THE CONSTITUTION IN THE CLASSROOM
2010

THE FOURTH AMENDMENT
SEARCH AND SEIZURE

HIGH SCHOOL LESSON PLAN

INTRODUCTION / PRELIMINARIES
"THE CONSTITUTION IN THE CLASSROOM"

The purpose of this exercise is for students to come away better informed about the Bill of Rights and, more generally, about the American legal and justice systems.

You will want to make contact with school personnel in advance – first, to get your visit authorized, and second, to get a better understanding of the class(es) you'll be addressing. Be prepared that there may be some questions or concerns about the age-appropriateness of the material, and be flexible in deciding what's right for your community and for the maturity of the listeners.

These lesson materials are meant to be used and adapted according to the needs and interests of the class. Don't feel wedded to the sequence of events and don't feel obliged to use everything.

Make sure you leave 5 minutes at the end of class to complete and collect evaluation forms.

Above all, have fun!

This lesson plan was produced in cooperation with the legal staff of the Student Press Law Center, www.splc.org, a nonprofit advocacy group that works with students and school law on a daily basis protecting young people's First Amendment rights.

ORGANIZATION / PROCEDURE

We suggest that you start with a quick overview on the Bill of Rights and the workings of the legal system, to provide context for the discussion to follow. Give out the page with the text of the Fourth Amendment at the start of the class, and give out the other supplemental handouts as you go along.

(Remember that "state action" applies only to the *public* schools – if you are speaking to *private* school students, be careful not to leave the impression that the Fourth Amendment case law about school searches will apply to them.)

As you go through the exercise, be thinking of more general points about the workings of the legal system that you can reinforce or use as taking-off points for class discussion. Examples might include:

- What is the purpose of a Supreme Court justice writing a dissenting opinion?
- The concept of the Constitution as a "living document" – for instance, the protection of "papers" in the 4th Amendment will apply to *any* means of storing information (e-mails, DVDs), even technologies well beyond what the Framers could have imagined.

The preliminary overview should be primarily give-and-take, and you can use the following pages for prompting. Rather than furnishing examples, think about whether the students are capable of volunteering their own.

THE CONSTITUTION AND THE BILL OF RIGHTS

The Constitution is the central organizing document of our nation. It sets up the structure of government with the legislative, executive, and judicial branches. It grants limited power to the federal government and reserves other powers to the States and citizens.

- For example, Article I of the Constitution creates the United States Congress, with a Senate and House of Representatives.
- Article II grants the power of the Executive Branch to the President of the United States.
- Article III creates the federal court system vesting power in the Supreme Court.

In simple terms, the legislature creates the laws, the executive administers the laws, and the judicial branch interprets the laws. The power in our constitutional system is thus divided up between three separate powers (this is called the "separation of powers") and also between the federal government and the fifty States (this is called "federalism"). The Constitution intentionally divides the power of government – both among its branches and between the states – to create a system of "checks and balances" protecting citizens from a single source of power.

The Bill of Rights represents the first Ten Amendments to the Constitution. It includes our fundamental guarantees of individual liberty including, the freedom of speech, freedom of religion, right against self-incrimination, right to a jury, right to a lawyer, right against cruel and unusual punishment, and reserves rights to the several States and citizens.

The Bill of Rights limits government interference in certain areas of life. Unlike some systems, the American constitutional system begins with the assumption that we have certain basic freedoms. For example, the First Amendment in the Bill of Rights says that Congress shall make no law interfering with freedom of speech. The Constitution assumes we have a freedom to speak and think as we wish, and ensures that the government does not interfere with it. In the same way, the Fourth Amendment guarantees that all Americans will be free from unreasonable searches or seizures. As we will see in this lesson, this assumes that we have the right to live free from unreasonable governmental interference.

THE SUPREME COURT AND CASE LAW

The Supreme Court is the final decision-maker when it comes to interpreting the Constitution. Questions about how to interpret the Constitution constantly arise and must be addressed by federal courts.

Each court, from the trial level to the Supreme Court, decides cases based on arguments by lawyers, looking at how other courts have decided similar issues in the past. There is a vast body of cases about the terms and ideas in the Constitution. Judges look to past cases, history, and other legal principles to answer the question of how to decide the cases before them. Today we will focus on a few of those cases involving the Fourth Amendment.

