Special Contribution

Expanding the Scope of Suspicionless Drug Testing in Public Schools

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I. INTRODUCTION

During the last term, the Supreme Court issued an important new opinion regarding suspicionless drug testing in public schools. The case of *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*[1] substantially expanded the scope of students subject to a school drug testing policy beyond what was allowed under the earlier case of *Vernonia School District 47J v. Acton*,[2] which only authorized the testing of student athletes.[3] This Article first considers

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1. 536 U.S. 822 (2002).
2. 515 U.S. 646 (1995).
3. *Id.* at 664-65.

some of the unusual principles that apply to an analysis of the Fourth Amendment[4] in a public school context as explained by the Court in *New Jersey v. T.L.O.*[5] and then examines the opinion in *Vernonia* and its progeny, *Pottawatomie*.

II. SCHOOL SEARCHES

School officials do not have absolute authority over their students. Students in school and out of school are persons protected by the Constitution. They have fundamental rights that the state must respect, just as students must respect their obligations to the state.[6] Consequently, the Fourth Amendment protects students in public schools.

The Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by public school officials.[7] Boards of education are not excepted from acting within the limits of the Bill of Rights, as applied to the states through the Fourteenth Amendment,[8] because Fourth Amendment restraints apply to governmental action, not just law enforcement action.[9] Moreover, unlike a private school that acts *in loco parentis* and only with the delegated power of the parent, a public school does not simply stand in the place of the parent without constitutional restraint because such power "is not entirely 'consonant with compulsory education laws.'"[10] Yet, the nature of the public school official's role is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[11]

In *New Jersey v. T.L.O.*, the first major Supreme Court case involving school searches, a teacher found a student smoking a cigarette in a school bathroom and took her to the principal's office. When the assistant vice principal asked the student about smoking, she denied it, so he demanded to see her purse. When he opened the purse, he found cigarettes and cigarette rolling papers, which are commonly used to roll

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4. U.S. CONST. amend. IV.

5. 469 U.S. 325 (1985).

6. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969). This case involved a First Amendment issue of students wearing black arm bands to school to protest the Vietnam war. *Id.* at 504.

7. *T.L.O.*, 469 U.S. at 333.

8. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

9. *T.L.O.*, 469 U.S. at 335. This case involved a search of a student's purse that contained marijuana. *Id.* at 328.

10. *Vernonia*, 515 U.S. at 655 (quoting *T.L.O.*, 469 U.S. at 336 (internal citation omitted)). Plaintiff sued for declaratory and injunctive relief to stop enforcement of the drug policy. *Id.* at 651.

11. *Id.* at 655.

marijuana cigarettes. He then searched the purse thoroughly and found marijuana, drug paraphernalia, a substantial sum of money, an index card noting students who owed her money, and two letters indicating that she was a marijuana dealer.[12] The Court held that the search did not violate her Fourth Amendment rights.[13]

As the Court explained, "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."[14] But, the Fourth Amendment only protects legitimate expectations of privacy, not unreasonable or illegitimate expectations of privacy.[15] Moreover, "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on the school grounds,"[16] which leads to striking "the balance between the school child's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."[17] Although the Fourth Amendment's reasonableness principle still controls the constitutionality of the intrusion, this balancing of interests, combined with the special relationship of a public school with its students, modifies the warrant requirement and the typical probable cause requirements commonly imposed on law enforcement officers.

The Supreme Court has determined that the warrant requirement is particularly ill suited to the school environment, in which swift and informal discipline is needed, and has held that school officials do not need a warrant to search a student.[18] The Court has also modified the level of suspicion of illicit activity required to justify a search involving students in public schools.[19] As a consequence, probable cause is not required. The legality of a search of a student depends on the reasonableness of the search under all the circumstances:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the

12. 469 U.S. at 325.
13. *Id.* at 327-28.
14. *Id.* at 337-38 (footnote omitted).
15. *Id.* at 338.
16. *Id.* at 339.
17. *Id.* at 340.
18. *Id.*
19. *Id.*

> 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.[20]

By focusing on the reasonableness of the search, school officials can rely on reason and common sense rather than on the complexities of the Fourth Amendment standards for probable cause.[21] This lowering of the usual Fourth Amendment standards is appropriate because the Supreme Court has found that public schools have special needs beyond the normal needs of law enforcement.[22] Such special needs include drug testing policies.

