suspicionless drug testing, and some of which do not.[92] While the court acknowledges the mixed results and incompleteness of the surveys, it applies its own "common sense" and concludes that "[p]resumably, a school's testing program gains effectiveness as a deterrent only gradually, as consistent implementation signals to students a new consequence to illicit drug use."[93] The court concluded that "reasonableness under Article I, paragraph 7 (New Jersey's analog to the Fourth Amendment) does not require the Board to wait for a definitive study regarding drug-testing

[89] Id. at 595 (internal quotes removed).
[90] Id. at 603.
[91] Id. at 604.
[92] Id. at 604-607
[93] Id. at 606.

efficacy before addressing a problem that it already knows affects a sizable number of students."[94]

In *dicta*, the New Jersey Supreme Court quoted Justice Breyer' concurrence in *Earls*, observing that the Hunterdon program "preserves an option for a conscientious objector." Students could refuse testing without facing disciplinary action, like suspension or expulsion. The student merely would not be able to participate in extracurricular activities or have the privilege of parking at school.

Thus, New Jersey essentially follows the special-needs jurisprudence of the U.S. Supreme Court in the application of its corollary to the Fourth Amendment to the public schools. The *Joye* decision goes a bit further though. In its decision, the court directly reinforced the doctrine of *in loco parentis* and the state's view that school children generally possess a lower legitimate expectation of privacy.

How then is the *Joye* decision applied in New Jersey? This is a relatively recent case, so the application of *Joye* is not very well developed. However, one case is particularly worth noting. In 1997 the Gateway Regional High School District implemented a random drug testing policy very similar to the program at Hunterdon. On November 30, 2009, plaintiff "Clement Q" was randomly selected for testing. He tested positive for drugs and his parents were notified pursuant to school policy.[95] The parents petitioned the Commissioner to expunge the test results and the case was referred to an Administrative Law Judge. The ALJ concluded that Gateway's policy violated N.J.A.C. 6A:16–4.4(b)(2) by failing to provide a description of (1) how students are randomly selected, (2) the statistical principals underlying the random selection method, (3) the method of documenting the random selection process, (4) the method "used to ensure

[94] Id. at 607.
[95] K.Q. v. Bd. of Educ. of Gateway Reg'l High Sch. Dist., A-4282-10T4, 2012 WL 1253008 (N.J. Super. Ct. App. Div. Apr. 16, 2012).

documenting and verifying the random-selection procedure, and (5) "procedures for students or their parents to challenge a positive result."[96] The ALJ thus held that Gateway's policy was "arbitrary, capricious, and unreasonable" and ordered the school to expunge the results of Clement's test. The Commissioner rejected most of the ALJ's decision, holding that, while some of the fine points of the description of the random process were not completely in line with the regulations, the parental recourse provisions were adequate. The commissioner held that Gateway did not act arbitrarily, unreasonable or capriciously. The parents appealed.

The New Jersey appeals court respected the Commissioner's decision and held that the Gateway policy[97] was sufficiently compliant with the New Jersey Statute and the *Joye* decision.

It appears as though random drug testing in New Jersey public schools, at least as applied to extracurricular activities or other groups that can opt-out of testing, is legal and enforceable. Both the schools and the courts justify the use of random drug testing as a reasonable means to address rampant drug use in schools, when the results are not shared with law enforcement, and the students are not subject to academic or other disciplinary measures.

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[96] Id.

[97] "On a biweekly basis, a maximum of twenty (20) of the eligible students that sign up for an athletic team/activity/club/parking shall be tested for illegal drug use. The contractor appointed by the Board of Education shall conduct testing. Those selected for testing shall be immediately notified and tested the same day. Students will be given a letter to notify their parent/guardian each time they are tested. Any eligible student who refuses to be tested, deliberately avoids testing or alters their specimen will be immediately dropped from the team/activity/parking as he/she is in violation of the consent agreement signed prior to the season/activity/parking. Selection and testing shall be done on a biweekly basis. The contractor conducting the random selection, and all testing, shall adhere strictly to all Federal and State standards. *A description of the random selection software methodology and procedure is on file in the district office*…. If a student or parent/guardian chooses to challenge a positive result the student or parent/guardian shall have the option to send a split sample to an approved testing facility of his/her choosing, utilizing the same screening parameters and levels identified in this policy, at his/her expense. Consideration will be given to the results of tests run by the student's facility of choice. Additional testing may be deemed necessary by the administration. The results of the split specimen are the final results." Id.

