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Don't Rush to Abandon a Suspicion-Based Standard for Searches of Public School Students

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Don't *Rush* to Abandon a Suspicion-Based Standard for Searches of Public School Students

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.[1]

I. INTRODUCTION

Historically, the Supreme Court has adhered to two basic principles in its Fourth Amendment jurisprudence. "First, warrantless searches are per se unreasonable, subject only to a few specifically delineated and well-recognized exceptions."[2] Second, highly intrusive searches, conducted under the warrant requirement or one of its exceptions, are reasonable "only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched."[3]

However, prior to 1985, public school teachers and administrators were not subject to these Fourth Amendment requirements. According to the doctrine of *in loco parentis*, teachers and administrators acted under the authority of the parent, not of the state.[4] As

1. U.S. CONST. amend. IV.

2. New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part). *See, e.g.*, United States v. Place, 462 U.S. 696, 701 (1983) (allowing a search on less than probable cause where a reasonable suspicion exists that the search will find evidence of a crime); Terry v. Ohio, 392 U.S. 1, 20 (1968) (allowing a search even absent a warrant or probable cause if a reasonable belief exists that the individual is armed and dangerous); Katz v. United States, 389 U.S. 347, 357 (1967) (holding that searches conducted in the absence of a warrant or probable cause are per se unreasonable).

3. *T.L.O.*, 469 U.S. at 354–55 (Brennan, J., concurring in part and dissenting in part). *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91 (1964); Wong Sun v. United States, 371 U.S. 471, 479 (1963); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

4. *See* Mercer v. State, 450 S.W.2d 715, 718 (Tex. Civ. App. 1970, no writ) (holding that no government search had occurred because the school administrator was acting *in loco parentis*; because the parent does not exercise governmental power, neither does the principal acting in the place of the parent).

Blackstone explained in his *Commentaries on the Laws of England*, a parent

> may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[5]

In 1985, the Supreme Court, in *New Jersey v. T.L.O.*,[6] held that the actions of public school teachers and administrators are governed by the Fourth Amendment. At issue in *T.L.O.* was a high school administrator's search of a student's purse to obtain evidence confirming a teacher's direct observation that a girl was smoking in a lavatory in violation of school rules.[7] The *T.L.O.* Court found the traditional interpretation of *in loco parentis* to be "in tension with contemporary reality and the teachings of this Court."[8] Specifically, the Court held that the concept of *in loco parentis* is not entirely "'consonant with compulsory education laws'"[9] and is inconsistent with other Supreme Court decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses of the Constitution.[10] Further, the Court had previously held that students do not "shed their constitutional rights . . . at the school house gate."[11] Based upon these considerations, the Court held that public school teachers and administrators are subject to the limits of the Fourth Amendment and "cannot claim the parents' immunity from the strictures of the Fourth Amendment."[12]

5. 1 WILLIAM BLACKSTONE, COMMENTARIES *453.

6. 469 U.S. 325 (1985).

7. *See id.* at 328.

8. *Id.* at 336.

9. *Id.* (quoting Ingraham v. Wright, 430 U.S. 651, 662 (1977)).

10. *See id.*

11. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (referring to First Amendment rights of "freedom of speech or expression").

12. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985). In explaining its holding, the Court wrote:

> We have held school officials subject to the commands of the First Amendment . . . and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather that public authority when conducting searches of their students. More generally, the Court has recognized that 'the concept of parental dele-

Even so, the Supreme Court upheld the search at issue because, although school teachers and administrators are subject to the requirements of the Fourth Amendment, the unique circumstances and setting of a school require a diminution of Fourth Amendment requirements. The Court explained that "the preservation of order and a proper educational environment . . . in the schools requires a certain degree of flexibility in school disciplinary procedures," which entails "some easing of the restrictions to which searches by public authorities are ordinarily subject."[13] Therefore, the Court held that neither the warrant requirement[14] nor the probable cause requirement[15] apply to a search of a public school student by a school teacher or administrator. "Rather," the Supreme Court wrote, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[16] The Supreme Court concluded that a search of a public school student by a teacher or administrator would be constitutionally permissible "when there are reasonable grounds for suspecting that the search will turn up

gation' as a source of school authority is not entirely 'consonant with compulsory education laws.' *Igrahm v. Wright*, 430 U.S. 651, 662, 97 S. Ct. 1401, 1407, 51 L.Ed.2d 711 (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

Id. at 336-37 (citations omitted).

