

THE LEGAL

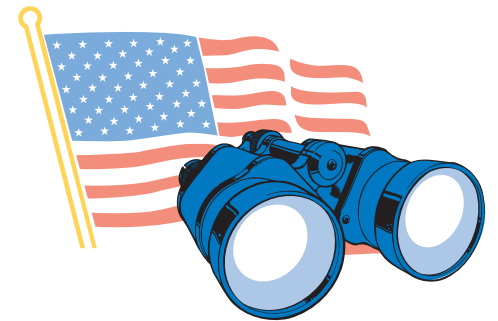


WINTER 2003

Security or Liberty: Must We Choose?

by Roberta K. Glassner, Esq.

The destruction of the World Trade Center on September 11, 2001 made each of us painfully aware that the U.S. is no more immune to terrorists than any other country in the world. Since that fateful day, Americans have focused on how to protect themselves and the country from terrorism, both at home and abroad.



The event that shocked the nation on 9/11 had a two-fold effect. It alerted us to the need for increased security to protect American lives and, at the same time, the need to protect our constitutional rights in the pursuit of that security.

What is national security?

National security can be defined as that which affects the health, safety and welfare of a country or its citizens, either directly or indirectly. Examples of direct threats to national security in the U.S. would be an assassination attempt on our president or an act of terrorism such as the one felt by Americans on 9/11. An example of an indirect threat to national security would be the bombing of an American embassy in a foreign country. While the bombing did not take place on U.S. soil, there is still a threat to U.S. citizens living abroad and a perceived threat to the U.S. in general.

Who is responsible for protecting our nation's security? The U.S. has international, federal and local agencies that protect the country in one way or another. The Central Intelligence Agency (CIA), which functions primarily outside the country, collects information for the U.S. on foreign spies and terrorist activity around the world, alerting government officials to potential danger.

In contrast, the Federal Bureau of Investigation (FBI) is the criminal law enforcement agency that operates principally within the U.S. The FBI was created by the Justice Department in 1908 to investigate domestic criminal activity on the federal level, such as kidnapping across state lines, bank robberies, organized crime, drug trafficking and civil rights violations. Finally, on a local level, police forces across the country take action against criminals within our cities and states.

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A Drug Test to Join the Band?

by Barbara Sheehan

You've been thinking about joining the chess club at school. Finally, you decide to do it. Then you find out your school requires a drug test first to prove that you're not using illegal substances.

Can your school make you take such a test when you've done nothing wrong? Is this a violation of your privacy rights?

Last summer, the U.S. Supreme Court gave an Oklahoma school district the green light on this type of random drug testing, paving the way for other schools around the nation to follow suit.

What was the Oklahoma case about?

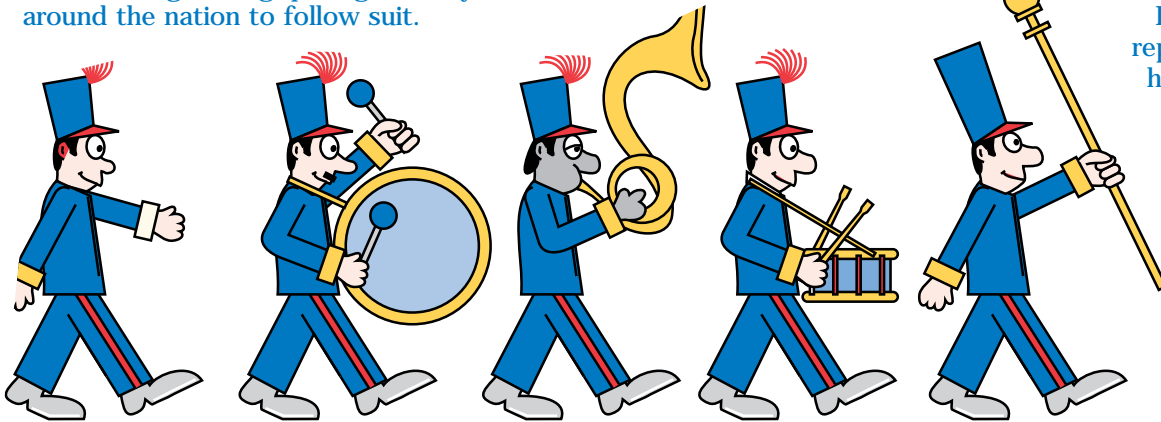
The landmark case of Board of Education of Independent School District No. 92 of Pottawatomie County et al. v. Earls began with two Oklahoma students — Lindsay Earls and Daniel James. Together with their parents, these students took legal action against their school district's drug testing policy, which requires that all middle and high school students consent to drug testing in order to participate in any extracurricular activity. The intent of the policy is to prevent and deter drug abuse among students.

