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Is Innocence Forever Gone--Drug Testing High School Athletes

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IS INNOCENCE FOREVER GONE? DRUG TESTING HIGH SCHOOL ATHLETES

Schaill v. Tippecanoe County School Corp.[1]

Schools have changed. The alarming increase in illegal drug use in schools has forced our nation's educators to pursue policies that were virtually unheard of a few short years ago.[2] School systems today are turning not only toward extensive educational programs but also to drug-testing as a means to combat the influx of drugs into the school environment.[3]

Students and schools are battling in the courtroom concerning drug-related programs and are raising questions about students' constitutional rights.[4] One of the more prevalent assertions is that schools are subjecting students to unlawful searches and seizures in violation of the fourth

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1. 679 F. Supp. 833 (N.D. Ind. 1988).

2. U.S. DEPARTMENT OF EDUCATION, WHAT WORKS: SCHOOLS WITHOUT DRUGS 5 (1987) ("Fifty-eight percent of high school seniors have used drugs."). Nonmetropolitan areas reported 41% illicit drug use by high school seniors during 1985-1986 as compared to 48% for high school seniors in metropolitan areas. Thirteen percent of high school seniors have used cocaine in the past year, more than double the proportion in 1975. *Id.*

3. U.S. DEP'T OF EDUCATION & U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT TO CONGRESS AND THE WHITE HOUSE ON THE NATURE AND EFFECTIVENESS OF FEDERAL, STATE, AND LOCAL DRUG PREVENTION/EDUCATION PROGRAMS 70 (Oct. 1987). "Based on a random, stratified sample of 700 school districts, respondents indicate that nearly three-fourths of the districts have a written policy on substance abuse and three-fifths require substance abuse education for at least some grade levels. . . . Only 4% of school districts report having drug-testing programs." *Id.* at Part 1, § 1, at 19-20 (footnote omitted).

4. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982) (en banc) (canine sniff); Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (1988) (drug testing); Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985), *modified*, 663 F. Supp. 149 (W.D. Ark. 1985) (drug testing); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980) (canine sniff of entire student body including kindergartners); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (canine sniff that resulted in nude search); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971) (search of student's coat); Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 510 A.2d 709 (App. Ch. Div. 1985) (canine sniff).

amendment. While the United States Supreme Court has ruled on some basic issues dealing with the constitutional rights of schoolchildren, including the fourth amendment,[5] the court has not directly treated the issue of drug testing in elementary, middle, or high schools.[6]

This Note focuses on random urinalysis testing of high school athletes and how the courts are responding to the constitutional implications involved. In *Schaill v. Tippecanoe County School Corp.*[7] an Indiana district court denied the declaratory and injunctive relief sought by two student athletes to prevent the implementation of a random drug testing program.[8] The plaintiffs alleged the proposed program would violate their constitutionally protected right to be free from unreasonable searches and seizures.[9]

The court's holding was based on the recent decision in *New Jersey v. T.L.O.*[10] which relied on the two-prong test from *Terry v. Ohio*[11] as the standard to be used in analyzing searches in public high schools. In *Terry*, the Court emphasized the need to balance the respective needs and rights of the parties involved.[12] Balancing requires a determination that the search was justified and that it was reasonably related in scope to the circumstances which justified it.[13] While the *Schaill* court premised its decision on balancing the needs and interests of the parties, it also took

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5. Hazelwood School Dist. v. Kuhlmeier, ___ U.S. ___, 108 S. Ct. 562 (1988) (restricted first amendment rights of students in public schools); New Jersey v. T.L.O., 469 U.S. 325 (1985) (established reasonable suspicion search standards consonant with fourth amendment and unique setting of public schools); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (first amendment applies to schoolchildren); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (fourteenth amendment applies in school environment).

6. "The United States Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officials" as provided in the fourth amendment. *Schaill*, 679 F. Supp. at 850. In order for fourth amendment protection to apply, state action must be implicated in the disputed activity. For purposes of this Note "school(s)" refers to public institutions whose function has "traditionally been performed as the '*exclusive*' prerogative of the state." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). Actions by private institutions, although performing a public function, do not constitute state action unless they are done in concert with a state actor. *Id.* at 835 n.6.

7. 679 F. Supp. 833 (N.D. Ind. 1988).

8. *Id.* at 858.

9. *Id.* at 848. The plaintiffs also alleged violations of their right to privacy, and due process and equal protection as embodied in the fourteenth amendment. This Note concentrates only on the allegations of fourth amendment violations. The court also questioned the plaintiffs' standing to seek the requested relief as the proposed program is just that, a proposal, and "conceivably, for a variety of reasons, they [plaintiffs] may never be the subject of urinalysis testing for drugs." *Id.* at 850-51.

