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## Note

### The 4 R's of Drug Testing in Public Schools: Random Is Reasonable and Rights Are Reduced

John J. Bursch\*

In the 1980s, school officials in Vernonia, Oregon, observed a troubling increase in student drug use.<sup>1</sup> After repeated attempts to halt the increase, including classes, seminars, and even a drug-sniffing dog, the school had not solved its drug problem.<sup>2</sup> As a last-ditch effort, the Vernonia School District instituted a policy requiring random drug testing for any student wishing to participate in Vernonia's athletic programs.<sup>3</sup>

Seventh-grade student James Acton challenged Vernonia's policy, claiming that the urinalysis drug testing procedure violated his Fourth Amendment right to be free from unreasonable searches.<sup>4</sup> A federal district court dismissed Acton's suit,

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1. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2388 (1995) ("Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it.").

2. *Id.* at 2389. Vernonia's failure to dissuade students from using drugs through drug education is not unique. In a six-year program and study targeted at low-income, urban elementary schools, a team of researchers found "no significant differences in drug use initiation" between boys participating in an anti-drug initiative and boys who did not. Julie O'Donnell et al., *Preventing School Failure, Drug Use, and Delinquency Among Low-Income Children: Long-Term Intervention in Elementary Schools*, 65 AM. J. ORTHOPSYCHIATRY 87, 87, 96-97 (1995). The researchers found only a slightly lower rate of drug use initiation for girls. *Id.* at 96. *But see* Gilbert J. Botvin et al., *Long-term Follow-up Results of a Randomized Drug Abuse Prevention Trial in a White Middle-class Population*, 273 J. AM. MED. ASS'N 1106, 1111 (1995) (finding fewer users in program actively discouraging drug abuse).

3. *Acton*, 115 S. Ct. at 2389. Vernonia's testing procedure, urinalysis, was 99.94% accurate in identifying drugs in a given urine sample. *Id.* Once a student athlete failed two drug tests, the district mandated either drug counseling or expulsion from the athletics program. *Id.* at 2390.

4. *Id.* James Acton wished to play football but would not consent to drug testing. *Id.*

finding the search reasonable.<sup>5</sup> The Ninth Circuit reversed,<sup>6</sup> holding that the policy violated Acton's privacy rights under the United States and Oregon Constitutions.<sup>7</sup> The court stated that while Vernonia's interest in deterring student athlete drug use might justify testing based on individualized suspicion, it did not support random drug testing of student athletes.<sup>8</sup>

The United States Supreme Court in *Vernonia School District 47J v. Acton* reversed the Ninth Circuit, finding that, in balancing Fourth Amendment interests, students in general have a reduced expectation of privacy and that student athletes as a group have an even lower privacy expectation.<sup>9</sup> Relying on the lowered privacy expectations inherent in student athletic programs,<sup>10</sup> on the negligible intrusiveness of the urinalysis,<sup>11</sup> and on Vernonia's important interest in stopping students from using drugs,<sup>12</sup> the Court found that the school's special needs outweighed the students' privacy rights.<sup>13</sup> Although the Court's ruling targeted one class of student drug users, it did not address the drug use problem of students not participating in athletics.<sup>14</sup>

Drug use increasingly has entered the mainstream in

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5. *Acton v. Vernonia Sch. Dist. 47J*, 769 F. Supp. 1354, 1365 (D. Or. 1992) (holding that the drug testing program was a reasonable, warrantless Fourth Amendment search), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995).

6. *Acton v. Vernonia Sch. Dist. 47J*, 23 F.3d 1514, 1527 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995).

7. *Id.*

8. *Id.* at 1526.

9. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2392 (1995).

10. Student athletes voluntarily choose to engage in an already regulated activity. *Id.* at 2393. Athletes typically share a locker room that provides no more privacy than a urinalysis drug test. *Id.* at 2392-93. Student athletes who fail to abide by the rules and regulations of the sport face suspension from the team. *Id.* at 2393. Each of these factors or characteristics is inherent in student athletic programs and reduces the students' reasonable privacy expectation.

11. *Id.* at 2394.

12. *Id.* at 2395 ("That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted."). The Court observed that drugs are most addictive during school years and that student drug use disrupts the educational process, leading to lifelong losses in learning. *Id.*

13. *Id.* at 2397. The Court held that the state's compelling interest outweighed the urinalysis test's Fourth Amendment privacy intrusion. *Id.*

14. Vernonia administrators and teachers noticed "a sharp increase" in student drug use, characterized by rudeness, profanity, and disciplinary referrals. *Id.* at 2388. Vernonia singled out athletes for drug testing, in part, because they apparently were the leaders of the drug culture. *Id.* at 2389.

American schools<sup>15</sup> and has become an insurmountable obstacle to the goals of education.<sup>16</sup> As drug use by teenagers continues to rise, the public's support for drug testing in schools inevitably will increase.<sup>17</sup> Despite its growing public approval, however, mandatory drug testing raises important privacy concerns. Although federal courts have significantly narrowed Fourth Amendment protection against unreasonable searches and have limited the constitutional rights of public school students

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15. A survey by the University of Michigan's Institute for Social Research reported that 25.2% of high school sophomores and 30.7% of seniors used marijuana in 1994. Leef Smith, *Back to School; Drug Use in Schools Takes Turn for Worse; Officials Toughen Rules to Try to Curb Abuse*, WASH. POST, Aug. 31, 1995, at 1, 5 (Virginia ed.).

16. Researchers have documented an increase in violence associated with drugs. See *Clinton Decries 'Madness' of Teen Drug Use*, SAN DIEGO UNION-TRIB., Nov. 3, 1995, at A6 (reporting correlation between high school students using drugs and students carrying guns and joining gangs). Alcohol and cocaine use also are implicated in a significant number of suicides and homicides among adolescents. U.S. Pub. Health Serv., *Alcohol and Other Drug Abuse in Adolescents*, 50 AM. FAM. PHYSICIAN 1737, 1737 (1994).

In addition to contributing to violent behavior, the increase in drug use among American youth directly impacts their school performance and the overall learning environment. John C. Shepherd, *Time for Action on Child Drug and Alcohol Abuse*, A.B.A. J., Dec. 1984, at 8 (noting that because psychoactive drugs affect "mood, concentration, ability to reason and memory," they "interfere with learning and impair school performance"). Marijuana, for example, has a lengthy detrimental impact on both physical and mental performance. Lowell R. Beck, *We Can Stem Drug Abuse*, 68 A.B.A. J. 691, 691 (1982). In general, drugs hamper concentration, creativity, conceptualization, and focus. *Id.* at 692. The Supreme Court has noted that drug use correlates with school disciplinary problems. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

Although researchers have not established a causal relationship between drugs and dropouts, "there is a definite correlation." SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 99TH CONG., 2D SESS., DRUGS AND DROPOUTS 2 (Comm. Print 1986). An increased dropout rate harms not only the individuals dropping out, but the entire society. Dropouts from the class of 1982 alone will cost the nation over \$55 billion during their lifetimes. SUBCOMMITTEE ON ECON. GROWTH, TRADE, AND TAXES, 102D CONG., 1ST SESS., DOING DRUGS AND DROPPING OUT 52 (Comm. Print 1991) (citation omitted).

17. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389 (1995) (noting "unanimous approval" of student athlete drug testing policy by parents attending the policy's "input night"). Drug testing programs in contexts other than public schools have enjoyed some remarkable success. See, e.g., Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 561 n.34, 562 (noting 65% to 80% success rate rehabilitating company employee drug users as well as drop in U.S. Navy drug use from 47% in 1981 to 4% in 1984) (citation omitted); Mark Rust, *The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, at 51 (noting that "the [U.S.] military's drug testing program . . . has sharply lowered drug use in the armed forces").

generally,<sup>18</sup> student Fourth Amendment privacy rights are not yet "dead."<sup>19</sup> Inevitably, courts will decide whether a school can mandate random drug testing for all its students without violating the Constitution.<sup>20</sup>

This Note contends that the Supreme Court's holding in *Acton* gives public schools blanket authority to impose random drug testing on entire student bodies. Part I describes federal courts' recent trend toward narrowing both Fourth Amendment protection and public school student constitutional rights. Part II analyzes why courts have moved in this direction and contemplates the extension of the courts' reasoning to various drug testing programs. Part III proposes a random drug testing program for an entire public school student body that should pass constitutional scrutiny. Although random school-wide drug testing threatens the viability of student "privacy," such a program is both consistent with *Acton* and necessary for schools to regulate effectively the educational environment.

## I. FOURTH AMENDMENT RIGHTS AND *ACTON*

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>21</sup> Although the Fourth Amendment guards against both state and federal privacy invasions,<sup>22</sup> federal courts have carved out so many exceptions to Fourth Amendment requirements that courts rarely find police searches and seizures unconstitutional.<sup>23</sup>

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18. See *infra* Part I.A. to I.B.

19. "[C]hildren assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate.'" *Acton*, 115 S. Ct. at 2392 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

20. See *id.* at 2397 (Ginsburg, J., concurring) ("I comprehend the Court's opinion as reserving the question whether Vernonia, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."); see also *id.* at 2406 (O'Connor, J., dissenting) (charging that using student athletes as a testing class resulted more from hopes that testing would survive constitutional scrutiny, rather than calculations that it effectively would combat the school's drug problems).

