Brigham Young University Education and Law Journal

Volume 2001 | Number 2 Article 7

Fall 3-2-2001

How Random and Suspicionless May School Searches Be?: Doubting *Joy v. Penn-Harris-Madison School Corporation*

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HOW RANDOM AND SUSPICIONLESS MAY SCHOOL SEARCHES BE?: DOUBTING *JOY V. PENN-HARRIS-MADISON SCHOOL CORPORATION*

I. INTRODUCTION

School districts' responses to the problems posed by student drug use place difficulties and limitations on the ability of individual schools to educate children.[1] Recently, random suspicionless drug testing of students who participate in specific activities has gained popularity. This drug testing procedure has raised concerns about the potential for violation of students' Fourth Amendment rights.[2] Such concerns justifiably stem from the expansion of schools' abilities to violate student privacy rights.

The legal disputes in this area never harp upon whether a student may be searched or drug tested by the school, or if the school has probable cause based upon individual suspicion, or if the school has obtained a warrant. The cases that follow similarly do not argue the permissibility of schools' drug testing students based on individualized suspicion alone. Rather, the issue presented in these cases is whether students may be classified for the purpose of drug testing by the types of activities they participate in at school, without either suspicion of individual illegal conduct or probable cause. In other words, is it permissible for schools to test students for drug use based solely upon the fact that they participate in extra-curricular activities?

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1. Charles J. Russo & David L. Gregory, *Legal and Ethical Issues Surrounding Drug Testing in Schools,* 1999 L. REV. MICH. ST. U. DET. C. L. 611 (citing studies done about levels of drug use).

2. The Fourth Amendment states:

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. U.S. CONST. amend IV.

In the recent case of *Joy v. Penn-Harris-Madison School Corporation,*[3] the Seventh Circuit dealt with the issue of whether or not the Supreme Court's tests espoused in *New Jersey v. T.L.O.*[4] and *Vernonia School Dist. 47J v. Acton*[5] were properly used in the school's decision to use random suspicionless drug testing of student drivers and others who participated in non-athletic extra-curricular activities.

In *Joy*, the Seventh Circuit reviewed an appeal by several students who sued their school district for due process violations. The school had enacted a random drug, alcohol, and nicotine testing policy for all students who participated in extracurricular activities, drove to school, volunteered to be part of the random pool, were suspended from the school for three consecutive days before they could come back to classes, and all students for whom there was a reasonable suspicion of being under the influence of drugs and alcohol. Joy and the other plaintiffs attacked the merits of the first two grounds: students who participate in non-athletic extra-curricular activities and students who drive to school.

The Seventh Circuit's decision in *Joy* was particularly notable in that it departed from established policy. The court upheld the school's suspicionless drug testing policy even though the school district failed to meet the test laid out by the Supreme Court, it had a poorly outlined policy, and its counsel admitted that his goal was to require all high-school students to undergo suspicionless drug testing. Had it not been for precedent set by the Seventh Circuit's previous decision in *Todd v. Rush County Schools,*[6] the panel stated it would have invalidated the school district's policy because it violated students' Fourth Amendment rights.[7]

This paper will explore the questions surrounding the *Joy* decision and examine the background and analytical framework that made the decision in upholding random suspicionless drug testing possible. To accomplish this task, this paper will analyze precedent set by the Supreme Court's and the Seventh Circuit's legal decisions and show how they have consistently held that students' rights under the Fourth Amendment are

3. 212 F.3d 1052 (7th Cir. 2000).
4. 469 U.S. 325 (1985).
5. 515 U.S. 646 (1995).
6. 133 F.3d 984 (7th Cir. 1998).
7. *See Joy*, 212 F.3d at 1066.

limited. This paper will then examine some of the underlying policy considerations behind these decisions, namely the impact of random drug testing upon the value of extra-curricular activities, the effects of these decisions upon the police powers of school districts, and whether the justification of protecting student health and welfare is sufficient for intruding upon student privacy. Finally, this paper will examine how a school district would properly implement a constitutional suspicionless, random drug-testing program.

II. BACKGROUND

Joy relied primarily upon two Supreme Court cases, *New Jersey v. T.L.O.*[8] and *Vernonia School District 47J v. Acton,*[9] as well as two previous Seventh Circuit cases for its decision. Since *Joy* relied upon these cases in its determination to uphold the school's drug testing policy, it is useful to review the tests proffered by the Supreme Court and the Seventh Circuit in determining whether a school district has appropriately applied the Fourth Amendment to its student drug-testing policies.

