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## Student Drug Testing: The Blinding Appeal of *In Loco Parentis* and the Importance of State Protection of Student Privacy

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# STUDENT DRUG TESTING: THE BLINDING APPEAL OF *IN LOCO PARENTIS* AND THE IMPORTANCE OF STATE PROTECTION OF STUDENT PRIVACY

*“Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”*<sup>1</sup>

## I. INTRODUCTION

The drug-abuse<sup>2</sup> crisis in America has its roots in the dissociation of people from each other.<sup>3</sup> For young people, dissociating from one’s parents and other adults is practically a right of passage in modern times, and recent research gives credence to what parents have always suspected: there is something different about the brain of a teenager.

Parents of teenagers don’t have it easy. Door-slamming fights over phone use and friend choice, late nights spent lying awake envisioning benders or high-speed car chases, the futile feeling that everything you says [sic] goes in one ear and out the other. And as much as parents struggle, teens will attest that adolescence is no cakewalk for them either. . . . [I]maging technologies are revealing brain differences that could explain teen traits that exasperate adults, including impulsivity, poor judgment and social anxiety.<sup>4</sup>

But regardless of whether the psychological and emotional problems of adolescents have social or biological roots, there

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1. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

2. The word drug, as used in this comment, refers to all mind-altering substances, including alcohol.

3. See U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PROMISING STRATEGIES TO REDUCE SUBSTANCE ABUSE 1 (2000), available at <http://www.ncjrs.gov/pdffiles1/ojp/183152.pdf> (stating that two decades of research have identified “well-developed social skills, strong family bonds, attachment to school, and active involvement in the community and religious organizations” as effective prevention strategies).

4. Erika Packard, *That Teenage Feeling*, MONITOR ON PSYCHOL., Apr. 2007, at 20, available at <http://www.apa.org/monitor/apr07/teenage.html>.

exists a “war” of sorts between well-intentioned adults and teenagers over how far young people can stretch the envelope of dangerous recreational drug use, and how far adults will go to stop them.

Because teenagers are normally (and in fact *wired* to be) combative and rebellious, their “army” will never be the one to back down. This means the adults in their lives have two choices: (1) return fire by never letting their children out of sight, constantly searching personal belongings for drugs, and even forcing their own children to submit to random drug tests,<sup>5</sup> or (2) dismantle these intrusive weapons in enlightened recognition that a futile drug war with their own children merely destroys any possibility of developing a relationship of trust and respect. Despite the relative benefits of option two, parents often choose to return fire, thus escalating the substance abuse “arms race.”

In recent years, the efforts of parents to prevent drug use by their children were supplemented and, in far too many cases, replaced by school efforts to do the same. In his 2004 State of the Union address, President Bush stated, “I propose an additional 23 million dollars for schools that want to use drug testing as a tool to save children’s lives. The aim here is not to punish children, but to send them this message: We love you, and we don’t want to lose you.”<sup>6</sup> A group calling itself the National Student Drug Testing Committee has even proposed model legislation, encouraging state legislatures to adopt statutory language that expressly allows public school districts to perform random, suspicionless searches for drugs.<sup>7</sup> Both the President and the Committee likely took their lead from recent decisions of the United States Supreme Court.<sup>8</sup>

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5. “So many parents simply haven’t thought to drug test their kids at home, even though testing is a very effective means of preventing teen drug use, especially by giving kids a great ‘excuse’ to say, ‘NO WAY, MY PARENTS TEST ME.’” *Drug Test Your Teen*, <http://www.drugtestyourteen.com> (advocating and selling home test kits).

6. Press Release, President George W. Bush, State of the Union Remarks on Reducing Drug Use (Jan. 21, 2004), available at <http://www.whitehousedrugpolicy.gov/news/press04/012104.html>.

7. THE NATIONAL STUDENT DRUG-TESTING COMMITTEE, MODEL LEGISLATION FOR STUDENT DRUG-TESTING PROGRAMS (2003), available at <http://www.studentdrugtesting.org/model%20state%20bill%20web%20file.PDF>.

8. The Committee begins its sample language for state statutes with, “[I]n accordance with the most recent enunciation of constitutional principles by the Supreme Court . . . .” THE NATIONAL STUDENT DRUG-TESTING COMMITTEE, *Sample Language Inserted into Existing State Statute*, MODEL LEGISLATION FOR STUDENT

The trend is dangerous. Random, suspicionless drug testing of public school students will distance students from school personnel as long as it remains in the school's arsenal. This distance is exactly what needs to be bridged. By using random student drug testing, schools are missing opportunities to redefine their efforts as a realistic movement toward enacting change. Instead of saying, "We will help you deal in positive ways with the struggles of growing up, and we are willing to confront and dismantle the intricate and daunting obstacles standing in the way of your healthy development," the use of these tests says simply, "We think the only way to help you is to catch you in the act, and the best way to catch you is to place a drug checkpoint in between you and your participation in the most rewarding activities of school."<sup>9</sup>

Adults have thus taken a stance that a confused and frightened teenager might take. They have chosen to engage in brinksmanship with a group they do not want to consider an enemy, and with whom they desperately need open lines of communication. Of course, that stance is much simpler and safer than one involving honest, reflective, and concerted action centered on the proposition that there is something wrong with teenage and school *culture*, and perhaps not with individual students.<sup>10</sup> We know this intuitively, yet the appeal of a "blanket" approach, like random drug testing, to the pervasive problem of student drug use is rather appealing. It is in fact simpler and easier to do scientific analysis on urine than to develop meaningful, comprehensive relationships with people whose brains are wired to oppose us. Why rely on adult intuition when science knows all about our kids, right down to

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DRUG-TESTING PROGRAMS (2003). *available at* <http://www.studentdrugtesting.org/model%20state%20bill%20web%20file.PDF>. Timing alone suggests that the President was acting on an opportunity opened up by the *Earls* decision, handed down only eighteen months before the Address. The President no doubt sought to parlay a socially conservative Court decision into socially conservative policy, and ultimately, law, but this is, of course, mere speculation.

9. For instance, a 2002 U.S. Supreme Court case upheld drug testing for students involved in extracurricular activities. *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

10. For example, to conclude that the recent increase in school shootings in America is a result of an epidemic of *individual* young madmen would be improvident. This rising violence indicates an underlying cultural discord among young people that is boiling to the surface. Yet, schools, the media, and parents focus their efforts almost exclusively on identifying troubled *individuals*. Just as this approach is unlikely to stop school violence because it is reactive and simplistic, blanket drug testing will fail to prevent student drug use for the same reasons.

the contents of their bodily fluids and the patterns according to which their synapses fire?<sup>11</sup> What do we have to lose? What does our nation have to lose?

