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NOTES

STUDENTS, URINALYSIS & EXTRACURRICULAR ACTIVITIES: HOW VERNONIA'S AFTERMATH IS TRAMPLING FOURTH AMENDMENT RIGHTS

Amanda E. Bishop*

INTRODUCTION: THE DRUG PROBLEM AMONG STUDENTS

STUDIES SHOW THAT DRUG USE among the nation's school children ages 12-17 has been declining since 1997. Following a survey by Monitoring the Future showing three years of steady decline of drug and alcohol use among students in grades 8 through 12, the Secretary of Health and Human Services, Donna Shalala, announced that the survey “confirms that

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we have halted the dangerous trend of increased drug use among our young people.”

To combat the remaining drug problem among school-age students, administrators have begun trying to find new ways to control the perceived take-over of the schools. Tactics have varied from school to school, although attempts to address the mounting drug use problem have included requiring drug tests after fights, expulsion for poor performance, locker searches, use of dogs to sniff for drugs, breathalyzer tests, strip searches, and most recently, urinalysis tests. Under the protection of the landmark case, _Vernonia School District 47J v Acton_, many schools have undertaken programs that test distinct portions of their student bodies, most commonly athletes, in an attempt to end and deter drug use within their school populations. Such drug testing, in some cases, has spread beyond athletes to include all students wishing to join extracurricular programs. To date, at least 12 states have initiated school drug-testing programs, including Arkansas,

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3 See, e.g., Willis by Willis v. Anderson Community Sch. Corp., 158 F.3d 415 (7th Cir. 1998) (finding that a school program requiring drug testing of students involved in fights was not justified under the special needs doctrine).

4 See, e.g., B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999) (holding unconstitutional a search of the entire school body using drug dogs because of a lack of immediate drug crisis or showing of individualized suspicion).

5 See, e.g., Konop v. Northwestern Sch. Dist., 26 F. Supp. 2d 1189 (D.S.D. 1998) (holding that school officials did not have a reasonable basis to conduct a strip search of students).

6 See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (holding that a school’s policy of testing student athletes for drugs was constitutional); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998) (holding a school policy which required suspicionless urinalysis drug testing of students involved in athletic and non-athletic extracurricular activities unconstitutional); Todd v. Rush County Sch., 133 F.3d 984 (7th Cir. 1998) (finding drug testing of students involved in extracurricular activities constitutionally permissible).


8 See Rhett Traband, The Acton Case: The Supreme Court’s Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs, 100 DICK. L. REV. 1, 2 (1995).

9 See Jan Crawford Greenburg, Little Rise in Drug Tests Seen at Schools After Court Ruling, PHILADELPHIA INQUIRER, Dec. 10, 1999, at F26 (admitting that few schools have undertaken programs but those that have, have not concentrated solely on athletes); ACLU Freedom Network, Schools Drug-Testing Students Who Wish to Join Clubs (visited May 14, 2000) <http://www.aclu.org/news/1999/w121099b.html> (citing id.).
Florida, Idaho, Indiana, Louisiana, Michigan, North Carolina, Ohio, Oklahoma, Texas, Wisconsin, and Wyoming. The blanket mandatory drug testing of students participating in extracurricular activities is unconstitutional and against the weight of even Vernonia. Implementing such programs does more harm than good because it will drive the troubled students away from the support and monitoring they get while involved in school activities. Furthermore, with the misinterpretation of Vernonia the idea of students’ privacy rights has begun to lose its meaning. This Note considers cases evaluating students’ privacy expectations, challenges to drug testing programs before and since Vernonia, and the policy implications of adopting urinalysis drug testing programs in our nation’s schools. The analysis in this Note proposes a correct interpretation of Vernonia for application to future cases of drug testing in the schools and suggests the impacts that wrongful interpretation could have. The Note concludes that Vernonia is being applied inconsistently and often too broadly in the nation’s lower courts. Drug problems within our schools should be addressed and combated, but not at the expense of our students’ fundamental Fourth Amendment rights.

THE SUPREME COURT ON URINALYSIS TESTING OF INTERSCHOLASTIC ATHLETES

Since the decision in Vernonia in 1995, schools and courts have grappled with the intended extent of the Supreme Court’s ruling. The Court in Vernonia held generally that student athletes could be tested randomly for drug use. This holding, however, becomes quite narrow when considering the specific facts the Court used to justify its conclusion. The Court pointed to four distinct factors, unique to school athletic programs as opposed to other student populations, in its rationale.

At issue in Vernonia was whether the school district’s policy to require student athletes to submit to random drug testing in order to participate in school sports was constitutional. The policy was unsuccessfully challenged on Fourth Amendment privacy grounds. Generally, student athletes, as persons protected by the Constitution, have a fundamental right to be “secure in their persons, houses, papers, and effects, against unrea-

10 See id.
11 See id.
sonable searches and seizures” unless a warrant is issued upon probable cause.\textsuperscript{12} It is well established that when a fundamental right is at issue the allegedly violative policy must withstand the strict scrutiny test. The strict scrutiny test determines whether there is a compelling state interest and whether the manner of carrying out that interest is narrowly tailored to the ultimate goal. \textit{Vernonia} held that the government’s interest in deterring drug use among Vernonia’s students was compelling enough, especially in light of the diminished expectations of privacy of the student athletes.\textsuperscript{13} This holding was composed of two parts: 1) a finding that a special need existed such that the warrant requirement did not need to be met, and 2) that the testing was a reasonable intrusion on the privacy of the students.

The Court found that the special needs requirement was met in \textit{Vernonia}, stating broadly that “special needs’... exist in the public school context.”\textsuperscript{14} Special needs were originally defined in \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{15} as needs beyond ordinary law enforcement or cases in which the state’s interest may outweigh the requirement of a warrant or individualized suspicion. Special needs in \textit{Von Raab} were found to exist where the normal requirement of a warrant simply interfered with the routine and necessary administration of a drug test in conjunction with employment decisions for U.S. Customs Officers.\textsuperscript{16} The reason for a warrant requirement is to provide facts for a neutral magistrate to determine that the permissible scope of privacy violation has not been exceeded.\textsuperscript{17} In the testing of customs officers, the Supreme Court found that the testing procedure was so well known to the employees and exercised without discretion that the requirement of obtaining a warrant every time was unnecessary.\textsuperscript{18} The Court went on, however, to stress that while the warrant requirement could be circumvented in that case, probable cause still needed to be shown in other situations.\textsuperscript{19} The nature of the position and responsibilities of the customs officers was found to be highly sensitive due to their close dealings with drug trafficking and the carrying of

\textsuperscript{12} U.S. CONST. Amend. IV.
\textsuperscript{13} See \textit{Vernonia}, 515 U.S. at 657, 661.
\textsuperscript{14} \textit{Id.} at 653.
\textsuperscript{15} 489 U.S. 656 (1989).
\textsuperscript{16} See \textit{id.} at 666-67.
\textsuperscript{17} See \textit{id.} at 667.
\textsuperscript{18} See \textit{id.}
\textsuperscript{19} See \textit{id.}
Based on the government’s compelling interest in safety and close monitoring of such a position, the Court found the employees’ privacy rights to be outweighed by the government’s pressing and timely need, thus equaling a *special need* beyond what could be achieved through normal law enforcement.²¹