10. 469 U.S. 325 (1985).

11. 392 U.S. 1 (1967).

12. *Id.* at 21.

13. *Id.*

advantage of a "crack in the door" left open in *T.L.O.* when the Court declined to address whether individualized suspicion is required to justify searches in a school setting.[14] This is a critical component in analyzing the justification prong from the *Terry* test because, historically, the Supreme Court has upheld searches without individualized suspicion in only a limited number of situations. Usually, this has been where a diminished expectation of privacy and minimal intrusion is balanced against weighty governmental interests.[15] Despite the grave dangers of drug use by athletes, it is questionable whether the lack of individualized suspicion can be justified when one considers the intrusive nature of urinalysis testing.

FACTS

In the fall of 1987, Harrison High School formulated a drug testing program and scheduled it to begin in October.[16] Darcy Schaill and Shelly Johnson filed suit in district court seeking declaratory and injunctive relief to prevent the proposed drug testing program from being implemented at Harrison High School.[17] They attacked the program contending it 1) violated their fourth amendment rights by requiring them to submit to unreasonable searches and seizures; 2) interfered with their legitimate expectations of privacy; 3) violated the due process clause of the fourteenth amendment; 4) violated the equal protection clause of the fourteenth amendment; 5) violated their basic constitutional rights in that it predicated participation in interscholastic sports upon the waiver of those rights.[18]

The Proposed Drug Testing Program

The preliminary formalities of the program required that prior to participation in any interscholastic sports each student athlete submit a consent form signed and dated by the student and his or her custodial parent or guardian.[19] It also required each student to attend educational

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14. *Schaill*, 679 F. Supp. at 852.

15. *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *United States v. Martinez-Fuentes*, 428 U.S. 543 (1976); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

16. *Id.* at 836.

17. *Id.* at 835.

18. *Id.* at 848.

19. *Id.* at 836. The consent form reads as follows:

> I have received and have read and understand a copy of the "TSC Drug Education and Testing Program". I desire that _____participate in this program and in the interscholastic athletic program of ____School and hereby voluntarily agree to be subject to its terms. I accept the method of obtaining urine samples, testing and analyses of such specimens, and all other aspects of the program. I agree to cooperate in furnishing urine

sessions regarding the drug testing program and receive copies and explanations of the program.[20]

TSC's proposed program applied to any student participating in interscholastic sports, including cheerleaders, each of whom was designated as a "student athlete."[21] The rationale for singling out athletic participants was based on a belief that student athletes are prominent members of the student body and "accordingly are expected to be 'good examples of conduct, sportsmanship and training, which includes avoiding drug and alcohol usage.'"[22] Furthermore, TSC indicated there is an element of danger to self and others when athletic participants use drugs.[23] TSC described its program purposes as being "educational, diagnostic, and preventative, as opposed to punitive or disciplinary."[24]

Logistics

The athletic director and the head coach of each team were authorized to initiate and select an unlimited number of student athletes to test. There was no limit established on the number of selections. One list, kept by the athletic director, would cross-reference the student athlete to an assigned selection number. At the time of selection, numbers would be drawn randomly from a box.[25] Each athlete selected would be required to "provide a sample of his or her urine in a verifiable manner, but the collection of the sample [would] not be physically observed."[26] A label with the student athlete's number and the date would be attached to the sample. To verify accuracy, the student and the athletic director were to then initial the cross-reference list. Only the head coach, the athletic director, and the

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specimens that may be required from time to time.

I further agree and consent to the disclosure of the sampling, testing and results as provided for in this program. This consent is given pursuant to all State and Federal Privacy Statutes and is a waiver of rights to non-disclosure of such test records and results only to the extent of the disclosures authorized in the program.

Id.

20. *Id.*
21. *Id.* at 836-37.
22. *Id.* at 837 (quoting TSC Drug Education and Testing Program).
23. *Id.*
24. *Id.* at 836. The purposes of the program are stated as follows:

to prevent drug and alcohol usage, to educate student athletes as to the serious physical, mental and emotional harm caused by drug and alcohol abuse, to alert student athletes with possible drug problems to the potential harms, to prevent injury, illness and harm as a result of drug and alcohol abuse, and to maintain at TSC high schools an athletic environment free of alcohol and drug abuse.

Id. at 837.