21. U.S. CONST. amend. IV.

22. The Supreme Court has extended both the Fourth Amendment's protection and the exclusionary rule to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

23. In describing the warrant requirement, for example, Justice Scalia stated that it "ha[s] become so riddled with exceptions that it [i]s basically unrecognizable." *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J.,

## A. DISAPPEARING PRIVACY RIGHTS

### 1. Searching for a "Search or Seizure"

Before deciding whether a particular action violates an individual's Fourth Amendment rights, a court must find a government action resulting in a "search or seizure."<sup>24</sup> To determine whether the government has conducted a search for Fourth Amendment purposes, the court examines whether the individual has a reasonable expectation of privacy in his or her person or in the place searched.<sup>25</sup> Surprisingly, courts have held that citizens have no reasonable expectation of privacy in private land and buildings outside of their homes' curtilage,<sup>26</sup> airplane carry-on luggage,<sup>27</sup> conversations with third parties,<sup>28</sup> bank transactions,<sup>29</sup> personal garbage,<sup>30</sup> or in their persons or

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concurring).

24. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) ("Before we consider whether the tests in question are reasonable under the Fourth Amendment, we must inquire whether the tests are attributable to the Government or its agents, and whether they amount to searches or seizures.").

25. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (articulating test for searches that involves examination of both the person's subjective expectation of privacy and the objectively reasonable expectation of privacy). Although appearing in a concurring opinion, the Supreme Court subsequently adopted Justice Harlan's "reasonable expectation of privacy" test. *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

26. *United States v. Dunn*, 480 U.S. 294, 301 (1987). In *Dunn*, officers made a warrantless entry onto a ranch, crossed over five fences, including two barbed wire fences, and peered through netting over locked wooden gates into a barn. *Id.* at 297-98. The officers obtained a search warrant on the basis of what they saw in the barn. *Id.* at 298. The Court concluded that because the barn did not fall within the "curtilage" of the house, the officers lawfully observed the barn's interior. *Id.* at 301, 305.

27. *United States v. Edwards*, 498 F.2d 496, 500-01 (2d Cir. 1974) (holding searches of carry-on baggage at airports reasonable if individuals receive fair warning of the impending search).

28. *United States v. White*, 401 U.S. 745, 753 (1971). *White* concerned the admissibility of evidence the police obtained through a wired informant. *Id.* at 746-47. The Court reasoned that anyone contemplating criminal activity takes the risk that persons they speak with may go to the police with the information. *Id.* at 752. Thus, there is no reasonable expectation of privacy in a conversation, even when the declarant subjectively believes the dialogue is private. *Id.* at 752-53.

29. *United States v. Miller*, 425 U.S. 435, 442 (1976). Although bank patrons disclose personal financial information for a limited purpose, the fact that the bank may, at any time, disclose the information to a third party eliminates the patron's reasonable expectation of privacy. *Id.* at 442-43. "The

any personal effects after they have been sent to prison.<sup>31</sup>

## 2. Presumption of a Warrant Supported by Probable Cause and Exceptions to the Presumption

If a citizen has a reasonable expectation of privacy in his or her person or in the area police want to search, courts generally require that the police must obtain a warrant.<sup>32</sup> To obtain a warrant, the police must demonstrate to a detached, neutral magistrate<sup>33</sup> that they have probable cause to search.<sup>34</sup>

Just as many state actions do not constitute a "search or seizure" because courts do not find a reasonable expectation of privacy,<sup>35</sup> courts will excuse police from acquiring a warrant in exigent circumstances,<sup>36</sup> such as the protection of individuals<sup>37</sup>

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depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." *Id.* at 443 (citing *White*, 401 U.S. at 751-52).

30. *California v. Greenwood*, 486 U.S. 35, 40 (1988). Although citizens *subjectively* may expect that no one will examine their garbage, the Court found trash deposited on the curb sufficiently exposed to the public to negate any reasonable expectation of privacy. *Id.* at 39-41. Because any member of the public has access to the trash, the police also may search and seize the trash. *Id.* at 40-41.

31. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). Although "prisons are not beyond the reach of the Constitution," the Court held "that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell." *Id.* at 523, 526. In the case of prisons, the reduced expectation of privacy flows from the restrictions of incarceration. *Id.* at 524. The Court curtails many rights of prisoners to further a prison's "institutional needs and objectives." *Id.* at 523-24 (quoting *Wolf v. McDonnell*, 418 U.S. 539, 556 (1974)).

32. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (holding that allowing warrantless searches when sufficient evidence exists to support a search warrant "would reduce the [Fourth] Amendment to a nullity"); *see also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 62 (1992) (noting the "per se" warrant presumption rule).

33. A neutral magistrate need not be legally trained. *See Shadwick v. City of Tampa*, 407 U.S. 345, 352 (1972) (upholding arrest warrant issued by municipal court clerk).

34. To demonstrate probable cause, the police must provide information sufficient for a magistrate to believe it probable that "relevant evidence will be found in the place to be searched." *Michigan v. Clifford*, 464 U.S. 287, 294 (1984).

35. *See supra* notes 26-31 and accompanying text (describing instances in which citizens do not have a reasonable expectation of privacy).

36. *Johnson*, 333 U.S. at 14-15 ("There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.").

or the preservation of evidence.<sup>38</sup> Courts also will excuse the warrant requirement when police stop a person upon reasonable suspicion of his or her involvement in a crime and frisk the person upon reasonable suspicion that he or she is carrying weapon.<sup>39</sup> Lastly, courts excuse the warrant requirement for searches based on "special needs."<sup>40</sup> Under the rubric of "special needs," the Supreme Court has upheld warrantless entry of homes,<sup>41</sup> regulatory searches of businesses,<sup>42</sup> traffic stops for drunk drivers,<sup>43</sup> and mandatory drug testing for certain

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37. See *United States v. Riccio*, 726 F.2d 638, 643 (10th Cir. 1984) (upholding police's warrantless entry to attend to a suspect after they shot him).

38. See *United States v. MacDonald*, 916 F.2d 766, 773 (2d Cir. 1990) (upholding police officers' warrantless, forced entry into apartment due to an "urgent need," including the "need to prevent the loss of evidence"), *cert. denied*, 498 U.S. 1119 (1991).

39. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). Under *Terry*, the police may make an investigative seizure of a person based solely on reasonable suspicion that the person is about to commit a crime. *Id.* at 22. Although a "stop and frisk" constitutes a "search and seizure" for Fourth Amendment purposes, the government has a significant interest in "crime prevention and detection." *Id.* at 19, 22. The government also has an important interest in the officer's safety and the safety of the general public. *Id.* at 23-24, 30. Together, these state interests sufficiently justify a search and seizure based on reasonable suspicion that persons are involved in criminal activity and may be armed and dangerous. *Id.* at 30.

40. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding that "when special needs, beyond the normal need for law enforcement" exist, courts will permit exceptions to the warrant requirement (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))); *New York v. Burger*, 482 U.S. 691, 693-94, 712 (1987) (upholding a noncriminal, administrative search of a junkyard based on special public safety needs).

41. See *Wyman v. James*, 400 U.S. 309, 318-26 (1971) (upholding warrantless entry by welfare caseworker during home visits); see also *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (holding that reasonable administrative standards to search an entire neighborhood area satisfy probable cause to search a particular home).

42. *Burger*, 482 U.S. at 712. *Burger* upheld a statute authorizing warrantless random searches of junkyards. *Id.* at 693-94, 712. Although the Fourth Amendment applies to commercial as well as residential property, businesses in a closely regulated industry have a reduced expectation of privacy. *Id.* at 700. The Court articulated three criteria for courts to apply in determining whether to uphold a warrantless inspection: The government must have a "substantial" interest, the warrantless inspection must be "necessary to further [the] regulatory scheme," and the statute authorizing the inspections must provide regularity and certainty to act as a substitute warrant. *Id.* at 702-03 (citations omitted). The Court emphasized that the third criterion required limited discretion for inspecting officials. *Id.* at 703.

43. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990). In *Sitz*, the state police had established a checkpoint program to fight drunk driving. *Id.* at 447. The police stopped every vehicle passing through the checkpoint,



employees.<sup>44</sup> In each of these cases, the State's need for the invasion of an individual's privacy outweighs the presumption for requiring warrants supported by probable cause.<sup>45</sup>

## B. DIMINISHING RIGHTS OF PUBLIC SCHOOL STUDENTS

Consistent with this trend of mitigating Fourth Amendment rights, courts generally have narrowed public school students' constitutional rights.<sup>46</sup> Beginning in the 1940s, the Supreme Court recognized that students enjoy some level of constitutional protection.<sup>47</sup> Two decades later, the Court appeared ready to recognize that some student rights nearly are equal to adult rights.<sup>48</sup>

The climate began to change in 1975, however, when the Court began restricting students' rights. In *Goss v. Lopez*, the Court recognized that students have certain due process rights before a school can suspend them,<sup>49</sup> but the Court nonetheless refrained from giving the students the same constitutional

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examining drivers for "signs of intoxication." *Id.* The Court found a "special governmental need" to stop drunk driving, and characterized the drivers' privacy invasion as "slight." *Id.* at 450-51. Balancing these interests, the Court held that the "government need" outweighed the privacy intrusion and upheld the checkpoint procedure against a Fourth Amendment challenge. *Id.* at 455.

44. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); see also *infra* notes 74-83 and accompanying text (describing the *Skinner* decision upholding drug tests for railroad employees).

45. See, e.g., *Sitz*, 496 U.S. at 455 ("[T]he balance . . . weighs in favor of the state program."); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) ("[T]he proper balance . . . leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search [of the person].").

46. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (eliminating the warrant and probable cause requirements for searches of students in public schools); *Goss v. Lopez*, 419 U.S. 565, 581, 584 (1975) (narrowing procedural due process protection for school suspensions); *Tarter v. Raybuck*, 742 F.2d 977, 982, 984 (6th Cir. 1984) (upholding warrantless search of a student), *cert. denied*, 470 U.S. 1051 (1985).

47. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking a school's compulsory flag salute and pledge on First Amendment grounds).

48. Compare *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that school board could not suspend students for wearing black armbands to protest the Vietnam War) with *Pickering v. Board of Educ.*, 391 U.S. 563, 564, 573-75 (1968) (holding that school board could not dismiss teacher for writing letter to the local newspaper criticizing the board's policies).

49. 419 U.S. at 576.

protection as adults.<sup>50</sup> The dissent suggested that "there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults."<sup>51</sup>

Since *Goss*, federal courts have limited student rights in a series of cases stressing the importance of the states' interests in maintaining safe schools and positive learning environments. By the time the Supreme Court decided *Acton*, for example, school officials could censor school newspapers,<sup>52</sup> search student possessions,<sup>53</sup> and search students themselves<sup>54</sup> without violating the Constitution. *New Jersey v. T.L.O.*, decided ten years before *Acton*, exemplifies the Supreme Court's shift away from presuming that a warrant supported by probable cause is required for school searches and toward a less rigid Fourth Amendment balancing test.<sup>55</sup>

Upholding a vice-principal's warrantless search of a student's purse,<sup>56</sup> the Court in *T.L.O.* ruled that the warrant requirement was unsuited to schools because forcing authorities to go to a neutral magistrate before conducting a search caused intolerable delays.<sup>57</sup> These delays, along with the probable cause requirement, interfered with swift, informal school discipline and the school's need to maintain order.<sup>58</sup> Therefore, the Court decided that searches of student belongings did not require probable cause and a warrant, but rather only individualized suspicion and overall reasonableness.<sup>59</sup> The Court determined the reasonableness of the search by "balancing the

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50. *Id.* at 581, 584. Rather than requiring schools to provide students with a hearing *before* suspending them, the Court held that schools need only give students written or oral notice of the disciplinary charges, and provide them with a hearing "almost immediately" after suspension. *Id.* at 580-82. The Court also recognized that in extraordinary cases, courts could waive even these minimal requirements in the interests of safety and the integrity of the academic process. *Id.* at 582-83.

51. *Id.* at 591 (Powell, J., dissenting).

52. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

53. *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985).

54. *Tarter v. Raybuck*, 742 F.2d 977, 982, 984 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

55. *T.L.O.*, 469 U.S. at 337, 341-42.

56. *Id.* at 328.

57. *Id.* at 340.

58. *Id.* at 340-41.

59. *Id.* at 341-42.

need to search against the invasion which the search entails."<sup>60</sup> Applying this test, the Court found that the school's substantial interest in maintaining order on school grounds and in the classroom outweighed the intrusion of searching the student's purse.<sup>61</sup>

Courts cite several reasons why public school students should have a lesser expectation of privacy than adults,<sup>62</sup> school teachers and administrators have a duty to provide positive learning environments and to protect students,<sup>63</sup> and parents have a right to expect that their children will be safe while at school.<sup>64</sup> Thus, school officials must have discretion to take actions to ensure these duties are fulfilled.<sup>65</sup> Courts recognize that commanding cumbersome procedures before searching students and seizing evidence of their unlawful activity would undermine these safety and educational goals.

### C. SHRINKING CONSTITUTIONAL PROTECTION FROM WORKPLACE DRUG TESTING

The Supreme Court has held that drug testing, whether by breathalyzer, urine samples, or blood samples, constitutes a Fourth Amendment search because it intrudes upon the private

60. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)).

61. *Id.* at 339, 346. Despite the majority opinion's deference to the school, two justices criticized the opinion for overstating students' reasonable privacy expectations. *Id.* at 348-50 (Powell, J., concurring). In his concurring opinion, Justice Powell, joined by Justice O'Connor, stated:

I agree with the Court's decision, and generally with its opinion. I would place greater emphasis, however, on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protection granted adults and juveniles in a nonschool setting. In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.

*Id.* at 348 (Powell, J., concurring).

62. Basic constitutional protection also are different for juveniles in criminal proceedings. See, e.g., *Schall v. Martin*, 467 U.S. 253, 263 (1984) (noting that the state's parenting role justifies different treatment between juveniles and adults regarding pretrial detention).

63. *Tarter v. Raybuck*, 742 F.2d 977, 982 (6th Cir. 1984) (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983)), *cert. denied*, 470 U.S. 1051 (1985). In *Tarter*, the court upheld a school search of a student for marijuana on the ground that school discipline and a safe environment obviated the need for a warrant. *Id.* at 984.

64. *Id.* at 982 (citation omitted).

65. *Id.* at 983.

domain of the human body.<sup>66</sup> Urinalysis, for example, involves a highly private excretory function.<sup>67</sup> Urination is not only a traditionally private activity, "its performance in public is generally prohibited by law as well as social custom."<sup>68</sup> Urinalysis also allows testers to discover a variety of protected information about the testing subjects in addition to whether they have used narcotics.<sup>69</sup>

Despite the warrant presumption for searches,<sup>70</sup> federal courts have upheld a variety of warrantless and even suspicionless drug testing programs. In 1975, the D.C. Circuit upheld warrantless, suspicionless drug testing in the military.<sup>71</sup> The next year, the Seventh Circuit held that mandatory warrantless, suspicionless drug testing of public bus drivers following their involvement in an accident was reasonable.<sup>72</sup> In 1984, the District Court for the Southern District of New York upheld

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66. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (urine testing); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood testing). Notably, the use of blood testing, and presumably urine testing, to gather evidence does not constitute "testimony" and therefore does not implicate the Fifth Amendment's protection against self-incrimination. *Schmerber*, 384 U.S. at 761-65.

67. *Skinner*, 489 U.S. at 626.

68. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (1987) ("Most people describe it by euphemisms if they talk about it at all."), *aff'd in part and vacated in part*, 489 U.S. 656 (1989).

69. See *Skinner*, 489 U.S. at 617 ("[C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.")

70. See *supra* note 32 and accompanying text (describing presumption of a warrant requirement).

71. *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476-77 (D.C. Cir. 1975). Because citizens give up some expectations of privacy by choosing to join the armed forces, the court reasoned that a balancing of interests was the most appropriate standard for evaluating the constitutionality of the testing. *Id.* at 477. In light of the rising rate of drug abuse by members of the Armed Forces, the serious threat drugs in the military pose to national security, the lack of criminal prosecution in cases of drug detection, and the overall reasonableness of the testing procedure, the court held that the military drug testing program passed constitutional requirements. *Id.* at 476-77. The court found the program reasonable even though the testing procedure could involve searches of the groin and anal areas. *Id.* at 475.

72. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.) (per curiam), *cert. denied*, 429 U.S. 1029 (1976). Balancing the interests involved, the court found that the state's "paramount" interest in public safety outweighed any reasonable expectation of privacy of the drivers for the purpose of drug testing. *Id.* The court also held that giving urinalysis and blood tests in the hospital was a reasonable way to take the samples. *Id.*

warrantless, suspicionless drug testing of the prison population.<sup>73</sup>

In 1989, the Supreme Court clarified the balancing test for drug testing cases. In *Skinner v. Railway Labor Executives' Ass'n*,<sup>74</sup> the Court upheld mandatory testing for all railroad employees involved in certain train accidents.<sup>75</sup> The Court found a special governmental need to ensure safety on the nation's railways.<sup>76</sup> This need justified the privacy intrusion of drug testing without a warrant or even individualized suspicion.<sup>77</sup> Because railroad employees voluntarily participate in a heavily regulated industry, the Court held that they have a reduced expectation of privacy when they are working.<sup>78</sup> The Court found that the drug tests were no more intrusive than some procedures often encountered in a physical examination<sup>79</sup> and that the program's limitations on discretion essentially

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73. *Storms v. Coughlin*, 600 F. Supp. 1214, 1224 (S.D.N.Y. 1984). The test at issue in *Storms* involved a random, daily check of urine samples for marijuana and narcotics. *Id.* at 1216. Because prisoners have reduced constitutional rights once incarcerated, the court reasoned that their expectation of privacy in their bodies was similarly reduced. *Id.* at 1218-19 (citing *Bell v. Wolfish*, 441 U.S. 520, 546 (1979)). In balancing the interests of the state against prisoner privacy interests, the court deferred to the decision of state prison officials who regarded the tests as necessary for deterring drug use and maintaining discipline. *Id.* at 1220-21. Because prison officials needed such minimal probable cause to initiate testing, the program was essentially random. *Id.* at 1220. The court did not find this lack of reasonable suspicion relevant in evaluating the program's reasonableness. *Id.* Consequently, the court held that the state's interest in maintaining safe and drug-free prisons outweighed the prisoners' limited privacy expectations. *Id.* at 1224.

74. 489 U.S. 602 (1989).

75. *Id.* at 633. The policy required the railroad to administer drug tests after a "major train accident," defined as "any train accident [involving] (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000 or more." *Id.* at 609. The railroad also gave tests following an "impact accident" involving more than \$50,000 damage and "[a]ny train incident that involves a fatality to any on-duty railroad employee." *Id.*

76. *Id.* at 620.

77. *Id.* at 619-21. The Court emphasized that the drug tests were reasonable even though they were not predicated upon particularized suspicion of a railroad employee's drug use. *Id.* at 624 ("In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.")

78. *Id.* at 627.

