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Shedding Rights At The College Gate: How Suspicionless Mandatory Drug Testing Of College Students Violates The Fourth Amendment

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NOTES

Shedding Rights at the College Gate: How Suspicionless Mandatory Drug Testing of College Students Violates the Fourth Amendment

JEREMY L. KAHN*

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I. INTRODUCTION

What do a high school diploma, an SAT score, and a urine sample have in common? All are required to start undergraduate studies at Linn State Technical College.¹ To begin its fall 2011 semester, Linn State made history by becoming the first public college to implement a mandatory drug screening program for all of its incoming students.² On

* Executive Editor, University of Miami Law Review; J.D. Candidate 2013, University of Miami School of Law; B.A. 2009, University of Michigan – Ann Arbor. I dedicate this paper to my mother, Phyllis, for her never-ending love and support, and for being the strongest person I know. I am extremely grateful to Professor Christina M. Frohock for being such an enthusiastic and helpful advisor for this article. I also thank my family and friends for their support.

1. See *Drug Screening*, LINN ST. TECHNICAL C., https://myinfo.linnstate.edu/ics/Drug_Screening.jnz (last visited Jan. 16, 2012); *Linn State Technical College: Admission Requirements*, LINN ST. TECHNICAL C., <http://www.linnstate.edu/admissions/requirements.php> (last visited Jan. 16, 2012).

2. See Rachel Bloom, *Pass a Drug Test Before You Can Pass a Class*, ACLU BLOG RIGHTS (Sept. 8, 2011, 5:05 PM), <http://www.aclu.org/blog/criminal-law-reform/pass-drug-test-you-can>

September 7, 2011, Linn State officials began removing small groups of students from class in order to collect urine specimens.³ In order to be prepared “for profitable employment and a life of learning,”⁴ students began their college experience on equal constitutional footing as parolees,⁵ probationers,⁶ and children.⁷ They now must prove themselves innocent, without any suspicion of wrongdoing, as they are treated with distrust by their educational institution. The students are assessed an extra fifty dollar fee in their tuition bill to pay for the testing of their urine samples.⁸ Those who refuse to submit to the test are expelled, or as the school states, subject to an “administrative withdrawal.”⁹ For students whose tests return positive for drug use, a second test is required after a forty-five day “grace period.”¹⁰ Failure to pass a second test will also result in expulsion from the college, without refund if the refund deadline has passed.¹¹

The Supreme Court has repeatedly stated that mandatory urinalysis drug tests are searches requiring the protections of the Fourth Amendment.¹² While searches are usually accompanied by a requirement of at least some level of individualized suspicion, suspicionless drug testing has been upheld as constitutional in several contexts under the special needs doctrine.¹³ The special needs doctrine derives from a narrow string of cases where an important governmental interest other than the need for law enforcement outweighs an individual’s privacy interest in a warrant or individualized suspicion requirement.¹⁴

This article argues that dragnet drug screening programs geared

pass-class; Alan Scher Zagier, *Linn State Technical College Begins Widespread Drug Tests*, HUFFINGTON POST (Sept. 7, 2011), http://www.huffingtonpost.com/2011/09/07/linn-state-technical-coll_n_952586.html.

3. See First Amended Complaint at 6, *Barrett v. Claycomb*, 2011 WL 5827783 (W.D. Mo. Nov. 18, 2011) (No. 11-CV-04242-NKL), available at <http://www.linnstate.edu/drugscreening/ACLU%20Lawsuit.pdf>.

4. See *Drug Screening*, *supra* note 1.

5. See *Samson v. California*, 547 U.S. 843, 855 (2006).

6. See *United States v. Knights*, 534 U.S. 112, 119–20 (2001).

7. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002).

8. See *Drug Screening*, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. See *Earls*, 536 U.S. at 828; *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001); *Chandler v. Miller*, 520 U.S. 305, 313 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989).

13. See, e.g., *Earls*, 536 U.S. at 830; *Acton*, 515 U.S. at 664–65; *Von Raab*, 489 U.S. at 677; *Skinner*, 489 U.S. at 620.

14. See *Von Raab*, 489 U.S. at 665–66.

toward college students, such as the one imposed by Linn State, are unconstitutional and cannot be saved by asserting the “special needs” doctrine. Part II examines the Supreme Court precedent on suspicionless drug testing in detail. This part compares how the Supreme Court has analyzed suspicionless drug testing of adults with its analysis of suspicionless drug testing of schoolchildren in the public school¹⁵ context. Part III discusses the applicability of this precedent to the college setting as well as reviews the current case law on college-level drug testing. This part offers a framework with which to analyze college drug testing programs as potential special needs searches. Part IV discusses the current litigation surrounding Linn State’s drug screening program and applies the framework developed in Part III to Linn State’s case. Part V concludes that mandatory, suspicionless drug screening programs, like Linn State’s, violate college students’ Fourth Amendment rights. This part briefly discusses the implications of upholding such programs and what such a result would mean for the special needs doctrine and Fourth Amendment jurisprudence.

II. WHEN IS SUSPICIONLESS DRUG TESTING CONSTITUTIONAL?

A. *The Birth of “Special Needs”*

The “hated” general warrants and writs of assistance effectuated by the Crown against the colonists, notable for their lack of individualized suspicion, were the chief evils the framers had in mind when drafting the Fourth Amendment.¹⁶ Implicit in the Fourth Amendment is a general requirement of individualized suspicion before a search can be performed.¹⁷ However, the Supreme Court has carved out exceptions to the individualized suspicion requirement, among them “those exceptional

15. While state colleges, such as Linn State, can also technically be called “public schools,” this article uses the term “public school” to refer collectively to public elementary, middle, and high schools. This article uses the word “college” to collectively refer to colleges, universities, and other similar post-secondary institutions.

16. See *Samson v. California*, 547 U.S. 843, 858 (2006) (Stevens, J., dissenting); *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *Stanford v. Texas*, 379 U.S. 476, 481–82 (1965); Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1237 (2004). See also generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

17. See *Chandler*, 520 U.S. at 313 (“To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”). See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). The Amendment itself reads:

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

U.S. CONST. AMEND. IV.

circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”¹⁸ This “category of constitutionally permissible suspicionless searches,” known as special needs, should be “closely guarded” and is applicable only in “limited circumstances.”¹⁹

Though the Court had already created exceptions to the individualized suspicion requirement,²⁰ the first mention of the phrase “special needs” was in Justice Blackmun’s 1985 concurring opinion in *New Jersey v. T.L.O.*²¹ T.L.O. was a fourteen-year-old high school girl who, along with another girl, was caught by a teacher smoking cigarettes in the girls’ bathroom at school.²² The two girls were brought to the principal’s office because smoking cigarettes in the bathroom was against school rules.²³ When questioned in the office by Mr. Choplick, the assistant vice principal, T.L.O. denied smoking either in the bathroom, or ever at all.²⁴ The other girl admitted to smoking in the bathroom against school rules.²⁵ In response to T.L.O.’s denial, Mr. Choplick demanded to see T.L.O.’s purse, in which he found not only cigarettes, but also rolling papers.²⁶ Because his experience taught him that rolling papers were associated with marijuana use, Mr. Choplick then “thoroughly” searched the purse for other evidence of drug use.²⁷ Mr. Choplick found “a small amount of marihuana [sic], 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 marihuana [sic] dealing.”²⁸ Mr. Choplick notified both T.L.O.’s mother and the police of his findings.²⁹ The State of New Jersey brought delinquency charges against T.L.O.

18. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

19. *Chandler*, 520 U.S. at 308–09.

20. *See, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–61 (1976) (holding brief stops at permanent border checkpoints without individualized suspicion constitutional and noting that while “some quantum of individualized suspicion is usually a prerequisite to a constitutional search . . . the Fourth Amendment imposes no irreducible requirement of such suspicion”).

21. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). This was not the first time a test contrived in a concurring opinion eventually became a pillar of Fourth Amendment jurisprudence. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

22. *T.L.O.*, 469 U.S. at 328 (majority opinion).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

and T.L.O. moved to suppress the evidence of the allegedly unlawful search of her purse.³⁰

While the Supreme Court initially granted certiorari on the question of whether the exclusionary rule applied to Fourth Amendment violations by school authorities, the Court ordered reargument on “the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities.”³¹ The Court found that the search of T.L.O.’s purse did not violate the Fourth Amendment because even though the Fourth Amendment still applied to searches by school authorities, the warrant and probable cause requirements were inapplicable to the unique school setting and thus only an amorphous “reasonableness” standard applied.³² The Court found that under the facts of *T.L.O.*, there were “reasonable grounds” for suspecting that the search would reveal evidence of a violation of the law or school rules.³³

In his concurrence, Justice Blackmun observed that the Court engaged in a balancing of public and private interests in order to create an exception to the warrant and probable cause requirements of the Fourth Amendment.³⁴ Justice Blackmun then noted that this type of balancing is proper “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”³⁵ Justice Blackmun agreed that school searches were such an “exceptional circumstance,” but worried that the Court had too hastily engaged in the balancing of interests to arrive at its result without first determining that the school setting presented a special need.³⁶ Essentially, in Justice Blackmun’s view, the Court skipped a necessary step, but still arrived at the right result.³⁷

Two years later, in *O’Connor v. Ortega*, the Court approvingly quoted Justice Blackmun’s *T.L.O.* concurrence and adopted the concept of “special needs” when holding searches of government employees’ workplaces constitutional despite the absence of a warrant or even prob-

30. *Id.* at 329. T.L.O. also moved to suppress a confession she made after being brought to the police headquarters. *See id.*

31. *Id.* at 332.

32. *Id.* at 337–42.

33. *Id.* at 342.

34. *Id.* at 351 (Blackmun, J., concurring).

35. *Id.* Most of the “special needs” cases have quoted this line from Justice Blackmun’s *T.L.O.* concurrence. *See, e.g.,* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *New York v. Burger*, 482 U.S. 691, 702 (1987); *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion).

36. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

37. *Id.*

able cause.³⁸ Such searches were constitutional provided that they were reasonable “under all the circumstances.”³⁹ The Court found that a public employer’s interest in searching the workplace of an employee is beyond a normal need for law enforcement, as the employer’s interest is in maintaining an effective and efficient operation of its agency.⁴⁰ Next, the Court found that a warrant or probable cause requirement would be impracticable in the workplace.⁴¹ Finally, the Court balanced public and private interests and lessened the probable cause requirement to one of reasonableness, mirroring the standard adopted in *T.L.O.*⁴² The concept of “special needs” transformed from dicta to doctrine.⁴³

While in both cases the Court developed a “reasonableness” standard in circumventing the Fourth Amendment’s warrant and probable cause requirements, the facts of both *T.L.O.* and *O’Connor* still retained an element of individualized suspicion, though less than probable cause. However, in each case the Court expressly declined to answer whether individualized suspicion was an essential element of its reasonableness standard.⁴⁴

38. See *O’Connor*, 480 U.S. at 725–26.

39. See *id.* The Court again provided little guidance as to what reasonable under the circumstances actually meant, but added that “[o]rdinarily, a search of an employee’s office by a supervisor will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file.” *Id.* at 726.