*Vernonia* seems to say that special needs always exist in public schools, but such a broad statement must be read in the context of the case. In fact, courts since *Vernonia* have not found special needs to be determinative in every public school situation.²² Even if the warrant requirement is inappropriate in the school context because of the swiftness with which school officials must act, the reasonableness of the search is still at issue since the probable cause requirement would normally remain intact even with the identification of special needs.²³

The three factors constituting the Supreme Court’s rationale in *Vernonia* were as follows. First, the Court established that students have a diminished expectation of privacy within the school environment as compared to the population generally.²⁴ In *Vernonia*, the Court defined the School District’s immediate crisis in terms of the severe classroom disruption created as the school became overrun with students under the influence of drugs.²⁵ The Court agreed with the school that the student athletes were the “leaders of the drug culture.”²⁶ This second factor of an immediate crisis clearly identified with a particular student population was found by the Court as highly important in determining that the school had a special need beyond regular law enforcement to act aggressively towards its students’ drug problem.²⁷

Next, the Court acknowledged the school’s concern that student athletes were at greater risk of physical injury while un-

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²⁰ See id. at 668-69.
²¹ See id. at 668.
²² See e.g., *Trinidad*, 963 P.2d 1095 (holding a public school’s drug testing policy for students in extracurricular activities unconstitutional without finding that a special need existed).
²⁴ See *Vernonia*, 515 U.S. at 654-57.
²⁵ Id. at 648-49.
²⁶ See id. at 649 (quoting the District Court in Acton v. Vernon School Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).
²⁷ See id.
der the influence of illegal substances. This was supported by direct evidence of injury and disregard for safety among the student athletes. The Vernonia School District faced a state of rebellion that was described as utter chaos where teachers were “at wit’s end” and repeatedly observed students glamorizing drug and alcohol use and actually using drugs.

Finally, in analyzing whether the athletes had a privacy expectation that rose above random urinalysis testing, the Court considered the bodily inspection to which athletes were already subjected. The Court determined that urinalysis testing itself, which consisted of a student urinating into a cup in the bathroom while one or more administrators stood outside the door of the stall listening for sounds of tampering, was narrowly tailored in its administration. The testing was likened to nothing more than normal bathroom activities. A very important factor in the Court’s determination that such testing did not offend a student athlete’s sense of privacy was the nature of scrutiny to which such an athlete already subjects him or herself. The Court noted that typical non-private locker room, communal showering facilities, and even doorless toilet stalls evidenced the extent of privacy a student athlete was used to. Furthermore, the fact that students were subject to mandatory physical examinations and that athletes as team players surrender a certain amount of control to a coach were also cited as evidence that a student athlete had already voluntarily relinquished most of his or her privacy expectations with respect to his health and body. It was not simply that students were the focus of this drug testing policy that the Court upheld its constitutionality. All of these factors diminished the expectation of privacy for student athletes as opposed to other students. To this effect the Court stated that “it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”

29 See id.
31 See id. at 662.
32 See id.
33 See id. at 662.
The Supreme Court considered *Vernonia* when deciding *Chandler v. Miller*\(^3^4\). In *Chandler*, the Court held that under the circumstances mandatory drug tests could not constitutionally be required of public office candidates. In this case a Georgia State policy required candidates for certain state offices to prove they had tested negative for illegal drug use through a urinalysis test within a month prior to qualification for nomination. The test could be taken at the candidate’s leisure through a private doctor and required no reporting of results that were positive. If a hopeful candidate tested positive, he could simply opt not to seek office, thereby not revealing his results to anyone. The testing mandate was based on the belief that “[t]he nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear-thinking.”\(^3^5\)

Despite the high values attributed to state officials, the Court found that the required suspicionless and warrantless search was not reasonable under the Fourth Amendment.\(^3^6\) Candidates for office in Georgia brought this suit questioning the policy’s constitutionality under the First, Fourth, and Fourteenth Amendments.\(^3^7\) The plaintiffs argued that the drug testing unconstitutionally infringed on their Fourth Amendment protected right to be free from unreasonable searches. Georgia defended its required search by arguing that special needs existed.\(^3^8\)

The special needs test failed in *Chandler*, however, because the Court believed that inherently no specific danger existed in drug use by a candidate for state office. While the Court acknowledged the legitimacy of issues including integrity, ability to perform official functions, and wielding of public trust, it nevertheless found that these were symbolic virtues rather than true special needs.\(^3^9\) A warrant could still issue in reasonable

\(^3^4\) 520 U.S. 305 (1997).
\(^3^5\) Chandler v. Miller, 73 F.3d 1543, 1546 (11th Cir. 1996), rev’d. 520 U.S. 305 (1997).
\(^3^6\) See *Chandler*, 520 U.S. at 323. The Court noted preliminarily that the testing of an individual’s urine by a governmental body constitutes a search under the Fourth and Fourteenth Amendments. *Id.* at 313 (citing *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 617 (1989)).
\(^3^7\) See *id.* at 310.
\(^3^8\) See *id.* at 314. See also discussion *infra* at 4 and accompanying notes.
\(^3^9\) See *Chandler*, 520 U.S. at 321-22.
time to avoid any significant threat posed by an officer under the influence of drugs. Georgia failed to prove that any drug abuse problem was threatening the state offices. "A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime . . . would shore up an assertion of special need for a suspicionless general search program."\textsuperscript{40} In \textit{Chandler}, not only did Georgia fail to prove that the drug testing program was more than a symbolic attempt to put additional restrictions on candidates for state office, but additionally there was no showing that a significant drug problem existed among the state officials. Normal law enforcement measures were implicitly found to be adequate by the court in dealing with Georgia's merely hypothetical drug problem.

In \textit{Chandler}, the Court distinguished \textit{Vernonia} as a case in which the privacy invasion was warranted due to the "immediate crisis prompted by a sharp rise in students' use of unlawful drugs."\textsuperscript{41} The Court then went on to describe the enforcement of the symbolic needs in \textit{Chandler} as requiring no more than the "day-to-day scrutiny" to which governmental office already lends itself.\textsuperscript{42} Chief Justice Rehnquist described the majority's reliance on this observation as perverse in its deviation from the traditional strict scrutiny balancing test.\textsuperscript{43} The Court's holding that no special needs exist where there is constant scrutiny of an individual is important for future cases regarding the testing of school students for drug use.