FULL TEXT OF THE FOURTH AMENDMENT

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

-U.S. Constitution, Amendment IV

Part Two QUICK REVIEW – THE CONSTITUTIONAL TEXT

- What does the Fourth Amendment protect?: "**Persons**," "**Houses**," "**Papers**," and "**Effects**."

    - Think about the answer you just gave – what does "persons" really mean? Quickly, let's review the difficulties in interpreting the constitutional text.

        - Regarding "persons" – what about a person's clothes? (yes), how about the wallet they are carrying? (yes), how about a person's blood or bodily fluid? (yes).

        - Regarding "houses" – what about an apartment? (yes), your front porch? (probably), a mobile home? (maybe depending on whether it is being used as a home or a car).

        - Regarding "papers" – what about a diary? (yes), a book in your house? (yes), your email? (probably not), your IM text messages? (probably not).

        - Regarding "effects" – what about your backpack? (yes), your ipod? (yes), your collection of comics? (yes).

        - These questions of interpretation are the questions lawyers and judges argue over to determine the meaning of the Constitution.

        - Should the protections of the Fourth Amendment be limited to just those four categories?

- Who does the Fourth Amendment protect?: "**The right of the people**" -- All those who live under the protections of the Constitution. Does that include "citizens"? (yes). Does that include children under 18? (yes). How about undocumented immigrants? (yes).

- What does the Fourth Amendment protect those people from? "**Against unreasonable searches or seizures**" by the government. In determining what is an "unreasonable" search or seizure, courts look to balance individual liberty within the need to keep an ordered society. Figuring out what is reasonable or unreasonable is one of the central challenges of the Fourth Amendment.

- **What does it mean to be "seized?"** The key is that you are not free to leave where you are detained – if you can end the conversation and walk away, then you aren't "seized." (Or in the context of property, that you are not free to take your property back.) Police put the cuffs on you, put you in the squad car, take you down to be booked – that's the easy one. But there are other ways you can be seized:

    - Police smash their car into your car as you are driving away.
    - Police shoot you.
    - And "seizure" applies to your property as well as to your person – *e.g.*, freezing the money in your bank account, towing your car to the impoundment lot, etc.

- What about justified intrusions by the government? The second part of the Fourth Amendment talks about "**no warrants shall issue, but upon probable cause**." A warrant is a formal document signed by a judge that allows police to search or arrest you. Warrants allow law enforcement officers who have reason to suspect you ("probable cause") to ask a judge for permission to interfere with your privacy. Thus, if a warrant is supported by enough specific information, the government can search you, or your house, or even arrest you.

- **What does it mean to have "probable cause?"** "Probable cause" means that the facts and circumstances would convince a reasonable person that a crime has been or is being committed. This is <u>not</u> enough proof to actually find someone guilty if they were charged with a crime and brought to trial. It's just enough proof to justify intruding on privacy to continue the investigation.

How does this work in the setting of the public schools?

- Students do not give up all of their Fourth Amendment rights, even when they are on school grounds during the school day.
- But the courts have recognized a reduced burden on the government to justify a search of a student's person or possessions at school.
- The Supreme Court set out the ground rules for when schools can search students in 1985 in a case called *New Jersey v. T.L.O.* In the *T.L.O.* case, the Supreme Court said that a school can search a student's person or possessions if there is at least a "reasonable suspicion" that the student will have drugs or weapons or some other contraband items. And in that case, there was a reasonable suspicion for searching the student's purse for cigarettes, because she and one of her friends were caught smoking in the bathroom.
    - REASONABLE SUSPICION is not the same as PROBABLE CAUSE. You can have a reasonable suspicion even if you are not convinced there has been a crime committed. Reasonable suspicion means that a person in the police officer's position, knowing the information that is available to him, could reasonably believe that a crime has been committed or is about to be committed. It's not just a hunch, it has to be backed up by some evidence, but less than what you'd need for probable cause.
    - "Reasonable suspicion" is also the standard if the police want to make a brief stop, like a traffic stop, where they detain you for a few minutes for questioning but haven't yet placed you under arrest.
    - DISCUSS – why reduce the burden in schools? Do you agree? Are there other places, like airports, where it also makes sense to give the government more leeway to search people and property?
- The key question in a search of a student's person or belongings on school property will be REASONABLENESS – and the keys to reasonableness are:
    - Is the item that the school is searching for something really dangerous?
    - How reliable is the information?
    - How badly was the person's privacy invaded?
        - EXAMPLE: Just last year (2009), the Supreme Court decided in *Safford v. Redding* that it was NOT reasonable to make a 13-year-old middle school student undress so she could be searched for Tylenols based on one student's unconfirmed tip. The drug was not all that dangerous, the information was not very detailed, and the intrusion on the student's privacy was severe.