79. *Id.* at 626-27.

duplicated the detached objectivity of a magistrate.<sup>80</sup> Balancing the government's interests against those of the railroad employees, the Court found that the tests did not violate the Fourth Amendment.<sup>81</sup>

Because the *Skinner* policy mandated blanket testing of employees after a train accident, the railroad officials did not need individualized suspicion to select employees for drug testing.<sup>82</sup> The Court held that testing based on reasonable suspicion was not a viable alternative to blanket testing in part because of the difficulty in establishing particularized suspicion in the aftermath of a major train accident.<sup>83</sup>

The Court also balanced the interests involved and upheld warrantless, suspicionless drug testing for U.S. Customs Service employees in *Skinner's* companion case, *National Treasury Employees Union v. Von Raab*.<sup>84</sup> In *Von Raab*, employees challenged the government's policy of drug testing any individual accepting a promotion to a position involving drug enforcement or gun handling.<sup>85</sup> As in *Skinner*, the special governmental interest in public safety outweighed the employees' reasonable expectation of privacy<sup>86</sup> and therefore justified searches without reasonable suspicion.<sup>87</sup>

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80. *Id.* at 622. The program stated specifically the circumstances warranting drug testing and the limitations on the test's intrusion. *Id.*; *cf. supra* note 42 (discussing the importance of objectivity and lack of discretion in "special needs" safety search of junkyards).

81. *Skinner*, 489 U.S. at 634.

82. *Id.* at 609 (noting that the program subjected "all crew members and other covered employees directly involved in [an] accident" to drug testing (emphasis added)).

83. *Id.* at 631; *see also* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (finding reasonable suspicion impractical when conditions "rarely generate articulable grounds for searching any particular place or person").

84. 489 U.S. at 679.

85. *Id.* at 660-61. The employees also challenged the portion of the policy covering individuals who handle "classified materials," but the Court declined to rule on this issue, citing inadequacy in the record. *Id.* at 679.

86. *Id.* at 679. The condition that employees had to take the test only if they chose to accept a promotion weighed in the government's favor. *Id.* at 667. The Court held the drug test valid even though the government presented no evidence that drug problems existed among Customs Service employees. *Id.* at 660.

87. *Id.* at 668-69.

## D. DRUG TESTING IN PUBLIC SCHOOLS

### 1. Pre-*Acton* Decisions

Although the Supreme Court did not examine drug testing in public schools prior to *Acton*, a few lower court decisions addressed the issue. In *Anable v. Ford*,<sup>88</sup> a federal district court struck down a mandatory school drug testing program because it viewed the program as excessively intruding on students' Fourth Amendment privacy rights.<sup>89</sup> The drug testing policy applied to any student whom a school official reasonably suspected "may be hiding evidence of a wrongdoing."<sup>90</sup> In *Anable*, a school staff member ordered one of the plaintiffs to "squat in the open and to urinate into a vial" to obtain the sample for testing.<sup>91</sup> According to the court, the search failed to pass *T.L.O.*'s Fourth Amendment test for "reasonableness" in the public schools.<sup>92</sup> The court also questioned the test's ability to expose sanctioned drug use.<sup>93</sup>

In *Brooks v. East Chambers Consolidated Independent School District*,<sup>94</sup> the District Court for the Southern District of Texas struck down a school district's random drug testing program for students in extracurricular activities.<sup>95</sup> The East Chambers school district had implemented a random urinalysis test, given in the privacy of a bathroom with no other observers,<sup>96</sup> and it prohibited students who tested positive from participating in extracurricular activities.<sup>97</sup> Using *T.L.O.*'s

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88. 653 F. Supp. 22 (W.D. Ark.), modified by 663 F. Supp. 149 (W.D. Ark. 1985).

89. *Id.* at 41. Notably, the court did not factor the severity of the penalty for drug use, denying the student credit for an entire semester, into its assessment of the program's constitutionality. *Id.* at 26.

90. *Id.* at 25.

91. *Id.* at 27.

92. *Id.* at 41 (finding that the "need" for the search did not justify its "excessively intrusive nature").

93. *Id.* at 22, 39-40 (noting drug test's propensity to "yield a false negative result").

94. 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd mem.*, 930 F.2d 915 (5th Cir. 1991).

95. *Id.* at 766. The school administered the test once at the beginning of the semester and then randomly throughout the term to any student participating in extracurricular activities. *Id.* at 760.

96. *Id.* at 762.

97. *Id.*

balancing test<sup>98</sup> the court determined that the school failed to show *any* reasonable justification for random drug testing.<sup>99</sup> The school's drug testing program, therefore, violated the Fourth Amendment's prohibition against warrantless searches and seizures.<sup>100</sup>

In the only decision prior to *Acton* upholding a school drug testing program, *Schail v. Tippecanoe County School Corp.*,<sup>101</sup> the Seventh Circuit held that random urine testing of student athletes did not violate the Fourth Amendment.<sup>102</sup> The court noted that student athletes have a reduced expectation of privacy<sup>103</sup> and that the program's safeguards limited official discretion.<sup>104</sup> Because the school had a strong interest in curbing student drug use<sup>105</sup> and the program did not allow police to use test results for criminal prosecution,<sup>106</sup> the court found the program reasonable.<sup>107</sup>

## 2. The *Acton* Decision

A majority of the Supreme Court in *Acton* found that the

98. See *supra* notes 57-61 and accompanying text (describing *T.L.O.*'s test for determining the reasonableness of limiting public school students' Fourth Amendment rights).

99. *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 764-66 (S.D. Tex. 1989), *aff'd mem.*, 930 F.2d 915 (5th Cir. 1991). The court found little evidence that drugs caused any major problems in operating the East Chambers school and no evidence that drugs created any particular problem in the school's extracurricular activities. *Id.* at 761. Further, the court found no evidence that drug use by students involved in extracurricular activities interfered with the school's educational environment more than drug use by other students, no evidence that the testing deterred students from using drugs, and no evidence of the inherent risks present in cases such as *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), or *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). *Brooks*, 730 F. Supp. at 764-66; see *supra* notes 75-83 and accompanying text (discussing *Skinner*); *supra* notes 84-87 and accompanying text (discussing *Von Raab*); cf. *supra* note 1 and accompanying text (noting the serious problem with student drug use in the Vernonia School District).

100. *Brooks*, 730 F. Supp. at 766.

101. 864 F.2d 1309 (7th Cir. 1988).

102. *Id.* at 1324.

103. *Id.* at 1318.

104. *Id.* at 1321-22 (noting that officials used random selection rather than personal discretion to choose athletes for testing, enacted measures to ensure testing accuracy, and conveyed information designed to keep students informed of program operation).

105. *Id.* at 1320.

106. *Id.* at 1322 n.18.

107. *Id.* at 1322, 1324.



Vernonia School District's random drug testing policy for student athletes did not violate the Fourth Amendment.<sup>108</sup> The Court recognized that the Fourth Amendment's guarantees extend to searches and seizures by school officials<sup>109</sup> and that state-compelled urine testing constitutes a "search" for Fourth Amendment purposes.<sup>110</sup> The Court held, however, that the "special needs" of the public school environment rendered the warrant requirement inapplicable to a constitutional evaluation of a school-enforced drug testing program.<sup>111</sup> Additionally, the Court rejected *T.L.O.*'s reasonable suspicion requirement,<sup>112</sup> holding that the Constitution only required balancing the students' Fourth Amendment intrusion against the legitimate government interests at stake.<sup>113</sup>

The Court began the balancing process by examining public school students' reasonable expectation of privacy.<sup>114</sup> Because students are "unemancipated minors"<sup>115</sup> and are "committed to the temporary custody of the State as schoolmaster,"<sup>116</sup> the Court found that students have a reduced expectation of privacy.<sup>117</sup> In so holding, the Court relied on a number of previous cases supporting a reduced expectation of privacy for schoolchildren<sup>118</sup> and noted that schools already subject students to intrusive physical examinations and vaccinations.<sup>119</sup>

Student athletes' expectation of privacy should be even

108. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2397 (1995).

109. *Id.* at 2390 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985); *Elkins v. United States*, 364 U.S. 206, 213 (1960)).

110. *Id.* (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)).

111. *Id.* at 2390-91 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987); *T.L.O.*, 469 U.S. at 340-41).

112. *Id.* at 2391 ("[T]he Fourth Amendment imposes no irreducible requirement of [reasonable] suspicion." (quoting *T.L.O.*, 469 U.S. at 342 n.8)); see *supra* note 43 and accompanying text (describing suspicionless drunk driving traffic stops); *supra* note 77 and accompanying text (describing suspicionless railroad employee drug testing).

113. *Acton*, 115 S. Ct. at 2390 (citing *Skinner*, 489 U.S. at 619).

114. *Id.* at 2391-93.

115. *Id.* at 2391.

116. *Id.*

117. *Id.* at 2391-92; see also *supra* notes 46-65 and accompanying text (discussing the reduced constitutional rights courts give to public school students).

118. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2392 (1995); see *supra* notes 62-65 and accompanying text (discussing reasons why public school students inherently have a reduced expectation of privacy).

