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Urinating on the Pennsylvania Constitution? Drug Testing of High School Athletes and Article I, Section 8 of the Pennsylvania Constitution

I. Introduction

Monday is test day in a Middletown Area High School.¹ At 11:00 a.m., the school principal is notified of the three students randomly selected by computer to participate in the process.² The principal notifies the parents of the chosen few.³ At about 1 p.m., Athletic Director Irv Strohecker visits the classroom of a selected student.⁴ The student is pulled out of class by Mr. Strohecker and taken across the street to the Family Medical Center.⁵ After the student presents identification, she walks with a technician and a school district staff person to the testing room.⁶ The student must then produce a urine sample.⁷ After collecting her urine in a sterile container, the student is taken back to school.⁸ A student that refuses to do so is disqualified from participation in athletic activities and treated as though he or she had failed the drug test.⁹

1. See Angela P. Swinson, *Steel-High To Make Drug Testing a Must*, HARRISBURG PATRIOT, May 7, 1998, at A1.

2. See Middletown Area School District, Pa., Drug Testing for Student Athletes Administration Procedure for Random Selection Process 1 (May 1997) (unpublished supplement to school board policy on file with *Dickinson Law Review*) [hereinafter Middletown Administrative Procedure].

3. See Swinson, *supra* note 1, at A1.

4. See *id.*

5. See *id.*

6. See Middletown Area School District, Pa., Protocol For Drug Testing Student Athletes 1 (May 1997) (unpublished supplement to school board policy on file with *Dickinson Law Review*) [hereinafter Middletown Protocol for Drug Testing].

7. See *id.*

8. See *id.* at 1-2.

9. See Middletown Area School District, Pa., Drug Testing for Student Athletes Board Policy § 227.3 (May 19, 1997) (policy on file with *Dickinson Law Review*) [hereinafter Middletown Policy].

In 1996, Middletown Area School District, located in central Pennsylvania, became the first in its area to test its athletes for drugs.¹⁰ Many Pennsylvania area school districts are joining Middletown in requiring student athletes to undergo mandatory random drug testing.¹¹ The Pennsylvania School Boards Association (PSBA) estimates that fifteen to twenty-five districts across the state have such policies.¹² Recently, some school districts have considered expanding their programs to test all students involved in extracurricular activities.¹³

Both the United States Supreme Court and the Pennsylvania Supreme Court view the forcing of an individual to urinate in order to test for drugs as a search of the individual.¹⁴ The United States Supreme Court has held that the Fourth Amendment to the United States Constitution¹⁵ permits school districts to randomly search high school athletes without cause through drug testing.¹⁶ Even though student athletes lack federal protection from suspicionless searches of their bodily fluids, shelter maybe available for Pennsylvania's students under the Commonwealth's constitution. Article I, Section 8 of the Pennsylvania Constitution¹⁷ has been

10. See Swinson, *supra* note 1, at A1.

11. Telephone Interview with Davelyn Smeltzer, Policy Consultant, Pennsylvania School Boards Association (Sept. 29, 1998) [hereinafter Smeltzer interview].

12. See *id.* This estimate does not include districts that have drug testing policies but who are not registered with PSBA nor does it include districts that test the entire student body. See *id.*

13. See Larry Alexander, *Hempfield Still Drafting Drug Policy*, INTELLIGENCER J., Dec. 9, 1998, at A1; Jane Zemel, *District Schools Weigh Expanded Drug Testing*, PITTSBURGH POST-GAZETTE, Oct. 6, 1998, at A10.

14. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Commonwealth v. McFarren*, 525 A.2d 1185, 1188 (Pa. 1987).

15. The Fourth Amendment reads:

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

U.S. CONST. amend. IV.

16. See *Acton*, 515 U.S. 646. In the fall of 1998, the Court refused to grant certiorari in a case involving a school district that tested all students involved in extracurricular activities for drugs. See *Todd v. Rush County Schs.*, 139 F.3d 571 (7th Cir. 1998), *cert. denied.*, 525 U.S. 824 (1998). Last year, the Court refused to grant certiorari in a case in which a high school's policy required all students who were suspended for fighting to be tested for drugs. See *Anderson Community Sch. v. Willis by Willis*, 158 F.3d 415 (7th Cir. 1998), *cert. denied.*, 119 S. Ct. 1254 (1999).

17. Article I, Section 8 reads:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to

extended to offer more protection of privacy rights than the Fourth Amendment in the search and seizure context.¹⁸ Although, Pennsylvania courts have not addressed the issue of drug testing in area high schools, an examination of the Commonwealth's search and seizure provision indicates that such drug testing is unconstitutional.

This Comment asserts that drug testing policies fail to pass Pennsylvania constitutional muster. The focus is directed toward mandatory suspicionless testing of student athletes, an activity that schools have adopted in response to increased drug use in recent years.¹⁹ Part II discusses a typical drug test performed by a school district and refers to policies from Derry, Fairfield, and Middletown Area School Districts. Part III analyzes the constitutionality of drug testing policies under Article I, Section 8. Part IV discusses alternatives to mandatory suspicionless drug testing of athletes that would effectuate school boards' goals of maintaining a drug-free environment without violating students' constitutional rights. Finally, Part V concludes that mandatory random drug testing of high school athletes is unconstitutional under Article I, Section 8 of the Pennsylvania Constitution.

II. Drug Testing Policies in Pennsylvania School Districts

Several types of drug testing policies exist in school districts across Pennsylvania.²⁰ This part will examine the purpose and

search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, §8.

18. See Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 77, 81-82 (1993).

19. See John Gibeaut, *Seeking Substances*, 84-May A.B.A. J. 42 (1998).

20. Some districts in western Pennsylvania that test athletes include Avella, Belle Vernon, Carlynton, Derry, and Iroquois. See Smelter interview, *supra* note 11. Midstate districts that test students for drugs include Danville, Fairfield, Gettysburg, Halifax, Keystone Central, Middletown, Steelton-Highspire, and Williamsport. See Steve Justice, *P-O To Consider Voluntary Drug Testing Program*, CENTER DAILY TIMES, January 27, 1997, at A10; Angela P. Swinson, *Schools Look At Policies On Tests*, THE HARRISBURG PATRIOT, January 5, 1999, at A1; Swinson, *supra* note 1, at A1; Letter from Pam Kolega, Program Advisor of Student Assistance Program and Technical Advisor to Safe and Drug Free Schools, Pennsylvania Department of Education (October 9, 1998) (on file with *Dickinson Law Review*); Smeltzer interview, *supra* note 11. Districts in eastern Pennsylvania with drug testing policies include Boyertown, Pottstown, and Chester Upland. See Dan Hardy, *Chester High's Drug Policy Puts Football on New Turf*, PHILADELPHIA INQUIRER, September 5, 1997, at A1.

procedures for testing student athletes. In addition, the consequences for a student who fails a drug test will be explained.

A. *Drug Testing Policies in Pennsylvania*

Three different types of policies appear to be in effect for the purpose of testing students for drugs in Pennsylvania schools.²¹ One type of policy requires mandatory random testing of student athletes.²² Other policies provide for voluntary testing of students.²³ The third type of policy calls for testing of a student if there is a reasonable suspicion that the student is under the influence of drugs.²⁴

B. *Purpose of Policies*

Pennsylvania school districts state that the purpose of testing athletes for drugs is preventative not punitive.²⁵ School districts test athletes to promote a safe and healthy environment, not only for the athletes on the playing field,²⁶ but for all students.²⁷ Through testing, districts also seek to identify those students with substance abuse problems so as to assist them with treatment programs.²⁸

C. *Random Mandatory Drug Testing of High School Athletes*

Drug testing procedures are similar throughout the various school districts in Pennsylvania.²⁹ Some school districts condition

21. See generally Carlynton School District, Pa., Drug and Alcohol Abuse Policy § 227 (revised June 21, 1997) (policy on file with *Dickinson Law Review*) [hereinafter Carlynton Policy]; Hardy, *supra* note 20, at A1; Swinson, *supra* note 1, at A1; Justice, *supra* note 20, at A10.

22. See Middletown Policy, *supra* note 9, at 1; Hardy, *supra* note 20, at A1; Swinson, *supra* note 1, at A1.

23. See Justice, *supra* note 20, at A10.

24. See Carlynton Policy, *supra* note 21, at 6.

25. See Derry Area School District, Pa., Student Athlete/Cheerleader Drug Policy 1 (Sept. 9, 1998) (policy on file with *Dickinson Law Review*) [hereinafter Derry Policy]; Middletown Policy, *supra* note 9, at 1; Hardy, *supra* note 20, at A1.

26. See Middletown Policy, *supra* note 9, at 1. "Administrators, teachers, and coaches recognize that drugs have a deleterious effect on motivation, memory, judgment, reaction time, coordination, and performance." *Id.*

27. See *id.*; see also Fairfield Area School District, Pa., Drug Screening of Athletes § 6615 (August 5, 1996) (policy on file with *Dickinson Law Review*) (stating that the purpose of drug testing is to identify those who risk jeopardizing their own or others' health and safety) [hereinafter Fairfield Policy].

