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When the Cure is Worse than the Disease: Student Random Drug Testing & Its Empirical Failure

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WHEN THE CURE IS WORSE THAN THE DISEASE: STUDENT RANDOM DRUG TESTING & ITS EMPIRICAL FAILURE

Susan P. Stuart*

When I asked my Education Law students this past semester whether student drug testing was effective, I was nearly laughed out of the lecture hall. I was particularly interested in their responses because most of them had matriculated after 1995, when the United States Supreme Court decided *Vernonia School District 47J v. Acton*,¹ so they were in a better position than I to have encountered student drug testing while they were attending school. Some were even former teachers whose experiences further supported the general proposition that student drug testing is an exercise in futility.

This reaction by my students dovetailed with scholarship I recently completed on the proposition that the Court's recent resurrection of the *in loco parentis* doctrine is an inappropriate legal justification for limiting public school students' constitutional rights.² By their responses, my students signaled that not only has the Court relied on improper legal analysis for limiting student rights in general but that, perhaps, the Court has relied on improper factual analysis in at least one particular area, student drug testing. My former thesis relied on the Court's analysis as being incorrect as a matter of law. My thesis for this Symposium was whether the Court has also erred as a matter of fact, that is, to examine whether the Court's willingness to permit increasingly intrusive invasions into student privacy under the Fourth Amendment was factually justified.

Thus, my overall thesis embracing both pieces of scholarship makes the alternative arguments that any good litigator might make, specifically with regard to the narrow question of student drug testing. Those arguments posit that, first, the Court's approach to student drug testing under the Fourth Amendment is wrong as a matter of law.

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¹ 515 U.S. 646 (1995).

² Susan P. Stuart, *In Loco Parentis and the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. ____ (forthcoming 2010).

Second, and the subject of this Symposium piece, that the Court's approach to student drug testing in particular is now wrong as a matter of fact. The latter argument suggests that the current evidence on the deterrent and curative effects of drug testing in schools does not support the Court's holding in either *Vernonia* or *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.³ When empirical studies conclude that student drug testing is ineffective, its use constitutes an unreasonable search under the Fourth Amendment because there is no longer any reasonable notion that student drug testing will accomplish its purpose of detecting student drug use and a school administration cannot sustain a state's assertedly heightened (much less compelling) state interest to overbalance students' Fourth Amendment rights.

I. PRIMER ON STUDENT SEARCHES AND THE WAR ON DRUGS

The genesis of the student drug-testing movement is the 1985 case of *New Jersey v. T.L.O.*⁴ Regardless of the ultimate fate of student drug testing, this Fourth Amendment student-search case will likely remain for the foreseeable future as justification for actions taken by a school administrator who believes an individually "suspicious" student is engaged in wrongdoing. But in 1995, the Court took an analytical detour under the Fourth Amendment and upheld random drug testing on a "suspicious" student population in *Vernonia*. A few years later, the breadth of that ruling led the Court to expand a school district's power to randomly test a group of students who were not "suspicious" at all. This strange arc reached its ultimate, yet oddly logical, end when the Court finally limited the intrusiveness of student searches in *Safford Unified School District #1 v. Redding*, where a school administrator submitted a female middle-school student to a strip search focused on prescription-strength ibuprofen.⁵ The long and short of this strange journey is that the middle of this route no longer has a factual rationale.

In *New Jersey v. T.L.O.*, a fourteen-year-old freshman suspected of violating a school rule that prohibited smoking challenged a school administrator's ability to search her purse. During the course of his search for cigarettes, the school administrator found rolling papers and, upon still closer examination, a small amount of marijuana, a pipe, empty plastic bags, money, and documentary evidence of drug dealing.⁶

³ 536 U.S. 822 (2002).

⁴ 469 U.S. 325 (1985).

⁵ 129 S. Ct. 2633 (2009).

⁶ *T.L.O.*, 469 U.S. at 328.

The Court upheld the search—despite the prohibition against warrantless and unreasonable searches under the Fourth Amendment—by recounting the special circumstances of public schools and the teacher-student disciplinary relationship, thereby carving out a special public school search-and-seizure analysis.

That analysis measured the reasonableness of a student search by balancing the invasiveness of the search with the need for the search, i.e., the individual's right of personal security and legitimate expectations of privacy versus the state's "need for effective methods to deal with breaches of public order."⁷ In the public school context, the analysis purportedly balances the child's legitimate expectation of privacy against the state's substantial interest "in maintaining discipline in the classroom and on school grounds."⁸ As a consequence of the special circumstances of public schools, the Court dispensed with the Fourth Amendment's warrant requirement because the exigencies of schools and the flexibility administrators need to deal quickly with student discipline make warrants especially inapt.⁹ The Court modified the need for probable cause to reasonable suspicion: whether the search was justified at its inception and whether it was reasonable in scope.¹⁰ Thus, a school administrator could be justified at the inception of a student search if she has reasonable grounds to believe that the search will turn up evidence of a violation of a school rule or of the law. As for the second prong of the test, the scope of the student search is reasonable if it is "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."¹¹ Subjected to that analysis, the search of T.L.O. did not violate the Fourth Amendment.¹²

Narrowly framed to address a school administrator's suspicion of an individual student's wrongdoing, *New Jersey v. T.L.O.* presaged the Court's arming itself to do battle with drugs in public schools. As the Court particularly noted, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."¹³ The Court was therefore girded for war when a small school district in Oregon decided to take that next step

⁷ *Id.* at 337.

⁸ *Id.* at 339.

⁹ *Id.* at 340.

¹⁰ *Id.* at 341.

¹¹ *Id.* at 342.

¹² *Id.* at 342 n.8.

¹³ *Id.* at 339.

in testing the boundaries of the Fourth Amendment's unreasonable search prohibition.

The small logging town of Vernonia, Oregon, began experiencing serious drug problems in its schools in the mid-1980s. Because of the limited entertainment options in such a small town, high school athletics played a large part in community life. However, the athletes played a large part in the glamorization and use of illegal drugs, which eventually led to a breakdown in school discipline.¹⁴ After several attempts to address the problems through drug education programs—special classes, speakers, seminars, theatrical presentations—and drug-sniffing dogs,¹⁵ the school district adopted a drug-testing program blessed by the community. The school district directed its program at the athletes by conducting pre-participation and random urinalyses throughout the sports seasons.¹⁶

When a challenge to the program reached the Court, it once again appealed to the “special needs” of schools, this time to further narrow the reach of the Fourth Amendment's unreasonableness inquiry in balancing the individual's constitutional rights against a “legitimate” state interest.¹⁷ Because Vernonia's drug-testing protocol addressed a target population rather than individualized suspicion, the Court went to great pains to justify the lack of reasonable suspicion at the heart of the search and scrambled to define a state interest that would work. Here the Court refused to require that public schools provide a “compelling” government interest akin to that in its adult drug-testing cases¹⁸ and determined that the state's interest must be “*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

¹⁴ Acton v. Vernonia Sch. Dist. 47], 796 F. Supp. 1354, 1356–57 (D. Or. 1992).

All of the teachers who testified at trial expressed how appalled and helpless they felt as students increasingly expressed their attraction to, and vocal defense of, the use of drugs. Students boasted about drug use and regaled one another with stories of the latest “high” or “party”. Class decorum suffered . . . Outbursts of profane language during class, rude and obscene statements directed at other students, and a general flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol typified a usual day . . . Drug paraphernalia was confiscated on school[] grounds, and open use of drugs was observed at a local cafe across the street from the high school.

Id.

¹⁵ *Id.* at 1357–58.

¹⁶ *Id.* at 1358.

¹⁷ Vernonia Sch. Dist. 47] v. Acton, 515 U.S. 646, 652–53 (1995).