\textbf{THE SEVENTH CIRCUIT'S READING OF \textit{VERNONIA}}

In \textit{Todd v. Rush County Schools},\textsuperscript{44} one such program intended to address the drug problem among high school students came before the Seventh Circuit Court of Appeals. In this case, students were prevented from participating in extracurricular activities such as athletic teams, Student Council, foreign language clubs, Fellowship of Christian Athletes, Future Farmers of America Officers, and the library club without first consent-

\textsuperscript{40} \textit{Id.} at 320.
\textsuperscript{41} \textit{See id.} at 319.
\textsuperscript{42} \textit{See id.} at 321 (quoting National Treasury Employees' Union v. Von Raab, 489 U.S. 656, 674 (1989)).
\textsuperscript{43} \textit{See id.} at 325 (Rehnquist, C.J., dissenting).
\textsuperscript{44} 133 F.3d 984 (7th Cir. 1998).
ing to a random drug testing program.\textsuperscript{45} Since most high school students are minors, parents were required to sign a consent form for their child to be tested through urinalysis for drugs, alcohol, or tobacco. The issue in the case was whether this mandatory drug-testing program violated the students’ Fourth Amendment rights.\textsuperscript{46} The school district defended its position based on \textit{Vernonia}, and the court agreed that \textit{Vernonia} was controlling as precedent and found that the school’s policy did not violate the Fourth Amendment.\textsuperscript{47}

Due to the overriding interest in promoting education, which could only be facilitated by combating the rash of illicit drug use, the Seventh Circuit found that the Indiana school’s program sufficiently met the test set forth in \textit{Vernonia}.\textsuperscript{48} The court saw this case as substantially equivalent to \textit{Vernonia}, different only in that it included extracurricular programs beyond athletics. The court concluded, however, that the interest in protecting the students’ health was key and saw no difference between student athletes and students voluntarily participating in non-athletic extracurricular programs.

The school district in \textit{Todd} felt that its program was legitimately in the students’ best interest because it was meant to deter drug use rather than punish those found to be using drugs.\textsuperscript{49} Citing one of its own district court opinions for support, the Court said that participation in extracurricular activities is a privilege and requires that students be physically and mentally fit to represent the school and serve as role models.\textsuperscript{50} As an institution acting \textit{in loco parentis}, the school viewed itself as responsible for not only the education but also the health and well being of the students.\textsuperscript{51} \textit{In loco parentis} means that one is acting “in the place of a parent.”\textsuperscript{52} Support for this view is found in \textit{Vernonia}, where the Supreme Court stated that “[c]entral, in our view, to the present case is the fact that the subjects of the Pol-

\textsuperscript{45} See id.
\textsuperscript{46} See id. at 985.
\textsuperscript{47} See id. at 986-87.
\textsuperscript{48} See id. at 986.
\textsuperscript{49} See id.
\textsuperscript{50} See id. (citing Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1320 (7\textsuperscript{th} Cir. 1988)).
\textsuperscript{51} See id.
\textsuperscript{52} BLACK’S LAW DICTIONARY 787 (6\textsuperscript{th} ed. 1990).
The Seventh Circuit decision in Todd was indirectly affirmed through a denial of a petition for rehearing en banc. Spectators see this as a green light for more such testing programs throughout the Seventh Circuit and the nation. Others similarly interpret Vernonia broadly to allow widespread testing of students. Four judges dissented in the request for rehearing en banc and filed an opinion explaining their reasoning. The dissenters questioned the interpretation of Vernonia asserted by the events surrounding Todd. The dissenters posit that there are three possible interpretations of Vernonia, all of which are plausible from a reading of that opinion. Determining the intended interpretation is crucial for application of Vernonia to future student drug testing cases. Judge Kenneth F. Ripple explained these three potential interpretations of Vernonia as being:

... (1) that "special needs" justifying drug testing always exist in the public school context, and thus school authorities may require drug testing for any reason including controlling access to core classes, see, e.g., [Vernonia] at 656. ...; (2) that it is necessary to show a particularized governmental need to impose drug testing on a particular student population, see, e.g., Vernonia's "state of rebellion"; (3) that drug testing is permitted in special scholastic environments in which the need is well identified and the privacy expectations are diminished, see, e.g., [Vernonia] at 657.

Todd used Vernonia to stand for the first principle—that special needs always exist in the context of students in public schools, but focused to a lesser degree on the second part of Vernonia, which then considers whether the search is reasonable. No showing was made that the targeted student population was posing a unique drug problem, such as Vernonia's "state of rebellion." The defendants also did not attempt to prove that the ex-

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53 Vernonia, 515 U.S. at 654.
55 See Richard Carelli, Justices Give Freer Hand For Drug Test at School; Doesn't Violate Privacy Court, COM. APPEAL, Oct. 6, 1998, at A1.
56 See Todd, 139 F.3d at 571.
57 Id. at 572.
tracurricular programs singled out constituted special environments with a distinct need to be free of the influence of drugs. In Todd, there was no study showing that students in extracurricular activities had a higher drug usage rate than other student populations, or that these students were "leaders of the drug culture."

The Seventh Circuit stressed that the only differences between the present case and Vernonia were the specific activities involved. The court went on to say that the health of the students was the compelling reason underlying the testing of athletes in Vernonia, and that the health of students in extracurricular activities generally is similarly compelling. The dissenters from the request for rehearing in Todd argued that if the singular factor indicating a compelling interest is a need for healthy students, then there would be no limits to who could be singled out for testing.

Certainly, physics class, math class or any other part of the school's academic endeavor also requires "healthy students." The assertion that students in extracurricular activities can take leadership roles in the schools and the community is a generality that does little to define, with the particularity suggested by Chandler, a group that needs to be tested.

The dissent in Todd went on to note that the Seventh Circuit's own decision in Schaill v Tippecanoe County School Corp. "rejected explicitly the suggestion that athletics and other school activities were similarly situated with respect to the need for suspicionless drug testing." With the rehearing denied, however, Todd stands in the Seventh Circuit as an extension of Vernonia applicable to at least students in extracurricular activities if not to any student who the school feels needs to be healthy to function at his best—essentially any student.

**COLORADO'S READING OF VERNONIA**

Trinidad v. Lopez, a case before the Colorado Supreme Court, similarly addressed a school's attempt to curtail student

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58 See id. (Ripple, J., dissenting from the denial for rehearing en banc).
59 See id.
60 See Todd, 133 F.3d at 986.
61 See Todd, 139 F.3d at 572 (Ripple, J., dissenting).
62 Id. (Ripple, J., dissenting).
63 Id. at 572-73 (Ripple, J., dissenting).
64 963 P.2d 1095 (Colo. 1998).
drug use through testing of students wishing to participate in extracurricular activities. Plaintiff Carlos Lopez, a senior at Trinidad High School was suspended from marching band, a required course for his enrollment in music classes and subsequent course credit, due to his refusal to consent to a drug test per the school’s policy.\(^6\) The policy was instituted following a study done by the Search Institute of Minneapolis to determine drug usage rates among students in grades six and above.\(^6\) The findings of the report showed that Trinidad students’ drug usage rates were above the national averages.\(^6\) This prompted the school board to implement a policy to test students involved in extracurricular activities in order to combat drug usage through deterrence. In the case of Lopez, however, being removed from the marching band meant not only denying him a privilege but it also affected his coursework since the music curriculum required participation in the marching band.