OPTIONAL DISCUSSION POINT: The *Safford* case was about a strip-search – the most intrusive type of search. Under what circumstances, if ever, do you think a school can constitutionally make a person undress to be searched? What types of measures could a school take that might make the search *less* intrusive so that it might be constitutional?

EXERCISE – The Fourth Amendment and Your Things in Class Right Now

What does the Fourth Amendment really mean to you *right now* in class and in school, generally?

As you sit in class you are carrying your "effects." You have personal belongings in your pocket, purse, or backpack – essentially your stuff. What right do you have to keep your stuff private? Does it change depending on where you are (home, school, courtroom, airplane)? Does it change depending on what it is that you are trying to keep private? That's the question and the challenge of the Fourth Amendment.

Make a list of all of the items you currently have or could have in class right now. Hold up an "effect" you have in your possession. These items might include:

- Books
- Notes
- Cell phone and the phone numbers therein
- Keys
- Wallets
- Identification cards
- Medicines
- Make up
- Purses
- Religious materials
- Embarrassing notes about who you like and who you don't like
- Your grades

These are your "effects" (although some are arguably "papers"). We know you are in school, and the question is: Does the Constitution protect these "effects" from unreasonable searches or seizures without a warrant based on probable cause?

The answer depends on whether you have a "reasonable expectation of privacy" in the items. In most Fourth Amendment cases, the question will be whether that "reasonable expectation" was violated by the unreasonable actions of government agents or officials.

Exercise Analysis: A "Reasonable Expectation of Privacy"

So what is a "reasonable expectation of privacy"? There are two parts to the analysis.

1. First, do you actually expect privacy in your effects that you bring with you to school?

    a. The answer is usually yes, you expect to keep the things you want private to remain private. If you come to school with a closed and locked backpack, it is reasonable to think that you hoped to keep the contents of the backpack from others.

    b. Would it be less reasonable if you carried the same things in a clear, see through plastic bag?

        i. Go through the list you wrote of your effects. Do you expect those things to remain private? Why?

2. Second, is this expectation of privacy one that others agree is reasonable?

    a. This is usually the more difficult question. Does the larger society (your class) agree that the medicine in your purse, or religious materials in your wallet should remain private.

    b. Are there other interests government officials (public school administrators, teachers, police) have in maintaining an orderly and safe school environment?

        i. For example, even if you wanted to keep the things private in your backpack, if there is a clear school rule that requires all bags and backpacks to be opened to search for weapons, your personal desire that things would remain private is not really a reasonable one. You know that it will be opened if the school just follows its own rules.

        ii. Go through the list of effects again, and ask each other if you think that everyone would agree that certain things deserve more privacy than others… (Medicine? Personal notes? Etc.)

Exercise Application:

Take one of the "effects" that you have in class right now (for example a notebook). Imagine that a police officer comes in and wants to read the notebook.

1. First question: Do you the student who owns the notebook expect that what you wrote will remain private?

2. Second question: Do you – the class – think that what is written is reasonable to keep private? Why?

    a. What are the values that are important in keeping the notebook private? (Privacy, autonomy, creativity, individuality, freedom etc.).

    b. On the other side, what are the reasons a police officer might want to read it? (to find evidence of a crime, to find reasons to suspect you, think about the notebooks just released by the Columbine massacre students, what if there was a concern about violence in the schools?).

    c. If the police do not have any real reason to suspect you, should you have a reasonable expectation of privacy?

3. What if it isn't a police officer, but your teacher? your parent/guardian?

When can the police search <u>without</u> a warrant?

