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Gangs, & Drugs*

Drug Testing High School and Junior High School Students After Veronia School District 47J v. Acton: Proposed Guidelines for School Districts

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Notes

DRUG TESTING HIGH SCHOOL AND JUNIOR HIGH SCHOOL STUDENTS AFTER *VERNONIA SCHOOL DISTRICT 47J v. ACTON:* PROPOSED GUIDELINES FOR SCHOOL DISTRICTS

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance.¹

I. INTRODUCTION

Benji Ramirez's life threatening behavior could have been detected, and possibly even prevented, before it caused his death.² His coach should have known.³ His friends and teammates knew, yet no one spoke out until after he collapsed during football practice and subsequently died later the same evening from an apparent heart attack.⁴ Benji was a seventeen-year-old high school senior who just three days before his tragic death had played the game of his life for the Ashtabula High School football team.⁵ His sudden death raised a perplexing question: How could a strong, healthy, six foot three inch tall, 201

1. *New Jersey v. T.L.O.*, 469 U.S. 325, 385-86 (1985) (Brennan, J., concurring and dissenting).

2. Rick Telander & Merrell Noden, *The Death of an Athlete*, SPORTS ILLUSTRATED, Feb. 20, 1989, at 68, 70.

3. *Id.* at 75. Many people in the community believed that Benji's coach was the bad guy who should have recognized Benji's steroid problem and addressed it. *Id.* Part of the admitted problem is that coaches do not receive adequate training to identify the signs of steroid use. *Id.*

4. *Id.* at 70.

5. *Id.* Benji's tragic death illustrates the misperception that drug abuse is only a problem in large metropolitan areas: Ashtabula is a Midwestern town with a population of 24,000 located in the State of Ohio. *Id.* at 71.

pound high school football star just collapse and die on the practice field?⁶ The answer came shortly after Benji's death when friends revealed to school officials that Benji had been using anabolic steroids.⁷ An autopsy report indicating that Benji's use of steroids was a contributing factor to his death confirmed the friends' statements.⁸

Benji's death created a sense of urgency in the Ashtabula community to take measures to prevent further drug related fatalities.⁹ The community responded by forming a substance abuse committee to make plans to deter drug use among students in the area schools.¹⁰ The committee discussed implementing comprehensive drug education programs for the general student population, and also drug testing procedures for student athletes.¹¹ This has been the institutional response across the country by school districts that have seen, or perceived, a rise in drug use among their students.¹² As school officials fear

6. At first Benji's death seemed to defy explanation because the practice had not been strenuous, the weather was not hot, and Benji appeared to be strong and fit. *Id.* at 70.

7. *Id.* at 70-71. Benji's steroid use was no secret: His nickname was "Roids." *Id.* at 76. Friends had seen him buy and even inject himself with steroids. *Id.* at 75-76. His football coach had questioned him upon hearing rumors that he was using steroids, which he denied. *Id.* at 76.

See generally RICHARD H. STRAUSS, *DRUGS & PERFORMANCE IN SPORTS* 59-60 (1987) (describing patterns of use of anabolic steroids among athletes). Anabolic steroids were first used in sports, such as weight lifting, that required great strength or muscle size. *Id.* at 59. However, the use of anabolic steroids has crept into many sports, including sprint and distance running, wrestling, and swimming. *Id.* at 60. Both female and male athletes use anabolic steroids. *Id.* "In the United States, anabolic steroids are used by some athletes, including football players, at the professional, college, and high-school levels, and even occasionally by high-school girl runners." *Id.*

8. Telander & Noden, *supra* note 2, at 71. County Coroner Dr. Robert A. Malinowski explained that while a coroner's report does not always produce incontrovertible facts, his opinion was that Benji's steroid use was a contributing factor in his death. *Id.* If Dr. Malinowski's opinion was correct, then Benji was the first American athlete whose death had been officially linked to steroid use. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. "Drug use is widespread among American schoolchildren." U.S. DEP'T OF EDUC., *WHAT WORKS: SCHOOLS WITHOUT DRUGS* 5 (1992) [hereinafter *WHAT WORKS*]. While a 1991 study shows that drug use among young people has declined, "[t]he United States continues to have the highest rate of teenage drug use of any nation in the industrialized world." *Id.* The results from the 1991 national study of high school seniors illustrate the gravity of the drug problem among America's youth:

Forty-four percent of high school seniors have tried an illicit drug by the time they graduate. Alcohol is the most widely used drug. By their senior year, 88 percent of students in the class of 1991 had used alcohol; 78 percent had used alcohol in the past year and 54 percent had used it in the month prior to the survey. Thirty percent of seniors surveyed reported at least one occasion of heavy drinking in the two weeks prior to the survey—an occasion in which they had five or more drinks in a row. Twenty-four percent of 1991 seniors reported using marijuana in the past year, and 14 percent

that drug use is reaching epidemic levels, submitting to mandatory drug testing has become a more common condition placed upon eligibility requirements for interscholastic sports participation.¹³

If Benji attended high school today the drug use that led to his death might have been prevented. This is because the United States Supreme Court recently decided that schools may drug test student athletes.¹⁴ This much is certain. However, if Benji was not a member of the football team, his drug use probably would have gone undetected. This is because the Supreme Court's recent decision does not clearly articulate whether other segments of the public school student body, outside of the context of athletics, may be tested.

said they had used it at least once in the previous month. Three and one-half percent of seniors indicated that they had used cocaine in the past year. Three percent of seniors had used crack, and 1.5 percent had used it within the last year.

Id.

Numerous articles and studies have also documented the prevalence of drug use among students. Ellen Flax, *250,000 Teenagers Have Used Steroids, Number May be Growing, Studies Find*, EDUC. WK., Sept. 19, 1990, at 6; Lynn M. Jackson, *Schools Fight Steroids Grip on Students*, USA TODAY, Nov. 19, 1990, at 2C. See generally JERALD G. BACHMAN ET AL., NATIONAL TRENDS IN DRUG USE AND RELATED FACTORS AMONG AMERICAN HIGH SCHOOL STUDENTS, 1975-1986 (1987) (reporting trends in drug use and attitudes of high school seniors based on an annual survey conducted since 1975). But see Jessica Portner, *Study Showing Rise in Drug Use Called Into Question*, EDUC. WK., Oct. 28, 1992, at 8.

13. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (requiring drug testing as an eligibility requirement for participation in interscholastic athletics); *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) (same); *Moule v. Paradise Valley Unified Sch. Dist. No. 69*, 863 F. Supp. 1098 (D. Ariz. 1994) (same); *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989) (same); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985) (same); *Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super Ct. Ch. Div. 1985) (same). However, the National Federation of State High School Associations estimates that less than one percent of the 16,000 public high schools in the United States test their students for drug use. Tanya Bricking, *High School Drug-Testing Debate Rages On*, USA TODAY, Nov. 14, 1995, at 1C. This figure appears to be on the rise. According to John Heeney, assistant to the director for the National Federation of State High School Associations, less than five percent (an increase from the less than one percent reported in 1995) of all high schools in the country have any kind of drug testing, voluntary or mandatory, for athletes. Steve Moore, *Parents Clash Over Issue of Drug Tests: A Committee Is to Study the Issue of Mandatory Random Testing of Athletes*, PRESS ENTERPRISE, Feb. 21, 1997, at B1.

14. *Acton*, 115 S. Ct. at 2386. The Supreme Court upheld suspicionless drug testing of high school and junior high school student athletes as an eligibility requirement to participate on an interscholastic sports team. *Id.* See *infra* notes 294-361 and accompanying text for a discussion of the *Acton* case.

Drug use among American youth, whether the substance is anabolic steroids or recreational drugs, creates many problems in the public schools¹⁵ and society as a whole.¹⁶ While these concerns merit individual attention, this Note will discuss the problem of drug use among student athletes to determine whether drug testing programs in public schools may be extended outside the

15. One of the educational costs of substance abuse is high drop out rates for students using drugs compared to students that do not use drugs. *Drug Use, Negative Outcomes Linked in Dropout Study*, ALCOHOLISM & DRUG ABUSE WK., Aug. 21, 1995, at 2 (explaining that drug use is a good predictor of school drop out patterns). The study surveyed a group of 1243 adolescent dropouts in California. *Id.* Reports indicated that 29.5% of the dropouts tried an illegal drug by the age of twelve, compared to only 8.3% of students that age still in school. *Id.* The dropouts' weekly rates of alcohol, marijuana, and cocaine use were two, five, and ten times the rates of use by students attending school. *Id.* The United States Department of Education has also documented the correlation between drop out rates and drug use. WHAT WORKS, *supra* note 12, at 11. "In a Philadelphia study, dropouts were almost twice as likely to be frequent drug users as were high school graduates; four in five dropouts used drugs regularly." *Id.*

Student drug use is also closely tied to truancy. *Id.* "High school seniors who are heavy drug users are more than three times as likely to skip school as nonusers." *Id.* "About one-fifth of heavy users skipped three or more school days a month, more than six times the truancy rate of nonusers." *Id.* In the classroom, student drug use adversely affects the learning process. *Id.* This is because adolescent drug use threatens normal cognitive development in a number of ways:

Drugs can interfere with memory, sensation, and perception. They distort experiences and cause a loss of self-control that can lead users to harm themselves and others. Drugs interfere with the brain's ability to take in, sort, and synthesize information. As a result, sensory information runs together, providing new sensations while blocking normal ability to understand the information received. Drugs can have an insidious effect on perception; for example, cocaine and amphetamines often give users a false sense of functioning at their best while on the drug.

Id. at 9.

Drug use erodes children's self-discipline and motivation which is essential for learning. *Id.* at 11. Research has shown that student drug use can cause a decline in academic performance. *Id.* "This has been found to be true for students who excelled in school prior to drug use as well as for those with academic or behavioral problems prior to use." *Id.* "According to one study, students using marijuana were twice as likely to average D's and F's as other students." *Id.* Negative academic school performance due to drug use is not permanent; "[t]he decline in grades often reverses when drug use is stopped." *Id.*

16. A strong correlation between drug use and juvenile delinquency is documented in a recent study sponsored by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. Stuart Greenbaum, *Drugs, Delinquency, and Other Data*, JUVENILE JUSTICE, Spring/Summer 1994, at 2. The Program of Research on the Causes and Correlates of Juvenile Delinquency drew on data from three projects that studied some 4000 youths over a five year period. *Id.* The study documented a strong correlation between criminal behavior and the use of drugs. *Id.* at 3. The study found that the more involvement a youth had with drugs, the more likely that youth was involved in delinquency. *Id.* The study revealed even more alarming data that substance abuse began at a young age. *Id.* The findings that by age 16 one-half of the youths studied were using alcohol on a regular basis, and about 25% were using marijuana, prompted the researchers to recommend that prevention programs begin as early as elementary school. *Id.* at 3, 6.

context of interscholastic sports.¹⁷

The introduction of mandatory drug testing in public schools has not gained acceptance silently; instead, controversy, opposition, and protest surround the issue.¹⁸ For example, students and their parents have brought lawsuits

17. The Supreme Court recently held that public schools may require student athletes to submit to mandatory, random, suspicionless drug tests as a condition to being eligible to participate in interscholastic athletics. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995). For a discussion of the *Acton* case, see *infra* notes 294-361 and accompanying text.

18. An exchange of academic discourse between Eugene A. Lincoln and Jeffrey T. Sultanik illustrates the controversy surrounding the issue of mandatory drug testing in public schools. Mr. Lincoln argues that drug testing students cannot satisfy the constitutional standard for searches in public schools set out in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Eugene A. Lincoln, *Mandatory Urine Testing for Drugs in Public Schools and the Fourth Amendment: Some Thoughts for School Officials*, 18 J.L. & EDUC. 181, 187-88 (1989). The *T.L.O.* standard requires a search in public schools to first be justified at its inception, and second to be reasonably related in its scope to the circumstances which justified the search in the first place. *Id.* at 181-82. Mr. Lincoln offers three hypothetical situations in which he concludes that drug testing in public schools is unconstitutional. *Id.* at 183-87.

Even in the first hypothetical, which describes a situation where a teacher observes students smoking marijuana on school premises, Mr. Lincoln asserts that drug testing is unconstitutional. *Id.* at 183-85. Mr. Lincoln argues that testing the students a teacher observed using drugs may satisfy the first prong of the *T.L.O.* standard; however, the second prong cannot be satisfied. *Id.* at 185. The second prong of the *T.L.O.* standard requires that a search be reasonable in its scope. *Id.* at 184. "That is, the measures adopted for the search must: (1) Be reasonably related to the objectives of the search; and (2) Not be excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* The crux of Mr. Lincoln's argument that student drug testing fails the second prong of the *T.L.O.* school search standard is that the Enzyme Multiplied Immunoassay Technique (EMIT) of drug testing does not measure current impairment. *Id.* at 184-85. Because the objective of testing in public schools, in the hypothetical, was to determine whether a student was under the influence of drugs while at school, EMIT drug testing is not reasonably related to the stated objective. *Id.* at 185. Mr. Lincoln also concludes that the second prong is not met because the procedures surrounding drug testing are excessively intrusive. *Id.*

Jeffrey T. Sultanik offers a response to Mr. Lincoln's article by setting out two hypothetical situations in which he concludes that drug testing in public schools is constitutional, and by presenting a number of factors that should be incorporated into a drug testing program. Jeffrey T. Sultanik, *Counterpoint: A Case For Mandatory Urine Testing For Drugs in Public Schools*, 19 J.L. & EDUC. 387, 387-94 (1990). The first hypothetical situation is similar to Mr. Lincoln's hypothetical based on teachers' observations of student drug use on school premises. *Id.* at 388-89. However, Mr. Sultanik discredits Mr. Lincoln's argument that drug testing is unconstitutional due to the shortcomings of the EMIT drug testing procedure by suggesting that the Gas Chromatography/Mass Spectrometry (GC/MS) method of testing be used. *Id.* The GC/MS method is more accurate and expansive, thus providing a more reliable indicia of current impairment which favors constitutionality. *Id.* at 389. Mr. Sultanik's second hypothetical is essentially the fact pattern presented to the court in *Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988). Although at the time the article was written only the *Schail* court had upheld suspicionless drug testing in public schools, Mr. Sultanik concluded that mandatory drug testing was an option school administrators should consider when facing a drug problem. Sultanik, *supra*, at 394. See *infra* notes 245-93 and accompanying text for a discussion of the *Schail v. Tippecanoe County School Corp.* case.

vigorously debating the constitutional issues raised by mandatory drug testing.¹⁹ In *Vernonia School District 47J v. Acton*,²⁰ the Supreme Court allowed a school to require its student athletes to submit to mandatory, random, suspicionless drug testing as a condition to be eligible to participate in an athletic program.²¹ While drug testing student athletes is now permitted, whether other student groups, or the entire student body, may be tested is not settled.²² The problem no longer is whether drug testing students is allowed; rather, the problem is determining which students may be tested.²³ Has the Supreme

19. In January 1997, eighteen-year-old high school student Hollister Gardner filed the most recent publicized lawsuit challenging a student drug testing policy. Mark Babineck, *Student Challenges Drug Testing Policy*, DALLAS MORNING NEWS, Feb. 2, 1997, at 24A (reporting that the lawsuit was filed in the federal district court located in Amarillo, Texas). The lawsuit names the Tulia Independent School District board members, including Hollister's father, as defendants. *Id.* Hollister, who is the president of the National Honor Society and a member of a number of extracurricular groups, is representing himself. *Id.* He is arguing that the school district's blanket application of drug testing all students involved in any extracurricular activities goes beyond the scope of the Supreme Court's recent decision upholding a drug testing policy aimed at student athletes. *Id.* See also Laurie Asseo, *Teen Sues School Board, Including Dad*, PATRIOT LEDGER, Feb. 25, 1997, at 2; Allan Turner, *Defending His Rights: Student Risking All to Oppose Drug Testing*, HOUS. CHRON., Feb. 2, 1997, at 1.

Previous cases challenging drug testing in the public schools include the following: *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (upholding the constitutionality of mandatory, random, suspicionless drug testing); *Schäill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) (upholding drug testing student athletes); *Moule v. Paradise Valley Unified Sch. Dist.* No. 69, 863 F. Supp. 1098 (D. Ariz. 1994) (striking down a drug testing policy as violating students' privacy rights under the Arizona state constitution, and lack of consent); *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989) (holding that no extraordinary circumstances existed to justify suspicionless testing, also noting the absence of evidence that students who participate in extracurricular activities are more likely to use drugs than nonparticipants); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985) (invalidating a drug testing policy because of unreliable test results, and the procedure of visual monitoring of the act of urination); *Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985) (holding a drug testing policy unreasonably intrusive on privacy that could not be justified by the numbers and percentages of students referred to drug counseling as compared to the total student body).

20. 115 S. Ct. 2386 (1995).

21. For a discussion of the *Vernonia School District 47J v. Acton* case, see *infra* notes 294-361 and accompanying text.

22. See *infra* section IV.A (discussing the expansion of student drug testing outside the context of athletics).

23. School boards across the country are currently debating whether they can constitutionally expand drug testing policies to include students who participate in extracurricular activities other than athletics. See, e.g., Michael Ehret, *New Reason for Students to Just Say No: Proposed Policy Would Require Those in Activities to Agree to Random Sampling*, INDIANAPOLIS STAR, Feb. 22, 1997, at C1 (Brownsburg school officials propose random drug testing for students grades seven through twelve involved in any extracurricular activities, including athletics, jazz band, show choir, and Spanish club); Jennifer Dziura, *Pot-Testing Top Students Just Doesn't Make Sense*, VIRGINIAN-PILOT & LEDGER STAR, Feb. 9, 1996, at E1 (Norfolk School Board considers extending drug testing to include student "role models" such as class officers, band members, and participants in

Court given school districts a green light to require students to consent to the possibility of a random drug test as a condition to participating in extracurricular activities such as band, drama club, dance team, or Spanish club, or is random drug testing limited to student athletes? The *Acton* decision definitely does not signal a red light to student drug testing, and probably not a green light either. Rather, the *Acton* decision should be viewed as a yellow light that signals school districts to proceed with caution in this area. Uncertainty plagues this area of the law,²⁴ the scope of permissible testing is unclear, and a manageable set of guidelines needs to be established.²⁵

This Note provides school districts that want to implement a drug testing policy a manageable set of guidelines, enabling them to curb drug use to provide a safe educational environment while simultaneously protecting the students' constitutional right to be free from unreasonable searches and seizures.²⁶ Section II of this Note will provide an overview of the Fourth Amendment.²⁷ This Section sets the constitutional context in which drug testing policies are scrutinized by discussing the development of the administrative search and its application to drug testing in the employment sector.²⁸ This Section will also

"extracurricular groups that represent the school system in public"); *Random Testing an Overreaction*, READING TIMES & EAGLE, Feb. 9, 1996, at B4 (Boyertown School District considers drug testing students who participate in athletics, band, and clubs after student caught with heroin); Richard Batzer, *School Lawyer to Research Drug Testing*, BUFFALO NEWS, Oct. 12, 1995, at B5 (North Tonawanda School Board debates whether testing should be limited to athletes or extended to other students, such as band and drama club members).

Some school districts have even expanded their drug testing policies to include any student who drives to school. Spencer F. Goodson, *Refusing to Submit to Random Drug Tests*, INDIANAPOLIS STAR, Feb. 20, 1997, at A15 (editorial opinion objecting to the fact that a seventeen-year-old honor student can no longer drive to school because he refused to submit to random, suspicionless urine testing for drugs); Mary Wade Atteberry, *Details of Drug Testing Explained*, INDIANAPOLIS STAR, Jan. 31, 1997, at B3 (explaining a new random drug testing policy for students who drive to school).

24. The *Acton* case has generated a substantial amount of recent commentary attempting to determine the limits of the Supreme Court's decision. See generally Jacqueline A. Stefkovich & G. Michael O'Brien, *Drug Testing of Students in Public Schools: Implications of Vernonia School District v. Acton for Other Types of School-Related Drug Searches*, 113 EDUC. LAW REP. 521 (1996); Darrel Jackson, Note, *The Constitution Expelled: What Remains of Student's Fourth Amendment Rights?*, 28 ARIZ. ST. L.J. 673 (1996); Denise E. Joubert, Note, *Message in a Bottle: The United States Supreme Court Decision in Vernonia School District 47J v. Acton*, 56 LA. L. REV. 959 (1996); Cornelius J. O'Brien, Recent Decision, *Constitutional Law—Fourth Amendment—Warrant and Probable Cause Requirements*, 34 DUQ. L. REV. 1167 (1996); Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2570-89 (1996).

25. See *infra* section IV. for a discussion of expanding drug testing outside athletics and a set of proposed guidelines for implementing such a policy.