25. *Id.*
26. *Id.* (quoting TSC Proposed Drug Testing Program).

staff person to whom the sample was given would know who was selected.[27] "A competent laboratory" would test the sample for "alcohol, street drugs . . . and performance enhancing drugs (such as steroids)."[28] The lab would report the results to the student, his or her parent or guardian, the athletic director, and the head coach.[29]

The toxicologist selected to do the testing was to first screen for marijuana using immunoassay technique (EMIT) followed by thin layer chromatography (TLC).[30] If the results from these tests were positive, gas chromatography mass spectrography (GCMS) would be utilized to confirm the results. To screen for amphetamines and opiates the preliminary test would be TLC followed by GCMS to confirm positive results. Cocaine would require three tests for confirmation. No tests were to be conducted for birth control pills or pregnancy.

Each student athlete would be given a chance to explain positive test results or to provide for additional testing.[31] If the student could not provide a satisfactory explanation, the school would suggest counseling.[32] Student athletes showing positive results with no acceptable explanation could be tested at anytime while participating in interscholastic sports. Reasonable suspicion of drug or alcohol use by a student athlete would also give TSC the right to test at any time.[33]

Enforcement

If test results were positive, the school would exercise no discipline, in that the student would not be expelled or suspended.[34] The first positive test involving alcohol would result in a 20% suspension from athletic contests of the relevant sport.[35] The first positive test for drugs other than alcohol would result in a 30% suspension.[36] Second occurrences would result in a 50% suspension from current participation with a potential carry-over to the next sport.[37] Third and fourth occurrences would result in a full calender year suspension and an interscholastic career suspension,

27. *Id.*
28. *Id.* (quoting TSC Proposed Drug Testing Program).
29. *Id.*
30. *Id.* at 838-39.
31. *Id.* at 837. Test results "are considered positive only if, after using at least two types of analyses, it indicates that drug residue substances are present in the system." *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* It was unclear from the facts in the case what a "20% suspension" exactly meant. It appears to mean 20% of the scheduled events in one season. *Id.*
36. *Id.*
37. *Id.* at 837-38.

respectively.[38] First or second suspensions could be reduced by participation in counseling approved by the athletic director.[39] Suspensions were to be from varsity contests and would be applied to practices at the coach's discretion.[40]

FOURTH AMENDMENT

Legal Standard

The fourth amendment protects personal privacy, dignity, and security from unreasonable searches or intrusions by the state.[41] Historically, many courts have upheld searches at public schools based upon a characterization that school officials were acting *in loco parentis* rather than as state actors.[42] The Supreme Court in *New Jersey v. T.L.O.*[43] rejected the notion that

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38. *Id.* at 838.
39. *Id.* (the amount of reduction is 1% per hour of counseling).
40. *Id.*
41. The constitution provides:

> The right of the people to be secure in their person's, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

42. *See* Doe v. Renfrow, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979) (canine sniff of entire student population of junior and senior high school not a search because school officials were acting *in loco parentis*); *see also* 4 W. LAFAVE, SEARCH AND SEIZURE § 10.11(a), at 164 (2d ed. 1987) (*in loco parentis* should be dropped from the legal vocabulary as it has "become a substitute for analysis" and, similar to *parens patriae*, is a "Latin phrase [which has] proved to be of great help to those who sought to rationalize the exclusion of juveniles from the consitutional scheme.") (quoting *In re* Gault, 387 U.S. 1, 16 (1967).

43. 469 U.S. 325 (1985). In T.L.O., a 14 year old school girl was found by a teacher smoking cigarettes in the lavatory in violation of a school rule. She was taken to the principal's office were she met the Assistant Vice Principal, Mr. Choplick. After denying she was smoking, Mr. Choplick opened T.L.O.'s purse and found cigarettes. He pulled the cigarettes out of the purse, and discovered cigarette rolling papers. Upon a thorough search of T.L.O.'s purse Mr. Choplick uncovered "a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing." *Id.* at 328. The evidence was turned over to the police and delinquency charges were brought against T.L.O. Contending that the search violated the fourth amendment, T.L.O. moved to suppress the evidence citing the exclusionary rule. The Supreme Court held the search valid based upon "reasonable suspicion", *id.* at 329, and by balancing the need of the school to maintain a disciplined environment conducive to learning against T.L.O.'s need for privacy. *Id.* at 341.

school officials act as parental surrogates to the students and for the first time applied the principles of the fourth amendment to the rights of children in the school setting.[44] In *T.L.O.*, the Court noted the tension between "contemporary reality" and the doctrine of *in loco parentis* stating "[i]n carrying out searches and other disciplinary functions pursuant to ["publicly mandated educational and disciplinary"[45]] 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."[46] The Court's position was based upon the fact that the authority instilled in school officials today is from statutorily mandated "educational and disciplinary policies" rather than from voluntary relinquishment by the parents.[47] Thus, the Court established that school officials' activities constituted state action for purposes of the fourth amendment.[48]

Having determined that the fourth amendment is implicated in the public school environment, the threshold question is whether the act at issue (here, urine testing) is in fact a "search."[49] If an activity intrudes upon an individual's "reasonable expectation of privacy," the activity is considered a "search" and fourth amendment protections apply.[50] The Supreme Court has held that there is no legitimate "reasonable expectation of privacy" in "what a person knowingly exposes to the public."[51] To

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44. *Id.* at 336-37.