The intent of the policy is to prevent and deter drug abuse among students.

Lindsay Earls was reportedly a member of her school's show choir, the marching band, the Academic Team and the National Honor Society. Daniel James wanted to participate in the Academic Team.

Both students felt that the school policy violated their

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Using Someone Else's Ideas Can Cost You Big

by Karen M. Spring

Imagine that you wrote an important paper on Abraham Lincoln for school. You spent weeks working on it, carefully reading about Lincoln and his presidency. All your spare time was dedicated to writing this paper because you wanted to get a good grade.

After you hand in your assignment on Lincoln, you hear rumors of how some students in the class cheated on their papers by copying information directly from the Internet. Then you receive your paper back and it has a C grade on it, while some of the cheaters received As and Bs on their papers.

What the cheaters did is an example of plagiarism. Eric Begun, a lawyer with experience in trademarks, copyrights and the

Internet, says that plagiarism can best be defined as a "failure to attribute." In other words, plagiarism is using someone else's ideas or work and passing them off as your own, without giving the original person credit for his or her work. The Center for Academic Integrity at Duke University considers plagiarism cheating, and Begun claims that plagiarism is a moral concept as well as a legal one.

It is okay to use information from someone else as long as recognition is given to that source, he

says. For instance, high school and college students use footnotes in their research papers as a method to recognize that the information is coming from someone other than the writer of the paper. It is also fine to use information you find while doing research, Begun says, as long as you substantially rewrite the information in your own words.

In terms of rewriting, however, how much is enough?

According to Begun, that is where common sense should come into play because there is no set formula. In the end, your final



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Assuming the Risk at Sporting Events: What Is the Price?

by Dale Frost Stillman

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Consider this scenario. Tom had just finished his hot dog, and he put his soda on the ground in front of his chair. He and his brother had third row seats between home plate and third base at Yankee Stadium. As he sat back up, a foul ball hit by Derek Jeter was coming directly at him. Luckily, his brother reached in front of Tom's face with his mitt and caught the ball. But what if Tom had sustained injuries as a result of being hit with Jeter's foul ball? Could he successfully sue the Yankees or Derek Jeter in the scenario described?

In real life, Brittanie Cecil was not as lucky as Tom. She died just days before her 14th birthday as a result of injuries she suffered after being struck in the head by a hockey puck while watching the Columbus Blue Jackets play the Calgary Flames. She had been sitting more than 100 feet behind the glass with her father, who had bought the tickets as a birthday present. The Blue Jackets center, Espen Knutsen, took a slap shot that was deflected over the glass by Calgary defenseman Derek Morris. It flew into the crowd hitting Brittanie's left temple. Two days later she was dead.

In the NHL's 85-year history, Brittanie is the first fan to be killed by a puck, although flying pucks have killed three people at minor league hockey games where the glass around the rink is lower. Countless others have been injured. During hockey games, fans are warned that pucks may fly into the crowd. Some teams post warnings on scoreboards and/or on the back of each ticket. Do these warnings limit the team or the venue's **liability** if an accident occurs?

