

QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676 or contact him by e-mail at kmcdowel@doe.state.in.us.

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DRUG TESTING OF STUDENTS: JUDICIAL RETRENCHING ON THE “SLIPPERY SLOPE”

When the U.S. Supreme Court decided Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995), upholding the random drug-testing of student athletes through urinalysis, the majority in the 6-3 decision indicated that its decision addressed student athletes.¹ Justice Antonin Scalia, writing for the majority, wrote: “We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.” 115 S.Ct. at 2396. Justice Ruth Bader Ginsburg, in her concurring opinion, reiterated that the majority opinion is reserved to drug-testing of those who seek to engage in sports and not “on all students required to attend school.” 115 S.Ct. at 2397. Vernonia involved a demonstrated need for some interdiction along with the failure of lesser intrusive means to address the problems the school district was experiencing. Because of the nature of athletics, there is a lesser expectation of privacy, the school’s proposed method for collecting the urine was not overly intrusive, and the nature and immediacy of the governmental concern was demonstrable. Although commentators warned that Vernonia should not be read too broadly,² school districts began to broaden such policies and procedures. Indiana’s federal judiciary is particularly noteworthy.

Schail v. Tippecanoe Co. Sch. Corp., 864 F.2d 1309 (7th Cir. 1988), a pre-Vernonia case, upheld a drug-testing policy designed to address health and safety factors inherent in athletic participation and cheerleading. The 7th Circuit, however, expressed reluctance to extend random, suspicionless drug testing through urinalysis beyond athletic participation and cheerleading, specifically indicating such searches may be improper “of band members or the chess team.” Schail, 864 F.2d at 1319.

However, the 7th Circuit did not express such reservations when it decided Todd v. Rush Co. Schools, 133 F.3d 984 (7th Cir. 1998), *cert. den.*, 525 U.S. 824, 119 S.Ct. 68 (1998), affirming the school’s drug-testing policy that included all extracurricular activities as well as driving privileges at the school. Although the empirical data was, by the court’s admission, “somewhat slight,” the court nevertheless found favor with a drug-testing regime that included not only athletics and cheerleading but the Student Council, Fellowship of Christian Athletes, Future Farmers of America, and the Library Club. A student who did not consent to the drug-testing program could not participate in extracurricular activities nor

¹See “Suspicionless Drug Testing: Frontiers of ‘Constitutional Muster,’” Recent Decisions 1-12: 1998; “Drug Testing Beyond *Vernonia*,” Quarterly Report January-March: 1998; and “Drug Testing and School Privileges,” Quarterly Report April-June: 1999.

²See, for example, “Beyond *Vernonia*: When Has A School District Drug Testing Policy Gone Too Far?”, 131 Ed.Law Rep. 547, 557 (W. Bradley Colwell, 1999). Also see Lawrence F. Rossow and Jerry R. Parkinson, *School Law Reporter* (March 1998): “To extend suspicionless searches from school athletes to all participants in extracurricular activities is no small step. If the step can be taken from athletics to all extracurricular activities by relying on Vernonia, it seems easy to take the next logical step—require drug testing of the entire student body.”

drive to school.

The Supreme Court in Vernonia, in balancing legitimate privacy interests with the demonstrated legitimate governmental interests, found the following favorable with respect to the suspicionless drug-testing program: (1) it screened only for illegal drugs; (2) the screen was uniformly applied and did not vary according to the identity of the student; (3) the results of the tests were disclosed only to a limited class of school personnel who had a need to know; and (4) the results were not turned over to law enforcement authorities or used for any internal disciplinary function. 115 S.Ct. at 2393.

The 7th Circuit, mindful of these guidelines, found in disfavor the school's drug-testing policy employed in Willis v. Anderson Community School Corporation, 158 F.3d 415 (7th Cir. 1998), *cert. den.*, 526 U.S. 1019, 119 S.Ct. 1254 (1999). Willis was not engaged in any school-sponsored extracurricular activities when he became subjected to the school's drug-testing policy. He had been involved in a fight with another student. Because this involved a suspension, he was required by the school's policy to be tested for drug and alcohol use. He refused and, as a consequence, was suspended again. If he refused to submit to the test upon his return from his second suspension, he would be deemed to have engaged in unlawful drug use and would be suspended a third time, pending expulsion. The 7th Circuit noted that the policy lacked the voluntariness and restricted use to extracurricular activities inherent in other cases. "[I]n *Vernonia* and *Todd* drug testing could be construed as part of the 'bargain' a student strikes in exchange for the privilege of participating in favored activities. In the present case, however, such testing is a consequence of unauthorized participation in disfavored activities." 158 F.3d at 422. Although the expectations of privacy by students attending a public school are less than the population as a whole, "their privacy interest is nonetheless stronger than that of the students discussed in *Vernonia* and *Todd*." 158 F.3d at 421. A goal of mere deterrence from drug and alcohol use is insufficient to support a suspicionless drug-testing program. Even though a suspicionless approach will "round up" more wrongdoers, "the Supreme Court has not sanctioned blanket testing. Nor has it renounced the proposition that the Fourth Amendment normally requires individualized suspicion." 158 F.3d at 422-23.

No Joy In Mudville: The 7th Circuit Revisits Todd

This growing skepticism of expanding drug-testing policies carried over to the next Indiana case the 7th Circuit entertained. On May 12, 2000, the 7th Circuit released its opinion in Joy v. Penn-Harris-Madison School Corporation, 212 F.3d 1052 (7th Cir. 2000). Although it upheld, for the most part, the school's drug-testing program, it did so with reservation bordering on reluctance, opining that it may have made a mistake in the Todd case.

In 1998, the school instituted School Board Policy 360: Student Testing for Drugs, Alcohol and Tobacco. The purpose for the policy centered on the health, safety, and welfare of employees and students. The policy also reiterated that participation in extracurricular activities is considered a privilege and not a right. All students in extracurricular activities received a copy of the policy and were required to attend at least one drug education session before engaging in the extracurricular activity. Each student (and each student's parent or guardian) was to sign and return a consent form that would allow the school

to conduct the drug testing. Failure to return the form precluded participation. The policy also addressed student drivers. In order to receive a permit to park on school grounds, a student had to pay a \$15.00 fee, provide proof of a valid driver's license, and sign and return the aforementioned consent form.³

The policy defined five (5) groups of students for drug testing:

1. All students that participate in extracurricular activities. Activities will include all athletic teams, music groups, academic competitions, clubs and organizations. A full listing of activities will be provided. These students will be part of a pool of students that will be randomly selected for testing.
2. All students who drive to school. These students will also be part of the random pool.
3. All students and staff who volunteer to be part of the random pool.
4. All students who are suspended from school for three consecutive days for student misconduct or substantial disobedience. These students must submit to a drug test before being allowed to return to school.
5. All students for which [sic] there is a reasonable suspicion of being under the influence of drugs or alcohol must submit to a mandatory test.

212 F.3d at 1055. Students who refused to take the drug test were deemed to have admitted they were under the influence of drugs or alcohol and in violation of school rules. A positive test result would validate usage and would likewise result in school-based disciplinary action, although the court termed such consequences as “ambiguous.” At 1056. There were consequences detailed for “in-season” and “out-of-season” offenses, including expulsion from the activity or team for the school year. Tobacco use would result in a one-year probation, but the second offense would result in expulsion from the activity or team. For student drivers, any documented abuse would result in a forfeiture of the parking permit and possible further school-based discipline. “The consequences for a student driver over 18 whose test results reveal the presence of nicotine are not mentioned.” *Id.* Notwithstanding, a school official said there would be no school-based discipline based upon a positive test result under this policy. At 1057.

The procedure followed generally acceptable methods for collecting random samples; screened for the

³The 7th Circuit in Todd, 133 F.3d at 985, *n.* 1, observed that its decision did not address the constitutionality of the drug-testing program as applied to a student's right to drive to and from school because the issue was not presented on appeal.

presence of alcohol, nicotine, and controlled substances; results were shared with parents and students (for first and second positive results); and confidentiality was protected by ensuring results were limited to those with a “need to know.” Id.