45. New Jersey v. T.L.O., 469 U.S. 325, 336 (1985).

46. *Id.* at 336-37.

47. *Id.* at 336.

48. The Court previously addressed schools and state action in Rendell-Baker v. Kohn, 457 U.S. 830, 840-43 (1982).

49. "Search" refers to the definition ascribed in the fourth amendment; 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1(a) (2d ed. 1987). Under the traditional approach, the term "search" is said to imply:

> some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search".

Id. at 301-02 (quoting 79 C.J.S. *Searches and Seizures* § 1 (1952)) (footnotes omitted). *See also* Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974) ("The question of what constitutes a covered "search" or "seizure" would and should be viewed with an appreciation that to exclude any particular police activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner.") (footnotes omitted).

50. Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

51. *Id.* at 351.

that effect, courts generally have held that taking samples of the voice,[52] handwriting,[53] or fingerprints[54] are not searches whereas the taking of blood,[55] stomach contents,[56] and X-rays[57] are searches which require compliance with the protective measures of the fourth amendment. With urinalysis testing, courts have generally concluded that because of societal attitudes and practices regarding the discharge of urine, there is a legitimate and reasonable expectation of privacy that brings urinalyses within the meaning of fourth amendment searches and seizures.[58] Discounting any difference between a blood test, which intrudes into a person's body, and the collection of discarded body fluids, one court emphasized the "basic offense to human dignity" as reason enough to set urinalyses apart from other more traditional types of searches.[59] A few courts have reached the conclusion that urinalysis testing is a search with little or no discussion,[60] while others have done so because the parties agreed upon the issue.[61]

Searches are unconstitutional if they are deemed unreasonable.[62] Generally, reasonableness under the fourth amendment requires that a warrant be issued by a neutral and detached magistrate.[63] Further, a warrant should be issued only upon probable cause to believe an offense has been com-

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52. United States v. Dionisio, 410 U.S. 1 (1973).
53. United States v. Mara, 410 U.S. 19 (1973).
54. Floyd v. State, 278 Ark. 342, 645 S.W.2d 690 (1983).
55. Schmerber v. California, 384 U.S. 757 (1966).
56. Rochin v. California, 342 U.S. 165 (1952).
57. United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972).
58. In McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) The court stated:

> [U]rine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds .... One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

Id. at 1127. *See also* Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986) (facilities designed to accommodate traditional privacy); *cf.* Allen v. City of Marietta, 601 F. Supp. 482, 488 (N.D. Ga. 1985) (the court felt compelled to say urinalysis tests are a search despite doubt that the framers of the constitution intended such coverage).

59. Storms v. Coughlin, 600 F. Supp. 1214, 1220 (S.D.N.Y. 1984); *cf.* Turner v. Fraternal Order of Police, 500 A.2d 1005, 1011 (D.C. App. 1985) (Nebeker, J., concurring) (as to seizures, collecting urine samples is not unlike collecting voice and handwriting exemplar; there is no seizure of the person).
60. Division 241 Amalgamated Transit Union v. Syscy, 538 F.2d 1264, 1266-67 (7th Cir.), *cert denied*, 429 U.S. 1029 (1976).
61. Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wis. 1985); *see also* Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984).
62. Terry v. Ohio, 392 U.S. 1, 9 (1967).
63. Katz v. United States, 389 U.S. 347, 357 (1967).

mitted.[64] Courts have held that searches without a warrant are "per se" unreasonable and therefore unlawful.[65] The basic purpose behind the warrant requirement is to insert a neutral party between the enforcing official and the individual whose rights are being infringed.[66] The importance of the warrant is so embedded in fourth amendment jurisprudence that the Supreme Court has allowed only "a few specifically established and well delineated exceptions."[67] In *T.L.O.*, the Court analogized searches in a school setting to those in an administrative setting and those requiring "reasonable suspicion."[68] Under this analysis the *T.L.O.* Court upheld as "reasonable" the warrantless search of a school girl's purse.[69]

Dismissing the warrant requirement, the Court held that the requisite level of suspicion to justify a warrantless search need not rise to that of probable cause.[70] Borrowing from *Camara v. Municipal Court*,[71] the *T.L.O.* Court emphasized that "the determination of the standard of reasonableness governing any specific class of searches 'requires balancing the need to search against the invasion which the search entails.'"[72] The real question,

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64. Probable cause exists when "the facts and circumstances within their [public officials'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.'" Brinegar v. United States, 338 U.S. 160, 175-176 (1949) (quoting Carroll V. United States, 267 U.S. 132, 162 (1925)).