One of the important factors in Vernonia, weighing on the side of an immediate and pressing need for the school to act, was evidence that the school’s athletes were “leaders of the drug culture.”\(^6\) No such evidence was presented in Trinidad. Instead, the school tried to justify its testing of the students involved in extracurricular activities on the basis that they were “representatives” and “ambassadors” of the school. This was particularly true of band members, who wore uniforms displaying the school’s colors.\(^6\) The relevant Institute statistics summarizing student drug use, however, concerned drug use of the student population in general.\(^7\) “[T]he study did not quantify the level of drug use among participants in the various extracurricular activities.”\(^7\)

Thus, the Court found that the statistics used by the school did not show any specific need to test students in the marching band or other extracurricular activities over a need to test all students.\(^7\) The Colorado Supreme Court limited its holding in

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\(^6\) See id. at 1097.

\(^6\) See id. at 1098.

\(^6\) See id.

\(^6\) Vernonia, 515 U.S. at 646.

\(^6\) See Trinidad, 963 P.2d at 1099.

\(^7\) See id. at 1099 n.8.

\(^7\) Id.

\(^7\) See id. at 1103.
Trinidad to the unconstitutionality of the school’s policy as it specifically related to the marching band.73

THE CASE IN OKLAHOMA

In Oklahoma the ACLU filed suit on behalf of two high school students against the Board of Education of Tecumseh Public School District to challenge the school district’s mandatory drug testing program.74 In October of 1998 the school implemented a policy of randomly testing students participating in particular school sponsored non-athletic and athletic activities such as Academic Team, Choir, and Marching Band.75 Students had to agree to the drug testing policy or be banned from participating in the specified activities.76

One of the two students bringing this suit was unwilling to consent to the drug testing program and was subsequently banned from the after school music activities in which she normally participated.77 The music activities, as well as some of the other activities targeted by the drug testing policy, were required as part of classes taken for credit during the regular curriculum day.78 Students were required to fulfill a fine arts credit to graduate, and among the choices are courses such as band and choir, which could only be completed by participating both during classroom time and after school.79 The other student challenging the policy opposed the requirement that he be tested in order to participate on the Academic Team.80 However, he would not be required to take a drug test for his continued participation in Life Guides, a group of role models and peer counselors pledged to abstain from drugs and alcohol.81 He worried that subjecting himself to urinalysis could result in a false positive which, even if eventually rectified, would affect his membership in Life Guides and cause him to lose his status as a stu-

73 See id. at 1097.
75 See id. at 25.
76 See id.
77 See id.
78 See id.
79 See id.
80 See id. at 28.
81 See id.
dent leader because he would be viewed skeptically as a potential drug user.\footnote{See id. at 29.}

The school initiated the mandatory drug testing policy following demands from parents that the school establish a strict program to crack down after two incidents of drug problems in the district's middle school.\footnote{See id. at 14-15.} The policy applied to all students participating in "FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics."\footnote{See id. at 33.} The selection of these activities over others that meet during school hours or on school grounds is seemingly without basis, as the activities not included are virtually identical to those, which are targeted.\footnote{See id. at 34.} Plaintiffs argued that there was no reason that selected activities were singled out by the school.\footnote{See id.}

The \textit{Earls} case has just begun to wend its way through the courts, but the issues being raised are reminiscent of those in \textit{Trinidad} and \textit{Todd}. Very important in \textit{Earls} will be the issue of the non-voluntariness of students' participation in curriculum-connected after school activities. In \textit{Vernonia} and its progeny, voluntary submission to the rules and policies of extracurricular programs have been argued as support for schools, allowing drug testing programs to go forward. This argument assumes that if urine testing violates one's individual sense of privacy too greatly, one is not forced to submit oneself to the test, since extracurricular activities are typically voluntary. However, this is not the case when a student needs credit towards graduation or as a resume booster as is the case in \textit{Earls}. The debate in \textit{Earls} will also inevitably center around the lack of any specific evidence that a drug crisis has presented itself at the school or that the students in the particular extracurricular activities are in any way creating that problem by higher usage rates.

\textbf{OTHER RECENT ATTEMPTS TO DETEER DRUG USE IN THE EDUCATIONAL ARENA}

In 1998, the Grapevine-Colleyville school district of Texas considered a plan to test students involved in extracurricular
activities for drug use. The school believed that since 80% of the students participated in extracurricular activities, the plan would be useful in protecting the students most visible in representing the school. The school felt its policy was in line with other such programs across the state. In fact, at least two other Texas school districts already conducted random suspicionless drug tests. The school had attempted to initiate the program as a voluntary program, but it was determined that the program was not successful and the school moved to implement the program as mandatory to combat the school district’s image as a high drug usage area.

Schools in Utah have also begun to consider and implement drug testing in some instances. One high school, Mountain High School, has a policy which tests students who have had problems with attendance or grades, or have been in trouble for fighting or possession or use of illegal drugs and drug paraphernalia. These circumstances under which testing is sanctioned reflect an approach much more focused on individualized suspicion and probable cause.

Students are not the only ones being targeted by random suspicionless drug testing policies. A Tennessee teacher’s union has fought with the school board over a requirement that suspicionless drug testing be conducted at certain events in a teacher’s career such as hiring, promotion, and so forth. Currently, teachers are only subject to drug testing when there is individualized suspicion. At the Tennessee school, “[t]he board seeks a much broader policy that tests teachers in four instances: when they are hired; before they are promoted or transferred; when there is reasonable suspicion; and after they are involved in serious traffic accidents.” A policy directed at teachers is even more troublesome when weighed against a

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88 See id.
89 See id.
90 See id.
92 See id.
93 See Paul Donsky, Money a Concern For Union, THE TENNESSEAN, Oct. 8, 1998, at 10B.
94 Id.
teacher’s expectation of privacy. The Court in *Vernonia* said that “Fourth Amendment rights . . . are different in public schools than elsewhere,” but this statement was made with respect to the privacy expectations of students, minors in the temporary care of the school, not teachers. Each case that addresses drug testing of students differentiates students’ rights based on the diminished rights of a minor in the custody of the school acting as a surrogate parent. Teachers do not fall into this category by their mere employment in the school arena.

**THE NATURE OF STUDENTS’ RIGHTS**

Students have a fundamental right to privacy. It is well settled that students do not “shed their constitutional rights . . . at the schoolhouse gate.” However, because the continued erosion of these rights often leaves one in doubt, it is important to clarify that such fundamental rights do still exist. The right to privacy has been diminished in certain circumstances as it is balanced against state interests found to be compelling, although it cannot be said that students no longer possess the Fourth Amendment right to privacy. Justice White once stated that “[a]lthough this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy.” Thus, while courts have found that a lesser expectation of privacy exists for students under the control of the school, students still have a fundamental right to privacy that can be infringed upon only after successful passage of the strict scrutiny test. The notion that students have not completely been stripped of their fundamental interest in privacy is supported by the use of the strict scrutiny test by courts in considering school policies argued to be in violation of students’ Fourth Amendment rights. The courts have tacitly acknowledged by employing this test that a fundamental right is still at issue despite its erosion in the school arena.