26. See *infra* section IV.

27. See *infra* section II.

28. See *infra* section II.

trace the evolution of the Fourth Amendment's special needs exception and its application to public schools from the foundational case of *New Jersey v. T.L.O.*²⁹ to the present battle over mandatory drug testing.³⁰ Section III will then describe a drug testing procedure implemented in public school athletic programs,³¹ followed by an analysis of the constitutional implications of mandatory, suspicionless drug testing in public schools.³² Finally, Section IV of this Note will propose a set of guidelines for school districts which determine when a drug testing program is appropriate and what specific procedures must be followed to ensure that the program is constitutional.³³

II. THE CONSTITUTIONAL STANDARD

A. An Overview of the Fourth Amendment

The most prominent legal issue raised by random, suspicionless drug testing of public school students is the legality of such a policy under the Fourth Amendment's protection against unreasonable searches and seizures.³⁴ The Fourth Amendment is the framework from which courts will base their decisions in cases that challenge student drug testing. It defines the parameters of permissible testing. Thus, an understanding of the Fourth Amendment is an essential requirement in the process of developing a set of guidelines to determine whether a drug testing program is permissible.

29. 469 U.S. 325 (1985). For a discussion of the *New Jersey v. T.L.O.* case, see *infra* notes 174-94 and accompanying text.

30. See *infra* section II.

31. This note will not address the constitutional issues raised by drug testing athletes at the collegiate, olympic, or professional level. For recent commentary addressing these issues, see generally Eric N. Miller, Comment, *Suspicionless Drug Testing of High School and College Athletes After Acton: Similarities and Differences*, 45 U. KAN. L. REV. 301, 317-27 (1996) (analyzing drug testing at the collegiate level); Steven O. Ludd, *Athletics, Drug Testing and the Right to Privacy: A Question of Balance*, 34 HOW. L.J. 599, 617-26 (1991) (discussing professional and collegiate drug testing); Alan Fecteau, *NCAA State Action: Not Present When Regulating Intercollegiate Athletes—But Does That Include Drug Testing Student Athletes?*, 5 SETON HALL J. SPORTS L. 291 (1995) (discussing NCAA drug testing).

32. See *infra* section III.

33. See *infra* section IV.

34. The Fourth Amendment of the United States Constitution provides that:

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. The Fourth Amendment is applicable to state and local governments (which include public school boards) through the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949).

1. What Constitutes a Search and State Action

At the beginning of any Fourth Amendment analysis is the threshold question whether a search protected by the Fourth Amendment has occurred.³⁵ Not every act of inspection or inquiry that may be considered a search in the ordinary meaning³⁶ of the word rises to the level of a protected search within the purview of the Fourth Amendment.³⁷ For example, when a parent inspects her child's bedroom to discover if the child is hiding something, a search within the meaning of the Fourth Amendment has not occurred. However, in the ordinary sense of the word, the parent searched her child's room.

To invoke the protection of the Fourth Amendment the government or its agent must have conducted the search.³⁸ This is the constitutional requirement of state action.³⁹ Simply put, if the government or its agent did not conduct

35. *Katz v. United States*, 389 U.S. 347 (1967). Professor Berner offers a "reach-grasp" dichotomy to explain the structure of the Fourth Amendment. Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 383 (1991). This dichotomy essentially reduces the framework of the Fourth Amendment to pose two questions. *Id.* The first question asks how far the Fourth Amendment reaches. *Id.* The answer to this question defines the areas in which the government may conduct searches, but does not specify exactly what may be searched within those areas. *Id.* The second question explores what may be searched. *Id.* It asks which searches are unreasonable. *Id.* In other words, within the realm of reachable searches which ones can be grasped, which are permitted, and which are prohibited? *Id.* The Fourth Amendment only prohibits unreasonable searches.

36. The everyday use of the word "search" commonly means "to look into or over carefully or thoroughly in an effort to find or discover something" WEBSTER'S NEW COLLEGIATE DICTIONARY 1034 (150th Anniversary ed. 1981).

37. The text of the Fourth Amendment explicitly mentions only four categories that are protected against unreasonable searches and seizures: "persons, houses, papers, and effects . . ." U.S. CONST. amend. IV. However, through judicial interpretation the protection of the Fourth Amendment has been expanded to include items in which an individual exhibits a subjective expectation of privacy that society accepts as reasonable. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

38. "[T]he actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment . . ." *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). In *T.L.O.*, the Supreme Court dismissed the argument that the history of the Fourth Amendment suggested that the prohibition of unreasonable searches and seizures only intended to regulate the conduct of law enforcement officers. *Id.* at 335. The Supreme Court has held the Fourth Amendment applicable to the conduct of civil authorities in addition to the conduct of law enforcement officers. *Id.* (listing the following examples: building inspectors, *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); Occupational Safety and Health Act inspectors, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-13 (1978); and fire fighters entering privately owned property to extinguish a fire, *Michigan v. Tyler*, 436 U.S. 499, 506 (1978)).

39. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 452-86 (4th ed. 1991) (discussing the concept of state action). "[T]he amendments to the Constitution which protect individual liberties specifically address themselves to actions taken by the United States or a state." *Id.* at 452. Thus, the Fourth Amendment provides protection only from searches conducted by the government or its agent. *Id.* If the government is conducting a search through

the search, then no search has occurred to implicate the Fourth Amendment because the Fourth Amendment does not protect searches conducted by a private party.⁴⁰

Recall the example of the parent searching her child's room. There, a search has not taken place because a parent is not a state actor and is not acting as the government's agent.⁴¹ Thus, the requirement of state action is not met when a parent searches her child's bedroom, and the Fourth Amendment accordingly is not implicated.

In contrast, the requirement of state action is met when public school officials implement a drug testing policy.⁴² The Supreme Court has recognized that public school officials are government agents.⁴³ Thus, the requirement of state action is met when schools drug test students because public school officials, administrators, and teachers are all state actors.⁴⁴

Meeting the state action requirement is only the initial step in a Fourth Amendment analysis. Not every act of inspection taken by the government or its agent implicates the constitution. To determine what actions constitute a search to invoke the protection of the Fourth Amendment, the Supreme Court developed a two pronged test.⁴⁵ In *Katz v. United States*,⁴⁶ the Court stated that to determine whether a search has occurred an individual must first have

a state actor, such as a police officer, or an individual acting as an agent for the government, the requirement of state action is met. *Id.* However, a private individual, such as a parent in the above example, is not a state actor or an individual acting as an agent for the government that must comply with the requirements set out in the Fourth Amendment before conducting a search.

40. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) (stating that the Fourth Amendment does not apply to even an arbitrary search or seizure conducted by a private party).

41. *See supra* note 38.

42. *See infra* note 178.

43. *T.L.O.*, 469 U.S. at 333. For a discussion of the *T.L.O.* case, see *infra* notes 174-94 and accompanying text.

44. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (holding that the Fourth Amendment's protection against unreasonable searches and seizures applies to searches conducted by public school officials).

45. See generally 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 2.1 (2d ed. 1987) for a discussion of the two pronged test which defines protected areas and interests. Professor LaFave is "the nation's leading authority on the fourth amendment." Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 594 (1989). One court has even referred to Professor LaFave as the "patron saint of the search and seizure law." *Juarez v. State*, 758 S.W.2d 772, 784 (Tex. Crim. App. 1988).

46. 389 U.S. 347 (1967).

exhibited a subjective expectation of privacy in an item.⁴⁷ Second, that expectation of privacy must be one that society is prepared to accept as reasonable.⁴⁸ This test has become known as the *Katz* reasonable expectation of privacy test.⁴⁹

The previous example of a parent searching her child's room illustrates the application of the *Katz* test.⁵⁰ The first part of the test requires an individual to have a subjective expectation of privacy.⁵¹ A minor child may very well subjectively believe that he has an expectation of privacy in his room. Thus, the child has met the first prong of the test. However, having a subjective expectation of privacy only satisfies the first portion of the test. The second part of the test requires the subjective expectation of privacy to be reasonable.⁵² A general societal standard determines the reasonableness of an expectation of privacy. A minor child's expectation of privacy in his bedroom does not meet this standard because it is not an expectation that society accepts as reasonable. Thus, a parent's search of her child's bedroom is not a search as far as the Fourth Amendment is concerned.

Returning to the specific issue addressed in this Note, drug testing through urinalysis is a search which the Fourth Amendment protects.⁵³ An individual has a subjective expectation of privacy in the excretory function which society has long recognized is reasonable.⁵⁴ Drug testing invades this privacy

47. *Id.* at 360 (Harlan, J., concurring). Commentators have disputed "whether such a subjective expectation is or ought to be a prerequisite to a finding that a Fourth Amendment search has occurred." 1 LAFAVE, *supra* note 45, § 2.1(b), at 308. Professor Amsterdam has even stated that "[a]n actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects." Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). "Because 'the courts frequently do not distinguish between the two parts of the *Katz* test,' little attention has been given to the independent significance of the first factor or to precisely how it is to be interpreted." 1 LAFAVE, *supra* note 45, § 2.1(c), at 309 (quoting Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 744-45 (1985)).

48. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

49. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

50. *See supra* notes 35-41 and accompanying text.

51. *See supra* note 47 and accompanying text.

52. *See supra* note 48 and accompanying text.

53. *See infra* notes 54-56, 77, 132-33, 152-55 and accompanying text for a further discussion of the privacy interests implicated by the collection and testing of urine.

54. "[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 646 (1989) (Marshall, J., dissenting) (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a

interest.⁵⁵ Therefore, following the *Katz* expectation of privacy test, drug testing is considered an intrusion that is protected by the Fourth Amendment.⁵⁶

2. The Reasonableness, Warrant, and Probable Cause Requirements

A search that meets the *Katz* reasonable expectation of privacy test and is conducted by the government or its agent may still not come within the protection of the Fourth Amendment.⁵⁷ Even if a search has occurred, the Fourth Amendment will only prohibit the search if it is unreasonable.⁵⁸ Prohibiting only unreasonable searches is a general requirement, applicable to all searches, found expressly within the text of the Fourth Amendment.⁵⁹

Just as reasonableness in general is an amorphous concept, so also is the definition, if one exists, of a reasonable search. In an attempt to define a reasonable search, the Supreme Court has stated that reasonableness "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."⁶⁰ This vague standard compelled the development of a balancing test.⁶¹ In considering all the circumstances, a court will balance the intrusion of a search on the individual's Fourth Amendment interests against the promotion of the government's legitimate interests.⁶² This

function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Id. at 617 (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

55. *Id.* See *infra* notes 128-63 and accompanying text for a further discussion of the *Skinner* case.

56. *Skinner*, 489 U.S. at 617. "[T]he collection and testing of urine is, of course, a search of a person, one of only four categories of suspect searches the Constitution mentions by name." *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2400 (1995) (O'Connor, J., dissenting) (quoting the Fourth Amendment's specific textual reference to four categories of suspect searches: "persons, houses, papers, and effects").

57. Returning to Professor Berner's "reach-grasp" dichotomy, this is the grasp analysis. Berner, *supra* note 35, at 383. At this point in a Fourth Amendment analysis the *Katz* test has been satisfied. The question now remains to be answered whether the search, as defined by *Katz*, is reasonable.

58. U.S. CONST. amend. IV; *Skinner*, 489 U.S. at 619. Note that the Fourth Amendment does not require investigative practices to be reasonable unless a determination has first been made that a search or seizure has occurred. Amsterdam, *supra* note 47, at 356 (noting that law enforcement practices do not have to be reasonable unless they are either searches or seizures).

59. *Katz v. United States*, 389 U.S. 347 (1967). The reasonableness clause in the Fourth Amendment specifically includes "[t]he right of the people to be secure . . . against *unreasonable* searches and seizures . . ." U.S. CONST. amend. IV (emphasis added).

60. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

61. See *infra* notes 85-117 and accompanying text (discussing the origin and application of the balancing test).

62. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

balancing test provides the framework for courts to decide whether a particular drug testing policy passes constitutional muster, or crosses the line and becomes an unconstitutional search.⁶³

Before a court will engage in such a balancing test, the reasonableness of a search is usually defined by the warrant and probable cause requirements.⁶⁴ These requirements mandate that a searching authority obtain a warrant based upon probable cause prior to conducting a search.⁶⁵ The purpose of the warrant requirement is to ensure that the safeguards of the Fourth Amendment are not forgotten in a rush of "hurried actions" by anxious authorities.⁶⁶ This purpose is accomplished by the warrant process which requires a "neutral and detached magistrate"⁶⁷ to decide whether sufficient probable cause⁶⁸ exists to issue a warrant.⁶⁹ Interjecting a neutral magistrate into the warrant process ideally serves as a check against the potential for officials to arbitrarily invade

63. See *infra* section III.

64. See *supra* note 34 (setting out the text of the Fourth Amendment).

65. U.S. CONST. amend. IV; *United States v. Ventresca*, 380 U.S. 102 (1965) (standing for the proposition that the Supreme Court has expressed a strong preference for compliance with the warrant requirement). Many commentators have also expressed a preference for strict adherence to the warrant requirement. 2 LAFAVE, *supra* note 45, § 4.1, at 118; Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982).

66. *Aguilar v. Texas*, 378 U.S. 108 (1964).

67. *Johnson v. United States*, 333 U.S. 10 (1948).

68. While the text of the Fourth Amendment specifically mentions that "no warrants shall issue, but upon *probable cause* . . .," a universally accepted definition or explanation of probable cause does not exist. U.S. CONST. amend. IV (emphasis added). Probable cause is "an exceedingly difficult concept to objectify" one commentator has stated. Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317, 317 (1971). The Supreme Court has made a similar assertion stating that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Despite its elusive meaning, the importance and tradition of probable cause in Fourth Amendment jurisprudence is reflected in the Supreme Court's statement that "[t]he requirement of probable cause has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). One explanation of probable cause that may prove helpful states that "[i]ts function is to guarantee a substantial probability that the invasions involved in the search will be justified by discovery of offending items." Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

69. Professor LaFave notes "that a significant part of the protection which flows from the warrant process stems from the fact that the critical probable cause decision is being made by a person possessing certain attributes and acting in a certain way." 2 LAFAVE, *supra* note 45, § 4.2, at 151. This protection is based on the assumption that a neutral and detached magistrate will not be influenced by the competing goals of law enforcement. *Johnson*, 333 U.S. at 14.

an individual's security and privacy interests. In other words, the warrant requirement limits the possibility of an official abusing his or her discretion.

In recent years the Supreme Court has carved out numerous exceptions to the warrant and probable cause requirements.⁷⁰ Warrantless searches have been upheld when exigent circumstances require an immediate search to prevent the destruction or loss of evidence⁷¹ and when law enforcement officers are in hot pursuit of a suspect.⁷² Further, neither stop and frisk searches⁷³ nor searches at the border require a warrant.⁷⁴ The rationale for these exceptions is that adequate time to obtain a warrant is not available.

The Supreme Court has also recognized a plain view exception;⁷⁵ an automobile exception;⁷⁶ an exception for items knowingly exposed to the public,⁷⁷

70. See Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 118-19 (1993) (discussing various cases carving out exceptions to the warrant and probable cause requirements).

71. *Cupp v. Murphy*, 412 U.S. 291 (1973).

72. *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (holding evidence obtained by officers who entered a house in pursuit of an armed robber admissible even though the search was warrantless). *But cf.* *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (holding invalid an officer's arrest of an individual for driving while intoxicated pursuant to a warrantless entry into the suspect's home despite the existence of the hot pursuit theory).

73. *Terry v. Ohio*, 392 U.S. 1 (1968).

74. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

75. *Arizona v. Hicks*, 480 U.S. 321 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Although the plain view doctrine is often characterized as an exception to the warrant requirement, it is well settled that government observation of objects in plain view is not even a search because there has been no invasion of privacy. Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 DICK. L. REV. 521, 523-24 (1991).

76. *California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982); *Carroll v. United States*, 267 U.S. 132 (1925).

77. What a person knowingly exposes to the public, even in his own home, is not subject to the Fourth Amendment's protection. *Katz v. United States*, 389 U.S. 347, 351 (1967). The application of this principle is illustrated by a Supreme Court case which dealt with aerial police surveillance. In *California v. Ciraolo*, 476 U.S. 207 (1986), through aerial surveillance the police obtained evidence that the defendant was cultivating marijuana. The defendant argued that the aerial surveillance of his yard was an unreasonable search because he had erected a fence around his yard to provide privacy. However, the Court held that despite the measures the defendant took to restrict some views of his activities, he did not have a reasonable expectation of privacy from aerial police surveillance. *Id.* at 214. The Court reasoned that the search was not unreasonable because the police had a right to observe anything any member of the public could have observed from a public vantage point. *Id.* at 213-14. Thus, because any member of the public flying over the defendant's yard could have seen exactly what the police saw, their observations were not unreasonable. *Id.* The mere fact that the defendant had taken some measures to restrict some views of his activities did not preclude the police from making observations from a vantage point where they had a right

abandoned,⁷⁸ or located in an open field;⁷⁹ and an exception for consensual

to be. *Id.* at 213. See also *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that an individual does not have a reasonable expectation of privacy in garbage bags left on a public street for collection because the garbage is knowingly exposed to the public).

If an individual sufficiently exposes an item in such a way that it is readily accessible to animals, scavengers, or other members of the public, an expectation of privacy in that item is not reasonable. *Id.* In *Greenwood*, the Court held that an individual did not have a reasonable expectation of privacy in garbage bags that he left on the curb outside his house. *Id.* The Court reasoned that because it was common knowledge that the trash collector, other members of the public, or even animals could rummage through the garbage, society was not prepared to accept that an expectation of privacy in such garbage was reasonable. *Id.*

Although urine is discharged from the body and treated as a waste product, it is not knowingly exposed to the public like the garbage in *Greenwood*. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1312 (1988). “[T]he highly private manner by which an individual disposes of his or her urine demonstrates that it is not intended to be inspected or examined by anyone . . .” *Id.* Cf. *United States v. Mara*, 410 U.S. 19, 21 (1973) (holding that the compelled production of a handwriting sample is not a search within the meaning of the Fourth Amendment because a handwriting sample is constantly exposed to the public); *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (holding that the compelled production of a voice exemplar is not a search within the meaning of the Fourth Amendment because a voice exemplar is constantly exposed to the public). While the compelled production of a voice or handwriting exemplar is not a search within the meaning of the Fourth Amendment, the courts have held that compelled production of other various body samples are searches that infringe on an individual’s legitimate expectations of privacy. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (holding that the removal of scrapings from under an individual’s fingernails is a search); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986) (holding that a breath analysis constitutes a search); *State v. Locke*, 418 A.2d 843, 846-47 (R.I. 1980) (same); *Thornburg v. Dora*, 677 F. Supp. 581, 586-87 (S.D. Ind. 1988) (same); *United States v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984) (holding that an X-ray constitutes a search); *United States v. Allen*, 337 F. Supp. 1041, 1043 (E.D. Pa. 1972) (same); *Bouse v. Bussey*, 573 F.2d 548, 550 (9th Cir. 1977) (holding that compelled production of a pubic hair sample is a search). In a situation more on point to the compelled production and examination of urine, the Supreme Court has held that the detention of an individual until he or she has a bowel movement that is subject to inspection constitutes a search. *United States v. Montoya de Henandez*, 473 U.S. 531 (1985); see also *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984). “Certainly, the compelled production and examination of an individual’s urine cannot be considered less intrusive than the searches involved in these cases.” *Schail*, 864 F.2d at 1312 n.1.

78. The warrantless search of an item that has been abandoned does not violate the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241 (1960). An individual may retain a property interest in an item while at the same time relinquish his or her reasonable expectation of privacy in it. *United States v. Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989). In *Thomas*, upon seeing the police, the defendant placed his gym bag in front of an apartment door and then left the premises. The court held that the defendant had abandoned the gym bag. *Id.* at 846. The court reasoned that because the test to determine intent to abandon is an objective one from which intent can be inferred, the defendant’s actions had objectively manifested an intent to abandon his gym bag. *Id.* The possibility that the defendant intended to retrieve his bag did not alter the court’s conclusion that the defendant intended to abandon it. *Id.* at 846-47 n.5. The defendant’s ability to retrieve the bag depended on the fortuity that other persons with access to the public hallway would not disturb it while it lay there unattended. *Id.*

searches⁸⁰ to allow the searching party to bypass the warrant requirement. Neither a warrant nor probable cause is needed for a search incident to a lawful arrest,⁸¹ for an inventory search of property impounded by law enforcement officials,⁸² or for administrative noncriminal searches such as the inspection of closely regulated businesses,⁸³ and drug testing of certain employees.⁸⁴

The development of judicially crafted exceptions to the warrant and probable cause requirements has increased the need for courts to use a balancing test to determine whether a search is reasonable. Without strict adherence to the warrant and probable cause requirements, a court must look to the reasonableness clause of the Fourth Amendment for guidance. The development of the reasonableness balancing test, which courts will use to scrutinize student drug testing policies, can be traced to the administrative search cases.