28. See Derry Policy, *supra* note 25, at 1; Hardy, *supra* note 20, at A1.

29. See generally Carlynton Policy, *supra* note 21; Derry Policy, *supra* note 25; Fairfield Policy, *supra* note 27; Middletown Policy, *supra* note 9; Justice, *supra* note 20, at A10.

participation in athletic programs upon consent to drug testing at the beginning of each season.³⁰ Typically, a district randomly selects athletes for testing each week throughout the athletic season by computer.³¹ Selection is made from the entire athletic team, regardless of whether the student has already been tested that season.³² Once selected, a student who refuses to be tested is treated as if he or she had tested positive for drugs.³³

Middletown Area School District's procedure, discussed at the beginning this Comment, provides a typical example of how drug testing is carried out in many Pennsylvania school districts.³⁴ Like Middletown, school districts usually have outside companies conduct the testing.³⁵ These companies are required to follow procedures to ensure that the student's urine specimen is not contaminated or substituted.³⁶

If the test result indicates the presence of illegal or banned substances,³⁷ the positive result is verified.³⁸ Once verification of the

30. See Derry Policy, *supra* note 25, at 2; Fairfield Policy, *supra* note 27, at § 6615.1; Middletown Policy, *supra* note 9, at 1.

31. See *supra* text accompanying note 2; Derry Policy, *supra* note 25, at 3; Middletown Administrative Procedure, *supra* note 2, at 1.

32. See Middletown Administrative Procedure, *supra* note 2, at 1.

33. See Derry Policy, *supra* note 25, at 2; Middletown Policy, *supra* note 9, at 3.

34. See *supra* text accompanying notes 1-9.

35. See Derry Policy, *supra* note 25, at 2; Middletown Policy, *supra* note 9, at 3; Swinson, *supra* note 1, at A1.

36. See Derry Policy, *supra* note 25, at 3 (extra clothing and bags must be left outside of the testing area, a custody control form must be completed, a temperature sticker must be affixed to the urine bottle, a bluing agent is added to water in toilet or urinal, a monitor stands outside the stall or near the urinal, and the urine bottle is capped and initialed by a lab employee); Fairfield Policy, *supra* note 27, at §§ 6615.3-6615.4 (student chooses specimen container, assigned same gender observer who observes the entire process, and the specimen container is sealed and labeled); Middletown Protocol for Drug Testing, *supra* note 6, at 1-2 (student must provide photo identification prior to testing, the temperature of the urine specimen is recorded, the specimen container is double sealed, and a Chain of Possession Drug Screening Form is completed).

37. In Middletown, a student's urine test is positive if it reveals marijuana, phencyclidine hydrochloride (PCP), amphetamines, cocaine, opiates, or barbiturates. See Middletown Policy, *supra* note 9, at 2. Derry has a more expansive list of substances which will result in a positive test result. The list includes: alcohol, barbiturates, LSD, methaqualone, phencyclidine hydrochloride (PCP), amphetamines, benzodiazepines, marijuana metabolites, nicotine, propoxyphene, anabolic steroids, cocaine metabolites, methadone, and opiates. See Derry Policy, *supra* note 25, at 4.

38. See Fairfield Policy, *supra* note 27, at § 6615.5; Middletown Policy, *supra* note 9, at 2. If the first specimen is positive then a second test is immediately performed using a second urine specimen which was separated from the original specimen. See Fairfield Policy, *supra* note 27, at § 6615.5; Middletown Policy,

positive result is complete, the outside company notifies the school principal.³⁹ The principal contacts the student's parents and may set up a meeting.⁴⁰ The student is suspended from participation in athletic activities.⁴¹ The duration of the suspension depends upon whether this is the student's first, second, or third offense.⁴² The student must also participate in a drug treatment program.⁴³ A positive test result indicating drug use does not result in a suspension or expulsion from school.⁴⁴ In addition, schools do not send results to juvenile or criminal authorities absent a binding subpoena or other legal process.⁴⁵ Finally, before he or she may participate in athletics again, the student must be re-tested, possibly several times.⁴⁶

III. Random Mandatory Drug Testing of Student Athletes Under Article I, Section 8

In *Commonwealth v. Edmunds*, the Pennsylvania Supreme Court set forth four areas that must be considered during analysis of the Pennsylvania Constitution.⁴⁷ *Edmunds* requires an examination of "(1) the text of the Pennsylvania Constitutional provision; (2) the history of the provision, including Pennsylvania case law; (3) related case-law from other states; [and] (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."⁴⁸ This methodology is employed throughout this Comment to address the constitutionality of random, mandatory drug testing of student athletes in Pennsylvania.

supra note 9, at 2.

39. See Derry Policy, *supra* note 25, at 5; Middletown Policy, *supra* note 9, at 1.

40. See Derry Policy, *supra* note 25, at 6; Middletown Policy, *supra* note 9, at 2.

41. See Derry Policy, *supra* note 25, at 7; Fairfield Policy, *supra* note 27, at § 6615.8; Middletown Policy, *supra* note 9, at 2.

42. See Fairfield Policy, *supra* note 27, at § 6615.9 (suspension from athletics until student provides evidence of a negative test); Derry Policy, *supra* note 25, at 6-7 (for first offense the student may be suspended for the remainder of the season and the next season for which he or she is eligible; for second offense student is suspended for the remaining season and next season; for third offense student is suspended for the duration of his or her career with the school district).

43. See Middletown Policy, *supra* note 9, at 2; see also Derry Policy, *supra* note 25, at 7 (participation optional).

44. See Derry Policy, *supra* note 25, at 7; Middletown Policy, *supra* note 9, at 3.

45. See Derry Policy, *supra* note 25, at 7.

46. See *id.*

47. See *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

48. *Id.*

A. Text of Article I, Section 8

The first area of analysis of the Pennsylvania Constitution is an examination of the text.⁴⁹ The text of Article I, Section 8 of the Pennsylvania Constitution is very similar to that of the Fourth Amendment to the United States Constitution.⁵⁰ Both prohibit unreasonable searches and seizures and both require probable cause to obtain a warrant to search or seize.⁵¹ The Pennsylvania Supreme Court has stated that although the language of the search and seizure provision in the federal Constitution reflects the wording in the state constitution, “we are not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical.”⁵² Pennsylvania courts have stated that the meaning of Article I, Section 8 cannot be understood from its text, but must be drawn from the provision’s history throughout Pennsylvania jurisprudence.⁵³

B. History of Article I, Section 8

The second area of analysis of the Pennsylvania Constitution centers around the history of the provision.⁵⁴ Protection against unreasonable searches and seizures existed in Pennsylvania’s Constitution ten years before the federal Constitution was adopted and fifteen years before the addition of the Fourth Amendment to the United States Constitution.⁵⁵ Drafted during the American Revolution, Pennsylvania’s original constitution⁵⁶ reduced to writing legal and moral codes that had originated in William Penn’s charter of 1681.⁵⁷ The original search and seizure provision was

49. *See id.*

50. *Compare supra* note 17 *with supra* note 15.

51. *See id.*

52. *Edmunds*, 586 A.2d at 895-896.

53. *See Commonwealth v. Cass*, 709 A.2d 350, 358 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998); *Edmunds*, 586 A.2d at 896; *Commonwealth v. J.B.*, 719 A.2d 1058, 1064 (Pa. Super. Ct. 1998).

54. *See Edmunds*, 586 A.2d at 895.

55. *See Commonwealth v. Sell*, 470 A.2d 457, 466 (Pa. 1983).

56. Clause 10 of the Pennsylvania Constitution of 1776 reads:

The people have the right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to the right and ought not be granted.

Edmunds, 586 A.2d at 896.

57. *See id.* at 896. Professor Kreimer notes that in Pennsylvania’s charter,

reworded in 1790 to its current form as it appears in Article I, Section 8, and it has remained virtually untouched for over two hundred years.⁵⁸

Pennsylvania courts originally relied on Fourth Amendment precedent in interpreting Article I, Section 8.⁵⁹ In the last twenty years, however, the Pennsylvania Supreme Court has recognized the Pennsylvania Constitution as an alternative and independent source of individual rights.⁶⁰ When interpreting Article I, Section 8, Pennsylvania courts have stated that the provision is tied to a strong notion of the right to privacy.⁶¹ In some cases, Pennsylvania courts have not completely rejected federal search and seizure doctrine and have analyzed situations under both the Fourth Amendment and Article I, Section 8.⁶² Sometimes the two provisions lead to the same outcome resulting in uniform federal and state privacy rights.⁶³ On other occasions, the Pennsylvania Supreme Court has departed

William Penn referred to privacy as “the greatest Worldly Contents Men can enjoy.” Kreimer, *supra* note 18, at 118.

58. See *Edmunds*, 586 A.2d at 896; see also *supra* note 17. In 1873, the words “subscribed to by the affiant” were added to the end of Article I, Section 8. The change adds only that the oath or affirmation supporting a warrant must be pledged to by the affiant. See *Edmunds*, 568 A.2d at 896.

59. See Kreimer, *supra* note 18, at 82.

60. See *id.* at 81; see also *Sell*, 470 A.2d at 467.

61. See *Commonwealth v. Cass*, 709 A.2d 350, 358 (Pa. 1998), cert. denied, 525 U.S. 833 (1998) (“It is undeniable that the notion of privacy implicit in Article I, Section 8 is particularly strong in this Commonwealth.”); *Edmunds*, 586 A.2d at 898 (“[A] steady line of case-law has evolved under the Pennsylvania Constitution making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth.”); *Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987) (“[T]he privacy interest guaranteed by the Article I, Section 8 must be accorded great weight.”); *Sell*, 470 A.2d at 467 (“[T]he survival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.”).