65. Katz v. United States, 389 U.S. 347, 357 (1967).

66. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (There are "two distinct constitutional protections" being served by the warrant: one is to prohibit *any* searches without probable cause because "any intrusion in the way of search or seizure is an evil . . . no intrusion is justified without a careful prior determination of necessity;" and the second is that any search "deemed necessary should be as limited as possible." The evil feared here is "a general, exploratory rummaging in a person's belongings.").

67. *Katz*, 389 U.S. at 357. The recognized exceptions are:

1) Exigency: Searches with probable cause but under circumstances that the time taken to get a warrant would frustrate the purposes of the search. Schmerber v. California, 384 U.S. 757 (1966); Carroll v. United States, 267 U.S. 132 (1925).

2) Consent: Searches conducted pursuant to the valid consent of the person being searched. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

3) Arrest: Searches incident to arrest. United States v. Robinson, 414 U.S. 218 (1973).

4) Reasonable Suspicion: Searches based upon reasonable suspicion that the officer or the public is in danger. Terry v. Ohio, 392 U.S. 1 (1968).

5) Administrative/Regulatory: Searches of a unique setting which justifies relaxing the fourth amendment requirements. Camara v. Municipal Court, 387 U.S. 523 (1967).

68. New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985).

69. *Id.* at 347-48.

70. *Id.* at 340-41.

71. 387 U.S. 523 (1967).

72. *T.L.O.*, 469 U.S. at 337 (1985) (quoting *Camara*, 387 U.S. at 536-37 (1967)).

then, in *T.L.O.* was how to strike the balance between the schoolchild's legitimate privacy expectation and the need to maintain order, discipline, and flexibility so as to provide an environment for learning in schools where drugs and violence are rife.[73] Rejecting the idea that society does not recognize a student's right to privacy, the Court noted that although discipline and order are difficult to maintain in public schools today, the situation is not so dire that schools need be equated with prisons where "no legitimate expectations of privacy" are recognized.[74]

Instead, a two-fold inquiry was adopted based upon the test set forth in *Terry v. Ohio*.[75] "[F]irst, one must consider 'whether the . . . action was justified at its inception;' and [second], 'one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.'"[76]

> 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 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.[77]

ANALYSIS

In *Schaill*, the district court held that the mandatory urinalysis drug testing which TSC proposed did indeed constitute a search deserving of fourth amendment protection.[78] The court further held that the program as proposed[79] did not violate the constitutional protections prescribed by

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73. *Id.* at 339-40.
74. *Id.* at 338.
75. 392 U.S. 1 (1968).
76. *T.L.O.*, 469 U.S. at 341 (1985) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
77. *Id.* at 341-42 (footnotes omitted).
78. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833, 850 (N.D. Ind. 1988).
79. The *Schaill* court emphasized the very limited scope of its opinion: "The focus here is on a paper proposal not yet executed and not an operational enterprise . . . . [T]his court addresses whether the defendants' program violates, on its face, any legally protected rights or interests of these plaintiffs as student athletes, since absent this role they would not be confronted with the possibility of the intended search." *Id.* at 851.

the fourth amendment.[80] In doing so, the court relied on the balancing factors cited in *New Jersey v. T.L.O.*.[81] Quoting *T.L.O.*, the court stated that because of the unique school setting the "legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[82] While it referred to the two-fold test adopted in *T.L.O.* to determine reasonableness, the *Schaill* court substituted its own first prong, noting that in *T.L.O.* "the Supreme Court expressly left open" the requirement of individualized suspicion.[83]

Balancing Needs

Justification at the Inception

The *T.L.O.* Court's first prong required the search to be "justified at its inception," which the Court said often included some reason for individualized suspicion. The Court held "under ordinary circumstances, a search of students by public school authorities must be grounded on reasonable suspicion" that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[84]

The *Schaill* court outlined the question in the first prong of "justification at the inception" as whether the circumstances peculiar to the *Schaill* case would justify urinalysis "unsupported by individualized suspicion."[85] The

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80. *Id.* at 855-57; the court also held that: 1) there were no violations of due process in that the proposed program provided for a hearing, an opportunity to seek additional testing, and the worst penalty imposed was permanent expulsion from the voluntary interscholastic sports program and only after repeated offenses; 2) the equal protection clause of the fourteenth amendment was not violated because the program is applicable to all students, male and female, the decision to participate in sports is totally voluntary, and the school is justified in singling out athletes for testing due to the unique health and safety risks involved for student athletes who are also drug users; and 3) the consent form does not operate as a waiver of constitutional rights but only as authority for school officials to use the test results in "the limited manner described in the program." *Id.* at 856-58.