- With the person's CONSENT
    - And that can get confusing – sometimes <u>more than one person</u> has the power to consent. Can you think of examples?
        - Roommates in an apartment
        - A couple that owns a house together
        - Renter who is renting the apartment and the landlord (sometimes, depending on circumstances)
        - Guest in a hotel and the owner of the hotel
- When it's necessary to protect the officer's safety – sometimes known as a "stop and frisk," when police are questioning a person who is not yet "seized," but they want to make sure the person isn't armed.
- When you've already been "seized" based on valid grounds for seizure, then the police can search you, your belongings, *i.e.* your purse or backpack, and your car (but almost certainly not your house, without a separate warrant). This is known as "search incident to arrest" or an "inventory search." Examples:
    - Police tow your car to the police department lot after they've arrested you – they can look all over the car, even the trunk and glove box.
    - Police can empty your pockets when they take you to the jail.

- When evidence is in PLAIN VIEW, so that it is immediately obvious what it is – for instance, a transparent plastic bag of drugs that a person leaves sitting on the passenger seat of his car.
- When there are "EXIGENT CIRCUMSTANCES" – sometimes the law recognizes that the police have to make snap decisions because the decision is so urgent or so time-sensitive. Examples:
    - The evidence is about to be destroyed – *e.g.*, police hear a person through the hotel room door yelling, "The cops are coming – get rid of the drugs!" and then hear the toilet flushing.
    - "Hot pursuit" – *e.g.*, if a suspect is being chased, runs into an apartment and slams the door, the police don't have to wait outside until they can get a court order.

<u>OPTIONAL DISCUSSION POINT</u>: We've talked about the normal ground rules for searches that the courts have put in place over the last 200 years, but does terrorism change those rules? After the 9/11/2001 terrorist attacks, should there be different sets of rules that make it easier for the police to stop, search and even detain people, even if they may *not* have probable cause? What would be the risks?

THE *VERNONIA* CASE: DRUG TESTING OF ATHLETES

INSTRUCTIONS: The full text of the Supreme Court's 1995 *Vernonia School District v. Acton* is too long to hand out for reading in class – edited excerpts of both the Scalia majority and the O'Connor dissent follow.

- Hand out the excerpts and give a brief setup and summary of the case. Explain that there was a majority opinion and a dissenting opinion.
- Divide the class in half – the majority and the dissenters. Explain to them that they're going to be asked to defend that justice's decision, not their own views.
- Give the students 10-15 minutes to review their side of the case (and if they have time, the other side) and formulate their thoughts. Encourage them to mark or highlight the main points of argument on each side as they read.
- Ask each side to address – from the perspective of their Justice, Scalia or O'Connor – the following set of questions and make the best argument for why that side is right:

(1) Should a school be able to test every athlete and to randomly test a sampling of athletes (the Scalia position) or should there have to be some grounds for suspicion that a specific athlete is a drug user before making him or her take the test (the O'Connor position)?

(2) Does it make sense to single out athletes for this extra scrutiny? Does it matter that student-athletes perhaps already give up some privacy?

(3) Suppose Vernonia School District comes back next week and decides that its policy will be to use the very same drug-testing system for elected members of the school's Student Government as well? Make your best argument as to why that rule would or would not violate the Fourth Amendment.

As the students are "deliberating," move about the groups to keep the conversation on-task and to prompt it along with discussion points, and be prepared to answer additional questions (it may be a good idea to review the entire case at 515 U.S. 646 in preparation for the class). Think about what additional facts might push the decision in one direction or another, and what facts you could supply to make for a more difficult decision – *e.g.*, if there were no documented evidence of disorder linked by school authorities to drugs, if there were no evidence that athletes used drugs any more often than anyone else, if the tests were videotaped and the tapes were available for any school employee to look at.

SUMMARY FOR INSTRUCTOR'S PRESENTATION

Vernonia School District 47J v. Acton (U.S. 1995)

This is a case about whether high school athletes can be required to take drug tests, even if there is no suspicion that the particular person being tested has ever used drugs.

The teachers and administrators at Vernonia School District 47J ("District") in Oregon noticed an increase in drug use during the late 1980s. Students were heard openly bragging that the school could do nothing about their drug use. Students became increasingly rude during class; outbursts of profane language were common. Athletes were the leaders of the drug culture. This was a special concern to the school, because there was fear that athletes under the influence of drugs would be more like to injure themselves or other athletes.