62. See Kreimer, *supra* note 18, at 85. See generally 1996 PA. BAR INST., PRESERVING AND PROTECTING THE PROMISE OF INDIVIDUAL RIGHTS UNDER ARTICLE I, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION 18 (1996) (PBI No. 1996-1207) (outlining cases where Pennsylvania courts have refused to interpret Article I, Section 8 more broadly than the federal courts have interpreted the Fourth Amendment) [hereinafter PRESERVING INDIVIDUAL RIGHTS].

63. See *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992) (holding under both the Fourth Amendment and Article I, Section 8, that the blood tests of drivers were unreasonable searches because no probable cause existed to believe that the drivers were under the influence of drugs or alcohol); *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985), as amended, (February 5, 1986) (adopting the federal totality of circumstances test for determining the existence of probable cause based on information from confidential informants in the analysis of Article I, Section 8 of the Pennsylvania Constitution); see also Kreimer, *supra* note 18, at 85.

from federal precedent and protected the right to privacy solely under the commonwealth's constitution.⁶⁴

The Pennsylvania Constitution protects citizens from both individual and general searches conducted by government officials.⁶⁵ Because drug testing is a general search of students,⁶⁶ this subsection will examine the treatment of general searches under Article I, Section 8. This subsection will also apply the test utilized under Article I, Section 8 to determine the constitutionality of random mandatory drug testing in high schools.

1. General Searches Are Permitted Under Article I, Section 8.— The United States Supreme Court has held that the Fourth Amendment does not require probable cause, reasonable suspicion, or a warrant to conduct certain general searches of the population.⁶⁷ The Court has held that a general search is constitutional if the state's interest in conducting the search outweighs the intrusion into

64. Compare *California v. Hodari D.*, 499 U.S. 621 (1991) (holding that pursuit by police is not a seizure and items recovered from fleeing individuals may be admitted into evidence), *United States v. Place*, 462 U.S. 696 (1983) (after balancing individual's privacy interest in luggage against the intrusiveness of a drug sniff by police dogs stated that sniff is not a search), *United States v. Leon*, 468 U.S. 897 (1984) (holding that the Fourth Amendment does not require the suppression of evidence seized by a police officer acting in good faith reliance upon a warrant later found to be defective because of lack of probable cause), with *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (holding that pursuit by police is a seizure and the contraband abandoned by the fleeing defendant had been coerced), *Commonwealth v. Johnston* 530 A.2d 74 (Pa. 1987) (under Article I, Section 8, a drug sniff by police dog of property is a search requiring articulable reasonable suspicion prior to drug sniff), *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991) (discussing the concept that Article I, Section 8 does not incorporate a good faith exception to the exclusionary rule). See generally PRESERVING INDIVIDUAL RIGHTS, *supra* note 62, at 1 (outlining cases where the Pennsylvania courts have interpreted Article I, Section 8 more broadly than the federal courts have interpreted the Fourth Amendment).

65. An individualized search focuses on a particular individual or piece of property. See *Commonwealth v. Cass*, 709 A.2d 350, 358 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998). General searches are conducted on large classifications of people or property. See *id.* For example, the search conducted in *Cass* was a general search because all 2,000 lockers in the school were examined. See *id.* General searches are conducted without suspicion as to wrongdoing and without a warrant. See generally *Commonwealth v. Martin*, 626 A.2d 556, 560 (Pa. 1993) (probable cause or reasonable suspicion is required to search a particular individual under Article I, Section 8); *Cass*, 709 A.2d 350 (balancing competing concerns is necessary to determine if a general search is constitutional under Article I, Section 8).

66. See *Cass*, 709 A.2d at 355.

67. See *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that the state's use of highway sobriety checkpoints does not violate the Fourth Amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (holding that warrantless stops by the Border Patrol at fixed checkpoints does not violate the Fourth Amendment).

the privacy rights of those searched, and the search can reasonably be said to advance the state's interest.⁶⁸ Pennsylvania courts also have held that warrantless general searches are permissible under Article I, Section 8.⁶⁹ An examination of several general search cases, including police roadblock situations and school-wide searches, will present the Pennsylvania constitutional standard through which to evaluate high school drug testing.

a. Police roadblock cases.—The Pennsylvania Supreme Court approached the constitutionality of general searches in police roadblocks under Article I, Section 8 in a fashion similar to that of the United States Supreme Court.⁷⁰ In several cases, the Pennsylvania Supreme Court did not require the police to have warrants or suspicion of wrongdoing in order to conduct the roadblock searches.⁷¹ The court justified the general searches by stating that the Commonwealth's interests in conducting the roadblocks outweigh the intrusion into the individual drivers' privacy.⁷²

The Pennsylvania Supreme Court has not enthusiastically dispensed of the warrant and probable cause requirements for searches in police roadblock situations under the Commonwealth's constitution.⁷³ The method of balancing interests to justify roadblock searches was suggested by two justices in *Commonwealth v. Tarbert*.⁷⁴ Warrantless police roadblocks were approved five

68. See *Sitz*, 496 U.S. at 455; *Martinez-Fuerte*, 428 U.S. at 556-62.

69. See *Cass*, 709 A.2d at 360; *Commonwealth v. Blouse*, 611 A.2d 1177, 1180 (Pa. 1992); *Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987).

70. Compare *Blouse*, 611 A.2d at 1178 (holding that police roadblock set up to detect license and equipment violations is reasonable and therefore constitutional because the government's interest in promoting safe highways outweighed the intrusion into drivers' privacy interests), *Tarbert*, 535 A.2d at 1042 (stating that police roadblocks are constitutional under Article I, Section 8 after balancing the state's interest in preventing drunk driving against the intrusion into driver's privacy) with cases cited *supra* note 67.

71. See *Blouse*, 611 A.2d at 1178; *Tarbert*, 535 A.2d at 1043.

72. See *id.*

73. See generally *Cass*, 709 A.2d at 365; *Blouse*, 611 A.2d at 1181.

74. See *Tarbert*, 535 A.2d 1035. In *Tarbert*, the Pennsylvania Supreme Court addressed the issue of police roadblocks aimed at drunk-driving. See *id.* at 1035. The court held that the roadblocks were illegal because the use of police power in such operations exceeded statutory authority. See *id.* at 1045. However the opinion of the court stated that such roadblocks were constitutional under Article I, Section 8 of the Pennsylvania Constitution. See *id.* at 1043. Only two justices, Nix and McDermott, signed onto the opinion. See *id.* at 1035. Justice Flaherty concurred without explanation. See *id.* Justice Zappala concurred in the result but disagreed with the constitutional analysis of the court. See *id.* at 1045 (Zappala, J., concurring). Justice Papadakos concurred in the result but stated that the court did not need to address the constitutional issue. See *id.* at 1047 (Papadakos, J.,

years later by a splintered Pennsylvania Supreme Court.⁷⁵ Although the court adopted a balancing test similar to that existing under federal law, the majority required administrative authorization of roadblocks, which is not required under federal law.⁷⁶ Finally, several members of the court continue to voice their objections to the exception to the probable cause requirement carved out in the police roadblock cases.⁷⁷ These justices state that general searches lacking probable cause or reasonable suspicion do not have any legitimacy under Article I, Section 8.⁷⁸ The Pennsylvania Supreme Court split again when it considered general searches in public schools.⁷⁹

b. General searches in the schoolhouse.—The Pennsylvania Superior Court utilized a balancing of interests test to justify metal-detector scans and bag searches in high schools.⁸⁰ The court held that the schools' interests outweigh the students' privacy interests.⁸¹ The searches were constitutional because the search was reasonably related to the school's safety concerns and safeguards were present to protect students' privacy rights.⁸²

concurring). Justice Larsen dissented stating that the legislature could not restrict such a legitimate exercise of police power. *See id.* (Larsen, J., dissenting).

75. *See Blouse*, 611 A.2d at 1177. The Pennsylvania Supreme Court upheld police roadblocks as constitutional under Article I, Section 8 after balancing the Commonwealth's interests against the intrusion into the drivers' privacy rights. *See id.* Only Justices Nix, Larsen, and McDermott signed onto the opinion. *See id.* Justice Papadakos concurred though stated that he did so reluctantly out of fear that the police would "get carried away and abuse their authority in such mass detection efforts." *Id.* at 1181 (Papadakos, J., concurring). Justices Flaherty, Zappala, and Cappy dissented disagreeing with the use of a balancing test under Article I, Section 8. *See id.* at 1181-1184.

76. *See Blouse*, 611 A.2d at 1180; Kreimer, *supra* note 18, at 86. To be conducted in a constitutionally acceptable manner, police roadblocks must be authorized by a police administrator prior to carrying out the searches as well as follow administrative orders as to how to conduct the searches. *See Blouse*, 611 A.2d at 1180.

77. *See Commonwealth v. Cass*, 709 A.2d 350, 365 (Pa. 1998) (Flaherty, C.J., concurring), *cert. denied*, 525 U.S. 833 (1998).

78. *See id.*

79. *See infra* note 100 and accompanying text.

80. *See In re S.S.*, 680 A.2d 1172 (Pa. Super. Ct. 1996); *In re F.B.*, 658 A.2d 1378 (Pa. Super. Ct. 1995), *aff'd* 726 A.2d 361 (Pa. 1999), *cert. denied*, 120 S. Ct. 613 (1999).

81. *See In re S.S.*, 680 A.2d at 1176; *In re F.B.*, 658 A.2d at 1382.