The United States Constitution has something to say about all of this. In order to satisfy the Fourth Amendment, a search must be reasonable under the circumstances. Ironically, school personnel do not have to obtain a warrant or show “probable cause” to search students.<sup>12</sup> However, courts must be mindful that, despite students’ diminished right to be secure in their persons, “[c]onstitutional provisions for the security of person and property are to be liberally construed, and ‘it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.’”<sup>13</sup> To say that the Supreme Court has carefully considered this warning when it comes to searches of public school students would be untrue. In fact, the Court has shirked its duty.

Random, suspicionless searching of the urine of student athletes was given the nod of constitutional approval in the 1995 case *Vernonia v. Acton*.<sup>14</sup> Then, in the 2002 decision *Board of Education v. Earls*, the right of a school to randomly test for drugs in the urine of all students involved in any extracurricular activity was upheld.<sup>15</sup> The courts have thus spoken on the issue, and the war on drugs lawfully extends to the government’s collection and scientific inspection of the bodily fluids of the hockey-playing, trumpet-blowing, debating, cheerleading youth of America.

These holdings must be viewed for what they are. The Court’s allowance of school drug testing policies simply defines for states and individual school districts what *may* be done without offending the Federal Constitution. These cases say little about what must or should be done. Most importantly, however, they do little to define what can *not* be done to students. Because the United States Supreme Court has not established the boundaries within which school districts are to act in the context of suspicionless drug testing, states must step forward and affirmatively legislate to define the limits of

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11. See Packard, *supra* note 4.

12. *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985).

13. *Byars v. United States*, 273 U.S. 28, 32 (1927) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

14. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

15. 536 U.S. 822 (2002).

these tests to protect each student.

This Comment illustrates the negative consequences of suspicionless student searches, the manner in which the Supreme Court has allowed its jurisprudence in this area to run amuck, and the critical importance of state law as a protector of individual liberties when federal law itself becomes unreasonable. Section II investigates the way we view the school/student relationship through the lens of a recent case involving the show of government force in a public school. Section III provides a look at how the Supreme Court has dealt with student search cases in recent years. Section IV questions the basis on which public school students have been said to possess Fourth Amendment rights less significant than those of the general public. Finally, Section V suggests that state governments play a crucial role in the protection of students' personal liberties.

## II. SEARCHING PUBLIC SCHOOL STUDENTS: THE REALITY AND THE CONSTITUTION

On November 5, 2003, at Stratford High School in Goose Creek, South Carolina, Principal George McCrackin signaled fifteen police officers, who sprung out of their hiding places, with guns drawn, into a hallway filled with approximately 130 high school students. Officers tackled some students to the ground and tied several of the students' hands with plastic ties.<sup>16</sup> Police dogs were brought in to sniff for marijuana in students' book bags.<sup>17</sup> Guns were pointed at some students' heads while officers shouted at all of the students to get down on the ground.<sup>18</sup> This nightmarish scenario occurred because the principal and local police suspected students of selling marijuana out of one of the school's bathrooms.<sup>19</sup> The way the students of Stratford High School were treated that day is very

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16. Seanna Adcox, *State Closes Criminal Case on School Raid*, POST & COURIER, (Charleston, S.C.), July 3, 2004, at A1; see also A.J. Angulo & Carol Marchel, *On Student Rights in the Year of Brown: A Legal, Psychological, and Policy Analysis*, 2008 BYU EDUC. & L.J. 1, 5; American Civil Liberties Union, *South Carolina Students Were Terrorized by Police Raid with Guns and Drug Dogs, ACLU Lawsuit Charges*, Dec. 15, 2003, <http://www.aclu.org/drugpolicy/gen/10672prs20031215.html> (with accompanying link to footage of raid from school surveillance cameras) [hereinafter ACLU Lawsuit].

17. Angulo & Marchel, *supra* note 16, at 5.

18. *Id.* at 5, 7, 27.

19. *Id.* at 5-6.

much the way any criminal suspect is treated. They were singled out as suspects through government surveillance; a comprehensive, decisive, and forceful plan was put in place; and finally, the terrified students, most of whom had no connection to the marijuana dealing, were subdued by force.<sup>20</sup> No drugs were found.<sup>21</sup>

What did these students *expect*? After all, there was suspected criminal activity happening in the school. However, even the Attorney General of South Carolina later acknowledged that there was something terribly wrong with what happened that day.<sup>22</sup> In his words: "Such raid tactics are well suited for a crack house but not a school house. . . . This is an example of a good plan in the wrong place."<sup>23</sup> Parents were "absolutely outraged"<sup>24</sup> and the local prosecutor had "serious concerns about the need for restraining students and drawing weapons."<sup>25</sup>

One expects the government to act differently around schools and students than it does in other places and among other people. As the public reaction to the Stratford High School incident indicates, one expects government actors to be more gentle, careful, and restrained in schools than when dealing with common criminals on the street. Yet, in student search cases, the Supreme Court has allowed for government treatment of students that goes well *beyond* that which is constitutionally tolerated for the average citizen, as evidenced by the decisions discussed in this Comment. To get to the heart of this peculiarity, two major issues need to be explored: (1) the historical and pragmatic relationship between school personnel and students; and (2) the type of privacy students can reasonably expect in this type of environment. The United States Supreme Court has downplayed the privacy expectations of students because it has not thoroughly defined, in constitutional terms, students' relationships with

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20. See *id.*; ACLU Lawsuit, *supra* note 16; see also Angulo & Marchel, *supra* note 16, at 6 ("[Principal] McCrackin witnessed this pattern on several separate occasions and came to the conclusion that a *handful* of these students were involved in drug-related activity." (emphasis added)).

21. Angulo & Marchel, *supra* note 16, at 5.

22. Adcox, *supra* note 16.

23. *Id.*

24. Associated Press, *Drug Sweep at School Spurs Probe*, CHI. TRIB., Nov. 9, 2003, at §1 [hereinafter *Drug Sweep*]; see also ACLU Lawsuit, *supra* note 16.

25. *Drug Sweep*, *supra* note 24.

government schools.

### III. EVOLUTION OF FOURTH AMENDMENT JURISPRUDENCE AS TO PUBLIC SCHOOLS

#### A. *New Jersey v. T.L.O. (1985)*

Before the nation's highest court was asked to wrestle with the constitutional implications of drug testing in schools, it dealt with the basic question of whether, and to what extent, public school students were protected from searches by school employees. In *New Jersey v. T.L.O.*, the standard constitutional requirement that citizens not be searched without probable cause or a warrant was found to be inapplicable to a search of a public school student by a school administrator.<sup>26</sup> The Court found that these constitutional safeguards would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>27</sup> In *T.L.O.*, the purse of a high school student suspected of smoking cigarettes in the school bathroom was searched by a school administrator, who uncovered not only cigarettes, but also marijuana and writings indicating the student had been selling marijuana.<sup>28</sup>

Creating a new standard to govern student searches by school personnel, the Court declared that the legality of a search "depend[s] simply on the reasonableness, under all the circumstances, of the search."<sup>29</sup> Explaining its new standard, the Court stated that the "reasonableness" inquiry has two parts. First, the search must be "justified at its inception,"<sup>30</sup> meaning there are "reasonable grounds for suspecting" the student has violated either the law or a school rule.<sup>31</sup> Second, it must be "reasonably related in scope to the circumstances

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26. 469 U.S. 325, 340-41 (1985).