The District tried offering special classes and speakers, and even brought in a drug-sniffing dog, but the drug problem persisted. So the District officials began considering a drug testing program. The school presented the idea to a meeting of parents, who approved it unanimously, and the policy went into effect for the fall of 1989.

Here's how the policy works. Students wanting to play sports have to sign a drug testing consent form and get their parents to sign. Athletes are tested at the beginning of the season. Once each week of the season, the names of the athletes are placed in a pool and 10% of team members are tested by random draw.

If the athlete is male, he produces his urine sample at a urinal in the locker room, with a male monitor in the room 12-15 feet away. If the athlete is a girl, she produces her sample in an enclosed bathroom stall with a female monitor listening outside. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

In the fall of 1991, James Acton, a seventh grader, signed up to play football but was denied participation because he and his parents refused to sign the testing consent forms. They brought suit under the Fourth Amendment, and the case made it all the way to the U.S. Supreme Court.

The Supreme Court ruled in favor of the school and said the drug testing requirement was not a violation of James Acton's Fourth Amendment rights. Justice Scalia wrote the majority opinion that explains the Court's reasoning. Justice O'Connor wrote a dissenting opinion that said the testing was unconstitutional.

The following is an edited summary and excerpt from:
SUPREME COURT OF THE UNITED STATES
No. 94-590

VERNONIA SCHOOL DISTRICT 47J v. WAYNE ACTON

June 26, 1995

Justice Scalia delivered the opinion of the Court.

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is “reasonableness.” Whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

A search unsupported by probable cause can be constitutional, we have said, when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable. We have found such "special needs" to exist in the public school context. There, the warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed. Strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools.

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the “reasonableness” inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. Particularly with regard to medical examinations and procedures, therefore, students within the school environment have a lesser expectation of privacy than members of the population generally.

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require suiting up before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors.

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to go out for the team, they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. They must submit to a preseason physical exam, they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with

any rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval.

The degree of intrusion depends upon the manner in which production of the urine sample is monitored. Under the District's Policy, [the] conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible. The other privacy invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. That the nature of the concern is important – indeed, perhaps compelling – can hardly be doubted. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. And of course the effects of a drug infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.

It seems to us self evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. [The students] argue that a less intrusive means to the same end was available, namely, drug testing on suspicion of drug use. We have repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment. Taking into account all the factors we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude Vernonia's Policy is reasonable and hence constitutional.

Justice O'Connor, dissenting

For most of our constitutional history, mass suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion based regime would be ineffectual. Because that is not the case here, I dissent.
It remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug ridden neighborhood in order to find evidence of crime. And this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods.

As an initial matter, I have serious doubts whether the Court is right that the School District reasonably found that the lesser intrusion of a suspicion-based testing program outweighed its genuine concerns for the adversarial nature of such a program, and for its abuses. For one thing, there are significant safeguards against abuses. The fear that a suspicion based regime will lead to the testing of “troublesome but not drug-likely” students, for example, ignores that the required level of suspicion in the school context is objectively reasonable suspicion.

Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition.

By invading the privacy of a few students rather than many (nationwide, of thousands rather than millions), and by giving potential search targets substantial control over whether they will, in fact, be searched, a suspicion-based scheme is significantly less intrusive.

The individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.

Nowhere is it less clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets – students – is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms. The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in school drug use – and thus that would have justified a drug related search.

In light of all this evidence of drug use by particular students, there is a substantial basis for concluding that a vigorous regime of suspicion based testing would have gone a long way toward solving Vernonia's school drug problem while preserving the Fourth Amendment rights of James Acton and others like him. I recognize that a suspicion-based scheme, even where reasonably effective in controlling in school drug use, may not be as effective as a mass, suspicionless testing regime. In one sense, that is obviously true – just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. But there is nothing new in the realization that Fourth Amendment protections come with a price.

I find unpersuasive the Court's reliance on the widespread practice of physical examinations and vaccinations, which are both blanket searches of a sort. ... A suspicion requirement for vaccinations is not merely impractical; it is nonsensical, for vaccinations are not searches for anything in particular and so there is nothing about which to be suspicious. … As for physical examinations, the practicability of a suspicion requirement is highly doubtful because the conditions for which these physical exams ordinarily search, such as latent heart conditions, do not manifest themselves in observable behavior the way school drug use does.

Physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are wholly non-accusatory and have no consequences that can be regarded as punitive. These facts may explain the absence of Fourth Amendment challenges to such searches. … Any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly non-accusatory from the student's perspective. The substantial consequences that can flow from a positive test, such as suspension from sports, are invariably – and quite reasonably – understood as punishment.

I find unreasonable the school's choice of student athletes as the class to subject to suspicionless testing – a choice that appears to have been driven more by a belief in what would pass constitutional muster, than by a belief in what was required to meet the District's principal disciplinary concern. … It seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus – disruption that had a strong nexus to drug use, as the District established at trial.

Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.

EXERCISE – THE FOURTH AMENDMENT GOES TO THE MALL

Divide class into 3 – two sets of lawyers (the District Attorney's prosecutors and Wendy's defense lawyers) and one set of judges.
Everyone gets a set of facts and squibs of six real Fourth Amendment cases to work with (on the two pages that follow).

Give a little setup for the exercise:

We're going to walk through the way that lawyers would present a Fourth Amendment case in front of a judge, and the way that judges would decide that case. This case involves criminal charges against a teenager, Wendy Nugent. We're going to split into teams. One team representing the prosecutors will handle the case on behalf of the government, trying to prove that Wendy is guilty of a crime. One team will represent Wendy as her defense attorneys, trying to prove that the evidence being used against her was obtained in violation of her Fourth Amendment rights so it cannot be used against her in court. And the third team will serve as judges – they'll be allowed to ask the lawyers questions during the arguments, and they'll vote, just like justices on the Supreme Court would vote amongst themselves, as to which side has the better legal argument.

Give the students 10-12 minutes to review the cases and formulate their arguments. Drift between the groups to help move along the discussion and offer prompts.

After the students have reviewed the facts and the caselaw, get the lawyers for each side to make their best arguments. Try to get a different person from each team to address each of the two issues:

> (1) "Officer" Blart was or was not subject to the Fourth Amendment as an agent of the government.
>
> (2) Assuming that the answer to Question 1 turns out to be "yes," Wendy's Fourth Amendment rights were violated by Officer Blart's stop and/or by his and inspection of her purse.

Encourage the judges to tease out the issues by asking questions, and be prepared to ask some of your own to move the discussion along.

When the arguments are done, ask the judge team to "deliberate" aloud as to which side has the superior legal argument and why, and take a vote as to whether the evidence can or can't be used against Wendy.

EXERCISE – The Fourth Amendment Goes to the Mall

Fourteen-year-old Wendy is shopping at Mammoth Mall. Paul Blart is working as a security guard at Mammoth Mall. “Officer” Blart is not a real police officer, but he dresses and acts like one: he wears a police uniform and badge, and he carries a radio given to him by the real Police Department. The Police Department has trained him to radio them if he sees a crime being committed.

While looking at new gloves, Wendy takes off her old gloves and shoves them in her coat pocket. Then she hurries to the exit to meet her friends at the food court. Officer Blart sees what he thinks is a shoplifting incident and takes off in hot pursuit on his Segway scooter.

“Hold it right there, I need to talk to you,” says Officer Blart, parking his Segway directly in Wendy’s path. Though there is plenty of room to walk around him, Wendy is frightened and stays put.
“What’s going on? Am I being arrested?” she asks.
“No, no, no – all I want is to get the store’s property back,” Blart tells her. “If you cooperate now, you’ll make this a whole lot easier on yourself. Or maybe you’d rather talk down at the station instead?” He smiles and pats the gold “POLICE” shield pinned on his chest.
“I need to call my mom, she’s a lawyer,” Wendy says, reaching into her purse for her phone. Officer Blart, afraid that Wendy might be going for a gun, grabs the purse and squeezes it to see if there’s anything that feels like a gun.
He immediately realizes there’s no gun. He does feel something small and rectangular, but he has no idea what it is.
“It’s OK if I look inside, isn’t it?” Officer Blart asks Wendy. Wendy, believing that she has no choice, says yes.
Officer Blart pulls out a pack of cigarettes. “You’re too young to have these!” he barks. He immediately radios the police, who rush to the scene and write Wendy a citation for unlawful possession of cigarettes by a minor.