The legal arguments and legal decisions around government's "special needs" in the school setting all revolve around the presumptive efficacy of suspicionless random drug testing. As we learned in the U.S. Supreme Court cases, the courts essentially ruled that the tests were reasonable because the proponents *believed* in the efficacy of the programs to deter drug use among the covered groups. All believed that the positive effects of drug testing would naturally spill over to the general school population. To be constitutional, all that was required was some evidence of a drug problem. The courts assumed that the tests would act as a deterrent or at the very least help those troubled students who use drugs to get the requisite counseling. At least the New Jersey Supreme Court, in its *Joye* decision paid some lip service to looking at the efficacy of the testing program at Hunterdon.

The question remains, however, whether random suspicionless drug testing is truly effective at deterring or reducing drug use. If it were not effective, I would argue that the entire jurisprudence build around this issue is a delusion. If we are to permit public schools to sacrifice our children's legitimate expectation of privacy and their right against unreasonable search and seizure, the search must truly be reasonable. A search that is ineffective or whose scope is out-of-whack relative to the legitimate goal of government is *a priori* unreasonable. If the suspicionless search is ineffective in deterring or treating drug abuse in schools, then such a search is in fact unreasonable.

## The Effectiveness of Suspicionless Searches

What do we know about the true effectiveness of suspicionless searches toward the goal of reducing and preventing illicit drug use in schools? In the *Joye* decision, the Hunterdon district presented evidence, albeit mostly anecdotal, to convince the court that its program worked. The court in *Joye* applied the tripartite test derived from the line of cases beginning with *T.L.O.,*

examining "the affected students' expectation of privacy, *the search's degree of obtrusiveness*, and the strength of the government's asserted need in conducting the search."[98] If the search fails to have any efficacy in addressing the special needs of the government, then I would argue such an intrusion is overly obtrusive relative to the information gleaned, and the search is unconstitutional. The court in *Joye*, however, does not believe that effectiveness and reasonableness are related, and rendered its decision despite unclear and conflicting evidence.[99]

What evidence did Hunterdon provide regarding efficacy? First, the school board presented "a 1996 statewide survey showing that over fifty percent of responding students stated that parental disapproval would deter them from illegal drug use." Hunterdon then argued, since parents would be notified of the results of the drug test, the students would stay clean.[100] Second, Hunterdon provided a 2002 study, the Dupont Study[101], which stated "all of the school officials surveyed strongly supported their entire [student drug testing] programs and all were convinced that their [student drug testing] programs benefited their entire school communities, including the students." [102] Third, Hunterdon presented the McKinney Study[103], which stated that "[r]andom drug testing policies *appear to* provide a strong tool for schools to use in the battle to reduce alcohol and drug usage among teens .... [T]his study does show that random drug

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[98] Joye at 597 (*emphasis added*).
[99] "Reasonableness in this context does not require that the Board possess irrefutable proof verifying the efficacy of random drug and alcohol testing in reducing substance abuse among students. Rather, it is enough that the Board believed that its program would have some measurable effect in attaining the Board's objectives." Id. at 603.
[100] Id. at 604.
[101] Robert L. DuPont, et al., *Report of a Preliminary Study: Elements of a Successful School-Based Student Drug Testing Program,* July 22, 2002, *available at* www.datia.org/pdf_ resources/prelim_study.pdf (Apr. 15, 2003) (DuPont Study).
[102] Joye at 604-605.
[103] Joseph R. McKinney, *The Effectiveness and Legality of Random Drug Testing Policies,* at 3 *available at* www.studentdrugtesting.org/Effectiveness.htm (last visited Apr. 16, 2003) (McKinney Study).

testing policies are effective in *reducing the temptation to use* drugs and alcohol."[104] Fourth, Hunterdon presented the Saturn Study[105], which compared Oregon schools with a suspicionless drug testing program with other Oregon schools that did not. That study showed that the "school that drug-tested student athletes had a rate of illicit drug use that was about one-fourth that of the control school …. [Despite] warning[s] that there were limitations to their study, the authors concluded that '[a] policy of random drug testing surveillance appears to have significantly reduced recent drug use among adolescent athletes.'"[106] Finally, Hunterdon, in a fit of equitable conduct, presented the Michigan Study[107], a survey of 76,000 students nationwide, which found that "drug testing (of any kind) was not a significant predictor of student marijuana use in the past 12 months."[108] Taken together, these proffered studies do not provide compelling statistical or scientific evidence of the effectiveness of suspicionless drug testing. In fact, the only large national study offered to the court (the Michigan Study) indicated that suspicionless drug testing had no positive effect on drug use by students.