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95 *Vernonia*, 515 U.S. at 656.


98 See generally *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d. 470 (5th Cir. 1982) (using strict scrutiny in analyzing a student’s Fourth Amendment challenge to the school’s use of a dog to sniff for drugs without individualized suspicion).
The Supreme Court in *Vernonia*, however, does very clearly state that unemancipated minors lack the full range of fundamental rights which adults are guaranteed.\(^9\) Instead, the Court admits that the rights remain, but with the caveat that “the nature of those rights is what is appropriate for children in school.”\(^10\) Thus, *Vernonia* leaves fundamental rights fully intact but asserts that those in conflict with the school’s need for order and discipline are tempered for the school environment.\(^10\) The decision leaves in question the degree to which the rights are diminished and in exactly which circumstances they are diminished. The Court notes that student privacy rights are less than what would be expected by an adult in public, but stressed the notion that the school’s control over students is “custodial and tutelary.”\(^10\) Given the many specific factors in *Vernonia*, however, the Court’s discussion of significantly compromised rights may have been very case specific. If the students targeted were not a population at high risk of physical harm due to their participation in athletics, or students whose expectations were not so lowered by regular communal undressing, then the question remains whether their rights would be as compromised as those of the athletes in *Vernonia*. A reading of *Vernonia* suggests only that the average student’s privacy rights are less than those of an adult, but that these rights are different between regular students and the student athletes in that case. In this respect, *Vernonia* gives no indication of what other circumstances could allow a school to intrude on the privacy expectations of other categories of students. I argue that while the expectations and therefore protection of privacy is less for students, *Vernonia* does not intend to diminish all students’ privacy rights the same as it does for student athletes.

**THE DECISION TREE FOR FOURTH AMENDMENT CHALLENGES IN THIS ARENA**

A constitutional challenge to urinalysis testing of public school students involves a series of preliminary issues to be determined before the policy can be upheld or stricken as violative of the Fourth Amendment. First, it must be established that a search took place. In challenges involving urinalysis, this ques-

\(^9\) See *Vernonia*, 515 U.S. at 654.
\(^10\) Id. at 655-56 (citations omitted).
\(^10\) See id.
\(^10\) Id. (New Jersey v. T.L.O., 469 U.S. 325, 339 (1985)).
tion has already been definitively answered. The Supreme Court in *Von Raab* agreed with the Fifth Circuit, which conclusively established that drug testing by urinalysis goes beyond one's reasonable expectations of privacy and therefore qualifies as a search under the Fourth Amendment.\(^\text{103}\) Once there has been a search, it must be questioned whether state action was involved.\(^\text{104}\) Action taken by public school officials is state action subject to constitutional scrutiny.\(^\text{105}\) With respect to the Fourth Amendment, the Supreme Court in *T.L.O.* specifically noted that the Fourteenth Amendment protects students' constitutional rights against action by public school officials.\(^\text{106}\) After concluding that a search has been effected by state action, the Fourth Amendment is implicated, and an inquiry must be made into the reasonableness of the search.

The reasonableness standard involves a two-pronged test.\(^\text{107}\) First, the action must be justified at its inception. Second, the search must be "reasonably related in scope to the circumstances which justified the interference."\(^\text{108}\) It is apparent from *T.L.O.* that when extraordinary circumstances do exist for conducting a search without the normal requirement of a warrant and individualized suspicion, the search will only be legal if the students' Fourth Amendment rights have not been interfered

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\(^{103}\) See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (referring to its earlier holding on the same day in *Skinner v. Railway Labor Executives Assn*, 489 U.S. 602, 616-18, that urine tests are searches under the Fourth Amendment).

\(^{104}\) One U.S. District Court noted: "If a search is being conducted by a private entity and not under the color of state law, then it is not subject to the identical scrutiny to which actions of public officials are subject." Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 763 (S.D. Texas 1989).

\(^{105}\) See generally *Elkins v. United States*, 364 U.S. 206, 213 (1960) (deciding that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers").

\(^{106}\) See *T.L.O.*, 469 U.S. at 334 (citations omitted).

\(^{107}\) See id. at 341, 343. The Court in *T.L.O.* explains that the use of the reasonableness test is necessary to "ensure that the interests of the students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* This remark suggests a balancing of the interests of the school and the students more similar to that involved in a test less stringent than the strict scrutiny test following the lowered importance of a student's fundamental right to privacy as articulated in *Vernonia*. \(^{107}\) See discussion infra pp. 18-19 and accompanying notes.

\(^{108}\) Id.
with more than is necessary to fulfill the school’s interest in preserving order in the educational environment.\footnote{109}

**THE FAILURE OF VERNONIA**

The Supreme Court in *Vernonia* based its decision largely on the school’s need to deter drug use among a student population which led the school’s drug culture and presented an immediate crisis. Schools implementing random testing programs seem to have picked up only on the idea that the Court had given the green light to testing distinct populations of students within the school body, especially interscholastic athletes. Since then, it has been easy for schools to justify their policies so long as they closely match the policy at issue in *Vernonia*. Beyond that, both the schools and the courts have been hesitant. No school has succeeded in requiring random drug testing of the entire school population, though several have tried.\footnote{110} For now, it seems that schools feel comfortable to test only portions of the school population that can be singled out as groups with lessened privacy expectations, greater drug usage rates, or heightened visibility in representing the school. This indicates that *Vernonia* does not stand as a unified test for constitutional testing policies but remains a conglomeration of factors of varying importance that schools can only attempt to scrape together into coherent guidelines for following *Vernonia*’s advice.

Student athletes bear the unfortunate brunt of the *Vernonia* aftermath. The Court’s focus on physical requirements of athletes and their already greater bodily exposure during annual physicals and daily undressing in the locker room have created a meaningless line unless testing is to be limited exclusively to student athletes. This speaks nothing to the interest a school may have in making sure that all students participating in physical education classes are drug free. Based on the factors out-

\footnote{109 See Brooks, 730 F. Supp. at 764 (interpreting New Jersey v. T.L.O., 469 U.S. 325, 343 (1985)).

\footnote{110 See Traband, supra note 8, (citing Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 766 (S.D. Tex. 1989), aff’d., 930 F.2d 915 (5th Cir. 1991) (deciding that testing the entire high school student body for drugs was violative of the Fourth Amendment); Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985) (finding school’s policy of drug testing any student suspected violating the school drug and alcohol code unconstitutional as unrelated to actual guilt or innocence based on tests inaccuracy); Odenheim v. Carlstadt-East Rutherford Reg. Sch. Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985) (holding that a policy to annually conduct a physical and urinalysis test for every enrolled student is unconstitutional).}
lined in *Vernonia*, including the greater need for physical health, the lowered expectations of privacy in the arena of locker rooms and communal showering, it seems that if a significant crisis of drug use was shown among the population of students in physical education classes, this too would constitute an acceptable population to test. With all of the other important factors of *Vernonia* intact, this population would be the next closest to that of *Vernonia*’s student athletes in terms of lowered privacy expectations and a unique need to be substance free. The main difference with respect to students in physical education classes is that their participation is not voluntary.