119. *Acton*, 115 S. Ct. at 2392.

lower, the Court reasoned, because they dress in locker rooms “not notable for the privacy they afford.”<sup>120</sup> In addition, schools require student athletes to maintain health insurance coverage, keep up their grades, comply with team dress codes, and attend mandatory practices.<sup>121</sup> In this respect, the Court found that the athletes’ voluntary participation resulted in a reduced expectation of privacy much like that of adults who choose to “participate in a closely regulated industry.”<sup>122</sup>

The Court then examined the urine test’s intrusiveness.<sup>123</sup> Although the Court recognized excretory functions as extremely private,<sup>124</sup> *Vernonia’s* policy provided for sample collection in a manner “nearly identical” to conditions in an ordinary public restroom<sup>125</sup> and thus were negligibly intrusive.<sup>126</sup> Although the Court expressed concern about the variety of information discoverable through urinalysis, it also found that the school’s narrow use of test results was minimally intrusive.<sup>127</sup>

Finally, the Court examined the government’s interest in compelling random drug testing of public school athletes.<sup>128</sup> The Court held that the state’s interest need not be “compelling,” only “*important enough* to justify the particular search at hand.”<sup>129</sup> The Court found that deterring drug use among schoolchildren constituted a very important state interest.<sup>130</sup>

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120. *Id.* at 2392-93.

121. *Id.* at 2393.

122. *Id.* (citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 627 (1989)); see *supra* text accompanying note 78 (noting that employees in the closely regulated railroad industry have a reduced expectation of privacy).

123. *Acton*, 115 S. Ct. at 2393.

124. *Id.* (“[C]ollecting the samples for urinalysis intrudes upon ‘an excretory function traditionally shielded by great privacy.’” (quoting *Skinner*, 489 U.S. at 626)); see also *supra* notes 66-69 and accompanying text (discussing privacy of urination).

125. *Acton*, 115 S. Ct. at 2393. Boys gave their samples at a urinal and fully clothed. *Id.* at 2389. Girls gave their samples within the confines of a bathroom stall. *Id.* The same-sex monitors may not see the students actually producing the sample in either case. *Id.*

126. *Id.* at 2393.

127. *Id.* The Court stressed that the tests checked only for drugs, and that school officials reviewed the results, not the police. *Id.* The Court also found that forcing students to disclose the medications they were taking prior to testing constituted an insignificant privacy intrusion. *Id.* at 2394.

128. *Id.*

129. *Id.* at 2394-95.

130. *Id.* at 2395. The Court found the school’s interest in eliminating drug abuse at least as important as ensuring efficient enforcement of national laws banning drug importation, *National Treasury Employees Union v. Von Raab*,

The Court noted that drug use affects entire student bodies, not just the individual user, because drug users disrupt the entire educational process.<sup>131</sup> Moreover, drug use is especially dangerous to student athletes because drugs increase the risk of injuries to the user and other participants in the sport.<sup>132</sup>

The Court rejected an argument for basing the drug testing program on reasonable suspicion.<sup>133</sup> It reasoned that the Fourth Amendment does not require searches to be the "least intrusive" possible.<sup>134</sup> Furthermore, a policy based on reasonable suspicion raises the danger of discriminatory selection of students for testing.<sup>135</sup> According to the Court, teachers are not in a position to add identification of drug users to an already long list of teaching demands.<sup>136</sup> Further, drug-impaired students "seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'"<sup>137</sup> Thus, the Court found a reasonable suspicion standard impractical because teachers would be unable to perceive or articulate grounds for selecting students to test.<sup>138</sup>

## II. EXTENDING *ACTON* BEYOND STUDENT ATHLETES

In *Acton* and *T.L.O.*, the Supreme Court made it clear that school searches are not subject to the Fourth Amendment

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489 U.S. 656, 668 (1989), or deterring the use of drugs by railway employees, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989). *Acton*, 115 S. Ct. at 2395. Additionally, the Court recognized Vernonia's particular disciplinary difficulties related to the increasing number of student drug users. *Id.* at 2395.

131. *Id.* The Court accepted Vernonia's contention that drug and alcohol use caused an epidemic disciplinary problem for the Vernonia schools. *Id.*

132. *Id.*

133. *Id.* at 2396.

134. *Id.*

135. *Id.* ("Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students.")

136. *Id.*

137. *Id.* (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989)); see also *supra* note 83 and accompanying text (noting the Supreme Court's rejection of a reasonable suspicion standard for drug testing railroad employees as impractical). But see Sheldon D. Blunk, Casenote, *Suspicionless Drug Testing of Public School Students: Brooks v. East Chambers Consolidated Independent School District*, 17 S.U. L. REV. 339, 350 (1990) (arguing that teachers are well-positioned to identify drug-impaired students because of their close proximity to students throughout the entire school day).

138. *Acton*, 115 S. Ct. at 2396.

warrant requirement.<sup>139</sup> A school district setting up a drug testing program, then, can choose students to take drug tests based on reasonable suspicion or select them randomly, but it need not obtain a warrant for each student tested. Reasonable suspicion requires school officials to have particularized evidence of drug use for every student they want to test. With random selection, school officials draw a certain number of students from a pool of candidates. Each method offers its own balance between effectiveness, intrusiveness, and administrative convenience. A discussion of these procedures elucidates both their benefits and problems from a Fourth Amendment perspective.

#### A. TESTING BASED ON REASONABLE SUSPICION

Although schools have two ways to implement a drug program based on reasonable suspicion—subjective selection based on observation and disciplinary violation testing—both present prohibitive problems.

##### 1. Problems with Subjective Selection Based on Observation

In her dissenting opinion in *Acton*, Justice O'Connor advocated a reasonable suspicion standard for selecting students for drug testing.<sup>140</sup> Rather than using a lottery, a school would test only students whom school officials reasonably suspected as drug users.<sup>141</sup> In addition to invading the privacy of fewer students than blanket testing,<sup>142</sup> selection based on reasonable suspicion would ensure that students retain control over whether the school will test them.<sup>143</sup> Students could avoid urinalysis altogether by avoiding the appearance of drug use.<sup>144</sup>

Proponents of this method, therefore, argue that reasonable

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139. See *supra* notes 57-59, 111 and accompanying text (describing the Supreme Court's willingness to dispense with warrant and probable cause requirements for searches of public school students).

140. See *Acton*, 115 S. Ct. at 2397 (O'Connor, J., dissenting).

141. *Id.* at 2397-98 (O'Connor, J., dissenting).

142. O'Connor noted that blanket searches affected scores of people while suspicion-based searches affected only "one person at a time." *Id.* at 2397 (O'Connor, J., dissenting) (quoting *Illinois v. Krull*, 480 U.S. 340, 365 (1987)); see also *infra* note 148 and accompanying text (discussing the inherent quantity limitation on reasonable suspicion selection).

143. *Acton*, 115 S. Ct. at 2397 (O'Connor, J., dissenting).

144. More specifically, students can avoid testing by not exhibiting any characteristics likely to give a school official reasonable suspicion that they have been using drugs.

suspicion testing is superior to random blanket testing. They claim that teachers represent ideal monitors to identify students "under the influence" because they observe students throughout the day as part of ordinary teaching responsibilities and can recognize uncharacteristic student behavior.<sup>145</sup> Although some commentators, as well as the *Acton* Court itself, believe that identifying drug-impaired individuals is difficult,<sup>146</sup> proponents of reasonable suspicion testing argue that teachers are in a better position to notice a student's drug problem than parents, who often have little close contact with their teenagers.<sup>147</sup>

A program based on reasonable suspicion, however, also has serious disadvantages. Reasonable suspicion testing limits the number of students tested,<sup>148</sup> thereby decreasing the number of drug-using students identified and thus program effectiveness. Testing based on reasonable suspicion will cause more implementation difficulties than a random program because, despite teachers' proximity to students, identifying drug users is extremely difficult.<sup>149</sup> In addition, burdening teachers with the task of identifying drug users adds a heavy responsibility to their already time-pressured days.<sup>150</sup>

Because reasonable suspicion also stigmatizes those students chosen for testing,<sup>151</sup> parents who support a random program may not accept testing based on suspicion.<sup>152</sup> School officials also could use the auspices of reasonable suspicion to discriminate against rude students, racial or ethnic minorities,

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145. See *supra* note 137 (discussing the special role of teachers that enables them to notice uncharacteristic student behavior).

146. *Acton*, 115 S. Ct. at 2396; see *supra* note 137 and accompanying text (noting difficulty of identifying drug users).

147. See Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REF. 239, 239 (1992) (stating that during adolescence, "the child accomplishes some degree of separation from the parents").

148. Because a reasonable suspicion program demands particularized suspicion for every student selected, it generally tests fewer students than programs based on random selection.

149. See *supra* text accompanying note 137 (describing the difficulty for lay people and even physicians charged with identifying drug users).

150. See *supra* text accompanying note 137 (describing the difficulty to identify drug users); see also *supra* note 136 and accompanying text (noting teachers' overburdened agendas); cf. *supra* note 83 and accompanying text (noting the Supreme Court's rejection of reasonable suspicion standard for train employee drug testing in part because of difficulty in determining suspicion).

151. *Acton*, 115 S. Ct. at 2396.

152. *Id.*

or simply unlikable students.<sup>153</sup> Discriminatory selection opens the door to student lawsuits,<sup>154</sup> and prevention of such suits would require schools to implement detailed procedures for documenting reasonable suspicion.<sup>155</sup>

With these social and procedural costs in mind, the Court generally has moved away from requiring individualized suspicion toward allowing blanket searches of all members in a given group.<sup>156</sup> Although blanket searches invade the privacy of more people, they also guard against official discrimination toward certain individuals or classes.<sup>157</sup> Moreover, the Court already has determined that the Fourth Amendment does not demand the "least intrusive" means possible.<sup>158</sup> Although the Court may decline to uphold suspicionless drug testing for the general population, it has expressed a greater willingness to permit such a method in public schools.<sup>159</sup>

## 2. Problems with Disciplinary Violation Testing

A second form of reasonable suspicion, the one Justice O'Connor formally advocated in *Acton*,<sup>160</sup> involves testing only those students who belong to a suspect *class* of likely drug users,

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153. *Id.* ("Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students."). Random selection cures this problem by eliminating school officials' discretion in selecting students. See *supra* note 43 and accompanying text (noting the constitutionality of a drunk driving checkpoint where every driver is stopped).