82. *See In re S.S.*, 680 A.2d at 1173. The Superior Court stated that the method used to search the students contained adequate safeguards to protect privacy interests. *See id.* All students who entered the high school were lead into the gymnasium. *See id.* Then, the students were scanned with metal detectors and their belongings were patted down by a school employee. *See id.* If a suspicious object is detected in the pat down of a student's coat or bag, the employee has his supervisor act as a witness as the employee conducts a search of the belongings.

Metal detector and bag searches for weapons were approved by the Pennsylvania Superior Court without adequately analyzing the ramifications under Article I, Section 8.⁸³ The court upheld the searches of students for weapons because of the high rate of violence in the particular schools.⁸⁴ The issue of whether general searches could be justified by a school's interest in combating drug use was not addressed until the Pennsylvania Supreme Court considered *Commonwealth v. Cass*.

In *Commonwealth v. Cass*, the Pennsylvania Supreme Court approved a general search of students' lockers for drugs by school officials and police.⁸⁵ The principal of Vincent Cass' high school feared that students were buying and selling drugs in the school.⁸⁶ Since the principal did not have any specific information implicating any certain student, he organized a general search of all 2,000 lockers for drugs.⁸⁷ School officials, accompanied by two police officers, took a trained drug dog to each locker in the building.⁸⁸ When the drug dog alerted to a particular locker, school officials opened that locker and those immediately adjacent, and searched inside the lockers.⁸⁹ Cass' locker was the only one searched that contained drugs.⁹⁰

In analyzing the search under the Fourth Amendment, the Pennsylvania Supreme Court relied on the United States Supreme Court's holding in *Vernonia School District 47J v. Acton*.⁹¹ The *Acton* case upheld random mandatory drug testing of high school

See id.

83. In the case of *In re S.S.*, the court held that the search did not violate the United States or Commonwealth Constitutions. *See In re S.S.*, 680 A.2d at 1176. The court did not explain why the search was justified under the Pennsylvania Constitution but merely followed the reasoning of *In re F.B.* in its analysis. *See id.* In *In re F.B.*, the court refused to analyze the search under the Pennsylvania Constitution because the appellant did not properly raise the state constitutional issue in his brief. *See In re F.B.*, 680 A.2d at 1382. In both cases, the court failed to use the four prong methodology set forth in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), to demonstrate why the searches are constitutional under Article I, Section 8.

84. *See In re S.S.*, 680 A.2d at 1176; *In re F.B.*, 658 A.2d at 1382.

85. *See Commonwealth v. Cass*, 709 A.2d 350 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998).

86. *See id.* at 352.

87. *See id.* at 353.

88. *See id.* On the day of the search, students were kept in the classrooms, unaware of the searches occurring in the halls. *See id.* at 352.

89. *See id.* at 352.

90. *See Cass*, 709 A.2d at 352. Cass was suspended from school and charged with possession of marijuana and drug paraphernalia. *See id.* at 352-353.

91. *See id.* at 356; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

athletes.⁹² Using a three prong test set forth in *Acton*, the Pennsylvania Supreme Court held that the search in this case did not offend the Fourth Amendment because: (1) a student possesses a limited privacy interest in his or her school locker, (2) a drug dog sniff is minimally intrusive, and (3) the search was a practical means to effectuate the principal's "compelling concerns" over possible drug use.⁹³

In analyzing the search under the Pennsylvania Constitution, the Pennsylvania Supreme Court addressed the applicability of the reasoning set forth in *Acton* to Article I, Section 8.⁹⁴ After balancing the student's privacy right against the school's interest in maintaining a safe school environment, the court stated that general searches based upon neutral guidelines may be conducted with less than reasonable suspicion.⁹⁵ The court held that the privacy interests of students in a school setting are entitled to no greater protection under the Pennsylvania Constitution than the Fourth Amendment.⁹⁶

For the majority in *Cass*, Justice Cappy justified general searches of school lockers by relying on the police roadblock cases as evidence of the "tolerance" of such searches under Pennsylvania law.⁹⁷ Interestingly, Justice Cappy was opposed to the warrantless general searches in the roadblock cases.⁹⁸ In upholding general searches of high school students under Article I, Section 8, Justice Cappy refers to a past acceptance of general searches by the court of which he played no part.⁹⁹ Also in *Cass*, as with the police roadblock cases, three of the six justices strongly disagreed with the use of a balancing test to justify a general search of students' lockers under Article I, Section 8.¹⁰⁰ Therefore, when addressing

92. See *Acton*, 515 U.S. at 664-65.

93. See *Cass*, 709 A.2d at 357-358.

94. See *id.* at 358.

95. Cf. at 365. The Pennsylvania Supreme Court stated that in order to be constitutional, general searches must be conducted based upon neutral, clearly articulated guidelines. See *id.*

96. See *id.*

97. See *id.* at 360.

98. See *supra* notes 74-75 and accompanying text.

99. See *supra* notes 74-75 and accompanying text.

100. See *Cass*, 709 A.2d at 366-373. "I emphatically disagree with [the] treatment of Pennsylvania law. . . . I take issue with the majority's reliance on *Talbert* and *Blouse*, for [random police roadblocks do not] have any legitimacy under Article I, Section 8. . . . This exception to the general requirement of probable cause or reasonable suspicion swallows the entire prohibition against unreasonable searches and seizures, and is, therefore, unconstitutional." *Id.* at 366 (Flaherty, C.J., concurring). Only six justices took part in the decision because Justice Saylor did not participate.

the constitutionality of drug testing, the court would probably remain divided as to the wisdom of using a balancing test to justify general searches under Article I, Section 8.¹⁰¹ Even if a majority of the Pennsylvania Supreme Court decided to apply the balancing test to drug testing policies, the policies would be found to be unconstitutional because the school's interests cannot outweigh the intrusions upon the students' privacy rights.

2. *Balancing Interests Does Not Justify Drug Testing.*—General searches in the school environment are constitutional under Article I, Section 8 if based upon clearly articulated neutral guidelines and the school's interests for the search outweigh the student's right to privacy.¹⁰² Most likely, the Pennsylvania Supreme Court's mandate that general searches be conducted based upon guidelines would be satisfied by the formulation of written drug testing policies.¹⁰³ Although the Pennsylvania Supreme Court implies in *Commonwealth v. Cass* that drug testing of high school athletes does not violate the Pennsylvania Constitution,¹⁰⁴ this Comment will demonstrate that under *Cass*' own balancing test, drug testing policies fail to pass constitutional muster. Drug testing cannot be classified as a constitutionally acceptable search because the school's interest in testing does not outweigh a student's privacy rights.

a. *School's interest in testing.*—The Pennsylvania Supreme Court requires a school to have a compelling interest in order to conduct a general search of its students.¹⁰⁵ For example, the principal in *Cass* asserted that he initiated the search of all students' lockers in order to address heightened drug activity in the school.¹⁰⁶

101. See *id.* at 365 (three justices in favor of applying the balancing test under Article I, Section 8, three justices opposed to employing use of the balancing test, and one justice did not participate in the consideration of the case); *Commonwealth v. Blouse*, 611 A.2d 1177, 1180 (Pa. 1992) (four justices in favor of applying the balancing test under Article I, Section 8 and three justices opposed to applying the balancing test); *Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987) (only two justices stated that they are in favor of using a balancing test under Article I, Section 8).

102. See *Cass*, 708 A.2d at 365.

103. See *Derry Policy*, *supra* note 25, at 1; *Fairfield Policy*, *supra* note 27, at § 6615.1; *Middletown Policy*, *supra* note 9, at 1.

104. See *Cass*, 709 A.2d at 365. The court concluded that students were entitled to no greater protection from a general search under Article I, Section 8 of the Pennsylvania Constitution than under the Fourth Amendment to the United States Constitution. See *id.* Because the decision involved a general search of school lockers, arguably it does not apply to general searches of students' bodily fluids.

105. See *id.* at 361.

106. See *id.* at 352. The principal offered several reasons for his suspicions of

The Pennsylvania Supreme Court stated that “protecting students from the dangers of drugs is certainly a compelling and important interest of the school district.”¹⁰⁷

School districts assert reasons similar to those presented by the school in *Cass* for instituting random drug testing of athletes.¹⁰⁸ It is likely that the Pennsylvania Supreme Court would recognize as compelling a school district’s interest in fighting the presence of drugs within the school environment. However, the school districts have not automatically tipped the scale in their favor by justifying drug testing with a compelling reason. The Pennsylvania Supreme Court has stated that even the war on drugs is not so compelling an interest that an individual’s rights may be annihilated.¹⁰⁹ Prior to writing the majority opinion in *Cass*, which upheld suspicionless searches of lockers because of the dangers of drugs, Justice Cappy wrote the following about the drug dog sniff of an individual’s body:

Much has been compromised in the name of the war on drugs. But let it ring clear in Pennsylvania, no matter how well intended or compelling the government interest in ridding ourselves of the illicit drug trade, our unwavering belief in the sanctity and integrity of personal privacy constrains us to conclude that no citizen should be subjected to a governmental intrusion of this nature.¹¹⁰

Fighting the war on drugs was not a sufficient justification for the search of an individual’s outer-garments, without cause, through the use of a drug detection dog.¹¹¹ The privacy interests implicated by urinalysis are at least, if not more, weighty than a search of one’s clothing.

b. Student’s privacy interest.—When balancing the Commonwealth’s interest against an individual’s rights, the Pennsylvania Supreme Court has stated that the privacy interest guaranteed by Article I, Section 8 must be accorded great weight.¹¹² In a line of cases involving school searches of individual students, the

increased drug activity in the school: information from students, observations of suspicious activity (students passing packages among themselves in the halls, students wearing beepers, students carrying large amounts of money, and students increased use of the pay phones), increased use by students of drug counseling, and calls from concerned parents. *See id.*

107. *Id.* at 361.