Wendy is pretty sure her rights have been violated. Her mother, attorney Kendra Nugent, goes to court with her to fight the citation for possession of cigarettes.

Mrs. Nugent says Wendy was illegally seized and searched in violation of the Fourth Amendment, so the evidence found in her purse can’t be used against her.

District Attorney McCoy prosecutes the case for the City of Newark. He tells the judge that: (1) there’s no Fourth Amendment case here, because Officer Blart was not working for the government, (2) Wendy wasn’t “seized” because she was free to leave and (3) searching the purse was reasonable to protect Officer Blart’s safety.

Abraham v. Raso (3rd Circuit 1999)
An off-duty police officer working security at a shopping mall shot a suspect after he tried to ram her with his car. She was accused of violating his Fourth Amendment rights by using excessive force (shooting) to restrain him. The court ruled that the officer was acting as an agent of the government and was subject to the Fourth Amendment, because she was wearing a police uniform, she ordered the suspect repeatedly to stop, and she tried to place him under arrest.

United States v. Shadid (7th Circuit 1997)
Two mall security guards followed Shadid to the parking lot because a store manager said he had shoplifted a ring. They stopped Shadid and patted him down for their safety, finding ammunition and a gun; they called police, who charged Shadid with unlawful weapons possession. The court ruled that Shadid's Fourth Amendment rights were not violated. The guards were not state officials because they acted with the primary purpose of protecting the mall's property and because there was no evidence that the police department directed or controlled their actions.

Chapman v. Higbee Company (6th Circuit 2003)
An off-duty police officer working at a department store (wearing his police uniform, badge and gun), suspected that Chapman was shoplifting clothes, so he and a store manager followed Chapman into the dressing room and made her lift up her clothes to see if she was sneaking out merchandise. They found nothing, and Chapman sued the store for illegally searching her. The court ruled that, even though he was off-duty, the officer could be a state official because he did a job – strip-searching a customer – that is normally the police's job, and Chapman may not have felt free to leave since the officer had on a uniform, badge and gun.

Bond v. Unites States (Supreme Court 2000)
U.S. Border Patrol agents boarded a bus to check for illegal immigrants, and patted and squeezed several passengers' bags. They felt a hard brick inside of Bond's bag, so they asked if they could look inside. Bond agreed, and the pulled out a brick of illegal methamphetamine, and charged Bond with drug possession. Bond argued that the search violated his Fourth Amendment rights. The Supreme Court agreed that the search was illegal and threw out the evidence. There was no expectation that police officers would manipulate the luggage, so there was an expectation of privacy. The search was not necessary for officers' safety because the luggage was on overhead racks outside of the passengers' reach.

United States v. Mattoralo (9th Circuit 2000)
Police stopped Mattoralo on suspicion of burglary. For their safety, they patted down his pockets. In his front pocket was something tube-shaped, which the officer thought might be a pocketknife. As soon as he patted the pocket, the officer realized it was a bag filled with rocks of illegal methamphetamine. The court said this was a legal search and Mattoralo's Fourth Amendment rights were not violated, because the search was necessary for officer safety and the officers realized the object was drugs as soon as they touched it.

United States v. Miles (9th Circuit 2001)
Police stopped Miles on suspicion that he had fired shots into a house. While patting him down for weapons, they felt a small square box in his jacket pocket. They realized it was not a weapon but were not sure what it was, so they rattled and shook it, and figured out it was bullets. The bullets matched the ones used in the house shooting, so they charged Miles with the shooting. The court threw out the evidence and found the search illegal, because once the police knew that Miles had no weapon, they could no longer continue the "safety pat-down" search to check for other evidence of a crime, like bullets, which did not pose a danger to them.

OPTIONAL DISCUSSION POINT: How has technology changed people's expectation of privacy? Do you have more or less privacy than your parents or your grandparents had? How should the Fourth Amendment treat text messages, e-mails and other electronic communications – should the rules be the same as for a letter written on a piece of paper? [See the *Quon* case and Harriton example that follow.]