¹⁸ Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

privacy.”¹⁹ No longer fettered by an inquiry as to the reasonableness of a search at its inception, the Court’s analysis of a student search’s reasonableness now balanced the nature of the students’ privacy interest against the character of the intrusion in light of the “nature and immediacy” of the state’s concern.

The Court’s new balancing test rested first on the school’s “special needs” and the character of the student-athletes’ privacy rights. Here, student-athletes’ genuine expectations of privacy could be curtailed by the school’s “custodial and tutelary responsibility for children.”²⁰ The Court reasoned that the student-athletes voluntarily subjected themselves to a higher degree of regulation than other students by the very fact of having gone out for sports; they should necessarily have a lower expectation of privacy. The Court’s reasoning stressed that a urinalysis is not very intrusive on those expectations. Analogized to vaccinations required in public schools to protect students, urinalyses are also designed to protect the student-athletes’ classmates²¹ with only a minimal invasion of privacy.²² Indeed, the Court asserted, this type of search was one that a reasonable tutor or guardian might undertake.²³

As the counterpoint in its balancing analysis, the Court’s examination of the state’s “heightened” interest in administering these tests embraced four factors: (1) deterring drug use in the targeted group; (2) controlling the disruptive influence in the educational function caused by the users; (3) protecting the non-users in the school from being “infected” by the users; and (4) protecting the health and safety of the targeted group—student-athletes—from immediate harm visited upon them by both using drugs and participating in sports.²⁴ The Court refused to “quantify” the state’s interest, especially by agreeing that the school district’s interest had to be compelling. However, the Court concluded that “[w]hether that relatively high degree of government concern is necessary in this case or not, we think it is met.”²⁵ Ironically, nowhere in its analysis did the Court look for evidence that student drug testing works to accomplish any of these goals.²⁶

¹⁹ *Vernonia*, 515 U.S. at 661.

²⁰ *Id.* at 656.

²¹ *Id.*

²² *Id.* at 658–60.

²³ *Id.* at 665.

²⁴ *Id.* at 661–63.

²⁵ *Id.* at 661.

²⁶ The district court mentioned the trial testimony of a Dr. DuPont: “The testimony of Dr. DuPont was particularly persuasive on the significant deterrent effects that a random drug testing program can have on a youthful population.” *Acton v. Vernonia Sch. Dist.* 47], 796 F. Supp. 1354, 1363 (D. Or. 1992). As more fully explained below, *infra* note 58, Dr. DuPont’s 1992 testimony was at best unsupported because of the lack of current supportive

1060 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

Having loosed the hounds with its *Vernonia* opinion, the Court was clearly primed for questions about more extensive random student drug testing posed to it by *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*. In that case, a school district implemented a random and suspicionless drug-testing program for all middle school and high school students involved in extracurricular activities.²⁷ *Vernonia* provided the template for the Court's analysis in *Earls*; however, the *Earls* analysis was even more elastic in determining that public school students' Fourth Amendment rights can be supplanted simply because the United States is engaged in a "war on drugs."

In this case, the Court relied again on the school district's special needs and its custodial and tutelary responsibilities to weaken its students' Fourth Amendment expectations of privacy. However, the Court placed an even lower burden on the state to fulfill its heightened interest. Indeed, the state's proof is almost ephemeral, due in no small measure to the fact that the school district in *Earls* targeted a suspicionless student population in a school with no discernible drug problem, in contrast to the *Vernonia* School District. The Court relied only on the general notion that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."²⁸ Almost as after-thoughts, the Court noted that the school district's interest in deterring drug use and protecting student health and safety also proved the "nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them."²⁹ No effort was made to show that the school district was concerned about the disruption of the educational function or about protecting other students from the "evils" of drug use by the targeted group. The result is that a school district can now justify its government interest in support of student drug tests merely by evoking a judicially hysterical response to the "war on drugs."

That hysteria became so contagious that the Court recently had to reap what it had sown in *Safford Unified School District #1 v. Redding*.³⁰ There, a school administrator—pursuant to a school rule prohibiting the nonmedical use of any type of drug on school grounds—authorized the

evidence and at worst inherently incredible. The Supreme Court, however, never mentioned this testimony at all. The evidence for the Court's assertion of the worth of student drug testing in the war on drugs is nowhere mentioned in its opinion but was apparently assumed and without foundation.

²⁷ Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 826 (2002).

²⁸ *Id.* at 834.

²⁹ *Id.*

³⁰ 129 S. Ct. 2633 (2009).

strip-search of a female middle school student for prescription-strength ibuprofen.³¹ But common sense prevailed, and the Court quantified the reasonableness of individual searches as first set out in *New Jersey v. T.L.O.*: a student search based on individualized suspicion is reasonable at its inception only if there is “a moderate chance of finding evidence of wrongdoing.”³² Unfortunately, the *Safford* decision seems an island of rationality compared to the fervor with which many school districts have embraced student drug testing as a means to combat the war on drugs.

II. STUDENT DRUG TESTING DOES NOT WORK

Vernonia and *Earls* unfettered any number of preexisting restraints on school districts to combat the Great War on Drugs with random student drug testing. They now see their powers as nearly limitless so long as courts accept, at face value, that searches are an effective weapon in that war. This truth is assumed, often by citation to the Court itself: “Finally, we find that testing students . . . is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”³³ Unfortunately, the Court had no evidence before it to make such a factual finding, and the current research reveals there is no evidence to support the proposition that drug testing is an effective weapon in the war on drugs. Consequently, there is no factual basis for a reasonable guardian or tutor to administer such a test nor a factual basis for otherwise supporting any school district’s government interest as defined by *Vernonia* and *Earls*. And without a valid government interest, there is no legal justification for allowing random student drug testing under the Fourth Amendment—much less any economic justification for all the federal, state, and local funds spent on such programs.

If *Vernonia* were the Holy Grail by which school districts aspire to cure their drug problems, then it would be only fitting that one might look to the success of the Vernonia School District’s random drug-testing program. Its high profile made it the city on the hill. However, one looks in vain for any meaningful study measuring the effectiveness of

³¹ *Id.* at 2639–40.

³² *Id.* at 2639. The Court ultimately determined that the school administrator had qualified immunity from liability because lower courts’ decisions did not sufficiently communicate to school administrators that such a search would violate the Fourth Amendment. *Id.* at 2643–44. On the other hand, one might imagine that the school administrator felt few constraints in his behavior in light of the Court’s conviction that any measure taken in the war on drugs would trump the Fourth Amendment regardless of the circumstances vis-à-vis the Court’s rhetoric in *Vernonia* and *Earls*.

³³ *Earls*, 536 U.S. at 837.

1062 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

that program. Only anecdotal evidence suggests the policy “was . . . effective because some teachers noted a decrease in drug use and an improvement in discipline.”³⁴ Clearly, this is not a roaring endorsement of a random drug-testing policy.

Until around 2003, the only “scientific” evidence available to examine the effects of student drug testing came from small studies done at individual school districts, at individual schools, and at one adolescent outpatient clinic, the last of which was deemed unreliable because its subjects were not randomly selected. These studies tended to be self-congratulatory rather than objective, but remain the backbone of advocacy for drug-testing programs. Surveys of student-athletes subject to Vernonia-like policies revealed a mixed bag of results because nearly half of the participants believed testing does not deter usage.³⁵ Finally, a small study of school superintendents’ opinions showed only that more than half of them believe student drug testing is ineffective.³⁶

Given the costs involved, one might assume that by now, fifteen years after *Vernonia* was handed down, school districts would demand data about the effectiveness of student drug testing programs before implementation or adoption. If such demands were actually made, school districts might decide that committing thousands of dollars to these programs would be a waste of money.