A. Supreme Court Cases Dealing with the Fourth Amendment Rights of Public School Students

1. New Jersey v. T.L.O.

The first case dealing with the rights of school districts to search students for drugs came in the 1985 case, *New Jersey v. T.L.O.*[10] This case arose when a female student who had been caught smoking in a bathroom had her purse searched by the assistant principal after she flatly denied smoking. The assistant principal found not only a pack of cigarettes, but also rolling papers, a small amount of marijuana, a pipe, several empty plastic bags, cash, a list of students who owed her money for marijuana, and two letters implicating her in drug dealing. After the police and her mother were called, the student, T.L.O., admitted to having dealt drugs.[11]

8. 469 U.S. 325 (1985).
9. 515 U.S. 646 (1995).
10. 469 U.S. 325 (1985).
11. *See id.*

The Supreme Court had to decide whether "the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers."[12] The majority's decision held that for the purposes of the Fourth Amendment, the assistant principal conducted a reasonable search. The majority reached this conclusion based upon a balancing test between the school's interest in a drug-free learning environment and the student's interest in privacy.[13] The Court emphasized that in certain cases a search may be conducted without a warrant and that probable cause was not the only standard for an official of the state to conduct a search.[14] The majority even acknowledged that although the Fourth Amendment applies as a restraint of governmental intrusion upon students' rights, a "special needs" exception exists when it is determined that individual suspicion and probable cause are impracticable.[15] The Court further explained that since the government has an obligation to fulfill the purposes of education,[16] the need to instill discipline among the students is more pressing than ever. Widespread drug use has made it much more difficult for school districts to discipline their students.[17] Hence, the "special needs" exception requires schools to have the ability to use reasonable flexibility in determining when it is appropriate to search students under the Fourth Amendment.[18] On one side of the equation, schools find it necessary to exercise their police power in maintaining stability and order,

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12. *Id.* at 331.

13. *Id.* at 343.

14. *See id.* at 337. The court dictated the rule: "on one side of the balance are arrayed the individual's legitimate expectation of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *Id.*

15. *See id.*

16. *Id.* at 334. The Court stated "[t]hat they 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." *Id.*

17. *Id.* at 340 (". . .maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.").

18. *See id.* "It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." As such, the court is hesitant to create rules which would, "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."

whereas on the other side of the equation, students expect to maintain their privacy. The Court held that the Fourth Amendment did not protect a person's unreasonable or illegitimate expectations of privacy. The test balances the governmental and privacy interests in cases where the practicality of the warrant and probable cause requirements are in the particular context.

The Court rejected two of New Jersey's arguments: first, that a student in public schools was more akin to a prisoner and second, that he or she had no need to bring personal belongings to school. It did, however, hold that the reasonable expectation of student privacy was diminished in the public school setting. The rule in *T.L.O.* was that school officials could justify a search of a student upon reasonable and individualized suspicion "that the search [would] turn up evidence that the student has violated or is violating either the law or the rules of the school."[19]

Justice Stevens' vigorous dissent stated that students in a governmental institution deserved more than a reasonableness test to determine whether they could be searched for violation of school rules.[20] Unlike the majority, Stevens did not distinguish between students in public schools and the general public at large. Stevens argued that, despite whatever test the majority proposed, "[t]he search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy."[21] He stated, "[m]oved by whatever momentary evil has aroused their fears, officials – perhaps even supported by a majority of citizens – may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone. . .'"[22]

Stevens felt that the problem with the majority's balancing test was that the difficulties experienced in securing a warrant "[are] not an unintended result of the Fourth Amendment's

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19. *Id.* at 342.

20. *See id.* at 354. The sanction of "school officials to conduct full-scale searches on a 'reasonableness' standard whose only definite content is that it is not the same test as the 'probable cause' standard found in the text of the Fourth Amendment." *Id.*

21. *Id.* at 375.

22. *Id.* at 361-62 (footnote omitted).

protection of privacy; rather, [they are] the very purpose for which the Amendment was thought necessary."[23] Stevens further contended that the use of a balancing test in determining the limits of Fourth Amendment rights "finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens."[24] He expostulated that the majority's balancing test was essentially a form of cost-benefit analysis not contemplated by the Constitution.[25] Thus, he felt the majority overstated the social costs faced by the government while under-weighing the need for Fourth Amendment protection by students.[26] Stevens finally concluded that the probable cause standard should be upheld even for students.[27]

2. Vernonia*: U.S. Supreme Court Precedent*

Vernonia continued where *T.L.O.* left off by applying "special needs" testing to the area of random drug testing of student athletes. The Vernonia school district was at a loss as to what to do regarding an entrenched drug problem led by the student athletes. School district officials anecdotally had noticed that the number of students using drugs had risen significantly, that discipline had become worse, and that profane language had become common during the 1980s. After a series of injuries involving athletes suspected of drug use, the district decided to actively respond to the problem through "special classes, speakers, and presentations designed to deter drug use."[28] When this initial program failed, the district, after presentations to the parents, implemented a "Student Athlete Drug Policy." This policy, which involved drug testing student athletes only, had the express purpose of "prevent[ing] student

23. *Id.* at 357.

24. *Id.* at 358.

25. *See id.* at 362-69 (wherein Justice Stevens extensively discusses the flexibility, in terms of "costs," etc., for which this rule provides).

26. *Id.* at 362.

27. *See id* at 361

> "Considerations of the deepest significance for the freedom of our citizens counsel strict adherence to the principle that no search may be conducted where the official is not in possession of probable cause – that is, where the official does not know of 'facts and circumstances [that] warrant a prudent man in believing that the offense has been committed.'" (quoting Henry v. United States, 361 U.S., at 102 (1959)).