The New Jersey Supreme Court had the benefit of two extensive studies, Goldberg and Yamaguchi, but unfortunately, the U.S. Supreme Court did not have that advantage. *Vernonia* and *Earls* were both decided before any systematic studies were conducted exploring the effectiveness of random suspicionless drug testing in schools. Those decisions did, however, encourage the federal government to support drug testing programs in schools.

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[104] Joye at 605 (quoting McKinney).
[105] Lynn Goldberg et al., *Drug Testing Athletes to Prevent Substance Abuse: Background and Pilot Study Results of the SATURN (Student Athlete Testing Using Random Notification) Study,* Journal of Adolescent Health, at 16-17 (Jan. 2003)
[106] Joye at 605-06 (quoting Goldberg).
[107] Ryoko Yamaguchi, et al., *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies,* Journal of School Health, at 164 (Apr. 2003) (Michigan Study).
[108] Joye at 606 (quoting Yamaguchi).

The courts in *Vernonia* and *Earls* applied a certain "common sense" in their decision to permit suspicionless searches in public schools. Anecdotal evidence and the opinion of administrators were presented as "evidence" of the need for testing and the effectiveness of the testing. The court held that the searches were reasonable, because the school had acted reasonably in presupposing that random drug testing would be effective. Combined with the seriousness of the special needs, the court held the searches to be constitutional. But is drug testing in schools efficacious?

Two peer reviewed and controlled academic studies were undertaken on the heels of *Earls* to measure just that. Yamaguchi, Johnston and O'Malley of the University of Michigan conducted the first major study in 2003[109]. In that study, the researchers asked four questions. What percentage of schools tested students for drugs and alcohol? Which students do the testing cover? What is the relationship between testing and actual use? Data was collected from the Monitoring the Future (MTF) study of the National Institute on Drug Abuse, information provided by school administrations, and the Youth, Education & Society (YES) questionnaire. The study was large, spanning from 1998 through 2001 and including 30,000 eighth graders from 260 schools, 23,000 tenth graders from 227 schools, and 23,000 twelfth graders from 235 schools.

Only a minority of schools at that time administered drug testing of any kind. In 2001, according to this study, 18.14% of schools, representing 19.23% of students had drug testing of any kind, suspicion-based or random drug testing. 14.04% of schools, representing 14.07% of students, had a suspicion-based program. 3.30% of schools, representing 2.81% of students, had a random drug testing program covering students participating in extracurricular activities.

[109] Yamaguchi *et al.,* J. School Health, 73(4):159-64, Apr. 2003.

4.95% of schools, representing 5.68% of students, had a random drug test program covering only athletes.

Interestingly, the results of this large cross-sectional study indicated that drug testing of any kind was not a significant predictor of student drug use. The take home from this study suggests that drug testing for any student is not a significant predictor of marijuana use in the past twelve months. Drug testing of athletes was also found not to be a significant predictor of marijuana use for those athletes. Drug testing of any kind (including testing for cause) of "experienced" marijuana users (those having smoked at least 20 times prior to the study) was also found not to be a significant predictor of marijuana use. Finally, drug testing of any kind was found to not be a significant predictor of other illicit drug use. It is important to keep in mind that this study, which was designed as a cross sectional analysis, cannot be used to make causal assumptions. In other words, the results can be used to assess correlations and hence have predictive value, but they do not tell us whether drug testing causes a change in behavior of the students.

In another 2003 study, Goldberg and colleagues conducted an experiment using a handful of Oregon public schools.[110] 18 high schools were divided into two groups. The control group consisted of those schools that deferred the implementation of a random drug testing program. The experimental group consisted of those schools implementing a suspicionless random drug test program covering students participating in extracurricular activities. Positive drug tests could not result in academic or legal punishment, but students could be suspended from the extracurricular activities. The drug test results were kept confidential, but parents were notified of their children's positive results. Counseling was prescribed for those students who tested positive.

[110] Goldberg *et al.,* J Adolesc Health, 2007, 41:421-29.

Students in both groups were administered a 121-question survey that asked about students' use and perceptions of drugs. The survey was administered five times to each student over the course of the study. Both the control and the experimental groups showed the same baseline level of drug and alcohol use. The establishment of a baseline and the assignment of a control and experimental group was important in establishing this study as a prospective study that can tease-out cause and effect relationships.