The only large—and professionally defensible—study conducted to date on the efficacy of drug testing concluded that these programs have no statistical effect on student drug use. This 2003 study examined nationally representative student data provided by the Monitoring the Future study (supported by the National Institute on Drug Abuse) and school characteristics data provided by the Youth, Education, and Society study (supported by the Robert Wood Johnson Foundation). The data spanned five years and included nearly 100,000 students from 894 schools. Students were eighth graders and high school sophomores and seniors, who filled out extensive questionnaires on their drug usage and related behaviors and attitudes.³⁷ During the five years of the study, 18.8% of the schools in the study reported using student drug testing.³⁸ The results of the study are succinct:

³⁴ Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O’Malley, *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use* 3–4 (Youth, Educ. & Soc’y Occasional Papers No. 2, 2003), available at <http://www.yesresearch.org/publications/occpapers/YESOccPaper2.pdf>.

³⁵ *Id.* at 4–5.

³⁶ *Id.* at 6.

³⁷ *Id.* at 7–8.

³⁸ *Id.* at 11.

There are . . . no significant differences in marijuana use or the use of other illicit drugs as a function of whether or not the school has (a) drug testing of any kind, (b) drug testing of students based on cause or suspicion, or (c) drug testing of athletes. Nor is there evidence that the heavy drug-using segment of the student population, specifically, is deterred from using marijuana or other illicit drugs by random or for-cause testing.³⁹

But even more notable were the study's bleak conclusions about schools that had a random-testing policy for *all* students.

Although the five-year study included only seven schools with all-school, random drug testing, the absolute differences—statistical significance was difficult to extrapolate from such a small sample—yielded dismal results for critics of the researchers' original study.⁴⁰ “[I]f we took the observed values to be true, they would suggest only a 5% to 7% reduction in the prevalence of marijuana use associated with testing and, disturbingly, a larger proportional *increase* in the use of other drugs, after controlling for the kinds of students and schools involved.”⁴¹ The researchers did not conclude that drug testing would never work under any circumstances but instead that the most “promising” (and popular) types of student drug testing—random testing of all students and of student-athletes—“did not produce encouraging results.”⁴² In fact, the study revealed that high school seniors were *more likely* to both smoke

³⁹ *Id.* at 15.

⁴⁰ This study was the second conducted by these researchers in the same year, 2003. The earlier study covered four years and 76,000 students. Ryoko Yamaguchi, Lloyd D. Johnston, & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 159–60 (2003). The government, via the National Institute on Drug Abuse, funded part of that first study. *Id.* at 159. The Bush II White House was not happy with the negative conclusions from this study and demanded that the researchers go back to the drawing board to add all-school, random drug-testing programs to the mix. Yamaguchi et al., *Drug Testing*, *supra* note 34, at vii; Ryan Grim, *Blowing Smoke: Why Random Drug Testing Doesn't Reduce Student Drug Use*, SLATE, Mar. 21, 2006, www.slate.com/id/2138399/. Drawing from a more extensive sampling of students and adding all-school programs, the researchers came to the same conclusion. Yamaguchi, et al., *Drug Testing*, *supra* note 34, at 15. As the first study states, “[w]hile lack of evidence for the effectiveness of drug testing is not definitive, results suggest that drug testing in schools may not provide a panacea for reducing student drug use that some (*including some on the Supreme Court*) had hoped.” Yamaguchi et al., *Relationship*, *supra*, at 164 (emphasis added).

⁴¹ Yamaguchi et al., *Drug Testing*, *supra* note 34, at 15.

⁴² *Id.* at 16.

marijuana and abuse illicit drugs within twelve months in schools with random drug testing.⁴³

A more recent study also conducted by reputable experts revealed similarly negative results for random drug testing of student-athletes. This 2007 study—one part of the so-called SATURN research—was a two-year, head-to-head comparison of five “intervention” high schools that had implemented a random drug and alcohol testing program against six “control” high schools that had deferred implementing such a policy.⁴⁴ The results were mixed, with significant negative findings. Intervention schools reported a deterrent effect in “past-year” student-athlete drug use compared to the deferred-policy schools. However, there was no deterrent effect for “past-month” use. In addition, an implemented policy appeared to increase risk factors for future substance abuse, consistent with the results of an earlier, smaller study.⁴⁵ Of equally grave concern was the increased use of anabolic steroids during the study at the intervention schools. The intervention schools’ athletes also recorded less positive attitudes about the benefits of drug testing.⁴⁶ As a result, these researchers opined that “[m]ore research is needed before [drug and alcohol testing] is considered an effective deterrent for school-based athletes.”⁴⁷

Taking its cue from the empirical evidence, even the National School Boards Association (“NSBA”) is skeptical about the efficacy of drug

⁴³ *Id.* at 31. See Jennifer Kern et al., Amer. Civil Liberties Union & Drug Policy Alliance, *Making Sense of Student Drug Testing: Why Educators Are Saying No 3* (2d ed. 2006), available at http://www.drugpolicy.org/docUploads/drug_testing_booklet.pdf; Grim, *supra* note 40.

⁴⁴ This SATURN study’s parameters included schools that did not have a drug-testing policy in place and required that one be adopted. Linn Goldberg et al., *Outcomes of a Prospective Trial of Student-Athlete Drug Testing: The Student Athlete Testing Using Random Notification (SATURN) Study*, 41 J. ADOLESCENT HEALTH 421, 421 (2007) [hereinafter Goldberg et al., 2007 Study]. These researchers—Dr. Linn Goldberg and his colleagues—conducted an earlier study in 2003. Linn Goldberg et al., *Drug Testing Athletes to Prevent Substance Abuse: Background and Pilot Study Results of the SATURN (Student Athlete Testing Using Random Notification) Study*, 32 J. ADOLESCENT HEALTH 16 (2003) [Goldberg et al., 2003 Study]. The results of that first SATURN study were questioned because it covered only one year and only two schools and because of the high attrition rate of post-testing questionnaires from the targeted student-athletes. Yamaguchi et al., *Drug Testing*, *supra* note 34, at 5. That study also raised some research ethics issues because the drug testing required by the study “resulted in higher negative attitudes toward school and greater risk factors for using illicit drugs among [drug-tested] athletes, contrary to what the program intended.” *Id.* That first SATURN study apparently was suspended by the federal government because of these methodology problems. Kern et al., *supra* note 43, at 3.

⁴⁵ Goldberg et al., 2007 Study, *supra* note 44, at 421, 426.

⁴⁶ *Id.* at 426–27.

⁴⁷ *Id.* at 421. That pronouncement could not have been good news for the government—the National Institute on Drug Abuse—which funded the study. *Id.* at 428.

testing: “The data are mixed regarding the efficacy of student drug testing programs, so the response . . . depends on who is answering.”⁴⁸ The NSBA sets out very general arguments for both sides of the student drug-testing debate and, ironically, focuses on the opposition advocacy of both the American Civil Liberties Union and the American Academy of Pediatrics. If the NSBA stakes out no particular position in this controversy, then one would think that school districts might take a second or third look at what could be an expensive yet ineffective weapon against student drug abuse.⁴⁹

As a matter of fact, the number of schools and school districts actually implementing drug-testing programs is relatively small although not insignificant. From 1998 through 2001, the percentage ranged from just over 14% of schools, peaking at just over 23% in 2000 then down to approximately 16% in 2001.⁵⁰ According to a 2006 survey, approximately 12% of the nation’s school districts had testing programs with an additional 10% considering them.⁵¹ If the vast majority of school districts seem to think these drug tests are not worth the candle, why do some school districts still insist on having them?

⁴⁸ Nat’l Sch. Bds. Ass’n, *Student Drug Testing* 4 (2005), available at <http://www.nsba.org/MainMenu/SchoolBoardPolicies/NSBAFederalGuidanceDocuments/StudentDrugTesting.aspx>.