27. *Id.* at 340. Curiously, the Court has not found the work of police officers on the streets to be "unduly" burdened by the constitutional requirements of probable cause or the obtaining of a warrant. Are we to assume that catching a student in the act of breaking a school rule is more important than catching a criminal in the act of committing a felony, so that constitutional protections provided to the latter can be justifiably withheld from the former?

28. *Id.* at 328.

29. *Id.* at 341.

30. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

31. *Id.* at 342.

which justified the interference in the first place,”<sup>32</sup> meaning “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>33</sup>

In short, the Court defined a “reasonable search” as one that has “reasonable” grounds and is “reasonable” in scope, with a “reasonable” relation to the search’s objectives.<sup>34</sup> Considering that the Bill of Rights commands the government not to engage in “unreasonable” citizen searches, one wonders whether the Court is being admirably loyal to that mandate, or if its insistence on a circular definition is a subtle means by which to empower school administrators with a liberal amount of discretion to search student-citizens, regardless of Fourth Amendment precedent.

Interestingly, and perhaps ironically, the *T.L.O.* Court thought it necessary to reiterate the protections provided to student-citizens by the Constitution, invoking the language of *West Virginia State Board of Education v. Barnette*,<sup>35</sup> which held that students may not be forced to salute the American flag:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. *That 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.*<sup>36</sup>

*T.L.O.* is particularly significant in that it marks the first time the Court extended the “special needs” doctrine to the public school setting.<sup>37</sup> The doctrine allows a departure from the constitutional requirement of probable cause when, and

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32. *Id.* at 341 (quoting *Terry*, 392 U.S. at 20).

33. *Id.* at 342.

34. *See generally id.* at 327–48.

35. 319 U.S. 624 (1943).

36. *T.L.O.*, 469 U.S. at 334 (quoting *Barnette*, 319 U.S. at 637) (emphasis added).

37. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S. C. L. REV. 258, 263 (Winter 2000).

only when, those exceptional circumstances in which “special needs, beyond the normal need for law enforcement, make the . . . probable-cause requirement impracticable.”<sup>38</sup> In such a case, the Court balances the interests of the government against the individual’s privacy interests to determine the reasonableness of the search.<sup>39</sup> Exactly when the doctrine should apply is somewhat unclear, and some have suggested that the Court’s application of “special needs” is arbitrary.<sup>40</sup> What *is* clear, however, is that the application of this doctrine has opened the door to the erosion of students’ constitutional rights, as discussed below. In fact, this “unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards”<sup>41</sup> has allowed government actors behind closed schoolhouse doors to invade the privacy of students in ways that would not pass constitutional muster if inflicted upon the general public. Nowhere is this more true than in the area of student drug testing.

### B. *Vernonia v. Acton* (1995)

In the late 1980s, students in the small logging town of Vernonia, Oregon, like many teenagers across the country, became noticeably attracted to the “drug culture” and student drug use was on the rise.<sup>42</sup> Students “boast[ed] that there was nothing the school could do about it.”<sup>43</sup> The students had lobbed one over the fence. The administration, “at its wits end,”<sup>44</sup> chose to return fire. The Vernonia School District instituted a policy requiring all student athletes to submit to random drug testing by urinalysis in order to play sports.<sup>45</sup> If

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38. *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment)) (alternation in *O'Connor*).

39. *Id.*

40. See, e.g., *Linke v. Northwestern Sch. Corp.*, 734 N.E. 2d 252, 257 (Ind. App. 2000) (“[T]he drug testing policies reviewed under the special needs analysis seem to gain ‘a judicial rubber stamp of approval’ even though the justification for the testing is not always clear and the ineffectiveness of a suspicion based testing regime has not been established.” (quoting *Dodson*, *supra* note 37, at 276)), *vacated*, 763 N.E. 2d 972 (Ind. 2002).

41. *T.L.O.*, 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part).

42. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995).

43. *Id.*

44. *Id.* at 649.

45. *Id.* at 650.

selected for testing, a boy would urinate while in the presence of a man who was allowed to watch.<sup>46</sup> A selected girl would urinate in a stall while a woman listened.<sup>47</sup> The samples were inspected for tampering and then sent to a laboratory, where they underwent scientific testing for the presence of amphetamines, cocaine, and marijuana.<sup>48</sup>

When a case challenging the policy reached the Supreme Court, Justice Scalia, writing for a six-Justice majority, first found that the privacy expectations of public school students were less than those of the general public.<sup>49</sup> After all, students are routinely required to be tested for hearing problems, dental problems, and scoliosis, and must be vaccinated against diphtheria, measles, rubella, and polio.<sup>50</sup> The Court's apparent reasoning is that in light of these accepted public health-related intrusions, surely students do not have a legitimate expectation that *additional* encroachments on their personal privacy and security will be subject to constitutional scrutiny.<sup>51</sup> Indeed, it is "[f]or their own good."<sup>52</sup>

Having peeled away a layer of constitutional protection from the whole student body, the Court went on to find that "[l]egitimate privacy expectations are even less with regard to student athletes."<sup>53</sup> An "element of 'communal undress' [is] inherent in athletic participation", with open locker rooms, community showers, and even doorless toilet stalls.<sup>54</sup> Moreover, athletes subject themselves to regulation just by signing up for the team. They have to keep their grades up, submit to a pre-season physical exam, and comply with the coach's rules, among other things.<sup>55</sup> "School sports are not for the bashful."<sup>56</sup>

It seems that the Court found that voluntary nudity in front of peers, a minor consequence of athletic participation,

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 657.

50. *Id.* at 656.

51. *See id.*

52. *Id.*

53. *Id.* at 657.

54. *Id.* (quoting *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)).

55. *Id.*

56. *See id.*

constitutes implied consent to being observed during the very personal process of urination by an adult who is present only for that reason, and whose ultimate purpose is to perform scientific tests on the urine to discover if something very *major* is going on in the athlete's private life.<sup>57</sup> However, the Court cited no precedent to support its conclusion that the voluntary and incidental relinquishment of certain privacy expectations allows the government to take advantage of that fact to engage in further involuntary and deliberate intrusions on its own accord.

Turning to the character of the intrusion, the Court found that the manner in which the samples were taken was typical of the environment of public restrooms, and therefore the privacy interests compromised were "negligible."<sup>58</sup> The Court went on to find that the other part of the intrusion—the government's scientific examination of a citizen's bodily fluids—is not significant because the urine is tested only for drugs and the results given only to a few people.<sup>59</sup> The Court's dismissive attitude toward the intrusions involved here is unsettling. A man using a public restroom does not expect that the manner in which he relieves himself and the product thereof are matters of great interest and concern to a man watching him urinate. Nor does he expect that his urine will be scrutinized by scientific analysis or that he will be confronted with the results of that analysis and have his life dramatically and involuntarily changed if the results offend the government.