III. MANDATORY DRUG TESTING PROGRAMS IN PUBLIC SCHOOLS

In *Vernonia School District 47J v. Acton*, the school district enacted a drug testing policy for all athletes that required them to sign a consent form authorizing the district to take a urine sample from all athletes at the beginning of the season. The drug policy also authorized random drug tests of ten percent of student athletes during the school year. The district implemented the policy because of an increasing rate of drug use within the student body and evidence that drug use among student athletes increased the risk of sports injuries.[23] The expressed purpose of the policy "[was] to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[24] The Court considered the purpose of the drug policy and the reasonableness of the protocol and found the policy constitutional.[25] In analyzing the constitutionality of the policy, the Supreme Court examined three factors to determine the policy's reasonableness under the circumstances.[26]

First, the Court looked at the nature of the privacy interest the search intruded on and the scope of the legitimate expectation of privacy, and it noted that privacy expectations vary with the context, such as whether the person is "at home, at work, in a car, or in a public park."[27] As a part of this analysis, the Court also considered the individual's legal relationship to the state.[28] Central to the Court's ruling in *Vernonia*

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20. *Id.* at 341-42 (footnotes omitted).
21. *Id.* at 343.
22. *Vernonia*, 515 U.S. at 653.
23. *Id.* at 648-50.
24. *Id.* at 650.
25. *Id.* at 664-65.
26. *Id.*
27. *Id.* at 654.
28. *Id.*

was the proposition that the subjects of the drug policy were children who had been committed to the temporary custody of the state.[29] As the Court explained, the "'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[30] The Court looked to common law and found a long tradition of significant control over students. It explained:

> Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . 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."[31]

The Court also considered other routine medical requirements and examinations mandated for students, which result in a lower expectation of privacy for students than for the population at large.[32] Regarding these routine medical requirements, the Court explained:

> For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases . . . . Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally."[33]

The Court then noted that most athletes have even lower expectations of privacy than students who do not play sports.[34] This lower expectation of privacy arises from communal locker rooms, greater requirements for grades, physical examinations, and rules of conduct that apply to

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29. *Id.*

30. *Id.* at 656.

31. *Id.* at 654-55 (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)) (citations omitted).

32. *Id.* at 656-57.

33. *Id.* (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J. and O'Connor, J., concurring)) (citations omitted).

34. *Id.* at 657.

sports teams, but do not apply to non-athletes.[35] "By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[36]

Second, the Court looked at the character of the intrusion and noted that the collection of urine for urinalysis is traditionally shielded by great privacy, but the degree of intrusion depends on how the collection is monitored.[37] Under Vernonia's policy, male students gave samples at a wall urinal, fully clothed, and monitored from behind. Female students gave samples in an enclosed toilet stall while a female monitor stood outside the stall. These are conditions comparable to public restrooms.[38] As the Court explained, "Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible."[39]

Further considering the character of the intrusion, the Court noted that the policy's scope was restricted to testing for drugs and did not attempt to determine whether students were pregnant or suffered from some disease.[40] Also, all students were tested in the same way; the results were disclosed only to a limited number of school personnel who needed to know the results; and the results did not go to law enforcement officers nor were they used to discipline students.[41] After thoroughly considering the character of the intrusion, the Court found that the invasion of privacy the student athletes were subjected to by the drug testing policy was not significant.[42]

Finally, the Court considered the nature and immediacy of the school district's drug abuse concerns and the drug policy's efficacy in combating

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35. *Id.*

36. *Id.* The court further explained:

> Legitimate privacy expectations are even less with regard to student athletes. 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 by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (1988)).