28. *Vernonia,* 515 U.S. at 649.

athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[29]

All students wishing to participate on any athletic team were required to have their parents sign a consent form permitting drug testing. The policy mandated drug testing of all athletes at the beginning of the season. The students' names were subsequently placed into a pool from which a student, with two adults, would draw the names of ten percent of the athletes, who would be drug tested that day. The tests were administered in the locker rooms and students were searched specifically for controlled substances. If a student tested positive, a second test was taken; if the second test were negative, then no further action would be taken. However, if the test was again positive, the athletes' parents would be notified and the student would be given the choice of participating in a six-week drug assistance program or being suspended for the remainder of the season. A second offense would automatically suspend the student from playing sports for the rest of the season. A third offense would suspend the athlete from the rest of the present season and the next two athletic seasons.[30]

The Court initially explained that the Fourth and Fourteenth Amendments were enacted to protect the citizenry of the people from unreasonable searches and seizures,[31] which encompassed drug testing in schools.[32] The Court, however, qualified this by stating that a person's Fourth Amendment rights are not absolute; rather, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"[33] The Court acknowledged that judicial warrant and probable cause are generally required when the government conducts a search but that some instances warranted exception. The Court determined, because of its holding in *T.L.O.*, that public schools fell into the category of "special needs" cases. Thus, under the "special needs" doctrine the government does not require a warrant to perform a search. Hence, the Court developed a balancing test where it engaged in "balancing . . . between the intrusion on the individual's Fourth Amendment interests" and

29. *Id.* at 650.
30. *See id.* at 651.
31. *See id.* at 652.
32. *See id.*
33. *Id.* at 652.

the search's promotion of legitimate governmental interests.[34]

Subsequently, the Supreme Court went on to enumerate a four-prong test as a guide in determining whether or not the government could reasonably conduct a search without a warrant. First, the Court said that the nature of the privacy interest must be examined. The Court stated that since minors are in the custody of the school, they are limited in their privacy interests in general, and that athletes, in particular, have a limited privacy interest because "there is 'an element of communal undress' inherent in athletic participation."[35] Secondly, the court reasoned, the government must determine the character of the intrusion on the individual's privacy interest. Here, since the drug testing process was "nearly identical to conditions encountered in public restrooms," the Court concluded that the impairment of student's privacy rights was reasonable.[36] This view was bolstered by the fact that the information was "not disclosed to law enforcement personnel and was provided to only a limited number of school personnel."[37] The Court stated that the third prong was the nature of the governmental concern at issue. As the Court in *Vernonia* pointed out: "deterring drug use by schoolchildren was obviously impor-

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34. *Id.* at 653. *See also Joy*, 212 F.3d at 1058-59 (quoting *Schaill* by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (1988)).

35. *See Vernonia*, 515 U.S. at 657. This characterization presents its own troubling legal question: does the fact that a school provides only 'communal' changing facilities determine that the Fourth Amendment privacy protections have lost some of their meaning? What if schools paid for locker rooms with private or semi-private lockers? Would those student athletes have the same problems as *Vernonia*? It seems that this justification is a weak one. One commentator has noted that this concept of a lower expectation of privacy for students participating in extracurricular activities is not universally accepted.

> Certainly there is no remarkable element of communal undress present for participants in the Library Club or Future Farmers of America. The Court of Appeals comes distressingly close to authorizing blanket, random, suspicionless searches of all public school students based upon the lesser expectation of privacy held by students in general. J. Nathan Jensen, Note, *Don't Rush to Abandon a Suspicion-Based Standard for Searches of Public School Students*, 2000 BYU L. REV. 695 (2000).

36. *Joy*, 212 F.3d at 1059. It would seem that there is a difference between urinating without anyone monitoring your behavior and the scrutiny that one's behavior is under during urinalysis. It appears again that the court is stretching. Although the situation is the same, the context is very different. Further, the courts do not consider a legal privacy interest in one's biological byproducts, perhaps because these cases fall under the "special needs" exception.

37. *Id.* at 1059.

tant, especially given that school years are the time when the physical, psychological, and addictive effects of drugs are most severe."[38] The Court stated that drug use by students affects the whole student body because it disrupts the educational process.[39] The Supreme Court noted that the lower courts required that the school district show a "compelling need" for the drug testing in order to eliminate the requirement of individualized suspicion of students.[40] This was met, however, because the government was able to show that its interest was "*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."[41] The Court stated the fourth prong was the immediacy of the concern. It concluded that "this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."[42] The *Vernonia* court highlighted evidence showing that drug use negatively impacts student athletes in several ways, namely through "impairment of judgment, slow reaction time, and a lessening of the perception of pain." There were additionally physical risks of drugs to athletes, such as "'artificially induced heart rate increase . . . [b]lood pressure increase and [m]asking of the normal fatigue response.'"[43] Based upon examination of these four prongs, the Court held that all the government needed was substantial reasonableness before it could randomly drug test student athletes without suspicion.

