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## Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities

James M. McCray

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# ***Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities***

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## I. INTRODUCTION

The United States makes clear its reverence for education by demanding that its children attend school.<sup>1</sup> What is less clear, however, is the nation's dedication to each student's constitutional rights. From the earliest days of the common law, public school students have lacked fundamental rights, even the right of liberty in its narrowest sense.<sup>2</sup> Although public students retain certain constitutional rights,<sup>3</sup> the public school system maintains an elevated power over its students.<sup>4</sup> This power is like that of a parent,<sup>5</sup> including the duty to "inculcate the habits and manners of civility" into its students.<sup>6</sup> The public school's control over the student is "custodial" and "tutelary,"

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1. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 152 tbl.230 (115th ed. 1995) (noting that in 1990, over forty-one million students were enrolled in America's public schools; by 2002, the number is estimated to reach over forty-nine million).

2. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting that minors lack the most fundamental rights of self-determination, including the basic right to come and go at will).

3. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that students do not "shed their constitutional rights . . . at the schoolhouse gate").

4. See generally *Acton*, 515 U.S. at 655-56 (recognizing a public school's inherent power to control children within its halls, but not to such a degree that a constitutional duty to protect arises).

5. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (stating "school authorities ac[t] in loco parentis"). The school acts *in loco parentis*—in the place of a parent—when parents delegate part of their parental authority to the school during the school hours. See *Acton*, 515 U.S. at 655. William Blackstone described the *in loco parentis* power as when the school "has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 WILLIAM BLACKSTONE, COMMENTARIES \*453.

6. *Fraser*, 478 U.S. at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

7. See *Acton*, 515 U.S. at 655 (discussing a school's enhanced power over the student).

permitting a school to flex its authority over students within its halls, even when the state could not control free adults.<sup>8</sup>

Schools possess a legitimate interest in maintaining a conducive learning environment, arguably justifying this elevated control over students.<sup>9</sup> In addition, the ever-increasing presence of drug use within public schools poses a significant threat to the school's educational serenity.<sup>10</sup> The Supreme Court has recognized that deterring students from using drugs is not only important, but compelling,<sup>11</sup> as the deleterious and adverse consequences of drug use climax during

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8. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (stating "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").

9. See *id.* at 340 (noting that courts must strike a balance between the student's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment where learning can take place).

10. See, e.g., *Acton*, 515 U.S. at 648-49 (noting that in the Vernonia School District "teachers and administrators observed a sharp increase in drug use," coupled with students boasting that the school could do nothing about the students' involvement and use of drugs, a marked rise in disciplinary problems, and reports of students becoming increasingly rude during class and common outbursts of profane language). It is well documented that drug use in America's schools is a pervasive problem. Researchers continually report statistics demonstrating that student drug use is increasing. See *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 375 n.12 (6th Cir. 1998) (stating that "[t]he prevalence of drug use among our nation's youth is beyond dispute"); see also Daniel Klaidman, *The Politics of Drugs: Back to War*, *Newsweek*, Aug. 26, 1996, at 57 (reporting a recent federal study showing that drug use by children ages twelve to seventeen had increased 80% since 1992). Courts have further recognized the increase in student drug use. One court explained

[a]ccording to the DEA, in 1996, 18% of eighth graders used marijuana (up 6% in 1991), and 34% of tenth graders used marijuana (up from 15% in 1992). In that same year, one in four tenth-graders and twelfth-graders reported using drugs in the previous 30 days; and fifteen percent of eighth-graders reported using drugs in the previous 30 days.

*Knox County*, 158 F.3d at 375 n.12. According to the FBI, there were over 60,000 juvenile arrests for possession in 1994. See *id.* Further, because of drugs' pervasiveness within the school system, schools are continually stepping up drug testing programs. See Nancy J. Flatt-Moore, Comment & Note, *Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies After Vernonia*, 1998 BYU EDUC. & L.J. 239, 240 n.7 (noting that one researcher found "at least 16 schools in 11 states were using some form of drug testing on their students"); see also *infra* note 12, which describes drugs' deleterious effects on students' bodies.

11. See *Acton*, 515 U.S. at 661. The Court noted that deterring drug use by school children was equally important to enforcing laws that prevent drug importation, see *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (holding suspicionless drug testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms was reasonable under the Fourth Amendment), or the governmental concern of deterring engineers and trainmen from using drugs, see *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989) (holding the Federal Railroad Administration's adopted regulations requiring mandatory drug and alcohol testing without a requirement of a warrant or a reasonable suspicion that any individual employee may be impaired was a compelling government interest that outweighed the employee's privacy concerns, withstanding a Fourth Amendment challenge).

the school years.<sup>12</sup> Because of the increasing presence of drugs and the consequences of drug use, America's public schools must continually seek solutions to combat students' drug use.

Using *Acton* as the leading paradigm, coupled with the Seventh Circuit Court of Appeals' persuasive reasoning in its Fourth Amendment jurisprudence, illustrated in *Todd v. Rush County Schools*, this Note argues that a logical extension of precedent necessitates the conclusion that public schools may constitutionally require students who voluntarily enroll in extracurricular activities to undergo random, suspicionless drug testing. Part II surveys the history of drug testing, including its Fourth Amendment implications. Part III then analyzes lower court decisions that have addressed the constitutionality of testing public school students involved in extracurricular activities for drugs. Finally, Part IV proposes a legal framework explaining why courts should allow schools to subject their students to drug testing, notwithstanding potential moral and ethical problems. As America's school drug problem surges, courts must recognize the challenge of maintaining a conducive learning environment—the basic educational mission of schools—and balance this with students' fundamental interest in privacy.

## II. FOURTH AMENDMENT JURISPRUDENCE ON THE SUBJECT OF DRUG TESTING IN SCHOOLS

The lower federal courts have applied the Supreme Court's drug testing jurisprudence to school's testing of student athletes. The result has been a split in authority. The Court's response—*Vernonia School District 47J v. Acton*—has created a theoretical foundation for

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12. See *Acton*, 515 U.S. at 661. The Court stated that “[m]aturing nervous systems are more critically impaired by intoxicants than mature ones are; ‘childhood losses in learning are lifelong and profound’; [sic] ‘children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.’” *Id.* (quoting Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 PHI DELTA KAPPAN 310, 314 (1990)); see also Todd W. Estroff et al., *Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects*, 28 CLINICAL PEDIATRICS 550, 555 (1989) (concluding that the data examined in the paper “suggest a direct causal link between the progression and severity of cocaine abuse and the progression and severity of addictive psychiatric, and psychobehavioral systems among the adolescents”); Kandel, et al., *The Consequences in Young Adulthood of Adolescent Drug Involvement*, 43 ARCHIVES of GEN. PSYCHIATRY 746, 753 (1986) (following 1004 young men and women from ages 15 and 16 to age 25 and observing that prior use predicts future use and that “[u]se of a drug initiates a cascade of events and consequences that is amplified by the regenerative interaction of initial drug use and its subsequent use”). Further, the Court noted that drug use affects not only the students, but the entire educational process, disrupting the learning environment and the faculty's ability to teach. See *Acton*, 515 U.S. at 662.

extending the constitutionality of student drug testing beyond student athletes to all students participating in extracurricular activities.

Using the Supreme Court's 1995 landmark *Acton* decision,<sup>13</sup> which held that schools may conduct random, suspicionless drug testing of high school athletes,<sup>14</sup> school districts have sought to extend testing to all students as a prerequisite for participating in extracurricular activities.<sup>15</sup> Rationalizing that protecting students' health is a primary concern,<sup>16</sup> schools justify imposing random, suspicionless urinalysis testing on all students enrolling in extracurricular activities ranging from athletics<sup>17</sup> to the library club.<sup>18</sup> These school districts have barred students who do not consent to testing from participation in specified activities.<sup>19</sup> Fourth Amendment issues arise, however, concerning the school's imposition of mandatory testing programs upon the individual student.<sup>20</sup> Although the Supreme Court held that random, suspicionless drug testing of public high school athletes with-

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13. Since *Acton's* inception, a slew of commentators and lower courts cited, followed, and criticized the decision and its language. Many criticize the opinion for substantially reducing a student's basic individual rights. *Acton* caused shock waves to emanate throughout the legal world. See, e.g., *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1105 n.18 (Colo. 1998) (remarking that since *Acton* was decided, approximately 100 opinions have cited the case, and commentators' views about *Acton* have saturated law reviews and other legal periodicals).

14. *Acton*, 515 U.S. at 664-65 (concluding that the Vernonia School District's policy was reasonable and therefore constitutional).

15. See, e.g., *Todd v. Rush County Sch.*, 133 F.3d 984, 984 (7th Cir. 1998), *reh'g denied en banc*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 68 (1998) (noting that Rush County School Board adopted a program prohibiting any high school student from participating in extracurricular activities or driving to and from school until the student and parent or guardian consented to a random, unannounced, suspicionless urinalysis test for drugs, alcohol or tobacco); *Lopez*, 963 P.2d at 1096-97 (noting that school district promulgated mandatory, suspicionless urinalysis drug testing of all sixth through twelfth grade students seeking to participate in extracurricular activities).

16. See *Todd*, 133 F.3d at 986 (noting that "[t]he linchpin of this drug testing program is to protect the health of the students involved").

17. See *Acton*, 515 U.S. at 664-65 (sustaining random, suspicionless urinalysis testing of high school student-athletes).

18. See *Todd*, 133 F.3d at 984-86 (sustaining random, unannounced urinalysis examinations of students enrolling in extracurricular activities, including athletic teams, Student Council, Foreign Language Clubs, Fellowship of Christian Athletes, Future Farmers of America ("FFA") Officers, and the Library Club).

19. See, e.g., *id.* at 984 (noting that the school board's approved program prohibited any high school student from participating in any extracurricular activities or driving to and from school unless the student and parent or guardian consented to the drug, alcohol, and tobacco testing).