40. *Id.* at 724.

41. *Id.* at 724–25.

42. *Id.* at 725–26.

43. Strikingly absent from the majority was Justice Blackmun himself who authored the dissent. See *id.* at 732–33 (Blackmun, J., dissenting) (“Because there was no ‘special need’ to dispense with the warrant and probable-cause requirements of the Fourth Amendment, I would evaluate the search by applying this traditional standard. Under that standard, this search clearly violated Dr. Ortega’s Fourth Amendment rights.”) (internal citation omitted). The Court cited Blackmun’s *T.L.O.* concurrence again three months later when holding searches of probationers’ homes a valid special need. See *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987). Justice Blackmun again authored a dissent noting that while the supervision of probationers is a “special need” justifying a reduced level of suspicion, the warrant requirement should still apply to such searches. See *id.* at 881–82 (Blackmun, J., dissenting). This solution would have been utterly irreconcilable with the Fourth Amendment’s explicit provision that “no Warrants shall issue, but upon probable cause.” U.S. CONST. AMEND. IV; see also *Griffin*, 483 U.S. at 877 (majority opinion).

44. See *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (“We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. . . . Because the search of T.L.O.’s purse was based upon an individualized suspicion . . . we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.”); *O’Connor*, 480 U.S. at 726 (“Because petitioners had an ‘individualized suspicion’ of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today.”).

B. *Suspicionless Drug Testing as a Special Need*

Four years after *T.L.O.*, the Supreme Court issued two opinions on the same day applying the special needs doctrine to mandatory suspicionless drug testing—*Skinner v. Railway Labor Executives' Ass'n*⁴⁵ and *National Treasury Employees Union v. Von Raab*.⁴⁶ These two cases ensured drug testing a place in the sphere of special needs. They also made clear that special needs searches do not always require individualized suspicion to be “reasonable” under the Fourth Amendment.⁴⁷

In *Skinner*, railway labor organizations challenged, and the Supreme Court upheld, the constitutionality of newly promulgated federal regulations concerning drug and alcohol testing of railroad employees.⁴⁸ The regulations required railroads to collect blood and urine samples of all employees directly involved in a train accident and to send the samples to the Federal Railroad Administration for laboratory analysis.⁴⁹ The regulations also authorized, but did not mandate, breath and urine tests in other circumstances, such as when a supervisor had “reasonable suspicion” that an employee was under the influence of alcohol.⁵⁰ These regulations were the Federal Railroad Administration’s response to findings that pervasive drug and alcohol use among railroad employees was a cause of a number of train accidents involving multiple fatalities and injuries as well as significant property damage.⁵¹

Citing concerns of medical privacy and bodily integrity, the Court importantly held that the collection and testing of urine is a search under the Fourth Amendment.⁵² This holding ensured that all future drug testing programs would be analyzed under Fourth Amendment scrutiny.⁵³ Next, guided by Justice Blackmun’s *T.L.O.* concurrence, the Court engaged in a special needs analysis.⁵⁴ The Court easily found the government’s interest not one of “normal law enforcement,” but rather a

45. 489 U.S. 602 (1989).

46. 489 U.S. 656 (1989).

47. *Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 668.

48. *See Skinner*, 489 U.S. at 612–13.

49. *Id.* at 609–10.

50. *Id.* at 611. Despite the fact that this part of the regulations was permissive and performed by a private railroad company, the Fourth Amendment was nevertheless implicated because the Court found the railroads were acting “as an instrument or agent of the government.” The mandatory provisions of the regulations implicated the Fourth Amendment because railroads complying with the provision do so by “compulsion of sovereign authority.” *See id.* at 614.

51. *Id.* at 607–08.

52. *Id.* at 617. At the time, every Federal Court of Appeals had already come to the same conclusion. *See id.*

53. *See, e.g.,* *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.9 (2001) (“[I]n our special needs cases, we have routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment.”).

54. *See Skinner*, 489 U.S. at 619.

need to prevent train accidents and ensure the safety of others.⁵⁵ The Court then engaged in balancing the interests of the government and its “need” with the railroad employees’ privacy interests in a requirement of individualized suspicion.⁵⁶

The main purpose of the drug testing was to determine if drugs or alcohol were present in the body at the time the accident occurred.⁵⁷ The Court found that a warrant requirement would frustrate that purpose because the body could metabolize traces of drugs or alcohol in the time taken to obtain a warrant.⁵⁸ Additionally, railroad supervisors, unlike those engaged in law enforcement, are unfamiliar with the procedures of obtaining a warrant.⁵⁹ The Court similarly found a requirement of individualized suspicion unnecessary due to what it saw as the minimal intrusion on the employees’ privacy and the government’s compelling interest in obtaining the drug tests, which would be “significantly hindered” by such a requirement.⁶⁰ Suspicionless, mandatory drug testing was, for the first time, approved by the Supreme Court.

Though decided on the same day, *Skinner* laid the groundwork for the validation of the much broader drug testing regime addressed in *Von Raab*. *Von Raab* involved a drug screening requirement for U.S. Customs Service employees seeking a transfer or promotion to positions involving direct involvement in drug interdiction or requiring the employee to handle a firearm.⁶¹ Again, based on a similar analysis performed in *Skinner*, the Court found the drug testing program constitutional despite the absence of a warrant, probable cause, or any other level of individualized suspicion.⁶² What made *Von Raab* different, and more far reaching than *Skinner*, was the absence of any actual problem within the U.S. Customs Service.⁶³ No drug problem existed among the employees and no major incident sparked the implementation of the

55. *Id.* at 620.

56. *Id.* at 621.

57. *Id.* at 623.

58. *Id.*

59. *Id.* at 623–24.

60. *Id.* at 631, 633.

61. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 660–61 (1989).

62. *See id.* at 677, 679.

63. Indeed, this difference is what caused Justices Scalia and Stevens to dissent in *Von Raab* even though both approved of the drug testing program in *Skinner*. *See id.* at 680–81 (Scalia, J., dissenting) (“Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court’s opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court’s opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely.”).

drug screening program.⁶⁴ Justice Scalia's dissent decried the program as merely "symbolic,"⁶⁵ while the majority highlighted the potential threat to safety and the need to deter a problem before it actually occurred.⁶⁶ The majority also generalized the "pervasive social problem" of drug abuse, which "[t]here is little reason to believe that American workplaces are immune from."⁶⁷ This generalization and focus on deterring a potential threat led many to fear that the Supreme Court would widely approve of suspicionless drug testing programs so long as the government merely asserted some threat to safety, whether real or speculative.⁶⁸ *Chandler v. Miller*⁶⁹ assuaged those fears and defined the scope of *Von Raab*'s holding.

Chandler concerned a Georgia statute requiring candidates for certain state offices to certify that they had submitted to and passed a urinalysis drug test within thirty days prior to qualifying for nomination or election.⁷⁰ Failure to do so would disqualify the candidate from appearing on the ballot.⁷¹ In the 1994 state election, the Libertarian party nominated candidates for three positions covered by the statute.⁷² The three candidates challenged the statute as an unreasonable search under the Fourth Amendment.⁷³ In defense of the constitutionality of the requirement, the State of Georgia argued that the drug testing requirement was a special need.⁷⁴ The state readily conceded that the statute

64. See *id.* at 683 (Scalia, J., dissenting) ("What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. . . . The Commissioner of Customs himself has stated that he 'believe[s] that Customs is largely drug-free,' that '[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program,' and that he 'hope[s] and expect[s] to receive reports of very few positive findings through drug screening.'").

65. *Id.* at 681.

66. See *id.* at 675 (majority opinion).

67. *Id.* at 674. Justice Kennedy, writing for the Court, dubiously stated that the decision in *Skinner* "amply illustrated" how American workplaces are not immune from pervasive drug abuse. See *id.* However in *Skinner*, there was concrete evidence of a drug problem which is precisely what differentiated it from *Von Raab* in the first place. Thus, the Court merely bootstrapped the evidence of drug abuse in *Skinner* to justify its holding and compensate for the lack of evidence in *Von Raab*.

68. See, e.g., *id.* at 685 (Scalia, J., dissenting); *Employee Drug Testing*, 103 HARV. L. REV. 269, 279 (1989); Kenneth C. Haas, *The Supreme Court Enters the "Jar Wars": Testing, Public Employees, and the Fourth Amendment*, 94 DICK. L. REV. 305, 335–36, 371 (1990).

69. 520 U.S. 305 (1997).

70. See *Chandler*, 520 U.S. at 309.

71. *Id.*

72. See *id.* at 310.

73. *Id.*

74. See *id.* at 318.

was not enacted in response to any suspicion of drug use by candidates for state office and that Georgia did not have any particular problem of state officeholders using illegal drugs.⁷⁵ Nonetheless, relying on the reasoning of *Von Raab*, the State of Georgia argued that the lack of a particular drug problem was not fatal to its argument and that the possible use of illegal drugs by state officeholders “draws into question an official’s judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials.”⁷⁶ The statute was thus necessary because of its deterrent effect on the potential hazard of drug users running for and attaining state offices. While the State of Georgia’s argument essentially mirrored the Supreme Court’s opinion in *Von Raab*, the Court found the statute violated the Fourth Amendment in an 8-1 opinion.⁷⁷ Notably, (echoing Justice Scalia’s dissent in *Von Raab*) the Court stated that Georgia’s asserted need was “symbolic, not ‘special’” and that “[t]he Fourth Amendment shields society” from state action that “diminishes personal privacy for a symbol’s sake.”⁷⁸ The Court held that “blanket suspicionless searches” were constitutional only if they were “calibrated” to a “substantial and real” risk to public safety.⁷⁹ The Court emphasized the requirement that public safety must be “genuinely in jeopardy.”⁸⁰

The only way to reconcile *Chandler* with *Von Raab* is to first accept, perhaps as a necessary fiction, that the *Von Raab* Court really believed the Custom Service’s purported deterrent, rather than symbolic purpose for drug testing. In *Chandler*, the Court was faced with a *Von Raab* situation (where drug testing was asserted as a special need to deter people in important positions from abusing drugs when there was admittedly no evidence of a drug problem) and came to the opposite outcome relying on reasoning similar to that of Scalia’s *Von Raab* dissent.⁸¹ In *Von Raab* the need was special, but this time the Court found the program to be merely symbolic due to the absence of evidence of a “concrete danger.”⁸² Perhaps recognizing this inconsistency, the Court “made a strenuous effort” and “went out of its way” to distinguish and

75. *See id.* at 319.