The 7th Circuit acknowledged the line of Supreme Court cases that recognized drug-testing as a search under the Fourth Amendment, but that such a search can be reasonable where the government demonstrates a “special need” beyond the normal need for law enforcement, that makes the warrant and probable cause requirements impracticable. When such a “special need” exists, courts are required to “balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.” At 1058, quoting Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 619, 109 S.Ct. 1402 (1989). The Supreme Court has determined such “special needs” exist within the public school context because the warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed, and strict adherence to a probable cause standard would undercut the need to maintain order in the schools. Id., citing Vernonia, 515 U.S. at 653 and New Jersey v. T.L.O., 469 U.S. 325, 340-41, 105 S.Ct. 733 (1985). In Vernonia, as noted *supra*, the Supreme Court found a “special need” in preventing student athletes from using drugs and upheld the legitimacy of suspicionless drug testing of the athletes. From Vernonia, five (5) factors have emerged for courts to consider when balancing intrusion on an individual’s Fourth Amendment interest and the search’s promotion of a “legitimate governmental interest”:

1. What is the nature of the privacy interest upon which the search intrudes?
2. What is the character of the intrusion on the individual’s privacy interest?
3. What is the nature of the governmental concern at issue?
4. What is the immediacy of the government’s concern? and
5. What is the efficacy of the particular means in addressing the problem?

At 1059. Although the methodology presented to the Supreme Court in Vernonia was absent in the Todd case, the 7th Circuit still accepted the stated reasons for the drug-testing policy: successful participation in extracurricular activities requires healthy students; extracurricular activities—and not just athletic participation—constitute a privilege and voluntary participation; students in extracurricular activities often assume leadership roles in the school; the health and safety of the students need to be protected; and drug use needs to be deterred. At 1061.

Although the school in Joy relied upon the Todd decision, the 7th Circuit stated that “[w]e do not believe that the result in Todd is compelled by the Supreme Court’s decision in Vernonia. Therefore,... if we were reviewing this case based solely on [Supreme Court precedent], we would not

sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities.” At 1062-63. Nevertheless, because Todd was precedent, the 7th Circuit affirmed the judgment of the federal district court in favor of the school, except as to the nicotine testing of students over the age of 18 years. At 1063. Pertinent findings of the court are as follows.

- In Vernonia, the student-athletes had a lesser expectation of privacy due to the nature of sports in general, which entail physical examinations and a degree of “communal undress,” as the Supreme Court described it. Although other students in extracurricular activities other than athletics likewise volunteer for certain groups and agree to the rules regarding those groups, “those rules do not require the same surrender of physical privacy as required of the student athletes in *Vernonia*. In the case of students driving to school, the contrast is even more stark. Overall, the expectation of privacy for students in extracurricular activities or with parking permits, although less than the general public, is still greater than the expectation of privacy for athletes.” Id.
- In order to justify the type of intrusion sought as a “special need,” the government needs to demonstrate some correlation between the defined population and the abuse. “Here, however, the School has not proven, or even attempted to prove, that a correlation exists between drug use and those who engage in extracurricular activities or drug use and those who drive to school.” The lack of such a correlation distinguishes this case from Vernonia “in which the evidence demonstrated that the athletes were the leaders of the drug culture. Thus, counsel for [the School] is admitting that, at least in this respect, the district is attempting to do what this court in *Willis* admonished against: dividing the students into broad categories and drug testing on a category-by-category basis, which allows for drug testing for all but the most uninvolved and isolated students. See *Willis [v. Anderson Community Schools]* 158 F.3d [415] at 423. In fact, at oral argument, counsel announced that the goal is to test all students on a random, suspicionless basis.” At 1064. However, the school “has not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities.” At 1065.
- The court acknowledged that there is a “legitimate and pressing need for drug and alcohol testing of students driving vehicles on school property” because the “mass exit of students after classes into the relatively close confines of a student parking lot, one student under the influence of drugs or alcohol could cause serious injury or death.” At 1064. However, the testing for nicotine is not so easily justified. The school’s policy legitimately forbids the use of tobacco products on school grounds, but tobacco use at home by a student over the age of 18 years is legal. “[I]f a student smokes at home, leaves the cigarettes at the house, drives to school, and is drug tested, the results would reveal the presence of nicotine. This student could be subject to sanctions under [the School’s] policy for a perfectly legal activity.” This, the court concluded, “goes too far,” especially where the school has not documented “any serious risks associated with a student driving while using a tobacco product.” Id.

- Although the Supreme Court allowed in Vernonia that individualized suspicion would be difficult and potentially litigious as a predicate to drug-testing, this did not permit the implementation of a random program on a suspicionless basis as long as it would test a large subset of the entire school population.” The Supreme Court has indicated in other drug-testing cases “that suspicionless drug testing without evidence of a drug problem by the targeted groups should not be used if suspicion-based drug testing is possible.” This, the 7th Circuit added, was a point emphasized in Willis. Although the court allowed that individualized suspicion “would be impossible for the school” in determining which students entering or exiting the school premises were using drugs or alcohol, the school “made no showing that teachers, staff and sponsors of extracurricular activities would not be able to observe the students for suspicious behavior.” The danger of students driving to and from school “is well-defined, and the efficacy of testing on individualized suspicion is hardly an adequate preventive measure against the possibility of real and immediate injury... With respect to random testing of those who participate in extracurricular activities, we believe that, according to the methodology employed by the Supreme Court in *Vernonia*, there has been an inadequate showing that such an intrusion is justified.” At 1065.
- Notwithstanding the finding of inadequate basis for the intrusion, the 7th Circuit upheld the policy. “[T]he judges of the panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court’s recent precedent in *Todd*. Given that the opinion in *Todd* was issued only two years ago, that the facts of our case do not differ substantially from the facts in *Todd*, that the court in *Willis* reaffirmed the basic principles in *Todd*, and that the governing Supreme Court precedent has yet to address the matter, we believe that we must adhere to the holding in *Todd* and affirm the district court’s grant of summary judgment for the School as it relates to testing students involved in extracurricular activities.” At 1066.
- “[W]e caution against reading the opinion in *Todd* too broadly.... The scope of *Vernonia* remains undecided today. Until we receive further guidance from the Supreme Court, we shall stand by our admonishment in *Willis* that the special needs exception must be justified according to the methodology set forth in *Vernonia*. Under that approach, the case has yet to be made that a urine sample can be the ‘tuition’ at a public school.” At 1066-67.

The 7th Circuit denied rehearing on July 11, 2000. Plaintiffs have sought review by the Supreme Court.

The State Court Weighs In

Until August 21, 2000, all drug-testing cases involving Indiana students were federal court decisions. On that date, the Indiana Court of Appeals issued Linke v. Northwestern School Corporation, 734 N.E.2d 252 (Ind. App. 2000), finding unconstitutional under Indiana law the drug-testing policy

instituted by the school for extracurricular activities and driving privileges.

The school's policy was directed at protecting the health and safety of students. There were some empirical data that showed an increase in drug and alcohol use among the students at the school, but "the statistics did not dramatically alarm [school] officials to conclude that drug use was particularly affecting school discipline at [the school]." At 253. A committee was formed after two students died from drug overdoses while a recent graduate, who was using inhalants, was killed in a car accident. The intent was to prevent future tragedies rather than combat an existing drug problem. *Id.*

The school's policy applied to all students in grades 7-12 who wished to participate in athletics, certain extracurricular activities (including drama, Future Farmers of America, National Honor Society, student government, and Students Against Drunk Driving), or "co-curricular" activities.⁴

The students were required to sign a consent form before participation would be allowed. "If the student is involved in a co-curricular activity and he or she does not consent to a drug test, then the student may not participate in performances or competitions which take place outside of normal school hours, but still will receive class credit." At 254.

The school employed the usual random screenings through urinalysis, with positive results re-tested, the student and his parents advised of results, and procedures to ensure the results do not become a part of a student's educational record. *Id.*

The plaintiffs filed suit to enjoin the implementation of the program, but the trial court denied their motion for summary judgment and found instead for the school, determining that the school's policy did not violate either the Fourth Amendment of the U.S. Constitution or Article I, §11 of Indiana's Constitution.⁵ On appeal, the plaintiffs relied on Indiana law rather than federal case law. The Fourth Amendment and Article I, §11 are roughly similar in language.

⁴The court noted that the "co-curricular" activities are actually activities for which students receive class credit, such as band, choir, and solo-ensemble contests. The term "co-curricular" essentially refers to "curricular" rather than "extracurricular." The Colorado Supreme Court in *Trinidad School Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) found the extension of such policies to curricular activities (in that case, the marching band) was unconstitutional. Activities that are for class credit are not "voluntary" in the sense extracurricular activities are. In addition, there was no showing that members of the marching band had presented any difficulties nor was there a demonstrated risk of physical harm to members of the band that would necessitate, much less support, a random, suspicionless drug-testing of band members.

⁵The trial court also found that the school's policy did not violate Article 1, §23 of Indiana's Constitution, but because the Court of Appeals disposed of the case without addressing this aspect, its application to this matter will not be discussed.