20. The Fourth Amendment to the United States Constitution provides that the federal government shall not violate "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. Further, the Fourteenth Amendment extends the Fourth Amendment guarantees against unreasonable searches and seizures of the individual's person to state actors. See *Elkins v. United States*, 364 U.S. 206, 213 (1960); see also *infra* note 32. Consequently, because of the state actor requirement, this Note will only address drug testing in public schools.

stands Fourth Amendment scrutiny,<sup>21</sup> the Court has not addressed whether the *Acton* rationale may extend to public school students voluntarily seeking to participate in any extracurricular activity.<sup>22</sup>

Lower courts are nevertheless beginning to tackle the issue. This Note addresses whether a tested student who wishes to participate in extracurricular activities may sustain a Fourth Amendment challenge against the school for violating his or her right to privacy and right to freedom from unreasonable searches and seizures.

#### A. *Laying the Groundwork—Supreme Court Fourth Amendment Jurisprudence*

Since 1985, the Supreme Court has recognized that public school students maintain a diminished expectation of privacy within the school system.<sup>23</sup> Abandoning the warrant and probable cause requirements usually associated with Fourth Amendment jurisprudence, the Court traditionally applies a "special needs" rationale<sup>24</sup> to analyze whether searches in public schools meet the Fourth Amendment "reasonableness" test.<sup>25</sup> The Court has continually recognized that mandatory, suspicionless drug testing is "reasonable" in certain instances,<sup>26</sup> with the Court setting forth landmark precedent in its 1995 *Acton* decision.<sup>27</sup>

The Seventh Circuit was the first federal appellate court to extend *Acton* and its progeny to uphold mandatory suspicionless testing of students voluntarily participating in extracurricular activities.<sup>28</sup> Using the Supreme Court's precedent established in *Acton* and its progeny, this Note will demonstrate that *Acton* can and should be logically extended to students voluntarily participating in all extracurricular activities.

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

22. See *Acton*, 515 U.S. at 666 (Ginsburg, J., concurring) ("I comprehend the Court's opinion as reserving the question whether the 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.") (emphasis added).

23. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (holding that school officials may search students without strictly adhering to the probable cause standard); see also *infra* note 43.

24. The Court has applied a "special needs" analysis since 1987. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (providing that where circumstances make the Fourth Amendment's probable cause and warrant requirements impracticable, certain "special needs" may justify a search).

25. See *Acton*, 515 U.S. at 653; see also discussion *infra* Part II.B.

26. See *id.* at 653-54 (reviewing different contexts where the Court upheld such searches).

27. See *id.* at 665 (holding that random, suspicionless drug testing on high school athletes is "reasonable" and therefore constitutional).

28. See discussion *infra* Part III.A.

1. *New Jersey v. T.L.O.*—Acknowledging that Suspicionless Searches of Students May be Reasonable

The Supreme Court's 1985 decision in *New Jersey v. T.L.O.* marks the Court's first major step to legitimize school searches of students.<sup>29</sup> Reviewing whether the Fourth Amendment permits school officials to search students' belongings<sup>30</sup> based upon reasonable suspicion, the Court set forth the initial groundwork necessary to sustain drug testing of students in extracurricular activities. Holding that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to public school officials,<sup>31</sup> the Court reaffirmed the long-standing notion that the federal Constitution's protection of individual rights applies to public school students.<sup>32</sup> The Court considers public school officials as state agents for the purpose of Fourth Amendment analysis, because officials assume a tutelary role over students and

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29. The Court noted that although it originally granted certiorari to determine the exclusionary rule's appropriateness concerning juvenile court proceedings dealing with unlawful school searches, rather than actual law enforcement, the Court decided to expand its review to the broader question of the potential scope of school authority in the context of the Fourth Amendment. *See T.L.O.*, 469 U.S. at 332-33 n.2 (noting that the numerous lower federal and state courts have attempted to resolve the tension between the school's need to maintain a conducive learning environment and the rights of the individual student).

30. After discovering that a student and her friend were smoking cigarettes in the school's bathroom, violating pre-established school policy, the teacher had the students meet with the Assistant Vice Principal, who questioned them about their misconduct. *See id.* at 328. When the student denied the violation, the official demanded to search her purse, finding cigarettes and cigarette rolling papers often used for smoking marijuana. *See id.* A more thorough search produced marijuana, a smoking pipe, associated plastic bags, a substantial amount of money, a list of students owing money, and two letters indicating marijuana dealership. *See id.* Subsequently, the State of New Jersey filed delinquency charges in Juvenile Court against the student, and the court found the search reasonable. *See id.* at 328-29. The Appellate Division of the New Jersey Superior Court agreed that no Fourth Amendment violation occurred when the officials searched the student's purse, but the New Jersey Supreme Court reversed and ordered the evidence to be suppressed, concluding the search unreasonable. *See id.* at 329-31. The United States Supreme Court granted the State of New Jersey's petition for certiorari. *See id.* at 331 (citing 464 U.S. 991 (1983)).

31. *See id.* at 334.

32. *See id.* The Court stated that "[i]t is now beyond dispute that 'the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.'" *Id.* (citing *Elkins v. United States*, 364 U.S. 206, 213 (1960)); *accord Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949). The Court found equally indisputable that the Fourteenth Amendment prohibits public school officials from encroaching on those rights of the individual student. *See T.L.O.*, 469 U.S. at 334 (refusing to except boards of education from Fourth Amendment scrutiny); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (admonishing school boards and officials that educating the young for citizenship entails "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").



execute publicly mandated educational and disciplinary policies as representatives of the state.<sup>33</sup>

The *T.L.O.* Court logically extended the Fourth Amendment's command of reasonableness as the threshold test to the school context.<sup>34</sup> The balancing test necessary to determine reasonableness weighs the individual student's legitimate expectations of privacy and personal security against the public school's need to maintain a conducive learning environment free from disorderly conduct, misbehavior, and interruptions by fellow students.<sup>35</sup> Although the student maintains a certain legitimate level of privacy,<sup>36</sup> the school must still closely supervise its students and enforce rules necessary to maintain an adequate learning environment, a requirement of something less than Fourth Amendment absolutism for schools and their officials.<sup>37</sup> Consequently, the *T.L.O.* Court excused school searches from the usual warrant requirement necessitated by the Fourth Amendment.<sup>38</sup>

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33. See *supra* note 32. Consequently, although often acting as surrogate parents, public school officials cannot assert parents' immunity to escape Fourth Amendment scrutiny. See *T.L.O.*, 469 U.S. at 336-37.

34. *Id.* at 337 (noting that reasonableness is determined by circumstances surrounding the search that takes place).

35. See *id.* The Court extended *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967) (allowing administrative building inspections), to the school context, developing the necessary balancing test between the determined specific class to be searched with the government's purported compelling reason. See *id.* at 337.

36. See *T.L.O.*, 469 U.S. at 338 (noting that to receive Fourth Amendment protection, society must be prepared to recognize the individual's expectation of privacy as legitimate).

37. See *id.* at 339-40 (noting that the state's interest in education necessitates a less rigid rule for searches in the school setting than normally applies under Fourth Amendment analysis).

38. *Id.* at 340. The Fourteenth Amendment incorporates the Fourth Amendment, which expressly requires either a reasonable warrantless search or a search pursuant to a warrant based upon probable cause, see U.S. CONST. amend. IV., against public schools, see *Elkins v. United States*, 364 U.S. 206, 213 (1960). However, when the burden to obtain the warrant would unduly frustrate the governmental purpose behind the search, the Court will dispense with the warrant requirement. See *Camara*, 387 U.S. at 532-33. In *T.L.O.*, the Court found that it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools," to require the school teacher to first obtain a warrant before searching a student suspected of violating school rules. See *T.L.O.*, 469 U.S. at 340 (expressly holding no warrant needed by teacher to search student). In addition, the Fourth Amendment requires a showing of probable cause before searching the individual. See U.S. CONST. amend. IV; see also *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Sibron v. New York*, 392 U.S. 40, 62-66 (1968). Such a showing of "probable cause" is usually necessary to meet the Fourth Amendment's requirement that all searches be "reasonable." See *T.L.O.*, 469 U.S. at 340. Yet, the state actor may not always have to demonstrate "probable cause." Based on some type of individualized suspicion that the person committed an infraction to justify a search of his or her person, the Court has repeatedly "recognized the legality of searches and seizures based on suspicions that, although 'reasonable,' do not rise to the level of probable cause." *Id.* at 340-41 (citing examples of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968)). Because of "the substantial need of teachers and administrators for

After excepting the warrant requirement, the Court further abandoned the probable cause requirement.<sup>39</sup> Joining the host of courts that held a school's mission to maintain its learning environment outweighs the Constitution's requirement of probable cause during searches,<sup>40</sup> *T.L.O.* suggested that individualized suspicion soon will no longer be needed when searching students.<sup>41</sup> The Court expressly stated that the legality of searching a student in a public school depends only on reasonableness, taking into account all of the surrounding circumstances.<sup>42</sup>

In determining "reasonableness," the Court conducted a two-fold inquiry: (1) whether school officials justified the search at its inception, and (2) whether the search was reasonably related in scope to the circumstances that justified the interference.<sup>43</sup> In so doing, the school official's own reason and common sense serve to regulate his conduct, allowing the school to police its halls to ensure safety, without unduly frustrating its efforts by requiring a warrant and probable cause when a daily disciplinary problem arises.<sup>44</sup> Yet, the reasonableness standard ensures individual student privacy by mandating that the school may intrude into the student's interests only as necessary

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freedom to maintain order in the schools" the *T.L.O.* Court held that, in addition to not requiring a warrant, the school teacher or administrator does not need to demonstrate "probable cause" to search a student for potential rule infractions either. *T.L.O.*, 469 U.S. at 341. Instead, the school official may search the student by only demonstrating the "reasonableness" of the search. *See id.*

39. *See T.L.O.*, 469 U.S. at 341; *see also supra* note 38.

40. *See id.* at 340-41 (reviewing precedent where probable cause was not needed and noting that a "school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search"); *see also* cases cited *supra* note 38. The Court noted that maintaining discipline in school entails restraining students from "assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities." *Id.* at 342 n.9.

41. The Court later abandoned the need for individualized suspicion in the drug testing-urinalysis context and allowed for random, suspicionless testing. *See infra* notes 56-59.

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

43. *See id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Court then stated that a school satisfies the inquiry's first part by having a reasonable belief that a search of the student will produce evidence of a violation of the law or the school rules. *See T.L.O.*, 469 U.S. at 341-42. The inquiry's second part will be satisfied as long as the search procedure is reasonably related to the search's objectives, and is not excessively intrusive in light of the nature of the suspected offense coupled with the age and sex of the student searched. *See id.* at 342.