108. School districts’ drug testing policies seek to eliminate drugs in the school environment. *See supra* text accompanying notes 25-28.

109. *See Commonwealth v. Martin*, 626 A.2d 556, 561 (Pa. 1992).

110. *Martin*, 626 A.2d at 563 (Cappy, J., concurring).

111. *See id.* at 560.

112. *See Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987).

Pennsylvania Superior Court¹¹³ required school officials to have reasonable suspicion before searching a particular student in order to protect the student's privacy and right to be free from unreasonable searches and seizures.¹¹⁴ The Pennsylvania Supreme Court has also recognized students' right to privacy under the Pennsylvania Constitution.¹¹⁵

Pennsylvania jurisprudence recognizes the intrusiveness of urinalysis, but addresses the subject in only a few cases. Urinalysis has been mentioned in opinions involving Pennsylvania's implied consent law.¹¹⁶ The Pennsylvania Supreme Court has held that urinalysis may be conducted only if there is probable cause to believe that an individual was driving under the influence of alcohol or a controlled substance.¹¹⁷ The Pennsylvania Supreme Court has

113. The Pennsylvania Supreme Court has not addressed the issue of the appropriate standard for determining the constitutionality of an individual search under Article I, Section 8 of the Pennsylvania Constitution.

114. See *Commonwealth v. J.B.*, 719 A.2d 1058, 1064 (Pa. Super. Ct. 1998) (holding that under Article I, Section 8 of the Pennsylvania Constitution, individualized searches of public school students conducted by school officials are subject to a reasonable suspicion standard). This is the same standard set forth by the United States Supreme Court for individual searches of students under the Fourth Amendment. See *New Jersey v. T.L.O.* 469 U.S. 325 (1985) (holding that a search of a student's purse by a school official was reasonable because it was based upon reasonable suspicion that the student had been smoking in the bathroom); see also *In re S.K.*, 647 A.2d 952 (Pa. Super. Ct. 1994) (holding that the pat-down of a student by a school security officer was reasonable because it was based upon reasonable suspicion that the student was in possession of cigarettes); *In re S.F.*, 607 A.2d 793 (Pa. Super. Ct. 1992) (holding that the search of a student's pockets by school police officer was based upon reasonable suspicion and was therefore justified); *In re Dumas*, 515 A.2d 984 (Pa. Super. Ct. 1986) (search of individual student's locker by the assistant principal was not based upon reasonable suspicion and was therefore unreasonable and invalid).

115. See *Commonwealth v. Cass*, 709 A.2d 350, 360 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998) ("[P]ublic school students do possess a privacy interest, albeit a limited one, protected by the Pennsylvania Constitution.").

116. See *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992); *Commonwealth v. McFarren*, 525 A.2d 1185 (Pa. 1987). Under Pennsylvania's Motor Vehicle Code, an individual consents to a breath, urine, or blood test if a police officer has reasonable grounds to believe that the person has been operating a motor vehicle under the influence of alcohol or a controlled substance. See 75 PA. CONS. STAT. ANN. § 1547(a) (West 1982).

117. See *Kohl*, 615 A.2d at 315; *McFarren*, 525 A.2d at 1188. The Pennsylvania Supreme Court refused to justify chemical testing by balancing the privacy interests of the driver against the Commonwealth's interest in reducing drunk driving. See *Kohl*, 615 A.2d 308; Kreimer, *supra* note 18, at 86. The court noted that the Commonwealth had a compelling interest in protecting its citizens from the dangers of drunk driving, however the protection afforded by Article I, Section 8 may not be diminished by the Commonwealth's vigilance in promoting that interest. See *Kohl*, 615 A.2d at 316. The Superior Court also required probable cause for chemical testing and refused to balance an individual's privacy interests

also addressed drug testing of employees by a private employer.¹¹⁸ While the decision appears to reflect the court's acceptance of urinalysis as a non-intrusive search, the holding is limited to drug testing of adults by a private, and not state, actor.¹¹⁹ The case does not indicate how the court would address drug testing of high school athletes.

Mandatory and suspicionless drug testing in high schools strays from the trend in Pennsylvania law protecting the privacy and integrity of an individual's body from state intrusion. For example, when urged by the Commonwealth to expand the length of time permitted for a *Terry* frisk and adopt a new category of seizure called justifiable detention, the supreme court refused to do so.¹²⁰ The court rejected the Commonwealth's "ends justify the means" rationale and stated that the seriousness of the criminal activity being investigated can never be used as a reason for abandoning the constitutional right to be free from governmental intrusions into personal privacy, absent reasonable suspicion or probable cause.¹²¹ In addition, under Pennsylvania law, an invasion of one's body is a more severe intrusion of privacy rights than a search of one's property.¹²² Therefore, although *Commonwealth v. Cass* allows

against the government's interest in conducting the search "given the high level of intrusiveness" of urine and blood tests. See *Commonwealth v. Danforth*, 576 A.2d 1013, 1021 (Pa. Super. Ct. 1990).

118. See *Rebel v. Unemployment Compensation Bd. of Review*, 723 A.2d 156 (Pa. 1998) (denying unemployment benefits to an employee who refused to comply with a drug test by his employer Duquesne Light). The court stated that urinalysis did not unduly intrude on the employee's privacy interests because the tests were conducted off the job site and in a "confidential and professional manner." *Id.* at 160.

119. See *id.* at 159. Justice Zapalla in his concurring opinion stated, "this decision has absolutely no ramifications with respect to . . . the protection against unreasonable government intrusions provided by the state and federal constitutions." See *id.* at 160-61 (Zapalla, J., concurring).

120. See *Commonwealth v. Rodriguez*, 614 A.2d 1378, 1382 (Pa. 1992). A *Terry* frisk allows an officer to search an individual based upon a reasonable suspicion that criminal activity is afoot. See *Terry v. Ohio*, 392 U.S. 1 (1968); *In re S.J.*, 713 A.2d 45 (Pa. 1998). The Pennsylvania Supreme Court has held that officers may not frisk an individual merely to protect their own safety, but must have specific articulable facts establishing that an individual is armed and dangerous before conducting a pat-down for weapons. See *In re S.J.*, 713 A.2d at 48.

121. See *Rodriguez*, 614 A.2d at 1383. The court stated that the "serious ills inflicted upon society by illegal narcotics" was not reason enough to ignore the protection of an individual's privacy under Article I, Section 8. See *id.*

122. See *Commonwealth v. Martin*, 626 A.2d 556, 560 (Pa. 1993). A drug dog sniff-search of property in Pennsylvania requires reasonable suspicion that drugs are located in the place, see *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987), while a drug dog sniff-search of a person requires probable cause. See *Martin*, 626

students' lockers to be searched without cause, the analysis cannot be extended to permit the general search of students' bodies through urinalysis.

Even though drug testing occurs in a controlled school setting, the privacy interests of students in the bathroom must be afforded great weight.¹²³ The intrusiveness of urinalysis is supported by many sources, including Pennsylvania law.¹²⁴ The school's interests in testing are important, but are not sufficient to justify the invasions of students' privacy. The Pennsylvania Supreme Court has refused to allow governmental interests such as eliminating illegal drugs and abolishing drunk driving to outweigh an individual's right to be free from government searches.¹²⁵ Therefore, the balance tips in favor of the student's right to be free from a suspicionless search of his or her bodily fluids.

C. *Case Law From Sister States Relating to Drug Testing of High School Students.*¹²⁶

The third area of analysis of the Pennsylvania Constitution requires an examination of related case law from other states.¹²⁷ To date, no state has heard a state constitutional challenge to mandatory drug-testing of high school athletes. In *Commonwealth*

A.2d at 560. Once the sniff search of an individual has been conducted, any additional search beyond a pat-down for weapons requires a warrant. *See id.*

123. When balancing the Commonwealth's interests against the individual's rights, the privacy interest guaranteed by Article I, Section 8 must be given great weight. *See Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987).

124. *See infra* notes 170-71 and accompanying text; *supra* text accompanying notes 116-117.

125. *See supra* notes 117 and 122. The Pennsylvania Supreme Court stated: We are mindful that government has a compelling interest in eliminating the flow of illegal drugs into our society, and we do not seek to frustrate the effort to rid society of this scourge. But all things are not permissible even in the pursuit of a compelling state interest. The [state] Constitution does not cease to exist merely because the government interest is compelling. A police state does not arise whenever crime gets out of hand.

Commonwealth v. Martin, 626 A.2d 556, 560 (Pa. 1993).