13. *Id*. at 339-40.

14. *See id*. at 340. The Court explained:

The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. . . . [W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority.

Id.

15. *See id*. at 341. The Court stated:

[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

Id.

16. *Id*. at 341.

evidence that the student has violated or is violating either the law or the rules of the school."[17]

The Supreme Court recently expanded upon *T.L.O.* in *Vernonia School District 47J v. Acton* ("*Vernonia*").[18] In *Vernonia*, the Court upheld a *suspicionless* search program for public school students who wished to participate in interscholastic athletics.[19] This decision has been criticized as being too quick to abandon a suspicion-based drug testing search regime, thereby depriving students of their only remaining Fourth Amendment protection—the *New Jersey v. T.L.O.* individualized suspicion requirement.[20]

Since *Vernonia*, several school districts have moved to implement suspicionless drug testing programs for various groups of students. [21] Several of these programs have been challenged, with the courts divided on whether suspicionless mandatory drug testing violates students' Fourth Amendment rights. This Note examines *Todd v. Rush County Schools*,[22] a Seventh Circuit Court of Appeals decision that relied upon *Vernonia* to uphold a warrantless, suspicionless urinalysis testing program for public school students who wish to participate in extracurricular activities. Part II discusses *Vernonia School District 47J v. Acton*.[23] Part III presents the facts of *Todd v. Rush County Schools* and reviews the reasoning behind the decision. Part IV addresses several problems with the application of *Vernonia* to *Todd*. That Part also discusses the suspicion-based standard and its ability to fulfill the purposes of a suspicionless program while protecting students' privacy interests in a public school context. Part V concludes that the *Vernonia* holding should be limited to its facts and that a suspicion-based standard would best preserve students' constitutional rights while protecting the government's ability to maintain order and a proper educational environment in public schools.

17. *Id.* at 342.

18. 515 U.S. 646 (1995).

19. *See id.* at 665.

20. *See id.* at 680-81 (O'Connor, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 342 (1985); Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2571-75 (1996).

21. *See, e.g.*, Todd v. Rush County Sch., 133 F.3d 984, 985 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095, 1097 (Colo. 1998) (en banc).

22. 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

23. 515 U.S. 646 (1995).

II. *VERNONIA SCHOOL DISTRICT 47J V. ACTON*[24]

In *Vernonia*, the Supreme Court upheld a drug testing program that called for random urinalysis drug testing of students who wished to participate in interscholastic athletic programs. In doing so, the Court balanced students' privacy interests against the government interest of maintaining order and a proper educational environment in public schools by deterring drug use among the nation's school children. Initially, the Court explained the problems in the school district:

> [A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached "epidemic proportions." The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's [sic] misperceptions about the drug culture.[25]

The Court noted that "[n]ot only were athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture."[26]

In its analysis, the Court first considered the privacy interest of public school students. It stated that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[27] Although the Court, in *New Jersey v. T.L.O.*, held that school officials "cannot claim the parents' immunity from the strictures of the Fourth Amendment,"[28] school officials possess a "custodial and tutelary" power that "permit[s] a degree of supervision and control that could not be exercised over free adults."[29] Further, because public school students must submit to various physical exams and vaccinations, "students within the school environment

24. *Id.*

25. *Id.* at 649 (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

26. *Id.* (citation omitted).

27. *Id.* at 654.

28. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

29. *Vernonia*, 515 U.S. at 655.

have a lesser expectation of privacy than members of the population generally."[30] Concerning students who participate in interscholastic athletics, the Supreme Court found persuasive the fact that student-athletes, because of the nature of athletics, have a lesser expectation of privacy than the general student body.[31] Additionally, student-athletes *voluntarily* choose to participate in interscholastic athletics, thereby subjecting themselves to a high degree of regulation.[32]

The *Vernonia* Court continued by considering the governmental interest in preservation of order and a proper educational environment in public schools by deterring drug use among public school students. This interest did not need to meet some "fixed, minimum quantum of governmental concern," the Court reasoned, but merely had to be "important enough to justify the particular search at hand."[33] The Court found that the government interest in the educational environment of public schools was important enough to justify the search at issue in *Vernonia*, because "the effects of a drug-infested school are visited not just upon the users but upon the entire student body and faculty, as the educational process is disrupted."[34] Further, the Court explained that with student athletes in particular there was a need to respond to "the risk of immediate physical harm to the drug user or those with whom he is playing his sport."[35] The Supreme Court found that the program was an efficient means to achieve the governmental interest because it both deterred drug use among athletes and worked against the wide-ranging

30. *Id*. at 657 (quoting *T.L.O.*, 469 U.S. at 348) (Powell, J., concurring)).