76. *Id.* at 318.

77. *See id.* at 322. Chief Justice Rehnquist was the sole dissenter noting that the Court’s decision was irreconcilable with *Von Raab*. *See id.* at 324–26 (Rehnquist, C.J., dissenting).

78. *Id.* at 322 (majority opinion).

79. *Id.* at 323.

80. *Id.*

81. *See* Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 *Miss. L.J.* 501, 517 (2004).

82. *Chandler*, 520 U.S. at 319.

limit *Von Raab*.⁸³ The Court described *Von Raab* as “[h]ardly a decision opening broad vistas for suspicionless searches” and instructed that “*Von Raab* must be read in its unique context.”⁸⁴ The Court also noted that the drug testing regime in *Von Raab* concerned an agency with a “unique mission” with inherently “grave safety threats.”⁸⁵ According to the *Chandler* Court, in *Von Raab* it was “compelling” to make sure that drug users were not in such “high-risk” positions.⁸⁶ The Court also recast *Von Raab* as not having as speculative a need by noting that there was some concrete evidence of Customs officials succumbing to bribery by drug smugglers.⁸⁷

Chandler was the first case where the Supreme Court found a suspicionless drug testing program unconstitutional.⁸⁸ In addition to limiting *Von Raab*, the Court also redefined the special needs analysis by carefully analyzing the threshold question of whether the asserted need was actually “special” rather than going straight to balancing public and private interests.⁸⁹ For suspicionless searches, this threshold would be met only by showing a “substantial and real” threat to public safety.⁹⁰ The Court warned that where “public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.”⁹¹

*Ferguson v. City of Charleston*⁹² reaffirmed the vitality of the principle that the Court would perform a threshold inquiry and not take the state’s assertion of a special need at face-value when evaluating the applicability of the special needs doctrine.⁹³ *Ferguson* involved a state hospital drug testing the urine samples of maternity patients who fit a profile of suspected cocaine use.⁹⁴ The drug testing policy was a response to the growing number of prenatal care patients using

83. Sundby, *supra* note 81, at 517.

84. *Chandler*, 520 U.S. at 321.

85. *Id.* at 316.

86. *Id.*

87. *Id.* at 321.

88. See Arcila, *supra* note 16, at 1229.

89. See Joy L. Ames, Note, *Chandler v. Miller: Redefining “Special Needs” for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 288 (1997).

90. *Chandler*, 520 U.S. at 323.

91. *Id.* The need asserted in *Von Raab* arguably comports with this construction of the term “special need.” See *id.* at 321–22 (distinguishing state elected officials from Customs officers because elected officials, unlike Customs officers, “do not perform high-risk, safety-sensitive tasks”).

92. 532 U.S. 67 (2001).

93. *Id.* at 81. See also Sundby, *supra* note 81, at 527–28.

94. *Ferguson*, 532 U.S. at 71. Though the patients who were drug tested fit a certain profile, the Court doubted whether the criteria the hospital employed in its policy would even give rise to reasonable suspicion, let alone probable cause, for drug use. See *id.* at 76, 77 & n.10.

cocaine.⁹⁵ The hospital's policy had been developed with the help of law enforcement officials.⁹⁶ Women who tested positive for cocaine use were threatened with arrest if they did not participate in a drug treatment program.⁹⁷ Due to the procedural posture of the case, the Court assumed in its special needs analysis that the patients did not consent to the drug screening of their urine samples.⁹⁸

Justice Stevens, writing for the majority, noted that in each of the Court's previous drug testing cases, the special need was one which was "divorced" from the government's interest in law enforcement.⁹⁹ This drug testing program, on the other hand, involved law enforcement during its development and implementation and used law enforcement and the threat of prosecution to coerce the patients into substance abuse treatment.¹⁰⁰ The hospital argued that its "ultimate purpose" was the "beneficent" one of protecting the health of the patient and newborn and thus distinguishable from the general interest in crime control.¹⁰¹ Justice Stevens, citing *Chandler*, noted that the Court would not merely accept the state's assertion of a "special need" and that the Court must carry out a "'close review' of the scheme at issue" to determine if the need was in fact special.¹⁰² The Court proceeded to examine the record and "consider all the available evidence" to determine the validity of the claim that the primary purpose of the drug testing was distinguishable from a "general interest in crime control."¹⁰³ The Court rejected the hospital's asserted beneficent purpose and found "the immediate objective of the searches was to generate evidence for law enforcement purposes."¹⁰⁴ Even if an ultimate goal of the policy was to get drug addicted mothers into treatment, the reason for the drug tests was to ensure the threat of prosecution was real due to the use of the drug test results as evidence in potential criminal proceedings.¹⁰⁵ Thus, *Ferguson* ensured that the Court would "scrutinize the underlying record and develop its own judgment of whether the drug testing satisfied its developing 'special needs' jurisprudence" rather than just accept the state's purported purpose.¹⁰⁶

95. *See id.* at 70.

96. *See id.* at 70-72.

97. *See id.* at 72.

98. *See id.* at 77.

99. *Id.* at 79.

100. *See id.* at 80.

101. *Id.* at 81.

102. *Id.* (quoting *Chandler v. Miller*, 520 U.S. 305, 321 (1997)).

103. *Id.* at 81-82.

104. *Id.* at 83.

105. *Id.* at 83-84.

106. Sundby, *supra* note 81, at 528.

C. *Suspicionless Drug Testing in the Public School Context:
The Trilogy of T.L.O., Acton, and Earls*

While noting that students do not “shed their constitutional rights . . . at the schoolhouse gate,”¹⁰⁷ the Supreme Court has nevertheless limited the Fourth Amendment rights of public school students in three important decisions—*T.L.O.*, *Veronia School District 47J v. Acton*,¹⁰⁸ and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.¹⁰⁹ These cases largely relied on the age of the students and the unique setting of a public school, which exercises temporary custody over schoolchildren. While Justice Blackmun’s concurrence in *T.L.O.* introduced the concept of “special needs” to Fourth Amendment jurisprudence,¹¹⁰ *T.L.O.* is also significant for laying the foundation for the limitations of schoolchildren’s Fourth Amendment rights.

T.L.O. eliminated the probable cause requirement for searches of schoolchildren and maintained that the only requirement of such school searches is that they be “reasonable.”¹¹¹ *Acton* did away with the individualized suspicion requirement entirely for the drug testing of student-athletes.¹¹² *Earls* expanded *Acton*’s holding to all schoolchildren engaged in any extracurricular activity.¹¹³ Together, these cases stand for the proposition that schoolchildren have a fundamentally lessened reasonable expectation of privacy.¹¹⁴ Students retain some Fourth Amendment protections, but for special needs searches, where the individualized suspicion requirement has been eliminated for both adults and children alike, schoolchildren have watered-down Fourth Amendment rights. School officials’ actions are given greater deference and meeting the criterion of “special” is much more easily surmountable over a student’s lessened privacy interest.¹¹⁵

In *T.L.O.*, the Supreme Court wrestled with the question of how the Fourth Amendment applied to schoolchildren.¹¹⁶ The decision sought to find a balance between sacrificing a student’s Fourth Amendment rights

107. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that public school students had a First Amendment right to wear black armbands to school in protest of the Vietnam War).

108. 515 U.S. 646 (1995).

109. 536 U.S. 822 (2002).

110. See *supra* notes 21–43 and accompanying text.

111. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985). For the facts of *T.L.O.*, see *supra* notes 22–33 and accompanying text.

112. See *Acton*, 515 U.S. at 664–65.

113. See *Earls*, 536 U.S. at 830.

114. See *id.*

115. See *id.* at 831, 834–37.

116. See *T.L.O.*, 469 U.S. at 332.

entirely and granting the same protections as given to adults.¹¹⁷ The Court reached a middle-ground in its vague “reasonableness” standard.¹¹⁸ While students did have legitimate expectations of privacy, they were not entitled to a warrant or probable cause requirement before they could be searched, but ordinarily searches would have to be based on reasonable suspicion.¹¹⁹ The Court noted the school setting was unique because “swift and informal disciplinary procedures” are necessary for teachers to maintain order in the school.¹²⁰

Interestingly, the rationales of *T.L.O.*’s concurring opinions are what echo throughout the majority opinions in *Acton* and *Earls*. Justice Blackmun’s concurrence developed the concept of special needs.¹²¹ Justice Powell’s concurrence, which Justice O’Connor joined, went into detail regarding the “special characteristics” of the school setting.¹²² Justice Powell focused mainly on the relationship teachers have with their students.¹²³ Powell noted that teachers enjoy “a degree of familiarity with, and authority over, their students” that resembles a parent-child relationship.¹²⁴ He contrasted the adversarial relationship between law enforcement officers and criminal suspects with the shared interests of students and teachers.¹²⁵ Teachers, according to Justice Powell, have personal responsibility for their students’ welfare in addition to their education.¹²⁶ Justice Powell then stressed the importance of maintaining discipline and order for a school to educate its students.¹²⁷

In *Acton*, the Court for the first time considered, and upheld, mandatory drug testing in the public school context.¹²⁸ In response to a “sharp increase in drug use,”¹²⁹ an Oregon school district instituted a policy of random drug testing of student-athletes.¹³⁰ Athletes were targeted because they were “the leaders of the drug culture” and because

117. *See id.* at 340.

118. *See id.* at 340–42.

119. *See id.*

120. *Id.* at 340.

121. *See supra* notes 21–43 and accompanying text.

122. *T.L.O.*, 469 U.S. at 348 (Powel, J., concurring).

123. *See id.* at 348–50.

124. *Id.* at 348.

125. *See id.* at 349–50. Interestingly, while *T.L.O.* was not strictly a “special needs” case because the concept had not yet been formally adopted by the Court, Justice Powell’s comparison between the teacher-student relationship and the adversarial police-suspect relationship foreshadowed the Court’s later-defined principle that the primary purpose of a special needs search must not be rooted in law enforcement. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 81–82 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000).

126. *See T.L.O.*, 469 U.S. at 350 (Powell, J., concurring).

127. *See id.*

128. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

129. *Id.* at 648.