Fourth Amendment

Unreasonable searches and seizures. — 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.

Article I, § 11

Unreasonable search or seizure. — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The Court of Appeals noted the textual similarities but cautioned that the analysis standard is different. The court analyzed the movement of the U.S. Supreme Court from reasonable (but still individualized) suspicion for school searches by school officials under T.L.O. to the “special needs” decisions that excused a need for individualized suspicion where there was a countervailing legitimate governmental interest that could not be served through lesser intrusive means. Vernonia is one of the latter cases.

The cases utilizing the special needs analysis have drawn extensive criticism because of the judicial “line drawing” that is required to approve or disapprove drug testing policies. The United States Supreme Court has yet to provide guidance as to what exactly a “special need” is and how the individual privacy and governmental interests involved should be weighed. [Citation omitted.] Further, the drug testing policies reviewed under the special needs analysis seem to gain “a judicial rubber stamp of approval” even though the justification for the testing is not always clear and the ineffectiveness of a suspicion based testing regime has not been established.

At 257. “Despite the criticism of the special needs analysis, an explosion of drug testing policies has occurred in public schools across the country. [Citation omitted.] Indiana schools have been at the forefront of the debate.” Id.

The “debate” has chiefly involved the Todd, Willis, and Joy cases. The appellate court noted that the 7th Circuit “stated it would rather not uphold the school’s drug testing policy for students participating in extracurricular activities or driving to school..., it was compelled to adhere to Todd because of *stare decisis*. The court cautioned against embarking upon a ‘slippery slope’ and against reading Todd too

broadly because schools seem to be testing the limits of recent case law to reach their goal of subjecting all students to suspicionless drug testing.” At 258.

The court indicated that Todd, Willis, and Joy “are representative of how Indiana school drug policies are analyzed when constitutional challenges are made upon federal grounds.” Id. However, as the court added, this dispute is to be analyzed under state—not federal—law.

“The Indiana Supreme Court has explained that when examining constitutional issues, claims based upon the Indiana Constitution should be analyzed separately from those based upon their federal counterpart in the United States Constitution.” Id. This is true even when, as here, the Indiana constitutional provision “is substantially textually coextensive” with the Fourth Amendment. Notwithstanding, “we may part company with the interpretation of the Supreme Court of the United States or any other court based on the text, history, and decisional law elaborating the Indiana constitutional right.” At 259, quoting Ajabu v. State, 693 N.E.2d 921, 929 (Ind. App. 1998).

Questions arising under the Indiana Constitution should be resolved by “examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.” *Indiana Gaming Comm’n v. Moseley* (1994) Ind., 643 N.E.2d 296, 298. When construing the constitution, “a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.” *Bayh v. Sonnenburg* (1991), Ind., 573 N.E.2d 398, 412, *cert. den.* (1992) 502 U.S. 1094 (quoting *State v. Gibson* (1871) 36 Ind. 389, 391).

At 258–59. The court noted that Article I, §11 had a predecessor in the state’s 1816 constitution that had identical verbiage. There was no significant debate over the intent of the provision. “[T]he intent of the framers was similar to that of the framers of the United States Constitution. [Citation omitted.] The intent was to protect against abuses of police power similar to those experienced in colonial times.” At 259. When the Indiana provision is considered independently from the federal provision, “there is support for the proposition that it provides greater protection than the Fourth Amendment.” Id. Previous Indiana Supreme Court decisions have recognized that Indiana’s law provides a separate prohibition against unreasonable searches and seizures, and challenges arising under Article I, §11 “should be analyzed under an independent reasonableness standard.” Id. “[T]he reasonableness of the official behavior must always be the focus of our state constitutional analysis.” Id., citation omitted.

Although there are no Indiana appellate decisions regarding random drug tests within a public school context, the reasonableness of official behavior in the conduct of the search will be analyzed against the purpose of Article I, §11, which is “to protect the areas of life that Hoosiers regard as private.” Id.,

citation omitted.⁶

The Indiana Supreme Court has stated that Section 11 must be given a liberal construction to prevent unreasonable searches and seizures. [Citation omitted.] Therefore, implicit in Section 11 is a general requirement of individualized suspicion at least with regard to school children. The framers of the Indiana Constitution intended to protect the people from abuses of police power. We see no reason to depart from requiring individualized suspicion to protect against the abuses associated with blanket suspicionless searches of school children.

Id. The Court of Appeals observed that the framers of the United States Constitution has the same concerns, but “federal law in the area of drug testing has strayed from the intent of the framers.” At 260. Although the court recognized that Vernonia and its successors extended the Fourth Amendment beyond requiring individualized suspicion, “we see no reason to similarly extend our analysis of Article I, Section 11. The Indiana Supreme Court has emphasized that we should remain consistent with the framers’ interpretation of the text. [Citations omitted.] We are strongly convinced to remain consistent, especially when in the case before us, the school does not propose a direct correlation between drug use and its need to randomly test the majority of the students for drugs.” Id.

Of the 550 students enrolled in the high school, 405 have signed the consent forms but only about 300 have become involved in extracurricular or “co-curricular” activities. The appellate court repeated the caution of the 7th Circuit in Willis that deterrence from drug and alcohol use should not be the “sole focus” because such a policy would “undoubtedly lead to blanket testing” by dividing students into several broad categories and then testing on a category-by-category basis. “Eventually, all but the most withdrawn and uninvolved students will fall within a category that is subject to testing.” Id., quoting Willis, 158 F.3d at 423. But the 7th Circuit “has been faced with internal conflicts after Todd permitted suspicionless drug testing for students participating in extra-curricular activities.” Id.

“We do not wish to create this same upheaval in Indiana,” the court concluded. At 261.

The school sought a rehearing, which the appellate court declined in a four-page decision released on October 6, 2000. Linke v Northwestern Sch. Corp., __N.E.2d__ (Ind. App. 2000). The Court of Appeals rejected the school’s argument that previous appellate court cases made Indiana law coextensive with the Fourth Amendment. Each case cited was distinguishable from the Linke facts. The Court of Appeals reaffirmed its position that reasonable suspicion is a predicate to such a search, except where “special needs” can demonstrate the impracticability of such a standard. No such “special need” was demonstrated in this case that would serve to except the usual requirements, the

⁶“Hoosiers” refers to residents of Indiana. The exact origin of the term is unknown, but it has been the subject of numerous folk etymologies, most of which are unflattering.

court concluded.

No End to the Joy

While the 7th Circuit wrestled with Joy v. Penn-Harris-Madison Sch. Corp., *supra*, a companion state court action was pending in the St. Joseph County Superior Court. On September 29, 2000, the trial court—relying on Linke v. Northwestern Sch. Corp., *supra*, found the school’s drug-testing policy violated Indiana’s constitution, Article I, §11. Joy, et al v. Penn-Harris-Madison (PHM) School Corporation, Cause No. 71D07981OCPO1368 (St. Joseph Co. Sup. Ct., 2000). “Policy 360 of the PHM School Corporation is indistinguishable in any legally significant way from the policy condemned by the Indiana Court of Appeals in Linke v. Northwestern School Corporation...,” the trial court judge wrote. The following are pertinent findings of the court.

- Although the random, suspicionless drug-testing program “applies to a substantial percentage of students,” PHM “made no finding parallel to the finding in Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) that student athletes were the leaders of the drug culture.” The court added that at PHM, students involved in extracurricular activities are less likely to be involved in the use of drugs. “In fact an assistant principal at PHS [Penn High School] stated in an interview in the school newspaper, ‘Students who don’t participate in school activities are the ones most likely to abuse drugs.’” Slip Opinion, at 3. “A student’s decision to join her school’s volleyball team, French Club and Bible study program can hardly be seen as an indication that she is abusing, or more likely to abuse illicit drugs.” Id.
- “No special need to test students who drive to school or who are involved in extracurricular activities was ever established by PHM School Corporation. They relied instead on some national and local surveys of drug use trends. Nothing ties those surveys to the categories of students subject to random testing.” Slip Op., at 4.
- School authorities can make warrantless searches of students where there exist a reasonable suspicion the search will uncover an infraction of a school rule or law. The school in this case “acknowledges it is capable of using the reasonable standard and it is part of Policy 360. Searches without reasonable suspicion are therefore unreasonable.” Id.
- The fact that a random drug-testing program would be more effective at discovering illicit drug, or alcohol, or tobacco use does not excuse the lack of reasonable suspicion. “It would be ‘more effective’ to test teachers, school administrators, the superintendent, the school board, parents of students, and visitors to the schools in addition to all students.” Slip Op., at 4-5.
- The trial court added that the 7th Circuit, in deciding the companion federal case, seemed “at times to be verbally expressing a chill running up their collective spines” because of the lack of correlation between drug use and involvement in extracurricular activities. At 5, citing to Joy,

212 F.3d at 1063. The federal court and the trial court expressed concern about the “slippery slope” of balancing constitutional rights with widespread, suspicionless searches of an “entire student population.” By permitting all students to be tested, “the element of voluntariness obviously would not be present. The danger of the slippery slope continues to haunt our jurisprudence.” At 5-6, citing *Joy*, 212 F.3d at 1066.