B. The Administrative Search⁸⁵

The balancing test that emerged from the administrative search cases developed into a constitutional standard to determine the reasonableness of a search under the Fourth Amendment. The government's need to enforce residential and commercial building codes provided the impetus for the development of the administrative search exception to the warrant and probable cause requirements. The administrative search became the means to enable

79. An expectation of privacy in an open field is generally considered unreasonable because open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shield from government interference or surveillance. *Oliver v. United States*, 466 U.S. 170, 179 (1984). In *Oliver*, after disregarding a no trespassing sign and entering the defendant's fenced-in field, the police discovered a marijuana crop. The Court held that despite the fence and the no trespassing sign, the defendant did not have a reasonable expectation of privacy in his field because it was still generally accessible to the public. *Id.*

80. *United States v. Mendenhall*, 466 U.S. 544 (1980); *United States v. Matlock*, 415 U.S. 164 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

81. *Chimel v. California*, 395 U.S. 752, 763 (1969).

82. *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

83. *New York v. Burger*, 482 U.S. 691 (1987) (permitting warrantless inspections of automobile junkyards); *Donovan v. Dewey*, 452 U.S. 594 (1981) (inspecting mines for compliance with safety requirements); *United States v. Biswell*, 406 U.S. 311 (1972) (inspecting gun dealers).

84. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). For a discussion of the *Skinner* and *Von Raab* cases, see *infra* notes 125-73 and accompanying text.

85. The following cases illustrate typical administrative searches: *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) (building inspection for housing code violations); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (government employer's search of employee's desk); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of public school students and their belongings); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints).

municipalities to inspect an ever increasing number of residential and commercial buildings. To facilitate this enormous task, local ordinances typically permitted municipal employees to enter private premises to perform their inspection duties.⁸⁶ These ordinances also made refusal to admit an authorized inspector a violation punishable by fine or imprisonment.⁸⁷

The Supreme Court first addressed the constitutionality of administrative searches in *Frank v. Maryland*.⁸⁸ There, the Court held that warrantless

86. 3 LAFAVE, *supra* note 45, § 10.1, at 597-98.

87. *Id.* § 10.1, at 598.

88. 359 U.S. 360 (1959), *overruled by* *Camara v. Municipal Court*, 387 U.S. 523 (1967). In *Frank*, acting on a complaint from a resident that rats were in her basement, a health inspector began an inspection of the houses in the vicinity looking for the source of the rats. *Id.* at 361. The inspector knocked on the door of Frank's home, and after receiving no response, examined the outside of the house. *Id.* This inspection revealed that the house was in an extreme state of decay, and that in the rear of the house there was a pile of rodent feces mixed with straw, trash, and debris weighing approximately half a ton. *Id.* Frank arrived during the inspection. *Id.* The inspector asked Frank for permission to inspect the interior of his home. *Id.* Frank refused and was subsequently arrested and found guilty of violating the Baltimore City Code even though the inspector never had a warrant authorizing him to enter Frank's home. *Id.* at 361-62.

The Fourth Amendment was previously found to be applicable to administrative searches in *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd* 339 U.S. 1 (1950). In *Little*, the court reversed a homeowner's conviction for refusing to allow a health inspector entry into her home without a search warrant. *Id.* The government argued that the Fourth Amendment should not apply to administrative searches because the purpose of the search was the protection of public health, not the investigation of a crime. *Id.* at 16-17. The court did not agree with the government's distinction. The court reasoned that because the prohibition against unreasonable searches and seizures was based on the "common law right to privacy," no distinction could be made to separate the freedoms from search and seizure between searches for criminal and non-criminal purposes. *Id.* As Judge Prettyman poignantly stated:

[The prohibition against unreasonable searches and seizures] was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a *fantastic absurdity*

Id. at 17 (emphasis added). The decision and reasoning in *Little* would prove to be prophetic; the Supreme Court would first reject it in *Frank*, only to return to it in *Camara v. Municipal Court*, *See v. City of Seattle*, and the current administrative search cases. 2 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 34:2, at 377-80 (2d ed. 1993) (discussing the history of the administrative search in the Supreme Court). See *infra* notes 95-117 and accompanying text for a discussion of *Camara v. Municipal Court* and *See v. City of Seattle*. See also JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 246-48 (1966) (discussing the *District of Columbia v. Little* case).

administrative searches were constitutional.⁸⁹ Of more importance than the decision itself, which would enjoy a short life as valid precedent, are the factors the Court addressed in deciding the case. First, the Court took into account the remedy the government sought.⁹⁰ Because the government was not seeking evidence for criminal prosecution, the Court found the inspection to “touch at most upon the periphery of the important interests” which the constitution protects.⁹¹ Next, the Court noted that the government’s limited power of inspection adequately protected an individual’s private property from arbitrary searches.⁹² Finally, the Court emphasized that the general welfare of the community made these searches of indispensable importance, the effectiveness of which would be greatly hindered by the requirements necessary for a search for evidence of criminal acts.⁹³ In light of these factors the Court concluded that warrantless administrative searches were constitutional.⁹⁴

Only eight years later, the Supreme Court overruled *Frank* in two administrative search cases heard and decided together: *Camara v. Municipal Court of San Francisco*⁹⁵ and *See v. City of Seattle*.⁹⁶ These cases had a

89. *Frank*, 359 U.S. at 365-67. See Loree L. French, Note, *Skinner v. Railway Executives' Association and the Fourth Amendment Warrant-Probable Cause Requirement: Special Needs Exception Creating a Shakedown Inspection?*, 40 CATH. U. L. REV. 117, 129-30 (1990) (discussing the *Frank* case and the historical development of the administrative search exception).

90. *Frank*, 359 U.S. at 366.

91. *Id.* at 367. But cf. *Little*, 178 F.2d at 16-17 (criticizing the argument that the Fourth Amendment does not apply in cases where the purpose of the search is protection of public health, not investigation of crime, as “preposterous in fact” and without basis). In *Frank*, the Court also stated that the inspection caused “only the slightest” infringement on individual privacy rights. *Frank*, 359 U.S. at 367. The Court reasoned that such an infringement “must be assessed in the light of the needs which have produced it” to decide that the search was constitutional. *Id.* This language suggests that the Court applied a balancing test in this case without formally acknowledging to have done so.

92. *Frank*, 359 U.S. at 366. Valid grounds for suspicion were required, and the inspection was to take place at a reasonable time during the day. *Id.* In this case, the pile of rodent feces combined with the run down condition of the house provided adequate suspicion that a nuisance existed. *Id.*

93. *Id.* at 372. The Court bolstered this point stating “[t]he need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few.” *Id.* John Wesley Hall made this interesting comment in response to the Court’s assertion:

This is one of those paternalistic arguments like “We’re from the Government, and we’re here to help you.” Or, as long as the Government’s purpose is paternalistic and not investigatory, the Fourth Amendment does not apply. Thus, because most people are willing to sacrifice or not assert their rights, the Fourth Amendment rights of all may be devalued?

2 HALL, *supra* note 88, § 34:2, at 379 n.28.

94. *Frank v. Maryland*, 359 U.S. 360, 365-67 (1959), overruled by *Camara v. Municipal Court*, 387 U.S. 523 (1967).

95. 387 U.S. 523 (1967).

96. 387 U.S. 541 (1967).

profound impact on the law of search and seizure.⁹⁷ In *Camara*, the tenant of an apartment building refused to permit a warrantless inspection of his residence by a city health inspector.⁹⁸ After refusing three times to allow an inspection the police arrested and charged the tenant with a misdemeanor.⁹⁹ The Supreme Court noted probable jurisdiction of the case in view of the "growing nationwide importance" of the administrative search problem.¹⁰⁰

The Court overruled *Frank* to the extent that the decision permitted warrantless administrative searches.¹⁰¹ In reaching this decision, the Court first noted that the practice of permitting warrantless administrative searches did not adequately ensure the basic purpose of the Fourth Amendment "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."¹⁰² The Court then proceeded to reject the *Frank* Court's premise that administrative searches "touch[ed] at most upon the periphery of the important interests safeguarded by the [constitution]"¹⁰³ Having concluded that administrative searches are significant intrusions upon the interests protected by the Fourth Amendment, the Court then discredited the assertion that the warrant process could not function effectively in this field.¹⁰⁴ In sum, the Court concluded that except in emergency situations, the searching authority must obtain a search warrant prior to conducting an administrative search.¹⁰⁵

97. 2 HALL, *supra* note 88, § 34:3, at 380 (noting the profound effect *Camara* and *See* would have on the law of search and seizure in general). See generally Wayne R. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1. See also 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4:8 (2d ed. 1978).

98. *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967). The inspection was conducted pursuant to the San Francisco Municipal Code which allowed for a routine annual inspection for possible violations of the city's Housing Code. *Id.* at 526.

99. *Id.* at 526-27. Charges were brought against the tenant pursuant to § 507 of the Housing Code for refusing to permit a lawful inspection. *Id.* at 527.

100. *Id.* at 525.

101. *Id.* at 528. Although *Frank* could arguably be distinguished on its facts from *Camara*, the Court nevertheless felt compelled to overrule it because the opinion had "generally been interpreted as carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment." *Id.* at 529.

102. *Id.* at 528.

103. *Id.* at 530 (quoting *Frank v. Maryland*, 359 U.S. 360, 367 (1959)). The Court opined that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.*

104. *Camara v. Municipal Court*, 387 U.S. 523, 532-34 (1967).

105. *Id.* The Court was concerned that the practical effect of allowing a warrantless administrative search would give an inspector too much discretion in the field. *Id.* at 532. "This is precisely the discretion to invade private property which [the Court] ha[s] consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* at 532-33.

Camara marked the first time the Supreme Court balanced the government's interests in effective regulatory enforcement against an individual's privacy interests. After balancing these interests, the Court determined that the Fourth Amendment's reasonableness requirement would permit a lesser standard of probable cause to justify an administrative search than that required in searches for evidence of criminal violation.¹⁰⁶ The Court explained that the unique character of administrative searches required evaluating whether some accommodation short of probable cause could adequately balance public need and individual rights.¹⁰⁷ The Court ultimately set out a reasonableness standard for administrative searches that balances valid public interests against private invasions produced by the search.¹⁰⁸

The balancing test the Court set out in *Camara* would be readily followed.¹⁰⁹ In *See v. City of Seattle*,¹¹⁰ the Supreme Court applied the principles established in *Camara* to the inspection of commercial structures not used as private residences.¹¹¹ In addition to building inspections, courts have extended these principles to permit the inspection of closely regulated businesses such as the pharmaceutical,¹¹² firearm,¹¹³ gaming,¹¹⁴ nuclear,¹¹⁵ and

106. 2 HALL, *supra* note 88, § 34:3, at 382; *see generally* 3 LAFAYE, *supra* note 45, § 10.1(b), at 184-91 (discussing the *Camara* Court's analysis balancing the need to search against the invasion which the search entails).

107. *Camara*, 387 U.S. at 534. The unique situation the administrative search poses, as compared to a search pursuant to a criminal investigation, is the goal of widespread compliance with a particular standard. *Id.* at 535. In *Camara*, the goal of the inspections was securing city-wide compliance with minimum safety standards for private property, whether the deviations were intentional or unintentional. *Id.* Thus, in determining whether probable cause exists to issue a warrant, the Court concluded that the need for the inspection must be weighed in terms of the reasonable goals of code enforcement. *Id.*

108. *Id.* at 539. In particular, the Court asserted that three factors combined to support the reasonableness of administrative searches: (1) the long history of judicial and public acceptance; (2) the public interest demanding that all dangerous conditions be prevented or abated; and (3) the fact that the invasions only involved a limited invasion of privacy. *Id.* at 537. *See also* 3 LAFAYE, *supra* note 45, § 10.1(b), at 184-91 (discussing the three factors the Court balanced in *Camara*).

109. In fact, the Court acknowledged that "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails" could adequately resolve the administrative search dilemma. *Camara*, 387 U.S. at 536-37.

110. 387 U.S. 541 (1967).

111. *Id.* at 542. Again, the Court established a reasonableness scheme for the inspection of commercial premises. *Id.* at 542-43.

112. *United States v. Prendergast*, 436 F. Supp. 931 (W.D. Pa. 1977).

113. *United States v. Biswell*, 406 U.S. 311 (1972) (upholding the inspection of a licensed gun dealer's storeroom).

114. *Lanchester v. Pennsylvania State Horse Racing Comm'n*, 325 A.2d 648 (Pa. Commw. Ct. 1974) (upholding the warrantless search of a horse trainer's truck located on a state licensed horse racing facility). *See also Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) (upholding the random drug testing of jockeys, trainers, grooms and track officials).

mining¹¹⁶ industries. The reasonableness balancing test for administrative searches is now firmly established in the Fourth Amendment's search and seizure jurisprudence.¹¹⁷

C. *The Special Needs Exception*

Yet another exception permits a court to engage in a balancing test rather than adhere to the Fourth Amendment's textual requirements where the government can articulate a special need.¹¹⁸ The special needs doctrine recognizes that exceptional circumstances, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable. The Supreme Court created this exception in *New Jersey v. T.L.O.*,¹¹⁹ where the Court addressed the scope of protection public school children receive under the Fourth Amendment.¹²⁰ The Court ultimately held that public school officials do not need to obtain a warrant in order to search students.¹²¹ The Court justified this position by stating that a warrant requirement would frustrate "the swift and informal disciplinary procedures needed in the schools."¹²² Thus, the special needs exception was created to allow even more searches to be conducted without first obtaining a warrant.

After its introduction into Fourth Amendment jurisprudence, the special needs exception expanded. Examples of special needs searches today are numerous. They include searches of prisoners, parolees, and probationers, as

115. *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 562 (8th Cir. 1988) (upholding drug testing of employees at a nuclear power plant).

116. *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (upholding the warrantless administrative search of a mine).

117. Variations of a four pronged balancing test have since emerged to determine the reasonableness of an administrative search. *Delaware v. Prouse*, 440 U.S. 648 (1979). These tests seek to balance (1) the importance of the governmental interest; (2) the physical or psychological intrusion upon the individual's privacy interests; (3) the amount of discretion an official has in conducting the search; and (4) the effectiveness and necessity of the intrusion in reaching its goals. *Id.* at 654-61.

118. The special needs exception originated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In order to clarify when a warrant based upon probable cause did not need to be obtained prior to conducting a search, Justice Blackmun stated that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351 (Blackmun, J., concurring). Justice Blackmun's concerns have become known as the special, or compelling, needs doctrine which dictates when the warrant and probable cause requirements may be bypassed.

119. 469 U.S. 325 (1985).

120. See *infra* notes 174-94 and accompanying text for a further discussion of the *New Jersey v. T.L.O.* case.

121. *T.L.O.*, 469 U.S. at 340.

122. *Id.*

well as border searches, immigration stops and searches, airport security checks, administrative and regulatory searches, and military searches.¹²³ A recent example of the growing prevalence of the administrative search balancing test and the special needs exception is the Supreme Court's analysis of drug testing certain employees.¹²⁴

In *Skinner v. Railway Labor Executives' Ass'n*,¹²⁵ and *National Treasury Employees Union v. Von Raab*,¹²⁶ the Supreme Court upheld the constitutionality of random, suspicionless drug testing of certain employees. The Court relied on the special needs exception to allow such testing without a warrant or probable cause.¹²⁷ The special needs addressed in each of these cases were extraordinary safety concerns and national security hazards.

Skinner addressed whether regulations promulgated by the Federal Railroad Administration (FRA) requiring that employees involved in train accidents submit blood and urine samples for testing violated the Fourth Amendment.¹²⁸ The FRA promulgated these regulations based on findings that railroad employee alcohol and drug use posed a serious threat to public safety.¹²⁹ Previous efforts to curb substance abuse based on observation of impaired railroad employees had proven ineffective.¹³⁰ Thus, to more effectively detect and deter substance abuse, the new regulations imposed a mandatory duty to test

123. HALL, *supra* note 88, § 38:1, at 494.

124. See *infra* notes 125-73 and accompanying text.

125. 489 U.S. 602 (1989). For an additional discussion and analysis of the *Skinner* case, see generally French, *supra* note 89, at 117; Heidi P. Mallory, Note, *Fourth Amendment—The “Reasonableness” of Suspicionless Drug Testing of Railroad Employees*, 80 J. CRIM. L. & CRIMINOLOGY 1052 (1990).

126. 489 U.S. 656 (1989). For an additional discussion and analysis of the *Von Raab* case, see generally Kenneth C. Betts, *Fourth Amendment—Suspicionless Urinalysis Testing: A Constitutionally “Reasonable” Weapon in the Nation’s War on Drugs?*, 80 J. CRIM. L. & CRIMINOLOGY 1018 (1990).

127. See *supra* notes 118-24 and accompanying text.

128. *Skinner*, 489 U.S. at 606.

129. *Id.* The Court first noted that “[t]he problem of alcohol use on American railroads [was] as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago.” *Id.* A review of accident investigation reports revealed concrete statistical evidence of this safety problem. *Id.* at 607. Between 1972 to 1983 at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor occurred on the nation’s railroads. *Id.* These accidents caused 25 fatalities, 61 non-fatal injuries, and an estimated \$19 million in property damage. *Id.* The accident investigation reports also identified “an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor.” *Id.* (quoting 48 Fed. Reg. 30,726 (1983)).

130. *Id.* at 607-08. Comments to the proposed regulations from interested parties indicated that railroads were only able to detect a small number of alcohol and drug violations relying on the practice of observation by supervisors and co-workers. *Id.*

employees involved in a train accident.¹³¹

Skinner presented the Supreme Court with its first opportunity to address the collection and testing of urine samples.¹³² At the outset, the Court concluded that the collection and testing of urine is a search which the Fourth Amendment protects.¹³³ Next, the Court summarized the Fourth Amendment's reasonableness requirement.¹³⁴ However, because the drug testing at issue did not require either a warrant or probable cause, the Court was forced to turn its discussion to the newly created special needs exception to justify the searches.¹³⁵

The Court began its analysis noting that "when faced with such special needs, [it] [had] not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in [a]

131. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 606 (1989). The specific events triggering a mandatory duty to collect blood and urine samples were the following: a major train accident, impact accident, and any train accident that involved a fatality. *Id.* at 609. An additional regulation permitted permissive testing based on a supervisor's reasonable suspicion that an employee was impaired. *Id.* at 611.

132. The Court first addressed whether the regulations satisfied the state action requirement to implicate the Fourth Amendment. *Id.* at 614. The determination of "[w]hether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes turns on the degree of the Government's participation in the private party's activities . . ." *Id.* Although the railroads were privately owned, the government exercised significant control and participation in regulating the railroad industry. *Id.* at 615. Thus, the Court held that the government's encouragement, endorsement, and participation in the implementation of the drug testing regulations was sufficient to implicate the Fourth Amendment. *Id.* at 615-16.

133. *Id.* at 617. Although the Court had long recognized that blood testing was an intrusion that must be deemed a search, it faced a unique situation with the collection and testing of urine. *Id.* In *Schmerber v. California*, 384 U.S. 757 (1966), the Court set the precedent that compelled physical intrusion infringed an expectation of privacy that society accepted as reasonable. *Id.* at 767-68. Thus, the *Skinner* Court responded that:

Unlike the blood-testing procedure at issue in *Schmerber*, the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical 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. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.

. . . .

Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Skinner, 489 U.S. at 617.

134. *Skinner*, 489 U.S. at 619 (stating that the reasonableness of a search is generally balanced in favor of the warrant and probable cause requirements).

135. *Id.*

particular context.”¹³⁶ The government’s interest in ensuring the safety of the travelling public and the railroad employees was the type of situation the special needs exception was designed to effectuate.¹³⁷ Having concluded that a special need existed, the Court then proceeded to determine whether the need was sufficient enough to dispense with the warrant and probable cause requirements.

The Court held that a warrant was not essential to the reasonableness determination.¹³⁸ The Court reasoned that because the FRA regulations narrowly defined the permissible testing limits to prevent arbitrary testing a warrant would only frustrate the purpose of the search.¹³⁹ Next, the Court addressed the probable cause requirement.¹⁴⁰ Generally, when the government performs a search without a warrant the search must be based on probable cause that a person has violated the law.¹⁴¹ However, the searches in this case were not based on a showing of probable cause. The FRA automatically tested the employees after an accident whether they manifested any sign of impairment or not. Therefore, this unique situation required the Court to address the concept of individualized suspicion.¹⁴²

The Court began its discussion of the individualized suspicion requirement noting that when circumstances exist to permit a search without probable cause, “some quantum of individualized suspicion” is generally required.¹⁴³ However, the Court also made it clear that individualized suspicion is not an absolute requirement.¹⁴⁴ After noting the general adherence to the individualized suspicion requirement, the Court recognized that in certain circumstances

136. *Id.* at 620-21.

137. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 620-21 (1989).

138. *Id.* at 624.

139. *Id.* at 622-24. The drug testing would not be effective if it was not conducted as soon as possible after an accident because the rate that alcohol and drugs leave the bloodstream may result in the loss of valuable evidence. *Id.* at 623.

140. *Id.* at 624.

141. *Id.*

142. *Id.* An individualized suspicion requirement imposes a burden on the searching authority to articulate a reason for searching a particular individual. Whether the Fourth Amendment contains such a requirement is an issue that the Supreme Court has not settled. The Court would address this issue in *Skinner*.