31. *See id*. at 657. The Court explained:

> School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation."

Id. (quoting Schaill *ex rel*. Kross v. Tippecanou County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)).

32. *See id*. ("[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." (citations omitted)).

33. *Id*. at 661.

34. *Id*. at 662.

35. *Id*.

drug problem in the district.[36] The Court concluded that because of the greatly decreased expectation of privacy among student-athletes and the overwhelming government interest in deterring drug use among the nation's school children the testing program was constitutional.

III. *TODD V. RUSH COUNTY SCHOOLS*

A. Facts

In August 1996, the Rush County, Indiana, School Board approved a random, suspicionless drug testing program. In order to participate in any extracurricular activity or drive to and from school, the student and a parent or guardian had to consent to the student being tested for drugs, alcohol, or tobacco in random, unannounced urinalysis examinations.[37] Extracurricular activities included "athletic teams, Student Council, Foreign Language Clubs, Fellowship of Christian Athletes, Future Farmers of America Officers, and the Library Club."[38] Following the implementation of the program, the parents of four students refused to sign the consent form, thereby barring the students from participating in extracurricular activities.[39] These parents brought suit claiming that the program violated the students' Fourth Amendment rights. On cross motions for summary judgment in the United States District Court for the Southern District of Indiana, the court granted the school district's motion for summary judgment and denied the students' motion.[40] The Seventh Circuit Court of Appeals upheld the grant of summary judgment for the district and ruled that random drug testing of students participating in extracurricular activities did not violate the Fourth Amendment.[41] The Supreme Court subsequently denied certiorari.[42]

36. *See id.* at 663.

37. *See* Todd v. Rush County Sch., 133 F.3d 984, 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

38. *Id.*

39. Prior to refusing to participate in the drug testing program, the plaintiff students had participated in extracurricular activities through membership in the Library Club, Future Farmers of America, and videotaping the football team. *See id.*

40. *See* Todd v. Rush County Sch., 983 F. Supp. 799, 801 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

41. *Todd*, 133 F.3d at 984.

B. Reasoning

Relying on *Vernonia*, the Seventh Circuit Court of Appeals ruled that students who participate in extracurricular activities have a decreased expectation of privacy. The court based this conclusion on the finding that "Fourth Amendment rights . . . are different in public schools than elsewhere"[43] and emphasized that "the testing policy was undertaken in furtherance of the school district's 'responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.'"[44] Most important, the court emphasized the fact that "[students] are required to submit to random drug testing only as a condition of participation in an extracurricular activity"[45] in which they have voluntarily chosen to participate. Although the court recognized that extracurricular activities "'are considered valuable to the school experience, and [that] participation may assist a student in getting into college,'" it noted that "extracurricular activities, like athletics, 'are a privilege at the High School.'"[46]

The district court relied heavily upon the governmental interest of "[d]eterring drug use by our Nation's schoolchildren"[47] to find that the program at issue in *Todd* did not violate students' Fourth Amendment Rights. The court of appeals agreed.

> The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose—the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.[48]

Because the "school years are the time when the physical, psychological, and addictive effects of drugs are most severe,"[49] the school

42. *See* Todd v. Rush County Sch., 525 U.S. 824 (1998).

43. *Todd*, 133 F.3d at 986 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)).

44. *Id.* (quoting *Vernonia*, 515 U.S. at 656).

45. *Id.* (quoting Schaill *ex rel.* Kross v. Tippecanou County Sch. Corp., 864 F.2d 1309, 1319 (7th Cir. 1988)).

46. *Id.* (quoting Todd v. Rush County Sch., 983 F. Supp. 799, 803 (S.D. Ind. 1997)).

47. Todd v. Rush County Sch., 983 F. Supp. 799, 806 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998) (quoting *Vernonia*, 515 U.S. at 661).

48. *Todd*, 133 F.3d at 986 (quoting *Schaill*, 864 F.2d at 1324).