Justice O'Connor, joined by Justices Stevens and Souter, did not agree with the majority's elaborate balancing test. In her dissent, she mused that "the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search."[44]

She argued that suspicionless drug testing was not justified

38. *Vernonia*, 515 U.S. at 661.
39. *See Joy*, 212 F.3d at 1060.
40. *Vernonia*, 515 U.S. at 661.
41. *Id.* (emphasis added).
42. *Id.* at 662.
43. *Id.*
44. *Id.* at 667.

on the facts because it was not clear that a suspicion-based regime would not work. She criticized the majority's reasonableness test, stating that it "treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative—that is, an alternative that officials may bypass if the lesser intrusion . . . is outweighed by policy concerns unrelated to practicability."[45] She felt that reasonableness should mean reasonable suspicion, rather than some sort of balancing. This should be especially true since the Court never discussed whether a suspicion-based program is practical. The Fourth Amendment places a limitation, enacting a price on government's ability to monitor the behavior of its citizens even in situations involving a compelling government interest like fighting drugs, which is traditionally not part of a school's function.[46]

O'Connor went further, stating that the majority's decision effectively espoused a policy allowing for blanket searches of students.[47] She felt that the decision was fundamentally unconstitutional because it could undermine the very nature of the Fourth Amendment. "Blanket searches, because they can involve 'thousands or millions' of searches, 'pos[e] a greater threat to liberty' than do suspicion-based ones, which 'affec[t] one person at a time.'"[48] Judges should not be in the business of determining what has, up until *Vernonia,* been "generally considered per se unreasonable within the meaning of the Fourth Amendment."[49] A reasonableness test violates the Framers' hard-fought battle to contain the ability of government to generally search its citizens, individuals as well as groups.

O'Connor suggested, instead, an alternative procedure that would address the school district's need for a policy that combats drugs and still maintains the individual suspicion requirement.[50] She suggested that the school should focus drug-

45. *Id.* at 676.

46. *See id.* at 680.

47. *Id.* at 681. The instant case, however, asks whether the Fourth Amendment is even more lenient than that, i.e., whether it is so lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people.

48. *Id.* at 667 (quoting Illinois v. Krull, 480 U.S. 340, 365 (1987)).

49. *Id.*

50. *See id.* Others disagree with this sentiment arguing that it would undermine the effectiveness of the school to deter drug use. These commentators fail to ask whether society wants to promote effectiveness; *See also* John J. Bursch, Note, *The 4*

testing on students who violate rules against severe disruption on and around campuses. This policy would accomplish two things: it would limit the number of students tested and would give students control, through their behavior, over the likelihood that they would be tested.[51] This ensures that only those who violate specific rules will be drug tested.

O'Connor further challenged the majority's test itself by refuting its justification for implementing the test. She remarked, "certainly monitored urination combined with urine testing is more intrusive than some personal searches we have said trigger Fourth Amendment protections in the past."[52] She additionally found the Court's reliance upon physical examinations and vaccinations as poor justification for its holding because neither physical examinations nor vaccinations are searches under the Fourth Amendment. She stated, "[p]hysical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive."[53] Additionally (and similar to *T.L.O.*), O'Connor pointed out that the majority overstated governmental concern of a suspicion-based program, commenting that the district seems to have *understated* the extent to which such a program is less intrusive of students' privacy."[54] Finally, O'Connor echoed Steven's dissent in *T.L.O.* by concluding, "[i]t cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis."[55]

B. Seventh Circuit Cases

1. Athletes and Cheerleaders

Before *Vernonia* was decided, the Seventh Circuit had already determined that school districts may randomly drug test

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R's of Drug Testing in Public School: Random Is Reasonable and Rights are Reduced, 80 MINN. L. REV. 1221 (1996).

51. *See Vernonia*, 515 U.S. at 685.

52. *Id.* at 672 (*See* Cup v. Murphy, 412 U.S. 291, 295 (1973)).

53. *Id.* at 683.

54. *Id.* at 678.

55. *Id.* at 686. "But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights." *Id.*

student athletes and cheerleaders in *Schaill v. Tippecanoe County School Corp.*[56] In *Schaill,* the baseball coach had received information that several of the players on the team were using drugs. He ordered that his team undergo drug testing and found that five of the sixteen players tested positive for marijuana use.[57] These results led the school board to "institute a random urine testing program for interscholastic athletes and cheerleaders in the TSC school system."[58] The program required a signed consent form by both the student and one parent. If the student made the team, each athlete was assigned a number that was placed in a box. At different times during the season, the administrator would select a number from the box and the person chosen would be tested.[59] The student was taken to the restroom, and was allowed to fill the cup without visual monitoring. Certain checks ensured that the sample was authentic.[60]

Litigation ensued when two students refused to participate in the schools' random urinalysis program, claiming that the test violated their Fourth Amendment due process rights.[61] The district court denied their claims for declaratory and injunctive relief.[62]

The circuit panel determined that urinalysis testing was a Fourth Amendment search and that a person had a reasonable expectation of privacy when urinating.[63] The court determined that the school could not contract away a person's constitutional rights that it could not command directly.[64] Thus, the

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56. 864 F.2d 1309 (7th Cir. 1988).

57. *See id.*

58. *Id.*

59. *See id.* at 1311.