81. 469 U.S. 325, 340-42 (1985).

82. *Schaill*, 679 F. Supp. at 851 (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

83. *Id.* at 852. The court in *T.L.O.* stated:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."

T.L.O., 469 U.S. at 342 n.8 (footnotes omitted).

84. *Schaill*, 679 F. Supp. at 851-52.

85. *Id.* at 852.

court never really said that urinalysis without individualized suspicion was justified in the case at hand. Such a finding is the obvious implication, however, since the court upheld the proposed drug testing program. This tact is somewhat surprising in light of past judicial decisions in which unique settings justified the use of the reasonableness standard without individualized suspicion. Typically, in such situations courts have required both a strong state interest and a low degree of intrusiveness.[86]

Camara v. Municipal Court, which introduced the administrative search, was partially based on the fact that the searches involved were not "personal in nature."[87] There, the Court found that administrative searches were necessary as the only effective means of enforcing housing codes. Further, the Court felt the difficulty in detecting safety hazards, the strong interest in public safety and welfare in housing inspections, and the fact that the searches were of homes and not people, justified the lack of reasonable suspicion.[88] In *United States v. Villamonte-Marquez*,[89] the Supreme Court held that, in border searches, brief detainment of offshore boats by customs officials was permissible without reasonable suspicion.[90] Given the government's interest in deterring and apprehending smugglers, a brief detention enabling officials to "visit public areas of the vessel, . . . and inspect documents" was justified where neither the vessel nor its occupants were searched.[91] The Supreme Court in *United States v. Martinez-Fuerte*[92] upheld fixed border checkpoint stops for brief questioning where no reasonable suspicion existed.[93] The Court cited the importance of controlling the influx of illegal aliens and held that because of heavy traffic flow at the border it was impractical to require individualized suspicion.[94]

The Court in *T.L.O.* said that while it was not deciding the issue of individualized suspicion as related to searches in schools, exceptions to that requirement have been "appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'"[95] Administrative searches and border searches represent relatively minimal intrusions into a person's privacy because they usually are invasions into the "effects" of the persons involved. Here, the search at issue entails an analysis of

86. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).
87. *Id.*
88. *Id.*
89. 462 U.S. 579 (1983).
90. *Id.* at 592-93.
91. *Id.* at 592.
92. 428 U.S. 543 (1976).
93. *Id.* The court held that "check-point stops are seizures within the meaning of the Fourth Amendment." *Id.* at 556.
94. *Id.* at 556-57.
95. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985) (citations omitted).

discarded body fluids. While, arguably, this type of search is not as repugnant as some other types,[96] the collection of the fluid sample itself presents a real issue. Our culture has instilled into each of us the very private nature of discharging urine and observance or listening can be exceedingly embarrassing. While it is true that athletes as a general rule find themselves sharing locker rooms and public facilities, it would be both a giant leap and conclusory to state that their privacy expectations as to urinalysis tests are therefore greatly diminished. Locker rooms and public restrooms function in a context where one blends in with the activity rather than being singled out. Conversely, a urinalysis test points to one person individually and says "perform." As one court put it: "urinalyses are degrading."[97]

Courts have continuously distinguished searches of persons from searches of places and effects.[98] Except for the basic discussion of whether a urinalysis test is a constitutionally protected search, the court in *Schaill* barely addressed the student's need for privacy or the level of intrusion experienced by a urinalysis test, despite claiming to recognize the need to balance both sides of the issue.

The basic premise that seems to underlie the focus of TSC's drug-testing program is that if statistics show an average of 20-30 percent of our nation's athletes to be using drugs, then correspondingly, 20-30 percent of athletes at Harrison High School must be using drugs. Drugs are injurious to the user and others. Therefore, testing all students participating in interscholastic sports is justified.[99] The Supreme Court has rejected this notion of suspicion-by-association because it goes a long way towards undermining the probable cause and reasonable suspicion standards which guard against "general, exploratory rummaging."[100] The Court in *Ybarra v. Illinois*,[101] ruled that even where the reasonable suspicion standard allows searches on less than probable cause, the requirement of particularized suspicion remains intact.[102]

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96. Presumably a court would draw the line at forced invasions into a person's body short of probable cause. *See* Schmerber v. California, 384 U.S. 757 (1966).