49. *Id.* (quoting *Vernonia*, 515 U.S. at 661).

district had an interest in deterring student drug use through a drug testing program. The court also felt that extending the *Vernonia* framework to include extracurricular activities was justified because the "linchpin"[50] of the program was to protect the health of students, and the program was "sufficiently similar"[51] to the program upheld in *Vernonia*.

IV. ANALYSIS

Although the Seventh Circuit held in *Todd* that the outcome of the case was governed by *Vernonia*, the court did not adhere to the Supreme Court's reasoning and was too quick to deprive students of their only remaining Fourth Amendment protection: the *New Jersey v. T.L.O.* individual suspicion requirement.[52] Part A discusses the court's misapplication of *Vernonia School District 47J v. Acton* to the circumstances present in *Todd v. Rush County Schools*. Part B suggests that a reasonable suspicion requirement for searches of public school students preserves students' remaining constitutional rights while still allowing school teachers and administrators the latitude needed to maintain order and a proper educational environment in public schools.

A. Suspicionless Testing Programs Directed at Students Participating in Extracurricular Activities

The *Todd* court ignored the Supreme Court's emphasis on student-athletes' greatly decreased expectation of privacy and placed too much emphasis on what it perceived to be the voluntary nature of extracurricular activities. Further, the extreme circumstances that justified the suspicionless search program in *Vernonia* were not present in *Todd*.

1. Unwarranted and unjustified expansion of Vernonia School District 47J v. Acton *to include students not participating in athletics*

In *Vernonia*, the Supreme Court found it dispositive that the students targeted by the testing program (1) had an expectation of privacy of an even lesser degree than nonathlete students and (2)

50. *Id.* at 986.

51. *Id.* at 987.

52. *See* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

voluntarily chose to participate in interscholastic athletics. In addition to the element of "communal undress" present in athletic locker rooms, athletes at Vernonia's public schools were required to submit to a preseason physical exam (which included producing a urine sample), acquire adequate insurance coverage or sign an insurance waiver, maintain a grade point average above a minimum level, and comply with rules of training, conduct, and dress. The *Vernonia* court concluded that "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[53] Finally, the Supreme Court emphasized the substantial psychological and physical risks posed to athletes by drug use: "[I]t must not be lost sight of 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."[54]

Although the testing program at issue in *Todd* sought to include student participants in all extracurricular activities, not just interscholastic athletics, the court of appeals found that "the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students."[55] It upheld the trial court's conclusion that, despite the increased privacy intrusions and regulations inflicted upon participants in athletics, "any perceived differences between the student athletes in *Vernonia* and the nonathlete extracurricular participants in this case turn out to be more *ethereal* than real."[56]

This reasoning ignores the fact that athletes are subjected, as noted in *Vernonia*, to even greater intrusions of privacy than the general student body or participants in nonathletic extracurricular ac-

53. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (citations omitted).

54. *Id.* at 662. The Supreme Court noted that drugs have both psychological and physical effects on athletes. Included among the psychological effects are impairment of judgment, slow reaction time, and a lessening of the perception of pain. The physical effects include an artificially induced heart rate increase, peripheral vasoconstriction, blood pressure increase, masking of the normal fatigue response, irregular blood pressure responses, a reduction in the oxygen-carrying capacity of the blood, and possible coronary artery spasms and myocardial infarction. *See id.*

55. *Todd*, 133 F.3d at 986.

56. Todd v. Rush County Sch., 983 F. Supp. 799, 806 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998) (emphasis added).

tivities. 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.[57] In *Vernonia*, the Supreme Court cautiously avoided this result by emphasizing the lesser privacy expectation of student athletes as opposed to the general student body.[58]

It is difficult to reconcile the Seventh Circuit's reasoning in *Todd* with a statement from *Schaill* ex rel. *Kross v. Tippecanoe County School Corp.* ("*Schaill*"),[59] a Seventh Circuit decision, relied upon as controlling authority by the *Todd* court. In *Schaill*, the Seventh Circuit upheld a random, suspicionless drug testing program for participants in athletics based on athletes' decreased expectation of privacy.[60] The court stated that "we believe that sports are quite distinguishable from almost any other activity. Random testing of athletes does not necessarily imply random testing of band members or the chess team."[61]