The Court mischaracterized and overtly downplayed both intrusions, most likely for two reasons. First, in *T.L.O.* the Court had set the stage for eroding the Fourth Amendment rights of students by putting aside the requirement of probable cause to promote the "swift and informal disciplinary procedures needed in the schools."<sup>60</sup> The constitutional rights of students having been overshadowed by practical considerations, the *Acton* Court was free to continue down that road. Second, the concept of *in loco parentis*, the theory that schools essentially replace parents during the school day, pervades the Court's public school jurisprudence.<sup>61</sup> Even

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57. *Id.* at 658.

58. *Id.*

59. *Id.*

60. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

61. *Morse v. Frederick*, 127 S. Ct. 2618, 2633 n.6 (2007) (Thomas, J., concurring)

though the Court has been slowly moving away from the doctrine, when the Court does choose to invoke it, the idea that parents have delegated at least part of their parental powers to school personnel—and parents are, of course, free to search their children as they please<sup>62</sup>—cleanly removes much of the inconvenient constitutional red tape getting in the way of the school's "custodial and tutelary responsibility for children."<sup>63</sup>

Significantly, *Acton* invokes, for the first time in the public school context, the "special needs" doctrine to negate the need for individualized suspicion in conducting the searches.<sup>64</sup> The precedent for this allowance lies in cases where public employees were randomly tested for drugs.<sup>65</sup> In such cases, the Court has held that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest . . . would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."<sup>66</sup>

An important aspect of those cases allowing for random drug searches of public employees is the fact that the employees were completely free to seek employment elsewhere; they were not forced to submit to the tests any more than they were forced to work for the government.<sup>67</sup> In contrast, public school students are forced to attend school by compulsory

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(stating that "at least nominally, [the Supreme] Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools").

62. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

63. *Acton*, 515 U.S. at 656. Although the Court has expressly abandoned *in loco parentis* as a model for the relationship between public schools and their students, the abandonment appears to be entirely semantic. The "special needs" doctrine is not itself a model for a relationship, but rather contemplates the identification of a need that is unique to the government institution that is being challenged. In this case, the need cited is the "custodial and tutelary" responsibilities of public school personnel. One could argue that such responsibilities have their origin in law, but in fact these concepts come from the traditionally parent-like role of schools. If this were not the case, then there would be no "special" need at all. The "special" character of schools comes only from the fact that they are asked to do what parents would otherwise do on their own.

64. *Id.* at 653. While *T.L.O.* marks the first time the Court used the "special needs" doctrine in the public school setting, *Acton* is the first time the Court did so in order to set aside the requirement of individualized suspicion.

65. *Id.*

66. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989); see also *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989).

67. See *Skinner*, 489 U.S. at 624–27.

schooling laws.<sup>68</sup> Although students are technically not required to participate in extracurricular activities, they are encouraged to do so to the point where nonparticipation makes them outcasts, and harms their social, physical, and mental well-being.<sup>69</sup> To say that participation in extracurricular activities is optional is to ignore their central, critical importance to public education. Students are not employees of the school, nor are they, in any realistic sense, free to choose non-participation in school activities. As such, the application of the “special needs” doctrine to justify abandonment of the requirement of individualized suspicion in schools is a stretch, at best. The reality of the situation is that the drug tests are required only of those students who are least likely to use drugs.<sup>70</sup> Those who go against the healthy advice of adults and do not participate in extracurricular activities will never be subject to these intrusive government searches. That is the message that is sent, and it is undoubtedly heard by students.

To allow fundamental constitutional protections to be set aside for the sake of convenience, or in deference to the interest of government actors charged with quasi-parental action, is patently contrary to the Court’s own recognition that school children do, without any doubt, enjoy the protection of the bedrock constitutional guarantees of liberty and privacy: “[Y]oung people do not ‘shed their constitutional rights’ at the schoolhouse door.”<sup>71</sup>

The Court consistently draws a line between necessary and practical deference to the quasi-parental role of schools, and the inalienable *constitutional* rights of children: “The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.”<sup>72</sup> This is a very clear warning that the deference given to schools in

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68. See, e.g., MO. REV. STAT. § 167.031 (2007).

69. See Heather Miller, *Students Struggle to Balance Class, Activities*, MICHIGAN DAILY ONLINE, Sept. 20, 1996, <http://www.pub.umich.edu/daily/1996/sep/09-20-96/news/ff1.html> (“Learning happens outside the classroom just as much as it happens inside.”).

70. Bd. of Educ. v. Earls, 536 U.S. 822, 843 (2002) (Ginsburg, J. dissenting) (“Petitioners’ policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects.”).

71. Goss v. Lopez, 419 U.S. 565, 574 (1975) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

72. *Id.*

dealing with students is merely logistical, and cannot be used to undermine constitutional rights. Therefore, in student search cases, the Court's justification for schools' downplaying the constitutional expectations of student-citizens, that schools have "special needs," is a violation of the Court's own meticulous efforts to separate those schoolhouse powers that are logistically convenient from those that can be granted to government actors only if constitutional lines are crossed. The reasons behind ancillary benefits provided to government child-care takers have thus "bled" onto much more fundamental and important constitutional territory.

The unique needs of schools in dispensing discipline, and the unique role of school personnel as quasi-parents, do not in any way erase the fact that school personnel are state actors, or that students are American citizens. Outside of government prisons and the military, there are no institutions that place American citizens more at the mercy and whim of state actors than public schools. The foundation of personal liberty on which our nation is built is most likely to crack when the power of the government is unleashed on citizens behind closed doors. When that power is expanded precisely *because* the citizens are under close government control, the meaning of the Constitution has been mangled to the point where it is no longer true to either its letter or its spirit. If anything, the Court should be especially suspicious of how the constitutional guarantee of personal privacy is protected in government schools.

### C. Board of Education v. Earls (2002)

While *Acton* indicated the Court was getting carried away by the traditional relationship between schools and students, *Board of Education v. Earls*<sup>73</sup> solidified the status of students as subordinate citizens with privacy rights no greater than those guaranteed by the grace of their principal.

High school student Lindsay Earls was a member of Tecumseh High School's show choir, marching band, academic team, and the National Honor Society.<sup>74</sup> Under her school's policy, membership in each of these non-athletic activities was contingent upon her urinating in a cup while a faculty member

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73. 536 U.S. 822.