97. McDonnell v. Hunter, 612 F. Supp. 1122 (1985). *See supra* notes 58-61 and accompanying text.

98. United States v. Crowder, 543 F.2d 312, 322 (D.C. Cir. 1976) (en banc) ("One's body simply cannot be equated with his car, his clothing, or even his home as a repository of evidence."), *cert. denied*, 429 U.S. 1062 (1977).

99. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833, 855 (N.D. Ind. 1988).

100. Katz v. United States, 389 U.S. 347, 357 (1967).

101. 444 U.S. 85 (1979) (search of tavern customers based upon a warrant to search the tavern and the bartender).

102. *Id.* at 91.

The *Terry v. Ohio*[103] exception adopted in *T.L.O.* requires reasonable suspicion directed at the person to be searched.[104] Suspicion directed at one individual cannot be transferred to another simply because they are similarly situated.[105] Likewise, information about a particular class of individuals (athletes) cannot create reasonable suspicion of the guilt of each member of the class.

The decision in *Schaill* defines no standard at all for determining whether a search is justified. The court espouses the use of the two-prong test but ignores any meaningful discussion of applying it in a situation lacking individualized suspicion. For all practical purposes, it leaves the decision of when and what to search totally in the hands of the school officials and does not provide the "safeguards" called for in *T.L.O.*.[106] The danger is not so much in the instant case as there is a specific program which provides some safeguards against abuse, but rather, the danger lies in the precedent the cases establish.

Reasonableness of Scope

The second prong set out in *T.L.O.* deals with the scope of the search.[107] It requires that "the measures adopted [be] 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."[108]

The primary objective of the TSC program is "drug-free student athletes."[109] The *Schaill* court noted that participants were both male and female, ranging in age from 14 to 18 years. The offense addressed is the use of drugs, prohibited by school policies, state law, and athletic training rules. Procedures established for collection and cross-checking ensure a "true" sample and one that actually belongs to the particular student tested. Further, the program is a written plan which includes notice prior to the sports season and an opportunity to explain positive test results. No provision for academic punishment is included and the collection of the urine samples "will not be visually observed."[110]

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103. 392 U.S. 1 (1967).
104. *Id.*
105. Hunter v. Auger, 672 F.2d 668, 675 (8th Cir. 1982) (strip searches of prison visitors); United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978) (strip search of an airline flight attendant based upon a tip concerning a fellow crewmember).
106. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).
107. *Id.* at 341.
108. *Id.* at 342.
109. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833, 852 (N.D. Ind. 1988).
110. *Id.*

It is true that drug usage in schools is a grave social problem across the nation. It is questionable, however, whether random urinalysis testing can be justified in this case. There is no evidence in the case to indicate that Harrison High School has a drug problem with its student athletes. In fact, the testimony in the case as to drug usage was based on studies of national averages and was not directed toward a particular problem in TSC schools.[111] Several of the witnesses indicated they had not observed drug usage at Harrison High School and were unaware of a drug problem.

Combined with the apparent lack of a drug problem among the student athletes is the intrusive nature of this particular kind of search. There was testimony in the case that mandatory urinalysis testing can create so much stress that some individuals are unable to void the bladder for up to two or three hours.[112] Subjecting adolescents to stress of this kind based on random, generalized suspicion seems harsh at a minimum.

One might also take issue with the fact that the evidence related to the testing procedures which TSC employed, in the court's words, "indicates that little, if anything, can be inferred relative to current impairment from the proposed program."[113] This basically means that the tests do not show whether a student is currently under the influence of drugs and, therefore, is in danger of injury due to physical impairment or is violating the school's anti-drug rules. This finding is counterbalanced in the court's opinion by the evidence related to potential injuries and health hazards to athletes due to increased exertion, stress, and bodily contact. Admittedly, the evidence supports the supposition that participation in sports while under the influence of drugs is dangerous not only to the student but also to the other teammembers. It appears, however, that if the tests cannot show a student to be currently under the influence of drugs they are ultimately being used to show general drug usage; not to protect student athletes from sports injuries. There is no evidence to support the supposition that it is more dangerous to student athletes to use drugs outside the sports arena than it is for any other student. Since there is no ability to determine current impairment through a urinalysis test, it is arguable that any purpose other than punishment is served by drug testing student athletes.

Further, the same arguments can be made for alcohol testing as for drugs. Yet the evidence showed that the toxicologist indicated he would not be testing for alcohol unless the school advised him to do so. This implies there is no pre-established plan for alcohol testing. If the objective of the program is to ensure drug-free athletes, one wonders why alcohol is excluded. The facts indicate that the Superintendent of Schools at TSC believes alcohol to be "the most frequently used drug" and further admits that the proposed drug testing program would be an ineffective means for

111. *Id.* at 839-40.
112. *Id.* at 843.
113. *Id.* at 857.

detecting alcohol.[114] It is difficult to justify an intrusive drug test of this nature when it does not even address the "most frequently used drug."