Sports attorney James DeMarzo says that in order to prove a venue's liability, a **plaintiff** would need to prove that he or she was injured as

a result of **negligence** on the part of the venue. For example, if the protective glass was not at the required height and someone was injured, that person would most likely have a case against the facility or the team.

Cost of watching the game

Does Brittanie's family have any legal recourse against the Columbus Blue Jackets or Nationwide Arena, where the game was played, as a result of her death? According to the legal principle, assumption of risk, they don't. Black's Law Dictionary defines assumption of risk as a doctrine that means "a person may not recover [damages] for an injury received when he voluntarily exposes himself to a known and appreciated danger." In other words, Brittanie, who according to reports after her death was a great hockey fan, should have been aware that there is an implicit risk of injury when attending a hockey game (i.e., flying pucks). DeMarzo believes that most sports fans understand the principle behind assumption of risk and are aware of the danger involved in attending a sporting event.

Assuming risk in other cases

In a case dating back to 1948, a Cleveland man attended his first hockey game. The fact that he was seated in an unscreened area when a hockey puck hit him, allowed him to successfully argue that since it was his first game, he didn't realize that sitting in this area posed a danger to him. The defense of assumption of risk was defeated in that case.

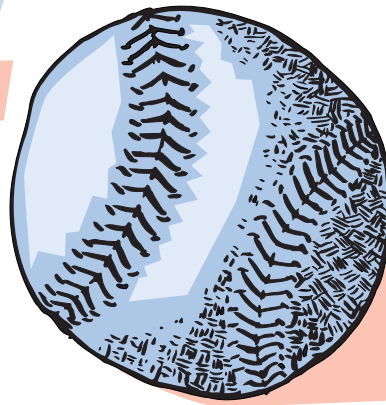
During a minor league hockey game, the Charlotte Checkers goalie, Jason LaBarbera, threw his stick and injured an eight-year-old boy. LaBarbera, frustrated because he had been taken out of the playoff game after he allowed five goals to score, threw his stick into what he thought was the tunnel leading to his team's locker room. LaBarbera was suspended for 18 games, but no criminal charges were filed against him.

In 1999, a similar incident occurred at the Great Western Forum, home of the Los Angeles Kings. In that case, a hockey fan successfully sued the Kings, the San Jose Sharks and Sharks forward, Joe Murphy. The fan was hit in the head by a flying puck that Murphy had thrown into the crowd in response to a goal by the Kings. The reason assumption of risk was not a viable defense in that case was because play had stopped, so it was not reasonably foreseeable that a fan might be hit. The case was reportedly settled in the millions of dollars with neither the Kings, the Sharks, nor Murphy admitting guilt.

If a bystander is injured because of the negligent design of a stadium or hockey rink, the injured party could sue the venue, according to DeMarzo. In 1999 a fan of the Florida Marlins Major League Baseball team did just that, successfully suing the team when he was injured as the result of a wild pitch. He proved that the netting near the bullpen was too low, demonstrating negligence on the part of the stadium.

What about New Jersey?

Although there have been cases in New Jersey involving skiing, roller skating and equestrian activities where assumption of risk has applied, the legal concept was essentially replaced, DeMarzo says, with comparative negligence in the 1970s. Comparative negligence is a principle of law that looks at the negligence of the victim, and could lead to a reduction of the award against the **defendant**, depending on the contribution of the



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Security or Liberty

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What changed after 9/11/01?

On October 24, 2001, in response to the 9/11 attacks, the U.S. Congress passed the U.S. Patriot Act, a new set of anti-terrorism laws proposed by U.S. Attorney General John Ashcroft. This act is designed to coordinate the operations of the country's law enforcement agencies — the CIA, the FBI and local police — so that any information about terrorist activities will be available to all agencies at the same time. The Patriot Act also broadened the intelligence-gathering powers of the FBI to uncover terrorist activity within the U.S.