Additionally, the district court in *Rush*, attempted to analogize the *Vernonia* to the Rush County testing program by emphasizing the perceived voluntary nature of extracurricular activities. "[E]xtracurricular activities, like sports, are voluntary activities which submit the students to extra rules and regulations. Participation in extracurricular programs is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a nonparticipant."[62] Although the district court spoke generally of "extra rules and regulations" attendant to extracurricular activities, it did

57. Notably, the Eighth Circuit, in *Miller* ex rel. *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), recently upheld the constitutionality of a school district's random urinalysis testing program for *all* students in grades seven through twelve, based upon the lesser expectation of privacy held by public school students. *See id.* at 578-79. The decision was later vacated as moot because the plaintiff-student was no longer a student in the school district. *See id.* at 582.

58. *See Vernonia*, 515 U.S. at 657 ("By choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."); *see also* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE §10.11(b) at 821 (3d ed. 1996).

59. 864 F.2d 1309 (7th Cir. 1988).

60. *See id.* at 1310.

61. *Id.* at 1319 (footnote omitted).

62. Todd v. Rush County Sch., 983 F. Supp. 799, 806 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

not specify any particular rules or regulations enforced upon students participating in nonathletic extracurricular activities such as the Library Club, Future Farmers of America.

Further, the district court ignored the very likely situation of a student, as part of a graded class, being required to participate in an extracurricular activity.[63] In addition, invaluable experience is gained through extracurricular activities, and college and university admission committees place strong emphasis on extracurricular activities.[64] Although this situation is not identical to that in which students are required to participate in an extracurricular activity as part of a graded class, "the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they *must engage* in such activities."[65]

Finally, unlike the substantial and documented health risks posed by drug use to students participating in athletics, the court did not pinpoint an increased risk to students who use drugs and participate in the Library Club, band, or any of Rush County's other nonathletic extracurricular activities.[66] The court merely reasoned that "successful extracurricular activities require healthy students."[67] This is not a sufficient ground on which to deny nonathlete public school students what is, in essence, their only remaining Fourth Amendment protection—the individualized suspicion requirement.[68] Thus, where students who do not participate in athletics are the targets of the searches, the necessary decreased expectation of privacy that student-athletes possess is not present to tip the scales in favor of allowing suspicionless, mandatory drug testing. In those situations, a

63. *See, e.g.*, Trinidad Sch. Dist. v. Lopez, 963 P.2d 1095, 1110 (Colo. 1998) (en banc) (holding unconstitutional a school drug policy requiring consent to random drug tests in order to participate in extracurricular activities; student was required, as part of his for-credit instrumental music class, to participate in band, an extracurricular activity.).

64. *See, e.g.*, Todd v. Rush County Sch., 133 F.3d 984, 986 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

65. *Trinidad Sch. Dist.*, 963 P.2d at 1109 (emphasis added); *see also Todd*, 139 F.3d at 573 (Ripple, J., dissenting) ("Exclusion of a high school student from all extracurricular activities deprives that student of a great deal of what the modern American high school has to offer in terms of academic and personal development.").

66. *See supra* note 53 and accompanying text.

67. *Todd*, 133 F.3d at 986.

68. *See* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

suspicion-based standard should be used in order to allow students to retain their remaining Fourth Amendment protection.

2. The absence of extreme circumstances similar to those present in Vernonia

In its holding, the Supreme Court emphasized the unique and extreme circumstances present in the Vernonia schools.

> [A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary problems had reached "epidemic proportions." The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's [sic] misperceptions about the drug culture.[69]

The Court noted that "[n]ot only were athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture."[70] Further, the Supreme Court upheld the testing regime largely because the program targeted the leaders of the drug culture at the schools.[71]

In stark contrast to the circumstances in *Vernonia*, the district court in *Todd* found that "[t]he empirical evidence is not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students," and "[t]here also is very little to indicate that students in extracurricular activities are 'ringleaders' of a drug rebellion, as in *Vernonia*."[72] Therefore, unlike *Vernonia*, the program in *Todd* did not work to eliminate a drug problem by targeting the leaders of the "drug culture." In short, there was nothing in *Todd* that would justify a suspicionless search program in the face of minimal evidence of a drug problem among the targets of those searches.

69. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649 (1995) (quoting Acton v. Vernonia Sch. Dist. 47J, 786 F. Supp. 1354, 1357 (D. Or. 1992)).