Undoubtedly, the need to address the problem of drugs in schools is an important one. The Supreme Court has taken judicial notice of the fact that drugs are a "major social problem" in schools today.[115] Students with drug habits not only harm themselves, but as well interfere with the learning process by creating disorder and discipline problems. This is a weighty problem in a setting where order is already difficult to maintain.

Additionally, as the *Schaill* court stated, athletes are viewed with admiration and respect and carry with them the power to influence others' behavior.[116] The student athlete represents his or her school to the outside community and accordingly has a responsibility to uphold the school's image. By participating in athletics, students also voluntarily embrace a lifestyle requiring rigorous preparation for sports events, scholastic requirements, and adherence to training rules.[117] It could be said that the privilege to participate in sports carries with it an additional price in the interest of all these considerations; that of submitting to drug testing.

Other considerations, however, must be part of the balancing process. The Supreme Court in *Camara*, factored into its balancing formula the fact that housing code inspections based on a general area was the only alternative that would "achieve acceptable results."[118] In *Schaill*, the court declined to address other alternative methods by which TSC could reach its desired goal stating that the other methods were not at issue; that the only issue was whether the "Constitution of the United States prohibits this school board from adopting and implementing this drug program."[119] Given the intrusive nature of urinalysis testing, this court should have considered the availability of alternative means of detection as a factor in balancing "the need to search against the invasion which the search entails."[120] In *Delaware v. Prouse*,[121] the Supreme Court espoused the need to include this factor in the balancing test: "[g]iven the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the fourth amendment."[122]

Finally, courts should not forget that the methods and practices employed in schools are lessons that students will remember in later life.

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114. *Id.* at 841.
115. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).
116. *Schaill*, 679 F.2d at 856.
117. *Id.*
118. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).
119. *Schaill*, 679 F.2d at 856.
120. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).
121. 440 U.S. 648 (1979).
122. *Id.* at 659.

"That they [Boards of Education] 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 for our government as mere platitudes."[123]

CONCLUSION

Random urinalysis cannot be justified under the *Terry* standard as interpreted by the *Schaill* court. It fails the first prong of *Terry* in that unique settings which allow for a lesser standard of reasonable suspicion require that where the search is of a personal and highly intrusive nature, at a minimum, individualized suspicion is necessary. It fails the second prong because when *all* the relevant factors are balanced, singling out all athletes for the random test by virtue of their position in the school can not be justified.

Even though the situation here is a school setting rather than a police setting, it is useful to note that random urinalysis of student athletes is in direct contravention of the basis of our criminal justice system; that all persons are innocent until proven guilty. TSC's proposed program assumes the opposite; that all athletes are guilty until proven innocent. The court points to the opportunity to defend positive results at school or to appeal through the judicial system.[124] It affords little consolation, after the fact, that a court is willing to say "it shouldn't have happened" to a schoolchild subjected to the degrading experience of a urinalysis test.[125]

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123. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

124. *Schaill*, 679 F. Supp. at 857.

125. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988) was affirmed on appeal. 864 F.2d 1309 (7th Cir. 1988). The court of appeals agreed that urinalysis tests are searches within the meaning of the fourth amendment. The court concluded that individualized suspicion is not required for searches of student athletes because 1) athletes have diminished expectations of privacy; 2) the governmental interests furthered are weighty and no other alternative method would suffice; and 3) the search was not intended to uncover criminal activity. *Schaill*, 864 F.2d 1309.

For a discussion regarding athletes' privacy expectations, see *supra* notes 95-97 and accompanying text. As to governmental interests, while the war on drugs is admittedly a weighty problem, there is no evidence in this case to suggest it is a weighty problem in *this* school. *See supra* note 111 and accompanying text. The court also dismissed the argument that less intrusive alternative methods are available without any meaningful discussion thus, accepting the district court's ruling that the drug testing here is "reasonable." *Schaill*, 864 F.2d 1309. Arguably, when an intrusive search such as urinalysis testing is involved, it should be required that testing be the *best* alternative available. *See supra* notes 118-22 and accompanying text. Finally, it is agreed that uncovering criminal activity was not the basis for

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[126]

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setting up the drug testing program. However, since the tests cannot determine current impairment it is questionable whether the purpose of preventing drug related injuries is met. *See supra* note 113 and accompanying text. Arguably, the test becomes punitive in nature in that athletes will be suspended for activity taking place outside the confines of school authority.

126. *Coolidge*, 403 U.S. 443, 454 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).