Under this new act, the FBI is no longer limited to investigating crimes or known criminal activities. The Bureau now has

expanded authority to spy on individuals and religious and political groups in the U.S. on the suspicion they may be potentially dangerous to U.S. national security. Agents may conduct this undercover spying even if there is no evidence of any laws broken or any proof of the intention to commit a criminal act.

National security vs. civil liberties

Civil liberties are the personal rights of every individual living in the U.S. and are guaranteed and protected by the U.S. Constitution. These rights include, but are not limited to, freedom of speech, freedom of the press and freedom from discrimination.

Today, if the FBI suspects individuals of terrorist connections or activities, the Bureau can seek a special warrant to tap telephone lines, review credit card records,

spy on Internet use, obtain library information such as book and periodical checkouts, and gain access to medical and banking records for these individuals. Before 9/11, the FBI would need to present strong and convincing evidence or **probable cause** to a judge that a crime had been or was about to be committed or that a law had been or was about to be broken.

In addition, under the new guidelines of the Patriot Act, FBI agents can carry out undercover surveillance at places of worship and political meetings. Before the act was passed, the FBI could collect personal data or create records of people attending public events only if the information being gathered was related to a specific criminal investigation.

Few would disagree that it is critical for the U.S. to protect itself against foreign enemies. But many

civil rights organizations, including the American Civil Liberties Union (ACLU), are concerned about the FBI's expanded power to gather information through domestic undercover operations and spying on ordinary citizens. In the 1970s, the U.S. Congress passed a series of regulations that controlled the FBI's powers to conduct domestic spying operations. These limitations were imposed when it was learned that the Bureau had carried out illegal undercover surveillance and wiretapping of anti-war and civil rights activists for many years and had illegally created FBI files on those individuals.

Constitutional implications

The Fourth Amendment of the U.S. Constitution guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures... and no



Someone Else's Ideas

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product should look different from the original. Begun believes that an "ordinarily **prudent** person" should know whether he or she is rewriting enough to be certain that he or she is not plagiarizing. But he also cautions, "what is enough may be more than what most people would first think."

Downloading plagiarism

The Internet has made information easier to access. Many students use the Internet to do research for school and some copy information directly from a Web site to use in their homework. Others use the copy-and-paste feature of their computer to link large portions of different documents into one paper.

"The Internet is a relatively new means of distributing content," Begun said. "The same issues still apply in terms of plagiarism that did years ago."

A Rutgers University survey of nearly 4,500 high school students revealed that only 46 percent of the students surveyed thought that cutting and pasting text directly from a Web site without attributing the information was cheating, while only 74 percent of those surveyed thought that copying an entire paper was cheating.

Donald McCabe, the Rutgers University researcher that conducted the survey told USA Today, "In the students' minds what is on the Internet is public knowledge."

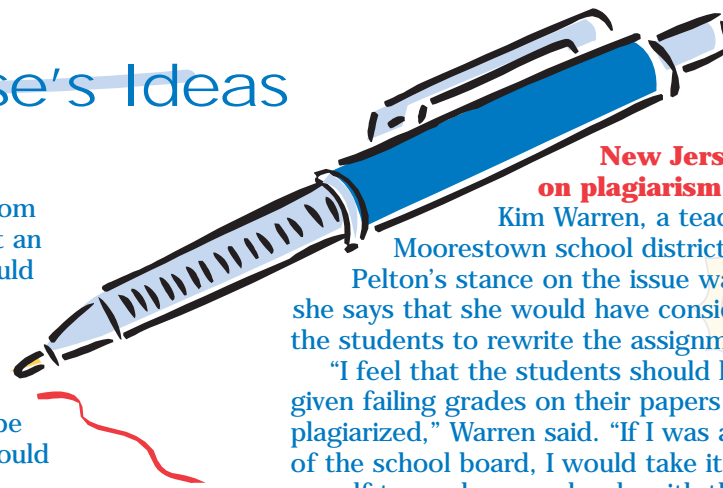
Begun says that the Internet has made it easier for plagiarism to be committed. Whether or not students think of the Internet as fair game, Begun says the same rules apply, and ignorance is not a defense.