DISCUSSION TOPIC: THE *QUON* CASE: PRIVATE TEXT MESSAGES ON PUBLIC TIME

The following excerpt is adapted from a December 15, 1999, story on *NPR.org*. The entire story is viewable online at:
http://www.npr.org/templates/story/story.php?storyId=121470151&ps=cprs

Text-Message Case Could Redefine Workplace Privacy

Can public employees expect any privacy when using work-issued devices? The Supreme Court has agreed to weigh in. California police officer Jeff Quon says he believed that hundreds of personal text messages he'd sent with his work-issued pager — including explicit notes to his mistress — were private.

After all, the Ontario Police Department, where Quon is a SWAT team sergeant, had told him and others that electronic messages wouldn't be reviewed if officers reimbursed the department for charges beyond what the city's service contract allowed.

But when police officials decided to review the texts of heavy users like Quon — to determine if the service contract needed to be expanded — they set off a legal battle over workplace privacy in the digital world that has now reached the Supreme Court.

At issue is whether and when constitutional privacy rights extend to text messages sent by public employees on work-issued communication devices, and how far government employers may go in writing policies that limit those rights. The law is more settled in the private-company realm: Employees of private companies have almost no expectation of privacy when using company-issued equipment, including computers and hand-held devices.

Questions for Class Discussion:

- What do you think – do you ever have an expectation of privacy when you're using equipment given to you by your boss at work?
- Should it make a difference that Sergeant Quon worked for the government and not for a private company? Does that change the expectation of privacy?
- The Supreme Court addressed this issue in 1987, in a case called *O'Connor v. Ortega*. In the *O'Connor* case, a doctor at a government hospital was fired after his bosses searched his desk and looked at private papers kept in his office. The Supreme Court decided that there is a reasonable expectation of privacy in some government offices, depending on how the office operates. In this office, only Dr. Ortega ever used the drawers in his desk and he'd been keeping his private

papers there for 17 years. So the expectation of privacy may depends on how the office actually works. Are there other kinds of work environments where you wouldn't have an expectation of privacy?

- In Sergeant Quon's case, should it make a difference what the searchers actually found? What if instead of notes to his girlfriend, they found plans to steal drugs out of the evidence room? Can you justify the reasonableness of the search after the fact if what you find is really, really bad?

DISCUSSION TOPIC: WHEN THE SCHOOL'S EYES FOLLOW YOU HOME…

The following excerpt is adapted from the February 11, 2010 *Philadelphia Inquirer*. The entire story is viewable on the *Inquirer*'s website at: http://www.philly.com/philly/news/breaking/84715512.html?cmpid=15585797

Suit: School-issued laptops used to spy on kids on Main Line

Lower Merion School District officials used school-issued laptop computers to illegally spy on students, according to a lawsuit filed in U.S. District Court.

The suit says unnamed school officials at Harriton High School in Rosemont remotely activated the webcam on a student's computer last year because the district believed he "was engaged in improper behavior in his home."

An assistant principal at Harriton confronted the student for "improper behavior" on Nov. 11 and cited a photograph taken by the webcam as evidence.

In a statement on its website, the district said that "The laptops do contain a security feature intended to track lost, stolen and missing laptops. This feature has been deactivated effective today."

In a later statement, the district said: "Upon a report of a suspected lost, stolen or missing laptop, the feature was activated by the District's security and technology departments. ... This feature has only been used for the limited purpose of locating a lost, stolen or missing laptop. The District has not used the tracking feature or web cam for any other purpose or in any other manner whatsoever."

Questions for Class Discussion:

- So, is this a Fourth Amendment search at all? Does it depend on where the student was when the camera was activated? What if the camera was used only during the school day while the student had the computer on campus?
- Assuming that activating the camera in the laptop is a "search," what do you think of the justification for turning on the cameras to recover lost or stolen computers? And what if the school is trying to locate a lost computer but sees something totally different – should they be required to ignore what they saw?
- The lawsuit says that students were given no notice that the computers contained cameras that might be activated. Would that matter? Could accepting the computer after you've received notice equal "consent" be photographed?
- Some schools require everyone to have a laptop. Does it make a difference if accepting one of these computers is mandatory?
- What do you think: is it *ever* appropriate for a school to activate a camera inside a student's computer and then use what's in the photo as grounds for discipline?
- Based on everything we've discussed in this class, if the student's family claims an illegal search under the Fourth Amendment, how should their lawsuit come out? What more would you need to know to make a decision?