74. *Id.* at 826.

listened, and upon the sample testing negative for drugs.<sup>75</sup> She sued on Fourth Amendment grounds, arguing that the search “must be based at least on some level of individualized suspicion.”<sup>76</sup> Besides the fact that boys were not directly watched under the Tecumseh policy, the process of collection and analysis was nearly identical to that used in *Acton*.<sup>77</sup>

Writing for a 5-4 majority, Justice Thomas extended the reasoning and holding of *Acton* to cover the facts in *Earls*. The Court found that the driving force behind the decision in *Acton* was the “school’s custodial responsibility and authority,” not the fact that athletes, in particular, had a reduced expectation of privacy.<sup>78</sup> However, the Court also noted that “students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions . . . as do athletes.”<sup>79</sup> These include possible communal undress and additional rules to follow.<sup>80</sup> Therefore, according to the majority, the reasons for upholding athlete drug testing apply with equal force to the testing of students involved in any extracurricular activity.<sup>81</sup>

The Court also found support for its holding in the fact that, under the policy, the results of a positive test were to be kept largely confidential and not used as criminal evidence.

[T]he Policy clearly requires that the test results be kept in confidential files separate from a student’s other educational records and released to school personnel only on a ‘need to know’ basis. . . . Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences.<sup>82</sup>

This downplaying of the consequences of a positive test is both inaccurate and off-point. First, the privacy intrusions at issue are the urine collection process and the subsequent search of urine for the presence of drugs.<sup>83</sup> These are discrete

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75. *Id.* at 826. 832–33.

76. *Id.* at 829.

77. *Id.* at 832–33.

78. *Id.* at 831.

79. *Id.*

80. *Id.* at 832.

81. *Id.*

82. *Id.* at 833.

83. *Id.* at 832.

searches, the constitutionality of which must be determined by analysis of each search in and of itself.<sup>84</sup> Any constitutional right to be free from these intrusions necessarily exists wholly apart from any right not to be unduly punished for a positive test result: “[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials.”<sup>85</sup> Lindsay Earls brought suit on the basis of her Fourth Amendment right to privacy;<sup>86</sup> she made no allegation of any undue punishment by the government.

Second, despite the Court’s urging to the contrary, the results of these drug tests have far-reaching and severe consequences. The Court asserted that “the only consequence of a failed drug test is to limit the student’s privilege of participating in extracurricular activities.”<sup>87</sup> This simplistic assessment, while underestimating the critical importance of extracurricular activities, also conveniently overlooks the effect that a positive test would have on a student’s relationship with his family, teachers, and friends. Beyond embarrassment, a positive drug test result is almost certain to change radically the life of the student, whose reputation would thereafter be permanently damaged and whose freedoms would be severely restricted by the adults in his life.

There is evidence, even in the isolated case of Lindsay Earls, that this “confidentiality” policy was not scrupulously honored by the district.

Lindsay Earls and her parents allege that the School District handled personal information collected under the policy carelessly, with little regard for its confidentiality. Information about students’ prescription drug use, they assert, was routinely viewed by Lindsay’s choir teacher, who left files containing the information unlocked and unsealed, where others, including students, could see them; and test results were given out to all activity sponsors whether or not they had a clear “need to know.”<sup>88</sup>

Therefore, beyond being extraneous to the Fourth

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84. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (analyzing initial search of student’s purse separately from subsequent search).

85. *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

86. *Earls*, 536 U.S. at 826–27.

87. *Id.* at 833.

88. *Id.* at 848 (Ginsburg, J., dissenting).

Amendment concerns that are at issue, there is significant reason to believe, if Lindsay Earls' experience is indicative of other schools' behavior, that school districts intend to use test results to the fullest extent possible and that other legal rights of tested students, including possible violations of FERPA<sup>89</sup> and medical privacy laws, are implicated by the use, and misuse, of these test results.

The majority opinion gives no indication that random, suspicionless testing of *all* enrolled students would be unconstitutional. However, it is fairly clear from Justice Breyer's concurring opinion that this case would have come out the other way if the policy was to test all students. In citing reasons that the policy is not overly intrusive, Justice Breyer noted that "the testing program avoids subjecting the entire school to testing."<sup>90</sup> That this fact was likely determinative in *Earls* reveals the Court's unstable stance on the issue. If, by the Court's reasoning, keeping kids off drugs is of primary importance, and *in loco parentis* allows a relaxed privacy standard, searching all students should be perfectly legitimate.

Upon reading the *Earls* opinion, one wonders what happened to the "communal undress" factor that was seemingly central to *Acton's* analysis of athlete testing.<sup>91</sup> As Justice Ginsburg implies in her dissenting opinion,<sup>92</sup> the majority had to pull a stunt to get around the obvious rationale in *Acton* that the policy was constitutional because it applied to athletes only. The *Earls* majority employs the relatively immaterial language in *Acton* discussing the decreased privacy expectations of students as a whole.<sup>93</sup> The further explanation that, like athletes, participants in other extracurricular activities have to follow certain rules, is peculiar considering that the *Acton* Court found "communal undress" and similar aspects of athletics to be definitive of the privacy expectation at issue in that case.<sup>94</sup>

In a dissenting opinion that is simultaneously lucid,

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89. Family Educational Rights and Privacy Act, 20 U.S.C. §1232g (2000). The Act denies government funding to schools that fail to protect students' rights to privacy in certain records, including medical records.

90. *Earls*, 536 U.S. at 841 (Breyer, J., concurring).

91. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

92. *See Earls*, 536 U.S. at 845-47 (Ginsburg, J., dissenting).

93. *Id.* at 830-31 (majority opinion).

94. *See Acton*, 515 U.S. at 657.

pragmatic, and founded upon bedrock constitutional law, Justice Ginsburg states, "The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects."<sup>95</sup> This poignant statement reflects the Court's traditionally practical and rational character, as reflected in the language of *Mapp v. Ohio*: "There is no war between the Constitution and common sense."<sup>96</sup>

The foundation of the majority's holding is that extracurricular activities are voluntary, and thus participation in them is detached from compulsory attendance laws, and therefore the students themselves, and not the government, subject those who participate in extracurricular activities to drug testing.<sup>97</sup> This rationale, while superficially appealing, belies the truly inextricable role "extracurricular" activities play in public schools. According to Justice Ginsburg:

While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program; for that reason, the petitioner . . . is justified in expending public resources to make them available. Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.<sup>98</sup>

For state governments to force young people to enroll in their educational programs, and then force them to trade privacy for participation in the best of those programs in the name of the public good, is a sly "bait and switch" technique that compromises the integrity of government schools. It would be more consistent with the "custodial and tutelary"<sup>99</sup> role of schools to embrace extracurricular participation as an integral part of the schooling to which children are required to submit. For purposes of the Fourth Amendment, students are in fact compelled by government actors to participate in extracurricular activities. These activities are not

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95. *Earls*, 536 U.S. at 843 (Ginsburg, J., dissenting).

96. 367 U.S. 643, 657 (1961).

97. *See generally Earls*, 536 U.S. 822.