37. *Id.* at 658.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 660.

the problem.[43] In other words, did the school district have a compelling state interest to authorize the intrusion upon a genuine expectation of privacy? The Court was quick to warn:

> It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.[44]

The Court explained that the nature of the concern of drug abuse among school children is obvious, especially in light of the health effects of drugs on growing children.[45] As to the immediacy of the school district's concern, the Supreme Court did not challenge the district court's conclusion that a significant segment of the student body, especially the athletes, were in a state of rebellion, that disciplinary actions had reached epidemic proportions, and that alcohol and drug abuse fueled this rebellion.[46]

The Court concluded by saying, "Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's policy is reasonable and hence constitutional."[47]

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[48] decided in June of 2002, the Supreme Court considered a drug testing policy that required all middle and high school students who participated in competitive extracurricular activities to consent to drug testing.[49] This policy was broader than the athlete-only policy examined in *Vernonia* because it expanded the scope of drug testing to include any student who participated in any activity sanctioned by the Oklahoma Secondary Schools Activities Association. The policy required students to provide urine for analysis before participating in the activity and to agree to subsequent testing at any time upon reasonable suspicion. The urinalysis tests detected only the use of

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43. *Id.*
44. *Id.* at 661.
45. *Id.*
46. *Id.* at 662-63.
47. *Id.* at 664-65.
48. 536 U.S. 822 (2002).
49. *Id.* at 825.

illegal drugs and did not detect medical conditions or the presence of authorized prescription medications.[50]

The students who filed the complaint sought injunctive and declaratory relief. The students argued that the school district had not identified a special need for testing students participating in extracurricular activities, that the policy did not address a proven problem, and that the policy did not have the promise of bringing any benefit to students or the school.[51] The students also argued that the policy violated the Fourth Amendment because school officials did not base the testing on individual suspicion.[52]

The district court followed the principles articulated in *Vernonia* in analyzing the drug policy and found the policy constitutional. The court noted that although the school district did not show a drug epidemic among students, the school district did show a history of drug abuse for the past twenty-five years, which presented a legitimate concern.[53] The district court further found that the policy effectively addressed the drug problem by ensuring that a large percentage of the student population—those involved in extracurricular activities—did not use drugs.[54]

The United States Court of Appeals for the Tenth Circuit reversed, concluding that the policy violated the Fourth Amendment because the school district failed to show a drug abuse problem in a sufficient number of students who were subjected to the tests.[55] Furthermore, the school district failed to show that testing those students would actually help control the drug problem.[56]

The Supreme Court reviewed the policy for its reasonableness, "the touchstone of the constitutionality of a governmental search."[57] The Court noted that, "[i]n the criminal context, reasonableness usually requires a showing of probable cause . . . . The probable-cause standard, however, 'is peculiarly related to criminal investigations' and may be unsuited to determining the reasonableness of administrative searches where the '[g]overnment seeks to *prevent* the development of hazardous conditions.'"[58]

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50. *Id.* at 826.
51. *Id.* at 827.
52. *Id.* at 829.
53. *Id.* at 827.
54. *Id.*
55. *Id.*
56. *Id.* at 827-28.
57. *Id.* at 828.
58. *Id.* (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667-68 (1989) (noting that the drug policy did not in any way implicate or involve criminal investigations)).

Regarding the issue of a suspicionless search, meaning a search not based on some level of individualized suspicion, the Court explained:

> It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests. But we have long held that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." "[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impractical.'"[59]

In finding the policy constitutional, the Court conducted a fact-specific balancing of the intrusion on students' rights versus the promotion of legitimate government interests.[60] The Court first considered the nature of the privacy interests, noting that "the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake and the reasonableness of the drug testing policy in general."[61]

Following the language of *Vernonia*, the Court stated that "'when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.'"[62] The school district has a responsibility for "maintaining [the] discipline, health, and safety" of its students.[63] This responsibility authorizes more control by the school and therefore allows more intrusion on the students' Fourth Amendment rights than would generally be allowed.

In trying to draw a distinction with *Vernonia*, the students argued that because they were not involved in athletic activities, they were not subject to regular physicals and locker room conditions.[64] The Court, however, responded that students who participate in nonathletic competitive activities occasionally travel off campus and find themselves

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59. *Id.* at 829 (citations omitted).
60. *Id.* at 830.
61. *Id.*
62. *Id.* (quoting *Vernonia*, 515 U.S. at 665).
63. *Id.* at 831.
64. *Id.*

in communal conditions.[65] Also, school clubs have their own rules concerning participation in activities. The Oklahoma Secondary School Activities Association has special rules for participants in the regulated organizations and also requires a faculty sponsor to monitor the students for compliance with the rules.[66] Therefore, just as in *Vernonia*, students subject to this policy have more limited expectations of privacy because of their involvement in the extracurricular activities.[67]