The trial court ordered the school to withdraw Policy 360 to the extent it permits random, suspicionless urinalysis of its public school constituents.⁷ The schools is likely to appeal the trial court’s decision.

THE DECALOGUE: THOU SHALT AND THOU SHALT NOT

On September 28, 1880, a special ceremony was conducted in Indianapolis for the laying of the cornerstone for what would become the State Capitol. The ceremony began with the playing of “American Overture” by the Biessenherz’s Band followed by a prayer by the Rev. T. H. Lynch. There were introductory remarks, the playing of the “Anvil Polka,” an oration by former Indiana Governor T. A. Hendricks, the playing of “Overture Lustspiel,” the reading of an original poem by Mrs. Sarah T. Bolton entitled “Laying The Corner-Stone,” more speeches, and then the playing of “Pinafore Waltzes.” Governor J.D. Williams then presided solemnly over the official laying of the corner stone, into which were placed forty-two (42) items. Item number 30, as detailed in the official program, was:

A card containing the Ten Commandments elegantly written in Greek and English and beautifully illuminated by Samuel Morrison, Esq., of Indianapolis, in the eighty-third year of his age. Mr. Morrison was the first white child born in the territory now comprising Dearborn County, Indiana.

The Band played Wagner’s “Nieblungen March.” The proceedings concluded with a “Prayer and Benediction” by the Rt. Rev. Joseph C. Talbot, Bishop of Indiana. Everyone went home.

No lawsuits followed.

The passing of 120 years does make a difference. The Decalogue has become embroiled in political tussles and increased judicial wariness.⁸ In California, a person sought to purchase an “advertisement”

⁷It is noteworthy that the trial court did not restrict its order to students but to “the Citizens of the State of Indiana who attend its schools.”

⁸Although the Decalogue (from the Greek, “ten words”) is more commonly known as “The Ten Commandments,” there is no precise numbering of commandments. Hence, the numbering of the

on a public high school's baseball fence where he would include the text of the Ten Commandments. The court upheld the school's refusal of the advertisement. See DiLoreto v. Bd. of Education of Downey Unified School District, 196 F.3d 958 (9th Cir. 1999), *cert. den.*, 120 S.Ct. 1674 (2000).⁹ More than forty members of an interfaith group distributed book covers bearing the Ten Commandments to students attending the Chicago public schools, but ensured that the distribution occurred off school grounds.¹⁰ Although a number of State legislatures grappled with "Ten Commandments" legislation last year, only three states—Indiana, Kentucky, and South Dakota—passed laws that were designed to permit the display of the Ten Commandments in public areas, including public schools.

The lawsuits have followed.

The Indiana Experience

Indiana has two time periods to consider in its legal analysis of displays of the Ten Commandments: pre-legislation and post-legislation.

Pre-Legislation

In 1980, the U.S. Supreme Court decided Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192 (1980), the only case by the highest court to address displays of the Ten Commandments. In Stone, the Supreme Court found unconstitutional a Kentucky law requiring the display of the Ten Commandments in public school classrooms. But the Stone case dealt with a legislative mandate, not the passive acceptance of a donated monument or legislation that permits—rather than requires—certain displays of historical significance that include the Ten Commandments.

commandments may vary somewhat among faith traditions. Drawn from *Exodus* 20: 2-14 and *Deuteronomy* 5:6-18, the Decalogue refers to the proscriptions against polytheism, idolatry, murder, adultery, theft, false testimony, and greed, while requiring reverence for God, respect for the Sabbath, and respect for one's parents. These commandments were part of the revelations to Moses as detailed in Hebrew Scripture. According to rabbinical tradition, there are 613 *mitzvot* (literally, "commandments"; singular, *mitzvah*) in the Pentateuch, the first five books of the Bible in which legal requirements are established. The Ten Commandments are the best known of these *mitzvot* (248 positive, 365 negative). *The Penguin Dictionary of Religions* (John R. Hinnells, Ed., 1984).

⁹See **Quarterly Report**, "Commercial Free Speech, Public Schools, and Advertising," October-December: 1999.

¹⁰*School Law News*, August 18, 2000, pp. 6-7.

The federal district court in Books v. City of Elkhart, 79 F.Supp.2d 979 (N.D. Ind. 1999) noted this problem at 989:

The first difficulty before the court in deciding on a test [for determining whether a display of the Ten Commandments would violate the First Amendment] is determining how to characterize the Ten Commandments. It is not exactly a religious symbol, as in challenges to displays of nativity scenes and Latin crosses, because it has a message. It is not purely a religious message, though, because it has great historical and legal significance in this county. It is close to being a religious free speech issue, but not quite, because the donation of the monument [by a fraternal group] means that it is no longer the speech of a private actor in a forum which the City has opened to the public.... In Establishment Clause analysis dealing with religious symbols and messages, context is everything.

The court was addressing a monument that was donated in 1956 by a fraternal organization. The monument contained Judaic and Christian symbols and contained the text of the Ten Commandments that attempted to include both Protestant and Catholic versions. The monument sits on the grounds of the Elkhart municipal building.

The Supreme Court in Stone v. Graham found that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths...” 449 U.S. at 41. However, other courts—and the judge in Books as well—believe that there are some secular attributes that have rendered the Decalogue a “part of our public life.” At 993, citing to Suhre v. Haywood Co., North Carolina, 55 F.Supp.2d, 384, 391-92 (W.D. N.C. 1999), and Colorado v. Freedom From Religion Foundation, 898 P.2d 1013, 1024, n. 17 (1995). The court added that the monument containing the Ten Commandments “is no more religious than the national motto, ‘In God We Trust,’ and no more pervasive than the presence of the motto on national coins and currency.” Id.

The court applied the three-part analysis established by the U.S. Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105 (1971). In order to pass constitutional muster, the challenged governmental activity: (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive entanglement with religion. Failure to satisfy any one of these three parts will render the activity unconstitutional.

The Supreme Court, in Stone v. Graham, rejected the Kentucky legislature’s stated secular purpose in requiring public school classrooms to post the Ten Commandments. The majority did not accept the argument that the Ten Commandments have had a significant impact on the development of secular

legal codes of the Western World. 449 U.S. at 45.¹¹ In Books, the purpose of the donation was well known, was by a group not affiliated with any religion, and was a national effort in the 1950's to address moral standards among the youth. The present-day purpose of the municipal government to maintain the monument—as well as the other monuments—is for cultural and historical reasons. The court found there was present a secular purpose, thus satisfying the first part of the analysis.

Whether a monument or similar display in a public area gives one the impression of government endorsement of religion depends upon the context of the display. At 1000, considering the first and second parts of the Lemon analysis under an “endorsement” analysis. The court reviewed the matter based upon what a reasonable person might perceive when viewing the monument in its context with other monuments on the municipal lawn. At 1001. That is, is the monument part of a larger display of monuments of historical and cultural importance? At 1002. Although the text of the Ten Commandments dominates the monument’s surface, a “neutral observer looking at the monument, presumed to have an awareness of its history, would know that the Ten Commandments has both religious and historical significance in this nation.” The presence of various religious symbols would likewise lead the “observer” to view this as an attempt to “acknowledge equally the significance of the major religions represented in this country at the time of [the monument’s] donation to the City.” An observer would note that the monument is “part of [the City’s] overall collection of displays of historical and cultural significance,” although the lawn is relatively small. Id. “Local municipalities,” the court added, “should be granted some latitude by the federal courts in how they arrange artistic displays in the space they have available.” The presence of the monument on the lawn of the City’s municipal building did not present an “endorsement” problem, but there was a question as to its placement near one of the main entrances to the building. However, it is not the only such monument or display. Had the lawn been a bigger area, the court mused, this would not be a significant question. Notwithstanding, the court held “that it is not an unconstitutional endorsement of religion for the City of Elkhart to acknowledge the importance of the Ten Commandments in the legal and moral development of this nation by displaying this monument in its present location on the lawn of the Municipal Building.” At 1002-03.