44. *See id.* at 341-43:

Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

to preserve the learning environment.<sup>45</sup> In removing the traditional requirements of individualized suspicion, probable cause, and a warrant, and inserting in their place a balancing test and reasonableness requirement, *T.L.O.* lays the groundwork that would justify a logical extension of Fourth Amendment jurisprudence to permissibly allow the testing of students who voluntarily enroll in extracurricular activities.

## 2. *Skinner v. Railroad Labor Executives' Ass'n*—Extending Fourth Amendment Reasonableness to Drug Testing

Four years after *T.L.O.* provided a mechanism for extending Fourth Amendment jurisprudence to the school setting, the Supreme Court extended the reasonableness test to mandatory drug testing within the employment context.<sup>46</sup> When railway labor organizations sought to enjoin the Federal Railroad Administration from requiring workers to undergo mandatory drug and alcohol testing,<sup>47</sup> the Supreme Court held in *Skinner v. Railway Labor Executives' Association*<sup>48</sup> that even though breath, blood, and urine testing of the em-

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45. *See id.* at 343. Justice Powell, joined by Justice O'Connor, provided further support in stating that public school students' rights are not coextensive with adults who are outside the school's walls. *See id.* at 348 (Powell, J., concurring). Justice Powell specifically noted that

In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally. They spend the school hours in close association with each other, both in the classroom and during recreation periods.

The students in a particular class often know each other and their teachers quite well.

*Id.* Further, Powell stated: "It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally." *Id.*

46. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633-34 (1989) (holding that the Fourth Amendment is applicable to mandatory drug and alcohol testing by government entities, and that such testing in the present case was reasonable).

47. The Federal Railroad Administration ("FRA") enacted mandatory blood and urine tests of employees involved in certain train accidents, pursuant to its authority under the Federal Railroad Safety Act of 1970, authorizing the promulgation of rules and regulations necessary to maintain railroad safety. *See id.* at 606 (citing the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431(a) (repealed 1994)). Further, the FRA promulgated regulations authorizing railroads to administer breath and urine testing to specified employees when they violated certain safety rules. *See Skinner*, 489 U.S. at 606.

48. Concerned about alcohol and drug abuse among railroad employees and the railroad industry's staguant efforts to curb the problem, the FRA sought mandatory alcohol and drug testing to ensure railroad safety. *See Skinner*, 489 U.S. at 606-07. Finding that a significant number of train accidents involved alcohol or drug use, the FRA imposed the blood and urine testing program to detect the ongoing abuse. *See id.* at 607-12. The Railway Labor Executives' Association, among other labor organizations, sought to enjoin the drug testing rules. *See id.* at 612. Although the District Court noted a valid interest in the integrity of the employees' bodies, it held that the governmental interest in the safety of its employees and the general public outweighed the employees' interests. *See id.* Yet, the Court of Appeals for the Ninth Circuit divided on the issue, reversing the District Court's holding in the end. *See id.* The Court first

ployees is intrusive, the government's interest in safety outweighed the employees' individual privacy interests.<sup>49</sup>

The *Skinner* Court reaffirmed the longstanding principle<sup>50</sup> that an intrusion beneath an individual's skin, coupled with subsequent chemical analysis of any samples obtained, is an invasion of the individual's privacy, and thus a search implicating the Fourth Amendment.<sup>51</sup> The possibility that breath, blood, and urine testing may reveal numerous extremely private medical facts, including epilepsy, pregnancy, and diabetes, coupled with the possibility of the tested subject being visually or aurally monitored while he or she produces the sample, triggers the Fourth Amendment search analysis.<sup>52</sup> How-

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held that the breath, blood, and urine testing implicated the Fourth Amendment. *See id.* Although circumstances surrounding the testing was exigent, the Ninth Circuit held that individualized suspicion of particular employees was necessary before testing could satisfy the reasonableness requirement. *See id.* at 612-13. The public interest in blanket, suspicionless testing of employees was not sufficient to outweigh the employees' individual privacy interests. *See id.* The Supreme Court granted certiorari, 486 U.S. 1042 (1988), to examine the Fourth Amendment question. *See Skinner*, 489 U.S. at 613.

49. *See Skinner*, 489 U.S. at 634.

50. *Id.* at 616 ("We have long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search."); *see also* *Winston v. Lee*, 470 U.S. 753, 760 (1985) (reviewing *Schmerber* and noting the "intrusion perhaps implicated *Schmerber's* most personal and deep-rooted expectations of privacy"); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) ("Compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.").

51. *See Skinner*, 489 U.S. at 616; *cf. Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (noting important Fourth Amendment difference between examining objects in plain view and exposing concealed objects). The Court also concluded that breath tests are as intrusive as blood and urine tests because breath-testing procedures, as described in the instant case, require in-depth breath analysis known as "deep-lung" breath for the subsequent chemical analysis. *See Skinner*, 489 U.S. at 616-17. Consequently, the possibility of bodily integrity being compromised arises as a significant issue that needs to be considered as a search in conjunction with blood and urine testing. *See id.* at 617.

52. *See Skinner*, 489 U.S. at 617. The Court based its conclusion partially on the persuasive language derived from the Court of Appeals for the Fifth Circuit when it stated:

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

*National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987); *see also Skinner*, 489 U.S. at 646-47 (Marshall, J., dissenting) (remarking that the majority's characterizing of the individual's privacy interests being implicated by urine collection as 'minimal,' "is nothing short of startling"); *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1312 (7th Cir. 1988) ("There can be little doubt that a person engaging in the act of urination possesses a reasonable expectation of privacy as to that act, and as to the urine which is excreted."); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1543 (6th Cir. 1988) ("There are few other times where individuals insist as strongly and universally that they be let alone to act in private."); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) (explaining "[urine] . . . is normally discharged and disposed of under circumstances that merit protection from arbitrary interference"); Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968) (noting that

ever, such testing may withstand Fourth Amendment scrutiny if the governmental actor establishes reasonableness.<sup>53</sup> Nevertheless, the *Skinner* Court approved the *T.L.O.* rationale of excusing the warrant and probable cause requirements,<sup>54</sup> finding that the government's interest in ensuring railroad safety is much like its interest in school safety, whereby "special needs" may justify departing from traditional Fourth Amendment scrutiny.<sup>55</sup> The "special needs" rationale is a categorical exception<sup>56</sup> to the Fourth Amendment's traditional strict requirements, a rationale that extends to constructs other than *T.L.O.* and *Skinner*.<sup>57</sup>

Abandoning the warrant<sup>58</sup> and probable-cause<sup>59</sup> requirements under the rationale that they only impede and frustrate government's

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"in 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"; *cf.* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (analyzing further the possibility of blood and urine sample obtainment constituting a "seizure" under the Fourth Amendment)

53. *See Skinner*, 489 U.S. at 619 (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber*, 384 U.S. at 768). Courts use the nature of the search and its surrounding circumstances to analyze reasonableness. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). The balancing test of weighing the intrusion on the individual with the government actor's interests is the method courts use to determine reasonableness. *See Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

54. *Skinner*, 489 U.S. at 619; *see also Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (reviewing cases in which the Court permitted exceptions to the warrant and the probable cause requirement).

55. *See Skinner*, 489 U.S. at 620.

56. Arguably, this rationale constitutes a "categorical exception" to the Fourth Amendment, as it excuses the necessary warrant and probable-cause requirements, traditional mandates of the Fourth Amendment. *See generally id.* at 619 (stating exceptions to this rule); *Griffin*, 483 U.S. at 873-74 (noting justifications for straying from the warrant and probable-cause requirement).

57. *Skinner*, 489 U.S. at 619 (When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.); *see also infra* Part II.A.3 (discussing United States Customs service workers).

58. *See Skinner*, 489 U.S. at 623-24. The court rationalized that the railway supervisors, like the school officials in *T.L.O.*, "are not in the business of investigating violations of criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Id.* Consequently, the warrant requirement would significantly hinder and frustrate the Government's objectives of ensuring safety to the public and the activity's participants (e.g. school children in *T.L.O.* and employees in *Skinner*). *See id.*

59. *See id.* at 624 (abandoning the traditional requirement of individualized suspicion and noting that the requirement is "not a constitutional floor"). As long as the intrusion upon the individual's privacy is minimal, the fact that the employee already subjects himself to certain regulations and rules in the employment context justifies the abandoning of the probable cause requirement, as he lacks a certain amount of freedom to come and go as he pleases. *See id.* at 624-25. Interfering with the railroad employee's freedom by subjecting him to a urine test does

safety objectives, the *Skinner* Court further rationalized abrogating Fourth Amendment protection by stating that employees cannot expect the same level of privacy when participating in pervasively regulated industries.<sup>60</sup> The *Skinner* Court also noted that the government needs to conduct drug tests to maintain a healthy and safe environment for the railroad employees as well as the public they serve.<sup>61</sup> Consequently, *Skinner* stands as a constitutional justification for allowing mandatory, suspicionless drug testing when public health and safety concerns are paramount to privacy.<sup>62</sup>

### 3. *National Treasury Employees v. Von Raab*—Affirming Reasonableness in Other Contexts

The same day the Supreme Court handed down the landmark *Skinner* decision, the Court extended the “special needs” rationale to allow the suspicionless drug testing of employees applying for promotion to positions involving drug interdiction or the carrying of firearms in *National Treasury Employees Union v. Von Raab*.<sup>63</sup> Using *Skinner*’s

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not implicate serious intrusions upon the individual’s privacy. *See id.* Consequently, by analogy, as school children are subjected to the mandates and restrictions upon their freedom to move during normal school hours, they lack the necessary privacy interests as well. *See* discussion *infra* Part IV.A. Furthermore, a logical extension of this rationale encompasses students who voluntarily enroll in extracurricular activities, as the student subjects himself to the rules and regulations of the particular activity and agrees to attend meetings and activities, thus restricting his freedom to move and placing the extracurricular student within the same category as outlined here. *See* discussion *infra* Part IV.B.

60. *Skinner*, 489 U.S. at 627.

61. *Id.* at 633 (“The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct . . . [and] . . . it may be necessary . . . to examine the body or its fluids to accomplish the regulatory purpose.”).

62. *Id.* at 634.

63. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In *Von Raab*, the United States Customs Service implemented a drug testing program in May 1986. *See id.* at 659-60. The Service required testing for employees seeking employment in positions directly involving drug interdiction or enforcement of related laws, activities requiring the employee to carry a firearm, or activities requiring the handling of classified materials. *See id.* at 660-61. Along with having to qualify for the position through the Customs testing program, each prospective employee had to successfully pass a drug screening. *See id.* at 661. Any employee testing positive without adequate explanation faced possible dismissal from the Service. *See id.* at 663. Consequently, a union of federal employees and a union official sought to enjoin the Service’s drug testing program, on behalf of current Customs Service employees seeking those positions. *See id.* The District Court acknowledged an important governmental need in ensuring a drug-free work place and work force, yet concluded that the testing program violated the Fourth Amendment, as being overly intrusive without probable cause or reasonable suspicion. *See id.* The United States Court of Appeals for the Fifth Circuit, however, determined that the testing program was reasonable, noting that the search’s intrusiveness was “minimal,” and that the Government had a substantial interest in ensuring drug-free employees because of the nature of the jobs that the program covered. *See id.* at 663-64. Specifically, the Fifth Circuit found that

rationale,<sup>64</sup> the Court reaffirmed the abandonment of the warrant<sup>65</sup> and probable-cause requirements,<sup>66</sup> finding that the government's safety interests outweighed individual privacy interests.<sup>67</sup> Thus, the Court logically extended the *Skinner* rationale to a new context by allowing mandatory, suspicionless drug testing to ensure safe federal law enforcement.<sup>68</sup> By 1989, the Court had set forth two major pieces of a new Fourth Amendment paradigm: (1) allowing random, suspicionless searches within the school context, and (2) allowing random, suspicionless drug testing of individuals within the employment context, with the only limitation on testing being the evolving Fourth Amendment reasonableness test.<sup>69</sup>

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[i]llicit drug users . . . are susceptible to bribery and blackmail, may be tempted to divert for their own use portions of any drug shipments they interdict, and may, if required to carry firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use.'

*Id.* at 664. The Supreme Court granted certiorari, 484 U.S. 903 (1988), and affirmed the Fifth Circuit's judgment in part. See *Von Raab*, 489 U.S. at 664-66.

64. See *Von Raab*, 489 U.S. at 665 (reiterating *Skinner*'s rationale).

65. See *id.* at 667 (noting that "a warrant would provide little or nothing in the way of additional protection of personal privacy").

66. See *id.* at 668 (stating that "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions").

67. See *id.* at 668, 670 (noting that "the Government has a compelling interest to ensure that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment"). The Court equated the importance of the Government's interest with the state's interest in conducting random suspicionless searches on incoming travelers, a longstanding legitimate function of the United States. See *id.*; see also *Carroll v. United States*, 267 U.S. 132, 154 (1925) (noting that the importance of national self-protection allows the country to require travelers to identify themselves and their belongings).

68. See *Von Raab*, 489 U.S. at 677, 679 (holding that suspicionless testing of Customs Service employees applying for promotion to positions involving drug interdiction or the carrying of firearms is reasonable under the Fourth Amendment).

69. It is important to note that in 1997, the Supreme Court struck down Georgia's requirement that candidates for state office pass drug tests, holding that the suspicionless testing program was not "reasonable," as the risk to public safety was not substantial and real. See *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (noting that "if a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as 'special' wasted many words in entirely unnecessary, perhaps even misleading, elaborations"). However, for purposes of this analysis, the testing struck down in *Chandler* is inapplicable because it was completely outside the school context, even though the Court relied on *Acton* for much of its analysis. Instead, *Chandler* involved candidates running for public office, where a Georgia statute required drug testing before the candidate may run. See *id.* at 309. *Chandler* is therefore factually dissimilar, as public candidates are adults exercising a voluntary decision under a state statute not within the confined school environment involving non-adults, the setting of this Note.

#### 4. Lower Court Jurisprudence—Applying the Court's Paradigm to Different Contexts

As the Supreme Court struggled to define what “special needs” justify a departure from the Fourth Amendment’s traditional warrant and probable cause requirements, lower courts addressed the same issue. Two major lower federal court decisions influenced the Court’s public school drug testing jurisprudence. Upholding one testing program for athletes<sup>70</sup> and striking down another for all seventh through twelfth grade students voluntarily enrolling in extracurricular activities,<sup>71</sup> these somewhat antithetical decisions would be the impetus for resolutions of the constitutionality of random, suspicionless urinalysis testing for public school students.<sup>72</sup>

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70. See *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988).

71. See *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 760-61 (S.D. Tex. 1989), *aff'd* 930 F.2d 915 (5th Cir. 1991).

72. Other lower federal and state courts applied the Court’s paradigm to even more constructs than once imagined. See, e.g., *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361, 374-75 (6th Cir. 1998) (holding that school board’s mandatory, suspicionless drug and alcohol testing program was constitutional when administered to teachers and other officials in “safety-sensitive” positions); *DesRoches, II v. Caprio*, 156 F.3d 571, 578 (4th Cir. 1998) (concluding that the school principal’s proposed search of a student’s backpack was reasonable under the Fourth Amendment); *Solid Waste Dep’t Mechanics v. Albuquerque*, 156 F.3d 1068, 1074 (10th Cir. 1998) (holding that the city failed to assert a “special need” for its suspicionless drug testing of trash truck mechanics, and therefore the program failed the reasonableness test); *Aubrey v. School Bd. of Lafayette Parish*, 148 F.3d 559, 565 (5th Cir. 1998) (noting that school board’s interest in mandatory, suspicionless urinalysis of employed custodian outweighed custodian’s privacy interests due to elementary school employment context); *Wilcher v. Wilmington*, 139 F.3d 366, 378 (3rd Cir. 1998) (holding Wilmington’s drug testing policy requiring firefighters to produce urine samples did not violate the Fourth Amendment’s reasonableness test); *Pierce v. Smith*, 117 F.3d 866, 874-80 (5th Cir. 1997) (concluding “special needs” existed when state medical residency program required physician, whose status was a “student-employee” with diminished expectations of privacy, to undergo private urinalysis drug test subsequent to an alleged violation of hospital policy by slapping a disorderly patient); *O’Neill v. Louisiana*, 61 F. Supp. 2d 485, 487 (E.D. La. 1998) (granting plaintiff’s motion for preliminary injunction enjoining the implementation of the State of Louisiana’s mandatory drug testing of elected officials pursuant to state statute); *Gruenke v. Seip*, No. CIV.97-5454, 1998 WL 734700, at \*8 (E.D. Pa. Oct. 21, 1998) (declining to decide whether a school swim coach’s forcing of student to take pregnancy test violated student’s Fourth Amendment rights); *Brousseau v. Town of Westerly*, 11 F. Supp. 2d 177, 182-83 (D.R.I. 1998) (finding government’s interest in safety of students was compelling and urgent enough to justify warrantless pat-down search of sixth grade student when large knife was noted missing from the school cafeteria); *Ascolese v. Southeastern Penn. Transp. Auth.*, 925 F. Supp. 351, 358 (E.D. Pa. 1996) (holding that public transportation authority failed to demonstrate that special needs existed to excuse need for warrant for mandatory pregnancy testing); *Anable v. Ford*, 653 F. Supp. 22, 40 (W.D. Ark. 1985) (holding that the school’s policy requiring drug testing of any student who violated school drug and alcohol code was improper and unconstitutional); *Loder v. Glendale*, 927 P.2d 1200, 1234-35 (Cal. 1997) (holding city’s suspicionless drug testing of all current employees who were offered promotion was not reasonable under the Fourth Amendment, but that the city’s suspicionless drug testing of persons applying for and offered jobs was reasonable); *California v. Latasha*, 70



a. *Schaill v. Tippecanoe County School Corp.—The Seventh Circuit Sets the Stage*

The Seventh Circuit set the stage for future Supreme Court jurisprudence in the Fourth Amendment arena when it became the first federal appellate court to uphold random, suspicionless urinalysis testing of interscholastic athletes in *Schaill v. Tippecanoe County School Corporation*.<sup>73</sup> Based on nationwide drug abuse problems among high school students and possible drug use by athletes at one of its schools, Tippecanoe County School Corporation ("TSC") implemented a random urine testing program for all interscholastic athletes and cheerleaders in its school system.<sup>74</sup> If a student tested positive, the school informed the student's parents and allowed the student to clear his or her name by offering an innocent explanation for the positive result.<sup>75</sup> If, however, the student failed to explain the test result, the school suspended the student from participating in the athletic activity for part of the season.<sup>76</sup> Two students sought declaratory and injunctive relief from TSC's drug testing program, asserting that the program was both offensive and intrusive.<sup>77</sup>

The Seventh Circuit Court of Appeals extended the Supreme Court's *T.L.O.* rationale to the student drug testing context,<sup>78</sup> con-

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Cal. Rptr. 2d 886, 887 (Cal. Ct. App. 1998) (holding that random metal detector weapon searches of high school students did not violate the Fourth Amendment); *University of Colo. v. Derdeyn*, 863 P.2d 929, 935 (Colo. 1993) (holding university's random, suspicionless drug testing of student athletes was unconstitutional); *Florida v. J.A.*, 679 So. 2d 316, 319 (Fla. Dist. Ct. App. 1996) (finding that public school board's policy authorizing random, suspicionless weapons searches of public high school students was reasonable and constitutional); *Brennan v. Board of Trustees*, 691 So. 2d 324, 329 (La. Ct. App. 1997) (concluding that student-athletes had diminished expectation of privacy, that university's and NCAA's significant interests outweighed the student's, and that urine testing was constitutional); *Caruso v. Ward*, 530 N.E.2d 850, 855 (N.Y. 1988) (upholding random urinalysis of police officers volunteering for organized crime unit); *Wisconsin v. Angela D.B.*, 564 N.W.2d 682, 692 (Wis. 1997) (concluding that search of student's coat and person within office of school liaison officer was reasonable).

73. *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988).

74. *See id.* at 1310-11.

75. *See id.* at 1311.