60. *See id.* If the student tested positive for drugs, they could have the remaining sample tested at the lab of their choice. Barring any innocent explanations, the school would suspend the student from participating in 30% of the varsity events for the remainder of the season. A second positive result would keep the player from participating in 50% of the varsity events for a remainder of the season. A third positive result would suspend the student from playing varsity sports for a full calendar year, while a fourth one would eliminate the student from playing on any sport team while they were in high school. *Id.*

61. *See id.* at 1310.

62. *See* Schaill v. Tippecanoe County. Sch. Corp., 679 F. Supp. 833 (N.D. Ind. 1988).

63. *Schaill,* 864 F.2d at 1312. The court went on to say that society discusses such matters in only the most euphemistic forms, further indicating the general sense of privacy surrounding the act of urination.

64. *See id.* at 1312-13.

school's requirement that a student have a signed consent form before they could volunteer to play sports did not put the school in the clear.[65]

The court then considered the amount of suspicion requisite for urinalysis. Schaill argued for an individualized standard of probable cause.[66] The court, however, relied upon the balancing test used by the Supreme Court in previous cases.[67] Since *T.L.O.* stated that the warrant's probable cause requirements were inapplicable[68] and imposed a reasonableness test, the panel relied upon that standard and refused to narrow it, feeling that a stringent Fourth Amendment analysis would "unnecessarily intrude upon the purposes of the classroom or workplace."[69]

The court determined that there were many reasons why the school's urinalysis testing was reasonable.[70] First, the invasion of privacy was diminished due to the fact that the students were not watched during their test. Second, there was a diminished expectation of privacy respecting urinalysis for athletes due to the "element of 'communal undress' inherent in athletic participation."[71] Third, the student-athletes were subject to considerable regulation by the State High School Athletic Association, which, among other things, required "minimum grade, residency and eligibility requirements . . . [as well as] training rules, including prohibitions on smoking, drinking and drug

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65. *See id.*

66. *See id.* at 1313.

67. *See id.* To determine whether the government may grant a search requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

68. *Schaill,* 864 F.2d at 1314. *See also* James M. McCray, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387 (arguing for the continuation and logical extension of recent decisions to include all students in public schools, and pointing out that schools still have an *in parentis* right).

69. *Schaill,* 864 F.2d at 1314. The Supreme Court was concerned about requiring teachers to master the intricacies of Fourth Amendment requirements. Instead, the Court imposed upon teachers a duty to use the dictates of reason and common sense. Yet, it would seem odd to think that the Bill of Rights was open to one's personal judgment, reason or common sense. This seems like a dubious standard through which one may, in fact, have no standards.

70. The *Schaill* court seemed to be uncomfortable with legitimating this practice based solely on one factor. It went on discussing, ad nauseum, why drug testing is good and right, and even included many reasons not at issue.

71. *Schaill,* 864 F.2d at 1318.

use both on and off school premises."[72] The combination of these factors meant that "students competing for positions on an interscholastic athletic team would have strong expectations of privacy with respect to urine tests."[73]

2. Extracurricular Activities and Driving

Todd v. Rush County Schools (*Todd*)[74] was the first Seventh Circuit case to specifically deal with the issue of random suspicionless drug testing of students in extracurricular activities. *Todd* upheld the Supreme Court's rule in *Vernonia*, allowing a Rush County drug-testing plan for students who drive and participate in extracurricular activities. The particular school drug-testing policy involved here required all students who desired to participate in extracurricular activities or planned to obtain a parking permit to consent to random drug, alcohol, and tobacco testing.[75] The school district initiated the testing policy after the Indiana Prevention Resource Center indicated, based upon a survey of students at the high school, that tobacco, alcohol and marijuana use was higher than average for the various grades surveyed.[76] Due to the scope of the school district's new drug test, the policy virtually blanketed the entire school.[77]

The Seventh Circuit relied upon the *Vernonia* test and *Schaill* to uphold the drug testing policy on *in parentis* or police

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72. *Id.* This seems to be a false argument. The nature of grade requirements and prohibition on the use of drugs and alcohol are one thing, using methods that violate a student's privacy right is another. At least one commentator has claimed that *Vernonia* and other decisions like *Schaill* permit suspicionless drug testing of all high school students and that this behavior should be encouraged. *See* Bursch, *supra* note 50 (arguing that athletes have no need for additional protection from schools because other requirements make it akin to a heavily regulated industry).

73. *Schaill,* 864 F.2d at 1319. *See also* Russo & Gregory, *supra* note 1, at 619. The Seventh Circuit upheld the policy because:

> [I]t was reasonable under the Fourth Amendment and that the district had sufficient procedures in place that safeguarded the rights of students. In an interesting but realistic slant, the court also permitted testing based on its belief that since student-athletes gain enhanced prestige in the school community, it was not unreasonable to require student athletes and cheerleaders to undergo drug testing. [footnotes omitted].

74. 133 F.3d 984 (7th Cir. 1998).

75. *See id* at 984.

76. *See id* at 985.