143. *Skinner v. Railway Executives’ Ass’n*, 489 U.S. 602, 624 (1989) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)). “When the balance of interests precludes insistence on a showing of probable cause, [the Court] [has] usually required ‘some quantum of individualized suspicion’ before concluding that a search is reasonable.” *Id.*

144. *Id.* “A showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.” *Id.*

a search may be reasonable absent individual suspicion.¹⁴⁵ The Court had just created yet another balancing test for administrative searches which enabled not only the warrant requirement to be bypassed, but also the probable cause requirement.¹⁴⁶

The application of this balancing test to the facts in *Skinner* ultimately resulted in the Court deciding that the government's interest in safety outweighed the railroad employees' privacy concerns.¹⁴⁷ On the government's side of the balancing equation, the Court characterized the interest in testing without a showing of individualized suspicion as compelling.¹⁴⁸ However, on the railroad employees' side of the equation, the Court characterized their privacy interests as not unduly infringed.¹⁴⁹

The Court articulated a number of reasons why it concluded that the drug testing program did not impose an undue infringement on the employees justifiable expectations of privacy. First, the Court noted the context in which the privacy intrusions took place.¹⁵⁰ Because the testing took place in the employment context, any restrictions on the freedom of movement necessary to obtain the urine samples were no greater than the restrictions the employees impliedly consented to by accepting employment.¹⁵¹

Next, the Court addressed the unique privacy interests implicated by the collection and testing of urine.¹⁵² Unlike blood and breath tests, urinalysis requires the performance of an excretory function traditionally shielded by great

145. *Id.* "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." *Id.*

146. *Id.* at 620-21 (noting the safety sensitive tasks the employees subject to drug testing performed). In striking the balance between these competing interests, the Court noted the government's compelling interest in protecting the safety of the traveling public. *Id.*

147. *Id.* at 633.

148. *Id.* at 628 (noting the possibility that the employees subject to testing could cause *great human loss* before any signs of impairment became noticeable).

149. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989).

150. *Id.* at 624.

151. *Id.* at 624-25 (noting that "an employee consents to significant restrictions on his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours"). The Court reasoned that any additional interference with an employee's freedom of movement caused by the additional time it takes to obtain a urine sample could not be characterized as a significant privacy interest. *Id.* at 625.

152. *Id.* at 626.

privacy.¹⁵³ While the Court did not characterize the additional privacy interest in the excretory function as minimal, it noted the efforts taken to reduce the intrusiveness of the collection process.¹⁵⁴ Because the samples were collected in a medical environment, and not under direct observation, the Court believed that the employees' privacy interests were adequately safeguarded.¹⁵⁵

Finally, and most importantly, the Court noted that the employees' expectations of privacy were diminished by their participation in a heavily regulated industry.¹⁵⁶ The Court reasoned that because many of the incidents of railroad employment already intruded upon an employee's privacy the drug testing was only minimally intrusive.¹⁵⁷ Therefore, after balancing the employees' privacy interests against the government's compelling interest in protecting the public from the potential for great human loss caused by railroad accidents, the Court ultimately found the balance to weigh in favor of the government.¹⁵⁸

In his dissent, Justice Marshall vigorously criticized the special needs exception.¹⁵⁹ He argued that the Court should evaluate the FRA's drug testing policy using traditional Fourth Amendment analysis.¹⁶⁰ This analysis would

153. *Id.* Previous Supreme Court decisions had concluded that blood tests were not significant intrusions on an individual's legitimate expectations of privacy. *Winston v. Lee*, 470 U.S. 753, 762 (1985) (stating that "blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity"). *See also* *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) (stating "[t]he simple blood-alcohol test . . . is safe, painless, and commonplace"); *Schmerber v. California*, 384 U.S. 757, 771 (1966) (noting that such tests are commonplace, and that for most people the procedure involves virtually no risk, pain, or trauma); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (recognizing that "[t]he blood test procedure [had] become routine in our everyday life").

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

155. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626-27 (1989). The Court also addressed the problem that certain private medical facts an employee might prefer not to disclose would be discovered through the drug testing process. *Id.* at 627 n.7. The Court did not view this as a significant invasion of privacy because there was no indication that the government did not treat this information as confidential, or use it for any other purpose. *Id.*

156. *Id.* at 627.

157. *Id.* at 628.

158. *Id.* at 627. The pervasive goal of regulating the railroad industry is to ensure safety. Dependent upon this goal is the health and fitness of the railroad employees. *Id.* Thus, numerous precautions are taken to ensure the safety of railroad employees. *Id.* Congress recognized the relation between safety and fitness by enacting the Hours of Service Act in 1907. *Id.* Through the Federal Railroad Safety Act of 1970, Congress also permitted government testing of all railroad facilities, equipment or persons. *Id.* Even before the implementation of the drug testing policy at issue, the FRA required that railroad employees undergo periodic physical examinations. *Id.* *See also* *Railway Labor Executives' Ass'n v. Norfolk & W. R.R.*, 833 F.2d 700, 705-06 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R.*, 802 F.2d 1016, 1024 (8th Cir. 1986).

159. *Skinner*, 489 U.S. at 636-41 (Marshall, J., dissenting).

160. *Id.* at 641-42.

require a warrant based upon probable cause.¹⁶¹ In his view, the majority had taken "its longest step yet toward reading the probable cause requirement out of the Fourth Amendment."¹⁶² However, the special needs exception appeared to be firmly rooted as an exception to the traditional warrant and probable cause requirements.¹⁶³

In *National Treasury Employees Union v. Von Raab*,¹⁶⁴ the Supreme Court applied the special needs exception to hold that United States Customs Service employees who carry firearms could constitutionally be required to submit to suspicionless drug testing.¹⁶⁵ Just as in *Skinner*, the Court found a special need that justified the departure from the traditional warrant and probable cause requirements.¹⁶⁶ The government and the public have a common concern that employees charged with preventing controlled substances from entering the country are themselves free from the effects of these substances.¹⁶⁷ The Court also found that these employees had diminished expectations of privacy due to the nature of their work.¹⁶⁸ Thus, when the Court applied the balancing test to this situation, the government's compelling need to test outweighed the employees' privacy interests.¹⁶⁹

161. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 641-42 (1989).

162. *Id.* at 636. Justice Marshall poignantly stated that "[c]onstitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not." *Id.* at 637. In his view, the "patchwork quilt of settings" in which the special needs exception had been applied, resulted in the formation of an unguided balancing test. *Id.* at 639. Invoking Justice Holmes' oft-quoted phrase that "principles of law, once bent, do not snap back easily," Justice Marshall predicted that this unguided balancing test would ultimately reduce the privacy all citizens enjoy. *Id.* at 655 (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)).

163. *Id.* at 636. Justice Marshall noted that the Court had allowed the special needs exception to displace the textual requirements in each of the four categories of searches named in the Fourth Amendment: searches of persons, houses, papers, and effects. *Id.* at 636-37.

164. 489 U.S. 656 (1989).

165. *Id.*

166. *Id.* at 666.

167. *Id.* at 668-71. These employees are the first line of defense against the national law enforcement crisis caused by the smuggling of controlled substances. *Id.* at 668. This national interest could be irreparably damaged if those charged with implementing it, because of their own drug use, did not vigorously carry out their duty to prevent the flow of controlled substances into the country. *Id.* at 670. These employees are required to carry firearms to protect their physical safety. *Id.* at 669-70. The public and the government have a strong interest in ensuring that these employees do not suffer from an impaired perception if a situation arises in which they are required to employ deadly force. *Id.* at 670-71.

168. *Id.* at 672.

169. *Id.*

These employment cases expanded the special needs exception created in *New Jersey v. T.L.O.*,¹⁷⁰ which balances the government's need to conduct a particular search against an individual's reasonable expectation of privacy.¹⁷¹ After the employment cases, the only compelling needs that would warrant the implementation of a suspicionless drug test were those articulated in *Skinner* and *Von Raab*: extraordinary safety concerns and national security hazards.¹⁷² However, the Supreme Court's treatment of suspicionless drug testing in public schools would expand the special needs exception even further.¹⁷³

D. The Fourth Amendment in Public Schools

While the Supreme Court has stated that students do not shed their constitutional rights at the schoolhouse gate,¹⁷⁴ the Court has never granted the full protection of the Bill of Rights to schoolchildren. In particular, the Fourth Amendment has never been given full force in the public school environment.¹⁷⁵ In *New Jersey v. T.L.O.*,¹⁷⁶ the Court found the Fourth

170. 469 U.S. 325 (1985). See *infra* notes 174-94 and accompanying text for a discussion of the *T.L.O.* case.

171. The scope of employees which courts have permitted to be tested for drugs has expanded since *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), were decided. See, e.g., *IBEW Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir. 1992) (upholding drug testing of employees at a nuclear power plant because the employees have a diminished expectation of privacy, and the danger of catastrophic harm caused by a nuclear accident is great); *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991) (upholding drug testing of employees who hold top security clearances); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (upholding drug testing of truck drivers because the government has a compelling interest in ensuring that commercial trucks carrying large loads are operated in a safe manner); *IBEW Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990) (upholding the constitutionality of testing employees who work on natural gas and hazardous liquid pipelines); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (upholding random urinalysis testing of airline personnel with safety responsibilities).

172. Numerous cases have expanded the scope of employees who must submit to drug testing. See *supra* note 171. However, the compelling need justifying these searches has always been truly serious concerns of a safety nature. See *supra* note 171.

173. See *infra* notes 195-372 and accompanying text for a discussion of suspicionless drug testing in public schools.

174. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

175. The unique setting of the public school requires the student's Fourth Amendment interest in privacy to be considered in light of the substantial interest of teachers and administrators in maintaining discipline and order. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). The Supreme Court has recognized that in the public school setting "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 580 (1975)). Given these concerns, the Supreme Court has recognized that in order to maintain discipline and security in the public school environment, disciplinary procedures must be given a certain degree of flexibility. *Goss*, 419 U.S. at 582-83. This flexibility can also be seen as the result of the Supreme Court's willingness to recognize the importance of preserving the informality of the student-teacher relationship to foster a positive educational environment. *Ingraham*

Amendment to be applicable to searches conducted by school officials at public schools. Before *T.L.O.*, it was not settled whether the Fourth Amendment even applied in public schools.¹⁷⁷

Although the Fourth Amendment applies in public schools, the Court held that public school officials¹⁷⁸ do not need to obtain a warrant in order to search students.¹⁷⁹ The Court justified abandoning the warrant requirement by stating that it would frustrate "the swift and informal disciplinary procedures needed in the schools."¹⁸⁰ The Court stated that a search may be conducted under "ordinary circumstances" without a warrant if the school based the search

v. Wright, 430 U.S. 651, 680-82 (1977).

176. 469 U.S. 325 (1985).

177. Early theories found that the Fourth Amendment was not applicable in public schools. RICHARD D. STRAHAN & L. CHARLES TURNER, *THE COURTS AND THE SCHOOLS: THE SCHOOL ADMINISTRATOR AND LEGAL RISK MANAGEMENT TODAY* 134 (1987). One theory simply asserted that because school officials are not agents of the state that the requirement of state action is not met. *Id.* Thus, under this theory the Fourth Amendment did not apply to searches of public school students. *Id.* Another theory invoked the doctrine of *in loco parentis*. *Id.* Under this old doctrine the school stands in place of the parents. *Id.* The school is given authority over the student equal to the authority of the parent. *Id.* at 129. Thus, just as a parent may search the person or property of his or her child, the school also enjoys the same authority. *Id.* at 134. Finally, some courts were willing to allow school searches that only imposed administrative, not criminal, penalties. *Id.* These theories are no longer relevant after *T.L.O.*

178. The Court first noted that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by public school officials. *T.L.O.*, 469 U.S. at 333. See *supra* notes 38-44 and accompanying text for a discussion of the state action requirement.

179. *T.L.O.*, 469 U.S. at 340. *T.L.O.* was a 14 year-old high school freshman who was caught smoking in the bathroom. *Id.* at 328. Upon being questioned by the assistant vice-principal in his private office, she denied she had been smoking. *Id.* The vice-principal then demanded to see her purse which he opened to discover a pack of cigarettes. *Id.* Further examination of the purse revealed rolling papers known to be associated with the use of marijuana, a pipe, several empty plastic bags, a small amount of marijuana, an index card that appeared to be a list of students who owed *T.L.O.* money, and two letters that implied she was dealing marijuana. *Id.* *T.L.O.* later confessed to the police that she had been selling marijuana at school. *Id.* at 329. Based upon the evidence seized by the assistant vice-principal and *T.L.O.*'s confession, the state successfully brought delinquency charges against *T.L.O.* *Id.* at 329-30.

180. *Id.* at 340. In his concurrence, Justice Blackmun expressed concern that the balancing test was becoming the rule rather than the exception to the Framers' explicit requirement in the text of the Fourth Amendment that a warrant be based upon probable cause. *Id.* He believed that the Court had used the balancing test, rather than strictly applying the Fourth Amendment's warrant and probable cause provisions, only when it had been confronted with "a special law enforcement need for greater flexibility." *Id.* at 351 (citations omitted). In order to clarify when a warrant based upon probable cause did not need to be obtained prior to conducting a search, Justice Blackmun stated that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* Justice Blackmun's concerns have become known as the special, or compelling, needs doctrine which dictates when the warrant and probable cause requirements can be bypassed.

upon a reasonable suspicion¹⁸¹ that the individual student was violating school policy or the law.¹⁸² Thus, the Court essentially extended the administrative search balancing test into the classroom and set the requisite suspicion requirement at the lower reasonable suspicion level.¹⁸³

The *T.L.O.* Court explained that reasonable suspicion depends on all the circumstances¹⁸⁴ and the dictates of reason and common sense.¹⁸⁵ While this standard should not impose a narrow notion of reasonableness,¹⁸⁶ at the same

181. The Court modified the level of suspicion required to justify a search from the traditional probable cause test to a reasonable suspicion standard in the school setting. *Id.* at 341. *See infra* notes 184-89 and accompanying text (describing what constitutes reasonable suspicion). *But see* 4 LAFAVE, *supra* note 45, § 10.11(b), at 807-32 (expressing a basis for concern about the Court's analysis justifying a watered-down probable cause test). Professor LaFave points out that the reasonable suspicion rule is not necessarily either consistent or inconsistent with the Fourth Amendment administrative search standard. *Id.* at 812. Rather, he expresses concern that the "rule has been accepted without a sufficient showing that the traditional probable cause requirement is too demanding in a [public] school setting." *Id.* The facts of the *T.L.O.* case itself illustrate Professor LaFave's concern: only after the teacher reported she personally observed T.L.O. smoking in the bathroom did the vice-principal search her purse. *Id.* at 814. Professor LaFave argues that these facts provided the vice-principal sufficient evidence to conduct the search under the traditional probable cause test. *Id.* Thus, Professor LaFave states that the *T.L.O.* case is just one more example of a factual situation that does not establish the need for a watered-down version of the probable cause test. *Id.* In fact, after reviewing a number of school search cases, Professor LaFave suggests "that in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test." *Id.* at 812.

182. *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985).

183. To justify the departure from the "probable cause" requirement the Court noted that the fundamental command of the Fourth Amendment is that searches be reasonable. *Id.* at 340. The Court stated that although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search . . . in certain limited circumstances neither is required." *Id.* at 340-41 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring)). The Court recognized that in a number of situations the reasonableness of a search does not require the level of suspicion to be set at probable cause. *Id.* at 341. *See also* *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *cf.* *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967). Finally, the Court reasoned that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *T.L.O.*, 469 U.S. at 341.

184. *T.L.O.*, 469 U.S. at 341.

185. *Id.* at 343. The Court stated that this standard would spare teachers and school administrators the necessity of learning the niceties of probable cause. *Id.* At the same time this standard would ensure that the privacy interests of the students would not be invaded more than necessary to achieve the legitimate end of preserving order and discipline in the school environment. *Id.*

186. *Id.*

time school officials are not allowed unfettered discretion to conduct searches.¹⁸⁷ In addition to the reasonable suspicion requirement, a search of school students or their possessions must also be reasonable in its scope.¹⁸⁸ For example, the existence of reasonable suspicion to search one location for a particular object might not support a search of other locations.¹⁸⁹

The Supreme Court did not decide a pivotal issue which the random drug testing of students raises. In *T.L.O.*, the Court explicitly refused to decide whether individualized suspicion is an essential element of the reasonableness standard it adopted for school searches.¹⁹⁰ Although the Fourth Amendment generally requires some quantum of individualized suspicion, the Fourth Amendment does not impose an irreducible requirement of such suspicion.¹⁹¹ Whether individualized suspicion is a necessary requirement for searches in public schools is a question that is not settled.¹⁹²

187. See Schreck, *supra* note 70, at 121-29 for a thorough discussion of recent court decisions defining the nature of reasonable suspicion and reasonable scope. It is interesting to note that of 23 cases after the 1985 *T.L.O.* decision, only 3 cases have held that school officials lacked reasonable suspicion to conduct a search. *Id.* at 122.

188. *Id.* at 127-29 (discussing recent cases defining the reasonable scope of school searches). See also Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U. L. REV. 1077 (1991) (offering four different school search scenarios to delineate the proper scope of *T.L.O.* and proposing that courts analyze more closely the circumstances surrounding particular school searches).

189. See, e.g., *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (holding that the search of a student for drugs was not reasonable when she had merely been found hiding in the school parking lot when she should have been in school). It is also important to note that the burden is on the administrator to establish that a specific rule or law has been violated, and that a search could reasonably be expected to produce evidence of that violation. *Id.*

190. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985). The Court did not believe that it was necessary to discuss or consider the circumstances in which school authorities may justify conducting a search absent individualized suspicion. *Id.* The Court refrained from addressing this issue for the prudential reason that because the search at issue had been based upon individualized suspicion, the issue was not properly before the Court to address. *Id.* The vice-principal had searched *T.L.O.*'s purse as a direct response to allegations that she had broken the school's prohibition against smoking. *Id.*

191. *Id.* See *supra* notes 125-73 and accompanying text for a discussion of two employment cases in which the Supreme Court, after quoting this same language, held that individualized suspicion was not required to drug test employees.

192. Professor Schreck points out two types of searches that can raise the issue of nonindividualized suspicion in the public school setting: "(1) when misconduct has occurred and suspicion is directed toward a group of students, but not a specific individual; and (2) when the school wishes to prevent misconduct by searching the general student population, although there is no suspicion that any particular student has engaged in misconduct." Schreck, *supra* note 70, at 130-31. Courts have generally held that these types of searches are unconstitutional because the "Fourth Amendment demands more than a generalized probability; it requires that the suspicion be particularized with respect to each individual searched." *Id.* at 131 (quoting *Kuehn v. Renton Sch. Dist. No. 403*, 694 P.2d 1078, 1081 (Wash. 1985)). However, in an emergency situation the "immediate and serious risk of harm could be determinative in balancing the interests at stake." *Id.*

The only guidance to answer this question which the Court provided was the statement that “exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where ‘other safeguards’ are available ‘to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field.’”¹⁹³ The Court would further discuss the individualized suspicion requirement in the next case it heard addressing the Fourth Amendment standard in public schools, *Vernonia School District 47J v. Acton*.¹⁹⁴

III. AN ANALYSIS OF THE CONSTITUTIONAL ISSUES RAISED BY MANDATORY, RANDOM, SUSPICIONLESS DRUG TESTING IN PUBLIC SCHOOLS

A. Description of a Drug Testing Procedure

Before discussing the various cases challenging random, suspicionless drug testing in public schools, an actual drug testing procedure will be described. The description will prove helpful in understanding the constitutional implications which these programs raise.¹⁹⁵ The procedures apply to all students who wish to participate on an athletic team.¹⁹⁶ The program requires the athlete and his or her parent or guardian to sign a consent form agreeing that the student will submit to urinalysis testing.¹⁹⁷ All students are tested at the beginning of the season for their sport, and again during the season if they are selected by random drawing.¹⁹⁸ If the athlete does not consent to the testing, he or she is not eligible to participate.¹⁹⁹

at 133 (quoting *Burnham v. West*, 681 F. Supp. 1160, 1167 n.8 (E.D. Va. 1987)).

193. *T.L.O.*, 469 U.S. at 342 n.8 (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

194. 115 S. Ct. 2386 (1995). See *infra* notes 294-361 and accompanying text for a discussion of the *Acton* case.

195. The drug testing program challenged in *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995), is described below. Variations of the program will be pointed out by making reference to the drug testing program challenged in *Schall v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).

196. *Acton*, 115 S. Ct. at 2389.

197. *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1358 (D. Or. 1992). “All students who desire to participate in interscholastic athletics are required to sign a form authorizing the District to conduct a test on a urine specimen provided by the student as a prerequisite to participation in the athletic program.” *Id.*

198. *Acton*, 115 S. Ct. at 2389. If the student athlete or his or her parent or guardian refuses to sign the consent form, the student athlete will be denied participation in the interscholastic program. *Id.* at 2390.

199. *Acton*, 796 F. Supp. at 1358. After refusing to sign the consent form James Acton was given the first day of football practice, he was told not only by the school principal, but also the school district superintendent, that he could not participate on the football team without signing the consent form and submitting to drug testing. *Id.* at 1359.