76. *See id.*

77. *See id.*

78. *See id.* at 1311-12. In analyzing whether a search occurred, the court stated that the excretory function of urinating was not only considered highly private, but the method of urine disposal is also considered private because the individual does not knowingly avail it to the public. *See id.* (comparing the discharge of urine to trash disposal, the subject of the Court's holding in *California v. Greenwood*, 486 U.S. 35 (1988), where no legitimate expectation of privacy exists). Further, the removal and taking of scrapings under an individual's fingernails, pubic hair, breath samples, X-rays, or the compelling of urination all constitute potential Fourth Amendment searches. *See id.* at 1312 n.1 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (detention to compel bowel movement constitutes a Fourth Amendment

cluding that probable cause and warrants were not required for a random drug testing program.<sup>79</sup> The Seventh Circuit interpreted the Supreme Court's holding in *T.L.O.* quite broadly, remarking that school officials are not required to keep abreast of the ever-changing Fourth Amendment search doctrine, nor are they required to retain lawyers and use the court system when investigating a possible school violation.<sup>80</sup> Invoking the reasonableness test,<sup>81</sup> the Seventh Circuit observed that student athletes possess diminished expectations of privacy because of the "communal undress" inherent in athletic participation, along with extensive athletic regulations.<sup>82</sup> These characteristics distinguish athletics from other activities.<sup>83</sup>

In upholding the drug testing program, the court found particularly relevant the fact that students could have avoided the drug testing program entirely by choosing not to participate in athletics.<sup>84</sup> In addition, the Seventh Circuit noted that students who participate in athletics receive the benefit of enhanced prestige and status within the school community for their efforts.<sup>85</sup> Finally, the fact that drug usage exacerbates athletic injuries formed a health and safety ration-

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search); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (fingernail scrapings constitute a Fourth Amendment search); *Burnette v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986) (breath analysis constitutes a Fourth Amendment search); *United States v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984) (obtaining X-rays constitutes a Fourth Amendment search); *Bouse v. Bussey*, 573 F.2d 548, 550 (9th Cir. 1977) (obtaining pubic hair sample constitutes a Fourth Amendment search); *Thornburg v. Dora*, 677 F. Supp. 581, 586-87 (S.D. Ind. 1988) (breath analysis constitutes a Fourth Amendment search); *United States v. Allen*, 337 F. Supp. 1041, 1043 (E.D. Pa. 1972) (obtaining X-rays constitutes a Fourth Amendment search); *State v. Locke*, 418 A.2d 843, 846-47 (R.I. 1980) (breath analysis constitutes a Fourth Amendment search)).

79. *See Schail*, 864 F.2d at 1314 ("Unfortunately for the appellants, we believe that the Supreme Court has already struck the appropriate balance in the context of school searches, and has determined that the probable cause and warrant requirements do not apply.")

80. *See id.* at 1314-15 (noting why the Supreme Court's holding in *T.L.O.* is stated quite broadly).

81. *See id.* at 1315.

82. *See id.* at 1318-19. The court discussed the heightened level of regulation often associated with joining athletics, observing that athletics require a minimum GPA, residency requirements, eligibility requirements and that athletes subject themselves to additional training rules prohibiting smoking, drinking, and drug use on and off school premises. *See id.*

83. *See id.* at 1318-19. The court further noted that the random testing of athletes does not equate to testing non-athletes like those participating in the band and chess team. *See id.* at 1319. Further, the Seventh Circuit expressly distinguished its decision from blanket testing the entire school population, refusing to endorse the testing of all students. *See id.* at 1319 n.10; *cf. Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709, 713-14 (N.J. Super. Ct. Ch. Div. 1985) (striking down drug testing program for all students enrolled in school).

84. *See Schail*, 864 F.2d at 1319 & n.11. The court remarked that a greater intrusion would have occurred if all students were searched without any realistic option of opting out of the testing program. *See id.* at 1319 n.11.

85. *See id.* at 1320. The court further stated that "[b]ecause of their high visibility and leadership roles, it is not unreasonable to single out athletes and cheerleaders for special attention with respect to drug usage." *Id.*

ale to cap off the Seventh Circuit's reasoning why drug testing students voluntarily enrolling in athletic and cheerleading activities is reasonable.<sup>86</sup> Athlete drug testing thus did not violate the Fourth Amendment because of students' reduced expectation of privacy and the school's need to curb the drug problem among students.<sup>87</sup>

b. *Brooks v. East Chambers Consolidated Independent School District—Rejection, Distinguishment, or Anomaly?*

Another major federal court decision held unconstitutional urinalysis drug testing of students participating in extracurricular activities. After a small group of parents and students petitioned the school board to attempt to eliminate the drug and alcohol abuse of its students, the school board unanimously enacted a drug testing program requiring mandatory, random urinalysis testing of students participating in extracurricular activities.<sup>88</sup>

A senior who participated in the high school's Future Farmers of America ("FFA") program sought injunctive relief to prevent the school from precluding his participation in an upcoming FFA competition due to his refusal to undergo urinalysis.<sup>89</sup> Extending the Court's *Von Raab* and *T.L.O.* analytical construct to determine the constitutionality of the school district's drug testing program, the court observed that the program was an intrusive across-the-board search of a

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86. *See id.* at 1320-21.

87. *See id.* The Seventh Circuit relied on the Supreme Court's language in *T.L.O.*, observing that *T.L.O.* described the drug problem among students as "one of the particularly ugly forms' in which school disciplinary problems commonly arise in present-day America." *Id.* at 1320. Further, the court based its decision on the statistical evidence demonstrating that at the current time, over half the seniors in Indiana had at least tried marijuana. *See id.* One third used marijuana on a weekly basis, and in one of the school district's schools, members of the baseball team tested positively for drug use. *See id.* The *Schaill* decision served as the precursor to *Acton*, setting the stage for the evolving constitutionality of drug testing within the system by its language arguing that schools need enhanced control to maintain their learning environments; and with drugs exacerbating injuries to student athletes, the Seventh Circuit's decision to allow drug testing provided a justified rationale for the Court to look to when deciding *Acton*. *Cf. id.* at 1324 ("If schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment."). The logical extension of the *Schaill* court's amorphous rationale is the conclusion that schools may test students voluntarily enrolling in extracurricular activities, to ensure that leaders of extracurricular organizations do not serve as "leaders of the drug culture," but that they serve as positive role models for America's youth. *Cf. Veruonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995) (noting athletes were deemed leaders of the drug culture instead of positive role models).

88. *See Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 760-61 (S.D. Tex. 1989).

89. *See id.* at 760.

significant number of students.<sup>90</sup> While the *Schail* court observed that students who wish to continue drug use may simply forego the activity in question, the *Brooks* court decisively stated that the school could not justify searching students and ignoring their reasonable expectation of privacy based on students' ability to opt out of extracurricular activities.<sup>91</sup> The *Brooks* court concluded that *Schail's* reasoning was unpersuasive<sup>92</sup> and that the school system lacked a sufficiently compelling interest to implement random, suspicionless urinalysis on students who have no choice but to attend school.<sup>93</sup>

The district court found very little evidence of a demonstrated substance abuse problem within the school district.<sup>94</sup> Yet, the school enacted the program in reaction to public opinion that a general drug problem existed.<sup>95</sup> *Brooks* thus differs from the facts of *Schail*, where the school implemented the testing program because of an existing drug and alcohol problem.<sup>96</sup> However, the cases are similar because students in both athletics and extracurricular activities were considered privileged to participate and to attain leadership roles in those associated activities.<sup>97</sup> Consequently, like athletes, it is necessary for students who participate in extracurricular activities remain drug free.<sup>98</sup>

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90. *See id.* at 763-65 (stating that it is the "eagle eye examination of personal information of almost every child in the school district" that makes the search particularly intrusive).

91. *Compare id.* at 765 (noting that opting out of extracurricular activities to forgo drug testing is not adequate justification to intrude upon the student's Fourth Amendment rights) with *Shail*, 864 F.2d at 1319 n.11 (acknowledging as a relevant factor in determining reasonableness that students may simply choose to not participate in the school's athletic program).

92. *Brooks*, 730 F. Supp. at 765-66 (stating that "the law of the Seventh Circuit is different from and less protective of student rights than Fifth Circuit law").

93. *Id.* at 766.

94. *See id.* at 761.

95. *See id.*

96. *Compare Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1310 (7th Cir. 1988) (demonstrated drug abuse within the TSC athletic program), with *Brooks*, 730 F. Supp. at 761 (commenting that little to no major drug or alcohol problems existed among the students).

97. *See supra* note 96. The school expressly noted the leadership roles student athletics and extracurricular activities serve, providing positive examples to younger students through sportsmanship and good conduct. *See id.* Further, the school remarked that it is a privilege to participate in extracurricular activities. *See id.* As this Note argues and the school reinforced here, as well as the Seventh Circuit in *Schail*, it is not unreasonable for the school to require its students receiving these privileges to be and remain drug-free.

98. *See id.*; *see also* discussion *supra* note 97 and *infra* text at Part IV.

B. Vernonia School District 47J v. Acton—*Providing a Virtual Road Map*

The 1995 decision in *Vernonia School District 47J v. Acton*, upholding a public school district's mandatory, suspicionless drug testing of student athletes, is the touchstone of the Supreme Court's evolving Fourth Amendment school drug testing jurisprudence. In step with lower court decisions exploring the drug testing issue, the Court found that the public school's interest in maintaining a safe learning environment decisively outweighed the individual's privacy rights.<sup>99</sup>

In *Acton*, public school officials had noted widespread student drug use,<sup>100</sup> finding that student athletes were not only using drugs, but were leading the school's "drug culture."<sup>101</sup> Concerned about drug use causing exacerbation of athletic injuries, the school board approved a policy subjecting athletic participants to random urinalysis drug testing.<sup>102</sup> Testing positive resulted in a conference with the student's parents, and the student's option of either enrolling in a drug assistance program or being suspended from participating in athletics for the remainder of the season.<sup>103</sup> Subsequent offenses resulted in mandatory drug treatment, suspension from athletic events, and even suspension from the current and next two athletic seasons.<sup>104</sup>

After signing up to play football, James Acton refused to take a drug test,<sup>105</sup> and the school subsequently denied him the ability to play football.<sup>106</sup> Acton sought declaratory and injunctive relief to prevent the school from enforcing its random urinalysis testing.<sup>107</sup> Although the District Court dismissed Acton's claim, the Ninth Circuit held that

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99. *Acton* leaves open the question of whether it is constitutional to test students who voluntarily enroll in extracurricular activities. At least one lower court has extended *Acton* to reach this Note's conclusion—that public schools have the right to drug test extracurricular students. See discussion *infra* Part III.

100. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648-49 (1995) (observing that students' expressed desire for drugs combined with sharp increases in disciplinary problems, rude behavior during class, and outbursts of profane language, manifested an apparent increase in drug use).

101. See *id.* at 649 ("Not only were student athletes included among drug users but, as the District Court found, athletes were the leaders of the drug culture.").

102. See *id.* at 650.

103. See *id.* at 651.

104. See *id.*

105. See *id.*

106. See *id.*

107. See *id.*

Vernonia's policy violated Acton's Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures.<sup>108</sup>

Clarifying its drug testing and school-search jurisprudence, the Supreme Court confirmed that the touchstone of Fourth Amendment jurisprudence in the public school context is "reasonableness."<sup>109</sup> Noting that the "special needs" rationale applies in the school context,<sup>110</sup> justifying the abandonment of the warrant and probable-cause requirements, the Court reiterated the importance of weighing the school's interests against those of the individual student.<sup>111</sup>

The Court first addressed the student's privacy interest, seeking to determine whether the public school student maintains rights coextensive with the rights of adults outside the school's walls. The Court concluded that the school's "custodial and tutelary control" over students reduced the students' fundamental rights to be free in their physical movement.<sup>112</sup> Although acknowledging that students still "do not shed their constitutional rights . . . at the schoolhouse gate,"<sup>113</sup> the Court reasoned that students' rights must yield to the school's interest in ensuring a conducive learning environment.<sup>114</sup>

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108. *See id.* at 652. The Supreme Court granted certiorari, 513 U.S. 1013 (1994), to review the question of whether the school district's random, suspicionless urinalysis drug testing program violated the Fourth and Fourteenth Amendments to the United States Constitution. *See Acton*, 515 U.S. at 648-52.

109. *See Acton*, 515 U.S. at 652 (stating that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness'").

110. *See id.* at 653. The Court stated that special needs arise when the warrant and probable-cause requirements make impracticable law enforcement's normal need to carry out its duties. *See id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

111. *See Acton*, 515 U.S. at 652-53. Further, the Court reviewed its rationale developed in *T.L.O.*, *Skinner*, and *Von Raab*, concluding that the balancing test of "reasonableness" was the only Fourth Amendment inquiry necessary in determining whether a school's drug testing policy violated the student's constitutional rights. *See id.* at 653-54 (noting that the Fourth Amendment does not impose an "irreducible requirement" of first having individualized suspicion in order to have probable cause for a search).

112. *Id.* at 654-55. The Court expressed that both historically and today, "unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will." *Id.* at 654. The Court further explained that although the public school's role does not create a duty to protect the individual student, the role does require the school to act "*in loco parentis*." *See id.* at 655 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)). Consequently, the school must teach "habits and manners of civility." *Acton*, 515 U.S. at 655 (quoting *Fraser*, 478 U.S. at 681); *see also infra* note 5 (explaining "*in loco parentis*").

113. *Acton*, 515 U.S. at 655-56 (citing the oft quoted language in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

114. *See Acton*, 515 U.S. at 656. After reviewing precedent where a student's rights in the First and Fourteenth Amendment categories are not automatically co-extensive with adults, the Court held that a student's Fourth Amendment rights are also "different in public schools than elsewhere." *See id.* (reviewing *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (advocating informal due process rights of student); *Fraser*, 478 U.S. at 683 (prohibiting use of vulgar and offensive terms); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (allowing censorship of

The public school student possesses a reduced expectation of privacy, rendering the student's right to be free from searches and seizures susceptible to a variety of government interests.<sup>115</sup> Moreover, in light of the fact that athletic activities are not for the bashful,<sup>116</sup> with "communal undress" and lowered privacy in locker rooms, the Court found that student-athletes' expectations of privacy are less than those of ordinary students.<sup>117</sup> Additionally, given the fact that the student initially "volunteers"<sup>118</sup> to join the particular activity, subjecting himself to the heightened rules and regulations of training rules, dress code, insurance coverage, academic achievement, curfew, and other related matters, the Court equated athletics to adults choosing to work in a highly regulated industry.<sup>119</sup> Students who participate in athletic activities cannot expect as much privacy as students who merely matriculate within the school's academic programs.<sup>120</sup>

In an effort to cabin drug testing programs, the Court stipulated that drug testing programs be non-intrusive,<sup>121</sup> and that the school demonstrate a compelling interest for implementing such a

school-sponsored publications); *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (declining to extend more additional safeguards upon corporal punishment)).

115. *See Acton*, 515 U.S. at 657 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985)).

116. *See id.* ("School sports are not for the bashful. They require 'suing up' before each practice or event, and showering and changing afterwards."). Drawing upon *Schaill's* rationale of "communal undress" often present in athletics, the Court discussed the fact that student-athletes often change and shower in non-private locker rooms, where showers and toilets afford little to no privacy as well. *See id.*

117. *See id.* (quoting *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)).

118. The Court emphasizes the significance of the individual student volunteering to engage in a regulated activity. This volunteer aspect of high school athletics suggests that the student impliedly agrees to a lower privacy interest and a higher level of conduct and behavior because of perceived benefits gained through athletic participation. *See id.* ("By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.").

119. *See id.*

120. *See id.*

121. The Court analyzed the actual intrusiveness of the school's urinalysis program. *See id.* at 658. Utilizing *Skinner*, the Court recognized that withdrawing urine from the individual encroaches on a great privacy normally shielded by the Fourth Amendment. *See id.* Moreover, the Court scrutinized the manner of production and the process at which the school obtained the sample. *See id.* Nevertheless, the actual constitutionality of the urinalysis programs are beyond this Note's scope. It is the author's argument that if the school carefully follows the criteria set forth in *Acton*, using the Court's analysis to tailor one's drug testing program to the constitutionally recognized testing principles, a school may withstand a Fourth Amendment intrusiveness challenge concerning the actual method and process of obtaining the urine samples. *See id.* at 658-60 (analyzing the drug testing process and ultimately finding that the program's intrusiveness was not significant).

program.<sup>122</sup> The Court drew upon the fact that schools have an interest in preventing drug-abuse by students, and that if narrowly-tailored only to student-athletes, a testing program is not significantly intrusive.<sup>123</sup> The Court emphasized the negative "role model" effect of athletes using drugs, along with the health and safety risks when drugs exacerbate athletic injuries, as support for the drug testing program.<sup>124</sup> Concluding that the students had a reduced expectation of privacy, that the program was relatively unobtrusive,<sup>125</sup> and that the school had a compelling interest in immediately curbing the drug-use problem, the Court held that Vernonia's drug testing program withstands the Fourth Amendment's test of reasonableness.<sup>125</sup>

Although reserving the question of whether *Acton* may be extended to other contexts,<sup>127</sup> the Court noted that the significant reason for upholding the constitutionality of Vernonia's program rested upon the need to further the school's responsibilities as a guardian and tutor of its students.<sup>128</sup> The Court did not limit its decision to athletes,<sup>129</sup> leaving the door open for a logical extension of *Acton*'s holding to other school settings.<sup>130</sup>

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122. See *id.* at 659-62.

123. See *Acton*, 515 U.S. at 658-60, 662.

124. See *id.* at 662-63. The Court surveyed the harmful effects of drugs upon students and their bodies. See *id.* at 661-62. Stating that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe," the Court reviewed literature demonstrating drugs' deleterious effects on the drug-using student's nervous system and how drugs inhibit successful lifelong learning and growth. *Id.* (citing Hawley, *supra* note 12; Estroff et al., *supra* note 12; Kandel et al., *supra* note 12). Further, the Court recognized that drug-use also affected the school's learning environment, inhibiting fellow students and teachers by disrupting the educational process. See *Acton*, 515 U.S. at 662. The Court also analyzed the constitutionality of suspicionless versus individual, suspicion-based testing programs, ultimately concluding that a holding of constitutional reasonableness does not depend on finding a "least restrictive alternative." See *id.* at 663. Rather, the Court found that suspicion-based testing may be worse. See *id.* at 663. But see *id.* at 666-86 (O'Connor, J., dissenting) (strongly criticizing the Court's upholding of "suspicionless" testing within the school context).

125. See *supra* note 121 for discussion on the program's unobtrusiveness.

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

127. *Id.* at 665 ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts"); see also *id.* at 666 (Ginsburg, J., concurring) (interpreting the Court's opinion as reserving judgment on the constitutionality of a school's decision to impose mandatory drug tests on all students who are required to attend school); *id.* at 685 (O'Connor, J., dissenting) (questioning the school's motive to apply the tests only to student athletes as a tactic to pass constitutional scrutiny and noting that the original program had called for testing all students involved in extracurricular activities).

128. *Id.* at 665. Because a school is entrusted with the custodial care of students, the Court found the furtherance of the government's responsibilities as the most significant element in allowing Vernonia's program to withstand a Fourth Amendment challenge.

129. It is important to note that the Court's minimal attempt to caution against extending its holding to other contexts was made expressly by Justice Ginsburg in her concurrence, see *id.* at 666, and only in passing by the majority, see *id.* at 665. However, the Court never expressly



The Court consequently provided a virtual road map for future school districts and courts. A logical extension of *Acton* would allow public schools to conduct drug testing programs in factually similar situations.<sup>131</sup>

### III. SEMINAL LOWER COURT JURISPRUDENCE IN THE WAKE OF *ACTON*

#### A. *Seventh Circuit Jurisprudence: A Repeating Pre-cursor?*

The Seventh Circuit Court of Appeals—the same court that decided *Schall* more than ten years before—became the first court to extend *Acton* and its progeny to uphold mandatory, suspicionless urinalysis testing for students voluntarily participating in extracurricular activities. Although controversial, the Seventh Circuit set forth compelling and persuasive reasons for logically extending *Acton's* conclusion.

In *Todd v. Rush County Schools*, the Seventh Circuit held that random drug testing of students in extracurricular activities did not violate the students' Fourth Amendment rights.<sup>132</sup> The school district's program applied to all students enrolled in extracurricular activities.<sup>133</sup>

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limited its decision to apply only to athletes, but rather left enough room for a future, logical extension to testing students involved in extracurricular activities as well.