One teacher takes action

In the fall of 2001, students in a 10th grade class at Piper High School in Piper, Kansas were given an assignment to write a paper about leaves. When teacher Christine Pelton began grading the papers, she suspected that some of the students had plagiarized their work. A check of some science books and a few Web sites proved her correct. Twenty-eight of the 118 students had indeed cheated on the project.

Pelton gave the 28 students a zero grade on their papers. Parents went to the school board to complain about the tough standards and what they considered unfair punishment. Piper High School's principal backed Pelton and said that her handling of the matter was fair.

In December, the school board ruled that the students' punishment was unfair, however, and asked Pelton to change the zero grades. Pelton refused and resigned her position with the high school, believing that she had been treated unfairly. She also stated that the decision was unjust to the other 90 students who had completed their own work on the project. Another teacher and Piper High School's principal also resigned in protest.



New Jersey schools on plagiarism

Kim Warren, a teacher in the Moorestown school district, believes that Pelton's stance on the issue was correct, but she says that she would have considered allowing the students to rewrite the assignment.

"I feel that the students should have been given failing grades on their papers if they plagiarized," Warren said. "If I was a member of the school board, I would take it upon myself to work more closely with the students, educating them on plagiarism and its penalties," she added.

Eric Begun says that many school boards reference plagiarism in their school policies in an effort to discourage the practice and often make the penalty a failing grade.

For example, the Deerfield School in Mountainside requires students and their parents to sign a form that defines the rules for proper computer and Internet usage. The agreement states: "I will not plagiarize works that I find on the Internet. Plagiarism is taking the ideas or writings of others and presenting them as if they were my own."

Other schools like St. Joseph School in Hammonton and the Franklin Township School District in Franklinville offer similar policies for students. While these rules and regulations may not end plagiarism, they do make students aware that such behavior is not tolerated.

What about the professionals?

While students attempt to claim ignorance regarding plagiarism, one would think that a professional writer would know better. However, many writers, reporters, and columnists have ruined their careers by plagiarizing the work of others. When someone takes work that is not his or her own and then in turn publishes that work as if it were their own, he or she, in many cases, has gone from plagiarizing to **copyright infringement**. That, according to Begun, is against the law.

For example, Stephen Ambrose, the late and well-respected historian who wrote many books on World War II and served as a consultant on Steven Spielberg's film, *Saving Private Ryan*, was accused of lifting entire passages from other sources in five of his best-selling books. According to Begun, that type of infringement can result in the writer being **liable** for \$150,000 per infringement. There is also a provision in the law for criminal penalties and imprisonment if the infringement is serious enough. A judge would review the seriousness of the offense and determine whether jail time is warranted, he explained.

So, the next time you are writing that history paper and are tempted to copy directly from Encyclopedia Britannica or cut-and-paste text from the really cool Web site you discovered, think about the consequences. 🛠️

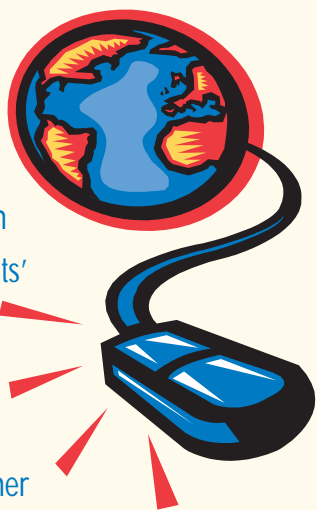
victim's negligence. In other words, what is the level of your own negligence? In order to win, DeMarzo says, you must prove that the other person intended to cause the injury or acted in a reckless way.