⁴⁹ See also Karen Walker, *The Principals’ Partnership, Research Brief: Drug Testing* (2005), available at <http://www.principalspartnership.com/drugtesting407.pdf>. Drug tests can range from \$14 to \$30 per test, depending upon the quality of the test and the drug being sought. Steroid tests cost approximately \$100 while more sophisticated tests used by the NCAA—requiring a higher standard of accuracy—cost more than \$200 each. Yamaguchi et al., *Drug Testing*, *supra* note 34, at 1. Those tests suggested as efficacious by the National School Boards Association include a “5-panel screen” urinalysis test for marijuana, opiates, amphetamines, cocaine, and PCP—costing \$15 to \$30—and more comprehensive tests for testing hair, sweat, and oral fluids. Kern et al., *supra* note 43, at 10; NSBA, *Student Drug Testing*, *supra* note 48, at 7–8. The NSBA has noted that hiring a school substance abuse counselor would cost just about the same amount of money as that expended on a testing program. *Id.* at 10. This cost-saving measure was implemented by an Ohio school district that canceled its drug testing program because it cost \$35,000 per year at a cost of approximately \$3200 for each of the eleven positive hits from testing 1473 students. Kern et al., *supra* note 43, at 11; NSBA, *Student Drug Testing*, *supra* note 48, at 10 n.16.

⁵⁰ NSBA, *Student Drug Testing*, *supra* note 48, at 3. See also Chris Ringwalt et al., *Random Drug Testing in US Public School Districts*, 98 AM. J. PUB. HEALTH 826, 827 (2008) (determining that 14% of the nation’s school districts had random drug testing in at least one school during academic year 2004–05).

⁵¹ Victoria Clayton, MSNBC, *Growing Up Healthy: Debate over Drug Testing* (Sept. 21, 2007), <http://www.msnbc.msn.com/id/20631668/>.

1066 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

III. READ MY LIPS: STUDENT DRUG TESTING DOES NOT WORK [REALLY!]

Two particular interest groups—the Bush II White House and the drug-testing industry—have convinced a third that student drug testing is an effective tool in deterring drug abuse in the public schools. They have gulled desperate school administrators to buy into student drug testing. Although there are a myriad of ways in which the first two have led the third astray, professionally elicited proof of effectiveness is not one of them.

For reasons that are not readily apparent, the Bush II administration invested heavily to increase school districts' participation in drug testing of students as a deterrent to drug abuse by subsidizing state grants for such programs.⁵² In 2003, approximately \$8 million was allocated for drug-testing programs while the President's 2004 State of the Union Address requested \$23 million for testing⁵³ and additional millions for the 2006 budget.⁵⁴ In its 2007 budget, the Bush II administration asked for \$15 million for random student drug testing.⁵⁵ The White House followed up on its investment by funding the original Monitoring the Future empirical study in 2003. Then, when the original study yielded negative results on student drug testing as a deterrent, the White House demanded a second study to expand its parameters to include schools where all students were subject to random testing. When that study only confirmed the earlier results, the White House devised its own rating system, the Program Assessment Rating Tool ("PART"), administered by the Office of Management and Budget. However, even PART deemed the grant-funding program for student drug testing to be ineffective: "The [Safe and Drug Free Schools State Grants] program has failed to demonstrate effectiveness in reducing youth drug use, violence, and crime."⁵⁶ Nevertheless, the White House continued to tout student drug testing long past the time the evidence revealed its ineffectiveness.

⁵² Eric Martin, *Does Drug Testing Actually Deter Student Drug Use?*, IND. PREVENTION RESOURCE CTR. (2007) www.drugs.indiana.edu/news-featured_detail.aspx?seq=2.

⁵³ Walker, *supra* note 49, at 1. See *School Drug Testing Grants Raise Question About Role of Intervention*, ALCOHOLISM & DRUG ABUSE WKLY., Oct. 30, 2006, at 1, 2. Ironically, the federal grants distributed to schools for drug testing cannot be used for substance abuse treatment. *Id.*

⁵⁴ NSBA, *Student Drug Testing*, *supra* note 48, at 2.

⁵⁵ Floralynn Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL'Y 231, 232 (2007); Grim, *supra* note 40, at 1.

⁵⁶ Grim, *supra* note 40, at 2.

With a stake of nearly a billion dollars,⁵⁷ the drug-testing industry has had no small part in promoting the continuation of government funding. One of its tools has been a government-funded study conducted by a former White House drug czar, Robert L. DuPont, who is also a partner in a company that manages workplace drug and alcohol testing. DuPont's study examined nine schools specifically selected because they already had a "successful" program in place and asked those schools' administrators to describe how effective their programs are.⁵⁸ The positive results of the study were a foregone conclusion, but the pro-drug-testing forces hail it for its detailed support for the effectiveness of random drug-testing programs.⁵⁹ This particular study is also noteworthy because no one else—especially reputable, objective researchers—seems to cite its results.

Questionable studies and results have also emerged from Indiana as early as 2002 and have also attained totemic significance for drug-testing advocates. The first such study merely tabulated the results of school

⁵⁷ Larry K. Brendtro & Gordon A. Martin, Jr., *Respect Versus Surveillance: Drug Testing Our Students*, 15 RECLAIMING CHILD. & YOUTH 75 (2006).

⁵⁸ Grim, *supra* note 40, at 3. Robert L. DuPont, Inst. for Behav. & Health, *Commentary: Reflections on Random Student Drug Testing Supreme Court Case: Both Support and Criticisms Remain* (2009), available at <http://www.ibhinc.org/pdfs/PottawatomieCommentary1023.pdf>. That researcher, Robert L. DuPont, recently "reaffirmed" the positive attributes of random student drug-testing and is in fact touting random drug testing of all students, calling it "an inexpensive component of a school's drug prevention program" and claiming it "is not disruptive or controversial and is welcomed by the large majority of the school communities as an effective component [in] their schools' efforts to help students make the most of their opportunities in their educations and in their lives." *Id.* DuPont, a former White House drug czar, has been characterized as an advocacy researcher who will reach desired outcomes to advance his agenda. Brendtro & Martin, *supra* note 57, at 79. Interestingly, a Dr. DuPont's testimony was instrumental in the district court's granting judgment to Vernonia School District in *Acton v. Vernonia School District 47*, 796 F. Supp. 1354, 1357, 1364 (D. Or. 1992). According to the district court,

DuPont testified that, although some people display outward manifestations of drug or alcohol use, many others do not, making application of the reasonable and individualized suspicion standard an unreliable and impractical tool to aid in preventing accidents before they happen. Thus, random drug urinalysis testing was seen as the next logical step in a progressive attempt to address the drug and alcohol problems.

Id. at 1364.

⁵⁹ C.E. Edwards, *Student Drug-Testing Coalition, Student Drug-Testing Programs: An Overview & Resource Guide* 17-18 (2008), available at <http://www.studentdrugtesting.org/DEA%20SDT%20booklet.pdf>. Grim, *supra* note 40, at 4. Indeed, Grim describes and quotes DuPont, the author of the study, as one who "doesn't claim neutrality. 'I can't quite get the argument that [drug testing] wouldn't work.'" *Id.* at 4. It is also noteworthy that a significant number of the board members of the Student Drug-Testing Coalition, which is a leader in the student drug testing movement, represent the drug-testing industry and specifically denominated testing companies. *Id.* at 5.

1068 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

administrators' questionnaires. Given the source of the results, these questionnaires naturally elicited responses that were favorable to continued drug testing and concluded that student drug use increased after the programs stopped.⁶⁰ Follow-up studies by this same researcher in 2003, 2004, and 2005 "confirmed" the 2002 results. The absence of control schools that other researchers have used suggests some inherent problems in the design of the study and therefore questions about its validity.⁶¹ In addition, the results themselves—that the programs had no long-term deterrent effect—confirm the inherent ineffectiveness of student drug testing because of the acknowledged resumption of student drug and alcohol abuse when the programs were canceled.