130. *Id.* The Court only discussed the important element of furthering the school's responsibilities as guardian of the children in its care, rather than even mentioning the program pertaining only to athletes. *See id.*

131. *See infra* Part IV.

132. *Todd v. Rush County Sch.*, 133 F.3d 984, 986-87 (7th Cir. 1998). The Seventh Circuit, with all of the judges on the original panel, voted unanimously to deny rehearing *en banc*; a majority of the active judges also voted to deny rehearing *en banc*. *See Todd v. Rush County Sch.*, 139 F.3d 571, 571 (7th Cir. 1998). *But cf. id.* at 573 (Ripple, J., dissenting from the denial of rehearing *en banc*) (arguing that the Supreme Court's holding in *Chandler v. Miller*, 520 U.S. 305 (1997), requires the school district to define the tested group with particularity before testing, so as to avoid the "sort of general search that, from the beginning of the Republic, had been the principal concern of the Fourth Amendment"); *see also id.* (Wood, J., dissenting from the denial of rehearing *en banc*) (dissenting and wanting the court to clarify the *Acton* standard). It is important to note that the Supreme Court recently denied plaintiff's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *See Todd v. Rush County Sch.*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 68 (1998). Nevertheless, as the Court's denial only constitutes a refusal to hear the case at that particular time, and it does not condone the particular circuit's holding as the rule of law for the United States, this Note continues to assert that the Supreme Court should adopt the Seventh Circuit's rationale in *Todd* as the necessary and logical extension to the Court's holding in *Acton*.

133. *See Todd*, 133 F.3d at 984-85. The program enacted prohibited any high school student from "participating in any extracurricular activities or driving to and from school unless the student and parent or guardian consented to a test for drugs, alcohol or tobacco in random, unannounced urinalysis examinations." *Id.* at 984. However, the court expressly declined to discuss the constitutionality of upholding the driving to school prohibition, as plaintiffs all

Extracurricular activities not only included athletics, but encompassed all other school activities, such as Student Council, foreign language clubs, Fellowship of Christian Athletes, Future Farmers of America ("FFA"), and the Library Club.<sup>134</sup> Without consenting to testing, a student could not participate in any extracurricular activity.<sup>135</sup> The school district informed the family of any student testing positive, and the family had the opportunity to explain the test's result.<sup>136</sup> Failure to provide a satisfactory explanation of the positive result prohibited the student from engaging in any extracurricular activities until the student retested and obtained a negative result.<sup>137</sup> Testing positive twice gave the school reasonable suspicion to test further and then invoke disciplinary action.<sup>138</sup>

Plaintiffs included members of the Library Club, members of the FFA, and a student who wished to videotape the football team, all of whom refused to sign the drug testing program's consent forms.<sup>139</sup> The plaintiffs sought to enjoin the school from enforcing the program, arguing that the school's imposition of random, mandatory suspicion-

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wished to participate in extracurricular activities as well. Thus, the court limited its holding to extracurricular activities. *See id.* at 985-86 n.1.

134. *See id.* at 984.

135. *See id.* at 984-85.

136. *See id.* at 985. Under the program, the school allowed the student and his family to explain whether the student's inducement of certain medications produced the positive result before any further disciplinary action occurred. *See id.*

137. *See id.* The program required no other disciplinary action for a positive result. *See id.* The student is simply precluded from participating in extracurricular activities and from driving to and from school in this case. *See id.* The school also provides the positive-testing student and his or her parents with information on drug-treatment programs. *See id.* Further, the student may always request a new urine test, so as to avoid possible testing aberrations. *See id.*

138. *See id.* Out of 950 students in the Rush County High School, 728 students consented to the random urinalysis testing. *See id.* Out of that group, 170 students did not participate in extracurricular activities or fall within the program's scope. *See id.*

Evidence indicated that the particular school arguably had a drug problem. *See id.* The court indicated that from 1992-97, although there were no alcohol-related expulsions, "zero to one tobacco-related expulsion[s] per year, and one to four drug-related expulsions" occurred. *Id.* Concerning suspensions, 2-9 alcohol-related, 21-44 tobacco-related, and 1-9 drug-related suspensions occurred. *See id.* Further, the Indiana Prevention Resource Center conducted a survey of the school in 1994, finding that Rush County High School students in certain grades used cigarettes and alcohol more than the state average, while marijuana usage in certain grades was actually lower than the state average. *See id.* Also, "[t]wo witnesses stated that drug use ha[d] been increasing at the high school, causing the drowning of a senior and an automobile crash where the students were inhaling the contents of aerosol cans." *Id.* The testing program did detect a small fraction of the students for abusing banned substances. *See id.* The program detected five to eight students for either marijuana or for nicotine use. *See id.* The school tested students on five to six occasions, involving twenty to thirty students each time. *See id.*

139. *See id.* Plaintiff William Todd wanted to videotape the football team, yet was barred by the school from doing so when his parents refused to sign the consent form. *See id.* The school barred the other plaintiffs from participating in the Library Club and FFA for their refusal to sign the drug testing consent form.

less urinalysis of all students wishing to participate in extracurricular activities violated their Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures.<sup>140</sup>

Finding that *Acton* and *Schaill* controlled the question, the Seventh Circuit adopted the Supreme Court's rationale that public schools have a custodial and tutelary role vis-a-vis all students, including those wishing to participate in extracurricular activities.<sup>141</sup> Public school students thus have diminished constitutional rights in the school context, and the school has a compelling need to deter drug use; these facts liken the case to *Acton*. The primary difference between *Todd* and *Acton* was that the *Acton* testing program was limited to students involved in athletics, while the *Todd* testing program involved students in all extracurricular activities.<sup>142</sup> The Court found that the same compelling interest applied whether the students were athletes or whether the students were involved in all extracurricular participation.<sup>143</sup>

Likening athletics to extracurricular activities, as if *Acton* were a virtual road map, the Seventh Circuit used the Supreme Court's factors in its equation: (1) that extracurricular activities are a valuable experience and a privilege like athletics, with associated prestige enhancing benefits; (2) that the urinalysis program only serves as a condition of participation in the extracurricular activity; (3) that the school's program only applies to those students who voluntarily choose to participate in the desired activities; (4) that students participating in activities may take on leadership roles and serve as examples to others; and (5) that the school has an interest in protecting the health of the students.<sup>144</sup> Underlying the court's reasoning was the "special need" to maintain a healthy learning environment, conducive to studying.<sup>145</sup> The court held that informal disciplinary methods and procedures were necessary to further this mission of maintaining a healthy learning environment.<sup>146</sup>

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140. *See id.* at 985-87.

141. *See id.* at 986 & n.3 (after noting that the custodial and tutelary role schools maintain over children was a central element in *Acton*, the Seventh Circuit found such a role logically extended to the instant case as well).

142. *Id.* at 986.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.* (citing *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1306, 1324 (7th Cir. 1988)) (noting that school survival depends on giving school administrators "reasonable means" to deter disruptive conduct). Consequently, the Seventh Circuit concluded that *Todd* was sufficiently like *Acton* and *Schaill* to withstand the plaintiff's Fourth and Fourteenth Amendment challenge. *See id.* at 987.

*Todd's* holding serves as a legitimate reading of *Acton*; it logically extends Fourth Amendment reasonableness to testing students who voluntarily participate in extracurricular activities.<sup>147</sup> As the Supreme Court found the Seventh Circuit's *Schail* holding persuasive when deciding *Acton*, this Note asserts the Court should use *Todd* as a necessary extension of *Acton* in holding that testing of all students voluntarily participating in extracurricular activities does not violate the Fourth Amendment's prohibition on unreasonable searches and seizures.<sup>148</sup>

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147. *Todd v. Rush County Sch.*, 139 F.3d 571, 573 (7th Cir. 1998) (Ripple, J., dissenting from the denial of rehearing en banc) (recognizing that the court is interpreting *Acton* broadly, going a long way toward permitting drug testing of the general school population).

148. The Seventh Circuit recently distinguished *Willis II v. Anderson Community School Corp.*, 158 F.3d 415, 424-25 (7th Cir. 1998), where it struck down a school's requirement for mandatory, suspicionless drug testing of truant students or students breaking school rules. See *id.* at 425. Finding that the school could have easily maintained a suspicion-based testing program, the court found that the privacy interests present in *Willis II* were greater than those present in *Acton* or *Todd*. See *id.* at 420-22. In doing so, however, the court recognized *Todd* as the logical extension of *Acton*. See *id.* at 423. The *Willis II* court focused on the need to set some boundaries within the school-context, so as to not sanction unbridled blanket-testing of the entire student population. See *id.* at 425. See generally *The Fourth Amendment: School Drug Tests Testing the Courts*, A.B.A. J., Dec. 1998, at 33 (remarking that students who wish not to be drug tested in public schools are "better off being belligerent than involved," when reviewing the differences between *Willis II* and *Todd*).

Recently, the United States Court of Appeals for the Eighth Circuit decided, but later vacated for mootness, *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), involving a public school's random drug testing of students in seventh through twelfth grades. See *id.* at 576. Although vacated because the student graduated high school before the court could rule, the opinion provides helpful support to this Note's conclusion.

The school banned the student who refused to submit to such testing from participating in the extracurricular activities of the radio club, prom committee, the quiz bowl, and school dances, among others. See *id.* at 577. Relying on *Acton's* assertion that "special needs" exist within the school environment to justify such testing, the Eighth Circuit held that all students within the public school experience a diminished expectation of privacy, not merely student-athletes. See *id.* at 579. Expressly noting that the school's testing "policy goes beyond student athletes to include all manner of extracurricular activities," the court found that extracurricular activities may possess features that further lower the student's expectation of privacy, like that of athletics. *Id.* at 579.

Importantly, the court recognized no immediate drug and alcohol problem among the students, as was present in *Acton*. See *id.* at 580. Yet, the court did find that drugs and alcohol pose enough significant damage and disruption to the school that the school should not have to wait for a demonstrable problem to arise before testing. See *id.* at 581. As such, the Eighth Circuit reinforces this Note's proposition that prevention through a constitutional suspicionless drug testing of all students voluntarily enrolling in extracurricular activities is necessary to preserve the school's learning environment. Cf. *id.* at 582 (stating that "when the mission of the public schools can be so thoroughly thwarted by substance abuse among the pupils, a random search policy such as the one at issue here, which is designed to effectively deter students who may be disposed to such abuse is reasonable and therefore constitutional").