So, the next time you see a professional or semi-professional sporting event in person, pay close attention to the action of the game. If, as a fan, you are injured by the normal play of the game, you may not be able to blame anyone but yourself. 🛠️

Catch Us on the Web and Read The Legal Eagle Online

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While you're there, check out other interesting and fun stuff in our Students' Corner. There is also useful information for teachers about other Foundation school-based programs.



warrants shall issue but upon probable cause.

In criminal law, probable cause consists of facts presented to a judge that provide reasonable grounds to believe a criminal act was or will be committed. If the judge is convinced by the facts, a **warrant** is issued for a search, a telephone tap or to seize property or records. A law enforcement officer's suspicion or belief of illegal activity, unsupported by facts, was not enough for a warrant to be issued.

Under the Patriot Act, the strict requirements of probable cause have been lowered. The new guidelines, however, do not give the FBI total freedom to conduct a search. Agents still must apply for a special warrant through the courts before they can bug telephones or collect private records.

Opposing views

In support of the FBI's broad new powers, Attorney General Ashcroft has stated "lifting restrictions on domestic spying is necessary for an agency whose top job is preventing terrorist attacks against the U.S." He added, "these major changes will free field agents to counter terrorist threats freely and quickly."

FBI Director Robert Mueller also issued a statement saying, "I don't think there's an agent out there who doesn't feel the need, the necessity to overturn every stone, to pick up on every clue out there to try to protect the American public."

President George W. Bush assured Americans about the revised regulations, saying "we intend to honor our Constitution and respect the freedoms we hold dear."

Despite this assurance, some organizations, including the ACLU and the Center for Constitutional Rights, are concerned that the FBI's broad new powers may be a threat to our civil liberties, fearing that the FBI will again improperly create files on innocent citizens and harass political groups critical of government policies, with no evidence of any illegal activity. The Council on American-Islamic Relations has voiced concern about the FBI's focus on Arab-Americans and its monitoring of mosques, objecting to the new powers that "spy on a religious minority engaged in lawful activities."

While expressing these concerns about the Patriot Act, all agree that measures to prevent future attacks and disrupt terrorist organizations are necessary. But what is necessary as well, they warn, is a watchful eye on the part of

Congress to assure that Americans' constitutionally guaranteed freedoms under the Bill of Rights do not become casualties in the war against terrorism. To prevent this from happening, both the U.S. Senate and the U.S. House of Representatives have formed committees to monitor the FBI's activities.

While the new surveillance powers outlined in the U.S. Patriot Act will expire in 2005, many "civil libertarians believe the U.S. Supreme Court may ultimately be called upon to decide the constitutionality of the act. The challenge will be to find the delicate balance between the increased security that the U.S. needs and the liberty Americans cherish. 🛠️

Roberta K. Glassner is an attorney in New Jersey.

Drug Test

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Fourth Amendment right under the U.S. Constitution to be free from unreasonable search and seizure.

What did the Court say?

In considering this case, the U.S. Supreme Court relied heavily on its 1995 ruling in a similar case called *Vernonia School District 47J v. Acton*. Like the Oklahoma case, the *Vernonia*, Oregon case considered the constitutionality of school drug testing. *Vernonia*, however, considered only the testing of student athletes, whereas the Oklahoma case encompasses students involved in any extracurricular activity. In both the Oregon case and the recent Oklahoma case, the court upheld the school's drug testing policies.

What was the reasoning?

First, in the Oklahoma case, the school's policy was examined for reasonableness, which the Court deemed "the touchstone of constitutionality." Ultimately, the court found that the drug testing undertaken was a reasonable means of preventing and deterring drug use among schoolchildren.

Unlike in the criminal system — where a number of stringent standards must be met before a lawful search can be conducted — public schools have more relaxed standards due largely to their caretaking role, the Court noted. The Court said that schools must strike a balance between intrusions on students' privacy and governmental interest in providing a safe and healthy learning environment.