130. *See id.* at 648–50.

of the risk of sports-related injuries.¹³¹ The Supreme Court upheld the drug testing policy as a special needs search.¹³² Specifically, the Court looked at three factors: “the nature of the privacy interest,”¹³³ “the character of the intrusion that is complained of,”¹³⁴ and “the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it.”¹³⁵

In examining the nature of the privacy interest, the Court noted that legitimate expectations of privacy vary with both context and the individual’s legal relationship with the state.¹³⁶ Relying on *T.L.O.*, the Court first found that schoolchildren have a lowered expectation of privacy due to the “custodial and tutelary” relationship between the school and the student.¹³⁷ The Court declared that the fact that the individuals being drug tested were children in the temporary custody of the state was “central” to its holding.¹³⁸ The Court noted that at common law, unemancipated minors lack some fundamental rights and are subject to school authorities who act *in loco parentis* over children in their custody.¹³⁹ This echoed the importance Justice Powell placed on the student-teacher relationship in his *T.L.O.* concurrence.¹⁴⁰ The Court also found that student-athletes have an even lesser expectation of privacy than ordinary schoolchildren because they engage in “communal undress” in the locker room and because by choosing to participate in school sports they subject themselves to a higher degree of regulation.¹⁴¹

The Court next weighed the students’ lowered expectation of privacy against the school district’s need to deter drug use by its schoolchildren.¹⁴² The Court found that deterring drug use by the nation’s schoolchildren “is at least as important” an interest as deterring drug use among railroad workers and customs agents.¹⁴³ According to the Court, the government in this case had an even greater interest in acting to counter drug use among its students because it took on a “special responsibility of care and direction” for them.¹⁴⁴ Thus, for the purposes

131. *Id.* at 649.

132. *See id.* at 653, 664–65.

133. *Id.* at 654.

134. *Id.* at 658.

135. *Id.* at 660. While this third factor actually has two components, the Court treated it as one factor.

136. *See id.* at 654.

137. *Id.* at 655.

138. *Id.* at 654.

139. *See id.* at 654–55.

140. *See supra* notes 122–27 and accompanying text.

141. *Acton*, 515 U.S. at 657.

142. *See id.* at 660–61.

143. *Id.* at 661.

144. *Id.* at 662.

of balancing interests, the school's custodial relationship simultaneously decreased the students' interest in privacy and magnified the state's interest in drug testing. This "double-counting" highlights the significance of the custodial relationship to upholding drug testing programs in public schools. The Court also was persuaded by an "immediate crisis" affecting the school based on the documented history of a drug problem.¹⁴⁵

In *Earls*, the Court upheld a drug screening program like the one in *Acton*, only this time it applied to students engaging in all extracurricular activities instead of only student-athletes.¹⁴⁶ The jump from *Acton* to *Earls* paralleled that from *Skinner* to *Von Raab*. Both former cases had drug testing programs implemented after actual evidence of a problem was presented.¹⁴⁷ In the later cases, the Court allowed for drug testing even in the absence of evidence of a concrete problem by citing the need for the deterrent effect of a possible future problem.¹⁴⁸ It was a special need merely to prevent the potential problem and the Court's balancing test favored the government's need. *Earls* relied heavily on *Acton*, especially with regard to its focus on the unique public school setting "where the State is responsible for maintaining discipline, health, and safety."¹⁴⁹ *Earls*, however, was silent as to how it could be reconciled with *Chandler's* requirement of a "substantial and real" threat to public safety. *Earls*, nevertheless, is distinguishable from *Chandler* because it deals with minors in the state's custody.¹⁵⁰ In *Earls*, as in *Acton*, the state took responsibility for the schoolchildren and thus it was in the state's interest to protect them from the dangers of drugs.¹⁵¹

Thus, for schoolchildren only, the Supreme Court is willing to find the threat of "the nationwide drug epidemic" sufficient to establish a special need.¹⁵² However, for adults, no post-*Chandler* decision has altered the requirement of a genuine threat to public safety to sidestep the requirement of individualized suspicion.

145. *Id.* at 663.

146. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002).

147. *See Acton*, 515 U.S. at 662-63; *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 607-08 (1989).

148. *See Earls*, 536 U.S. at 849-50 (Ginsburg, J., dissenting); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 673-744 (1989).

149. *Earls*, 536 U.S. at 830-31 (majority opinion).

150. *See Arcila, supra* note 16, at 1233 n.44.

151. *See supra* note 144 and accompanying text.

152. *Earls*, 536 U.S. at 834.

III. SUSPICIONLESS DRUG TESTING REACHES THE COLLEGE CAMPUS

A. *Current Case Law on College Student Drug Testing*

Currently, almost all of the drug testing that occurs at the college level is geared toward student-athletes.¹⁵³ Because Linn State's drug testing program is unprecedented, the case law on the drug testing of ordinary college students is scant. In fact, only one public college (aside from Linn State) currently has a drug testing policy that applies to ordinary students, as opposed to student-athletes.¹⁵⁴ The University of Maryland mandates a drug test for any student who is found guilty of a drug offense.¹⁵⁵ However, by its own terms, individualized suspicion is a prerequisite for such a drug test as the use of a drug test is dependent on a previous finding of guilt. Drug testing of college athletes is largely conducted by the NCAA, which has been held not to be a state actor.¹⁵⁶ However, some college athletes at state universities have gone to court to challenge drug tests administered by their schools. An interesting example is *University of Colorado v. Derdeyn*.¹⁵⁷

In the fall of 1984, the University of Colorado, Boulder, developed a drug testing program for its intercollegiate student-athletes.¹⁵⁸ If a student-athlete failed to sign a consent form for random urinalysis drug testing, the student was barred from participating in intercollegiate athletics.¹⁵⁹ Although the drug testing policy was amended several times, the penalty for testing positive for drug use was never more severe than a suspension from intercollegiate athletics for a period of time.¹⁶⁰ In 1986, several University of Colorado student-athletes filed a lawsuit, eventually making its way to the Supreme Court of Colorado, challenging the drug testing policy on both state and federal constitutional grounds.¹⁶¹

The University of Colorado argued that even if the drug testing policy were otherwise unconstitutional, the students consented to the drug testing.¹⁶² The Supreme Court of Colorado, however, found that the "consent" was not given voluntarily.¹⁶³ In analyzing whether the

153. 2 ZEESE, DRUG TESTING LEGAL MANUAL § 8:7 (2d ed.).

154. *Id.*

155. *Id.*

156. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 182 (1988). The Fourth Amendment applies only to state actors. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)).

157. 863 P.2d 929 (Colo. 1993).

158. *Id.* at 930.

159. *Id.*

160. *Id.* at 930-32.

161. *Id.* at 930, 932.

162. *See id.* at 946.

163. *See id.* at 949-50.

drug testing was constitutional without consent, the court relied on *Skinner* and *Von Raab* and proceeded to balance the students' privacy interests with the university's governmental interests.¹⁶⁴ The court first decided that university students do not have a diminished expectation of privacy "simply because they are university students."¹⁶⁵ The court noted the inapplicability of cases like *T.L.O.* and the common law doctrine of *in loco parentis* to the college setting.¹⁶⁶ Interestingly, the court even cited the district court opinion in *Acton* as an example of a high school case inapplicable to the college context.¹⁶⁷ The court easily recognized that the Fourth Amendment rights of college students should be analyzed like those of adults rather than high school students or other schoolchildren.¹⁶⁸ Next, despite various arguments to the contrary, the court found that the urinalysis drug testing was a "clearly significant" intrusion and that the status of being a student-athlete did not diminish one's expectation of privacy.¹⁶⁹

The Supreme Court of Colorado noted that the trial court below made a finding of fact that there was "no evidence that the University instituted its program in response to any actual drug abuse problem among its student athletes" or "that any person has ever been injured in any way because of the use of drugs by a student athlete while practicing or playing a sport."¹⁷⁰ The governmental interests asserted by the university were compliance with NCAA rules, fair competition, and student health and safety concerns.¹⁷¹ With impressive foresight, the court read *Skinner* and *Von Raab* to hold that generally an interest is "compelling" enough to do away with an individualized suspicion requirement when there is a threat to public safety or national security—a similar conclusion arrived at by the Supreme Court four years later in *Chandler*.¹⁷² As *Chandler* had not yet been decided, and, thus, the available precedent lacked a threshold inquiry of whether the need was really "special," the court understandably noted that the absence of a public safety threat was not dispositive, but only a factor in its balancing of interests.¹⁷³ The court held that because the lack of a public safety interest was coupled

164. *Id.* at 936.

165. *Id.* at 938.

166. *Id.* at 938–39 (collecting federal cases uniformly rejecting the applicability of *in loco parentis* to the college setting or any other argument that college students have diminished Fourth Amendment rights).

167. *Id.* at 939. *Acton* had not yet produced a Court of Appeals decision.

168. *Id.*

169. *See id.* at 939–43.

170. *Id.* at 934.

171. *Id.*

172. *See id.* at 943–45. *See also supra* notes 70–91 and accompanying text.

173. *See Derdeyn*, 863 P.2d at 945.

with the absence of a showing that the student-athletes had a diminished expectation of privacy, the drug testing policy violated the Fourth Amendment as well as the state constitution.¹⁷⁴

Not all courts have followed *Derdeyn*. In another case where college athletes challenged a drug testing policy, *Hill v. National Collegiate Athletic Association*,¹⁷⁵ the court reached an opposite result. In *Hill*, Stanford University student-athletes challenged NCAA drug testing as violating a state right to privacy.¹⁷⁶ The Supreme Court of California held the state law provision applied to non-state actors like the NCAA, but nevertheless upheld the drug testing policy.¹⁷⁷ Though the state constitutional right to privacy applied to non-state actors,¹⁷⁸ the privacy it protected was construed as “no broader” than the protections afforded by the Fourth Amendment.¹⁷⁹ Unlike the Supreme Court of Colorado in *Derdeyn*, the Supreme Court of California found that by participating in intercollegiate athletics, student-athletes did have a diminished expectation of privacy.¹⁸⁰ The court found a diminished expectation of privacy because college athletes are subject to “close regulation and scrutiny of the physical fitness and bodily condition” and “physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete’s life *not shared by other students or the population at large*.”¹⁸¹ Here, by comparing student-athletes to ordinary students, the court implicitly agreed that ordinary college students do not share the diminished expectation of privacy of student-athletes. The court then weighed the interests of the NCAA in drug testing—“safeguarding the integrity of intercollegiate athletic competition” and “protecting the health and safety of student athletes”—against

174. *See id.* The Supreme Court of Colorado thus reached the same principles that emerged after *Chandler* and *Earls*—that the absence of a public safety threat can only be cured by drug testing a population with a greatly diminished expectation of privacy, such as schoolchildren. *See supra* notes 146–52 and accompanying text.

175. 865 P.2d 633 (1994).

176. *Id.* at 637. Interestingly, Stanford University intervened on the side of the student-athletes. *See id.*

177. *See id.* at 637, 644.

178. *See id.* at 644.

179. *See id.* at 650 n.9. Even though the Court found its state law right to privacy to not be broader than Fourth Amendment protections, the Supreme Court of California only made a finding with regards to its state constitution and not the federal constitution. *See id.* at 669. Indeed, the Fourth Amendment was inapplicable to this case where a non-state actor, the NCAA, was sued rather than a state college. A similar state law action filed against a private university also failed on state law grounds alone and did not include a Fourth Amendment question because of a lack of state action. *See Bally v. Ne. Univ.*, 532 N.E.2d 49, 51 & n.3 (1989).

180. *See Hill*, 865 P.2d at 658.