**TO WHOM SHOULD VERNONIA APPLY?**

Students participating in non-athletic extracurricular activities are not different from the student body as a whole except that their participation is voluntary. The only exception is in those cases in which participation is required in order to receive credit for a standard curriculum course. Being a member of the Library Club, for instance, does not require any physical exertion that demands a student be more fit than the average student. Illicit drug use, by definition, is illegal, but there are safeguards protecting persons from being searched randomly for signs of such drug use without individualized suspicion. *Vernonia*’s articulation of the *Von Raab* test for overcoming the requirement that there be individualized suspicion and a warrant is that there be a special need.\(^{111}\) The state does have an interest in monitoring minors for drug, alcohol, and tobacco use. The interest of the school must be weighed against the invasion of privacy forced upon the student and must be found to be compelling. In the case of testing students who wish to join extracurricular activities, there may indeed be a compelling state interest. In *Trinidad*, the evidence did not show this compelling state interest, however, as there was no study showing a higher drug use rate in students participating in activities versus other students.\(^{112}\) Undoubtedly this is not the only instance where a school has read *Vernonia* to allow testing of distinct student groups but has failed to establish that a special need exists within that group. Schools have repeatedly been prevented from testing the school body as a whole, but testing students in all

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\(^{111}\) See *Vernonia*, 515 U.S. at 653.

\(^{112}\) See *Trinidad*, 963 P.2d at 1099 n.8.
extracurricular activities comes close to testing all students especially in the instances where extracurricular participation rates are very high.\textsuperscript{113}

Clearly, Todd and Trinidad can be distinguished from Vernonia due to the lack of evidence specific to the targeted student population, but the courts nonetheless came to different conclusions, both based on Vernonia. In Todd, the court found that the health of students involved in extracurricular activities was a compelling interest as far as the school needed to show.\textsuperscript{114} This broad-brushed notion that an interest in the general health of students involved in all extracurricular activities versus students as a whole is a compelling interest is simply not a rigorous enough inquiry into the required compelling interest prong of the strict scrutiny test.

In Brooks v. East Chambers Consolidated School District, the defenders of a school’s drug testing policy aimed at all students in extracurricular activities asserted, without any evidence, that the academic performance of students involved in extracurricular activities somehow was harmed more greatly by the use of drugs than the academic performance of students who were not involved in extracurricular activities.\textsuperscript{115} The justification for the school’s program was therefore that students would generally be safer in all aspects of their lives if they were drug free. This is indisputably true. The court swiftly dismissed this argument, however, saying that “[t]hat rationale does not meet the compelling need criteria necessary to undertake a search without reasonable suspicion.”\textsuperscript{116} As has been noted in cases where schools attempted to test every student enrolled in the school\textsuperscript{117}, the court in Brooks concluded that this type of privacy intrusion “cannot be justified by the global goal of prevention of substance abuse.”\textsuperscript{118} The desire to keep all students drug free does not amount to a compelling interest.

Schools could conduct surveys to uncover evidence of high drug use within a particular student group. However, this would be a moving target and always miss the true intent of such poli-

\textsuperscript{113} See Brooks, 730 F. Supp. 761 n.1.
\textsuperscript{114} See Todd, 133 F.3d at 986.
\textsuperscript{116} Id. at 765.
\textsuperscript{117} See Odenheim, 510 A.2d 709 (holding that it is a violation of the Fourth and Fourteenth Amendments for a school to require drug testing of every student).
\textsuperscript{118} Brooks, 730 F. Supp. at 766.
cies. Instead, to set a truly meaningful standard for future cases, it should be articulated that Vernonia stood for something more than merely being able to show that a specific population had a higher incidence of drug use than the national averages at any given time.

NARROWLY TAILORED?—DOES WIDESPREAD TESTING MEET THE TEST?

When the constitutional right to be free from unreasonable searches is infringed upon, that infringement must not only be justified by a compelling state interest but also completed through narrowly tailored means. The second part of the strict test requires that the means of carrying out a governmental interest be narrowly tailored. Another failure of the school programs that test students who participate in outside activities is their failure to narrowly tailor the programs. When evaluating if a program is narrowly tailored, one must determine if there is a less intrusive way to achieve the same outcome. Assuming arguendo that a compelling state interest existed to test participants of extracurricular activities, urinalysis is not narrowly tailored to that interest.

In Chandler the Supreme Court noted at the outset that if a special need was found, the testing itself was not overly intrusive since it could be done at a time of the candidate’s choosing, by his private doctor, and allowed him the ability to disclose the results to no one if they were positive.\(^{119}\) Compared to that in Chandler, the method of urinalysis detailed in Trinidad and Todd are more intrusive. The Court in Vernonia likened the test to nothing more than normal bathroom activity.\(^{120}\) This simple dismissal of a procedure, which is, at best, humiliating, is inappropriate.

The intrusion of a urinalysis test, which can show any number of things about a person aside from drug, alcohol, and tobacco use, including the very individual and private matters of pregnancy and the use of prescription drugs,\(^ {121}\) is simply too great to be permitted in schools.\(^ {122}\) In Chandler, the court found

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119 See Chandler, 520 U.S. at 318.
120 See Vernonia, 515 U.S. at 650.
121 See Trinidad, 963 P.2d at 1098. To avoid the occurrence of false positives, pregnancy and prescription drug use must usually be disclosed upfront.
122 Drugs commonly tested for in schools with such a policy include marijuana, cocaine, alcohol, LSD, and nicotine, in descending order of schools testing for each.
that the intrusion was too great for state office candidates in light of the public scrutiny they are subjected to on a daily basis. Similarly with students in extracurricular activities, observation on a daily basis ought to be quite effective. Why should observation of students be different from that of adults? Teachers claim that drug use causes destructive educational behavior. If this is the case, teachers should be able to notice the telltale signs of drug use among their students, at least in the dire circumstances of an immediate drug crisis like Vernonia. Furthermore, if schools are concerned that this will not detect enough of the drug use, then perhaps we should be even more worried about the students who are not under such frequent vigilance by faculty, coaches, and teachers—the students not in extracurricular events.

DRUG DOGS

In B.C. v. Plumas Unified School District, the entire school body was searched by drug dogs brought in to sniff the students and their belongings. The court held, inter alia, that being sniffed by a dog without individualized suspicion violated a student’s privacy expectations even though such expectations may have been diminished with respect to the school, and enough so to constitute a search. The court then considered the reasonableness of the search and compared it to its interpretation of Vernonia: specifically that a “suspicionless search can be reasonable if the school is suffering an immediate drug crisis.” Although the court acknowledged that a school’s interest in deterring drug use is compelling, due to the lack of an immediate drug crisis facing the school at the time of the search, the court held that the search was unconstitutional because the government’s interest would not have been “placed in jeopardy by a requirement of individualized suspicion.”