77. *See id.* Of the 950 students who were in the high school, 170 did not participate in extracurricular activities.

power grounds.[78] It underscored the responsibility a school district has "as guardian and tutor of children entrusted to its care."[79] The court highlighted that the purpose of the drug testing was to deter drug use and not to catch criminals.[80] Unlike previous cases, the court did not actually appear to weigh the reasonableness of Rush County's drug testing policy; rather, it based its decision on several general policy concerns. It held that participation in extracurricular activities was a student privilege and that drug testing was a cost for those who wished to volunteer to participate.[81] Second, the circuit panel held that all extra-curricular activities were sufficiently similar to athletics and cheerleading as to render them under the same "special needs" category as athletes.[82] Third, irrespective of the student activity, the health and welfare rationale ultimately swayed the court: "the lynchpin of [the] drug testing program is to protect the health of the students involved."[83] The court went further, however, by holding that students should not complain about the drug testing because they benefit from the "enhanced prestige and status in the student community."[84] In the end, the court decided that "if the schools are to survive and prosper, school administration must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment."[85]

III. ANALYSIS

A. Vernonia *and* Todd *as applied in* Joy v. Penn-Harris-Madison School Corporation

The *Joy* court relied heavily upon precedent in making its

78. *See id.* at 986.

79. *Id.* (quoting *Vernonia*, 515 U.S. at 665).

80. *See id.*

81. *See id.*

82. *See id.*

83. *Id.* Some take a very generous view of this rationale. However, schools have only recently been responsible for the health and welfare for students (excepting on certain tort liability grounds). For a different view that is more generous to this line of thinking, *see* Russo & Gregory, *supra* note 1, at 623 ("since the board is responsible for the welfare of its students, it was justified in requiring drug testing of all participants in extracurricular activities.").

84. *Todd*, 133 F.3d at 986 (quoting *Schaill*, 864 F.2d at 1320).

85. *Id.* (quoting *Schaill*, 864 F.2d at 1324).

decision. It noted that under the Fourth Amendment, citizens are protected from "unreasonable searches and seizures by school officials."[86] Urinalysis is a search, and normally the government must have probable cause and a warrant unless the search falls under the category of "special needs."[87] At that point, the balancing test between governmental interests and the privacy interests of the parties would come into play. The court recognized that the nature of the school's concern was sufficiently similar to the concerns of schools in *Vernonia* and *Todd*.[88] Courts have emphasized that school districts are not allowed to divide students into general groupings on a category-by-category basis.[89] Consequently, the *Joy* court did not believe that *Todd* was mandated by *Vernonia*.[90] The court indicated that, had *Todd* not been decided less than two years prior to *Joy*, "[it] would not sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities."[91]

When the *Joy* court applied the *Vernonia* test, it made clear that Penn-Harris-Madison School Corporation (PHM) failed to meet the requirements for random suspicionless drug testing. Despite this, the court upheld the district's plan (except for the nicotine test) because of the precedent set in *Todd*.

The *Joy* court first examined the nature of the privacy interest of the students. It followed the assumption of previous courts that students expect less privacy than the general public because "students are in the temporary custody of the [s]chool" and are subject to routine physical exams and vaccinations.[92] The court stated that, unlike the athletes in *Vernonia* and *Todd*, students who "participate in extracurricular activities or who drive to school do not subject themselves to more explicit and routine loss of bodily privacy as a necessary component of

86. *Joy*, 212 F.3d at 1058 (quoting *T.L.O.*, 469 U.S. at 341-42).

87. *Id.*

88. *See id.*

89. *See id.* at 1062. "The court cautioned against dividing students into broad categories and drug testing on a category-by-category basis because then 'all but the most withdrawn and uninvolved students [would] fall within a category that is subject to testing.'"

90. *See id.*

91. *Id.* at 1063. Note 9 in the decision defines "extracurricular" to mean only "non-athletic activities."

92. *Id.*

their participating in the activities in question."[93] Thus, as the court pointed out, students in extracurricular activities have higher expectations of privacy than athletes but less than the general public.

The second *Vernonia* factor is examining the character of the intrusion. Since the drug test in *Joy* was virtually identical to the test promulgated in *Vernonia*, the intrusion was deemed not to be overly intrusive.[94]

The third factor examined is the nature of the governmental concern. The issue was "whether there is any correlation between the defined population and the abuse, and whether there is any correlation between the abuse and the government's interest in protecting life and property."[95] The difference between *Vernonia*, *Todd*, and *Joy* was that, in the first two cases, the schools presented evidence showing that drugs were a problem among the targeted students; whereas, the school Joy attended had not proved, "or even attempted to prove, that a correlation exists between drug use and those who engage in extracurricular activities or drug use and those who drive to school."[96] The Court admonished the school district for dividing students into broad categories and then testing them based on those categories,[97] a practice which schools had been previously warned against by the Seventh Circuit.

The fourth *Vernonia* factor described the correlation between the alleged abuses and the governmental interest. While statistics provided by PHM indicated that drug usage by students was generally higher than normal, the school district did not explain how students involved in extra-curricular activities were any different in their ability to perform than other students.[98] PHM also failed to show that students who were in-

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93. *Id.*

> Although PHM students in extracurricular activities, other than athletics, also volunteer to join a particular group and to subject themselves to the rules of that organization, those rules do not require the same surrender of physical privacy as required of the student athletes in *Vernonia*. In the case of students driving to school, the contrast is even more stark. *Id.*

94. *See id.* at 1064.