There was no coercion present either, the court concluded. The City does not expend any public funds

¹¹This continues to be one of the main secular reasons proffered when challenges are made to legislation that proposes the display of the Ten Commandments in a public arena. The other argument for secular purpose has been to improve the moral standards of today’s youth. See, for example, Colorado v. Freedom from Religion Foundation, 898 P.2d 1013 (Colo. 1995), which also involved the donation of a monument by a fraternal organization. The district court in Books v. Elkhart was greatly influenced by the Colorado Supreme Court’s decision, primarily because the same fraternal organization was involved, the same stated purpose for donating the monuments was proffered, the organization is not a religious one, and the program was initiated by a Minnesota juvenile court judge precisely to target wayward youth. 79 F.Supp.2d at 996.

in the maintenance of the monument, although it does ensure that the grounds are kept (but this would occur whether there was a monument there or not). In addition, no one is forced to stand in front of the monument and read its religious message. At 1005.

The court also addressed the issue of private speech on public property. It noted that the monument was donated in 1956. Within that historical context, the Ten Commandments was not considered offensive in a legal sense. The City accepted a gift, albeit a religious one, but displayed it not as a religious monument but within a larger display of items considered to be of cultural and historical significance. The City has not engaged in content-based or viewpoint discrimination; it has employed strict neutrality with respect to the displays of private speech on public property.

The City's Motion for Summary Judgment was granted, while the plaintiffs' similar Motion was denied. The case has been appealed to the U.S. 7th Circuit Court of Appeals. Oral argument was conducted on May 12, 2000. A written decision is pending.

The 2000 Session of the Indiana Legislature

The Indiana General Assembly, during the 2000 session, passed legislation that contained the following:

An object containing the words of the Ten Commandments may be displayed on real property owned by a political subdivision along with other documents of historical significance that have formed and influenced the United States legal or governmental system. Such display of an object containing the words of the Ten Commandments shall be in the same manner and appearance generally as other documents and objects displayed, and shall not be presented or displayed in any fashion that results in calling attention to it apart from the other displayed documents and objects.

P.L. 22-2000. This display could occur on real property owned by the State or any political subdivision. A public school district would be a political subdivision. Although there was significant bi-partisan support, critics warned that the law violated the Supreme Court's decision in Stone v. Graham, *supra*, and would be unconstitutional. Supporters argued that the Indiana law, unlike the Kentucky law that was found unconstitutional in Stone, does not mandate the posting of the Ten Commandments and expresses a secular purpose in the posting of documents of historical significance that influence the American legal and government institutions.¹² One of the sponsors of the bill in the

¹²This language reflects the sentiment expressed by the U.S. 10th Circuit Court of Appeals in Sumnum v. Callaghan, 130 F.3d 906, 910, *n.* 2 (10th Cir. 1997): "Although we recognized the religious nature of the Ten Commandments, we also note its 'substantial secular attributes' as a precedent legal code." The Supreme Court was less impressed with this statement of secular purpose

Senate had ready a monument that would be donated to the state by the Indiana Limestone Institute and placed on the south lawn of the State Capitol building. The monument would include the version of the Ten Commandments that was cited in Books v. City of Elkhart, 79 F.Supp.2d at 983, along with the Preamble of the 1851 Indiana Constitution¹³ and the Bill of Rights. It would be four-sided, stand seven feet tall and weight about 11,500 pounds. It would be made out of Indiana limestone.

The south lawn contains a number of monuments to various Indiana, national, and historical personages, as well as certain groups. There had been a monument with the Ten Commandments on the south lawn. It was donated in 1958 by the same fraternal organization involved in the Books' case, *supra*. The monument was eventually removed in 1991 after being vandalized several times. The proposed monument would be placed in about the same place as the one that was removed in 1991.

The governor, in accepting the donation on behalf of the State, said through a press release that the monument would be placed on the State House lawn to remind people of "some of our nation's core values," which all people "need to be reminded of from time to time." A lawsuit was filed to enjoin the State from erecting the monument.

Post-Legislation

On July 28, 2000, a federal district court judge in the Southern District of Indiana granted the plaintiffs' Motion for a Preliminary Injunction, enjoining the State from erecting the monument. Indiana Civil Liberties Union, Inc., et al. v. O'Bannon, 110 F.Supp.2d 842 (S.D. Ind. 2000). The ICLU challenged the posting of the Ten Commandments as violative of the First Amendment. It did not attack the constitutionality of P.L. 22-2000, which added I.C. 4-20.5-21 to the Indiana Code. It made challenges similar to those made in Books: That ICLU members and the plaintiffs travel regularly along the sidewalks and streets where the monument would be erected, and that they would be forced to come into direct and unwelcome contact with it. To avoid the monument would constitute an undue burden on them.

The district court employed the three-part analysis under Lemon v. Kurtzman, see *supra*. However,

in Stone v. Graham, 449 U.S. at 41. It declined to accept the following language as acceptable in passing the "secular purpose" test: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Notwithstanding the avowed purpose, the Supreme Court stated, the purpose for requiring the posting in the back of Kentucky public school classrooms was plainly religious in nature.

¹³The Preamble to the 1851 Indiana Constitution reads: "To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution."

the plaintiffs conceded that the monument would not foster excessive entanglement. As a result, the district court analyzed the first two parts under an “endorsement” application: (1) Does the monument serve a secular purpose? and (2) Is the effect of the monument one that advances or inhibits religion?

Although the general rule for determining the purpose behind a governmental action is to consult and to defer to the stated purpose—for the action and a secular purpose need not be the exclusive purpose—the avowed purpose must be sincere and not a sham, the court noted. 110 F.Supp.2d at 849. Where, as here, a monument is involved, the purpose is viewed within the context of the display as well as the content of the display to determine whether, in fact, there is a secular purpose. *Id.* Although other courts have accepted that the Ten Commandments have some direct relationship to the formation of the American legal system, the district court in this case was more skeptical. The only stated secular purpose was that provided by the governor in his press release: The monument would serve as a reminder of core values and ideals. Although the State represented at oral argument that the Ten Commandments were “ideals” that animated American government, it was unable to establish any historical linkage between seven of the commandments and “weak historical links to three of them.”¹⁴ At 851. The monument, as contemplated, would have the Ten Commandments appearing on one side of the four-sided monument with no explanatory text as to the historical context within which it should be viewed. The Ten Commandments would not be coordinated or related in some fashion to the texts appearing on the other three sides of the proposed monument. “Rather, the Ten Commandments will be displayed in such a way that a person looking at them will see only the Ten Commandments, as they are set out on a seven-foot tall limestone block.” The purpose, the court concluded, is religious and not secular. At 852.

Although failure of one part of the *Lemon* analysis is sufficient to find governmental action unconstitutional, the court addressed the possible perception of endorsement of religion by the erecting of the monument. Religious symbols are not *per se* unconstitutional, especially when viewed in a larger context. This could include works of art and public school curriculum. However, in this case, “a reasonable person looking at this monument would undoubtedly view it as an endorsement of religion.” At 856. There were two factors that persuaded the court to reach this conclusion: (1) “the text of the Ten Commandments is prominently located, to the exclusion of everything else, on one side of this seven-foot tall monument”; and (2) the “historical context” of the Ten Commandments could not be discerned by a reasonable person, unless he walked around the monument to read everything there. At 856-57. Even after circumnavigating the monument, “there is nothing that would allow a reasonable person to put the documents into a secular context.” At 857. The absence of any explanation regarding the “historical context” among the various texts tends to indicate that the religious message would be perceived rather than a “historical” or secular one. At 857, 858.

¹⁴The three were “thou shalt not kill” (although not all killing is, in and of itself, illegal), “thou shalt not commit adultery” (although such laws are no longer on the books), and “thou shalt not bear false witness against thy neighbors” (possible relationship to perjury laws). 110 F.Supp.2d at 851, *n.* 10.

The State has appealed to the U.S. 7th Circuit Court of Appeals, where Books v. City of Elkhart is awaiting decision after oral argument on May 12, 2000.

The Kentucky Experience

As noted *supra*, Kentucky legislation was at the core of the Supreme Court's decision in Stone v. Graham. On April 21, 2000, the governor of Kentucky signed into law Senate Joint Resolution No. 57, Section 8 of which required of the Department for Facilities Planning the relocation of "the monument inscribed with the Ten Commandments which was displayed on the Capitol grounds for nearly three decades to a permanent site on the Capitol grounds near Kentucky's floral clock to be made a part of a historical and cultural display which shall include the display of this resolution in order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." Plaintiffs initiated suit to enjoin the Department for Facilities Planning from complying with the mandate to relocate the monument. The court granted the plaintiffs' requested relief in a written opinion dated July 27, 2000. See Adland et al. v. Russ, 107 F.Supp. 2d 782 (E.D. Ky. 2000).