181. *Id.* (emphasis added).

the diminished privacy expectations of the student-athletes.¹⁸² The court found in favor of the NCAA.¹⁸³

Hill strongly influenced the decision in *Brennan v. Board of Trustees for University of Louisiana Systems*.¹⁸⁴ In *Brennan*, a student-athlete challenging drug testing sued the University of South Louisiana's governing body.¹⁸⁵ The action was brought under state privacy laws.¹⁸⁶ The court noted that the University of South Louisiana "without question" is a state actor.¹⁸⁷ However, relying on the balancing of interests performed in *Hill*, including the finding that student-athletes have a diminished expectation of privacy, the court found the drug testing policy did not violate the state constitution.¹⁸⁸

Derdeyn remains the only student-athlete drug testing decision to establish case law expressly based on the Fourth Amendment, rather than state law grounds.¹⁸⁹ It is somewhat of an outlier because it is also the only decision to find that student-athletes do not have a diminished expectation of privacy and that the state interests were not sufficient to

182. *Id.* at 659. While not mentioning drug testing specifically, New York Times columnist Joe Nocera has recently written a series of op-eds ridiculing the NCAA and its policies and suggesting that, perhaps, the NCAA might not be the ideal organization to represent reasonable interests. *See, e.g.*, Joe Nocera, Op-Ed., *Guilty Until Proved Innocent*, N.Y. TIMES, Jan. 21, 2012, at A23; Joe Nocera, Op-Ed., *More N.C.A.A. 'Justice'*, N.Y. TIMES, Jan. 14, 2012, at A21; Joe Nocera, Op-Ed., *Standing Up to the N.C.A.A.*, N.Y. TIMES, Mar. 24, 2012, at A19; Joe Nocera, Op-Ed., *The College Sports Cartel*, N.Y. TIMES, Dec. 31, 2011, at A23.

183. *See Hill*, 865 P.2d at 669.

184. 691 So. 2d 324 (La. Ct. App. 1997).

185. *See id.* at 325.

186. *See id.* at 328.

187. *Id.* at 329.

188. *See id.* at 329.

189. One other court did address the Fourth Amendment issue. *See O'Halloran v. Univ. of Wash.*, 679 F. Supp. 997, 1002 (W.D. Wash.), *rev'd*, 856 F.2d 1375 (9th Cir. 1988). The court found the drug testing of student-athletes to not violate the Fourth Amendment. *See id.* at 1002-07. However, the district court was reversed on procedural grounds by the Ninth Circuit which directed the case to be remanded back to state court where it originated. *See O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988). The Ninth Circuit did not address the Fourth Amendment issue. Prior to removal to federal court, the state trial court balanced public and private interests and ruled that the drug testing policy did indeed violate the Fourth Amendment. *See Stephen F. Brock & Kevin M. McKenna, Drug Testing in Sports*, 92 DICK. L. REV. 505, 549-551 (1988) (citing *O'Halloran v. Univ. of Wash.*, No. 87-2-08775-1 (Wash. Super., King County, July 23, 1987) (Transcript of oral opinion)). Subsequently, O'Halloran and the University of Washington entered into a settlement agreement in which the university agreed to eliminate its random drug testing and only drug test based on reasonable suspicion. *See Stephen F. Brock et al., Drug Testing College Athletes: NCAA Does Thy Cup Runneth Over?*, 97 W. VA. L. REV. 53, 93 & n.217 (1994) (citing *O'Halloran v. Univ. of Wash.*, No. 87-2-08775-1, at 1 (Wash. Super. Ct. June 26, 1989) (Stipulation and Order of Dismissal); *O'Halloran and University of Washington Partial Settlement Agreement*, at 1-2 (1989)). *O'Halloran* has been called a "three-headed procedural monster" that "established no rule of law." *See id.* at 89, 94. Thus, *Derdeyn* remains the only Fourth Amendment decision with any real precedential value.

overcome individual privacy interests.¹⁹⁰ On the other hand, several courts have found student-athletes to have diminished privacy interests and have upheld mandatory, suspicionless drug testing of student-athletes.¹⁹¹ However, prior to Linn State initiating its drug screening program, no court had ever been faced with the question of whether a student body as a whole, rather than just student-athletes, can be subjected to suspicionless drug testing.

B. *Developing a Framework for Analyzing Dragnet Drug Screening of College Students*

Drug testing of students performed by a state college is indisputably a “search” within the meaning of the Fourth Amendment.¹⁹² Despite being such a search, it may be deemed a special need, and thus not require individualized suspicion. The first question to answer is the threshold inquiry required by *Chandler* and *Ferguson*—whether drug testing of college students actually serves a special need.¹⁹³ If the drug testing is deemed to be a special need, then courts should engage in a balancing analysis to determine if the need is compelling enough to outweigh the privacy interest of the individual being tested.¹⁹⁴

1. DOES COLLEGE DRUG TESTING SERVE A SPECIAL NEED?

Drug testing will not be deemed a special need in two circumstances—if its primary purpose is indistinguishable from a general interest in law enforcement¹⁹⁵ or if it is done for symbolic purposes rather than an actual necessity.¹⁹⁶ It should be obvious after *Ferguson* that if law enforcement authorities are involved in a college drug testing program, or if the students can be subjected to criminal penalties, the drug testing program will not qualify as a special need.¹⁹⁷ Under *Chandler*, a drug testing scheme will be considered symbolic if there is no genuine threat to public safety.¹⁹⁸

190. See *supra* notes 158–74 and accompanying text.

191. See *supra* notes 175–88 and accompanying text.

192. See *supra* notes 52–53 and accompanying text.

193. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (quoting *Chandler v. Miller*, 520 U.S. 305, 321 (1997)).

194. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002).

195. See *Ferguson*, 532 U.S. at 81.

196. See *Chandler*, 520 U.S. at 322.

197. See *Ferguson*, 532 U.S. at 83–84. See also *Earls*, 536 U.S. at 833 (noting that under the drug testing scheme at issue the test results were not turned over to law enforcement); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 620 (1989) (noting the purpose of the drug testing was “not to assist in the prosecution of employees”).

198. See *Chandler*, 520 U.S. at 323. Lower courts have indeed read *Chandler* to hold that public safety must be in jeopardy before departing from the Fourth Amendment’s individualized

When the need is for public safety, the Court has consistently viewed the "safety" accomplished by the drug testing as being for the benefit of the public, or third parties, not the safety of the individuals being tested. The only caveat to this principle is when the target class of the drug testing is schoolchildren and the school authorities have an *in loco parentis*, custodial relationship over the students.¹⁹⁹ With regard to college students, the rationales of *Acton* and *Earls* do not apply, even if college students are found to have a diminished expectation of privacy. The level of the expectation of privacy affects only the balancing of interests rather than the threshold inquiry of whether a need qualifies as "special."²⁰⁰

Courts will not take a college's proposed need at face value, but will examine the record to determine what the purpose of the drug testing really is.²⁰¹ It can be argued that drug testing student-athletes serves the special need of reducing the risk of sports related injury.²⁰² An athlete on drugs can be a danger not only to herself, but to other competitors and spectators as well.²⁰³ It is also true that *some* students do engage in "safety-sensitive" tasks where drug testing might be a legitimate need. For example, students handling dangerous chemicals in a science lab could potentially pose a risk to public safety if they were abusing drugs. Importantly, even though these threats to public safety may be potential and the need preventative, they must still be genuine.²⁰⁴ Therefore, the activities engaged in by students targeted for drug testing play a role in determining the applicability of the special needs doctrine.

It is harder to make the case for drug testing ordinary college students. While colleges may not want their students to partake in illegal activities, such as drug use, a student's off-campus activities pose little threat to the college campus. A hypothetical drug-intoxicated student in the classroom who was disruptive to the learning environment could easily be singled out and disciplined accordingly. It seems even more unlikely that drug-crazed college students will be running around cam-

suspicion requirement. *See, e.g.,* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1139-41 (E.D. Mich. 2000) (holding a Michigan law allowing for random, suspicionless drug testing of welfare recipients unconstitutional because the government failed to show "that public safety is genuinely placed in jeopardy").

199. *See supra* notes 146-52 and accompanying text.

200. *Chandler* is instructive. Had the Supreme Court made it past the threshold inquiry, the political candidates likely would have been found to have a diminished expectation of privacy on account of being subjected to statewide scrutiny while running for public office. However, this was not mentioned in the opinion because it did not affect the threshold inquiry.

201. *See Ferguson*, 532 U.S. at 81.

202. *See Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 661 (1994). *See also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

203. *See Hill*, 865 P.2d at 661.

204. *See Chandler v. Miller*, 520 U.S. 305, 323 (1997).

pus injuring those around them. Even if a college did have a legitimate interest in making sure its students were not using drugs, there still would have to be a genuine, rather than a merely speculative, threat to safety. If the college reported little or no incidence of drug abuse among its students, the need will likely be found “symbolic, not ‘special.’”²⁰⁵ Also, even if there were evidence of drug use among the student body, there would still have to be a connection to *public* safety, rather than just the personal safety of the drug user.

Some school requirements that may raise issues of bodily integrity and constitutional liberties do serve public safety concerns. For example, a requirement of many colleges is that students receive certain vaccinations prior to being able to attend classes. This is clearly different from a drug test. First, vaccinations are not a search and do not reveal any personal information about the student.²⁰⁶ They do potentially infringe on civil liberties, however, as mandatory vaccinations have been challenged on First Amendment grounds.²⁰⁷ Additionally, if one student has a contagious disease, the entire campus community, professors and students alike, is threatened. The risks vaccinations address clearly would satisfy the requirement of a genuine threat to public safety if the Fourth Amendment were ever invoked.²⁰⁸ It is not speculative that college students get sick and can spread diseases to those around them. Contrarily, drug use is not contagious and one student abusing drugs is not likely to make those around him drug addicts or otherwise threaten their safety.

2. THE SPECIAL NEEDS BALANCING TEST FOR COLLEGE DRUG TESTING PROGRAMS

Assuming a drug testing program geared toward college students is found to serve a special need, it still must pass the balancing test applied by the courts. The Supreme Court has analyzed three factors when conducting the balancing test: “the nature of the privacy interest,”²⁰⁹ “the character of the intrusion,”²¹⁰ and “the nature and immediacy of the government’s concerns and the efficacy”²¹¹ of the drug testing program in meeting them. The first two factors address the weight of a college stu-

205. *Id.* at 322.

206. However, Justice O’Connor has characterized vaccinations as “blanket searches of a sort.” *Acton*, 515 U.S. at 682 (O’Connor, J., dissenting).

207. *See, e.g.*, *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987).

208. One might imagine a student asserting a right to privacy in medical files when a college demands proof of vaccination.

209. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002).

210. *Id.* at 832.

211. *Id.* at 834.

dent's privacy interest while the third addresses the weight of the college's asserted special need.