It is interesting to note that the use of a drug dog, an intrusion much less personal and less offensive than a urinalysis test,

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See, e.g., Joseph C. Franz, M.D., Student Drug Testing Survey-Narrative (visited 2/20/00) <http://www.freeyellow.com/members2/sportsafe/surveyweb.htm> (reporting results of survey involving 26 schools with drug testing initiatives).
123 See Chandler, 520 U.S. at 321.
124 192 F.3d 1260.
125 Id. at 1266.
126 Id. (citing Vernonia, 515 U.S. at 662-65).
127 Id. (citing Chandler, 520 U.S. at 314, quoting Skinner, 489 U.S. at 624).
was held to be an unreasonable search. Even though no evidence existed to show that there was a heightened or immediate need for dilution of the individualized suspicion requirement, just as in most of the cases involving testing of students participating in extracurricular activities, random searches by drug dogs have been found to be unconstitutional privacy invasions where courts have not found the same for urinalysis testing.\textsuperscript{128} It is likely that this inconsistency is based on the uncertainty over the interpretation of Vernonia.

**POLICY IMPLICATIONS**

Constitutional arguments aside, the problems with the drug testing policies that have been described throughout this Note are that they do not logically lead to the outcome desired by the schools. Schools want to deter drug use, yet the expected effect of a policy that tests a specific portion of the student body such as students in extracurricular programs is to drive those at-risk students away from the protective and constructive environments of the activities. Those students who really need the help of drug counseling and rehabilitation should be encouraged to remain in the schools and around adults who can monitor them and identify possible drug abuse problems so that they can gain the appropriate help. Students who are using drugs and know that they will be tested before they can participate in after school activities will simply not participate. Indeed the policy will deter—deter the same students the school wants to help from being around faculty often enough for their drug use to even be noticed. The at-risk students will become the majority of the students not participating in extracurricular activities, and the school will have no way to monitor them as well as they could have when the students were participating in after school activities. At least when testing is not in place, the students who were at-risk could be under supervision for longer than the standard school day, assuming of course that the students using drugs are typically involved in extracurricular activities at all. With a testing policy, these students will instead spend more

\textsuperscript{128} See generally Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) (holding that a search of the entire school by drug dogs was unconstitutional under the Fourth Amendment).
time on their own after school, most likely with no supervision. This does not achieve the purposes set out by the schools.\textsuperscript{129}

Following this logic, schools implementing policies to drug test the voluntarily involved students are likely testing the wrong population. This was the conclusion of a survey done in Indiana reporting drug use by various student groups.\textsuperscript{130} The study found that "many random school drug testing programs are unlikely to detect drug use, since they often target the lowest risk students."\textsuperscript{131} In \textit{Brooks}, District Judge Gibson of the Southern District of Texas opined that the "students who participate in athletics and other extracurricular activities are, in fact, less likely to use drugs and alcohol, if only because Texas law forbids students who fail courses from participating in extracurricular activities, and presumably, heavy drug or alcohol use will have a negative impact on academic performance."\textsuperscript{132} If this is true, students who may truly be in the most need of counseling and rehabilitative help have probably already been forced to forego participation in extracurricular activities.

One school announced that after the implementation of its drug-testing program, participation in extracurricular activities did not change. The reason, if it is indeed true, is most probably not that suddenly all students previously using drugs and participating in after school activities quit using drugs instantly. The most obvious reason for steady participation levels following the initiation of the program was that the school did not have a drug problem among its population of students participating in extracurricular activities or that the program uncovered students using drugs and helped them to be treated—a scenario which is not addressed by the school. One would assume, that students using drugs would be either forced to quit in order to pass the drug test, or they would quit the extracurricular activity rather than go through with the testing knowing that they would not pass. If the participation remained the same, then no


\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Brooks}, 730 F. Supp. at 764.
students must have quit. This suggests that no students had a
drug problem, or the tests failed to disclose any drug problem.
In this circumstance, the school should not have implemented a
drug-testing program under Vernonia because no problem ex-
isted to warrant the school’s compromising of students’ privacy
rights.

Various studies strongly support the notion that drug use is
better deterred by keeping students in a supervised environment.
Extracurricular activities work to keep children who might oth-
erwise go home to an empty house doing constructive activities
under the watchful eye of caring teachers and school staff. One
study found that among students grades six through eight, par-
ticipation in extracurricular activities showed a minor yet sig-
nificant correlation with decreased drug use.\(^{133}\) Statistics like
this make sense intuitively. If students are given enjoyable ac-
tivities in which they can truly excel and become constructively
involved, then there is less time for them to get into trouble with
illegal substances, get involved with others spending their time
dealing in illegal substances, or even become involved in
criimes. Another important study, based on data from the Justice
Department, showed that peak times for juvenile crime are 3-8
p.m.\(^{134}\) The rate of violent juvenile crime is almost triple be-
tween 3 p.m. and 4 p.m.\(^{135}\), which strongly suggests that this
behavior can be attributed to the lack of supervision due to the
time students spend between school and when most parents ar-
rive home.

The U.S. Department of Health and Human Services also
conducted a study on the correlation between extracurricular
activity participation and activities they termed “risky behav-
or,” such as drug use, teenage pregnancy, smoking, criminal
activity, and dropping out of school.\(^{136}\) The study definitively
showed that those students involved in after school activities
were significantly less likely to exhibit the risky behaviors con-
sidered.\(^{137}\) Based on such findings, we should want the drug us-


\(^{135}\) See id.

study on adolescent use of leisure time and its correlation to risky behavior).

\(^{137}\) See id.
ers and at-risk students to participate in as many school activities as possible to not only give faculty more time to observe them and potentially discover a drug problem without violating the student’s civil rights, but also to keep those students occupied doing constructive activities rather than being tempted by the illegal activity.

CONSTITUTIONAL SOLUTIONS

Programs for the drug testing of students should fail in the same way the testing in Chandler failed. Many, if not most of the cases involving schools with drug testing programs do not have evidence of any immediate drug crisis or even a drug problem by national average statistics. In Chandler, the Supreme Court used the lack of any evidence pointing to a drug problem among Georgia’s state officials as grounds for its holding that no need existed to infringe upon the candidates’ privacy expectations. Instead of granting Georgia the right to deter any future potential problem of drug abuse in the state’s legislature, the Supreme Court found that any problem not yet existing as a crisis could easily be monitored by the scrutiny under which state officers are typically put and through normal law enforcement means. The United States may never be able to wholly eradicate the problem of adolescents using alcohol or illegal drugs. The criteria of Vernonia require that a school have an immediate drug crisis, which suggests that a school’s problem be at least greater than the national average, if not so great that the learning environment is being threatened by drug-influenced students. In the instances where a school’s drug problem is less than a crisis, normal daily observation of the students and normal school policy enforcement means should be as successful as the Court said it should be in Chandler. Without at least having a drug problem exceeding the national average, no school should be able to justify a urinalysis policy.