Despite statistically reliable and valid evidence to the contrary, the pro-drug-testing contingent—with all that money at stake—cherry-picks information to depict only positive results rather than reality. For instance, one such advocacy group published a compilation of studies in 2008, all positive. That compilation is notable for the absence of any of the 2003 empirical research done with the Monitoring the Future data. That compilation also touts the pilot SATURN study and its preliminary "positive" findings, which were later determined to be statistically useless,⁶² but failed to cite the negative conclusions in the 2007 SATURN follow-up. The pro-drug-testing group, in selectively citing only the positive SATURN results, clearly ignored the overall evaluation of its lead researcher:

Dr. Linn Goldberg...likens testing to a doctor prescribing an experimental blood pressure medication instead of one that has been proven effective. He and other drug abuse experts say that the message that drug prevention is evidence-based and certain programs work has not been heard. Instead, billions of dollars have been squandered on programs without scientific merit that do not work... "Why would you ever say, 'We know something that works, but let's try something that we don't know works'?" says Goldberg.⁶³

⁶⁰ Joseph R. McKinney, *The Effectiveness and Legality of Random Drug Testing Policies* (2002), available at <http://www.studentdrugtesting.org/McKinney%202002%20survey%2008.pdf>.

⁶¹ Einesman & Taras, *supra* note 55, at 264–65; EDWARDS, *supra* note 59, at 19–21.

⁶² EDWARDS, *supra* note 59, 22–23.

⁶³ Clayton, *supra* note 51, at 2. See also Kern et al., *supra* note 43, at 26 n.2 (discussing one researcher's belief that drug testing does not limit consumption). Dr. Goldberg has also

Acting as an interest advocate in this way would probably not be objectionable if so much government money were not at stake and if people of good will were not desperately seeking any solution that might curb drug abuse in the public schools.

The members of the third interest group, the ones on the ground dealing with the face-to-face realities of drug abuse among students, are school administrators. They will tack to any port in the storm if they think it will provide a solution to their role in the war on drugs. The faux studies advanced by both the Bush II administration and the drug-testing industry give school administrators something to grasp onto. They seem willing to suspend skepticism if they can convince themselves that student drug testing is effective at reducing their problems in schools. But some school administrators are not that credulous:

Even Ed Lyskowinski, the superintendent of Rush County [Indiana] Schools, a genial man who wears an American flag pin and a bottle-brush haircut, agrees that drug testing is not really teaching kids why they shouldn't do drugs. But there's only so much schools can do, he says. "I'm not sure drug testing will address the root reasons kids do drugs," he says. "We're addressing a symptom. We're mirrors of society, and these are societal problems, and schools are only one of many ways to address societal problems."⁶⁴

The dangers in this merely cosmetic approach to a very serious problem are the misconceptions, misperceptions, and mistakes inherent in the limits of drug testing, not to mention the very real harms that students have experienced as a result.

IV. FIRST, DO NO HARM

The first of several problems with student drug testing is its inability to anticipate adolescent tastes. Drug use among adolescents is cyclical, and schools that rely on drug testing as a deterrent have usually neglected the root causes of adolescent drug abuse, especially those schools that acknowledge that their drug testing program has no long-term impact on drug use. In addition, this failure to anticipate trends in

analogized the use of student drug testing to "experimental surgery that's never been shown to work." *Id.*

⁶⁴ Janelle Brown, SALON, Why Drug Tests Flunk (April 22, 2002), www.salon.com/life/feature/2002/04/22/drug_testing/print.html.

1070 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

adolescent drug use likely attributes any deterrent “success” of student drug testing to factors that are actually out of schools’ control.

For instance, the rate of twelve-month drug use by high school seniors fell from nearly 50% to just under 30% between the late 1970s and 1992. However, between 1992 and 2002, the rate rose again to hover around 41%.⁶⁵ Five years later, the National Institute on Drug Abuse’s 2008 adolescent drug use statistics show only a slight decline in past-year use of any illicit drug to 36.6%, a fairly stable four-year statistic.⁶⁶ These numbers do not seem to correlate well to any presumed impact of *Vernonia* (1995) and *Earls* (2002).

Researchers opine a couple of causes for these cycles, which have particular pertinence to the claim that drug testing is ineffective. First, cycles of drug abuse tend to be drug-specific. A drug becomes the drug *du jour* based on its word-of-mouth benefits; the drug’s adverse consequences are slower to circulate. Consequently, a “new” drug of choice will spike in use until its harms are better known. Therefore, prevention efforts must focus on a drug-by-drug strategy,⁶⁷ a dynamic for which drug testing must necessarily lag behind. The drug-user generational “memory” is also cyclical. In addition to their attraction to new drugs, adolescents also return to golden oldies of which the current generation has no bad experiences. LSD and methamphetamines, popular during the 1960s, made a comeback in the 1990s.⁶⁸ Current concerns are the resurgence of the 1970s’ popularity of PCP and the 1990s’ Ecstasy.⁶⁹ The current adolescent population perceives less risk in LSD use, but at the same time they possess decreased perceptions of the harms in and disapproval of marijuana and inhalants.⁷⁰ Perhaps more problematic is that this adolescent generation shows an upward trajectory for abuse of prescription drugs compared to the use of street drugs, impelled in no small part by consumer advertising that implies their use and acceptance as widespread and risks of their use as low.⁷¹

⁶⁵ Yamaguchi et al., *Drug Testing*, *supra* note 34, at 1.

⁶⁶ Nat’l Inst. on Drug Abuse, U.S. Dep’t of Health & Human Servs., *NIDA InfoFacts: High School and Youth Trends 3* (2008), <http://www.drugabuse.gov/pdf/infofacts/HSYouthTrends08.pdf>. According to the numbers compiled by the Monitoring the Future study, nearly half of all high school seniors (47.4%) had used illicit drugs before graduation. *Id.* Worse, 71.9% had used alcohol. *Id.*

⁶⁷ L.D. Johnston, P.M. O’Malley, J.G. Bachman, & J.E. Schulenberg, Nat’l Inst. on Drug Abuse, *Monitoring the Future: National Results on Adolescent Drug Use: Overview of Key Findings 2008*, at 6 (2008), available at <http://www.drugabuse.gov/PDF/overview2008.pdf>.

⁶⁸ *Id.* at 6–7.

⁶⁹ *Id.*

⁷⁰ *NIDA InfoFacts*, *supra* note 66.

⁷¹ Johnston et al., *supra* note 67, at 7.

Nothing in the “research” of the pro-drug-testing cohort suggests that student drug testing can keep up with these cycles.

A second, and perhaps as deadly, problem with continuing the charade of drug-testing effectiveness is the adolescent desire to fool the tests and continue abusing drugs without getting caught. Teens can readily access numerous free resources for information on how to pass a drug test: “A quick Internet search for ‘pass drug test’ yields nearly four million hits, linking students to websites selling drug-free replacement urine, herbal detoxifiers, hair follicle shampoo and other products designed to beat drug tests.”⁷² One, titled “Fooling the Bladder Cops,” is a 1995, *Vernonia*-era compilation of resources and tips on how to pass drug tests, providing information on the amount of time it takes certain drugs to pass through a subject’s system, testing methods and standards, and lists of commercial products advertised as capable of removing evidence of drug use from testing samples.⁷³ As this technologically savvy drug-using population develops and “as random drug testing in schools grows, so will the black market for ways to fool the test. Clean urine samples and masking products with names such as UrinAid, THC Free and Instant Clean are already available.”⁷⁴ In addition, students experiment with homemade remedies to mask or change the test results, sometimes dangerously so.⁷⁵ In any event, basic knowledge informs students that most drugs are out of their systems within forty-eight hours so they are savvy enough to wait until after drug-testing day to indulge.