First, the nature of the privacy interest of a college student must be analyzed. In *Acton*, the Court noted that the legitimacy of an expectation of privacy varies with both context and the individual's relationship with the state.²¹² The Court then declared that the fact that the subjects of the search were children and that they had been "committed to the temporary custody of the State as schoolmaster"²¹³ were not only "central"²¹⁴ to its decision, but "the most significant element"²¹⁵ of it. *Earls*, relying heavily on *Acton*, echoed this rationale to again find that schoolchildren have a limited privacy interest.²¹⁶

Applying the rationales used to diminish the privacy interests of public school students to college students would clearly be inappropriate. With very few exceptions, all college students are at least eighteen years old and are adults, not children. While in reality, many college students may rely on their parents for financial support, college students are their own legal guardians. Indeed, in *Acton*, the Court concluded by cautioning "against the assumption that suspicionless drug testing will readily pass constitutional muster in *other* contexts."²¹⁷ *Earls* relied on the reasoning of *Acton* and passed "constitutional muster" because the drug testing program was being utilized in the same context—the public school environment.²¹⁸ While colleges and universities may want to ensure the safety of their students, the doctrine of *in loco parentis*, which was "central" to the Court's decisions in *Acton* and *Earls*, has been held to be inapplicable to the college setting.²¹⁹ Unlike public schools, colleges are not held responsible for the safety of their students and enjoy no custodial relationship over them.²²⁰ An examination of several torts cases reveals as much. In one case, parents of a university student sued the school for allowing their daughter to associate with criminals, be seduced, and use drugs.²²¹ In a curt opinion granting a motion for judgment on the pleadings, the court stated that the "plaintiffs completely misconstrue the duties and functions of a university."²²² The court

212. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

213. *Id.*

214. *Id.*

215. *Id.* at 665.

216. See *Earls*, 536 U.S. at 830.

217. *Acton*, 515 U.S. at 665 (emphasis added).

218. See *Earls*, 536 U.S. at 830.

219. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 138–41 (3d Cir. 1979); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59–60 (Colo. 1987). See also *supra* notes 165–68 and accompanying text.

220. See *Bradshaw*, 612 F.2d at 138–41, 143.

221. See *Hegel v. Langsam*, 273 N.E.2d 351, 352 (Ohio Ct. Com. Pl. 1971).

222. *Id.*

declared that “[a] university is an institution for the advancement of knowledge and learning. It is neither a nursery school, a boarding school nor a prison.”²²³ The court added that universities have no duty “to regulate the private lives of their students.”²²⁴ Even students who have been injured as a result of underage drinking at school-sponsored events have not been able to persuade courts that their universities breached a duty.²²⁵ Courts have strongly adhered to the principle “that the modern American college is not an insurer of the safety of its students”²²⁶ and have declined to impose a custodial duty on universities “to prevent students from violating liquor control laws whenever those students are involved directly or indirectly in a University activity.”²²⁷ Instead, courts have contrasted elementary and high schools with colleges by characterizing the former as “a mixture of custodial and educational institutions” while characterizing colleges as “educational institutions, not custodial.”²²⁸ One court noted that assigning colleges a custodial role and requiring them to prevent underage drinking by their students would be tantamount to requiring colleges “to babysit each student,” which would “produce a repressive and inhospitable environment.”²²⁹

Though the custodial relationship rationale of *Acton* and *Earls* does not apply to college students, *Acton* and *Earls* also considered, when analyzing the students’ privacy interests, the fact that the students chose to participate in a particular activity.²³⁰ While compulsory education laws required the students to attend school, the choice to participate in school sports or other extracurricular activities was voluntary and the student could choose not to participate and thus not be drug tested.²³¹ Similarly, in *Skinner*, the Court held the railway workers to have a diminished expectation of privacy “by reason of their participation in an

223. *Id.*

224. *Id.*

225. *See, e.g., Bradshaw*, 612 F.2d at 137 (college student became quadriplegic as a result of automobile accident where he was passenger in a car driven by another student who had engaged in underage drinking at a sophomore picnic); *Beach v. Univ. of Utah*, 726 P.2d 413, 414–15 (Utah 1986) (college student on a university-sponsored field trip fell from a cliff after engaging in underage drinking).

226. *Bradshaw*, 612 F.2d at 138. The *Bradshaw* court noted that while in earlier times the doctrine of *in loco parentis* did apply to colleges, the shift to the modern view coincided with the passage of the Twenty-sixth Amendment lowering the age of majority to eighteen. *See id.* at 139–40.

227. *Beach*, 726 P.2d at 417–18. An analogy to violations of drug laws should be obvious.

228. *Id.* at 419. *See also* *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987) (“Today, colleges and universities are regarded as educational institutions rather than custodial ones.”).

229. *Beach*, 726 P.2d at 419.

230. *See* *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831–32 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

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

industry that is regulated pervasively to ensure safety.”²³² A similar argument could be made for college students. They are not compelled by law to attend college; rather, they choose to attend.

Though it could be argued that because of the increasing importance of a college education in our society, choosing to go to college is not really a “choice” in the sense that choosing to play a sport is a choice; this argument would likely be unavailing. In her dissent in *Earls*, Justice Ginsburg made a similar argument when she attempted to distinguish the voluntariness of participating in extracurricular activities with engaging in school sports. She noted that extracurricular activities “are part of the school’s educational program” and that “[p]articipation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.”²³³ This argument did not carry the day. Indeed, the Supreme Court has used the concept of “choice” in Fourth Amendment cases to justify negative consequences for activities far more essential than going to college.²³⁴

While college attendance is optional and may slightly diminish one’s expectation of privacy, this is not fatal to a Fourth Amendment challenge. Under the unconstitutional conditions doctrine, the government may not condition receipt of a benefit or privilege on the relinquishment of a constitutional right.²³⁵ The unconstitutional conditions doctrine applies, even when the government is under no duty to provide the benefit in the first place.²³⁶ Just as people do not automatically waive

232. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 627 (1989).

233. *Earls*, 536 U.S. at 845 (Ginsburg, J., dissenting). Justice Ginsburg’s reasoning here is somewhat troublesome as it seems to be based on her own arbitrary value judgment that school sports are less important than extracurricular activities and that nonathletic activities, like the school band or academic team, are “essential” while athletic activities are not. It has been noted that Justice Ginsburg’s *Earls* dissent “seemed to sound a personal note.” Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment’s Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 609 (2008). Arguing that a college education is a necessity rather than a real choice would be a similar arbitrary value judgment not appropriate for legal analysis.

234. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 436 (1991) (noting that the defendant was not seized for Fourth Amendment purposes because his confinement was due to “his decision to take the bus,” rather than coercive police conduct, despite the fact that the defendant would have been stranded had he exited the bus).

235. *See Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972). For an analysis of the unconstitutional conditions doctrine see generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

236. *See United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006); *Boykins v. Fairfield, Ala. Bd. of Ed.*, 399 F.2d 11, 13 (5th Cir. 1968) (“Even if the school board were under no obligation to provide public education to children of military personnel on the air base, it could not provide that education subject to an unconstitutional condition.”).

their Fourth Amendment rights by using the post office²³⁷ or a public road,²³⁸ a college education is a benefit conferred by the state, and the state may not condition that benefit on a waiver of constitutional rights.²³⁹ Therefore, the fact that college students choose to attend a state school does not deprive them of their Fourth Amendment rights. “[T]he very purpose of the unconstitutional conditions doctrine is to prevent the Government from subtly pressuring citizens.”²⁴⁰ While Fourth Amendment protections certainly can be waived, the government cannot pressure or induce a citizen to waive those rights.²⁴¹

Therefore, the fact that students choose to attend college may play a role in analyzing their expectations of privacy, but does not by itself constitutionalize suspicionless drug testing.²⁴² However, within college, the more regulated the activities a student takes part in, the more the expectation of privacy has the potential to be diminished. Thus, while the fact that college students choose to attend college may be considered a factor and slightly diminish the privacy interests of the students, the privacy interest is certainly not as diminished as that of schoolchildren or even college athletes. Additionally, this is only one non-dispositive factor that must be evaluated when balancing interests.

The nature of the intrusion is the next factor the Court considers when balancing individual and state interests. The factors considered here include how the urine sample is procured and how the results of the test are used.²⁴³ The level of intrusiveness of the procedure for obtaining the sample varies based on where the sample is collected,²⁴⁴ who col-

237. See *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

238. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

239. *Morale v. Grigel*, 422 F.Supp. 988, 999 (D.N.H. 1976).

240. *Bourgeois*, 387 F.3d at 1324.

241. See *Scott*, 450 F.3d at 865 n.4.

242. As noted *supra* notes 165–68 and accompanying text, the Supreme Court of Colorado has held that college students’ expectations of privacy are not diminished at all simply because they choose to attend college. See also *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir. 1971) (A college cannot “require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room”); *Morale*, 422 F. Supp. at 999 (noting that a college “certainly cannot condition attendance . . . upon waiver of constitutional rights”); *Collier v. Miller*, 414 F. Supp. 1357, 1359, 1367 & n.11 (S.D. Tex. 1976) (noting that the university did “not argue in their brief that a different Fourth Amendment standard should apply to schools, nor would this Court find such an argument meritorious”); *Smyth v. Lubbers*, 398 F. Supp. 777, 786 (W.D. Mich. 1975) (holding adult college students have the same interest in the privacy of their rooms as any adult has in his home).

243. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 832–34 (2002).

244. See *Chandler v. Miller*, 520 U.S. 305, 310 (1997) (candidate had option of providing urine specimen at personal physician’s office).

lects the sample,²⁴⁵ whether the person is watched while urinating,²⁴⁶ whether the person is otherwise monitored,²⁴⁷ and whether the monitor is of the same sex as the person being tested.²⁴⁸ For example in *Chandler*, the Court noted that had the requisite special needs showing been made, “the State could not be faulted for excessive intrusion.”²⁴⁹ Under the Georgia statute at issue, a candidate for office was permitted to provide the urine sample in the office of his private physician.²⁵⁰ In *Earls*, a faculty monitor waited outside a closed bathroom stall and listened “for the normal sounds of urination” to avoid tampering and to establish a chain of custody.²⁵¹ While this was clearly more intrusive than the drug testing at issue in *Chandler*, the Court saw little problem with this method of collection.²⁵² In *Acton*, the faculty monitor was always of the same sex as the student producing the sample.²⁵³ Such conditions were “nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily.”²⁵⁴

Additionally, the use of the samples plays a role in weighing the intrusiveness of the drug test. In *Ferguson*, the Court differentiated the hospital’s drug testing policy as a “far more substantial” invasion of privacy than seen in its prior drug testing cases.²⁵⁵ There, the patients did not know about the purpose of the test or the use of the results.²⁵⁶ Also, in the prior cases, safeguards were in place to protect against the dissemination of the results to third parties.²⁵⁷ In *Ferguson*, on the other hand, the results not only were handed to third parties, but the third parties were law enforcement officials.²⁵⁸ The Court in *Skinner*, *Von Raab*, *Acton*, and *Earls* highlighted the fact that the results were not

245. See *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 626–27 (1989) (“The sample is also collected in a medical environment, by personnel unrelated to the railroad employer.”).