Once a week during the season a school official places the athletes' names into a pool from which a student, with the supervision of two adults, blindly draws the names of ten percent of the athletes for testing.²⁰⁰ The athlete is then notified of his or her selection and tested the same day. The athlete reports for testing and is given a specimen control form.²⁰¹ The form contains a confidential number for identification purposes.²⁰² An opportunity for the athlete to disclose prescription medications is provided at this time.²⁰³ The athlete may either provide a copy of his or her prescription or a doctor's authorization.²⁰⁴

An adult monitor of the same sex as the athlete then gives the athlete an empty specimen bottle, and accompanies him or her into a locker room or bathroom.²⁰⁵ The male athlete produces a sample at a urinal with his back to the monitor.²⁰⁶ Monitors may, though do not always, watch the student while he produces the sample, and they listen for the normal sounds of urination.²⁰⁷ Female athletes produce samples in an enclosed bathroom stall, so that they can be heard but not observed.²⁰⁸ The athlete then gives the sample to the monitor, who after checking it for temperature and tampering, transfers it to a vial.²⁰⁹ The student then places a lid on the vial, and the vial is sealed with security tape which the student signs and dates.²¹⁰ Finally, a school official

200. *Acton*, 115 S. Ct. at 2389. In *Schail*, each student athlete was assigned a number instead of being given a number once their name was drawn. *Schail*, 864 F.2d at 1310-11. The athletic director and head coach of each athletic team were authorized to institute random urinalysis for drugs during the athletic season. *Id.* at 1311. To select the student athletes to be tested their assigned numbers were placed in a box and then randomly drawn. *Id.*

201. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389 (1995).

202. *Id.*

203. *Id.* In *Schail*, if a sample tested positive the student was allowed an opportunity to explain any false positive due to prescription drugs or over-the-counter medicine that had been taken. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1311 (7th Cir. 1988).

204. *Acton*, 115 S. Ct. at 2389.

205. *Id.*

206. *Id.*

207. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389 (1995). "The monitor is present to assure that there is no tampering and remains 12 to 15 feet behind the student." *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1358 (D. Or. 1992). In *Schail*, the student athletes selected to be tested were allowed to enter a lavatory stall and close the door in order to produce the sample. *Schail*, 864 F.2d at 1311.

The student is not under direct visual observation while producing the sample; however, the water in the toilet is tinted to prevent the student from substituting water for the sample, the monitor stands outside the stall to listen for normal sounds of urination and the monitor checks the temperature of the sample by hand in order to assure its genuineness.

Id.

208. *Acton*, 115 S. Ct. at 2389.

209. *Id.*

210. *Acton*, 796 F. Supp. at 1358.

sends the sample to an independent laboratory where it is tested for the presence of controlled substances or performance enhancing drugs.²¹¹ The chain of custody of the sample is designed to ensure its authenticity.²¹² Access to the test results are strictly limited to protect the privacy and anonymity of the athlete.²¹³

If the sample tests positive, the school administers a second test as soon as possible to confirm the result.²¹⁴ If the second test is positive, the school notifies the athlete's parents.²¹⁵ The school then schedules a meeting with the student, his or her parents, and the appropriate school officials to discuss the options available to the student.²¹⁶ Sanctions that may be imposed vary.²¹⁷ Generally, upon the first positive test the school gives the athlete the choice of entering an assistance program which includes counseling and weekly urinalysis, or suspension from athletics for the remainder of the current season and the next athletic season.²¹⁸ Second and third positive test violations result in longer or permanent suspensions from athletic competition.²¹⁹

211. *Acton*, 115 S. Ct. at 2389. The laboratory routinely tests the samples for amphetamines, cocaine, marijuana, and alcohol. *Id.* Other drugs, such as LSD or anabolic steroids, may be screened at the request of the school district, but the identity of a particular student does not determine which drugs the sample will be tested for. *Id.* The test has an accuracy of approximately 99.94%. *Acton*, 796 F. Supp. at 1358.

212. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1311 (7th Cir. 1988).

213. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389 (1995). The laboratory does not know the identity of the student athletes whose samples it tests, and it is authorized to mail the results only to the superintendent or to provide the results to school district officials by telephone only after a code confirming the official's authority is recited. *Id.* The only officials that have access to the test results are the superintendent, principal, vice-principal, and athletic directors. *Id.* Also, the test results are not kept for more than one year. *Id.*

214. *Id.* at 2390. In *Schail*, the laboratory would retest any sample which tested positive using the more accurate, and more expensive, gas chromatography/mass spectrometry method. *Schail*, 864 F.2d at 1311.

215. *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1358 (D. Or. 1992).

216. *Acton*, 115 S. Ct. at 2389.

217. See *infra* notes 218-19 and accompanying text.

218. *Acton*, 115 S. Ct. at 2389. In *Schail*, the sanction for the first positive test was an automatic suspension from 30% of the athletic contests. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1311 (7th Cir. 1988).

219. A second positive test results in automatic suspension for the remainder of the current season and the next athletic season, and a third positive test results in the suspension for the remainder of the season and the next two athletic seasons. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2390 (1995). In *Schail*, the sanction for the second positive test result was a 50% suspension from 30% of the athletic contests. *Schail*, 864 F.2d at 1311. A third positive test result created a suspension for a full calendar year, and a fourth positive barred the student athlete from all interscholastic athletic competitions during the remainder of the student's high school career. *Id.*

B. Drug Testing Student Athletes

The following discussion provides an analysis of the various issues raised by drug testing student athletes.²²⁰ The overview of the leading cases challenging student athlete drug testing will give the reader an overall picture of the current case law. Next, the rationale for testing students athletes is briefly discussed, followed by an in depth discussion of two important cases challenging drug testing student athletes.

1. An Overview

In *Vernonia School District 47J v. Acton*,²²¹ the Supreme Court addressed the issue of drug testing in public schools for the first time. Writing for the majority, Justice Scalia concluded that suspicionless drug testing of student athletes does not violate the students' constitutional right to be free from unreasonable searches.²²² Until *Acton*, only one federal court had upheld mandatory, suspicionless drug testing of public school students.

Relying on *New Jersey v. T.L.O.*,²²³ the Seventh Circuit Court of Appeals in *Schail v. Tippecanoe County School Corp.*,²²⁴ held that randomly drug testing high school student athletes did not violate the Fourth Amendment. The court reasoned that the school's strong interest in drug testing outweighed the athletes' expectations of privacy. However, other courts did not follow this case until the Supreme Court addressed the issue in *Acton*.²²⁵

In sharp contrast to the decision in *Schail*, during the period after *Schail* and before *Acton*, courts consistently recognized student athletes' Fourth Amendment right to be free from intrusive bodily searches.²²⁶ This protection

220. The focus of this section is on drug testing student athletes because this is the student group that school districts have chosen to test.

221. 115 S. Ct. 2386 (1995).

222. *Id.*

223. 469 U.S. 325 (1985). See *supra* notes 174-94 and accompanying text for a discussion of the *T.L.O.* case.

224. 864 F.2d 1309 (7th Cir. 1989).

225. *Acton*, 115 S. Ct. at 2386.

226. Several courts have invalidated student drug testing for various reasons. *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989) (holding that no extraordinary circumstances existed to justify suspicionless testing, also noting the absence of evidence that students who participate in extracurricular activities are much more likely to use drugs than nonparticipants); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985) (invalidating a drug testing policy because of the unreliable test results and the procedure of visual monitoring of the act of urination); *Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super Ct. Ch. Div. 1985) (holding drug testing policy unreasonably intrusive on privacy that could not be justified by the numbers and percentages of students referred to drug counseling as compared to the

was founded upon the more or less absolute privacy that our culture provides the excretory functions.²²⁷ As the cases discussed below will demonstrate, this privacy interest is no longer absolute.²²⁸

2. Athletes at Greater Risk

Before discussing the cases challenging drug testing in public schools in greater detail, the rationale for focusing these programs on student athletes will be addressed. Drug use by student athletes presents special concerns that either do not exist among the general student population or are substantially increased when combined with sports.²²⁹ These special concerns center around the dangerous combination of drugs and sports.

The student athlete's health and fitness is adversely affected by drug use to a greater degree than non-athletic student drug use.²³⁰ One of the contributing

total student body).

227. See *supra* notes 54-56, 77, 132-33, 152-55 and accompanying text (discussing the privacy concerns implicated by compelled urinalysis).

228. See *infra* section III.C.

229. The compelling force of athletic competition alone can drive a student athlete to use drugs to improve his or her performance and gain a competitive edge. See JEFF MEER, DRUGS & SPORTS 72 (Solomon H. Snyder ed., 1987) (stating "[t]he drive to excel and win sometimes becomes so overwhelming that an athlete might do anything to obtain a slight advantage"). See generally TOM DONOHOE & NEIL JOHNSON, FOUL PLAY: DRUG ABUSE IN SPORTS 147-50 (1986) (offering a number of reasons why athletes use drugs).

The special problem of drug use in interscholastic sports stems from many sources. The most prominent source can be traced to the position the professional athlete holds in modern American culture. The mass media portrays popular professional athletes as cultural icons. These superstar athletes are the modern day heroes to thousands of young athletes. See, e.g., Jacob V. Lamar, *Scoring off the Field; The Penalty Flag Has Been Thrown for Drug Use Among Athletes*, TIME, Aug. 25, 1986, at 52, 52 (stating that professional athletes are exalted role models that are treated as American royalty). Many student athletes perceive excelling in sports as their avenue to power, fame, and fortune. Even an average professional athlete in many sports earns more than \$100,000 per year. BOB GOLDMAN ET AL., DEATH IN THE LOCKER ROOM: STEROIDS & SPORTS 32 (1984). This cultural backdrop, combined with the inherent competitive nature of sports, places student athletes at a greater risk than the general student body to use drugs. For an excellent account of how important high school sports can become to an athlete, student, and community, see H.G. BISSINGER, FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM (1990) (recounting the story of the 1988 football season of the Permian Panthers from Odessa, Texas who regularly drew crowds of 20,000 to see them play).

230. "The use of drugs by professional and college athletes has encouraged drug use by younger athletes." Nancy A. Nuzzo & Donald P. Waller, *Drug Abuse in Athletes*, in DRUGS, ATHLETES, AND PHYSICAL PERFORMANCE 141, 144 (John A. Thomas ed., 1988). Drug use among younger athletes may have more serious consequences than adult drug use.

The young body frequently responds to pharmacological agents in a different or modified way compared to the body of a mature adult. There are major physiological changes occurring during adolescent development with an increased susceptibility to drug alteration and damage. Bone growth, hormone surges, changes in cardiac function

factors that places student athletes at greater risk is that they are more likely to use more harmful drugs such as amphetamines and anabolic steroids.²³¹ The athlete's use of these types of drugs increase the risk of sports related injuries.²³² The effects of many drugs impair judgment, reaction, and coordination, leading to injuries on the playing field to both the athlete using drugs and other teammates or opponents.²³³ Thus, not only is the health and safety of the athlete using drugs at risk, but also the health and safety of other athletes.

In addition to focusing on the serious health risks posed by student athlete drug use, school districts have chosen to test student athletes because of their status within the school community.²³⁴ Student athletes are prominent

are all part of the pubescent adolescent physiology. The abuse of drugs during these important years of physiological development can cause unknown alterations in physiological systems. The adolescent years are also very difficult psychologically. Young athletes may become dependent upon abused drugs to maintain the self-image that was originally built up by and attributed to the use of drugs.

Id. at 145.

231. One study indicated that amphetamine use by student athletes was three times greater than that of the general student body. MICHAEL J. ASKEN, DYING TO WIN, THE ATHLETE'S GUIDE TO SAFE AND UNSAFE DRUGS IN SPORTS 46 (1988). "The use of steroids in adolescents is far more serious than in adults." Nuzzo & Waller, *supra* note 230, at 153. Adolescent use of steroids "can also irreversibly affect the reproductive system of prepubertal males and females, causing permanent infertility." *Id.* at 154. See also Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93 (1990) (discussing the physical effects of steroid use on the athlete and why athletes are likely to use them). In addition to the immediate health risks caused by anabolic steroid use, studies have shown a correlation between steroid use and other substance abuse. Robert H. DuRant et al., *Anabolic-Steroid Use, Strength Training, and Multiple Drug Use Among Adolescents in the United States*, PEDIATRICS, July 1995, at 23 (citing data compiled by researchers from questionnaires of 12,267 teenagers). The study revealed that high school students who use anabolic steroids are more likely to use several drugs and drink alcohol. *Id.*

232. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389 (1995). A Vernonia coach believed that serious injuries to a wrestler and a football player were caused by drug use. *Id.* The coach also expressed concern that many injuries may not be revealed. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992). This is because the student athlete is less likely to disclose an injury than a student injured in a regular physical education class. *Id.* The coach explained that the highly competitive atmosphere of interscholastic sports will influence the athlete's decision to report an injury, whereas the student injured in physical education class is more likely to disclose an injury. *Id.* "[The] sense of pride and desire to stay in the game, when coupled with the numbing influence of drugs, [is] a significant concern to all involved in [an] athletic program." *Id.*

233. *Acton*, 115 S. Ct. at 2389. Expert testimony confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination and performance. *Id.* See generally GARY I. WADLER & BRIAN HAINLINE, DRUGS AND THE ATHLETE 53-169 (1989) (providing an exhaustive discussion of the adverse effects of numerous drugs used by athletes).

234. *Schail v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833, 856 (N.D. Ind. 1988) (noting that "interscholastic athletes of a public school system typically enjoy a unique identity within the school community").

members of the student body who are viewed with admiration and respect.²³⁵ This status places student athletes in a leadership role that gives them the power to influence other students' behavior.²³⁶ This leadership role transcends the immediate school community to the community at large.²³⁷ Accordingly, the student athlete has a responsibility to uphold the school's image.²³⁸ In fact, one court has even taken judicial notice of the fact that drug use by athletes is a matter of great concern in society at large.²³⁹

The prevalence of drug use among athletes also damages the integrity of sports by eliminating its inherent fairness.²⁴⁰ Performance enhancing drugs give athletes using them an unfair advantage over athletes who do not use them.²⁴¹ Student athlete drug use further erodes the integrity of sports when an athlete develops a drug dependency which leads to unethical practices such as point-shaving, gambling, and bribery.²⁴² Even more damaging to the integrity of sports is the illegal drug market that has developed as a result of athletes' drug dependency.²⁴³ All these factors combine to impair the integrity of sports in general, and particularly the integrity of a school identified as having a drug problem in its sports program.²⁴⁴ A combination of all these concerns prompted the drug testing of student athletes in the following cases.

C. Two Cases Upholding Suspicionless Drug Testing

The following two cases provide the only case law upholding suspicionless drug testing in public schools. Special attention should be given to the most recent case because it was decided by the United States Supreme Court. Future challenges to student drug testing will draw on this case for arguments both for and against student drug testing. Thus, a complete analysis of these cases is

235. *Id.*

236. *Id.*

237. *Id.*

238. Mary L. Scott, Note, *Is Innocence Forever Gone? Drug Testing High School Athletes: Schaill v. Tippecanoe County School Corporation*, 54 MO. L. REV. 425, 440 (1989).

239. *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1320-21 (7th Cir. 1988).

240. Charles Feeney Knapp, Note, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 IOWA L. REV. 107, 113 (1990). "Sport is about honest competition." DONOHOE & JOHNSON, *supra* note 229, at 152. "Either we accept this and persuade athletes to forsake their tablets and syringes or we forget the honesty." *Id.* "With chemicals in the stadium it is a rat race, not a human race." *Id.*

241. See, e.g., Daniel Benjamin, *Shame of the Games; Ben Johnson is Stripped of His Gold in the Olympics' Worse Drug Scandal*, TIME, Oct. 10, 1988, at 74, 74 (reporting that Ben Johnson was stripped of his olympic gold medal and world record in the 100 meter sprint because he cheated by using anabolic steroids).

242. Knapp, *supra* note 240, at 113-14.

243. *Id.* at 114.

244. *Id.*

crucial to determine whether their rationale and reasoning can be extended to allow schools to drug test other students besides those participating in athletics.

1. *Schail v. Tippecanoe County School Corp.*²⁴⁵

In *Schail*, five out of sixteen high school baseball players ordered to produce urine samples tested positive for the presence of marijuana.²⁴⁶ Based on these results, other reports of drug use among student athletes, and a concern over the high incidence of drug use among high school students nationwide, the Tippecanoe County School Corporation (TCSC) instituted random urine testing for all student athletes.²⁴⁷ Two sophomores who wanted to join an athletic team but refused to consent to drug testing filed suit in district court to prevent the program from being implemented.²⁴⁸ The district court rejected the students' claims²⁴⁹ and the Seventh Circuit Court of Appeals affirmed.²⁵⁰

On appeal, the Seventh Circuit followed the lead of several federal courts recognizing that urine testing is a search against which the Fourth Amendment protects.²⁵¹ Next, the court turned to the more difficult question presented by random drug testing: the level of suspicion required before a school district may conduct such testing.²⁵² The court believed that this question had already been

245. 864 F.2d 1309 (7th Cir. 1988).

246. *Id.* at 1310. The McCutcheon High School baseball coach ordered these sixteen baseball players to provide urine samples based on information that members of the team were possibly using drugs. *Id.*

247. *Id.* Cheerleaders were also included in the drug testing scheme. *Id.* TCSC operates Harrison and McCutcheon High Schools in Indiana. *Id.* See *supra* section III.A for a description of the specific drug testing procedures followed in *Acton* and *Schail*.

248. *Schail v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833, 835 (N.D. Ind. 1988). The students argued that the program 1) violated their Fourth Amendment right to be free from unreasonable searches and seizures; 2) interfered with their legitimate expectations of privacy; 3) violated their right to due process guaranteed by the Fourteenth Amendment; 4) violated their right to equal protection guaranteed in the Fourteenth Amendment; 5) and violated the doctrine of unconstitutional conditions by forcing them to waive their right to be free from unreasonable searches in return for the privilege of participating in interscholastic sports. *Id.* at 848. See Scott, *supra* note 238, at 427 (listing the grounds on which the students attacked the drug testing program).

249. *Schail*, 679 F. Supp. at 835.

250. *Schail*, 864 F.2d at 1309.

251. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d. 1309, 1313 (7th Cir. 1988).

252. *Id.* The court noted that this determination requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). The court further elaborated on this balancing test stating that "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted" to decide whether a particular search is reasonable. *Id.* at 1313 n.3 (quoting *Bell v. Wolfish*, 441 U.S. 520, 599 (1979)).

answered by the Supreme Court in *New Jersey v. T.L.O.*²⁵³

The court interpreted the holding in *T.L.O.* broadly enough to bring the school's mission to teach students in a safe and secure learning environment within the special needs exception.²⁵⁴ However, not only did the challenged testing program bypass the warrant and probable cause requirements, the program also permitted testing in the absence of individualized suspicion.²⁵⁵ Recall that in *T.L.O.* the Supreme Court expressly reserved deciding whether individualized suspicion was necessary to validate a search under the reasonableness standard adopted in that case.²⁵⁶ Thus, the *Schaill* court could not rely on its broad interpretation of the *T.L.O.* standard to justify the drug testing program's absence of individualized suspicion. Instead, the court drew from the administrative search cases²⁵⁷ to articulate four principles to allow suspicionless testing.²⁵⁸

The first principle stated that suspicionless searches are more likely to be allowed when an individual has diminished expectations of privacy.²⁵⁹ Applying this principle to the drug testing policy at issue, the court noted that

253. *Id.* at 1314-15. For a discussion of the Fourth Amendment standard in public schools set out in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), see *supra* notes 174-94 and accompanying text.

254. *Schaill*, 864 F.2d at 1314-15. This broad interpretation of the *T.L.O.* holding defeated the students' argument that the holding only applied "in those cases . . . based solely on the need for swift, or even immediate, responses to violations of a school's . . . rules." *Id.* at 1314. The court rejected this argument noting that the Supreme Court was not merely concerned with the time required to obtain a warrant; rather, the Court was concerned that a warrant requirement would unnecessarily impede the purposes of the classroom. *Id.*

255. *Id.* at 1315.

256. See *supra* notes 190-94 and accompanying text.

257. The court summarized the important factors the Supreme Court has stressed when approving administrative searches absent individualized suspicion in the business context as follows:

In industries subject to pervasive regulation, a business owner has a diminished expectation of privacy and has, to some extent, impliedly consented to inspections through his or her voluntary decision to enter a regulated industry. Second, the regulatory scheme which authorizes the search must further substantial governmental interests. Third, warrantless, suspicionless inspections must be necessary to further the regulatory scheme; the government must demonstrate that imposition of a warrant or reasonable suspicion requirement would frustrate the purposes of the regulatory scheme. Finally, the statutory or regulatory program authorizing the warrantless entry must specify the circumstances in which a search is appropriate with such particularity that the business owner is adequately advised that a particular search is lawful and the inspecting officer's discretion is limited sufficiently to guard against the danger of searches instituted primarily for harassment or intimidation.

Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1317 (7th Cir. 1988).

258. *Id.* at 1317-18.

259. *Id.* at 1317. Expanding on this principle the court stated that "[a]n individual's privacy rights vary with the context—whether the individual is at home, at work, in school or in jail, in a car or on a public sidewalk." *Id.*

a substantial expectation of privacy generally surrounds the act of urination.²⁶⁰ However, the court concluded that the circumstances surrounding the testing procedures mitigated this expectation of privacy.²⁶¹ Of particular importance, the court noted that the absence of direct observation while the student produced the sample rendered the invasion of privacy less severe than if the monitor directly observed the student urinating.²⁶² The court also placed great significance on its finding that students participating in an interscholastic athletic program generally have a diminished expectation of privacy.²⁶³ Several factors led the court to make this conclusion. First, the element of "communal undress" inherent in athletic participation suggested to the court that athletes have a reduced expectation of privacy.²⁶⁴ Further, athletes had long been required to produce a urine sample as part of a mandatory preseason medical examination.²⁶⁵ The court also noted the extensive requirements placed upon participation in interscholastic athletics, including minimum grade point averages, residency and eligibility requirements, and training rules.²⁶⁶ Finally, the court considered the athletes' implied consent to drug testing.²⁶⁷ The court

260. *Id.* at 1318.

261. *Id.*

262. *Id.* Cf. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2389 (1995) (noting that the drug testing procedures allowed the monitor to watch the male student athlete produce the urine sample).

263. *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988).

264. *Id.*

265. *Id.*

266. *Id.* These training rules included "prohibitions on smoking, drinking and drug use both on and off school premises." *Id.* These type of training rules have been upheld by numerous courts. See, e.g., *Clements v. Board of Educ. of Decatur Pub. Sch. Dist. No. 61*, 478 N.E.2d 1209 (Ill. App. Ct. 1985) (upholding a high school athlete's suspension from interscholastic sports competition for attending a party where alcohol was served to minors); *Braesch v. DePasquale*, 265 N.W.2d 842 (Neb. 1978) (upholding a training rule prohibiting student athletes from smoking, drinking, or using drugs both on and off school premises).

267. *Schall*, 864 F.2d at 1319. The drug testing program required all students participating in interscholastic athletics to sign a consent form permitting the collection and testing of their urine. *Id.* The court noted that while this consent did not render the testing procedure any less of a search, it did factor into the balancing test to determine whether the search was reasonable. *Id.* Because the refusal to sign a consent form did not result in loss of employment, criminal penalty, or any academic penalty, the court concluded that it was reasonable to require a student athlete to consent to drug testing. *Id.* at 1319-20. The court also pointed out that the consent form put the students on notice that they may be tested, and informed the student of the manner in which the testing would be conducted. *Id.* at 1320. The court also characterized participation in interscholastic athletic programs as a benefit that provided the participating student enhanced prestige and status in the student community. *Id.* The fact that the student could avoid the search entirely by choosing not to participate in interscholastic athletic programs also factored into the court's analysis of the consent issue. *Id.* at 1319 n.11. While this factor weighed in favor of the reasonableness of the search, the court warned "that a considerably greater intrusion occurs where an individual has no realistic option but to submit to a search." *Id.* An example of this situation is when drug testing is made a condition of employment. *Id.* at 1319-20. However, the court distinguished the drug testing as a

concluded that the combination of these factors diminished the student athletes' expectations of privacy with respect to urine tests.²⁶⁸

The second principle the court announced requires a school to have a substantial interest in drug testing that could not be accomplished by less intrusive means.²⁶⁹ Addressing the school's interest in drug testing, the court noted that five out of sixteen positive test results were consistent with national and statewide statistics of high school student drug use.²⁷⁰ The particular harm that drug use can cause athletes, and the leadership status athletes enjoy, were also factors the court considered when assessing the legitimacy of the school's interest in drug testing.²⁷¹

The court found that alternative methods of investigation would not adequately serve the school's interest in detecting and deterring drug use.²⁷² The appellants argued that the school environment provided an ideal situation for a suspicion based testing scheme. The daily contact between teachers, administrators, coaches and students would allow school officials to select students based on visible signs of drug impairment or intoxication.²⁷³ While such a testing scheme may be feasible in the public school environment, it is not likely to have the deterrent effect of a random test.²⁷⁴ In short, the court concluded that drug testing was a reasonable method to deal with a serious threat to the school's learning environment.²⁷⁵

condition of employment situation to conclude that the consensual aspect of the drug testing at issue was important to the determination of the constitutionality of the program. *Id.* at 1320.

268. *Id.* at 1319.

269. *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988). The court also stated "[t]hat alternative investigative techniques would not *deter* unlawful conduct to the same extent as the challenged practice may also be a relevant consideration." *Id.* (emphasis added).

270. *Id.* at 1320. The statistics the court relied upon indicated that in 1980, 63% of the high school seniors in Indiana had tried marijuana, and 37% used marijuana at least once a week. *Id.* A 1986 national survey indicated that 23% of the high school seniors responding to the survey had used marijuana in the preceding month. *Id.*

271. *Id.* at 1320-21. *See supra* section III.B.2 (discussing the particular harm drug use causes athletes and the high school athlete's leadership role in the school community).

272. *Schaill*, 864 F.2d at 1320-21.

273. *Id.* at 1321.

274. *Id.* Detecting and deterring drug use were not the only goals of the program. *Id.* The program not only attempted to protect the health and safety of the students, but also attempted to provide an appropriate learning environment. *Id.* Thus, the court distinguished the present case from others cases in which courts placed significant emphasis on the fact that urinalysis does not effectively measure current impairment. *Id.* at 1321 n.16. *See, eg.*, *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1548 (6th Cir. 1988).

275. *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1321 (7th Cir. 1988).

The third principle can be categorized as a requirement that the discretion of the searching party be limited.²⁷⁶ The court observed that this principle serves several important functions.²⁷⁷ The possibility of arbitrary searches, or searches meant to harass or intimidate, is diminished by clearly articulated, objective criteria.²⁷⁸ Also, articulated selection criteria assures the individuals to be searched that the searching party is acting within his or her lawful authority.²⁷⁹ Finally, an established criteria tends to diminish the subjective intrusiveness of a search because the individual understands why he or she is being searched.²⁸⁰ The court found that the drug testing program provided these safeguards.²⁸¹

Finally, the fourth principle the court set out to determine the validity of warrantless, suspicionless drug testing was whether the school intended to discover evidence of criminal activity.²⁸² The court summarily addressed this principle noting that the school did not intend the program as a means to punish students; rather, the program emphasized rehabilitation, affecting only the student's eligibility for participation in interscholastic athletics.²⁸³ The program did not assess academic penalties. After balancing these four principles, the court concluded that the suspicionless search was permissible.²⁸⁴

The court also discussed the due process aspects of drug testing public school students.²⁸⁵ The Fourteenth Amendment prohibits the government from

276. *Id.* at 1318.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* This procedure safeguards against individuals feeling that they are the target of a search conducted for improper motives. *Id.*

281. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1321-22 (7th Cir. 1988). The program did not allow the school officials to exercise any discretion regarding choosing who would be tested. *Id.* The athletes were selected randomly, and specific provisions controlled the manner in which the samples were collected, the handling and testing of the samples, and the confirmation of the results. *Id.* at 1321. The students were also fully advised of these procedures to eliminate any element of surprise, and the selection criteria was published to prevent a student from being stigmatized among his or her peers when selected for testing. *Id.* at 1321-22. The court concluded that these procedures provided "adequate safeguards to assure that reasonable expectations of privacy [were] not 'subject to the discretion of the official in the field.'" *Id.* at 1321.

282. *Id.* at 1318. "A search conducted for civil or non-punitive purposes may be valid in circumstances where a search conducted as part of a criminal investigation would not be permissible." *Id.*

283. *Id.* at 1322. The progressive nature of the sanctions and the drug counselling program as an option to reduce the length of suspension demonstrated the program's emphasis on rehabilitation over punishment. *Id.*

284. *Id.*

285. *Id.* at 1323-24.

depriving any person of life, liberty, or property without due process of law.²⁸⁶ If a student has a liberty interest in participating on an athletic team²⁸⁷ then a drug testing scheme must provide the student procedural due process.²⁸⁸

In the context of drug testing students, procedural due process requires that the proceedings and procedures provide the students with "fundamental fairness."²⁸⁹ This requirement necessarily entails that the school give the students advance notice of the testing procedures, that the testing is reliable, and that the school provide an opportunity to rebut the charges at a meeting with school officials.²⁹⁰ The court held that the TCSC policy comported with these

286. The Fourteenth Amendment provides, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

287. *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1323 (7th Cir. 1988) (noting "that there is room for doubt whether a student athlete has a constitutionally protected liberty interest in being free of the potential stigma associated with removal from an athletic team"). "Courts have not agreed regarding procedural protections that must be provided when students face suspension or expulsion from extracurricular activities." MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 127 (3d ed. 1992). See, e.g., *Niles v. University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983) (holding that a student's interest in participating in interscholastic athletics is not a protected interest under the due process clause of the Fourteenth Amendment); cf. *Boyd v. Board of Dirs. of the McGehee Sch. Dist. No. 17*, 612 F. Supp. 86 (E.D. Ark. 1985) (holding that students could not be suspended from a high school football team without due process protection because the students have a property interest in participating on the team). However, "[w]hile school authorities may not be constitutionally required to provide due process under all circumstances involving the denial of extracurricular participation, a hearing for the affected students to explain their version of the situation is always advisable." MCCARTHY & CAMBRON-MCCABE, *supra*, at 127.

288. In the public school setting a rudimentary due process standard exists. 2 JAMES A. RAPP, *EDUCATION LAW* § 9.05 (1992) (discussing student disciplinary procedures). "At the very minimum, however, due process requires that when a protected interest is to be affected that a student be given some kind of notice and afforded some kind of hearing." *Id.* at 9.05[2][b], at 9-100.1. The Supreme Court has defined this rudimentary due process standard regarding suspensions from school of 10 days or less. *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the Court held that procedural due process requires that before a student is suspended the student must be given "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. See generally WHAT WORKS, *supra* note 12, at 55-57 (setting out procedural guidelines for student suspension and expulsion).

289. Knapp, *supra* note 240, at 127.

290. *Id.* See also *Schail*, 864 F.2d at 1323 (summarizing that procedural due process requires that a student should be given notice and the opportunity to be heard).

requirements.²⁹¹ The policy provided the students adequate notice of the testing procedures, accurate test reliability, and an opportunity to have their urine samples tested a third time at a laboratory of their choice.²⁹² These safeguards provided all of the process that is due in the school setting.²⁹³

2. *Vernonia School District 47J v. Acton*²⁹⁴

In *Vernonia School District 47J v. Acton*,²⁹⁵ the Supreme Court addressed drug testing public school students for the first time.²⁹⁶ Many school districts eagerly anticipated the Court's decision in this case. The conflicting federal court decisions made the Court's determination particularly important. The Court's ruling would resolve the split between the lower courts and hopefully set a uniform standard for the country.

The Court decided *Acton* some time after the development of the special needs exception²⁹⁷ and the approval of suspicionless drug testing in the employment cases.²⁹⁸ Thus, the Court had a substantially larger body of case law to form the basis of its decision than the *Schaill* court did when it faced the same issue. Drawing from these cases, the Court ultimately held that the school's drug testing program passed the Fourth Amendment's reasonableness test.²⁹⁹

James Acton, a twelve-year-old seventh grade student, signed up to play football for Washington Grade School in the Fall of 1991.³⁰⁰ The first day of practice James was given the school district's consent form for alcohol and drug testing.³⁰¹ James took the form home, and after discussing it with his parents, decided not to sign it.³⁰² James and his parents objected to the policy because it required James to submit to drug testing absent any evidence that he had used drugs or alcohol.³⁰³ The school district superintendent informed James that he could not participate on the football team without signing the consent form

291. *Schaill*, 864 F.2d at 1323; see also Knapp, *supra* note 240, at 126-27 (concluding that a due process challenge to student athlete drug testing is not judicially sustainable).

292. *Schaill*, 864 F.2d at 1323.

293. *Goss*, 419 U.S. at 565 (discussing due process in the school setting).

294. 115 S. Ct. 2386 (1995).

295. *Id.*

296. *Id.*

297. See *supra* section II.C (discussing the development of the special needs exception).

298. See *supra* notes 125-73 and accompanying text (discussing the approval of suspicionless drug testing in the employment context).

299. *Acton*, 115 S. Ct. at 2396-97.

300. *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1359 (D. Or. 1992).

301. *Id.*

302. *Id.*

303. *Id.*

and submitting to drug testing.³⁰⁴ James' parents then filed a lawsuit in federal district court on his behalf.³⁰⁵

The district court drew from the principles set out in *New Jersey v. T.L.O.*³⁰⁶ and *Schail v. Tippecanoe County School Corp.*³⁰⁷ to hold that the program was constitutional.³⁰⁸ The court described Vernonia as a small rural community in which interscholastic sports played a dominant role, and which faced a serious drug problem within its public schools.³⁰⁹ After previous efforts to curb student drug use failed, the school board approved and

304. *Id.*

305. *Id.* at 1356. The lawsuit sought declaratory and injunctive relief. *Id.* The Actons claimed that the drug testing policy violated their son's rights under the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Oregon Constitution. *Id.* The purpose of this note is to provide guidelines for school districts to implement a drug testing policy that will pass constitutional muster under the United States Constitution. Thus, this note will not discuss specific state constitutional arguments.

306. 469 U.S. 325 (1985). See *supra* notes 174-94 and accompanying text for a discussion of the *New Jersey v. T.L.O.* case.

307. 864 F.2d 1309 (7th Cir. 1988). See *supra* notes 245-93 and accompanying text for a discussion of the *Schail v. Tippecanoe County School Corp.* case.

308. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1368 (D. Or. 1992).

309. *Id.* at 1356. The record indicated that interscholastic sports were the major source of entertainment in the small logging community. *Id.* Witnesses testified that because entertainment opportunities were limited in Vernonia, interscholastic sports played a dominant role in the community and that the student athletes were well known and admired. *Id.* See BISSINGER, *supra* note 229 for a discussion of the importance of interscholastic sports in a small community and the admiration and respect student athletes in such a community receive. The record also indicated that approximately 60-65% of the Vernonia high school students and 75% of the elementary school students participated in school sponsored athletics. *Acton*, 796 F. Supp. at 1356.

Teachers and school officials testified that discipline and drug use was not a problem in the Vernonia public schools until the mid-to-late 1980s. *Id.* At that point school officials noticed a sharp increase in student drug and alcohol use. *Id.* As the drug problem escalated, classroom discipline problems increased. *Id.* The discipline problems became so bad that one teacher with 15 years of experience was ready to quit. *Id.* She was frustrated with her inability to deal with the discipline problems that had never existed in the Vernonia schools. *Id.* The grade school principal launched an investigation into the problem. *Id.* The investigation revealed that the glamorization and use of drugs and alcohol had become widespread: students bragged about drug use, classroom discipline suffered, students wrote essays glorifying the use of drugs, groups were formed within the student drug culture with names such as the "Drug Cartel," drug paraphernalia was confiscated on school grounds, and school officials observed students openly using drugs at a local cafe across the street from the high school. *Id.* at 1356-57.

The drug problem also invaded the sports program. *Id.* at 1357. Numerous incidents of drug and alcohol use were documented. *Id.* Students were caught drinking alcohol on a school bus after a game and others were caught stealing alcohol from a store after a track meet. *Id.* Coaches testified that they suspected injuries to several football players and a wrestler were caused by the athletes' drug use. *Id.* The wrestling coach even smelled marijuana in the hotel room of the injured wrestler. *Id.* At trial, a doctor explained the enhanced risk of injury that athletes using drugs or alcohol are exposed to. *Id.* See *supra* notes 229-33 and accompanying text (discussing the health risks resulting from mixing sports and drugs).

implemented a random drug testing policy³¹⁰ covering student athletes.³¹¹

The court relied on a growing body of case law³¹² to find a compelling need to conduct a search without a warrant or individualized suspicion.³¹³ The unique setting in which the testing took place was a significant factor the court considered to decide that a compelling need to test existed.³¹⁴ Thus, the court determined that the testing policy was reasonable after balancing all the relative

310. See *supra* section III.A for a description of the testing procedures implemented in the Vernonia schools.

311. *Acton*, 796 F. Supp. at 1358. After the initial investigation, the school attempted to address the drug problem through education. *Id.* at 1357. Special classes were held, special speakers were invited to the school, seminars were offered, and theatrical presentations were given. *Id.* These programs attempted to educate the students about the dangerous effects and addictive nature of drugs. *Id.* However, these efforts failed to deter student drug use. *Id.* In fact, the day after a special presentation addressing the evils of drug use, several sophomore athletes were caught cutting class and arrested for using intoxicants. *Id.* Even the presence of a specially trained dog that sniffed for drugs in the locker area did not significantly deter the students from using drugs. *Id.* The court stated that these efforts to deter student drug use demonstrated that the school administration was "at its wits end." *Id.* "Thus, random drug urinalysis was seen as the next logical step in a progressive attempt to address the drug and alcohol problems." *Id.* at 1364.

The school board decided to focus the testing on student athletes because through the investigation it had become clear that the leaders of the drug culture that had developed in the student community were also the leading student athletes. *Id.* at 1357. The court stated that "the very center of activity of the school and the community was endangered" by the fact that the student athletes were the leaders of the drug culture. *Id.* The school board was concerned that the leading athletes' behavior would have a negative impact on the entire student community, especially the younger students who would emulate the older students. *Id.* No evidence was presented to contest the prevalence of drug use among the students nor the conclusions the school board reached that the problem had led to increased classroom discipline problems. *Id.*

312. See *supra* notes 118-73 and accompanying text.

313. *Acton*, 796 F. Supp. at 1361. While the compelling needs found to justify suspicionless searches in the employment context involved serious national security or public safety concerns, the court found that the unique public school setting allowed the "easing" of Fourth Amendment restrictions. *Id.*

314. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1361 (D. Or. 1992). The court distinguished the truly compelling national security and safety interests found in the employment cases by falling back on the Supreme Court's statement in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), that the public school is a unique setting in which the constraints of the Fourth Amendment are "relaxed." The court stated:

Thus, although student athletes who use drugs do not pose the magnitude of a threat to society that, say, an intoxicated air traffic controller might, the fact that the searches take place within the school setting, as part of a program designed to maintain discipline, enforce athletic program regulations, and protect the safety of student athletes, is a significant factor that must weigh heavily in any balancing process.

Acton, 796 F. Supp. at 1361.

interests,³¹⁵ distinguishing numerous cases holding drug testing students unconstitutional,³¹⁶ and ultimately following the Seventh Circuit's decision in *Schaill v. Tippecanoe County School Corp.*³¹⁷

315. The court found several factors relevant in making its determination that the school's interest in testing outweighed the students' privacy interests. *Acton*, 796 F. Supp. at 1363. The following are the factors the court focused upon: (1) the specific instances of drug use and drug related injuries the coaches and teachers observed; (2) the student athletes' status as role models in the community; (3) the deterrent effect a random drug testing program has on a youthful population; (4) the limited scope and purpose of the drug test; (5) the fact that alternative methods of dealing with the drug problem had been attempted and failed; (6) the steps taken to limit the intrusion of the students' privacy in the testing procedure; (7) the accuracy of the testing procedure; and (8) the limited discretion in the selection of students to be tested. *Id.* at 1363-64.

316. In *Derdeyn v. University of Colorado*, 832 P.2d 1031 (Colo. Ct. App. 1991), and *Hill v. NCAA*, 801 P.2d 1070 (Cal. 1990), two similar drug testing schemes for intercollegiate athletes were struck down as unreasonable searches. The *Acton* court distinguished these cases on the grounds that college students for the most part have reached the age of majority, the university setting is far less structured than public middle school and high school, and the role of athletics on a large university is much different than that of a rural school. *Acton*, 796 F. Supp. at 1364 n.7.

The *Acton* court also distinguished two cases that more closely resembled the fact pattern before the court. *Id.* at 1363-64. In *Brooks v. East Chambers Consolidated Independent School District*, 730 F. Supp. 759 (S.D. Tex. 1989), the court held that a drug testing policy requiring all students participating in any extracurricular activity to submit to drug testing was unconstitutional. *Id.* at 766. The court reasoned that the program was unconstitutional because the testing procedures were not effective due to lax enforcement, and because of the lack of evidence demonstrating the connection between drug use, participation in extracurricular activities, and injury. *Id.* at 764-65. The *Acton* court distinguished *Brooks* on its facts. *Acton*, 796 F. Supp. at 1363. The court reasoned that "[u]nlike the policy challenged in *Brooks*, which applied random drug testing to all extracurricular activities, the Vernonia policy [was] limited to the one activity which, in that community, [was] likely to have the greatest impact on the drug and alcohol abuse problem" *Id.*

In *Anable v. Ford*, 653 F. Supp. 22, 40-41 (W.D. Ark. 1985), the court found the drug testing of individual students suspected of using marijuana unconstitutional because the test results were not reliable and the evidence was not sufficient to justify the intrusive procedures. The *Acton* court distinguished *Anable* by pointing to the fact that the testing procedures implemented by the Vernonia schools were highly effective and had an accuracy of 99.94%. *Acton*, 796 F. Supp. at 1364.