Related to fooling the tests is the third problem with drug testing, the limitation on their accuracy:

⁷² Kern et al., *supra* note 43, at 20. See Office of Nat’l Drug Control Policy, *What you Need to Know About Drug Testing in Schools* 14 (2002), available at http://www.ncjrs.gov/ondcppubs/publications/pdf/drug_testing.pdf (discussing various ways that students cheat on their drug test). Drug-testing proponents, of course, pooh-pooh the efficacy of these drug-masking efforts. *Id.* “Most of these masking products do not work, cost a lot of money, and are almost always easily identified in the testing process. But even if the specific drug is successfully masked, the product itself can be detected, in which case the student using it would become an obvious candidate for additional screening and attention.” *Id.* This attitude would seem to be wishful thinking and discounts the ingenuity of adolescents because, by the time follow-up tests are run, the drugs are out of a student’s system. *Id.*

⁷³ Justin Gombos, *Fooling the Bladder Cops* (Aug. 14, 1995), www.marijuanalibrary.org/bladder.html.

⁷⁴ Clayton, *supra* note 51.

⁷⁵ See Kern et al., *supra* note 43, at 20 (describing the dangerous methods that students may use to pass a drug test). Kern stated that “[s]tudents may also try dangerous home remedies. The president of the school board for Guymon, Okla., described a frantic parent who had caught her daughter drinking bleach.” *Id.*

1072 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

[T]esting for drugs is complex and there are many limitations. For example, if someone is using a drug not being tested for by the panel, the test will come up negative. If it's been 48 to 72 hours since the student last used, the test will likely come up drug-free. And if the specimen is adulterated, the test will not be able to detect drugs. Furthermore, prescription drugs interfere with tests. Just drinking two half-liter bottles of plain water will dilute the urine so much that it'll drive detection of substances below detection level.⁷⁶

The confluence of these problems means that student drug testing rarely provides positive results as to individual students. One Ohio school district garnered only eleven positive results from 1473 student tests, at a "success" rate of 0.7%.⁷⁷ Another school district spent \$65,000 for twenty-five positive results from 11,000 students, garnering an even lower rate of 0.23%.⁷⁸ The school district in *Earls* fared no better, with a five-year success rate ranging from 0.7% in two years of testing to 1.2% in a third. In five years, drug testing 4252 students involved in extracurricular activities garnered only forty positive results, an overall 0.9% rate of return.⁷⁹

A fourth major problem with the ineffectiveness of drug testing is students' absolute lack of fear. Teenagers really do not take the tests seriously nor do they change their behavior for fear of being caught using drugs. Adolescent attitudes toward drug-testing exhibit the typical teenager's feeling of invulnerability:

Sure, some people get caught, but not me. In addition, a student who chooses to do drugs already has more than a random chance of getting caught—adults are everywhere in this world. Someone could see her, smell smoke, see her bloodshot eyes, or wonder what the hell is so funny. And since most schools test only students who do something more than just show up for

⁷⁶ Clayton, *supra* note 53 (quotation marks omitted).

⁷⁷ Kern et al., *supra* note 43 at 11; see also NSBA, *Student Drug Testing*, *supra* note 48, at 10 n.16.

⁷⁸ Walker, *supra* note 49.

⁷⁹ Lori Goat, *The Ruling: Policies Changed But Minds Never Have*, COUNTRYWIDE & SUN (Tecumseh, OK), Oct. 22, 2009, www.countwideneews.com/print_this_story.asp?smenu=100&sdetail=2031.

class . . . kids can avoid the activities rather than quit puffing.⁸⁰

In an illuminating article to highlight the futility of one Indiana school district's drug testing program, a journalist interviewed several students who attended Rushville Consolidated High School, which had a drug-testing program. Those interviews showed that the students knew how to pass the urinalysis testing protocol, from doctoring the urine to changing the drug of choice. Their avoidance measures even included the mundane and commonsensical:

Many kids are still doing drugs, but have become very wily about not getting caught. As the local teenage boys in Rushville report, kids at Rushville High have gotten quite devious in their drug taking, what with the potions and mixes. For example, the kids say that Rushville students are well aware that the drug testing trailer pulls up every month, and they time their drug binges accordingly: The day *after* the truck comes is apparently a popular time to smoke dope. For weekend binges, the students pick drugs that won't linger in their systems until Monday, such as abundant quantities of alcohol.⁸¹

Talk to the students, and they know the programs do not work. Indeed, one senior opined that approximately seventy-five percent of the senior class had tried marijuana and were rarely caught, despite a six-year testing regime that instituted random tests corraling 75% to 90% of the students. Another student pointed out that "[d]rug testing is costing a lot of taxpayer money; but anything that's going on around here would be out of your system by the time you're tested."⁸²

And some adults recognize the relative futility of these programs:

Even at Rushville . . . six years of drug testing have had no quantifiable impact on student drug use. "The numbers have gone nowhere, if the truth be known," says Fred Smith, who tracks the program and student drug use surveys for the local Drug Free Schools program. Instead, he believes that the program is successful because he hears, word of mouth, that there are fewer parties. Of course, he says, "Here in Rush

⁸⁰ Grim, *supra* note 40.

⁸¹ Brown, *supra* note 64.

⁸² *Id.*

County, drug use wasn't rampant anyway" (a fact that causes some to question why drug testing was implemented in the first place).⁸³

Unfortunately, "fewer parties" does not translate to less student drug abuse. In the face of undisputed evidence that student drug testing at best maintains the status quo and at worst creates a climate of both potential for actual harm and a blatant disregard for the educational function, one wonders why the third interest group—the school administrators—continues to believe school drug testing is an effective deterrent.

No small part of the dynamic here is the credibility attached to Supreme Court's drug-testing opinions that are taken as "truth." For example, the Indiana studies much vaunted by the drug-testing advocates quote one of Justice Thomas's "findings" in *Earls*, averring that "the U.S. Supreme Court held that mandatory random drug testing program for all students participating in extracurricular activities was a reasonably effective means of meeting the school district's legitimate concerns regarding detecting, determining, and preventing illegal drug use by students."⁸⁴ No such evidence in that opinion supported Justice Thomas's "finding." That same statement by Justice Thomas was similarly quoted by Bush II's drug czar John P. Walters in the pamphlet entitled *What You Need to Know About Drug Testing in School*,⁸⁵ and further served as the basis for the otherwise unsubstantiated affirmation that "[t]he expectation that they may be randomly tested is enough to make some students stop using drugs—or never start in the first place."⁸⁶

The problem with using case law for the truth—as legally determined facts—is that those truths are only as good as, and as related to, the actual evidence adduced at the trial level. In neither *Vernonia* nor *Earls* did the Court elucidate any facts to support the proposition that student drug testing is effective.⁸⁷ In the Court's defense, accurate

⁸³ *Id.*

⁸⁴ McKinney, *supra* note 60. See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 837 (2002) (discussing the Fourth Amendment in the context of drug testing in public schools).

⁸⁵ Office of Nat'l Drug Control Policy, *supra* note 72.

⁸⁶ *Id.* at 4.

⁸⁷ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (discussing drug testing). The trial court in *Vernonia* heard testimony from Dr. DuPont about the efficacy of student drug testing. The facts now show that Dr. DuPont's conclusions are suspect, given his advocacy role as a former drug czar and current position with a drug-testing firm. See Bensinger, DuPont & Associates, <http://www.bensingerdupont.com/index.html> (last visited Mar. 22, 2010). In any event, the Court never relied on that evidence in its *Vernonia* opinion. The *Earls* trial court, on the other hand, had no evidence of drug testing's

empirical evidence that student drug testing is not actually effective post-dated both decisions. But for the drug-testing advocates, the Court's "factual" statements are taken at face value rather than as just opinions rendered on the limited evidence submitted. As a consequence, the drug-testing advocates have staked the basis of their arguments on the imprimatur of the Supreme Court as the "scientific" arbiter in the debate. Today, we know that the Court's factual statement—underpinning the effectiveness of student drug testing as a school's weapon in the war on drugs—is inaccurate.