154. *Acton*, 115 S. Ct. at 2396.

155. *Id.*

156. See *supra* notes 41-44, 82-83, 87 and accompanying text (noting series of "special needs" cases in which the Supreme Court upheld blanket searches for drunk driving traffic stops, regulatory searches of businesses, and drug testing); see also *supra* notes 27, 71-73 and accompanying text (noting "special needs" cases in which lower courts upheld searches of airplane carry-on luggage and drug testing of soldiers, bus drivers, and prisoners). The Supreme Court continued its "special needs" trend in *Acton*. See *supra* notes 133-38 and accompanying text (describing the Court's reasoning in rejecting a reasonable suspicion standard in favor of blanket testing); see also *supra* note 112 and accompanying text (describing the Court's rejection of *T.L.O.*'s reasonable suspicion standard).

157. *Acton*, 115 S. Ct. at 2396; see *supra* note 135 and accompanying text (describing the *Acton* Court's concern that reasonable suspicion policy will be used in discriminatory fashion).

158. *Acton*, 115 S. Ct. at 2396; see *supra* text accompanying note 134 (noting the *Acton* majority's rejection of "least intrusive" means testing).

159. See *Acton*, 115 S. Ct. at 2396 (warning against "the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts").

160. *Id.* at 2406 (O'Connor, J., dissenting).

for example, students who break disciplinary rules. This method is a form of reasonable suspicion testing because it imputes suspicion of drug use onto students who break school rules.<sup>161</sup> This form of testing, however, is underinclusive because not every student using drugs will face disciplinary charges and overinclusive because not every discipline problem involves a drug user.

More importantly, determining what behavior constitutes a disciplinary violation creates the same difficulties as identifying signs of drug use.<sup>162</sup> Basing selection on such an arbitrary standard raises the same problems with discriminatory testing that the Supreme Court has avoided through its approval of blanket testing in drug testing and other search cases.<sup>163</sup> Furthermore, even if a court overlooked the substantive and procedural problems associated with discriminatory selection, the tenuous nexus between discipline and drug use makes disciplinary violations less useful as a selection factor for drug testing than the symptoms of drug use themselves.<sup>164</sup>

## B. RANDOM TESTING

In a random testing program, administrators draw a fixed percentage of names from a pool of potential drug testing

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161. A connection between disciplinary violations and drug use is especially probable if the disruption "ha[s] a strong nexus to drug use." *Id.* (O'Connor, J., dissenting).

162. See *supra* note 137 and accompanying text (noting the difficulty of identifying drug users). Like students on drugs who do not display visible characteristics of their abuse, students on drugs who do not break disciplinary rules will never be tested. See *supra* note 149 and accompanying text (noting the difficulty of identifying drug users based on observation).

163. See *Acton*, 115 S. Ct. at 2397 (upholding blanket, random drug testing of student athletes); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding blanket drunk driving stops); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674-668 (1989) (upholding blanket drug testing of Customs Service employees); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (upholding blanket drug testing of railroad employees); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (upholding blanket searches of homes after showing of probable cause for an entire area); *supra* note 41 and accompanying text (discussing *Camara*); *supra* note 43 and accompanying text (discussing *Sitz*); *supra* notes 75-83 and accompanying text (discussing *Skinner*); *supra* notes 84-87 and accompanying text (discussing *Von Raab*); cf. *United States v. Edwards*, 498 F.2d 496, 500-01 (2d Cir. 1974) (upholding blanket searches of carry-on baggage at airport); *supra* note 27 and accompanying text (discussing *Edwards*).

164. See *supra* Part II.A.1. (discussing individualized suspicion based on observable signs of drug use).

candidates. Although random testing reaches more students<sup>165</sup> and limits official discretion,<sup>166</sup> it intrudes on the privacy of a greater number of students and does not give innocent students any chance of avoiding testing altogether. The Supreme Court overlooked these deficiencies and upheld Vernonia's drug testing policy for students athletes in *Acton*.<sup>167</sup> The same reasoning the *Acton* Court used to justify testing the limited pool of student athletes, however, combined with the reasoning in other recent Fourth Amendment cases, provides a basis for the public schools to justify broader drug testing programs.

Courts will subject every future public school random drug testing program to the same balancing test employed in *Acton*,<sup>168</sup> *Skinner*,<sup>169</sup> and *Von Raab*.<sup>170</sup> For a future drug testing program to satisfy the Fourth Amendment, the three elements of the balancing test must weigh in favor of the state. The students' reasonable expectation of privacy, considered in light of the test's intrusion, must not outweigh the legitimate state interests advanced by the program.<sup>171</sup>

## 1. Reduced Expectations of Privacy

### a. *Random Selection of Students Participating in School-sponsored Extracurricular Activities*

Schools might implement a broader random testing program by placing all students participating in extracurricular activities into the drug testing pool. During the pre-*Acton* era, a federal

165. Over the course of a school year, a random testing program possibly could reach nearly every student in the testing pool. Given that any student might be selected, this method also should increase the deterrent effect on students.

166. School officials have no discretion in the selection process. They choose the names randomly. Cf. *supra* note 42 and accompanying text (describing necessary certainty of statutes that replace warrants); *supra* note 135 and accompanying text (noting the dangers of official discretion in individualized suspicion testing).

167. *Acton*, 115 S. Ct. at 2396.

168. *Id.* at 2390-96; see *supra* notes 108-38 and accompanying text (discussing *Acton*).

169. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619-33 (1989); see *supra* notes 75-83 and accompanying text (discussing *Skinner*).

170. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-77 (1989); see *supra* notes 84-87 and accompanying text (discussing *Von Raab*).

171. See *supra* notes 114, 123, 128 and accompanying text (describing the Supreme Court's three-part analysis of Vernonia's drug testing policy for student athletes).



district court struck down such a drug program in *Brooks v. East Chambers Consolidated School District*.<sup>172</sup> In *Brooks*, however, the court found no compelling state interest for testing students involved in extracurricular activities,<sup>173</sup> a view the Supreme Court rejected in *Acton*.<sup>174</sup>

A Supreme Court finding that students in extracurricular activities do not have a greater reasonable expectation of privacy than student athletes would be consistent with *Acton*. Students in extracurricular activities, like those in athletics, lack some of the constitutional rights ordinarily held by adults because they are in the state's custody.<sup>175</sup> Like student athletes, students participating in school-sponsored extracurricular activities can choose not to participate if they do not want to submit to drug testing.<sup>176</sup> Students in extracurricular activities, like athletes, also voluntarily submit to school regulations that other students do not.<sup>177</sup> Thus, both groups of students hold somewhat similarly reduced privacy expectations.

The only significant difference between athletics and extracurricular activities is that schools do not subject students

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172. 730 F. Supp. 759, 766 (S.D. Tex. 1989); see *supra* notes 94-100 and accompanying text (describing *Brooks*).

173. *Brooks*, 730 F. Supp. at 764-66.

174. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2394-95 (1995) (holding that deterring *any* student from using drugs is an "important," if not "compelling," state interest).

175. See *supra* notes 46-65 (discussing students' reduced constitutional rights). Although extracurricular activities are not officially "school activities," they are connected closely with the school environment. The school sponsors the activities, usually with money, facilities, and human resources. In addition, schools often heavily regulate extracurricular activities, frequently requiring a dress code, minimum grade point average, and mandatory attendance. Finally, the school remains in "custody" of the students, especially when a coach or an advisor supervises the participants.

176. See *United States v. Edwards*, 498 F.2d 496, 500-01 (2d Cir. 1974) (describing the choice not to fly as creating the ability to avoid having luggage searched); *supra* note 27 and accompanying text (discussing *Edwards*); *supra* note 78 and accompanying text (describing choice to take a railroad job and, thus, to subject oneself to random drug testing in *Skinner*); *supra* note 122 and accompanying text (describing students' choice to participate in athletics).

177. Examples include late-night rehearsals for marching band, specified clothes and make-up for school plays, and school bus transportation for out-of-town debate competitions. Cf. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (upholding drug testing of railway employees, who chose to participate in heavily regulated industry); *supra* note 121 and accompanying text (noting student athlete regulations in *Acton*).

participating in extracurricular activities to locker room undress.<sup>178</sup> Schools may require them to conform to a mandatory dress code, but they ordinarily will not force them to change clothes in front of other participants. Despite this distinguishing characteristic, however, the Court's reluctance to extend full Fourth Amendment protection to participants in any "closely regulated industry"<sup>179</sup> or to students generally<sup>180</sup> provides an underlying justification for denying full Fourth Amendment protection to students in extracurricular activities. Given the many regulations schools customarily impose on participants in extracurricular activities,<sup>181</sup> *Acton* permits a finding that students in athletics and students in extracurricular activities hold essentially the same privacy expectations.<sup>182</sup>

b. *Random Selection from the Entire Student Body*

A random drug testing program for an entire student body raises more constitutional questions than programs for students in either athletics or extracurricular activities. Blanket random testing eliminates one of the primary characteristics justifying many of federal courts' decisions upholding diminished Fourth Amendment rights: voluntariness.<sup>183</sup> Students participating in

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178. *Acton*, 115 S. Ct. at 2392-93; see *supra* note 120 and accompanying text (describing the lack of privacy in locker rooms). Some extracurricular activities, such as a school play or marching band, may involve some form of communal undress.