This study showed that there was essentially no effect on drug use by students due to the implementation of random drug testing. Drug testing had no effect on past month illicit drug use, past month illicit drug and alcohol use, and past year illicit drug and alcohol use. The one exception was the effect of testing on past year illicit drug use (not combined with alcohol use) in two of the five surveys, where a slight but nonetheless significant negative effect on drug use was seen.

The study also looked at several mediating effects on drug use that could be affected by the random drug test. For example, the random testing had no effect on the either the retention or attrition of student athletes on sports teams, but did have a negative effect on their belief in their athletic competence. Surprisingly, random drug testing had a negative effect on students' attitudes regarding drug use. Students in the experimental group believed less in the benefits of drug testing, believed less in the authority's opposition to drug use, and believed less that drug testing was a reason not to use drugs.

Since the Supreme Court held random suspicionless drug testing in public schools constitutional, the federal government has become interested in helping schools develop testing programs, with the hope of reducing student drug use. In 2003, the U.S. Department of Education's Office of Safe and Drug-Free Schools (OSDFS) instituted a grant program to

support mandatory random student drug testing (MRSDT) programs in schools. Since that time, tens of millions of dollars have been given to schools; with the average grant size of $160,000 per school.

In 2007, the U.S. Department of Education initiated a study to examine whether this is money well spent.[111] The National Center for Education Evaluation looked at 36 high schools that had received the federal grants. Depending on the parameters measured, about 1,500 to 3,000 students participated in the study. The study examined whether the drug testing programs deterred drug use, or had any spill-over effect to students that were not covered. The study also looked at negative effects of the testing programs. After baseline data collection, half the schools were assigned to the treatment group, which implemented an MRSDT program, and half to the control group, which deferred implementation of the MRSDT program until after the data was collected.

As a starting proposition, this study reported that 47% of students report having used illicit drugs and 72% reported using alcohol. The government's position is that drug and alcohol use among children is a leading cause of health problems, low academic outcomes, delinquency, and risky sexual behavior.

This study did show a limited and minor effect of testing on student reported drug testing, but showed no spill-over effect. Specifically, the MRSDT experimental group showed a 5.5% reduction ($p < 0.05$) in students reporting using any tested drug within the past thirty days. This however was the only significant effect noted in the entire study. While there were trends showing an effect of about 2.5% to 5.8% reduction for some reported drug use parameters, none

[111] James-Burdumy, Susanne, Brian Goesling, John Deke, and Eric Einspruch (2010). The Effectiveness of Mandatory-Random Student Drug Testing (NCEE 2010-4025). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

were statistically significant. Those parameters measured included reporting use within the past 6 months of any substance, any substance except alcohol and tobacco, and any substance test by the district's MRSDT program; and reporting use within the past 30 days of any substance, and any substance except alcohol and tobacco.

Regarding the all-important spill over effects, this study showed absolutely no effect on students' intentions to use drugs in the future and no change in the perceived consequences of substance abuse. There was also no effect on the number of disciplining incidents between control and experimental schools.

Just as important as measuring any positive effects the testing may cause, this study also examined whether the random testing had a negative effect on students or their relationship to the school. Drug testing was found to have no effect on students' reported attitudes toward school, students' perception of their connectedness to the school, or participation in extracurricular activities. Furthermore, it had no effect, positive or negative, toward drug use.

Not to be out done, a research group from Fairleigh Dickinson University examined the effects of suspicionless random drug testing in suburban New Jersey in a study published in 2013.[112] This study ran from the 2006-7 school year through the 2012-13 school year and followed students from grade seven through twelve. The treatment school comprised students opting into a random drug testing program, in which all students are tested. One control school only tested for drugs on a suspicion basis. The other control school randomly tested only athletes. Control and treatment schools were in the same district with near identical demographics. Students were given a 25-question survey designed to examine students'

[112] "Partnership for a Drug Free New Jersey Study on the Effect of Suspicionless Random Drug Testing in New Jersey Middle Scools," Dan Cassino and Angela Valente, available at http:// http://drugfreenj.org/assets/_control/content/files/2013suspicionless.pdf.

relationships to their parents, use of alcohol, aspirational use of alcohol, and reported use and aspirational use of illicit drugs.