126. When analyzing the holdings of other states, the Pennsylvania Supreme Court has suggested that one should not focus on the number of states holding one way or another. *See Commonwealth v. Matos*, 672 A.2d 769, 775 (Pa. 1996). The Court has stated that one should look to the substance of the decisions to determine why states have extended greater protection or have declined to offer greater protection of rights under their own constitutions as compared to the United States Constitution. *See id.* The court also feels that it is important to note if other states express constitutional concerns similar to those of Pennsylvania. *See id.*

127. *See Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

v. Cass, the Pennsylvania Supreme Court pointed to acceptance by several states, under their own constitutions, of the United States Supreme Court's holding in *New Jersey v. T.L.O.*¹²⁸ as an indication that states would also accept the Supreme Court's approval of high school drug testing in *Vernonia School District 47J v. Acton*.¹²⁹ This assumption fails to consider the differences between the searches involved in *T.L.O.* and *Acton*.¹³⁰ Also, states that have approved of general searches in schools under their constitutions have done so when the searches involved student's property, and have not indicated how they would rule on general searches of students' bodies.¹³¹ Finally, a recent decision by the Colorado Supreme Court gives some indication that states may not be as tolerant of drug testing as the United States Supreme Court was in *Acton*.¹³²

1. *Acceptance of T.L.O. Does Not Indicate Acceptance of Acton*—Every jurisdiction that has considered *T.L.O.* under its own state constitution has adopted the Fourth Amendment analysis.¹³³ Assuming that the same result will occur when states are faced with state constitutional challenges to mandatory drug testing of high school athletes fails to recognize the differences between *T.L.O.* and *Acton*. While *T.L.O.* involves the search of a particular individual's property, *Acton* approves of random searches of student athletes' bodily fluids.¹³⁴ *T.L.O.* requires that a search of an individual student, or his or her property, to be based upon reasonable suspicion of wrongdoing.¹³⁵ *Acton* requires nothing more than the good intentions of a school district to justify forcing

128. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the Fourth Amendment requires only reasonable suspicion of a school violation to search a particular student's purse).

129. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that random mandatory urinalysis of student athletes is justified under the Fourth Amendment because the school's interests in testing outweighs a student athlete's expectation of privacy).

130. See *infra* text accompanying notes 135-36.

131. See *State v. Barrett*, 683 So.2d 331 (La. Ct. App. 1996); *Isiah B. v. State*, 500 N.W.2d 637 (Wis. 1993); *Desilets v. Clearview Reg'l. Bd. of Educ.*, 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993).

132. See *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998).

133. See *Commonwealth v. Cass*, 709 A.2d 350, 362 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998).

134. Compare *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the Fourth Amendment requires only reasonable suspicion of a school violation to search a particular individual) with *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that random mandatory urinalysis of student athletes is justified under the Fourth Amendment because the school's interests in testing outweighs a student athlete's expectation of privacy).

135. See *T.L.O.*, 469 U.S. at 341-42.

athletes to undergo chemical testing of their urine.¹³⁶ Because of the differences between the two Fourth Amendment rules set forth in these two cases, approval of a search based upon reasonable suspicion under a state constitution does not indicate acceptance of a search of all athletes' bodies without justification.

2. *States Approve of General Searches of Students Under Their Own Constitutions.*—There are only three state courts, in addition to Pennsylvania, that have addressed general searches of high school students.¹³⁷ All three have ruled on cases involving general searches of property in schools.¹³⁸ None of these state courts have indicated how they would rule if presented with challenges to high school drug testing under their states' constitutions.

In *State v. Barrett*, the Court of Appeals of Louisiana examined the general search of public school classrooms by drug dogs.¹³⁹ The only search that the court addressed was that of students emptying their pockets as they were leaving the classroom prior to the entrance of the dogs.¹⁴⁰ The court held that requiring students to empty their pockets was reasonable under the Fourth Amendment and Article I, Section 5 of the Louisiana Constitution partly because of the unobtrusive nature of the search.¹⁴¹ The court in no way indicated that by upholding the compulsion of a student to empty his pockets, the compulsion of a student to empty his bladder would be permissible under the state constitution.

In *Isiah B. v. State*, the Supreme Court of Wisconsin upheld the random searching of students' lockers by school officials under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution.¹⁴² The Wisconsin Supreme Court stated that it routinely conformed state law regarding search and seizure to federal law.¹⁴³ The acceptance of federal search and seizure doctrine by Wisconsin is not persuasive in a Pennsylvania

136. See *Acton*, 515 U.S. at 664-65.

137. See *State v. Barrett*, 683 So.2d 331 (La. Ct. App. 1996); *Isiah B. v. State*, 500 N.W.2d 637 (Wis. 1993); *Desilets v. Clearview Reg'l. Bd. of Educ.*, 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993). Pennsylvania addresses the general search of students' lockers in *Commonwealth v. Cass*. See *Cass*, 709 A.2d 350.

138. See *Barrett*, 683 So.2d 331; *Isiah B.*, 500 N.W.2d 637; *Desilets*, 627 A.2d 667.

139. See *Barrett*, 683 So.2d 331. During the searches, dogs sniffed students' belongings and desks, however the students themselves were never individually sniffed. See *id.* at 334.

140. See *id.* at 337.

141. See *id.* at 338.

142. See *Isiah B.*, 500 N.W.2d at 638.

143. See *id.* at 646.

constitutional analysis because Wisconsin law is less protective of individual rights than is Pennsylvania law.¹⁴⁴

In *Desilets v. Clearview Regional Board of Education*, the New Jersey Superior Court upheld the search of all students' hand luggage prior to leaving for a field trip.¹⁴⁵ The students themselves were not searched.¹⁴⁶ The New Jersey court did not believe that the circumstances of this case required greater protection of students' rights under Article I, Paragraph 7 of the New Jersey Constitution than that provided by the Fourth Amendment.¹⁴⁷ The court stated that student anxiety about the search was eliminated by prior warning that the luggage would be searched, by searching all students' bags, and by searching in the open.¹⁴⁸ Also, the court regarded the search as reasonable because students could avoid the process by not bringing hand luggage on the trip.¹⁴⁹ The court never indicated that New Jersey would accept *Acton* and general searches of student athletes' urine.¹⁵⁰

3. *State Court Struggles With Acton and Rejects Drug Testing of the Marching Band.*—A decision of the Colorado Supreme Court shows that states may not be as tolerant of drug testing as the United States Supreme Court was in *Acton*.¹⁵¹ In *Trinidad School District No. 1 v. Lopez*, the Colorado Supreme Court sitting en banc held that drug testing of students in the marching band was not reasonable and therefore violated the Fourth Amendment.¹⁵² While the court never addresses the matter under its state

144. The Wisconsin court in *Isiah B.* held that there was no constitutional violation in the random locker searches because the students had no reasonable expectation of privacy in their lockers. *See id.* at 650. This is contrary to what the Pennsylvania Supreme Court stated in *Commonwealth v. Cass*, "a student . . . can reasonably expect a measure of privacy within that locker." *See Commonwealth v. Cass*, 709 A.2d 350, 359 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998). The Pennsylvania Supreme Court does not typically conform Article I, Section 8 to federal law as does Wisconsin. *See sources cited supra* note 64. When considering other jurisdictions' approaches to constitutional concerns, the persuasiveness of the approaches depends upon whether other states express constitutional concerns similar to those of Pennsylvania. *See supra* note 126.

145. *See Desilets v. Clearview Regional Bd. Of Educ.*, 627 A.2d 667, 667 (N.J. Super. Ct. App. Div. 1993).

146. *See id.* at 668.

147. *See id.* at 673.

148. *See id.*

149. *See id.*

150. *See Desilets*, 627 A.2d at 667.

151. *See Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1107-10 (Colo. 1998).

152. *See id.* at 1110.

constitution, the court demonstrates some hostility toward drug testing of high school students.¹⁵³

The Colorado Supreme Court employed the analysis in *Acton* and examined the nature of the privacy interest, the character of the intrusion, and the governmental interest involved with drug testing members of the marching band.¹⁵⁴ The court questioned *Acton's* analogy of urinalysis to the ordinary use of a rest room.¹⁵⁵ The Colorado court had some difficulty labeling urinalysis as a negligible intrusion.¹⁵⁶ Also, the court disagreed with the school district's perception that *Acton* approved of implementing drug testing of students, like band members, who are role models.¹⁵⁷ There was no evidence to suggest that band members had a greater incidence of drug use than the student body as a whole, and no evidence that band members risked injuring themselves or others through drug use.¹⁵⁸ The Colorado court found that student "role models" could not be tested without evidence of a drug problem among such students.¹⁵⁹

At present, it is not clear that states will adopt the United States Supreme Court's acceptance of drug testing of high school athletes. Although state courts have adopted the Fourth Amendment requirement of reasonable suspicion for individualized searches under their own constitutions, a larger step is necessary to approve of randomly subjecting students to urinalysis without any individualized suspicion of wrongdoing. The Colorado Supreme Court's difficulty with one of the major points of *Acton*, that

153. See *id.* at 1108-1109.

154. See *id.* at 1105-10.

155. See *id.* at 1108. The court addressed the comparison of urinalysis to using a public restroom:

Ordinarily, a student has some choice about when to use the rest room and when to urinate. The fact that one student was not able to urinate after several attempts because he was too embarrassed underscores this point. Ordinarily, a student does not have an official monitor, a person whose sole purpose is to prevent a student from altering the student's urine sample, listening to (and perhaps watching from behind) the student urinating. Ordinarily, a student does not have to urinate into a container and present his or her urine sample to a school district representative for temperature assessment, labeling, and preparation for analysis. Ordinarily, a student urinates simply because the body requires it, not because a school district insists that the student provide a urine sample on demand in order for the school district to search it for the presence of drugs.

Id.

156. See *Lopez*, 963 P.2d at 1108.

157. See *id.* at 1109.

158. See *id.*

159. See *id.*

urinalysis is a negligible intrusion, may indicate that state courts will stop following the United States Supreme Court when evaluating drug testing under their own constitutions.