179. See *supra* notes 42, 78, 122 and accompanying text (describing a reduced expectation of privacy in heavily regulated industries).

180. See *supra* notes 52-65 and accompanying text (describing the reduced Fourth Amendment rights of public school students).

181. See *supra* note 177 and accompanying text (noting possible school regulations for students participating in extracurricular activities).

182. In addition, the drug-use justification for regulating public school student conduct is at least as strong as preventing railway accidents or preserving an effective Customs Service. See *supra* notes 130-31 and accompanying text (describing *Acton's* formulation of important government interest). This strong interest was enough for the Court to uphold testing for athletes and is equally applicable here. *Acton*, 115 S. Ct. at 2395. Furthermore, students start with a lower expectation of privacy than adult citizens. See *supra* notes 62-65, 115-19 and accompanying text (describing reduced expectation of privacy for public school students). Additionally, drug use *does* implicate safety and educational concerns for children in school, even those students not involved in athletics. See *supra* note 16 (discussing relationship between drugs and violence in adolescents).

183. See, e.g., *supra* notes 78, 86, 122 and accompanying text (noting cases in which voluntary participation in an activity or job justified participants' reduced expectation of privacy).

athletics and other extracurricular activities choose to participate, thereby agreeing to abide by the school's additional rules and requirements.<sup>184</sup> By contrast, students who simply attend classes do not have the option of refusing to participate.<sup>185</sup>

A judicial finding that the absence of voluntary participation does not make a significant difference in determining students' reasonable expectation of privacy, however, would be consistent with recent Supreme Court precedent. Student rights overall are shrinking.<sup>186</sup> In addition, past Supreme Court cases justifying Fourth Amendment intrusions based on the voluntariness of participants included several cases where the "choice" may have been illusory because the alternatives were impractical or infeasible.<sup>187</sup> Thus, even though school attendance may be involuntary, voluntariness may be essentially irrelevant where a student otherwise has a severely reduced reasonable expectation of privacy.

Although schools do not force nonathletes to undergo complete physical examinations, they compel vaccinations and require health insurance, which typically requires a physical.<sup>188</sup> Students, therefore, already expect some privacy invasions associated with schooling. Furthermore, the custodial character of the school environment, though not as rigorous and demeaning as prison or the military, fosters expectations in both students and their parents that the school will restrict some

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184. See *supra* notes 122, 176 and accompanying text (noting the choice that students involved in athletics or other extracurricular activities make).

185. States usually impose compulsory school attendance until the age of sixteen or eighteen. See, e.g., MINN. STAT. § 120.101, subd. 5 (1994) (mandating compulsory school attendance between ages seven and sixteen until the year 2000 and to age eighteen thereafter).

186. See *supra* notes 46-65 and accompanying text (discussing cases that have constricted students' rights).

187. For many people, keeping a job is not a "choice." Cf. *supra* note 78 and accompanying text (discussing *Skinner* and railroad employees who "choose" to participate in a heavily regulated industry). For someone with a family to support, quitting work to preserve personal privacy is not a viable "choice." Turning down a promotion may not be a "choice" either. See *supra* note 86 (describing *Von Raab* and Customs Service employees who "choose" to accept a promotion). Even using an airplane may not represent a real "choice" if the trip is of any significant distance and the individual has a deadline, either for work or for personal reasons. See *supra* note 27 (discussing *Edwards* and the "choice" to use the airlines for transportation).

188. See *supra* note 119 and accompanying text (noting compulsory student physicals and vaccinations). On its face, a physical examination, which often will include undress and physical contact, appears much more intrusive than an *Acton*-type urinalysis test.

student freedom.<sup>189</sup> Combined with school officials' duty to protect students and to provide a positive learning environment,<sup>190</sup> a severely reduced expectation of privacy for *any* student, not just those participating in athletics or extracurricular activities, would be consistent with *Acton*.

## 2. Intrusiveness

The second factor in the *Acton* balancing test is the intrusiveness of the testing procedure. Measuring intrusiveness involves looking at both the mechanics of the test and the penalties for a positive result.

### a. Analyzing Drug Testing Procedures

School districts setting up a drug testing program of any kind presumably will follow a testing procedure similar to the one in *Acton*, a procedure the Supreme Court described as negligibly intrusive.<sup>191</sup> Unlike *Anable v. Ford*, where a district court struck down a drug testing policy that forced a student to provide a urine sample in the middle of a bathroom and in front of a school official,<sup>192</sup> the Vernonia schools obtained urine samples under conditions similar to those in a typical public bathroom.<sup>193</sup>

Significantly, the Vernonia school officials, not the police, received the drug testing results so that students did not face the danger of criminal prosecution.<sup>194</sup> Although it is possible to garner private information unrelated to drugs through a urine

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189. Cf. *supra* note 31 and accompanying text (noting a reduced expectation of privacy for prisoners); *supra* note 71 and accompanying text (noting the constitutionality of drug testing in the military).

190. See *supra* notes 62-65 and accompanying text (noting the Supreme Court's reasoning for diminished student rights).

191. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2393 (1995); see *supra* notes 123-27 and accompanying text (discussing negligible intrusiveness of *Acton's* drug test). The Supreme Court found the testing no more intrusive than a public restroom. *Acton*, 115 S. Ct. at 2393.

192. *Anable v. Ford*, 653 F. Supp. 22, 39-40 (W.D. Ark.), modified by 663 F. Supp. 149 (W.D. Ark. 1985); see *supra* notes 88-93 and accompanying text (discussing *Anable*).

193. *Acton*, 115 S. Ct. at 2389; see *supra* note 125 (discussing Vernonia's procedure for obtaining urine samples from students in *Acton*).

194. *Acton*, 115 S. Ct. at 2393; see *supra* note 41 and accompanying text (noting permissibility of noncriminal, warrantless home entry by welfare worker); *supra* note 127 and accompanying text (noting the importance of no possibility of prosecution).

test,<sup>195</sup> restricting the test results to locating illegal drugs reduces the test's overall intrusiveness.<sup>196</sup> Finally, the use of an accurate testing procedure<sup>197</sup> minimizes the danger of false, positive drug testing results and thereby reduces the probability that innocent students will receive punishment.<sup>198</sup> Thus, an accurate urinalysis test, given in bathroom-like conditions, that reveals only illegal drug use and is unavailable as evidence for criminal prosecution, is minimally intrusive to *any* student, not just athletes.

b. *Punishment for Failed Drug Tests*

In addition to testing procedure, the severity of punishment for failed drug tests contributes to the test's intrusiveness. In *Acton*, the school automatically suspended student athletes from their teams if they failed two drug tests.<sup>199</sup> A similar punishment, school suspension, may not be appropriate for the student body in general.<sup>200</sup> Students using drugs probably need the discipline and education that a school environment provides to improve their lives.

While suspension is a viable punishment, drug treatment is a better cure for student drug use because it proactively addresses the substance abuse problem.<sup>201</sup> According to *Acton*, the Constitution permits drug treatment as an appropriate punishment for students testing positive on a drug test.<sup>202</sup>

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195. See *supra* note 69 and accompanying text (describing other information obtainable through urinalysis testing, especially pregnancy).

196. See *supra* note 127 and accompanying text (noting the negligible intrusiveness where school officials use tests only for purposes of detecting certain illegal drugs in a student's system).

197. See *Acton*, 115 S. Ct. at 2389 (noting 99.94% accuracy of test used by Vernonia).

198. See *Anable v. Ford*, 653 F. Supp. 22, 39-40 (W.D. Ark.) (noting the court's concern with the reliability of drug testing), *modified by* 663 F. Supp. 149 (W.D. Ark. 1985); *supra* note 93 and accompanying text (discussing *Anable*).

199. *Acton*, 115 S. Ct. at 2390. The school suspension for two drug test failures lasted up to two athletic seasons. *Id.*

200. Schools may not deprive students of their right to an education. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (holding that a state, having extended the right to a public education generally, must "recognize a student's legitimate entitlement to a public education" protected by the Due Process Clause).

201. See *supra* note 17 (describing the remarkable effectiveness of drug testing and treatment in the military and business contexts).

202. *Acton*, 115 S. Ct. at 2390; see *supra* note 3 and accompanying text (discussing the program's use of drug counseling, along with athletic team suspension, as "punishment" for failed drug tests).

School detention for drug treatment, then, should satisfy the Fourth Amendment as a necessary means to further the goals of punishment, rehabilitation, and deterrence.<sup>203</sup>

### 3. State Interests

The third factor in the *Acton* balancing test is the state interest involved. This involves looking at the scope of the problem and the associated risk of student and societal harm.

#### a. *Demonstrating a Student Drug Problem*

The *Acton* decision rested in part on the district court's finding that the Vernonia School District experienced an increase in students abusing drugs, which directly correlated to a decrease in classroom decorum.<sup>204</sup> Although almost any American school could demonstrate *some* increased drug use among students,<sup>205</sup> in some schools that increase will be relatively insignificant due to deterrence or demographics.<sup>206</sup>

The Supreme Court, however, has not hesitated to uphold drug testing in nonschool contexts where an employer could not show an increase in, or even a problem with, drug use.<sup>207</sup> In *Von Raab*, for example, the Court found the state interest in maintaining a drug-free Customs Service to be so important that an absence of current drug problems did not affect the balancing test.<sup>208</sup> The *Acton* decision states that the school drug crisis is

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203. See *supra* note 72 and accompanying text (noting that urinalysis and blood tests performed in a hospital were a reasonable way to further the goal of deterring drug use among public bus drivers); *supra* notes 116-17 and accompanying text (noting that students are already in state custody when at school, making any additional custody an inconsequential privacy restriction).