The Resolution at issue contained seventeen "Whereas" clauses that were intended to express the legislative purpose in enacting the legislation. The clauses interpreted two U.S. Supreme Court cases in such a fashion as to declare the United States a "Christian nation" and included quotes from famous Americans or pre-Revolutionary War legislative sources regarding belief in the Bible, God, or Christianity. "The final clause implies that the text of the Ten Commandments appears in the U.S. Supreme Court chambers as part of a frieze which contains several depictions of historical law givers." At 783.¹⁵

The monument referred to in the Resolution is a stone marker that is over six-feet tall and almost four-foot wide. It is made of solid granite. It was donated to the State in 1971 by the same fraternal organization involved in the disputes referenced *supra*. The monument also has inscribed on it religious and patriotic symbols. The monument has not actually been displayed for decades, as the Resolution indicates. It was removed to storage in 1980 to make room for construction of a building. The "floral

¹⁵This latter reference is to a part of the concurring opinion by U.S. Supreme Court Justice John Paul Stevens in County of Allegheny v. A.C.L.U., 492 U.S. 573, 652-53, 109 S.Ct. 3086 (1989), where he described the frieze that appears on the south wall of the Supreme Court. Moses is depicted holding the Ten Commandments, but there are numerous other lawgivers, the vast majority of whom would be viewed as secular. This contextual analysis would indicate to the observer "respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum."

clock” is a “prominent and central feature on the Capitol grounds.” *Id.* The clock itself attracts a number of tourists. It is thirty-four (34) feet in diameter and weighs over 200,000 pounds. It is surrounded by seven smaller monuments dedicated to secular interests such as citizens, veterans, and public servants. The Ten Commandments’ Monument would dwarf the other monuments. At 784.

The court analyzed the Resolution under the three-part Lemon test. The court found that the terms of the Resolution itself fails the “secular purpose” test. The monument is unaccompanied by any other historical or culture documents “evidencing the myriad of influences that shape our current body of law” leaving an observer “with the impression that the Commonwealth of Kentucky endorses the opinion that Christianity is the central foundation of our law.” At 785. In addition, a reasonable observer, viewing the monument and its placement, “would interpret this display as the Commonwealth’s endorsement of Christianity.” *Id.* The presentation of the monument and its verbiage would exclude in favor of Christianity all other influences on the current system of law, such as the Magna Charta, English common law, “or even the ancient Code of Hammurabi.” At 786.

The size of the monument, its prominent placement at a focal point on the Capitol grounds, and the accompanying language of the Resolution extolling the benefits of Biblical guidance, along with the implied endorsement of the Christian religion, “only begin the list of entanglements created by this Resolution,” the court wrote at 787, finding that the third part of the Lemon analysis was also violated.

The court found the Resolution to be unconstitutional and permanently enjoined the relocation of the monument to the location on the Capitol grounds near the floral clock.

Other Kentucky Cases

Adland et al. v. Russ was actually the fourth recent case involving the Ten Commandments to issue from the federal Eastern District Court in Kentucky. The Indiana federal district court in ICLU v. O’Bannon, see *supra* at 110 F.Supp.2d at 850, 855, referred to the three decisions issued in Kentucky earlier this year, all finding that the posting of the Ten Commandments on public grounds had no secular purpose and was unconstitutional. See Doe v. Harlan County School District, 96 F.Supp.2d 667 (E.D. Ky. 2000) (posting in public schools); A.C.L.U. of Ky. v. McCreary County, 96 F.Supp.2d 679 (E.D. Ky. 2000) (posting in the courthouse); and A.C.L.U. of Ky. v. Pulaski County, 96 F.Supp.691 (E.D. Ky. 2000) (also involving the posting in a courthouse). In all three cases, the stated secular purpose was to teach “American religious history and the foundations of the modern state.” ACLU v. McCreary Co., 96 F.Supp.2d at 686. However, the history of the displays indicated that they originally contained only the Ten Commandments. It was only when faced with potential

litigation that the displays were broadened to include other documents.¹⁶

STRIP SEARCHES OF STUDENTS

(This is part of the continuing series on school safety issues affecting the preparation and implementation of emergency preparedness and crisis intervention plans by schools.)

Indiana has had something of a history involving strip searches of students.¹⁷ The seminal case was Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), *reh. den.* 635 F.2d 582 (1980), *cert. den.* 451 U.S. 1022, 101 S.Ct. 3015 (1982). In addressing the suspicionless “strip search” of students in search of contraband at an Indiana public school, the 7th Circuit Court of Appeals stated:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search was not only unlawful but outrageous under “settled indisputable principles of law.” [Quoting Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 1000 (1975)]

Five years later, the U.S. Supreme Court decided New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), which acknowledged that the Fourth Amendment prohibition against unreasonable searches and seizures does apply to searches conducted by school officials but not to the same degree as searches and seizures conducted by law enforcement. The Supreme Court established a “twofold inquiry” to determine whether a search is reasonable:

1. The search must be “justified at its inception” (a law or school rule is being broken or there is a reasonable basis to belief that such will occur); and
2. The search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”

¹⁶Several Kentucky school and county officials—including the McCreary County judge— are defying the federal district court by posting the Ten Commandments, albeit within an alleged “historical context” by flanking the decalogue with copies of the U.S. and Kentucky constitutions. *School Law News*, October 13, 2000, p.10.

¹⁷For additional articles on this topic, see **Quarterly Report**, July-September: 1997; January-March: 1999; and Recent Decisions, 1-12: 1995.

In addition, “such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” T.L.O., 469 U.S. at 342, 105 S.Ct. at 743.

Justice John Paul Stevens, in a separate opinion concurring in part and dissenting in part, wrote that “to the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm.” T.L.O., 469 U.S. at 383, 105 S.Ct. 764, n. 25.

The district court in Oliver v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995) relied heavily on the above in analyzing a strip search of middle school students following report of a theft of a relatively minor amount of money. In this case, the plaintiffs were seventh grade female students attending a public middle school. Shortly before the end of the physical education class, two other female students reported \$4.50 missing from the locker room. The principal (who is male), with the help of a substitute teacher and food service worker (both female), checked the students’ lockers, bookbags, and shoes. The adult females eventually checked the girls’ bras to determine whether the money was hidden there. This search required the students to undress somewhat while the female adults checked the garments and waist bands. Some pockets were patted down. The principal later that day felt the latter search was too excessive. He contacted the parents of the affected students and explained what occurred. He also apologized. The court, relying on T.L.O. and Renfrow, stressed that, notwithstanding the relaxed standard for school officials in conducting searches, the search must be reasonable in scope and any search must not be “*excessively intrusive in light of the age and sex of the student and the nature of the infraction.*” Oliver, 919 F.Supp. at 1217, italics by court. The court also reiterated Justice Stevens’ warning in T.L.O. that strip searches would be generally upheld only where there is “a threat of imminent harm” from drugs or weapons. In this case, however, the theft of \$4.50 is not such a threat to anyone such that the “strip search” could be justified.

Oliver has now been joined by another Indiana dispute. Higginbottom v. Keithley, 103 F.Supp.2d 1075 (S.D. Ind. 2000) began when \$38.00 turned up missing from an unattended snack cart, although this is the only fact the parties agree to. According to the court, the sixth- grade teacher, a male, singled out four sixth-grade boys as suspects and had them disrobe down to their underwear in the boys’ bathroom. After searching their clothing to no avail, the teacher had them pull their underwear where he visually inspected their genitalia and buttocks to see whether the money had been hidden there. While this “strip search” was going on, the \$38.00 was discovered in the possession of another student from another class. The students initiated this lawsuit, alleging the activities of the teacher constituted civil rights violations, a breach of contract, a battery, and intentional and negligent infliction of emotional distress. The lawsuit named as defendants the teacher, the principal, the superintendent, and the local board of school trustees.

Breach of Contract Claim

The plaintiffs claim that the student handbook provided at the beginning of each school year¹⁸ created a contractual relationship between the school and the students' parents, with the students being third-party beneficiaries. However, the court found that elementary school children in publicly funded schools are not involved in any contractual relationship. At 1080. In addition, the classic elements of contract formation are absent in the issuance of the student guide (offer, acceptance, consideration, arms-length negotiation and transaction). The court concluded at 1081:

¹⁸See I.C. 20-8.1-5.1-7, which requires schools to establish and publicize school-based disciplinary rules.