98. *Id.* at 845 (Ginsburg, J., dissenting).

99. *Acton*, 515 U.S. at 656.

*extracurricular* in any real sense.

Justice Ginsburg further argues that it is absolutely critical to any search conducted under “special needs” rationale that a special need actually be demonstrated.<sup>100</sup> The purported “special need” in cases involving random urine tests of students is that there is a nationwide school drug problem.<sup>101</sup> It must follow, then, that there is no special need, and thus no justification for a suspicionless testing, where no drug problem has been adequately demonstrated at the school in question.

The risks of drug abuse are great indeed: “[D]rug use carries a variety of health risks for children, including death from overdose.”<sup>102</sup> “Those risks, however, are present for *all* schoolchildren.”<sup>103</sup> It is precisely because of the large scope and breadth of the school drug problem that the need to combat it is not “special.” A problem that affects all of us, from state to state and household to household, implicates the constitutional principles that govern all of us. It is unnecessary and inappropriate to apply a doctrine designed for application in unusual circumstances to a patently usual situation. If the special needs doctrine is used to justify a school drug testing policy, it should be an absolute prerequisite that the school district demonstrate the unique severity of the drug culture in its school.

No such demonstration was made in *Earls*,<sup>104</sup> which makes it clear that public school administrators who are concerned about student drug use can implement random drug testing policies even if no drug use in the school is discovered, and even if there is little indication of a local drug problem.<sup>105</sup> The justification offered by the Court is that there is a “nationwide drug epidemic.”<sup>106</sup> Unfortunately, it appears the Court has endorsed a worthless prophylactic at the cost of personal privacy for millions of young citizens. The tests do not prevent

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100. *Earls*, 536 U.S. at 842–43 (Ginsburg, J., dissenting).

101. *See, e.g., id.* at 834 (majority opinion).

102. *Id.* at 836–37.

103. *Id.* at 844 (Ginsburg, J., dissenting).

104. *Id.* at 843 (stating that the superintendent described the drug problem at the high school as “not . . . major”).

105. The Tecumseh district’s indications of a drug problem included only students who “appeared to be [on] drugs,” the finding of marijuana in the parking lot, and concerned community members. *Id.* at 834–35 (majority opinion).

106. *Id.* at 834.

drug use.<sup>107</sup> Catching students in the act of using drugs by means of testing whole groups of students is not a useful starting point for prevention of drug use: “[T]he strongest predictor of student drug use is students’ attitudes toward drug use and perceptions of peer use.”<sup>108</sup> Research has led to the conclusion that “a policy [of suspicionless drug testing of high school students] *cannot* work in the way it is hoped to and will, for many adolescents, interfere with more sound prevention and treatment processes.”<sup>109</sup> In short, we are dealing with the powerful forces of peer pressure, teenage culture, and addiction. A litmus test for drug abuse will be met with hostility and distrust, and will move teenagers away from, not toward, getting meaningful help.

#### IV. STANDING IN THE SHOES OF A PARENT

It is taken for granted that the existence and operation of public schools is an essential and inevitable aspect of a progressive, technological society.<sup>110</sup> But the Supreme Court has seemingly led the way toward a public that views public schooling not only as an institution to serve these societal changes, but as an institution that is actually central to the successful development of individual Americans, *as people*. This is particularly apparent in the language of *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the

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107. Greg Winter, *Study Finds No Sign that Testing Deters Students’ Drug Use*, N.Y. TIMES, May 17, 2003, at A1 (stating that a large-scale national study found that “[d]rug testing in schools does not deter student drug use any more than doing no screening at all”).

108. Drug Policy Alliance, *Federal Drug Testing Study Shows Invasive Tests Do Not Deter Use*, DRUG POLICY NEWS, May 20, 2003, [http://www.drugpolicy.org/news/05\\_20\\_03testing.cfm](http://www.drugpolicy.org/news/05_20_03testing.cfm).

109. Brief for the American Academy of Pediatrics, et al. as Amici Curiae Supporting Respondents at 1, *Earls*, 536 U.S. 822 (No. 01-332).

110. This is true despite the fact that the first compulsory public education laws were not enacted until the mid-nineteenth century in America. Infoplease.com, *State Compulsory School Attendance Laws*, <http://www.infoplease.com/ipa/A0112617.html> (last visited Apr. 3, 2008).

armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>111</sup>

If a visitor from another planet arrived in the United States and read this proclamation, he would likely be shocked that there exists a government institution with such life-giving, nurturing, and guiding power. In fact, he might be able to think of only one similar cultural force—that of the relationship between parent and child. But is it truly the case that schools, and not parents, are what allow us to exercise our “most basic public responsibilities,”<sup>112</sup> and that any “expectations” we may have in life stem not from our families or communities, but from our government-run schools? If so, one wonders what the role of parents is when the school day is over. *In loco school*, perhaps?

It is often said that school personnel stand *in loco parentis* to students.<sup>113</sup> That is, parents delegate at least part of their authority as parents to schools when they drop their children off in the morning.<sup>114</sup> Oddly, courts have rarely endeavored to define exactly what this delegation entails, or which of the traditionally “parental” powers are delegated to schools. Courts seem satisfied with the proposition that schools get some constitutional leeway in their treatment of students because they are parent-like.<sup>115</sup>

However, the Supreme Court has itself questioned the model of *in loco parentis* in a constitutional context:

Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant

111. 347 U.S. 483, 493 (1954).

112. *Id.*

113. See 68 AM. JUR. 2D *Schools* § 290 (2008).

114. Todd A. DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L. J. 17, 18.

115. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (recognizing the shortcomings of the doctrine of *in loco parentis* and then falling back on the parent-like relationship of schools and students to justify recognition of a lower student privacy expectation).

with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary “for the proper education of the child and for the maintenance of group discipline.”<sup>116</sup>

Furthermore, in *T.L.O.*, the Court observed: “Today’s public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.”<sup>117</sup>

If the authority of school personnel over students is derived from the state itself, rather than from a delegation of power from parents to the government, then that authority is not parent-like at all; it was in fact taken from parents. The states, through a combination of compulsory attendance laws and *in loco parentis*-inspired policies, have “bootstrapped” themselves into possessing a right to infringe on the personal liberties of students in a manner similar to a parent. Student-citizens are mandated to be in the presence of government actors, and the Supreme Court has used this mandated presence to justify intrusions on their personal liberties based on the state’s own declaration that it has such rights.

Despite the frequent use of the term *in loco parentis*, there are better models for describing the student/school relationship and drawing analogies for use in making constitutional decisions about the rights of students, for example, that of the doctor/patient relationship. The modern approach to public schooling is astoundingly diagnostic and treatment-oriented. This has been the case for decades, with states requiring mandatory testing for academic deficiencies,<sup>118</sup> the federal and state governments developing intricate devices for the accommodation of physical, psychological, and learning disabilities,<sup>119</sup> and perhaps ultimately, with the enactment of the No Child Left Behind Act,<sup>120</sup> which conditions the very

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116. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (quoting 1 F. HARPER & F. JAMES, *LAW OF TORTS* § 3.20, 292 (1956)).