The test used by the Court in Vernonia was the special needs test established in Skinner and echoed in Von Raab.\textsuperscript{138} Special needs were defined as “interests other than the ordinary needs of law enforcement.”\textsuperscript{139} The Court in Chandler went on to note that the need fulfilled by the Georgia statute was symbolic rather than special since enforcement of drug laws could

\textsuperscript{138} See Chandler, 520 U.S. at 311 (citations omitted).

\textsuperscript{139} Id.
be achieved through the constant scrutiny of our public officials. This decision followed Vernonia, which did not consider the issue of being able to monitor students for drug use or test them only when there was suspicion that they were a threat to themselves and their peers. This would be best solution, however, when considering the studies correlating drug use and student activity involvement. Why Vernonia did not consider daily observation a viable alternative, is probably because the Court found a special need that went beyond normal law enforcement; specifically the crisis confronting the school combined with the significantly lowered privacy expectations of student athletes. Schools that do not meet all of the criteria of Vernonia, however, should only be permitted the enforcement leeway of Chandler.

Under what I argue is the appropriate interpretation of Vernonia, in order to implement a urinalysis program, a school first needs to show that its drug problem is real and has risen to the level of an immediate “crisis.” This should involve proof that drug, alcohol, or tobacco use is hindering educational efforts within the school, and that these problems are higher than the nation’s average. Anything less than this level does not permit a school to degrade the fundamental privacy rights of all students when a few troubled youths could easily be identified based on daily observation of their behavior, attendance, performance, or visible symptoms. Next, the students targeted by the urinalysis program would have to be in a population whose privacy expectations had been as lowered as the expectations of the student athletes in Vernonia. All of the factors described in Vernonia there played into the final conclusion, and without the existence of at least a majority of those same factors, no drug testing policy should be upheld. No group of students other than the athletes and possibly students participating in physical education courses is likely to meet these criteria. No other students engage in school activities, which involve the same chance of physical endangerment from drug use. And even these students could not be singled out unless all of the other criteria were also met in the particular circumstance.

So, the question remains what else a school can do. Short of urinalysis testing, when the criteria of Vernonia are not met,

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140 See id. at 307.
141 See discussion supra pp. 5-7 and accompanying notes.
a school should still be able to encourage students to be drug free and demand that drugs not be a part of the educational environment. Schools have the power to employ normal means of detection including urinalysis when individualized suspicion exists. However, if the charge against a student in a case of individualized suspicion is mere possession, then a urinalysis test is inappropriate. As discussed earlier, searches involving drug dogs have been struck down as unreasonable in circumstances of schools unable to show at least that a major drug problem existed within the school—if not individualized suspicion. Schools using voluntary urinalysis or other testing programs are theoretically acting constitutionally, yet these programs place questionable value on students’ privacy rights since voluntary programs give parents the right to decide whether their children will participate or not. This leaves schools to find other innovative ways of deterring drug use through voluntary programs aimed at rewarding students and not involving invasions into their privacy. Schools remain, second only to the home, as the best place for students to be monitored by many pairs of watchful eyes for signs of illegal and dangerous activity. Encouraging students to spend even more time in the company of adults at constructive activities, is unquestionably one of the most valuable ways to enrich the student’s life and encourage less risky behavior. The bottom-line is that factors less than Vernonia do not make up a compelling interest. As much as invasive policies and tests could completely eradicate drug use among our nation’s students, courts have disallowed blanket policies reinforcing that the students’ fundamental rights do still have value and weight against the valiant, but intrusive, endeavors of the schools.

CONCLUSION—TEACH OUR STUDENTS THE VALUE OF THE CONSTITUTION—THAT RIGHTS MATTER

All of this leaves the impression that the decision in Vernonia may be an anomaly in terms of drug testing programs in schools, applicable to few if any other sets of facts. However,

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142 See Anable v. Ford, 653 F. Supp. 22, 38-9 (W.D. Ark. 1985) (considering that the vague conclusions of the urinalysis test rendered it inappropriate action for a school to take against two students charged with possession of marijuana).
drug testing of student groups, athletes and non-athletes, has increased after the Supreme Court issued its ruling.\textsuperscript{143}

The belief that this program will not harm students is flawed. Defenders of these drug-testing policies contend that students or their parents who feel that this privacy invasion is too great may opt out of all extracurricular activities. This choice, however, should not be one we want to impose on our nation’s children. The opportunity to participate in extracurricular activities is important for students. Not only, as the Court in \textit{Todd} noted, are extracurricular activities imperative to many high school students who want to build an impressive resume for their college applications\textsuperscript{144}, but these activities are also crucial for the development of young people mentally and socially. Furthermore, the observation in \textit{Vernonia} that students do not shed their privacy rights at the schoolhouse gate should be more than a consoling aside. It should be a reality. Even if these rights are diminished to a degree less than an adult would expect, they are not to be disregarded entirely simply because it is easier to control minors if privacy rights do not “get in the way.”

Students who go out of the necessary curriculum to risk humiliation and often go against peer pressure to join activities and pursue their dreams should not be punished, and forcing them to allow an invasion into an area where anyone not in a public school has a reasonable expectation of privacy is not an image of the democracy about which our schools teach. By continuing to degrade the privacy rights of students in public educational facilities, we are moving toward a frightening slippery slope of permissible state “interests.” The school may opt for exercises such as testing all students for AIDS or pregnancy so that the state can step in where individuals and families should be free to determine for themselves how to deal with life’s unintended consequences. It is not the school’s place to step in. Except in cases where the crisis is so impeding upon education and the students involved in the drug testing are in a population with already particularly low privacy expectations with a greater than

\textsuperscript{143} See Nancy J. Flatt-Moore, \textit{Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools’ Student Drug Testing Policies after Vernonia}, 1998 BYU Educ. & L. J. 239, 254 (analyzing school policy, especially in Indiana schools following the vague boundaries of \textit{Vernonia}).

\textsuperscript{144} See \textit{Todd}, 133 F.3d at 986 (quoting District court’s opinion, \textit{Todd v. Rush County Sch.}, 983 F. Supp. 799, 803 (S.D. Ind. 1997)).
normal risk of harm to themselves due to their continued illegal behavior, urinalysis has no place in our schools. School should be an environment where students are taught the value of their Constitutional rights and encouraged to be constructive in their behavior. Faculty and coaches observe the disturbances brought about by substance abuse in the cases discussed in this Note. This indicates that the problem can be dealt with to a great extent on the basis of individualized suspicion. If our schools have come to such a point that they cannot instill those values and take control of the problematic students through individualized suspicion and normal enforcement means, despite the declining drug usage rates, then there is a much larger problem that we should address as a nation involving our parents' responsibilities in raising their children.