246. See *Skinner*, 489 U.S. at 626 (“The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample.”); *Earls*, 536 U.S. at 832–33 (“This procedure is virtually identical to that reviewed in *Vernonia*, except that it additionally protects privacy by allowing male students to produce their samples behind a closed stall.”).

247. See *Earls*, 536 U.S. at 832 (noting that the students are subject to aural rather than visual monitoring). *But see* *Univ. of Colo. ex rel. Regents of Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 939 (Colo. 1993) (“[T]he differences in practice between aural and visual monitoring might not always be so great.”).

248. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658, (1995).

249. See *Chandler*, 520 U.S. at 318.

250. See *id.* at 310.

251. *Earls*, 536 U.S. at 832.

252. See *id.* at 833.

253. See *Acton*, 515 U.S. at 658.

254. *Id.*

255. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

256. See *id.*

257. See *id.*

258. See *id.* at 79.

handed over to law enforcement.²⁵⁹ The *Earls* Court also applauded the level of confidentiality maintained in the test results, which were disclosed only to those with a “need to know.”²⁶⁰ Furthermore, the severity of the consequences for failing a drug test factors into the evaluation of the use of the sample and the nature of the intrusion.²⁶¹ In *Acton* and *Earls*, the penalty for failing a drug test was relatively minimal. The student was not able to participate in the particular activity. However, no record was made in the student’s file and no academic sanctions such as suspension or expulsion were imposed.²⁶²

As a third factor, the Court considers the nature and immediacy of the government’s concerns and the efficacy of the drug testing program in meeting them. In *Skinner*, the concern was prevention of train accidents caused by workers being intoxicated on the job.²⁶³ The Court believed the drug testing scheme would be effective because of its deterrent effect on railway employees and in helping railroads determine if a particular accident was caused by drug use or some other factor.²⁶⁴ Thus, the Court found the government’s interest “compelling.”²⁶⁵ In *Acton*, Justice Scalia, writing for the majority, defined “compelling” as “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.”²⁶⁶ The Court there found deterring drug use among schoolchildren to be compelling given that the children were in the care and temporary custody of the school and that the effects of drugs are most severe on children.²⁶⁷ The Court also thought it important that the concern was immediate as “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, that [d]isciplinary actions had reached epidemic proportions, and that the rebellion was being fueled by alcohol and drug abuse as well as by the student’s misperceptions about the drug culture.”²⁶⁸

Additionally, the program in *Acton* was narrowly tailored to school athletes who were both the role models of the school that led the drug

259. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 833 (2002); *Acton*, 515 U.S. at 658; *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 620–21 (1989).

260. *Earls*, 536 U.S. at 833.

261. See *id.*

262. See *id.* at 833–34; *Acton*, 515 U.S. at 658.

263. See *Skinner*, 489 U.S. at 628–30.

264. See *id.*

265. *Id.* at 628.

266. *Acton*, 515 U.S. at 661.

267. See *id.* at 661–62.

268. *Id.* at 662–63 (internal quotation marks omitted).

culture and more at risk of physical harm because drug use increases the likelihood of sports-related injuries.²⁶⁹ In *Earls*, the Court found the random drug testing program “reasonably effective” in ensuring the safety and health of the students.²⁷⁰ In *Chandler*, on the other hand, the Court found that even if there had been a special need, the drug testing scheme was not an effective means of preventing candidates for office from using drugs.²⁷¹ The candidates knew in advance of the drug testing program and could schedule the drug test on their own time.²⁷² They could easily stay “clean” for the purpose of the drug test and then resume drug use, even when in office.²⁷³ In *Skinner*, as well, the Court noted that it was important to the program’s effectiveness that the employees did not know when they were to be tested as a train accident is an unpredictable occurrence.²⁷⁴

IV. LINN STATE’S SUSPICIONLESS DRUG TESTING PROGRAM

A. *The ACLU Files Suit: Barrett v. Claycomb*

On September 14, 2011, the American Civil Liberties Union and the ACLU of Eastern Missouri brought a § 1983 federal class action, styled *Barrett v. Claycomb*, for declaratory and injunctive relief against various officials on the Linn State Technical College Board of Regents.²⁷⁵ On September 21, an amended complaint was filed.²⁷⁶ The plaintiff class representatives are four Linn State students: Michael Barrett, IV, Branden Kittle-Aikeley, Shawn Kurgas, and Jacob Curliss.²⁷⁷ All four students are newly classified degree-seeking students enrolled at Linn State for the fall 2011 semester.²⁷⁸ The defendants include Donald Claycomb, the President of the Board of Regents of Linn State, as well as seven other Board of Regents officials.²⁷⁹

The plaintiffs seek to enjoin Linn State from drug testing its students without individualized suspicion.²⁸⁰ On November 15, 2011,

269. *See id.*

270. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 837 (2002).

271. *See Chandler v. Miller*, 520 U.S. 305, 319–20 (1997).

272. *See id.*

273. *See id.*

274. *See Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 630 (1989).

275. *See Class-Action Complaint for Declaratory and Injunctive Relief, Barrett v. Claycomb*, 2011 WL 5827783 (W.D. Mo. Nov. 18, 2011) (No. 11-CV-04242-NKL), available at http://www.aclu.org/files/assets/1_-_complaint.pdf.

276. *See First Amended Complaint, supra* note 3.

277. *Id.* at 3.

278. *Id.*

279. *Id.* at 3–4.

280. *Id.* at 9.

Judge Nanette K. Laughrey, of the Western District of Missouri, certified the class under Federal Rule of Civil Procedure 23(b)(2).²⁸¹ The class consists of “current, and future, students of Linn State Technical College who are, or will be, seeking degrees or certificates at the main campus of the College in Linn, Missouri, or any other Linn State Technical College location.”²⁸²

On October 25, 2011, Judge Laughrey held a hearing on the plaintiffs’ Motion for a Preliminary Injunction.²⁸³ She granted the motion on November 18, 2011.²⁸⁴ The Order does not contain a lengthy special needs analysis, though Judge Laughrey did state:

The Court finds that there is a fair/likely chance that Defendants’ drug testing program *will fail Fourth Amendment scrutiny because it is over broad*. Many students who have been tested are not involved with heavy equipment and hazardous working conditions at the college. Therefore, *it is unlikely that Defendants have any special need to test those students*. Thus, there is a fair/likely chance that the Defendants’ drug testing program will be found to be *systemically over broad* as currently conceived.²⁸⁵

On December 16, 2011, Linn State filed a notice of interlocutory appeal.²⁸⁶ Litigation in the case continues, and it appears the United States Court of Appeals for the Eighth Circuit will be the first appellate court to ever evaluate a mass drug testing scheme geared toward ordinary college students.

B. *Applying the Framework to Linn State’s Dragnet Drug Testing Scheme*

Linn State’s assertion of a special need survives only if the need falls under the “closely guarded category of constitutionally permissible suspicionless searches.”²⁸⁷ Linn State’s drug testing program does not involve law enforcement authorities or criminal penalties.²⁸⁸ However, this only begins the analysis, as the drug testing must be a response to a

281. Order at 4, *Barrett v. Claycomb*, 2011 WL 5822382, at *4 (W.D. Mo. Nov. 15, 2011) (No. 11-CV-04242-NKL).

282. First Amended Complaint, *supra* note 3, at 4.

283. Order at 1, *Barrett v. Claycomb*, 2011 WL 5827783, at *1 (W.D. Mo. Nov. 18, 2011) (No. 11-CV-04242-NKL) [hereinafter Preliminary Injunction Order].

284. *Id.* at 2.

285. *Id.* (emphasis added).

286. Docket of Proceedings, *Barrett v. Claycomb*, 2011 WL 5827783 (W.D. Mo. Nov. 18, 2011) (No. 11-CV-04242-NKL).

287. *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

288. See OFFICE OF THE PRESIDENT OF LINN STATE TECHNICAL COLL., LSTC DRUG SCREENING PROGRAM IMPLEMENTATION PROCEDURES at ¶ 10 (2011) [hereinafter PROCEDURES], available at <http://www.linnstate.edu/drugscreening/Drug%20Screening%20Implementation%20Procedures.pdf>.

genuine threat to public safety.²⁸⁹

Linn State declares that the drug testing is meant to support its mission to “‘prepare students for profitable employment and a life of learning,’ by guiding students in the development of safe workplace habits.”²⁹⁰ Linn State adds that drug testing “is becoming an increasingly important part of the world of work.”²⁹¹ The school believes that its drug testing program “will better provide a safe, healthy, and productive environment for everyone who learns and works at LSTC by detecting, preventing, and deterring drug use and abuse among students.”²⁹² Notably, Linn State admits that it does not have large drug use issue among its student body.²⁹³ Because it admits to lacking a significant drug use problem, and because it has not instituted the drug testing program in response to a genuine threat to public safety, Linn State’s drug screening program cannot qualify as a special need.²⁹⁴ Indeed, in the current litigation, when considering the *Barrett* plaintiffs’ motion for a preliminary injunction, Judge Laughrey decided that Linn State would not suffer any harm if the status quo of not drug testing students was maintained.²⁹⁵ She noted that Linn State “has operated successfully and safely since the 1960s without drug or alcohol testing. No drug related injury has ever been identified at the College. Therefore, the balance of equities favor [sic] the status quo until resolution on a full record.”²⁹⁶

Additionally, Judge Laughrey noted the breadth of the program as the factor that influenced her decision to grant the preliminary injunction against Linn State.²⁹⁷ Linn State’s drug screening program applies to all students “who are newly classified as degree or certificate seeking at the Linn State Technical College Campus or any Linn State Technical College location and degree or certificate seeking students returning after one or more semesters of non-enrollment.”²⁹⁸ This means that for the first year of drug testing, the program will mainly affect all first-year students. Because Linn State only offers two-year associate degrees,²⁹⁹ its entire student body will be subject to mandatory drug testing within just two years. This is the most far-reaching drug testing program insti-

289. See *supra* Part III.B.1.

290. See *Drug Screening*, *supra* note 1.

291. *Id.*

292. *Id.*

293. See Preliminary Injunction Order, *supra* note 283, at 1; *Drug Screening*, *supra* note 1.

294. See *supra* Part III.B.1.

295. See Preliminary Injunction Order, *supra* note 283, at 1.

296. *Id.*

297. *Id.* at 2 (declaring that the program is “systematically overbroad”).

298. *Drug Screening*, *supra* note 1.