317. 864 F.2d 1309 (7th Cir. 1988). See *supra* notes 245-93 and accompanying text for a discussion of the *Schaill v. Tippecanoe County School Corp.* case which upheld a suspicionless drug testing scheme requiring all student athletes to submit to random testing.

It is interesting to note that even at the district court level the court emphasized the limited application of its holding relating to future cases challenging drug testing students in public schools. *Acton*, 796 F. Supp. at 1364. The court limited its holding to the unique facts before it. *Id.* Those unique facts included the well documented drug problem, the previous less intrusive measures taken to resolve the problem, and the predominant role that athletics played in the small rural Vernonia community. *Id.* The court would not speculate whether a similar program would withstand a constitutional challenge in a large metropolitan school or even other small rural schools. *Id.* at 1364-65. On appeal, the Ninth Circuit Court of Appeals would also make a similar reservation even after reversing the district court's ruling. *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1526 (9th Cir. 1994). There, the court explained the "contours and outer limits" of its holding. *Id.* The court specifically stated that it did not conclude that "there could never be a case where a random search would be appropriate in a school setting." *Id.* The dicta in these cases further demonstrates the need for a uniform set of guidelines due to the ad hoc, case by case analysis courts must make

James and his parents appealed the decision to the Ninth Circuit Court of Appeals.³¹⁸ The Ninth Circuit reversed the district court's ruling and held that the program was unconstitutional.³¹⁹ The court did not find that the school had a compelling need to test the students, or that the student athletes had a diminished expectation of privacy.³²⁰ The court found that the school's goals of preventing athletic injuries, reducing student drug use, and improving discipline were not the kinds of dangers that supported a suspicionless testing scheme.³²¹ The court also found that James' privacy interests were not

when determining the constitutionality of a particular drug testing scheme.

318. *Acton*, 23 F.3d at 1514.

319. *Id.* at 1527.

320. *Id.* at 1525-26. The court acknowledged that the constitutionality of the drug testing scheme would be determined by balancing numerous factors. *Id.* at 1521. The factors the court proceeded to balance were those set out in *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse*, the Supreme Court articulated a four part balancing test to determine the reasonableness of a random, suspicionless search. *Id.* The four factors were as follows: (1) the importance of the governmental interest; (2) the degree of physical or psychological intrusion on the individual's rights; (3) the amount of discretion the official conducting the search has over the procedure; and (4) the effectiveness and necessity of the procedure in reaching its goals. *Id.* at 653-63.

The Ninth Circuit found that the Vernonia drug testing policy met the last two factors. *Acton*, 23 F.3d at 1522. The policy met the third factor because the random selection methods gave the school no discretion to determine which athletes would be tested. *Id.* The program was also effective. *Id.* Student drug use decreased and the Vernonia teachers reported improvements in classroom discipline. *Id.* However, the court stated that these results only weighed slightly in favor of the drug testing program because the "exact nature of the goal [of the program] [was] not entirely clear." *Id.* "If the goal was to avoid athletic injuries, testing of athletes was certainly a good way to approach that problem." *Id.* "If the goal was to reduce drug use in the student body in general, testing athletes seem[ed] to be a considerably more roundabout way of reaching that goal." *Id.* While the court expressed concern that random testing was necessary to reach the school's goal, it found that the program's efficiency weighed in favor of the policy. *Id.*

One commentator has argued that the Ninth Circuit erred by conceding the necessity of the suspicionless drug testing program to reach the school's goals of preventing athletic injuries and improving school discipline. Robert C. Farley, Jr., Recent Decision, *Constitutional Law—Suspicionless, Random Urinalysis: The Unreasonable Search of the Student Athlete*, 68 TEMP. L. REV. 439, 440 (1995). Mr. Farley argues that the district court "should have engaged in a more fact-specific analysis and determined the exact goal of the school district." *Id.* at 456. Because the school's exact goal was not defined, the court could not determine whether the drug testing policy was necessary to attain its goals. *Id.* Even assuming the goal of the policy was to remedy both of the school's concerns, Mr. Farley argues that the policy was not necessary because several other less intrusive means were available to further the school's goals. *Id.* at 457. The three alternatives to the Vernonia drug testing policy Mr. Farley suggests all advocate a suspicion-based testing scheme. *Id.* The rationale for such a scheme is the familiarity between athletes and coaches and students and teachers. *Id.* Thus, Mr. Farley concludes that the Ninth Circuit, although reaching the correct decision in the case, should have found that the drug testing policy failed the fourth part of the *Prouse* balancing test. *Id.*

321. *Acton*, 23 F.3d at 1526. The court reasoned that the extreme dangers and hazards involved in the employment cases that allowed suspicionless testing were not present in the Vernonia schools. *Id.* See *supra* note 171 (discussing the public safety concerns courts have found compelling). The court did not dispute that the school's goals were not worthy, only that they did

diminished because he chose to participate in athletics.³²² In sum, after balancing the school's interests in testing against James' expectations of privacy, the court concluded that the drug testing program was unconstitutional.³²³ The Ninth Circuit's decision in *Acton* directly conflicted with the Seventh Circuit's decision in *Schail v. Tippecanoe County School Corp.*,³²⁴ which addressed the same issue.³²⁵ Thus, the Supreme Court heard the case to resolve the conflicting decisions.

Justice Scalia, writing for the majority, concluded that the Vernonia drug testing policy was reasonable and hence constitutional.³²⁶ The Court made this determination by balancing the policy's intrusion on the students' Fourth Amendment interests against the school's legitimate interests in drug testing.³²⁷ After reiterating the familiar exceptions to the warrant and probable cause requirements, the Court discussed the nature of the students' privacy interests

not reach the level of compelling need to bypass the individualized suspicion requirement inherent in the Fourth Amendment. *Acton*, 23 F.3d at 1526. The court stated that "[h]aving uncaring, disrespectful, drug-impaired children in our schools is tragic." *Id.* "However, it is not the type of potential disaster that has caused the [Supreme] Court or us to find a governmental interest compelling enough to permit suspicionless testing." *Id.* The court explained that "[t]he prospect that an athlete might hurt himself or a competitor is real enough, but it is not a risk of the same magnitude as an airplane or train wreck, or a gas pipeline or nuclear power plant disaster." *Id.* The court simply did not find that the school's concerns carried the possibility of grave disaster or tragedy. *Id.*

322. *Acton*, 23 F.3d at 1526. The court began its analysis of the students' expectations of privacy by noting that while children are compelled to attend school, "nothing suggests that they lose their right to privacy in their excretory functions when they do so." *Id.* at 1525. The court also discredited the analogy drawn between the diminished expectations of privacy of employees working in highly regulated industries and the privacy expectations of student athletes. *Id.* at 1527. The court concluded that student athletes' privacy interests remain "robust." *Id.* at 1525. The court reasoned that the risks associated with regulated industries simply do not exist in the context of school athletics. *Id.* The student athletes' lives, nor the lives of others, do not depend upon the athletes' ability to perform their roles on the football team. *Id.* The court also addressed the contention that conditions in the locker room where student athletes shower and disrobe diminish their expectations of privacy. *Id.* The court stated that "[n]ormal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination."

323. *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1527 (9th Cir. 1994).

324. 864 F.2d 1309 (7th Cir. 1988). See *supra* notes 245-93 and accompanying text for a discussion of the *Schail v. Tippecanoe County School Corp.* case which upheld a suspicionless drug testing scheme requiring all student athletes to submit to random testing.

325. *Acton*, 23 F.3d at 1527. The Ninth Circuit specifically stated that it disagreed with the Seventh Circuit decision in *Schail* and criticized it for "minimiz[ing] the privacy interests of students." *Id.*

326. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2396 (1995).

327. *Id.* at 2390. While the Court characterized the balancing test as only containing two prongs, within those two prongs the Court proceeded to balance the four principles set out in *Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), to allow suspicionless testing.

the policy intruded upon.³²⁸

The Court focused on the context in which the drug testing occurred to determine the nature of the students' privacy interests.³²⁹ Central to this determination was the fact that the subjects of the drug testing policy were children who had been temporarily committed to the custody of the state in its role as schoolmaster.³³⁰ Thus, the Court stated that the reasonableness inquiry must take into account "the schools' custodial and tutelary responsibility for children."³³¹ Examples of schools meeting this responsibility are requirements that students submit to physical examinations and be vaccinated against various

328. *Acton*, 115 S. Ct. at 2390-91. The Court's summary of the Fourth Amendment standard regarding suspicionless searches provided the first clue that the Court would conclude that the drug testing program was constitutional. *Id.* The Court emphasized the language of the special needs exception and explicitly acknowledged that the Fourth Amendment imposes no irreducible requirement of individualized suspicion. *Id.*

329. *Id.* at 2391. The Fourth Amendment only protects subjective expectations of privacy that society recognizes as reasonable. *Id.* The determination of what expectations are legitimate varies with context, such as "whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.*

330. *Id.* While the Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985), "rejected the notion that public schools, like private schools, exercise only parental power over their students," the Court did emphasize that the "nature of [the] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Acton*, 115 S. Ct. at 2391-92. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *T.L.O.*, 469 U.S. at 339.

331. *Acton*, 115 S. Ct. at 2392. It is interesting to note that while the Court is willing to allow schools greater control over students because of "the schools' custodial and tutelary responsibility," this same responsibility does not give rise to a constitutional "duty to protect" students. *Id.* In fact, the Court expressly stated that "we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect.'" *Id.* (quoting *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 200 (1989)). A recent commentator stated that the Court's "passing reference to *DeShaney* raises significant questions regarding the proper reading of that decision." *Drug Testing—Student Athletes*, 109 HARV. L. REV. 220, 226 (1995). "In *DeShaney*, the Court rejected the argument that a state could acquire an affirmative duty, enforceable under the Due Process Clause, to protect a child from harm at the hands of a private actor simply because the state had represented repeatedly that it would protect the child." *Id.*

The Court thus asserts what appears to be a self-contradiction: although no custodial relationship exists that would give rise to an affirmative duty to protect under *DeShaney*, a custodial relationship does exist for the purpose of justifying enhanced search and seizure powers in *Vernonia*. . . . [I]f the Court intends to apply *DeShaney* faithfully, it faces a dilemma of its own creation: by extending the state's control over students, it edges toward a result whereby the state exercises so much control as to give rise to a constitutional duty to protect those students.

Id. at 227. See also John W. Walters, Note, *The Constitutional Duty of Teachers to Protect Students: Employing the "Sufficient Custody" Test*, 83 KY. L.J. 229 (1995) (proposing a "sufficient custody" test as a means to determine whether a constitutional duty to protect arises in the public school environment).

diseases.³³² Therefore, the Court concluded that with regard to medical examinations and procedures “students within the school environment have a lesser expectation of privacy than members of the population generally.”³³³ Addressing the expectations of the particular group of students singled out for testing by the school’s policy, the Court concluded that student athletes’ legitimate expectations of privacy are even less than those all students enjoy.³³⁴ The Court attributed this diminished expectation of privacy to the element of “communal undress” inherent in athletic participation and the rules and regulations student athletes voluntarily follow.³³⁵

Next, the Court considered the character of the intrusion the drug testing policy caused.³³⁶ The degree of intrusion depends upon the manner in which the urine sample is produced.³³⁷ The Court concluded that the procedures the testing policy followed in collecting the urine sample adequately safeguarded the students’ privacy interests.³³⁸ The Court also addressed the privacy implications created by requiring the students to disclose private medical information.³³⁹ The Court found that this invasion of privacy was not significant because the authorized tests only looked for drug use, and the students consented to releasing any information regarding their prescription medications.³⁴⁰

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

333. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985)).

334. *Id.* Justice Scalia stated that because “[s]chool sports are not for the bashful” student athletes have a diminished expectation of privacy. *Id.* One of the reasons Justice Scalia asserts that student athletes have a diminished expectation of privacy is the conditions surrounding public school locker rooms. *Id.* at 2392-93. Because student athletes regularly change and shower in an area “not notable for the privacy [it] afford[s],” student athletes have a reduced expectation of privacy. *Id.*

335. *Id.* at 2393. The Court also drew an analogy between student athletes and adults who choose to participate in a closely regulated industry to substantiate its determination that because students voluntarily participate in school athletics, they have reason to expect intrusions upon normal rights and privileges, including privacy. *Id.* But see United States Supreme Court Respondent’s Brief at 34, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590) (arguing that the rules and regulations student athletes voluntarily comply with “are not the sort of extensive government regulation that has been found to diminish the expectation of privacy of workers in high risk industries or high security areas of the government”) (quoting *Acton v. Vernonia Sch. Dist. 47J*, 23 F.3d 1514, 1525 (9th Cir. 1994)).

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

337. *Id.*

338. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2393 (1995). The Court even stated that the students’ privacy interests compromised by the process of obtaining the urine samples were negligible. *Id.* See *supra* section III.A for a description of the testing procedures.

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

340. *Id.* at 2393-94. The Court found it significant that positive test results were not disclosed to law enforcement authorities or used for any disciplinary function. *Id.* at 2393. The Court also suggested that to avoid requiring the students to disclose prescription medications to school officials the school could allow the student to disclose that information directly to the testing lab along with the sample in a sealed envelope. *Id.* at 2394.

Finally, the Court considered the nature and immediacy of the school's interest in drug testing.³⁴¹ Both of the courts below had conceded that the school district must demonstrate a compelling interest before suspicionless testing would be allowed.³⁴² The Supreme Court did not agree with the lower court's characterization of the phrase "compelling state interest."³⁴³ The Court explained that the phrase did not describe a "fixed, minimum quantum of governmental concern."³⁴⁴ Rather, the Court stated that "the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."³⁴⁵ Building upon this language, the Court ultimately set the standard for evaluating school searches to pose the question "whether the search is one that a reasonable guardian and tutor might undertake."³⁴⁶ After balancing the school's important interest in drug testing against the students' diminished expectations of privacy, the Court concluded that the school's actions were reasonable.³⁴⁷

341. *Id.*

342. *Id.* See *supra* section II.C (discussing the special needs exception).

343. *Acton*, 115 S. Ct. at 2394.

344. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2394 (1995).

345. *Id.* at 2394-95.

346. *Id.* at 2397. This standard is essentially the same as the one originally set out for searches in public schools in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Court will still engage in a balancing test; however, the unique context of the public school and the government's responsibilities as guardian and tutor of children entrusted to its care will be given great weight in the balancing equation. It appears that the Court will defer to the judgment of school boards and concerned parents when addressing school search issues. *Acton*, 115 S. Ct. at 2397. This assertion is based upon the Court's finding that the *Acton* case presented an "insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances." *Id.* See *supra* notes 174-94 and accompanying text for a discussion of the *New Jersey v. T.L.O.* public school search standard.

347. *Acton*, 115 S. Ct. at 2396. The Court characterized the school's interest in deterring drug use as important, perhaps compelling. *Id.* at 2395. The school's interest in deterring drug use was determined to be at least as important as the government's concern regarding law enforcement in *Von Raab*. *Id.* The Court also noted the high risk of harm associated with mixing drugs and athletic participation. *Id.* See *supra* notes 229-33 and accompanying text (discussing the health and safety risks associated with the combination of drugs and sports).

Addressing the immediacy of the school's concerns, the Court would not question the district court's finding that an immediate crisis fueled by student drug use had invaded the school. *Acton*, 115 S. Ct. at 2395. In fact, Justice Scalia commented that the immediate drug crisis in the Vernonia schools was of greater proportions than the crisis that existed in *Skinner*, where the Court upheld suspicionless drug testing of railroad employees "without proof that a problem existed on the particular railroads whose employees were subject to the test." *Id.* "And of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs officials." *Id.*

The Actons argued that a suspicion based scheme was a practical, less intrusive alternative to suspicionless testing. *Id.* However, the Court "refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Id.* The Court concluded that a suspicion based testing scheme would be worse than suspicionless testing in the public school

Justice O'Connor criticized the majority for dispensing with the individualized suspicion requirement on policy grounds.³⁴⁸ She argued that a blanket search was not permissible just because the possibility students would arbitrarily be chosen for testing was eliminated and the accusatory nature of the search was diluted.³⁴⁹ Rather, Justice O'Connor pointed to the history of the Fourth Amendment to argue that "mass, suspicionless searches have been generally considered per se unreasonable"³⁵⁰ Only in situations where it was clear that a suspicion based scheme would not be effective had the Court allowed mass, suspicionless searches.³⁵¹ Evenhanded treatment is no substitute for individualized suspicion because it does not afford the subject of the search any control over whether they will be searched.³⁵² Justice O'Connor asserted that the "[p]rotection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment."³⁵³

Justice O'Connor believed that a suspicion based testing program "would have gone a long way toward solving Vernonia's school drug problem while preserving the Fourth Amendment rights of James Acton and others like him."³⁵⁴ The fact that most of the evidence of student drug use would have allowed a search under the *T.L.O.* standard was the great irony of the case according to Justice O'Connor.³⁵⁵ In sum, Justice O'Connor concluded that suspicionless testing was not justified on the facts in this case.³⁵⁶

environment. *Id.* The Court reasoned that a suspicion based scheme would transform the testing process into a badge of shame for those students accused of drug use, generate the expense of defending lawsuits, and add to the ever expanding duty of teachers the responsibility to detect drug use. *Id.* The Court did not want to threaten the teacher-student relationship by imposing this adversarial duty on teachers. *Id.*

348. *Id.* at 2397 (O'Connor, J., dissenting).

349. *Id.*

350. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2398 (1995).

351. *Id.*

352. *Id.* at 2397-98. A suspicion based scheme allows a person to avoid a search by not acting in a suspicious manner. *Id.* at 2397.

353. *Id.* at 2399. "[T]he individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns." *Id.* at 2402.

354. *Id.* at 2403-04. Justice O'Connor criticized the majority for failing to seriously discuss the practicality of a suspicion based requirement. *Id.* at 2403. This lack of discussion was crucial according to Justice O'Connor because "nowhere is it less clear that an individualized suspicion requirement would be ineffectual than in the school context." *Id.*

355. *Id.*

356. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2403 (1995). Even if Justice O'Connor agreed that the drug testing policy was reasonable, she pointed out two additional flaws in the program. *Id.* at 2406. First, she pointed out that virtually no evidence existed in the record documenting a drug problem in the particular school James Acton attended. *Id.* All of the reported incidents of drug use centered around the high school. *Id.* The only evidence of a drug problem in James' elementary school, which included the 7th and 8th grades, was a single assertion by the

Justice Ginsburg specifically set out the issue addressed in this Note: the scope of the *Acton* decision.³⁵⁷ The Court clearly held that drug testing student athletes may be constitutionally permissible in circumstances where a compelling need to test is demonstrated³⁵⁸ and certain procedures are followed to ensure that students' privacy interests will be protected.³⁵⁹ However, the decision did not assume that suspicionless drug testing is permissible in other contexts.³⁶⁰ The following Section of this Note discusses whether *Acton* can reasonably be extended to allow suspicionless drug testing of other students outside the context of athletics.³⁶¹

IV. PROPOSED GUIDELINES FOR IMPLEMENTING A DRUG TESTING POLICY

A court will ultimately decide the constitutionality of a drug testing policy by utilizing a balancing test. The students' privacy interests will be weighed against the school's asserted need to test. The result of this balancing test will depend upon the weight and significance the court places upon the various competing interests.

The courts that have upheld suspicionless student drug testing find that the balance weighs in favor of the government, trumping the students' privacy interests. In *Schail* and *Acton*, the courts decided that mandatory, suspicionless drug testing of student athletes was not an unreasonable search. These two courts reasoned that because student athletes' expectations of privacy are even

school principal that the problems did not start at the high school level, they started in the elementary school. *Id.* Next, Justice O'Connor stated that the school's decision to single out student athletes for testing was unreasonable. *Id.* This choice was unreasonable because, in her opinion, the true driving force behind the drug testing program was to restore order and discipline in the classroom, not prevent athletic injuries. *Id.* In conclusion, Justice O'Connor wrote that "[i]t cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis." *Id.* at 2407. The problem of drug use in American public schools cannot be ignored, yet Justice Jackson's famous words must also not be forgotten, "[t]hat [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

357. *Acton*, 115 S. Ct. at 2397 (Ginsburg, J., concurring). Justice Ginsburg addressed the scope of the Court's decision stating, "I comprehend the Court's opinion as reserving the question whether the [Vernonia School] District, 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." *Id.*

358. *See supra* notes 326-47 and accompanying text.

359. *See infra* section IV.B (setting out the specific guidelines that should be followed to implement a drug testing policy).

360. *Acton*, 115 S. Ct. at 2396. The majority also "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.*

361. *See infra* section IV.A.

lower than the general population of students, suspicionless drug testing was reasonable.³⁶² How this balancing test will be applied to other segments of the student population, other than athletes, remains to be seen.