Indeed, the compulsory nature of public elementary education, which requires public schools to accept enrollment of children in their districts and mandates student attendance, militates against importation of mutual assent and consideration principles into the public elementary school context. We decline to conclude...that the School Corporation desired legal consequences to attach to its student guide, especially where the guide's contents are not negotiated with students or parents, they are subject to unilateral change by the School Corporation (they had been revised 25 times since 1972), and they are meant to implement a statutory directive to effectively educate children, an objective that, in this particular case, is based on public policy and lacks a commercial contract element.¹⁹

Civil Rights Claim: Fourth Amendment

The students claim the “strip search” violated their federal rights under the Fourth and Fourteenth Amendments. The court earlier had observed that, for the plaintiffs to succeed against the school corporation, they would have to show a pattern of conducting “strip searches” (in the absence of an express policy) and a causal nexus between the school’s express policy or accepted custom of permitting “strip searches” and the alleged injury suffered. The plaintiffs failed to establish (1) there existed in the school corporation an express policy that when enforced caused a constitutional deprivation; (2) there existed within the school corporation a practice or custom of such unconstitutional conduct; or (3) the constitutional injury was caused by a person with final policy-making authority. At 1085, citing to Oliver v. McClung, 919 F.Supp. at 1213. Summary judgment was entered for the school corporation on the civil rights claims.

The court, however, did not grant summary judgment for either party regarding the individual liability of the teacher for the conduct of the “strip searches.” At 1086. Citing to New Jersey v. T.L.O., the court noted that searches of students, even under the relaxed standards for school officials, must be justified at the inception of the search and reasonably related in scope to the circumstances giving rise to the search. Neither party developed a sufficient factual background upon which the court could rule, although the judge did indicate that the plaintiffs would likely be able to demonstrate at trial the unreasonableness of the search in light of the suspected infraction. At 1087.

Civil Rights Claim: Fourteenth Amendment

The plaintiffs asserted the teacher violated the “equal protection” clause of the Fourteenth Amendment by selecting the students to be searched based upon their socio-economic status. In order to prevail, the court noted, the plaintiffs would have to show that the teacher acted with “a nefarious purpose and

¹⁹The court also discusses—and dismisses—the related claims sounding in contract: promissory estoppel and quasi-contract. See 1082-84.

discriminated against them based on their membership in a definable class.” At 1088. The discriminatory acts must have been intentional or purposeful, or with deliberate indifference, with the decision-maker singling out a particular group for disparate treatment and selected the course of action at least in part for the purpose of causing its adverse effects on the identifiable group. Mere negligence is not sufficient. The court granted the teacher summary judgment on this issue. There was no showing the teacher treated students of modest means any differently from students from affluent families, that he knew of the students’ socio-economic status, that he had a history of singling out low-income students for disparate treatment, or that he harbored any ill-will towards such students. At 1088.

Battery

The plaintiffs claimed that the teacher’s conduct of the “strip search” constituted a battery. Under Indiana law, a battery is a “harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent...” *Id.* The *Oliver v. McClung* court noted that in Indiana, “any touching, however slight, may constitute ... battery.” 919 F.Supp. at 1220, cited by this court at 1089. In this case, there was no evidence that the teacher ever touched the students. The court granted summary judgment for the teacher on the issue of battery.

Intentional Infliction of Emotional Distress

Citing to *Oliver v. McClung*, the court noted that the tort of intentional infliction of emotional distress is determined where “one, who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another...” At 1089. One must have the intent to harm one emotionally. The plaintiffs did not provide any evidence the teacher “actually intended to inflict emotional damage upon them...” *Id.* Accordingly, the teacher was granted summary judgment on this issue.

Negligent Infliction of Emotional Distress

The standard for “negligent infliction” has a lower legal threshold than “intentional infliction.” The plaintiffs claimed the teacher was negligent in the conduct of the search and consequent violations of the students’ Fourth Amendment rights. The school argued that, in the absence of any physical contact (often called the “impact rule”), the plaintiffs claim should not survive summary judgment. The court disagreed:

Unlike a claim for intentional infliction of emotional distress, a claim for negligent infliction of emotional distress does not require the movant to prove that the defendant acted with an actual intent to harm one emotionally. Federal courts interpreting Indiana law have recognized that a plaintiff may recover for negligent infliction of emotional distress in the absence of physical injury if ‘(1) there is a tort which invades a legal right of the plaintiff; (2) which is likely to provide an emotional disturbance or trauma; and (3) the defendant’s conduct is willful, callous, or malicious.’ *Oliver*, 919 F.Supp. at

1221 [remaining citations omitted].

At 1090. “A constitutional tort based on an alleged unreasonable strip search of sixth-graders certainly is the type of conduct that reasonably could provoke emotional disturbance or trauma, and perhaps did in this case,” the court added. *Id.* The court denied defendants’ motion for summary judgment on this claim, noting further that “a reasonable jury could find that [the teacher] acted willfully or callously in so conducting that search.” *Id.*²⁰

There continue to be cases from other jurisdictions involving “strip searches” and public schools. The following are recent cases.

1. *Gloria Rogers v. Board of Education of the City of New Haven*, 749 A.2d 1173 (Conn. 2000). The plaintiff was a tenured teacher employed as an assistant principal in the school district’s middle school. A female student reported to her physical education teacher that \$40 had been stolen. The physical education teacher requested Rogers’ assistance in determining which of the twenty-two fifth and sixth grade female students stole the money. Rogers was concerned that violence may occur because the students were from different neighborhoods and there had been friction. Rogers was accompanied by a female school security guard. Rogers had one student remove her shoes and socks and pull out her pockets. However, the money was not found. Rogers then had the security guard and the physical education teacher search each student individually in the teacher’s adjoining room. Rogers waited outside, writing passes for students to return to their classes after being searched. The security guard and the teacher had some of the students pull down their pants and panties, which was reported at least indirectly to Rogers, but she did nothing to stop the strip searches although she had directed the searches to be conducted. The school board’s policy forbids school officials to conduct a search that would require a student to remove more clothing than shoes or jackets. “Strip searches’ of students by employees of this school district are prohibited.” At 1176. Rogers was aware of the policy, as well as her duty to protect the health, safety, and welfare of all students. Rogers’ contract was eventually terminated by the school board, which found that she knew or should have known that the student searches were being conducted improperly but did nothing to investigate or halt the strip searches. The school board also noted that Rogers neglected her duty to enforce board policies. Rogers appealed her dismissal to court, but the trial court dismissed her appeal. The Connecticut Supreme Court upheld the trial court. The board could terminate the teacher’s contract for the single incident involving her failure to properly supervise the strip searches of fifth and sixth grade female students for allegedly stealing \$40.

²⁰The dispute will not be going to a jury. The parties settled the case. The court approved the settlement on July 5, 2000.

2. Thomas et al. v. Clayton Co. Board of Education, 94 F.Supp.2d 1290 (N.D. Ga. 1999) began when a student reported to his fifth-grade teacher that \$26 in candy sales money was missing. A cursory search of the classroom and the trash cans by the teacher did not turn up the missing money. About this time a Drug Resistance Awareness Education (DARE) officer appeared to teach the fifth grade students a drug awareness lesson. The teacher left her class with the DARE officer while she went to the school's workroom to search the trash cans. While there, she met the assistant principal. After some discussion, the administrator approved a search of the students, but there is marked disagreement between the administrator and the teacher regarding the extent of the search. The teacher returned to her classroom and conducted a routine search of the students' bookbags, desks, purses, and—after the students removed their shoes—socks. The students also turned out their pockets. The teacher also patted their back pockets. The search proved fruitless. The teacher then asked the DARE officer to assist in the search.²¹ The DARE officer took the male students to the restroom where he had them pull their pants down to their ankles and pull up their shirts. A fifth grade student from another class came into the restroom to use the facilities, but the DARE officer searched him as well. The teacher conducted strip searches of the female students in the other restroom. The girls were required to lower their panties and raise their dresses or shirts. They were also asked to “pop up” their bras. The money was never found. The principal was confronted by the parent of the one of the students. When the principal asked the teacher if a strip search had occurred, she denied that such had occurred, although she admitted she did conduct a search for the stolen money. After more parents came forward, the administration conducted an investigation. The teacher gave three different written statements regarding the occurrence. The police department conducted its own investigation of the DARE officer, who initially denied participation. The DARE officer was eventually terminated for this and other instances of dishonesty. The students filed suit, alleging civil right violations of their right to privacy, to be secure in their persons, to be free from unreasonable searches and seizures, and due process (First, Fourth, Fifth, Ninth, and Fourteenth Amendments). The district court relied upon the two-fold inquiry established by T.L.O., see *supra*, adding that the Supreme Court did not limit its decision to situations where there is “individualized suspicion.” At 1301, citing T.L.O., 469 U.S. at 342, n.8. It also did not determine the propriety of strip searches. Id. The district court was critical of the controlling case in that circuit, Jenkins v. Talladega City Bd of Education, 115 F.3d 821 (11th Cir. 1997), an *en banc* decision that was decided on questions of qualified immunity rather than constitutional issues and incorporated language seemingly approving the strip searches of three female second-grade students in search of \$7.00. Accordingly, the court reviewed cases from other circuit courts, including Renfrow.