Additionally, in the Oklahoma case, the Court held that the students directly affected by the policy voluntarily subject themselves to intrusions on their privacy merely as a consequence of extra-curricular involvement. The most obvious example, perhaps, is communal undress (i.e., changing clothes in a gym locker room),

which was a notable point in the *Vernonia* case in reference to athletes.

Even where undress is not relevant, the Court argued in the Oklahoma case that all extracurricular clubs and activities have their own rules and requirements that do not apply to the student body as a whole and that serve to further diminish participants' expectation of privacy.

Further, in the Oklahoma case, the Court noted that the way urine samples were obtained for the drug tests and the confidential handling of the results were non-intrusive. Positive findings were not turned over to law enforcement authorities but rather used only to prohibit participation in extracurricular activities.

New Jersey courts respond in kind

Just two months after the U.S. Supreme Court announced its decision in the Oklahoma case, a New Jersey appellate court last August upheld a school's drug testing policy in a similar case in New Jersey's Hunterdon County.

Specifically, the Hunterdon County case challenged a drug and alcohol testing policy at Hunterdon Central Regional High School that expanded a prior drug testing program.

The expanded policy was established for the 2000 - 2001 school year to cover "students engaged in extracurricular activities and students with permits to park on campus."

Applying the reasoning in the Oklahoma case, the New Jersey appellate court concluded that Hunterdon's policy does

not violate the Fourth Amendment, however, an appeal in the case is pending with the New Jersey Supreme Court.

It all started in New Jersey

While the Oklahoma and Hunterdon privacy cases involved the search of a person's bodily sample for drugs, the first landmark Fourth Amendment student case of the U.S. Supreme Court involved the search of a teenager's purse for cigarettes and it originated in New Jersey.

New Jersey school law attorney David B. Rubin served as counsel to the New Jersey school district where the 1985 case, *New Jersey v. T.L.O.*, arose.

In brief, Rubin notes that T.L.O. involved a 14-year-old high school student in Piscataway who was caught by a teacher smoking cigarettes in a school bathroom with a friend. Upon questioning by the school's assistant vice principal, the student denied smoking cigarettes and claimed she did not smoke at all. The assistant vice principal demanded to see her purse.

Upon opening it, he found a pack of cigarettes. He also reportedly found a package of cigarette rolling papers, as well as marijuana, a pipe, plastic bags, a "fairly substantial" amount of money, an index card containing a list of students who owed the teenager money, and two letters that implicated her in marijuana dealing.

The search by the assistant vice principal was initially deemed unconstitutional by the New Jersey Supreme Court, but then went to the U.S. Supreme Court where the New Jersey decision was **overturned** and the constitutionality of the search was upheld. An underlying theme in the Court's decision, again, was that searches and seizures in

schools should be reasonable, in accordance with the Fourth Amendment. This reasonableness standard continues to be widely applied.

Looking forward

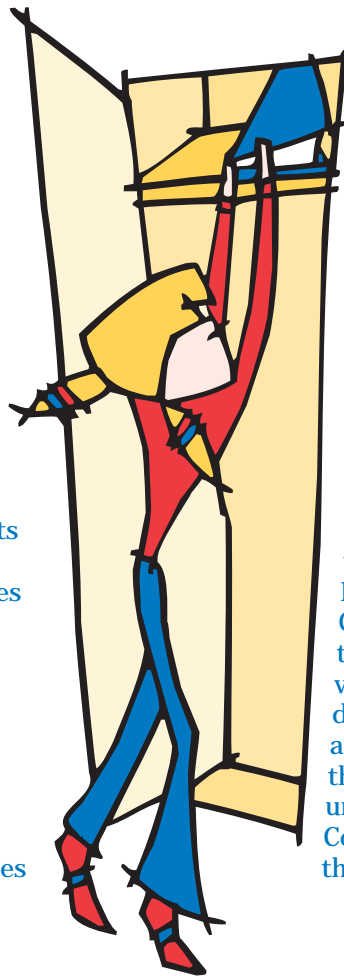
While the Fourth Amendment court decisions discussed in this article have ruled on the constitutionality of certain school policies, these decisions do not set policy. Decisions about whether to require drug tests like those in the Oklahoma case or in Hunterdon, lie with each individual school district.