95. *Id.*

96. *Id.*

97. *See id.* The goal in this area of the law is that all students will eventually become subject to random drug testing in order to attend public schools, as was admitted by the school district's attorney.

98. *See id.*

volved in extra-curricular activities were in more danger than other students. With regards to students who drove to school, the court found it plausible that "a legitimate and pressing need for drug and alcohol testing of students driving vehicles on school property stems from the ability of one student under the influence of drugs or alcohol to injure seriously another student."[99] The court, however, found that the school district had failed to provide evidence that showed "a correlation between drug use and students in extracurricular activities, or other evidence of a particularized special need, before implementing its suspicionless drug testing policy for those particular student groups."[100]

The final factor the court examined was the efficacy of the means. In both *Vernonia,* and *Todd*, the courts held that random suspicionless drug testing was appropriate because it was "difficult to use individualized suspicion to drug test a broad population of students, such as athletes."[101] The *Joy* court emphasized that other cases have held that schools *should* use a suspicion based regime of drug testing where there is no evidence of a drug problem by the targeted group.[102] The court said that there was no evidence to correlate drug usage and student extracurricular activities and student drivers: "PHM has made no showing that teachers, staff and sponsors of extracurricular activities would not be able to observe the students for suspicious behavior."[103] Thus, PHM failed this prong as well.

Based upon the factors outlined by the Supreme Court in *Vernonia*, the circuit court held that PHM failed to properly justify its random drug-testing plan for extra-curricular activities.[104] Despite this sentiment, the court upheld the decision

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99. *Id.*

100. *Id.* at 1065.

101. *Id.*

102. *See id.* "In *Chandler*, however, the Court stressed that suspicionless drug testing without evidence of a drug problem by the targeted group should not be used if suspicion-based drug testing is possible." (citing *Chandler v. Miller*, 520 U.S. 305 (1997)).

103. *Joy*, 212 F.3d at 1065.

104. See id. "With respect to random testing of those who participate in extracurricular activities, we believe that according to the methodology employed by the Supreme Court in *Vernonia*, there has been inadequate showing that such an intrusion is justified." Also, "[T]he judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity." *Id.* at 1066.

upon precedent established in *Todd*: "we believe that we must adhere to the holding in *Todd* and affirm the district court's grant of summary judgment for the School as it relates to testing students involved in extracurricular activities."[105] The court warned counsel not to take this too far, however, and expressed fears that schools were moving down a slippery slope in which all students would eventually be randomly drug tested.

B. Social Policy: Implications following Joy

Although much has been written over the past few years either supporting or decrying the use of suspicionless drug testing for students, little ink has been spent examining the underlying policy factors given by courts for their decisions. It is fairly clear that courts have relied on two primary social policy justifications for their decisions. Since the following section of this paper attempts to outline principles that a school board should use in determining whether or not to engage in random drug testing, this section will first examine what social assumptions our society is buying into in order to sacrifice student Fourth Amendment rights.

The first is the police power justification, which states that "[b]ecause school-aged children are obligated to attend school, the nation's school districts assume a duty to protect them while at school."[106] As phrased by one author, "[p]ublic school students should feel and be safe at school. They should be free from violence by other students as well as from unreasonable invasions of privacy and regulations of individuality by school officials. The current state of constitutional law as applied in the school setting, however, seems to require one at the expense of the other."[107] With their expanded role as protectors and enforcers, school districts risk public disapproval or outcry when they fail to successfully address student drug problems.[108]

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105. *Id.* at 1066.

106. Jennifer L. Barnes, Comment, *Students Under Seige? Constitutional Considerations for Public Schools Concerned with School Safety,* 34 U. RICH. L. REV. 621, 631 (2000).

107. *Id.* at 645.

108. *See* Michelle A. Bernstein, Comment, *Constitutional Law—Massachusetts Does Not Guarantee Fundamental Right to Education*—Doe v. Superintendent of Schools, 421 Mass. 117, 653 N.E.2d 1088 (1995), 30 SUFFOLK U. L. REV. 257, 259-60 (1996) ("The courts have reasoned that, in most situations, a school's safety and discipline needs largely outweigh a student's individual right to education, thus suggesting that pedagogical concerns qualify a student's right to attend school.").

T.L.O. first announced that the Fourth Amendment applied to school officials,[109] and the expansion of the *Vernonia* standard to include students in extracurricular activities as outlined in *Todd* and *Joy* indicate that these limits do not have much meaning.

With the advent of suspicionless random drug testing, society has expanded the police power given to schools. This is different from the ability to suspend or evict students from school grounds. The ability to give drug tests has heretofore been reserved for more formal enforcement structures in an environment of more significantly diminished constitutional rights.[110] This is a significant enhancement of the school district's role, power and responsibility, and carries with it the implicit threat of even further encroachment upon students' constitutional rights.

Another underlying social justification is the desire to promote the health and welfare of public school students. All cases aforementioned used this as grounds for upholding the drug testing policy. This justification is extraneous to schools' responsibility to educate, and has consequently not been argued as a tool to avoid school district tort liability. This justification, instead, raises the idea that schools are attempting to provide more holistic services and to be an environment where children are molded into upstanding adults. This is a situation where modern social science comes into conflict with the law. It is believed that with the correct curriculum, the right incentive packages, and the right amount of funding, school districts can stitch up holes in other areas of students' social fabric.