²¹There is marked disagreement between and among all the actors in this drama. The teacher asserts the assistant principal authorized the use of the DARE officer in the conduct of the search. The assistant principal hotly denies this. The students, teacher, and DARE officer all vehemently disagree with each other as to what occurred during the strip searches.

Although the court indicated that “some deference [must be shown] toward the decisions of often beleaguered educators who serve in the trenches everyday,” at 1305.

The district court established three variables that need to be analyzed in light of the two-part inquiry derived from T.L.O.:

- The extent to which suspicion must be individualized to warrant any kind of search;
- The propriety of strip searches, generally, in a school setting; and
- the appropriate level of intrusiveness of a search, given non-individualized suspicion.

Id. Accordingly, the court determined that “individualized suspicion” is not always necessary before any type of search may be undertaken in a school setting. This is particularly true where there is the potential imminent harm to students (weapons, bomb threats, drugs). In this case, the teacher had the requisite suspicion to conduct some type of search of the fifth grade class in order to find the missing \$26. The search by the teacher that was confined to bookbags, purses, shoes, socks, and desks was reasonable. However, the strip searches of the students in this case were not reasonable and, as a consequence, unconstitutional.²² The court did not conclude that all strip searches in a public school context would be unreasonable. Such searches “can sometimes be sustainable in a school setting if, for example, the school official has reasonable suspicion that a particular student may be in possession of dangerous items, drugs, contraband, stolen items, or the like.” At 1306, apparently relying on Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993), where the “strip search” of an Illinois student suspected of “crotching” drugs was upheld because there was individualized suspicion although the search did not reveal any drugs. The lack of any imminent danger to the students inveighs against the constitutionality of any strip search, although the court did not foreclose the possibility that there might be a situation where it would be necessary, even when there is no “particularized suspicion” of an individual student. But this is not the case here.

The Court concludes that where the item missing is only a small amount of money and where there is no particularized suspicion that a particular child has the money, a strip search of the entire class is disproportionate to the harm sought to be remedied, and hence unreasonable.

At 1307. Nevertheless, the court found that the actors were entitled to qualified immunity in part because the law is not clearly established that the conducting of strip searches in the 11th Circuit would violate the Fourth Amendment.

²²The court notes that the use of “strip search” in a school setting is more of a “shorthand expression” that does not refer to the complete disrobing that would occur in a strip search in a penal or police setting. Thomas, 94 F.Supp.2d at 1306, n. 21.

3. Thomas et al. v. Clayton Co. et al., 94 F.Supp.2d 1330 (N.D. Ga. 2000) involved a Motion to Reconsider by the plaintiffs in Thomas, *supra*. The court denied the motion. The court also declined to order expungement of the students' records of any mention of the strip searches. However, both the school district and the law enforcement agency stated that no such information was in the students' records. No other injunctive relief was granted by the court, primarily because the court believes its decision above is sufficiently detailed that there no longer exists any realistic harm to the plaintiffs.²³

COURT JESTERS: BURNING THE CANDOR AT BOTH ENDS

Trial lawyers enlist the assistance of experts to testify in court regarding issues that are reputedly beyond the ordinary knowledge and expertise of jurors or the judge. Although the laws of physics are immutable (or at least as immutable as humankind can comprehend), one can always enlist expert accident reconstructionists who will arrive at widely varying opinions based on the same physical facts (but always in concert with the preconceived opinion of the party who retained the expert's services in the first place).

The "battle of the experts" can be a high-stakes venture because the court will likely base its decision in whole or in part on the opinion offered by the expert considered more credible than the other (or others). Because of this legalistic "crap shoot," lawyers tend to view their experts as well respected, highly qualified members of a given profession, who, through many years of tireless efforts on behalf of the betterment of mankind, command the respect and quiet awe of all their professional peers. The other lawyer's expert, however, debases the profession by pandering his intellectual wares to the highest bidder like some kind of common guttersnipe.

"What is truth," Pilate asked.²⁴ Had there been experts in Pilate's day, he would have had as many opinions as he had experts and nowise nearer the truth. It is a rare occasion when an expert speaks candidly. A court saw fit to document such a rare instance.

²³A lawsuit was recently filed in Michigan by the American Civil Liberties Union (ACLU) challenging the alleged "strip search" of three boys and three girls at the Whitmore Lake High School. The search occurred after a student reported \$354 was missing from her wallet, which had been in a gym locker. In North Carolina, the Charlotte-Mecklenberg Board of Education reached a \$35,000 settlement on August 8, 2000, with the parents of middle school boys who were "stripped searched" in an effort to locate drugs. *School Law News*, September 1, 2000, p. 5.

²⁴*John* 18:38.

Ladner v. Higgins, Inc., 71 So.2d 242 (La. App. 1954) involved a worker's compensation claim arising out of a fall from scaffolding in a shipyard. Ladner claimed he was totally and permanently disabled as a result of the injuries he experienced and should receive a substantial number of compensated weeks. The company disagreed, arguing Ladner had completely recovered from his injuries and could return to work. Although expert orthopedic testimony indicated that Ladner no longer had any physiological limitations, Ladner asserted the fall has left him with a serious pain in his back that prevents him from resuming his former position. Ladner also claims that he suffers from a "post traumatic neurosis" that causes him extreme anxiety when he attempts to perform his former shipyard occupation.

Of course, the presence or absence of a mental condition would require expert psychiatric opinion. Neither party disappointed the court. Both sides trotted out their respective psychiatrists. Ladner's expert indicated, not surprisingly, that Ladner suffered "from a psychoneurosis or traumatic neurosis," which can be attributed to the fall from the scaffold. Therapy will be necessary for several years to alleviate the resulting anxiety.²⁵

The company's psychiatrist acknowledged that one could suffer a "post traumatic neurosis" from such an industrial incident, but this was not the case for Ladner, whom he described as "a malingerer for economic gain." The court did not let the matter go by allowing the divergent expert opinions to cancel out each other.

Finally, and of vast significance in our judicial determination of the serious medical issues involved herein, we find these pearls of wisdom emanating from the mouth of one whose testimony was being adduced to assist the court and whom we must presume, from the very nature of his profession, has accepted the Hypocratic Oath which, as we all know, is the foundation of medical ethics. In response to the question:

"Is that your conclusion that this man is a malingerer?"

[The company expert] responded:

"I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition."

²⁵The company's attorney violated a cardinal rule of trial practice by posing a sarcastic question to the plaintiff's expert without knowing what the answer might be. He asked: "You don't think that this man will get well until this lawsuit is over." Although the question was actually rhetorical, Ladner's psychiatrist answered (before he could be stopped) that no matter how the lawsuit may go, a resolution of the conflict would improve anyone's anxiety but not cure it. This would be true of Ladner. The court noted this exchange at 244, and viewed it as a common-sense response to an otherwise impolite statement.

At 244. For the company's "burning the candor at both ends" through such flippancy, the court awarded Ladner 400 weeks of worker's compensation. Ladner had a pain in the back. His claim was a pain in the neck to the company and its insurance carrier. The court viewed the company's presentation as a pain in a decidedly different place, and, accordingly, the court kicked the company in that area.

QUOTABLE . . .

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Justice William O. Douglas, Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679 (1952), cited by Indiana federal District Court Judge Allen Sharp in Books v. City of Elkhart, 79 F.Supp.2d 979, 1006-07 (N.D. Ind. 1999). Judge Sharp set off Justice Douglas' remark under the heading "**Epilogue.**" He began his discourse on the constitutionality of the monument containing the Ten Commandments on the lawn of the municipal building in Elkhart with a "**Prologue,**" below which he printed the crier's declaration that opens sessions of the U.S. Supreme Court: "O yez. O yez. O yez. All persons having business before the honorable, the Supreme Court of the United States are invited to draw near and give their attention for the Court is now sitting. God save the United States and this Honorable Court."

Date: _____

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The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at www.doe.state.in.us/legal/.

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