70. *Id.*

71. *See id.* at 663.

72. Todd v. Rush County Sch., 983 F. Supp. 799, 805 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

B. The Superiority of an Individualized Suspicion Standard Where the Unique Circumstances of Vernonia *are not Present*

Vernonia must not be interpreted as condoning anything but suspicionless searches of student-athletes who are known to be the leaders of a well-documented and extreme drug problem among the student body. When the unique circumstances of *Vernonia* are not present, an individualized suspicion standard, based upon the Supreme Court's holding in *New Jersey v. T.L.O.*, should be followed. In *T.L.O.*, the Court held that a search of a public school student by a school official will be constitutionally permissible "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[73]

1. A suspicion-based regime would be very effective in public schools

As the Supreme Court has explained, the strong preference for an individualized suspicion requirement will only be disregarded when it is impractical or not feasible under the particular circumstances.[74] Therefore, if an individualized suspicion requirement would be effective under the circumstances presented, the requirement should not be forsaken.[75] The Supreme Court has consistently adhered to this tenet, only upholding suspicionless regimes where an individualized suspicion standard is clearly found to be ineffective and unworkable.[76]

73. *T.L.O.*, 469 U.S. at 342 (footnote omitted).

74. *See Vernonia*, 515 U.S. at 674 (O'Connor, J., dissenting).

75. *See id.*

76. *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989) (holding that because it is "not feasible to subject [customs] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments," a suspicion requirement is impractical for searches of customs officials for drug impairment); Bell v. Wolfish, 441 U.S. 520, 559 n.40 (1979) (holding that because observation needed to gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford," a suspicion requirement for searches of prisoners for smuggling following contact visits is impracticable); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) ("[A] requirement that stops on major inland routes always . . . based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.) (observing that because of the "conceded inapplicability" of the profile method of detecting hijackers and the great number of plane travelers, suspicion-based searches of airport passengers' carry-on luggage is impractical); Camara v. Mun. Court, 387 U.S. 523, 537 (1967) (holding

There is no reason for courts to depart from this well-established tenet because it is far from clear that an individual suspicion standard is ineffective and unworkable in the public school setting. Public school students are under constant supervision, scrutiny, and observation in hallways, parking lots, lunchrooms, classrooms, and locker rooms by administrators, teachers, coaches, and fellow students.[77] Teachers, administrators, and coaches in a public school context are in a position to observe and detect behavior sufficient to establish reasonable suspicion of conduct that is either criminal or in contravention of school rules.[78] Further, students often supply specific information about the activities of other students.[79] Therefore, it appears that an individualized suspicion requirement would be very effective in the public school context.

In contrast, the court of appeals in *Todd v. Rush County Schools* does not explain why a suspicion based regime would be impractical or compromise significant governmental and public concerns. The district court merely explains that Rush County Schools' motivation for implementing the suspicionless program was subjective observations by a coach and an administrator that led them to believe that

that "faulty wiring" and other safety code violations are not visible from outside the house, making suspicion requirement for searches of homes for code violations impracticable).

77. *See T.L.O.*, 469 U.S. at 339 ("[A] proper educational environment requires close supervision of schoolchildren.").

> [Public school students] spend the school hours in close association with each other, both in the classroom and during recreational periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child.

Id. at 348 (Powell, J., concurring); *Vernonia*, 515 U.S. at 678 (O'Connor, J., dissenting) ("In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms." (citations omitted)).

78. *See infra* notes 86-87 and accompanying text.

79. *See In re* C., 26 Cal. App.3d 320, 322 (Cal. Ct. App. 1972) (reporting of student keeping drugs in locker); *In re* G., 11 Cal. App. 3d 1193, 1195 (Cal. Ct. App. 1970) (reporting that student had taken some pills and appeared to be intoxicated); Commonwealth v. Snyder, 597 N.E.2d 1363, 1364 (Mass. 1992) (reporting of student attempting to sell drugs); Berry v. State, 561 N.E.2d 832 (Ind. App. 1990) (reporting by students that another student was selling drugs); Commonwealth v. Carey, 554 N.E.2d 1199, 1200 (Mass. 1990) (reporting by students that another student had a gun); People v. Stewart, 313 N.Y.S.2d 253, 254-55 (N.Y. Crim. Ct. 1970) (reporting of student keeping drugs on person).

drug use was growing among the students of Rush County.[80] In its short opinion, the court of appeals overlooked the fact that these subjective observations noted by the district court would most likely have given rise to reasonable suspicion of in-school drug use, thus justifying a search under a suspicion-based standard, while preserving students' remaining constitutional rights.