204. *Acton*, 115 S. Ct. at 2388; see *supra* note 14 (discussing Vernonia school officials' problems with student discipline).

205. See *supra* note 15 and accompanying text (describing rising rate of drug abuse among students across United States).

206. It is unlikely that *every* public school system in America has experienced a dramatic change in the school drug culture. Apparently, even schools with a minimal increase can make a valid showing of a drug problem. See *Acton*, 115 S. Ct. at 2395 (accepting Vernonia's evidence of pervasive drug problems); cf. *id.* at 2406 (O'Connor, J., dissenting) (stating that although evidence of drug use at the high school existed, "there is virtually no evidence in the record of a drug problem" in Vernonia's schools).

207. See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-69 (1989) (upholding testing solely for drug use among Customs Services employees); *supra* notes 84-87 and accompanying text (discussing *Von Raab*).

208. *Von Raab*, 489 U.S. at 673-74.

"of much greater proportions" than existed in *Von Raab*.<sup>209</sup> Thus, a school's inability to demonstrate a drug problem to a court should not prohibit the court from finding that a school has a legitimate interest in deterring student drug use.

b. *Dangers of Student Drug Abuse: A Compelling Interest?*

To justify the drug testing program's intrusiveness, *Acton* relied on the increased risk of physical harm present when student athletes use drugs.<sup>210</sup> Given the absence of physical activity and contact in nonathletic activities, this rationale appears difficult to extend to the hazards associated with other extracurricular activities or to activities every student must participate in for educational purposes. A closer examination, however, reveals that the dangers associated with drugs can be just as serious for nonathletes.

Drug use leads to an increase in violence<sup>211</sup> and therefore makes the school setting more dangerous for other students.<sup>212</sup> Drug use also increases the risk of accidents in classes dealing with potentially dangerous substances or objects, like mercury in chemistry class, a dissection scalpel in biology, or high-powered tools in shop class.<sup>213</sup> Although not every student will be taking a potentially dangerous class, all students face the risk of being harmed in a violent, drug-associated outburst.

The impaired educational capacity and high dropout rate associated with drug use also causes psychological injury and high social costs.<sup>214</sup> Studies have shown that drug use *does*

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209. *Acton*, 115 S. Ct. at 2395 (citing *Von Raab*, 489 U.S. at 673).

210. *Id.*; see *supra* text accompanying note 132 (noting the Court's sensitivity to student athletes' particularly aggravated risk of physical injury caused by drug use).

211. See *supra* note 16 and accompanying text (noting the correlation between students using illegal drugs and students carrying guns).

212. *Acton*, 115 S. Ct. at 2395; see *supra* note 131 and accompanying text (noting the effect of one student's disruptive behavior on entire student body's academic setting). Although the *Acton* Court specifically referred to the effect on the academic environment, the effect of violence on an entire student body is just as prevalent as disruptive behavior.

213. The detrimental effects of drug use on students' minds could result in mistakes with dangerous objects or accidents caused by simple coordination impairment. See *supra* note 16 and accompanying text (noting the dangerous mental effects of drug use).

214. See *supra* note 16 (describing the relationship between drugs and poor school performance as well as the correlation between drugs and the dropout rate). Although the Court relied in part upon the threat of athletic injury, it did not address the psychological and social injury issues. *Acton*, 115 S. Ct. at

have a serious adverse impact on the educational environment.<sup>215</sup> Students leaving school with an inadequate education are more likely to be unemployed, to depend on the welfare system, and to commit violent crime.<sup>216</sup> These results are a large price for society to pay. Like the nation's interest in safe transportation<sup>217</sup> and an effective security and defense,<sup>218</sup> society's interest in students' safety and educational quality is compelling. The school's interest in stopping drug use, even without an interest in preventing physical harm to athletes, is therefore extremely important.<sup>219</sup>

### III. PASSING THE TEST: A SCHOOL-WIDE DRUG TESTING SCHEME THAT SURVIVES SUPREME COURT SCRUTINY

If a school decides to adopt a random drug testing program for all of its students, courts' balancing will favor the school's interest over the students' Fourth Amendment rights.<sup>220</sup> Although the constitutionality of a random drug testing program for an entire student body is a closer call than testing solely for student athletes, the state's important interest and the test's minimal intrusiveness still should outweigh the students' expectation of privacy. Additionally, from a policy standpoint, the Court's concern with discriminatory selection and its associated costs renders a program based on random selection more appealing than one based on reasonable suspicion.<sup>221</sup>

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2395.

215. See *supra* note 16 and accompanying text (describing memory and coordination deficiencies resulting from drug use, and correlation between student drug use and dropout rates).

216. See, e.g., Plyler v. Doe, 457 U.S. 202, 230 (1982) (noting that inadequate education adds "to the problems and costs of unemployment, welfare, and crime"); Carlos Villarreal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193, 1205 (1991) (noting increased welfare, job-training, and incarceration costs "attributable to inadequate education").

217. See *supra* notes 72, 76 and accompanying text (discussing the government's interest in safe transportation systems).

218. See *supra* notes 71, 86 and accompanying text (discussing the government's interest in drug-free military and Customs Service).

219. See *supra* note 77 (noting Supreme Court's unwillingness in *Skinner* to abandon individualized suspicion without compelling state interests and minimal intrusion).

220. See *supra* notes 114-38 and accompanying text (discussing the *Acton* balancing test).

221. See *supra* notes 156, 163 and accompanying text (noting Supreme Court's recent move toward blanket searches, even in the context of drug



Given *Acton's* mandates for a school drug testing program,<sup>222</sup> this Note proposes the following testing scheme:

### DRUG TESTING POLICY FOR BLACKACRE PUBLIC SCHOOL DISTRICT

*Whereas* despite efforts to thwart the rise of student drug use through drug education programs and parent involvement, the Blackacre School District's students continue to demonstrate an increasing attraction to drugs; and

*Whereas* drugs have resulted in an increasingly unruly student body, disrupting the educational purpose of the Blackacre School District; and

*Whereas* as student drug use has increased, the dropout rate also has increased; and

*Whereas* in addition to creating future societal burdens, both for the Blackacre community and the country as a whole, drugs threaten the students' personal safety and welfare; and

*Whereas* teachers have documented an increase in school violence in the Blackacre public schools, frequently related to students believed to be under the influence of illegal drugs; and

*Whereas* the impaired coordination and reasoning of students using drugs also creates a high risk to users and other students in any class employing dangerous materials or equipment; and

*Whereas* Blackacre's interest in halting drug use by students is compelling:

Now, therefore, be it

*Resolved by the Blackacre School Board assembled*, that the Blackacre School District announces a random drug testing program for the entire student bodies of the district's high and junior high schools. Each month during the school year, ten percent of the students will be selected randomly to give a urine sample.<sup>223</sup> The testing will be administered to one student at

testing).

222. *Acton's* requirements for a public school drug testing program include some evidence of a drug problem, although this may not be absolutely necessary, a negligibly intrusive testing procedure, immunity from criminal prosecution, and a narrowly tailored punishment. *See supra* notes 114-38 and accompanying text (discussing these requirements).

223. The Supreme Court upheld monthly random drug testing of ten percent of the student athletes. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389

a time in a small, private room with a school official waiting outside the door. The official will not observe the student visually, but the official shall listen for the normal sounds of urination and will check the sample for the proper temperature. The samples will be labeled and sent directly to a laboratory to be tested only for drugs. The results will not be used for criminal prosecution, being immune from a prosecutor's discovery requests. In the case of a positive test, the student will be given a second test. After failing a second test, the student must stay after school each school day for two hours of drug counseling and academic tutoring for ten weeks, followed by six months of periodic retesting.

### CONCLUSION

Drug use in schools is a real danger to student safety and education. Some schools have tried to remedy the problem through drug testing programs, but these policies raise concerns about student Fourth Amendment rights against unreasonable searches. Applying the Fourth Amendment balancing test for drug testing cases, *Vernonia School District 47J v. Acton* upheld a warrantless, random drug testing program for student athletes. The *Acton* decision continued the recent judicial trend of narrowing students' Fourth Amendment rights by eliminating the reasonable suspicion requirement for public school drug testing. Because the school drug problem exists beyond the athletic context, this Note concludes that random, school-wide testing would be consistent with the reasoning in *Acton* and other Fourth Amendment privacy cases.

This Note therefore proposes a random drug testing program for an entire student body that simultaneously would allow schools to attack drug use on a wider scale and provide an appropriate level of constitutional protection for students. Although student privacy is important, the enormous challenge that drugs present to schools justifies a minimally intrusive drug test, especially given students' reduced expectation of privacy. Courts must continue to protect student privacy in the drug testing context by monitoring discriminatory selection and overly intrusive testing. Additionally, the significance of the state

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(1995). School officials still might select some students for testing, provided they meet the reasonable suspicion and overall reasonableness standards articulated in *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). See *supra* text accompanying notes 59-60 (discussing two-part test).

interest in *Acton* is unique to the drug context. Courts only can justify further privacy intrusions when the state interest is equally high and the privacy intrusion is equally minimal. Random, school-wide drug testing, therefore, does not signal the "death" of student constitutional rights but rather a narrow exception intended to give school officials a stronger weapon in the war against drugs.