D. Policy Considerations

The final area of analysis of the Pennsylvania Constitution focuses upon policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.¹⁶⁰ Although drugs are a threat to children and their education,¹⁶¹ three reasons justify the refusal of mandatory random drug testing of student athletes in light of “Pennsylvania’s traditionally high regard for individual privacy.”¹⁶² First, the danger of massive expansion of the drug testing program beyond that of only athletes exists. Second, compulsive urinalysis has been recognized as a very invasive procedure that has harmful effects on children. Finally, drug testing programs aimed at athletes are not designed to effectively combat the drug problems in schools, but are structured according to the United States Supreme Court’s opinion in *Acton*.

1. *Danger of Expansion.*—The possibilities of expanding the drug testing policies appear limitless. The United States Supreme Court denied certiorari in a case involving random drug testing of students involved in extracurricular activities.¹⁶³ In light of the Court’s refusal to address this issue, the expansion of drug testing programs to all students involved in extracurricular activities has already been contemplated by several school districts in Pennsylvania.¹⁶⁴ Students, parents, and board members seem more receptive of a program that would test all students involved in

160. See *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

161. See *Commonwealth v. Cass*, 709 A.2d 350, 364 (Pa. 1998), *cert. denied*, 525 U.S. 833 (1998).

162. *Id.*

163. See *Todd v. Rush County Schools*, 139 F.3d 571, 571 (7th Cir. 1998), *cert. denied*, 525 U.S. 824 (1998); Joan Biskupic, *Supreme Court Lets Indiana Schools’ Drug Test Policy Stand*, WASHINGTON POST, October 6, 1998, at A3.

164. See *Alexander*, *supra* note 13, at A1 (students and administrators at Hempfield High School in Lancaster, Pa. believe the policy they hope to adopt should cover all students involved in extracurricular activities); Christine Schiavo, *Union Says Drug Tests Shouldn’t Be Top Priority*, ALLENTOWN MORNING CALL, December 12, 1998, at B20 (School Board Director of Allentown School District proposed a policy that would allow random drug testing of students in extracurricular activities); *Zemel*, *supra* note 13, at A10 (school administrators in Avella Area High School in Washington, Pa. are considering expanding their current drug testing policy to cover any student involved in an extracurricular activity).

extracurricular activities as opposed to simply singling out athletes.¹⁶⁵ The danger in expanding the programs to test all students involved in extracurricular activities is that soon districts may push to expand the program to all students.¹⁶⁶ School boards may reason that testing the entire student body treats all students equally and would not isolate those involved in school activities. Students cannot look to the United States Supreme Court to protect their right of privacy because the Court has failed to do so thus far. Testing must be blocked by Article I, Section 8 of the Pennsylvania Constitution before all students are invaded.

Changing testing policies to include the entire student body is only part of the expansion that may very well occur. A drug-free school environment includes more than just students, and must include teachers, administrators, bus drivers, coaches, custodial workers, secretaries, and food service workers. Schools in other parts of the country have attempted to test all people who enter the schoolhouse.¹⁶⁷ At least one Pennsylvania school district may follow this example.¹⁶⁸ Also, it is not unrealistic to imagine districts

165. See Alexander, *supra* note 13, at A1 (“[T]he prevailing attitude [of the community] seems to be that we would support this 100 percent if it were all extracurricular activities, as opposed to singling out athletes.”); Matthew Futterman and Frederick Kunkle, *High School Gridder Sacks Drug Testing*, THE STAR-LEDGER, September 25, 1998, at 25 (student athlete would not be opposed to drug testing program if it had targeted all students); John Gibeaut, *Who’s Raising the Kids*, A.B.A. J., August 1997, at 62 (a majority of parents support random drug testing of students); Elizabeth Gibson, *Parents Voice Concern Over Drug-Testing Plan*, HARRISBURG PATRIOT, August 7, 1998, at B2 (“I just don’t want the athletes to feel . . . targeted,” said a South Middletown parent regarding proposed mandatory student athlete drug testing); Swinson, *supra* note 1, at A1 (South Middletown School Board member questioned a proposal to test only athletes and not all students involved in extracurricular activities).

166. See *Todd v. Rush County Schs.*, 139 F.3d 571, 573 (7th Cir. 1998), *cert. denied*, 525 U.S. 824 (1998) (stating with regard to the majority’s decision to uphold mandatory drug testing of all students involved in extracurricular activities “[this] decision takes us a long way toward condoning drug testing in the general school population.”) (Ripple, J., dissenting); Gibeaut, *supra* note 19, at 42 (the School Boards Association of New Jersey “has adopted a policy that supports drug testing of all students”); Gibson, *supra* note 165, at B2 (parents wanted drug testing of a general segment of the student population); Zemel, *supra* note 13, at A-10 (Superintendent of Iroquois School District stated, “In a fair world, it would be that everyone should be tested for drugs on a random basis.”).

167. See Todd A. DeMitchell, *Security Within the Schoolhouse Gate: An Emerging Fundamental Value in Educational Policy Making*, 120 WEST’S EDUC. LAW R. 379, 386 n.49 (1997). A community drug task force pushed the White Mountains Regional School Board in northern New England to adopt a policy which included the random drug testing of all students, administrators, faculty, secretaries, and custodians. See *id.* at 386.

168. See Schiavo, *supra* note 164, at B20. The School Board Director of the Allentown School District proposed a policy that would require pre-employment

zealously fighting the war on drugs by randomly testing members of the Parent-Teacher Association. Parents play an important role in the educational system. Since parents are often their children's best teachers, they should be drug-free as well.¹⁶⁹ As is demonstrated, school drug testing policies may be expanded to include almost anyone associated with a school in an effort to cleanse the educational system of drugs.

2. *The Harmful Effects of Urinalysis.*—The privacy interests implicated by mandatory drug testing are far from minimal. Producing urine is an intimate act that is generally limited to performance in the seclusion of a bathroom.¹⁷⁰ A majority of public restrooms are segregated by gender and have stalls with doors that lock in order to protect the privacy of the act.¹⁷¹ Most jurisdictions prohibit, by law, urination in public.¹⁷² Beyond the intrusiveness of forcing the act itself, urine may contain information concerning an individual's life.¹⁷³ "Ordering a person to empty his or her bladder and produce the urine in a container for inspection . . . is no less offensive to personal dignity than requiring the individual to empty his pockets and produce a report containing the results of urinalysis."¹⁷⁴

Drug testing by urinalysis is not comparable to urinating in a public restroom.¹⁷⁵ Self-conscious adolescents may find the experience of urinalysis even more humiliating than adults experiencing the same intrusion.¹⁷⁶ Many policies require students

drug tests for teachers and require drug testing for teachers and students who are injured at school. *See id.*

169. Even if unintentional, parents teach children by example. *See* GARY I. WADLER & BRIAN HAINLINE, *DRUGS AND THE ATHLETE* 25 (1989) (parental reliance on drugs has been proposed as a "role-model coping mechanism" that contributes to adolescent drug abuse) [hereinafter WADLER & HAINLINE]; Jeanne E. Jenkins, *The Influence of Peer Affiliation and Student Activities on Adolescent Drug Involvement*, *ADOLESCENCE*, Summer 1996, at 297 (several studies have shown a significant association between parenting practices, parental drug use, and teenage drug use).

170. *See In re Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 510 N.E.2d 325, 329 (N.Y. 1987); Jeanette C. James, Note, *The Constitutionality of Federal Employee Drug Testing: National Treasury of Employees Union v. Von Raab*, 38 AM. U. L. REV. 109, 116 (1988).

171. *See* James, *supra* note 170, at 116.

172. *See id.*

173. *See Patchogue-Medford Congress of Teachers*, 510 N.E.2d at 329. Urinalysis shows evidence of drug use, venereal disease, pregnancy, epilepsy, schizoprenia, and sickle-cell anemia. *See* James, *supra* note 170, at 116.

174. *Patchogue-Medford Congress of Teachers*, 510 N.E.2d at 330.

175. *See supra* note 155.

176. *See* Martin R. Gardner, *Student Privacy in the Wake of T.L.O. - An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the*

to be monitored audibly during urination.¹⁷⁷ Some require visual monitoring of a student during urination.¹⁷⁸ Added to the embarrassment of being monitored, many students also experience a great deal of stress during the testing process.¹⁷⁹ Invasion of a student's privacy interests may damage self-esteem and healthy maturation into adulthood.¹⁸⁰ The American Academy of Pediatrics condemns the use of involuntary drug testing as a prerequisite for participation in extracurricular activities.¹⁸¹

3. *Drug Testing May Not Be Working.*—Random drug testing may not be as effective in combating the war on drugs as school boards had hoped.¹⁸² Problems with the policies stem from looking to Supreme Court precedent, and not at a district's own students, when deciding who to test.

It appears that many districts have adopted policies based not upon evidence of drug problems among its athletes, but because testing athletes has been accepted by the United States Supreme Court.¹⁸³ Evidence of a drug problem among athletes does not seem to be necessary so long as testing athletes is constitutional.¹⁸⁴ In

Schools, 22 GA. L. REV. 897, 903 (1988). Three students forced to undergo urinalysis stated that they were "extremely embarrassed and humiliated by the test." *Id.* at 935. "[O]ne student. . . 'tried five, six, seven times,' 'every night after school,' but could not urinate into the container because 'he was embarrassed to do so.'" *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1100 (Colo. 1998).