V. LAW IS NOT FAITH-BASED

The "factual" assertion that student drug testing is an effective deterrent has been proved unsupportable, and indeed false, by empirical and anecdotal evidence. This evidence reveals that student drug testing does not change student drug usage in any way and may, instead, cause more harm than good to the educational function. Students escape detection by changing their drug of choice or changing the time when they indulge. They find ways to mask or change the test results, sometimes dangerously so. As a last resort, students turn to alcohol, clearly not a result that schools would have hoped to happen or what they would have encouraged.⁸⁸ And the results of even the advocates' favorite studies show no long-term deterrence. Teenagers will defy authority no matter what—it is a precondition for being adolescent: "In one Louisiana school district, students who were facing a hair test shaved their heads and body hair, making a mockery of the drug testing program."⁸⁹ The educational function of schools is subverted in such circumstances, hardly a goal that any school district would advocate in favor of student drug testing. Indeed, the Court has always been very solicitous of schools' educational function.

More to the point is the vacuum on the side of the school district in balance against students' Fourth Amendment rights. This absence of evidence eliminates the Court's inquiry into the reasonableness of the

effectiveness whatsoever. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1282–83 (W.D. Okla. 2000). When faced with the issue of the drug-testing policy's effectiveness in addressing the state's interest, the court baldly asserted the following: "It can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs." *Id.* at 1295. That bald assertion is, of course, without basis in fact or reality.

⁸⁸ See also *NIDA InfoFacts*, *supra* note 66 (stating the results of survey that asked students about previous drug use); Walker, *supra* note 49 (discussing the mixed research in drug testing). As noted above, nearly 75% of students have used alcohol before graduation. *Id.*

⁸⁹ Kern et al., *supra* note 43, at 20.

searches and undercuts the *raison d'être* for imposing this intrusion into their students' privacy rights: not only is there no custodial nor tutelary justification for student drug testing, there is no state interest in implementing these tests, whether legitimate, heightened, or compelling.

With regard to the first, the Court swapped out the individualized suspicion test—at inception and in scope—for an examination of a school's custodial and tutelary responsibilities. A search pursuant to such responsibilities, the Court surmised, would be reasonable and therefore justify an invasion of student privacy under the Fourth Amendment. So would a reasonable tutor or custodian search a child if that search is not likely to turn up *any* evidence of drug usage? The undisputed evidence indicates that there is not even a 1% chance that a drug test will come up positive. A school administrator would be hard-pressed to describe that type of search as reasonably custodial or tutelary, especially in the face of more pressing economic needs of a school district.

Furthermore, *Safford* suggests there must be a "moderate chance of finding evidence of wrongdoing." No court is likely to believe that a search with less than a 1% chance of yielding a positive result—even when the tested population is likely to still be abusing drugs—has a moderate chance of yielding the evidence sought. The Court's vaccination analogy breaks down here because vaccines are virtually assured of working.⁹⁰ Student drug testing is not. No reasonable custodian or teacher is likely to favor those odds. Therefore, such a search is inherently unreasonable under the Fourth Amendment.

As to the second point, a school district can no longer prove its heightened state interest in the absence of proof that the search will work. The four-part state-interest inquiry framed in *Vernonia* and adapted in *Earls* relies on the school's asserted interests in (1) deterring drug use in the users; (2) protecting other children in the school from this "evil"; (3) stopping the disruption of the educational function; and (4) assuring the health and safety of the users in the targeted population. A search that does none of these things cannot be relied on by the state to justify anything, much less a Fourth Amendment violation, and is, *prima facie*, unreasonable.

Regarding the first asserted state interest, both empirical and anecdotal evidence proves that drug searches do not deter student drug use. The stark numbers in the reputable empirical studies show that

⁹⁰ See Centers for Disease Control & Prevention, Vaccines: VPD-VAC/VPD, <http://www.cdc.gov/vaccines/vpd-vac/default.htm> (last visited Mar. 22, 2010). The Department of Health and Human Services stated "vaccine-preventable disease levels are at or near record lows." *Id.*

student drug testing procedures have no statistical deterrent effect and, in some instances, increase abuse of other drugs or of alcohol. No court could justify any state interest in a search that may increase the harm. This enumerated state interest no longer withstands scrutiny.

Next, if the tested population is not deterred from using drugs, then one can safely conclude that the other children in the school are not protected from their “evil” influence. The failure of this “vaccine” in one group will most certainly not stop the spread of the disease to another. More specifically, the undisputed empirical proof indicates that school-wide random drug tests are ineffective, even when all students are “immunized.” Thus, there is no evidentiary support for the state’s second asserted interest.

As to the third justification, one cannot dispute that a school district has an important state interest in stopping disruption in the educational function caused by student drug abuse. And if drug usage and its attendant behaviors go underground because of student drug testing, there might be some palliative effect on the educational function. However, there is little to no evidence of anything more than a cosmetic effect. Therefore, it is difficult to justify these fewer disruptions if, as the studies suggest, student drug testing actually increases the harm to students who switch drugs, use dangerous home remedies, and increase their alcohol abuse. One can hardly argue any net educational advantage when students are exposed to greater dangers. Pre- and post-testing schools show no long-term deterrent effect, which one would assume is an underlying teaching opportunity and educational goal. All this as students lose even more respect for school authority.

Last, a test that does not succeed in deterring drug abuse perforce cannot protect anyone’s health and safety arising from that abuse. The facts also show very little likelihood that any particular student will test positive for drug use and thus be diverted to drug treatment programs. If the testing regimes do not have any impact on targeted groups, how much less will it be effective in the student population at large? No deterrence, no effect on health and safety. Instead, the evidence indicates increased harms arising from these programs and therefore different, if not increased, threats to student health and safety. It is hard to justify such a state interest.

A school district today cannot make a case for a state interest in imposing this type of testing on any portion of a student population. Random student drug testing programs do not—and have never—been fitted to accomplish the state’s interest sufficiently to tip the balance in its favor over students’ genuine expectations of privacy. A case brought today to challenge such a regime would wisely attack the state’s

compelling interest immediately as a matter of law with the empirical evidence and expert testimony. It may well boil down to a battle of the experts at trial because there has been little impact with amicus briefs by groups with much greater expertise in these matters than the courts.⁹¹ In addition, one faces an uphill battle to combat the underlying assumption of fact that, if the Supreme Court allows these tests, they must work. Although that assumption is false, refuting it remains a tough sell. Because courts are less likely to change their legal approach to these cases, a better solution lies in the litigation strategy itself—working within the legal framework and disproving the perceived wisdom and unproved presumptions that first landed us in this quandary. The litigant’s goal is to persuade the court that a school district has no government interest in subjecting students to a drug-testing program that does not work.

Contemporary events may also work against such arguments, despite their basis in fact. To the extent that the use of full-body scans is gaining increased favor as a method of securing safety from airborne terrorists, one confronts the assertion that we should be better safe than sorry, that these procedures are much more invasive than a mere drug test. Even assuming that that is a valid justification for searches that are only as good as the most recent crisis, they do not create affirmative harms like student drug-testing programs do. But a program that is a toothless—and perhaps a dangerous—weapon in the serious effort to curb student drug abuse does not fulfill any of the state’s asserted goals and is unreasonable as a matter of law. These programs must be abandoned and supplanted with something that works.