A. Expanding Drug Testing Outside of Athletics

In *Acton*, the Court expanded the special needs exception to the traditional warrant and probable cause requirements which the *Skinner* and *Von Raab* Courts relied upon. By upholding the drug testing policy in *Acton*, the Court no longer required a showing of extraordinary safety and national security hazards before justifying a suspicionless search. Rather, the Court asked whether the search was reasonable given the responsibilities schools have to provide an appropriate learning environment. This expansion of the special needs exception has cracked open the door to permit suspicionless drug testing. How wide is that crack is the question that remains unanswered.

At one end of the drug testing spectrum is a blanket program requiring all students attending public school to submit to random, suspicionless drug testing. While such a program would eliminate any allegation that a school singled out one particular group for testing, such a scheme would not pass a Fourth Amendment reasonableness test.³⁶³ While school attendance is compulsory, just being required to attend school does not significantly diminish a student's reasonable expectations of privacy.³⁶⁴ The Supreme Court conceded this point

362. These courts stated that the student athletes' expectations of privacy were diminished because of communal undress, pre-season physical examinations, and rules that student athletes must accept as conditions to participating in organized sports. See *supra* notes 245-347 and accompanying text.

363. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2396 (1995) (Ginsburg, J., concurring). In her concurrence in *Acton*, Justice Ginsburg explicitly reserved the question of whether a school wide testing scheme would be constitutional. *Id.* See also *Odenheim v. Carlstadt-E. Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. Chancery Div. 1985) (invalidating a drug testing program requiring every student enrolled in school to submit to annual urinalysis).

364. An interesting hypothetical situation that might pass the test set out in *Acton* to permit testing a substantial number of students is a requirement that all students in physical education class must submit to drug testing. One of the pervasive factors the *Acton* Court focused its analysis on when it balanced the athletes' expectations of privacy against the school's interest in testing was the athletes' diminished expectations of privacy. The same elements of communal undress the Court noted in *Acton* are present when a student changes before and after physical education class and also when showering after class. While the student in physical education class does not voluntarily submit to the numerous training rules incident to participating in athletics, the Court appeared to weigh this factor as only secondary to the element of communal undress it chose to focus upon. See *supra* note 334.

Additionally, if such a testing program were challenged, the affected students would have a strong argument that because they did not voluntarily subject themselves to a higher degree of regulation their expectations of privacy have not been diminished. The Court noted that because student athletes, just as employees in a closely regulated industry, voluntarily subject themselves to

in *New Jersey v. T.L.O.*³⁶⁵ Even given the expansion of the special needs exception,³⁶⁶ a school district would be hard pressed to identify a compelling need to test every student.³⁶⁷ Such a comprehensive testing scheme would also be subject to an attack that less intrusive means could sufficiently serve the school's desired end.

At the other end of the drug testing spectrum are programs that test a specific group within the school population, namely athletes. After *Acton*, such a program is constitutional if a specific drug problem is identified and certain procedural safeguards are followed.³⁶⁸ The more difficult determinations regarding the permissible scope of drug testing are those programs that lie in the middle of this spectrum. School districts across the country are contemplating expanding drug testing programs to include students participating in extracurricular activities besides athletics.³⁶⁹

A broad reading of *Acton* appears to allow the testing of other student groups besides athletes. Following the reasonableness standard set out in *Acton*, no reason exists why specific findings that a pervasive drug problem among the members of a school's dance team, band, or drama club would not permit suspicionless testing of these students. While the element of communal undress may not be as pervasive in each of these situations, such an element does exist. The students in each of these groups wear uniforms or costumes which they must change into or out of at some time. In the drama club situation students would typically change costumes backstage between acts during a performance. It is doubtful that each of these students has a private dressing room. Thus, an element of communal undress exists in these groups. Additionally, just as participation in athletics carries with it prestige and admiration in the school community that place student athletes in positions of leadership, so does participation in these groups. Finally, these students also voluntarily consent to rules and regulations governing their conduct to a greater extent than those imposed on students generally. Thus, many of the same factors the Court identified in *Acton* to determine that student athletes have diminished expectations of privacy can also be satisfied when analyzing the subjective expectations of the students participating in other extracurricular activities.

a higher degree of regulation, their expectations of privacy are diminished. See *supra* note 335. This is not the case for the student in physical education class. Just as compulsory attendance laws require students to attend school, state curriculum requirements mandate that a student take a certain number of physical education classes to meet graduation requirements.

365. See *supra* notes 174-94 and accompanying text (discussing *New Jersey v. T.L.O.*).

366. See *supra* section II.C.

367. Such a compelling need might be reached if an extremely high incidence of drug use in a particular school could be documented. See *supra* note 317.

368. See *supra* section III.C.2.

369. See *supra* note 23.

The school's asserted interest in protecting its students and providing an educational environment conducive to learning does not change when drug testing programs are expanded outside the context of athletics. The school's substantial interest in protecting students who choose to participate in other extracurricular activities from the dangers of drug use is just as important as protecting student athletes from the same dangers. The only factor that appears to be missing to distinguish drug testing between athletic and non-athletic extracurricular activities is the enhanced physical risks that drug use imposes on athletes.³⁷⁰ Other than this factor, no distinctions between the school's interest in protecting all its students from the harmful effects of drugs and only protecting its student athletes surface. The school's overriding interest in providing an appropriate learning environment further lessens any distinction that could be drawn.

Thus, school boards may constitutionally expand drug testing policies outside the context of athletics. However, expansion does not come without its price. Because the Supreme Court only addressed drug testing in the context of athletics, much room exists for students affected by expanded drug testing policies to argue that *Acton* can be distinguished from their particular situation. Therefore, a school board must be careful when determining whether a drug testing policy is in the best interests of all those involved.³⁷¹ The following guidelines will assist school boards in making these sensitive decisions. To determine whether a drug testing policy will meet the Supreme Court's school search standard, a variety of competing interests must be balanced.³⁷² The following guidelines will balance these interests.

370. See *supra* notes 229-33 and accompanying text.

371. The fiscal crunch many school districts face today may drive the decision that textbooks and school supplies should be purchased rather than attorney's fees that must be paid when litigation over a proposed drug testing program must be defended. The *Acton* litigation is illustrative. The case cost the school district about \$350,000. *Special Report: Vernonia Drug Testing*, PORTLAND OREGONIAN, Feb. 12, 1997, at B1.

Schools must also consider the cost of a drug testing program. The cost of drug tests vary. See, e.g., Bricking, *supra* note 13, at C1 (reporting that tests for marijuana cost between \$10 and \$20 and as much as \$110 for steroid testing); Rhonda Stansberry, *Public to Have Say on Steroid Test*, OMAHA WORLD-HERALD, Oct. 31, 1995, at 35 (reporting quotes that one lab charges \$135 per test for steroids and another lab charges \$51 per test).

372. See Eugene C. Bjoklun, *Drug Testing High School Athletes and the Fourth Amendment*, 83 WEST EDUC. L. REP. 913 (1993) (stating that the criteria courts balance are: compelling need, limited scope/achievable goals, less intrusive alternatives, diminished expectations of privacy, limitations on officials' discretion, and criminal/other penalties).

*B. Drug Testing Guidelines**Section (1): An Ideal Drug Testing Program*

§ 1.1 Voluntary Drug Testing

A voluntary drug testing program based on a reward system is the ideal program. Students would not be required to submit to random, suspicionless drug testing; rather, drug testing would be conducted on a voluntary basis. Students would be rewarded for participating in the program and testing drug free over specified periods of time.

Commentary: Voluntary drug testing avoids any Fourth Amendment implications. It also provides an effective means for students to develop self-respect. The reward system and positive peer pressure would provide the incentives for students to participate. Membership in a reward system also provides an easy excuse for students to avoid experimenting with drugs and alcohol when they feel negative peer pressure.³⁷³ Many schools currently operate voluntary testing schemes based on a reward system.³⁷⁴ However, a voluntary system may not be as effective as mandatory testing in solving a more serious drug problem.³⁷⁵ Thus, the following guidelines are intended to be consulted by school districts that have decided a stronger response is necessary to alleviate the specific drug problems in their districts.

373. Jonathan Martin, *Testing Clean for Drugs Earns Students Many Rewards*, SPOKESMAN REV., Feb. 6, 1997, at N6 (reporting a high school sophomore's reliance on membership in a drug free youth program as "an easy way to say no" to peer pressure to drink or smoke).

374. See, e.g., Alicia Doyle, *Simi Tailors Substance-Abuse Program to Young Pupils*, L.A. DAILY NEWS, Feb. 5, 1996, at SV1 (explaining that positive peer pressure has made voluntary drug testing programs in California high schools successful); Ray McCaffrey, *Drug-Free Kids Take a Different Type of Test*, COLO. SPRINGS GAZETTE TELEGRAPH, Feb. 2, 1996, at B1 (describing a voluntary drug testing program in which students receive a membership card good for discounts at participating businesses); Michelle Barbercheck, *Over Half of Students Opt for Drug Tests*, INDIANAPOLIS STAR, Nov. 11, 1995, at B1 (reporting that about 64% of Noblesville High School students volunteered to random drug testing enticed by incentives such as being able to eat lunch off campus and chances to win trips to Walt Disney World and the Bahamas); Justin Bachman, *Schools in No Rush to Start Drug Tests on Their Students*, FT. WORTH STAR-TELEGRAM, Nov. 1, 1995, at 17 (listing schools that offer voluntary drug testing programs); Dave McKibben, *Between Privacy and Playing Clean*, L.A. TIMES, Oct. 24, 1995, at 1 (same).

375. See *supra* text accompanying note 274.

Section (2): Development Guidelines

§ 2.1 Drug Education and Prevention Efforts

School boards should include special drug education classes in their curriculum, invite guest speakers, and sponsor presentations as preventive means to curb drug use before implementing a mandatory drug testing policy.

Commentary: These efforts will satisfy the less intrusive means requirement.³⁷⁶ If a drug testing policy is the first attempt a school makes to solve a drug problem, a court is more likely to strike it down. When previous efforts have been unsuccessful, a court is more likely to conclude that drug testing was simply the next logical step in the school's attempt to solve a serious problem.³⁷⁷

§ 2.2 Specific Problem Identification

School boards must identify a specific drug problem within the group of students who will be tested. This specific problem should be identified and recorded in the preamble or introduction of the written drug testing policy.

Commentary: Identifying a specific drug problem is an essential requirement to substantiate the legitimacy of a drug testing program.³⁷⁸ A reviewing court will be looking for a special need to justify the departure from the traditional warrant and probable cause requirements to allow suspicionless testing.³⁷⁹ Identifying a specific problem will satisfy the special need to allow suspicionless testing.³⁸⁰

§ 2.3 Specific Goals

The goals for the drug testing policy must be specific and clear. The goals must be the protection of the health and safety of the students and the promotion of a proper learning environment, not a disguised means of securing law enforcement.

376. See *supra* notes 269-75 and accompanying text. *But see supra* note 347 (noting that the *Acton* Court "refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment").

377. See *supra* note 311.

378. See *supra* notes 269-75, 309-17, 341-47 and accompanying text.

379. See *supra* notes 269-75, 309-17, 341-47 and accompanying text.

380. See *supra* notes 269-75, 309-17, 341-47 and accompanying text.

Commentary: A reviewing court is not likely to find that a generalized goal of reducing student drug use is a compelling reason to mandate that students submit to testing.³⁸¹ Rather, after identifying a specific problem and setting goals to reduce the problem, a court is more likely to consider a drug testing program reasonable.³⁸² The drug testing policy must not be used as a method for criminal investigation.³⁸³ The special needs exception developed through the administrative search cases applies to non-criminal searches.³⁸⁴ In the criminal context, courts are required to adhere to the Fourth Amendment's warrant and probable cause requirements.³⁸⁵

Section (3): Implementation Guidelines

§ 3.1 Student and Parental Consent

The school board must require the student and his or her parent or legal guardian to sign a consent form prior to testing. The consent form should only provide authorization to test the student for controlled substances and performance enhancing drugs.

Commentary: A consent form will serve numerous functions. The student and his or her parent or legal guardian will receive adequate notice of the drug testing procedures.³⁸⁶ An informative packet of materials describing the drug testing procedures, the consequences of a violation, a list of the specific substances the student will be tested for, and a consent form should be compiled. The school board should then distribute this packet of information well before the beginning of an extracurricular activity. This information will satisfy the procedural due process requirement that mandates adequate notice of the testing procedures be given.³⁸⁷

§ 3.2 Selection Methods

School officials should randomly select students to be tested. The selection criteria must specifically set out how the students will be selected, the frequency of the tests, and the substances the laboratory will be instructed to detect. This selection criteria should be published and made available for the student and his or her parent or legal guardian to review.

381. See *supra* notes 269-75, 309-17, 341-47 and accompanying text.

382. See *supra* notes 269-75, 309-17, 341-47 and accompanying text.

383. See *supra* notes 282-84, 340 and accompanying text.

384. See *supra* notes 85-173 and accompanying text.

385. See *supra* notes 85-173 and accompanying text.

386. See *supra* notes 285-93 and accompanying text.

387. See *supra* notes 285-93 and accompanying text.

Commentary: Random selection will ensure that the students selected to be tested are not arbitrarily chosen.³⁸⁸ Published selection criteria will provide notice and limit the school's discretion to select students for testing.³⁸⁹ Limiting the school's discretion to search is a fundamental requirement.³⁹⁰ The school must adequately limit the searching administrator's discretion to prevent students from being subjected to arbitrary searches, or searches meant to harass or embarrass.³⁹¹ A clearly defined testing scheme will adequately safeguard against this possibility.³⁹² Disclosure of the selection criteria will also eliminate any element of surprise when a particular student is selected for testing.³⁹³ The students will be able to assure themselves that their selection for testing was accomplished in a fair and impartial manner.³⁹⁴ Disclosing the substances that will specifically be tested will ensure that private medical facts, such as whether a student is pregnant or has diabetes, will not be discovered.³⁹⁵

§ 3.3 Testing Procedures

An adult monitor of the same sex as the student to be tested should oversee the collection of the urine sample. The monitor will provide the student with a specimen control form and an empty specimen bottle. The monitor may accompany the student into the area where the sample will be produced. The student should be permitted to produce the sample in an enclosed stall. Direct observation of the student while producing the sample should not be permitted. To ensure that the student does not tamper with the sample the water in the toilet should be tinted and the monitor should check the sample's temperature. The monitor should then seal the sample and the student should sign and date the seal before the sample is sent to a laboratory.

Commentary: These testing procedures minimize the intrusive nature surrounding the collection and testing of urine.³⁹⁶ The student should be monitored to prevent tampering, yet the student's privacy must be protected.³⁹⁷ Allowing the student to produce the sample in an enclosed stall will protect the

388. See *supra* notes 276-81 and accompanying text.

389. See *supra* notes 276-81 and accompanying text.

390. See *supra* notes 276-81 and accompanying text.

391. See *supra* notes 276-81 and accompanying text.

392. See *supra* notes 276-81 and accompanying text.

393. See *supra* notes 276-81 and accompanying text.

394. See *supra* notes 276-81 and accompanying text.

395. See *supra* notes 276-81, 339-40 and accompanying text.

396. See *supra* notes 77, 133, 205-08, 337-38 and accompanying text.

397. See *supra* notes 77, 133, 205-08, 337-38 and accompanying text.

student's legitimate privacy concerns surrounding the excretory function.³⁹⁸ This added privacy measure will not sacrifice the integrity of the testing system.³⁹⁹ The monitor may listen for the normal sounds of urination and tint the water in the toilets to prevent students from tampering with the samples.⁴⁰⁰ While the Supreme Court upheld a testing scheme that permitted observation of the student while urinating, this practice is not recommended.⁴⁰¹ The school board must remember that a court is going to balance the student's privacy interests against the school's interest in testing. No reason exists to give a court more factors that weigh in favor of the student's privacy interests when adequate measures to ensure the integrity of the sample are available.

§ 3.4 Reliable Testing Methods

The test itself must be reliable. An independent certified testing laboratory should be used, and a method of confirming a positive test result should be available. Confirmation of an initial positive test may be satisfied through either another more reliable test such as the gas chromatography/mass spectrometry testing method, or requiring the student to submit another sample for testing. The students should be given the option to have the remaining portion of their samples tested at an independent laboratory of their choice at their own expense. The student should also send any private medical information such as current prescription medications that may produce a false positive directly to the laboratory with the specimen control form.

Commentary: Procedural due process requires fundamental fairness in drug testing procedures.⁴⁰² Reliable drug testing methods will satisfy this fundamental fairness requirement.⁴⁰³ One of the problems with drug testing is that a student must reveal private medical facts to explain a false positive test result.⁴⁰⁴ At the minimum, an opportunity to explain any false positive due to prescription or over-the-counter medication should be provided.⁴⁰⁵ However, this requires the student to reveal his or her medical condition to school officials. This problem is solved by requiring the student to disclose private medical information directly to the testing laboratory with the urine sample.⁴⁰⁶

398. See *supra* notes 77, 133, 205-08, 337-38 and accompanying text.

399. See *supra* notes 205-08, 337-38 and accompanying text.

400. See *supra* notes 205-08, 337-38 and accompanying text.

401. See *supra* text accompanying note 207.

402. See *supra* notes 285-93 and accompanying text.

403. See *supra* notes 285-93 and accompanying text.

404. See *supra* notes 133, 339-40.

405. See *supra* notes 285-93 and accompanying text.

406. See *supra* note 340.

Section (4): Post-Testing Guidelines

§ 4.1 Appeal Process

The student must be given an opportunity to appeal the finding of a positive test result. A school board should form a committee to hear student appeals. The student should be able to introduce evidence or provide an explanation for the positive result before sanctions are imposed.

Commentary: In public schools procedural due process requires that a student is provided a rudimentary hearing before a suspension from school for less than ten days.⁴⁰⁷ While it is not clear exactly what procedures must be taken before a student is suspended from an extracurricular activity, an appeal process is strongly suggested.⁴⁰⁸ The appeal process will give the student an opportunity to be heard to rebut a positive result.⁴⁰⁹ These measures will ensure that the student's due process rights are satisfied.⁴¹⁰

§ 4.2 Sanctions

The only sanction the school board should authorize for a positive test result is suspension from extracurricular activities. Neither academic nor penal sanctions should be imposed. The sanctions for subsequent positive test results should be progressive. A counseling program should also be offered to mitigate the suspension period.

Commentary: The sanctions imposed must only suspend the students from the extracurricular activities in which they were participating.⁴¹¹ Because participation in extracurricular activities is a privilege, and not a right, a sanction that merely suspends the student from participating in such an activity is reasonable.⁴¹² Academic or criminal sanctions for a positive result would not be reasonable.⁴¹³ The drug testing policy must not be used as a method for criminal investigation. Progressive sanctions coupled with a counseling program demonstrate the school's interest in helping, not punishing, students to avoid the dangers of drug use.

407. See *supra* note 288.

408. See *supra* note 287.

409. See *supra* notes 285-93 and accompanying text.

410. See *supra* notes 285-93 and accompanying text.

411. See *supra* notes 282-84, 340 and accompanying text.

412. See *supra* notes 282-84, 340 and accompanying text.

413. See *supra* notes 282-84, 340 and accompanying text.

§ 4.3 Preserving Anonymity

Access to the students' records should be limited to those school officials whose duty it is to implement the drug testing program. Written consent from the student and his or her parent or legal guardian should be obtained before the records are disclosed to any other party. The records of the students who are tested should only be kept for one year after the student has transferred or graduated from the school.

Commentary: This practice will effectively preserve the anonymity of the student who tests positive, and the confidentiality of the student's records.⁴¹⁴ The purpose of a drug testing program in public schools is to protect the health and safety of the students, and provide a proper educational environment; not to single out or make examples of students who have used drugs. The goal is to help these students and teach them the many problems substance abuse can cause.⁴¹⁵ Thus, no reason exists to disclose or keep a student's records if the true goal of the drug testing program is to educate and assist the student in becoming a healthy and productive citizen.

V. CONCLUSION

The prevalence of drug use in society creates many problems. In public schools drugs adversely affect the learning environment in many ways: discipline cannot be maintained, achievement test scores plummet, more students drop out, and violence increases. No one will disagree that every effort should be made to decrease the use of drugs among American youth in public schools. However, school districts must also remember that they are educating American citizens who enjoy many constitutional freedoms. These freedoms must not be unduly compromised.

This Note discussed the unique setting of interscholastic sports in which the case has been made that a special need may exist to allow suspicionless drug testing as a means to decrease drug use. It is not clear whether or not such a special need exists to test other segments of the public school population. This Note provides school districts a set of guidelines to follow if they decide such a special need exists to test students outside the context of athletics. If these guidelines are followed, students' privacy interests will be adequately protected while allowing school districts to take the action they decide is necessary to resolve a recognized drug problem.

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414. *See supra* note 213.

415. *See supra* notes 15-16, 230-33.