2. A suspicion-based regime can satisfy the government interest in deterring student drug use while better protecting students' Fourth Amendment rights

Although the Supreme Court is often very quick to proclaim that students do not "shed their constitutional rights . . . at the schoolhouse gate,"[81] an unjustified suspicionless search regime has just that effect. It strips students of their only remaining Fourth Amendment protection—the individualized suspicion requirement.[82] It is intuitive that, much like suspicion-based law enforcement, a public school suspicion-based regime would not be as effective as a mass, suspicionless testing regime.[83] But the price paid for the liberties enjoyed under the Fourth Amendment is sometimes high. As the Supreme Court noted in *Arizona v. Hicks*, a decision that found a search lacking probable cause to be unreasonable, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[84] While a small few may slip through the cracks, the great majority of offenders will be caught under a suspicion-based search standard.[85] A survey of the major Fourth Amendment cases concerning public schools demonstrates that the evidence obtained through teacher and administrator observations of students is sufficient to warrant drug related searches under a suspicion-based standard.[86] This would achieve the govern-

80. *See* Todd v. Rush County Sch., 983 F. Supp. 799, 803 (S.D. Ind. 1997), *aff'd*, 133 F.3d 984 (7th Cir.), *reh'g en banc denied*, 139 F.3d 571 (7th Cir.), *cert. denied*, 525 U.S. 824 (1998).

81. Tinker v. Des Moines Community Sch. Dist., 393 U.S. 503, 506 (1969).

82. *See T.L.O.*, 469 U.S. at 342.

83. *Vernonia*, 515 U.S. at 680 (O'Connor, J., dissenting).

84. Arizona v. Hicks, 480 U.S. 321, 328 (1987).

85. *See* 4 LAFAVE, *supra* note 58, at § 10.11(b) at 812 ("[I]n most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test.").

86. *See Vernonia*, 515 U.S. at 679 (O'Connor, J., dissenting) (noting that a teacher observed small groups of students passing joints back and forth across the street at a restaurant

ment purposes of deterring student drug use and reducing the effects of drugs on the educational environment while at the same time ensuring that public school students are not subject to unreasonable searches and seizures.[87]

V. CONCLUSION

Public school students, while within the "school house gate," do not enjoy two of the Fourth Amendment's traditional categorical protections against unreasonable searches and seizures: the warrant requirement and the probable cause requirement. Recently, courts have moved to deprive students of their only remaining Fourth Amendment protection—the *New Jersey v. T.L.O.* individualized suspicion requirement.[88]

The holding of *Vernonia School District 47J v. Acton*, upholding a suspicionless testing program for students participating in interscholastic athletics, should be limited to its unique circumstances and not used to support suspicionless regimes for other groups of students or the general student body. For situations not akin to *Vernonia*, an individualized suspicion requirement for searches of students by teachers and administrators should be followed. Accordingly, the Seventh Circuit Court of Appeals erred in *Todd* by allowing random, suspicionless drug testing of students who participate in any extracurricular activity. An individualized suspicion-based standard can achieve the government interests in deterring student drug use and avoiding the effects of drugs on the educational environment while preserving students' remaining Fourth Amendment protection.

J. Nathan Jensen

before school and during school hours; a group of students was caught skipping school and using drugs at one of the students' houses; several students admitted drug use to school officials (some of them being caught with marijuana pipes); a clearly inebriated student presented himself to his teacher and had to be sent home; a student, who was observed dancing and singing at the top of his voice in the back of the classroom, was asked by a teacher what was going on and replied, "Well, I'm just high on life"; during a school road trip, the wrestling coach smelled marijuana smoke in a hotel room occupied by four wrestlers); *T.L.O.*, 469 U.S. at 328 (noting that a teacher directly observed students smoking in lavatory); *Todd*, 983 F. Supp. at 803 (noting that teachers' and administrators' "subjective perception[s]" led them to believe there was a growing drug problem in the school district).

87. *See* U.S. CONST. amend. IV.

88. *See T.L.O.*, 469 U.S. at 342.