Still, the U.S. Supreme Court's message about balancing students' privacy rights with governmental interests has been steady.

According to Rubin, these latest court cases reflect an effort by the courts over the last couple of decades to harmonize students' rights with school safety concerns. He questions whether the latest decision in the Oklahoma case is "the last word or just the next word."

The obvious remaining question, Rubin claims, is whether there is "any principled distinction you can make between the person on the chess club and the general student body?"

In other words, will schools one day be permitted to conduct random drug searches on all students, not just those involved in extracurricular activities? Given the conservative makeup of our nation's U.S. Supreme Court, Rubin predicts the answer is yes, and he believes that more students will be subject to drug testing in the future. Only time will tell. 🗑️



anonymously — an action by a person or entity who is not named or identified.

copyright infringement — using any previously published material without the author's permission.

defendant — in a trial, the person who is accused of wrong doing.

legislation — a proposed law.

liability — an obligation of responsibility for an action or situation, according to the law.

liable — legally bound or obligated to make good any loss or damage that occurs.

negligence — the failure to use the care that a reasonable person would use.

overturned — in the law, to void a prior legal precedent.

plaintiff — person or persons bringing a civil lawsuit against another person or entity.

probable cause — reasonable grounds for presuming guilt in order to avoid obtaining a warrant.

prudent — capable of exercising sound judgment; sensible.

remedial — corrective.

warrant — a written document from a judge authorizing anything from a search to an arrest to the obligation to pay a fine.

UPDATE

Bullying Outlawed in New Jersey

Have you ever been hassled by a bully or witnessed someone else being bullied? Maybe you are a bully yourself. If you are, you're in for some bad news. New Jersey schools will no longer tolerate bullying behavior, and the Governor has signed a new law to see that they don't.

The National Education Association estimates that everyday 160,000 schoolchildren stay home because they fear they will be attacked or intimidated by their peers. A study from the American Medical Association reports that 3.2 million kids are victims of bullying each year. With numbers like these, it is no wonder that bullying has become such a hot button issue for many schools, parents and students across the country.

In the Winter 2002 edition of *The Legal Eagle*, (Pending Law Takes Stand Against Bullies), we reported on pending New Jersey **legislation** that would address the bullying issue. New Jersey Governor James McGreevey signed that legislation on September 6, 2002, establishing it as a law. The new law, which pertains to incidents of "intimidation, harassment or bullying that occur on school property, at any school-sponsored function or on a school bus," gives New Jersey schools until September 2003 to come up with an anti-bullying strategy.

School districts must also develop a policy to be followed when an act of bullying occurs. All school policies must include certain components, such as "a description of the type of behavior expected from each student, the consequences and appropriate

remedial action for a person who commits an act of harassment, intimidation or bullying, and a procedure for reporting an act of bullying, including a provision that permits a person to report the act **anonymously**, as well as a procedure for prompt investigation of a report." A school district's policy must also provide a plan for how it will be publicized to faculty and students.

The New Jersey Department of Education developed a model policy, incorporating the required 10 components so that school districts have a blueprint to get started. Individual districts are free to expand the policy to address their school's specific needs, but cannot eliminate the mandatory components outlined in the law.

What can a bully expect as punishment for his or her behavior? The Department of Education's model policy recommends consequences ranging from behavior intervention to suspension or expulsion from school.

For more information about bullying you can visit the following sites: www.kidscape.com
www.nobully.org
www.bullying.org
www.stopbullying.org
www.no-bully.org/high_school.htm#top 🗑️