117. 469 U.S. at 336.

118. See, e.g., MISSOURI DEPARTMENT OF ELEMENTARY & SECONDARY EDUCATION, *ASSESSMENT STANDARDS FOR MISSOURI PUBLIC SCHOOLS* (1998), <http://www.dese.mo.gov/divimprove/assess/assessmentstandards.pdf> (outlining the requirements of the mandatory Missouri Assessment Program).

119. See, e.g., *Individuals with Disabilities Education Act*, 20 U.S.C. §§ 1400–1487 (2000).

120. 20 U.S.C. §§ 6301–6578 (Supp. V 2005).

existence of a public school on progress measured by empirical data developed and collected by strict adherence to statistical standards.<sup>121</sup> Two important conclusions can be drawn from the state of modern schools. First, this is not “parenting;” it is the application of the scientific method. Second, the academic progress of a school, as measured by empirical data, is being given top priority by school administrations over many other considerations.<sup>122</sup> We want our schools to succeed so badly that we have commanded them to *stop being parents* and start increasing test scores. Therefore, while *in loco parentis* is not a dead letter, it is a model for schools that has proper application only in the minds of Supreme Court Justices.

The diagnostic character of modern public schools is often confirmed by teachers and administrators with first-hand knowledge of how schools operate. A recent broadcast on National Public Radio about the current emphasis on student achievement data included interviews with public school teachers in California who spoke in an impressive, analytical manner one might expect of a scientist.<sup>123</sup> A third-grade teacher described his school’s data-driven curriculum as follows: “It’s kind of like a scientific process of shooting a rocket off. . . . That one didn’t work. Let’s go back to the drawing board. We’re going to add better fins, we’re going to streamline this thing, and we’re going to put a parachute on it.”<sup>124</sup>

Traditional interaction among teachers and the administration has taken a backseat to a focus on data and exacting pedagogical methods. Schools “are throwing out old practices, such as regular staff meetings that did little more than take up time. In many schools, teachers only get together to discuss student achievement data.”<sup>125</sup> All of this is, of course, driven by the necessity of schools to meet federal

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121. 20 U.S.C. § 6493(d) (Supp. V 2005) (describing in detail the thorough statistical method for measuring achievement that is mandated by federal law).

122. See Kansas City, Missouri School District Homepage, <http://www2.kcmsd.net/Pages/AboutKCMSD.aspx> (last visited Mar. 16, 2008). The homepage states: “Where Achievement Is The Standard.” The achievement referred to is likely not social achievement, and it is doubtful that the “standard” is one set by the students themselves. The District makes it clear that “[t]he students’ performance standards are a critical part of the District’s efforts to regain full accreditation.” *Id.*

123. *Morning Edition: California Schools Collect Student Data to Help Kids* (NPR radio broadcast June 18, 2007) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=11151829>).

124. *Id.*

125. *Id.*

standards in order to continue to receive federal funding.<sup>126</sup> Moreover, teachers themselves have a vested interest in the school's achievement and progress data, because "many people think that poor performing schools have poor teachers."<sup>127</sup> While some teachers, perhaps those with scientific backgrounds, actually find the data-driven approach "invigorating,"<sup>128</sup> others know something is amiss in this approach. As one teacher said, "In our minds these aren't little data people. . . . I don't see a score. I see a little person, who I want the very best life for."<sup>129</sup> While this sentiment is likely shared by many teachers, raising *people* is not the task modern schools have undertaken. They are on a mission to raise *numbers*, and they cannot afford to fail. This is strikingly similar to the way a doctor regards his patients. He is singularly concerned with finding out what is wrong, applying the best possible techniques, and achieving positive results. Because schools regard students as scientific subjects for educational purposes, one would be consistent in regarding them as such for constitutional purposes as well.

The Supreme Court addressed the topic of involuntary drug testing in state-run hospitals in *Ferguson v. City of Charleston*.<sup>130</sup> In that case, the hospital, without the patients' permission, tested the urine of pregnant women who were suspected of using cocaine.<sup>131</sup> The hospital cited its ultimate goal of getting pregnant women off drugs and into treatment as a substantial justification for the searches.<sup>132</sup> It asserted that the case should be analyzed under the "special needs" balancing test.<sup>133</sup> Therefore, as in *Acton* and *Earls*, the Court was potentially confronted with the question of whether the public's interest in keeping a group of vulnerable people off

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. 532 U.S. 67 (2001).

131. *Id.* at 70.

132. *See id.* at 82; *see also* Brief of Respondents at 3, *Ferguson*, 532 U.S. 67 (No. 99-936) (arguing that not only did the hospital have a direct clinical need to know if pregnant patients were using cocaine, but also had a "broader medical and social need to stem the tide of an epidemic of maternal drug use"). Similarly, schools make the argument that they have a duty to stem the tide of an epidemic of student drug use. *See supra* text accompanying note 106.

133. Brief of Respondents, *supra* 132, at 24 (stating that the drug tests clearly met "the guiding principles and parameters of the special needs doctrine").

drugs outweighs the individual's Fourth Amendment privacy expectations. However, the Court chose not to resort to "special needs analysis" in *Ferguson*, stating that the purpose of the tests was "ultimately indistinguishable from the general interest in crime control."<sup>134</sup> Thus, the stated purpose was insufficient to overcome "[t]he Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches."<sup>135</sup>

The "special need" cited in student search cases, keeping kids off drugs for their own good, is almost identical to the asserted "special need" the Court rejected in *Ferguson*, namely, keeping pregnant women off drugs for their own good.<sup>136</sup> Because the school/student relationship more closely resembles the doctor/patient relationship than the parent/child relationship, and government-run hospital patients have a recognizable privacy expectation in the contents of their bodily fluids, government-run school students should be afforded at least the same constitutional protections as patients. In short, the need to keep students off drugs is not special; it is universal, and implicates the full protections of the Fourth Amendment. Students are not sub-citizens; they are particularly impressionable citizens who do not "shed their constitutional rights . . . at the schoolhouse gate."<sup>137</sup>

#### V. INTERPRETING STATE LAWS TO PROVIDE PROTECTIONS BEYOND THOSE OF FEDERAL LAW

State constitutions typically contain search and seizure clauses that are nearly identical to the language of the Fourth Amendment. When a plaintiff sues under both the state and federal constitutions, the handling by the state court of the state law claim is a delicate balance among longstanding principles of federalism, respect for the U.S. Supreme Court, and practical considerations. For example, the Iowa Supreme Court, in upholding a suspicionless high school locker search,

134. *Id.* at 81 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)). Unlike the policies in *Acton* and *Earls*, under the hospital's policy, if a woman tested positive for cocaine twice, the police would be notified and the patient would be arrested. *Id.* at 72.