Like the earlier studies, the treatment did not show significant differences between the treatment group and the controls. An important parameter measured was the student's likelihood of having a conversation with a parent. The working model was that parents have the greatest effect on reducing drug use by their children by talking about the negative effects of drugs and their disapproval of drug use by their children. Here, the drug-testing program had no effect on the likelihood that a child would have that all-important conversation with a parent.

The spillover effects of random testing, and the perception of safety and drug and alcohol use was also examined. Here, the treatment had no significant effect on the perceived use and safety of drugs and alcohol. No spill-over effects were observed from random drug testing.

The study did however show a minimal effect on rising eighth graders. Those seventh graders who were actually tested showed a mean reduction of 6 points in the likelihood of using alcohol in the eighth grade. The researchers hypothesized, while clearly disappointed that random testing did not work as expected, that testing merely 30-40% of students in a school might be to blame for the failure. They hypothesized, without any data to support the hypothesis, that perhaps 60% or more of students would need to be tested to see any spill-over effects and an actual reduction in drug use.

On the whole, it appears as though common sense once again misleads the courts. What is believed to be reasonable and what is actually true, the scientific method tells us, is not necessarily the same thing.

The collision between the historical doctrine of *in loco parentis* and the modern application of fundamental constitutional rights to children in the classroom forced a compromise.

Government has an important interest, standing *in loco parentis*, to reduce drug use among children and to promote the health, well being and education of our children. Children have a reduced expectation of privacy under the care of their parents and under the care of their schools. Schools therefore are allowed to test our children without suspicion and without probable cause, *because* (the courts assume) random drug testing is a reasonable means to address the problem.

Let us ask ourselves these questions. Is it reasonable to subject children to the humiliation of urinalysis, to the stigma of drug counseling, to the false promise of a constitutional right to privacy and against unreasonable search and seizure based on an unfounded belief and anecdote? Maybe. Is it reasonable to do so when scientific peer reviewed studies teach us that the random tests do not solve the problem? Clearly the answer is no. What if the taxpayers must foot the bill for drug tests, expensive confirmatory drug tests, and student counseling, when the positive repercussions are not there? Definitely no.

The social science research tells us that parents have the greatest effect on children's attitude toward drugs and alcohol and their use of alcohol and drugs. I suggest that the government spend more money on research directed to understanding the social dynamics of drug use among children, and seek to find a workable solution. The courts could then apply a dose of reality to the important government interest, instead of applying "reason" and "common sense" detached from any measurable sense of reality. Even if we apply *in loco parentis* to the public schools, and completely eliminate any lip service to the reasonableness requirement of the Fourth Amendment, we should ask ourselves whether a parent would subject his child to a random urinalysis to deter drug use? Most likely not, especially when the parent knows that a frank conversation is proven to be more effective.

When the courts revisit this issue again, perhaps when a school is challenged for randomly testing all students, they should apply the reason of reality, divined through the scientific method. The courts should hold suspicionless drug testing unreasonable in view of the important government interest in ameliorating drug use, and in violation of the Fourth Amendment.

## A Vignette

Sparta High School, a large high school in an affluent semi-rural community in Sussex County, New Jersey, decided that it had a major drug problem. Rumors in the community stated that heroin use was near epidemic proportions. Pot deals were going down on campus. The parents and school board were rightfully concerned. Naturally, the parents wanted the school to do whatever it could to help them protect their children.

On June 12, 2007 the Sparta school board approved a program, which would subject any student, who participated in extracurricular activities and parked on campus, to random drug testing. Other students could participate with the consent of a parent. Sparta would be the first school in Sussex County to enact such a program, and join the approximately twenty other districts across New Jersey that have such a program at that time. The program was slated to go into effect for the 2007-2008 school year.[113]

Today, Sparta has yet to put its random drug-testing program in place. In August of 2007, one month before the proposed random testing program was to be activated, New Jersey proposed new rules regulating student drug testing, which would have impacted the implementation of the proposed testing. The Sparta school district delayed the program under the advice of their attorney. When the new school board convened in late April of 2008, they voted to delay the random drug testing indefinitely. Their reasoning, according to Sparta board

[113] "Sparta Oks Random Drug Testing for Students", Jim Lockwood, Star-Ledger, June 12, 2007.

president Kevin Pollison, "[A]ny new drug-test policy would be challenged in court, and now is not the time for Sparta to get sued over it."

At least parents in Sparta have a choice. If they want their child tested for drugs in school, they can shell-out $15,000 per year to send their child to Pope John School, or $35,000 per year for nearby Blair Academy. Those schools would be happy to test your child for drugs.