As a result, schools take on the responsibility to provide meals, before school activities, after school activities, and everything in between to help students "make it." The question that needs to be asked is, "what are the limits of a state sponsored educational process?"[111] For already overburdened schools, at some point something simply has to give. From a policy perspective, it appears that in order for a school to function properly it must limit its primary responsibility to teaching instead of attempting to take on a full social services role.

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109. *See also* Jensen, *supra* note 35.

110. I.e., a probation officer may use random suspicionless drug testing as an appropriate tool for drug offenders.

111. *See* Berstein, *supra* note 108, at 263 (discussing a recent Massachusetts case which holds that there is no fundamental right to an education).

In the end, schools must take on and clean up all of society's ills, almost none of which they are responsible for. Schools have become ground zero for resolving issues adults do not want to deal with. When should we ask, "what is the purpose of public education for my child?," "what role does and should my child's school play in my child's social and cognitive development?," "what activities are most important for a child to participate in when they attend elementary school, junior high and high school?" Parents must answer these questions, as should (on a modified basis) school board superintendents, principals, and school boards. Teachers must examine their purpose for being teachers.

The biggest question society should begin asking is this: when are the marginal costs for administering a certain program in the public schools outweighed by the marginal benefits? Or more specifically, what largess currently allocated to school activities is better suited to other governmental or private interests within the local community? While some argue that public schools themselves should be dramatically altered, perhaps the real problem is merely that schools have lost focus on their primary goal: to educate young people in a discrete set of skills in preparation for adulthood.[112]

If school districts feel that in order to provide a satisfactory extra-curricular program they need to resort to random drug testing, perhaps the time has come for a shift in policy. Instead of remaining more concerned about school-provided extracurricular activities, they should focus their energies on whether their students can read, write, or do arithmetic. Perhaps local governments and school districts could formulate plans to shift the burden of extracurricular activities from the schoolhouse to a broader public sphere.[113]

IV. WHAT IS A SCHOOL DISTRICT TO DO?

Many school districts are concerned about the level of drugs

112. One could easily argue that schools do just that today. The problem is that public schools should only play one part in a student's life. Other skill sets are learned in the home, through interaction with other facets of government, and in church and non-school related extracurricular activities.

113. Schools could also spin off athletic programs, turning them over to city or private leagues. Schools, meanwhile, could use the money they save on classroom materials, teacher salaries, or even to retire school bonds early.

and their ability to help prevent students from harming themselves with drugs; consequently, the following guiding principles may help school districts formulate a plan.[114]

First, conduct an assessment. Determine whether there really is a drug problem in the school district. This may help school districts determine what sorts of remedies are necessary for their own individual situations. Use a survey or other scientific means to discover what percentages of students in the school district are using drugs and the type of drugs that are being used. Attempt to determine whether a correlation exists between levels of drug usage and the types of activities students are participating in. During the assessment, make sure that the five *Vernonia* factors are appropriately answered:

- What is the nature of the privacy interest?
- What will be the character of the intrusion?
- What is the nature of the government's concern?
- What is the immediacy of the government's concern?
- What is the efficacy of the means?

Second, during the period where an assessment is being made, use what courts normally describe as "less intrusive means" to fight the drug problem by providing seminars, required workshops, classes, videos, and other sorts of training to warn students and their parents from using drugs and alcohol. See what effect this has on the level of drug usage in the school, or in the school district. Develop a file of anecdotal material and stories where students became involved with drugs and the tragedies that befell them.

Third, if random drug testing is determined to be necessary, focus on the group of students who are most "at risk" of damaging their health and welfare. Have a meeting with the parents of the students and, prior to implementation of the policy, receive their input and suggestions. Parents seem to be concerned about the safety of their children and frequently go along with good faith efforts of schools to help children.

The following factors should be considered when developing a plan:

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114. This should be taken as a specific plan. This section's purpose is to highlight the underlying considerations that should go into the determination of how to proceed with developing a plan. Two law review articles that offer excellent nuts and bolts specifics on planning procedures are: Bursch, *supra* note 50 (providing a model resolution for a school drug testing policy) and Russo & Gregory, *supra* note 1. Also consider Justice O'Connor's dissent in *Vernonia*.

- Narrowly tailor the number or type of students you are drug testing (i.e. athletes and cheerleaders).
- Have both students and parents sign permission forms.
- Regulate substances that will easily pass muster like illegal drugs and alcohol.
- Ensure that there is a legitimate written procedure for who is selected, how they are tested, and how the results for positive drug tests will be handled.
- Try to work with established services that have already done this sort of thing so as to create an air of objectivity and a scientific basis for the project.

V. CONCLUSION

In spite of the dangers and harms faced by students who use drugs, it is possible for school districts to utilize means that rely upon a suspicion-based level rather than merely resorting to random suspicionless drug testing. Certainly, situations may exist where it appears that the most drastic means possible are necessary to combat this problem. It should be remembered, though, that students are also people who have constitutional rights that the government may not violate.

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