135. *Id.* at 86.

136. *Id.* at 84 (claiming that the hospital's true purpose was to use the threat of arrest to "force women into treatment").

137. *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969).

stated, “[W]e usually interpret ‘the scope and purpose of [Iowa’s search and seizure provision] to track with federal interpretations of the Fourth Amendment.’”<sup>138</sup> It does this out of “[s]pecial respect and deference [to] United States Supreme Court interpretations of similar language in the federal constitution.”<sup>139</sup>

This rather weighty deference is remarkable, considering a state court need not, when interpreting state law, follow U.S. Supreme Court decisions that find no violation of the Federal Constitution (like *Acton* and *Earls*). When interpreting state law, a state court is bound only by U.S. Supreme Court decisions that define the constitutional limitations on state action.<sup>140</sup> A state is free to provide its citizens with constitutional rights beyond those guaranteed by federal law, without need for even passing recognition of what the Federal Constitution does *not* guarantee.<sup>141</sup> Nonetheless, a state court will often look to the U.S. Supreme Court for guidance in interpreting a state provision nearly identical to the Federal Constitution. Thus, the New Jersey Supreme Court, upholding an *Acton*-like testing policy, stated, “Although we are not bound by federal decisions when interpreting our State’s constitution, ‘federal decisional law may serve to guide us in our resolution of New Jersey issues.’”<sup>142</sup> Therefore, the *Earls* decision has led some state courts to adopt a simple “us too” method of dealing with student search cases, ostensibly because the federal Justices are so well-respected. This is not guidance; it is a voluntary abandonment by these state courts of the principals of federalism that comprise the boundaries within which the federal government must act. State litigants are entitled to application of their state’s law, not just an

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138. *State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003) (quoting *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998)).

139. *State v. Davis*, 304 N.W.2d 432, 434 (Iowa 1981) (citing *Redmond v. Ray*, 268 N.W.2d 849, 852 (Iowa 1978)).

140. U.S. CONST. art. 3, § 2 (stating that the judicial power of the federal judiciary “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . treaties”). Because the federal government is one of enumerated powers, such power therefore does not extend to cases arising under state law and contemplating no federal issue.

141. See *Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d 76, 88 (Pa. 2003) (“The cases decided under [the Pennsylvania Constitution] have recognized a strong notion of privacy, which is greater than that of the Fourth Amendment.”).

142. *Joye v. Hunterdon Cent. Reg’l High Sch. Bd. of Educ.*, 826 A.2d 624, 633 (N.J. 2003) (quoting *State v. Cooke*, 751 A.2d 92, 99 (N.J. 2000)).

assumption that federal law has them covered.

One state court of last resort, also looking to the Supreme Court for guidance, found it in a Justice's losing argument. In her dissenting opinion in *Earls*, Justice Ginsburg characterized the school's policy as "perverse," because it targets for testing those students who are least likely to use drugs,<sup>143</sup> and "symbolic," and thus unconstitutional, because the policy is meant primarily to express the school's abhorrence of drug use.<sup>144</sup> In *Theodore v. Delaware Valley School District*, the Pennsylvania Supreme Court, interpreting a provision of the Pennsylvania Constitution substantially similar to the Fourth Amendment,<sup>145</sup> agreed.<sup>146</sup>

The Pennsylvania high court held that the Delaware Valley School District was not entitled to judgment as a matter of law, based on the intervening *Earls* decision, because there were pressing questions concerning Pennsylvania's four-part test for the legality of school searches. Under the test, the four factors that must be balanced are: "(1) the students' privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) 'the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search.'"<sup>147</sup> This test is derived from the decision in *Acton*, though the two standards are not identical.<sup>148</sup>

Rejecting the notion in *Earls* that students' privacy rights implicated by the tests are trivial, the Pennsylvania court found it critical that the school district had offered no reason to believe a drug problem actually existed in its schools.<sup>149</sup> As a further indication that the fourth factor of the test was not met, the court quoted Justice Ginsburg's dissent in *Earls*: "Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance

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143. *Bd. of Educ. v. Earls*, 536 U.S. 822, 843 (2002) (Ginsburg, J., dissenting).

144. *Id.* at 854.

145. Article I, § 8 of the Pennsylvania Constitution reads: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

146. 836 A.2d 76 (Pa. 2003).

147. *Id.* at 88 (quoting *In re F.B.*, 726 A.2d 361, 365 (Pa. 1999)).

148. *Id.*

149. *Id.* at 90-91.

abuse problems than are their less-involved peers.”<sup>150</sup>

In an imaginary war, the Pennsylvania school district had taken aim at innocent bystanders. It would be naive to assume that students did not notice they were not trusted to make important choices for themselves. It would be dangerous to assume this caused no harm. The culture gap widens and the drug war escalates. While the Pennsylvania court’s drawing of a line between *Acton* and *Earls* was constitutionally appropriate, more importantly, it recognized that “[g]overnment is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example.”<sup>151</sup> The lesson taught by suspicionless drug testing is that it is okay to set trust aside for the sake of knowledge.

Similarly, under California law, it appears that random, suspicionless drug searches are unconstitutional. The test for whether a student search is allowable in California is similar to the “reasonable suspicion” test articulated in *T.L.O.*:<sup>152</sup> “[T]his standard requires articulable facts, together with rational inferences from those facts, warranting an objectively reasonable suspicion that the student or students to be searched are violating or have violated a rule, regulation, or statute.”<sup>153</sup> However, the Supreme Court of California limited the potential scope of the standard by stating, “The corollary to this rule is that a search of a student by a public school official is unlawful if predicated on mere curiosity, rumor, or hunch.”<sup>154</sup> As to each tested student, it cannot be said that a random, suspicionless drug test is based on notably more than curiosity or a hunch. The court also made clear that California law itself, and not a delegation of parental power, was the basis for this standard: “While most [courts] balance the interests of the student against *in loco parentis* responsibilities of school officials, we prefer . . . to view these countervailing governmental interests as statutorily, rather than common law, based.”<sup>155</sup>

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150. *Id.* at 92 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting)).

151. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

152. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

153. *In re William G.*, 709 P.2d 1287, 1295 (Cal. 1985).

154. *Id.* at 1296.

155. *Id.*

## VI. CONCLUSION

While the need to keep Americans, and especially young Americans, from abusing dangerous recreational drugs is obvious, the need to instill within young people faith in the United States Constitution and its foundation of personal liberty guarantees is even more profound and critical to the identity of our nation. Public school students have no reason to trust the liberty guarantees of our Constitution when they are not themselves trusted. But besides the fact that random, suspicionless drug testing is an unworkable and undesirable practice, there is reason to determine that it is also illegal. Because the federal government has not done so, the states should reaffirm that their most important citizens possess the most important rights *of* citizens.

*Tony LaCroix*