Next, the Court considered the character of the intrusion.[68] In this case a faculty monitor stood outside a closed restroom stall and waited for the student to produce a urine sample.[69] The Court noted the similarities between the procedure in this case and that in *Vernonia* and further explained that there was even more protection for the male students than those in *Vernonia* because they were allowed to produce their samples behind a closed bathroom stall.[70] The policy further required that the test results be kept in confidential files separate from the students' other educational records and that test results be released only on a need-to-know basis. Test results were not turned over to law enforcement authorities, and the results could not lead to disciplinary or academic consequences.[71]

The policy had an escalating limitation on the students' involvement in extracurricular activities. A student could fail the test twice and still be allowed to participate. After the first failed test, the school contacted the student's parent or guardian for a meeting, and the student could continue participating in the activity if she showed proof of receiving drug counseling and then submitted to a second drug test in two weeks. Upon the second positive test, the student was suspended from participation in the extracurricular activity for fourteen days and was required to receive four hours of substance abuse counseling and then to submit to monthly drug tests. Only after a third positive test would the student be suspended from participating in the extracurricular activity for the remainder of the year or eighty-eight days, whichever was longer.[72] The Court stated that "[g]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results

65. *Id.* at 832.
66. *Id.*
67. *Id.* at 832-33.
68. *Id.* at 832.
69. *Id.*
70. *Id.* at 832-33.
71. *Id.* at 833.
72. *Id.* at 833-34.

are put, we conclude that the invasion of students' privacy is not significant."[73]

Finally, the Court weighed the nature and immediacy of the school district's concerns about the drug problem and the likely effectiveness of the policy in alleviating the problem.[74] The Court explained that the health and safety risks identified in *Vernonia* apply with equal force to these students.[75] "Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school."[76] The Court further noted that the school district had presented specific evidence of drug use in the schools.[77] The Court went on to explain that the Court had not required a "particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing."[78]

The Court specifically rejected the court of appeals position that school boards attempting to implement a drug testing policy for random suspicionless drug testing must demonstrate some identifiable drug abuse problem among a significant number of the students subject to the testing.[79] A school district does not have to wait for a substantial drug problem to develop before implementing a drug testing program designed to deter drug abuse. The Court could not and would not articulate a threshold level of drug abuse that would suffice to justify suspicionless drug testing.[80]

The Court specifically rejected the argument that testing must be based on individualized reasonable suspicion.[81] The court explained:

> [T]he Fourth Amendment does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches

73. *Id.* at 834.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 835.
79. *Id.* at 836.
80. *Id.*
81. *Id.* at 837.

> may chill enforcement of the program, rendering it ineffective in combating drug use.[82]

Finally, the Court noted that testing students involved in extracurricular activities was a reasonably effective means of combating the drug problem in the school system and that it effectively serves the school district's interest in protecting the students' health and safety.[83]

IV. CONCLUSION

The Supreme Court significantly expanded the scope of drug testing for students in *Pottawatomie* beyond what was authorized in *Vernonia*. Is the next step testing the entire student body? Would the Supreme Court find such a policy constitutional? Probably not.

In *Vernonia*, Justice Ginsburg filed a concurring opinion, but in *Pottawatomie* she dissented. She recognized an obvious difference in testing school athletes and testing members of school clubs. "Interscholastic athletics . . . require close safety and health regulation; a school's choir, band, and academic team do not."[84]

She also noted that the drug problem in *Vernonia* was of a much greater magnitude than in *Pottawatomie*.[85] In light of these two points made in her dissent, it is unlikely that she would vote for the constitutionality of school-wide testing.

Justice Breyer joined the majority in *Vernonia*,[86] but he offered a concurring opinion in *Pottawatomie*.[87] He noted that the *Pottawatomie* "testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion . . . ."[88] A school-wide testing policy would not have this safety valve, and Breyer would likely join with the *Pottawatomie* dissenters—Ginsburg, O'Connor, Stevens, and Souter—to form a majority to find a school-wide testing policy unconstitutional.

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82. *Id.* (citations omitted).
83. *Id.* at 837-38.
84. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 846 (2002) (Ginsburg, J., dissenting).
85. *Id.* at 849 (Ginsburg, J., dissenting).
86. 515 U.S. at 647.
87. 536 U.S. at 838 (Breyer, J., concurring).
88. *Id.* at 841 (Breyer, J., concurring).