VI. FOR THE GREATER GOOD

Schools are obligated to do their best to reduce student drug usage, especially if one accepts the proposition that schools have a civic duty to teach students to be responsible and socially useful citizens. Teaching students about the harms of drug abuse and deterring that abuse fit neatly within that proposition. If student drug testing—an easily

⁹¹ See Briefs of Amici Curiae for Bd. of Educ. of Indep. Sch. Dist. No. 92; Pottawatomie County v. Earls, 536 U.S. 822 (2002) (No. 01-322) (listing the various groups who filed amicus briefs). Various amici curiae opposed to student drug testing in *Earls* included American Academy of Pediatrics, National Education Association, American Public Health Association, National Association of Social Workers, NASW-Oklahoma Chapter, National Council on Alcoholism and Drug Dependence, Center for Law and Education, Loyola Child Law Center, and Lawyers for Children, Inc., Juvenile Law Center, Advocates for Children of New York, Children & Family Justice Center, Justice Policy Institute, National Center for Youth Law, Juvenile Rights Advocacy Project. *Id.*

implemented and relatively neutral program—does not work, then schools must explore other options. Programs that work usually require more significant commitment of time but not necessarily more economic outlay than student drug testing programs.

Successful drug prevention programs usually have an educational function and are therefore within the expertise of schools.⁹² That educational function tends not to just address the immediate discipline problems posed by student drug abuse but also reaches the root causes of that abuse and teaches long-term strategies for deterrence and prevention. “Research has shown that the strongest predictor of student drug use is students’ attitudes toward drug use and perceptions of peer use.”⁹³ The educational function—indeed, the school environment—is well adapted to teaching that message to the student population: “When testing for peer-group influences on the behaviors of drug and alcohol use, cigarette smoking, church going, and the likelihood of dropping out of high school, results indicate *strong evidence of peer-group effects at the school level for all activities.*”⁹⁴

Effective drug prevention programs have different delivery systems, different teaching methodologies, and different educational philosophies. Sometimes they must be adapted to the specific school population and the environment in which the school exists.⁹⁵ They may also have to target specific drug use.⁹⁶ There is no one-size-fits-all solution like drug-testing programs offer, which of course is part of drug

⁹² Coexistent with the educational function are the facilities that schools offer for after-school activities that keep students from abusing drugs. Extracurricular activities and athletics are often considered good deterrents from drug abuse although that might be a self-fulfilling observation because those students most likely to abuse drugs are not involved in such activities. Furthermore, extracurricular activities take place during the periods of the highest incidence of adolescent drug abuse between 3:00 and 6:00 when adult supervision is at its nadir. Students for Sensible Drug Policy, *Eliminate the Harmful and Costly Student Drug Testing Grants 1* (2008), available at <http://ssdp.org/campaigns/srp/drug-testing-backgroundunder.pdf>. There is, of course, no small irony that those students who are making an effort to avoid using drugs through extracurricular activities are those who are so often the ones targeted for random drug testing.

⁹³ Yamaguchi et al., *Relationship*, *supra* note 40, at 164.

⁹⁴ Swati Raychowdhury, Mi Kyung Jun, & E. Lisako Jones, *Adolescents’ Drug Use and Its Relationship with Beliefs on Drug Use and Perception of Peer Approval, Across Our Desks to Yours*, IND. PREVENTION RES. CENT.: ACROSS OUR DESKS TO YOURS (Aug. 2005), at 1, 2, available at http://www.drugs.indiana.edu/publications/desks/desks_2005-08.pdf (emphasis added).

⁹⁵ E.g. Chris Ringwalt & Kappie Bliss, *The Cultural Tailoring of a Substance Use Prevention Curriculum for American Indian Youth*, 36 J. DRUG EDUC. 159 (2006) (discussing racial tailoring of drug curriculum to ensure minority receptivity).

⁹⁶ Peggy C. Stephens et al., *Universal School-Based Substance Abuse Prevention Programs: Modeling Targeted Mediators and Outcomes for Adolescent Cigarette, Alcohol and Marijuana Use*, 102 DRUG & ALCOHOL DEPENDENCE 19, 27 (2009).

1080 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

testing's appeal. Some of the more comprehensive programs incorporate drug education into the science and health curricula and provide counseling and referrals to professional treatment.⁹⁷ Other programs consist only of substance abuse education that examines different teaching modalities and different content areas, such as social skills, normative education, and social influences.⁹⁸ Effective programs teach children how to make healthy choices and often create a strong, and positive, relationship to schools as a deterrent to drug use.⁹⁹ When possible, effective programs rely on parental input and involvement.¹⁰⁰

The data on the success rate of school drug abuse intervention programs are mixed, but even the worst programs perform significantly better than random drug testing. The data certainly support the proposition that particularly popular tactics—like those used in the Vernonia School District before drug testing was imposed—do not work, such as celebrity speakers, values clarification, “Just Say No” programs, and fear.¹⁰¹ Statistically successful programs interlace approaches, in some combination of drug education, norms shaping, and skill building. Their success is a result of focus on deterring both drug use and other delinquent behavior while improving academic performance.¹⁰²

In assessing the effectiveness of education-based drug prevention programs, the anecdotal evidence as well as the empirical data are positive.¹⁰³ Moreover, these programs do not have to constitutionally

⁹⁷ Kern et al., *supra* note 43, at 21–22.

⁹⁸ See, e.g., Substance Abuse Prevention Curriculum Guide, Handbook, www.preventioncurriculum.com/handbook/preface.cfm (last visited Mar. 22, 2010) (discussing what appears in the substance abuse handbook).

⁹⁹ See Robert Wood Johnson Found., School-Based Prevention (Oct. 2, 2007), www.rwjf.org/pr/product.jsp?id=49732 (discussing different methods of school based drug-prevention programs, that do not include random drug testing).

¹⁰⁰ Marsha Rosenbaum, *Experience, Research Show Testing Doesn't Work*, ATLANTA J.-CONST., June 8, 2003, available at www.drugpolicy.org/library/dtfrosenmaum.cfm.

¹⁰¹ Martin, *supra* note 52.

¹⁰² *Id.*

¹⁰³ See e.g. Heddy Kovach Clark et al., *Project “SUCCESS” Effects on the Substance Use of Alternative High School Students*, 35 ADDICTIVE BEHAVIORS 209 (2010) (discussing Project SUCCESS, a drug prevention and outreach program); Eric F. Wagner et al., *Implementing School-Based Substance Abuse Interventions: Methodological Dilemmas and Recommended Solutions*, 99 ADDICTION 16 (2004) (reviewing literature on drug problems in schools, and presenting potential problems and their solutions); National Institute On Drug Abuse, *Preventing Drug Abuse Among Children and Adolescents: Examples of Research-Based Drug Abuse Prevention Programs*, <http://www.drugabuse.gov/prevention/examples.html> (last visited Mar. 22, 2010) (discussing different drug prevention and awareness programs); Substance Abuse and Mental Health Services and Administration, *Substance Abuse Prevention: 2007 Winners*, <http://www.samhsa.gov/scienceand service/sap.aspx> (last visited Mar. 22, 2010) (discussing different successful drug prevention and awareness programs in 2007). See also NSBA, *Student Drug Testing*, *supra* note 48 (discussing student

justify themselves as reasonable and effective under the Fourth Amendment. School districts' failure to turn to these more effective programs in combating the war on drugs is due, in no small measure, to the Court's assertion that student drug testing is a viable weapon in the drug-fighting arsenal. It is not. As a result, schools are failing their students by not taking full advantage of more demonstrably effective weapons.¹⁰⁴ To the extent that schools continue to implement student drug testing programs based on that reliance, they are fooling themselves and perhaps doing greater harm than good.

drug testing, generally). The NSBA also lists several programs of differing proven usefulness and supplies a compendium of resources, such as the National Student Assistance Association, National Institute on Drug Abuse, National School Counselors Association, Drug Policy Institute, and the Substance Abuse and Mental Health Services Administration. *Id.* at 9-10.

¹⁰⁴ See e.g. Dana L. Wenter et al., *Comprehensiveness of Substance Use Prevention Programs in U.S. Middle Schools*, 30 J. ADOLESCENT HEALTH 455 (2002) (discussing middle school substance abuse programs).