177. See *Carlynton Policy*, *supra* note 21, at 9; *Derry Policy*, *supra* note 25, at 3.

178. See *Carlynton Policy*, *supra* note 21, at 9; *Derry Policy*, *supra* note 25, at 3.

179. See Samantha Elizabeth Shulter, Note, *Random, Suspicionless Testing of High School Athletes Vernonia School District 47J v. Acton 115*, 86 J. CRIM. L. & CRIMINOLOGY 1289, 1300 (1996). Stress may affect students so that they cannot urinate for several hours subsequent to testing. See *id.*

180. See *Gardner*, *supra* note 176, at 901. Privacy is tied to dignity, self-respect, and the right to be treated as a person. See *id.* at 905. Children's experiences with privacy influence their self-esteem and become an illustration of independence and self-knowledge. See *id.* at 901. Fostering an appreciation for privacy is part of an education in American civic values and preparation for becoming a responsible citizen. See *id.* at 902.

181. See American Academy of Pediatrics Committee on Substance Abuse, *Testing For Drugs of Abuse in Children and Adolescents*, PEDIATRICS, August 1996, at 308 [hereinafter *Testing Adolescents*].

182. The effect of policies are not easily determined because low numbers of positive test results may indicate either the district does not have the drug problem among athletes that it had thought or that the tests have been a successful deterrent. See *Swinson*, *supra* note 20, at A1.

183. See *Alexander*, *supra* note 13, at A1 (superintendent is aiming policy strictly at athletes because of the Supreme Court decision); *Swinson*, *supra* note 1, at A1 (school board aimed drug testing only at athletes because they were told that the Supreme Court decision applied specifically to athletes).

184. Prior to adopting a policy testing athletes for drugs, Gettysburg Superintendent stated that the district did not have a serious drug problem. See *Gibson*, *supra* note 165, at B2.

addition, studies show that students not involved in school activities tend to be those likely to turn to drugs.¹⁸⁵ On the contrary, athletes may shy away from drugs because of the affect drugs can have on their performance, especially if the student is serious about seeking an athletic scholarship for college.¹⁸⁶ If a student is not involved in athletics, then there is no chance that he or she will be tested, and this student's problem will continue without remedy. Students can also hide drug problems by intentionally avoiding participation in school athletics.¹⁸⁷ Therefore, policies may actually discourage the student who is vulnerable to drug abuse from pursuing the structure and positive influence of an athletic program.¹⁸⁸ Testing athletes for drugs appears ineffective and harmful, in addition to being unconstitutional. School boards have other tools available besides random mandatory drug testing to fight the war on drugs in a constitutional manner.

IV. Alternatives to Mandatory Suspicionless Drug Testing

Drug use has increased among teenagers both in Pennsylvania and nationwide throughout the 1990s.¹⁸⁹ Protecting students' constitutional rights and striking down random mandatory drug testing of athletes would not leave school districts helpless in combating the drug problem. Testing students for drugs based

185. See PAUL J. BROUNSTEIN, ET. AL., *SUBSTANCE USE AND DELINQUENCY AMONG INNER CITY ADOLESCENT MALES* 52-56 (1990) (stating that those not using drugs showed a higher interest in school and were involved in extracurricular activities than those who used drugs) [hereinafter *SUBSTANCE USE*]; *Testing Adolescents*, *supra* note 181, at 306 (involuntary drug screening of only athletes does not promote good health); Jenkins, *supra* note 169, at 295 (drug use not as prevalent among those involved in extracurricular activities); Swinson, *supra* note 20, at A1 (one student commented that it appears that typically the better students are the ones being tested).

186. See WALDLER & HAINLINE, *supra* note 169, at 27 (high school seniors with aspirations of completing college have lower rates of drug abuse than those who do not expect to complete college); Hardy, *supra* note 20, at A1 ("You can't run up and down a basketball court and do drugs, or perform as well. . . in football.").

187. See Schiavo, *supra* note 164, at B20 (Teacher stated that the school was having a difficult time getting students to participate in extracurricular activities and that testing would decrease participation in extracurricular activities and athletics even more).

188. See Jenkins, *supra* note 169, at 295 (increasing students' attachments to school through extracurricular activities and rewarding academic experiences leads to a decrease in drug use); Gibson, *supra* note 165, at B2 (athletics may provide the structure and goals needed to mature and resist peer pressure).

189. See DeMitchell, *supra* note 167, at 379; Telephone interview with Donna Wedig, Administrative Assistant II with the Pennsylvania Department of Health's Bureau of Drug and Alcohol Programs (January 8, 1999) (notes on file with *Dickinson Law Review*).

upon reasonable suspicion, coupled with drug prevention programs, would be a constitutional step toward drug-free schools.¹⁹⁰

At least one district in Pennsylvania, Carlynton, tests its students only when there is "reasonable cause" to believe the student is under the influence of drugs.¹⁹¹ The district follows procedures similar to those used at schools that test athletes, the only difference being who is chosen and how.¹⁹² Carlynton's policy involves constitutional testing of students since all that is required to search an individual student under Article I, Section 8 is reasonable suspicion of wrongdoing.¹⁹³ Because students are under constant supervision by teachers, administrators, and in some schools, police officers, recognizing a student under the influence of drugs should not be difficult.¹⁹⁴ This method of testing may be more effective than the random testing of athletes. Because the policy applies to all students, it deters the entire student body from using drugs, not only those involved in athletics. Students can participate in extra-curricular activities without surrendering their constitutional rights and can reap the benefits that are associated with increased school involvement.¹⁹⁵

In addition to testing, schools could institute drug prevention programs. Some programs have reduced drug abuse among students by 50 to 75%.¹⁹⁶ One such program, called Life Skills, coaches children on how to refuse an offer of drugs.¹⁹⁷ The program also teaches students strategies for problem solving, goal setting, coping with stress, making friends, standing up for one's beliefs, and

190. Some districts in Pennsylvania have adopted voluntary drug testing programs. See Justice, *supra* note 20, at A10. Presumably only those who are not using drugs or who have not used drugs for several days would consent to be tested. See *Testing Adolescents*, *supra* note 181, at 305. Therefore, voluntary testing would not detect most drug users. See *id.*

191. See Carlynton Policy, *supra* note 21, at 1.

192. Compare Carlynton Policy, *supra* note 21, at 1 (any student is subject to testing if there is reasonable cause to believe the student is under the influence of drugs) with Middletown Policy, *supra* note 9, at 1 (all athletes subject to mandatory random testing), and Derry Policy, *supra* note 25, at 1 (all athletes subject to mandatory random testing).

193. See cases cited *supra* note 114.

194. Carlynton's policy sets forth what will be considered reasonable cause to conduct a drug test: "odors, pupillary changes, slurred speech, lack of normal coordination, or other observable behavior that is an indication of being under the influence." Carlynton Policy, *supra* note 21, at 6.

195. See *supra* note 188 and accompanying text.

196. See Warren Richey, *Best Weapon in War on Drugs: Sixth Grade*, CHRISTIAN SCIENCE MONITOR, June 19, 1997, at 1.

197. See *id.* at 7.

recognizing the harmful messages that the media sends.¹⁹⁸ To create a drug-free environment, schools need to institute programs that enhance children's self-esteem, rather than ingrain distrust and fear through random chemical testing.¹⁹⁹

V. Conclusion

Article I, Section 8 of the Pennsylvania Constitution has been "unshakably linked" to a right of individual privacy for over two hundred years.²⁰⁰ Pennsylvania courts have not hesitated to extend greater protection of privacy under the Pennsylvania Constitution than that recognized under the Fourth Amendment.²⁰¹ An examination of Pennsylvania's search and seizure clause illustrates that random drug testing of student athletes is another area in which Pennsylvania law separates from federal precedent.²⁰² The issue of student drug testing has not been addressed by other jurisdictions under their state constitutions, and it is far from clear that those jurisdictions will approve of urinalysis in public schools.²⁰³ Fears about expansion of drug testing policies, evidence of the harmful effects of urinalysis on children, and doubts concerning the effectiveness of existing policies all support protection of students' rights under Article I, Section 8.²⁰⁴ Finally, alternative programs, including testing for drugs based upon reasonable suspicion of drug use, are available to school districts in the quest for drug-free schools.²⁰⁵ Carving out an exception for student athletes and denying them the protection that Article I, Section 8 provides is a civics lesson in itself. Today's students, and Pennsylvania's future

198. *See id.*

199. *See* SUBSTANCE USE, *supra* note 185, at 4 (teenagers who abuse drugs tend to have relatively low self-esteem); Gardner, *supra* note 176, at 901 (threats to students' privacy "[function as] threats to self-esteem").

200. *See* cases cited *supra* note 61.

201. *See* sources cited *supra* note 64.

202. *See* discussion *supra* Part III.B.2. In a footnote in *Commonwealth v. Mason*, the court discussed the differences between federal and Pennsylvania search and seizure law:

The ultimate distinction, then between federal and the Pennsylvania analysis is not that the federal courts seek only to deter police misconduct and the Pennsylvania courts seek to protect certain rights, but that the federal courts place less importance than do we on the right of privacy. Therefore, they balance interests differently and reach a different conclusion as to the relative importance of privacy against securing criminal convictions.

637 A.2d 251, 257 (Pa. 1993).

203. *See supra* Part III.C.

204. *See* discussion *supra* Part III.D.

205. *See supra* Part IV.

leaders, are learning that the rights of a few may be ignored if the governing authority has a good enough reason.

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