299. See *Linn State Technical College: Facts*, LINN ST. TECHNICAL C., <http://www.linnstate.edu/about/facts.php>.

tuted by any college and is even more expansive than the high school drug testing programs previously condoned by the Supreme Court. Many of these students, including all of the class representatives in the current litigation, are not engaged in hazardous activities and do not handle any heavy machinery on campus.³⁰⁰ Judge Laughrey's opinion seemed to imply that the drug testing program could be considered a special need if the targeted students were all engaged in some type of hazardous activity.³⁰¹ Judge Laughrey's intuition reflects *Chandler's* public safety requirement.

Assuming, *arguendo*, that Linn State's asserted reason even were a legitimate purpose to drug test its students without suspicion, a balancing of interests would favor the students' individual privacy rights. Three factors weigh in Linn State's favor. First, college students may have a slightly diminished expectation of privacy due to their choice to attend college.³⁰² Second, urine samples are collected by a private company that follows federal drug screening guidelines.³⁰³ Finally, only those with "a legitimate need to know" are informed of a student's drug test results.³⁰⁴

Regarding the lessened expectation of privacy, the diminishment is only slight and does not compare to that of student-athletes or public schoolchildren.³⁰⁵ Additionally, as noted above, a college may not condition enrollment on the waiver of a constitutional right and the lowered expectation of privacy (if lowered at all) must still be overcome by the college's need.³⁰⁶ Furthermore, while Linn State does claim to follow less intrusive federal guidelines, the nature of the intrusion is still increased by the fact that students are pulled out of class, thus disrupting the lesson.³⁰⁷ Linn State adds insult to injury by forcing students to subsidize the cost of invading their privacy by adding the cost of the drug screen to their tuition.³⁰⁸ Additionally, even giving Linn State the benefit of the doubt that those it deems to have "a legitimate need to know" really comprises a narrow group of individuals, any student who has been administratively withdrawn from the school will have a "badge of shame" on their record as it will be obvious that those who are withdrawn likely failed a drug test.³⁰⁹

300. See First Amended Complaint, *supra* note 3, at 6.

301. See Preliminary Injunction Order, *supra* note 283, at 2.

302. See *supra* Part III.B.2.

303. See *Drug Screening*, *supra* note 1.

304. See PROCEDURES, *supra* note 288, at ¶ 7.

305. See *supra* Part III.B.1.

306. See *supra* Part III.B.1.

307. See First Amended Complaint, *supra* note 3, at 6.

308. See *Drug Screening*, *supra* note 1.

309. *Cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995).

The harshness of the consequences of a positive drug screen plays a role in the balancing of individual privacy interests with those of the state.³¹⁰ In the high school cases, the penalty for failing a drug test was not being able to participate in the particular extracurricular activity.³¹¹ At Linn State, a refusal to submit to a drug screen results in an administrative withdrawal.³¹² If a student does submit to a drug screen and the result is positive, she “will have a period of approximately 45 days to rescreen and test negative to remain enrolled.”³¹³ Aside from criminal penalties, involuntary withdrawal is the most severe penalty a college can impose on its students. Perhaps if the penalty were to prohibit the student from engaging in certain dangerous activities, Linn State’s argument would be strengthened; however, the severity of the current consequences weighs against Linn State.

The only factor that can actually add any weight to Linn State’s side of the scales is the nature and immediacy of the school’s concerns and the efficacy of the drug testing program in meeting them. However, Linn State’s program fails to address an immediate concern or effectively address even a general problem of campus drug use. Linn State’s asserted purpose of developing “safe workplace habits”³¹⁴ based on the fact that drug testing is becoming more prevalent “in the world of work”³¹⁵ is tantamount to saying that because their students may be drug tested by their future employers, they should get used to it now. However, college students do not need to be trained to urinate in a cup. They are surely capable of doing it right the first time when their employers ask them to. Simply stated, there is no immediate concern.

It appears Linn State’s real purpose is to send a message to prospective employers that its students are already “clean” and perhaps subservient. Indeed, The New York Times interviewed one of Linn State’s attorneys and asked him if Linn State had a problem with graduates failing drug tests at their jobs and, if so, whether that was the reason for the drug screening program.³¹⁶ The attorney responded that although he could not give specific examples, it would not surprise him if that were true and doubted that the program would have been initiated if that were not a problem.³¹⁷ The attorney also admitted that Linn State lacks any

310. See *supra* notes 261–62 and accompanying text.

311. See *supra* notes 261–62 and accompanying text.

312. See *Drug Screening, supra* note 1.

313. *Id.*

314. *Id.*

315. *Id.*

316. Timothy Williams, *At One College, a Fight over Required Drug Tests*, N.Y. TIMES, Oct. 10, 2011, http://www.nytimes.com/2011/10/11/us/at-linn-state-technical-a-fight-over-required-drug-tests.html?_r=2.

317. *Id.*

statistics on its graduates.³¹⁸ Whatever public relations effect Linn State's drug screening program may have on future student employment, the need is not "special," nor is it immediate enough to overcome individual privacy interests.

Additionally, the drug testing program is not even an effective means of achieving Linn State's goals. Students know approximately when they will be drug tested and can simply refrain from drug use for a brief period of time before the test. They can then resume drug use without fear of being caught. Students know that once they pass the first drug test, they will not be subject to additional testing without cause.³¹⁹ The Supreme Court criticized the drug testing program in *Chandler* as ineffective for the same reason.³²⁰ In short, the analysis of Linn State's drug testing program should not even get past the initial threshold inquiry, but even if it did, Linn State's "need" does not outweigh its students' privacy interests.

V. CONCLUSION

Some view urinalysis drug testing as "seriously embarrass[ing]," while others may view a drug test as a minor inconvenience, rather than a major threat to their constitutional liberties.³²¹ This Conclusion is addressed to the latter. Indeed, requiring a person to urinate in a cup in order to attain the benefit of higher education, conferred by the state, does not evoke the same emotions as thoughts of government agents ransacking homes in the middle of the night.³²² Some may even see

318. *Id.*

319. *Id.*

320. See *supra* notes 271–74 and accompanying text.

321. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 841 (2002) (Breyer, J., concurring). At the trial in *University of Colorado v. Derdeyn*, one student testified as follows:

Q Who was there outside the room?

A Terry, [a female trainer,] I believe.

Q Were you watched while you were providing the sample?

A No.

Q How did you feel about the process of someone standing outside while you were providing the sample?

A It bothered me.

Q Why?

A Because it's embarrassing. No one should have to watch someone else pee. It's a private thing, shouldn't be more people in the bathroom. I thought, when I came, I thought it was, you know, they made it seem so minor and it seemed like it was going to be like you go to the doctor and you pee and you put it in a little thing and they open the little door and they take it, you know. The way they made it seem, it didn't seem like it would be that bad until the meeting.

Univ. of Colo. *ex rel.* Regents of Univ. of Colo. v. Derdeyn, 863 P.2d 929, 939 n.20 (Colo. 1993).

322. Sundby, *supra* note 81, at 501–02.

college drug testing as a good policy that will deter students from using drugs at a formative time in their lives. However, constitutional analysis requires using principles to lead to outcomes, not vice versa.³²³ The special needs doctrine may have a place in Fourth Amendment jurisprudence, but it cannot be abused as a license to allow the government to engage in suspicionless searches whenever individualized suspicion is inconvenient. Getting a warrant is always an inconvenience, as is gathering enough evidence to show probable cause. But these are inconveniences that are constitutionally mandated.³²⁴ While Linn State's drug testing program may be well intentioned, it is not constitutional. As Justice Brandeis famously remarked, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, *well-meaning* but without understanding."³²⁵

"No one would want to live in an Orwellian world in which the government assured a drug-free America by randomly testing the urine of all its citizens."³²⁶ The Supreme Court has not created a drug testing exception to the Fourth Amendment, but rather a very limited special needs exception.³²⁷ Drug testing ordinary college students without any individualized suspicion, like mass fingerprinting, opening the mail, or searching off-campus houses of college students, is not a special need. Rights are slowly eroded, not fully taken away at once.³²⁸ The erosion begins when "immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."³²⁹ As Justice Marshall noted, "principles of law, once bent, do not snap back easily."³³⁰ Allowing even a minor inconvenience, where public safety is not imme-

323. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989).

324. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.").

325. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (emphasis added), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). Though it is somewhat cliché to conclude an article on the Fourth Amendment by quoting from Justice Brandeis's dissent in *Olmstead*, an attempt to articulate these ideas more eloquently would be futile.

326. Am. Fed'n of Gov't Emps., *AFL-CIO v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993).

327. See *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (noting that the special needs exception is a "closely guarded category of constitutionally permissible suspicionless searches").

328. See *Boyd v. United States*, 116 U.S. 616, 635 (1886) ("[I]llegitimate and unconstitutional practices get their first footing in . . . silent approaches and slight deviations from legal modes of procedure."), *overruled on other grounds by Warden v. Hayden*, 387 U.S. 294 (1967).

329. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 654 (1989) (Marshall, J., dissenting) (quoting *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)).

330. *Id.* at 655.

diately threatened, opens the door for further suspicionless searches and expands a doctrine that is supposedly based on a status of being special, extraordinary, and limited. As one Fourth Amendment scholar observed, “[t]oo often, what might seem at worst a minor misstep at the time turns out, when viewed from the clearer perspective provided by the passage of time, to have been a step over the cliff.”³³¹

Justice Brandeis instructed that in order to protect our “right to be let alone,”³³² “every unjustifiable intrusion by the government upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment,” and we should “be most on our guard to protect liberty when the government’s purposes are beneficent.”³³³ Teeth must be given to the label of a “closely guarded”³³⁴ exception to individualized suspicion; otherwise, many pages of the U.S. Reports would be reduced to meaningless rhetoric rather than law.

While admittedly Linn State’s drug screening program is a far reach from indiscriminately searching people’s homes, this is an indiscriminate search of people’s bodies. The thought of citizens lining up to prove to the state that they are law-abiding by sacrificing even a thread of their bodily integrity is anathema to the adversarial process of our system of justice. Investigation, individualized suspicion, and a presumption of innocence are inseparable from that system. We cannot sacrifice constitutional principles because under a certain set of facts a particular outcome seems appealing.³³⁵ We must engage in the analysis methodically to arrive at the result that comports with our Constitution.

331. Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of A Patron Saint*, 94 MICH. L. REV. 2553, 2581 (1996).

332. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled* by *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). Brandeis believed this right to be “the most comprehensive of rights and the right most valued by civilized men.” *Id.*

333. *Id.* at 478–79 (emphasis added).

334. *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

335. *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004) (“Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. *Cf. Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (requiring that police demonstrate individualized suspicion that a suspect is armed before frisking him). Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence—rather than potentially effective, broad, prophylactic dragnets—as the constitutional norm.”).