B. *The Supreme Court of Colorado—Constitutional Rejection or Extension?*

While *Todd* signaled that public schools may test students wishing to participate in extracurricular activities, *Trinidad School District No. 1 v. Lopez* confused the issue. *Lopez* distinguished band members from athletes, and held that the school's suspicionless drug testing program for students participating in extracurricular activities violated the Fourth Amendment of the United States Constitution.<sup>149</sup> The Colorado Supreme Court thus chose not to extend *Acton*. This confusion should be a signal to the Supreme Court that the public's concern over drug testing within the school system remains undecided and tumultuous.

Enacting a mandatory, suspicionless urinalysis program of all sixth through twelfth grade students voluntarily participating in extracurricular activities, the Trinidad School District required each student to successfully pass a drug test before enrolling in extracurricular activities.<sup>150</sup> If the student tested positive, the laboratory automatically performed a subsequent test to verify the first results.<sup>151</sup> If the subsequent test was also positive, the school notified the student's parents or guardians; the principal then conducted a due process inquiry with the student and his or her parent or guardian as to the violation, and the school required that the student submit to a drug assistance program and weekly drug tests for six weeks.<sup>152</sup> A student's refusal resulted in suspension from current and future extracurricular activities.<sup>153</sup> Second and third offenses resulted in longer suspensions.<sup>154</sup>

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149. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1110 (Colo. 1998).

150. *See id.* at 1098. The Policy, entitled "Drug Testing Student Athletes/Cheerleaders/Extra Curricular," also allowed school officials to test students who participate in an extracurricular activity and were under reasonable suspicion of drug use. *See id.* The Colorado Supreme Court expressly limited its holding to students involved in the marching band. *See id.* at 1098 n.6. The court declined to comment on the Policy's application to other student activities. *See id.* Moreover, the court noted that the program had only been applied to students wanting to participate in volleyball, football, golf, cheerleading, and the marching band. *See id.* at 1099. The policy resulted in one-third of all high school students and one-fourth of all junior high school students being tested for illegal drug use. *See id.*

151. *See id.* at 1098.

152. *See id.*

153. *See id.*

154. *See id.* The second offense resulted in suspension from participating in current and subsequent extracurricular activities, and mandatory drug-assistance programs. *See id.* A third offense invoked suspension from the current and next two extracurricular activity seasons. *See id.*

Although the school demonstrated an ever-increasing drug problem,<sup>155</sup> no evidence suggested illicit drug-use by band members.<sup>156</sup> Carlos Lopez enrolled in two band classes, in which he received academic credit and grades, and also enrolled<sup>157</sup> in the marching band.<sup>158</sup> Yet, when confronted with the drug testing program, he refused to consent, seeking to enjoin the school from enforcing the program.<sup>159</sup>

In reviewing the school's drug testing program, the Supreme Court of Colorado noted that the policy encompassed more than voluntary activities. The program reached even those students who enrolled in some of the academic band classes by virtue of the classes' requirements of participation in the "extracurricular" marching band.<sup>160</sup> Analyzing the Supreme Court's "special needs" rationale in *Acton*, the Colorado court decided not to extend *Acton*, noting two issues of distinguishment. First, the court found that the marching band hardly fit within the rationale that students participating in the activity have ceded some measure of privacy by enrolling in the activity, which the Supreme Court had found persuasive in diminishing

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155. *See id.* at 1098-99. An independent research firm, the Search Institute of Minneapolis, Minnesota, conducted an attitudinal and behavioral survey on the school's students, finding that 44% of students in grades six through twelve had used drugs in the last year. *See id.* at 1098. Of the sixth-grade students, 23% used drugs in the last year, and an alarming 63% used drugs in the eleventh grade. *See id.* Further, 63% of the school's seniors had at least used marijuana once during their lives, while 13% reported using cocaine at least once. *See id.* Also, 20% of the eighth graders frequently used drugs. *See id.* Drug-use at the school exceeded national averages by a significant margin. *See id.* (noting that only 35% senior marijuana use and 6% cocaine use compared to Trinidad's 63% and 13% usage, respectively).

156. Although the trial court did not find any distinguishing use between that of athletes and those students participating in other extracurricular activities, the band director testified he had not observed increased drug use among the band members in the three years before the drug testing policy was adopted. *See id.* at 1099.

157. The court expressly remarked that the school's policy required participation in the extracurricular marching band, if the student matriculated in either band classes. *See id.* at 1105. Therefore, participation in "extracurricular" marching band was necessary for academic band credit. *See id.* Consequently, the court commented that "two for-credit classes that are part of the regular curriculum of course offerings are inextricably linked to the 'extracurricular' activity of marching band." *Id.* Failure to participate in the marching band resulted in failing one or both of the for-credit classes. *See id.*

158. *See id.* at 1097, 1100.

159. *See id.*

160. *See id.* at 1105, stating:

while a cursory reading of the Policy indicates that it reaches only those students who are participating in voluntary extracurricular activities, the real scope of the Policy is not so limited. Under the Policy, students who are enrolled in a regular class must provide a urine sample for drug testing.

*See also supra* note 157 (discussing the inextricable linkage between the extracurricular activity of marching band and the for-credit band classes).

student-athletes' expectation of privacy in *Acton*.<sup>161</sup> Second, the *Lopez* court noted a significant difference between the cases in that participating in the marching band was not truly voluntary, as the students were required to participate as a class requirement.<sup>162</sup> Because of these two differences, the court recognized that students do share a diminished expectation of privacy compared to adults, but that the marching band members at issue here possessed a much higher degree of privacy than did the athletes of *Acton*.<sup>163</sup>

Unlike *Acton*, the school's testing program in *Lopez* pertained to students who did not have a demonstrable drug problem.<sup>164</sup> The court expressly declined to subject marching band students to drug testing simply because they were enrolled in an activity, which carries with it intrinsic benefits and prestige of being a "role-model" to other students.<sup>165</sup> Instead, the court remarked that if students wished to pursue post-secondary education and have a meaningful high school education, then participation in extracurricular activities was a necessity.<sup>166</sup> This observation changed the analysis by introducing the possibility that drug testing programs may constructively deprive students of academic and personal development.<sup>167</sup> Basing its decision on the lack of voluntariness, communal undressing, and an identifiable drug-abusing group, the Colorado Supreme Court struck down Trinidad's testing program as unreasonable under the Fourth Amendment.<sup>168</sup>

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161. See *Lopez*, 963 P.2d at 1107 (observing that the "communal undress" element present in *Acton* was lacking here; although band members wear uniforms, they do not publicly undress or shower together).

162. *Id.* (recognizing that the Court's voluntariness factor was not met in *Acton*).

163. See *id.* But see *id.* at 1111 (Scott, J., dissenting) (arguing that there is no constitutionally significant distinction concerning a student voluntarily enrolling in an extracurricular activity and that of an activity awarding an associated academic credit for participation; and, that there really is no difference in communal undress in band activities than the undress in sporting activities present in *Acton*); see also *id.* at 1117 (quoting *Acton*, 515 U.S. at 653) ("I believe the privacy right announced in the majority opinion must yield to the 'special needs' that 'exist in the public school context,' as acknowledged by the United States Supreme Court.").

164. *Id.* at 1109 (noting the differences between the band members disciplinary records, and the lack of risk of physical harm compared to athletes).

165. See *id.*

166. See *id.* at 1109-10 (citing *Todd v. Rush County Sch.*, 139 F.3d 571, 571-73 (7th Cir. 1998) (Ripple, J., dissenting from denial of rehearing en banc) (stating that "involvement in a school's extracurricular offerings is a vital adjunct to the educational experience").

167. See *id.* (declining to extend the traditional rationale of the school's need to deter drug use rationale to justify testing the marching band members).

168. See *id.* (holding that after considering the factors set forth in *Acton*, the policy was unconstitutional).

A tension exists between the decisions of the Seventh Circuit and the Colorado Supreme Court. The Seventh Circuit's holding remains a viable opinion, allowing for schools across the United States to maintain a conducive learning environment by enacting drug testing programs to deter drug-abuse.<sup>169</sup> Although the Colorado Supreme Court expressly struck down the drug testing program in *Lopez*, this Note suggests that the court's holding does not broadly reject drug testing for extracurricular activities; rather, it is distinguishable because it presents facts that may not exist in many situations.

#### IV. EXTENDING *ACTON* TO ALL EXTRACURRICULAR ACTIVITIES

The logical extension of the Supreme Court's holding in *Acton* is the conclusion that a school may test all students participating in extracurricular activities, upholding the Seventh Circuit's holding in *Todd*. Students voluntarily participating in extracurricular activities possess attributes similar to athletes in that they voluntarily participate, receive an intrinsic benefit of enhanced prestige, and serve as examples to other students. The health and safety of students are concerns in extracurricular activities just as in athletics. Granted, this Note's assertion raises moral and legal considerations, especially when one considers the private nature of urination and the extent to which testing programs invade the lives of public school students. Nevertheless, if society demands that the American public school further its necessary and vital mission of educating students for tomorrow, then the Supreme Court needs to validate *Todd's* extension of *Acton*—to allow for the mandatory, suspicionless drug testing of students voluntarily participating in extracurricular activities.

##### A. *American School Fourth Amendment Jurisprudence: The Precedent is Set*

The Fourth Amendment mandates that federal actors not subject individuals to unreasonable searches and seizures, allowing them

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169. It is important to note that other schools systems are exploring the mandatory drug testing of students involved in extracurricular activities. For example, the New Jersey Schools adopted a drug testing program of all students. See John Gibeaut, *Seeking Substances, Indiana Schools Push for Expansion of Drug Test Ruling*, 84 A.B.A. J. 42 (1998). Nevertheless, other schools like the Miami-Dade County School District and schools in New Orleans have declined adopting such programs. See *id.* However, with *Todd's* ruling, the Seventh Circuit may have signaled to schools that they need not be as hesitant in the future. See *id.* (arguing that the Seventh Circuit's cases may encourage public schools to enact mandatory, suspicionless drug testing programs for students voluntarily participating in extracurricular activities).



to maintain their bodily, personal, and professional integrity.<sup>170</sup> By incorporation, the Fourteenth Amendment extends the Fourth Amendment's edict to guarantee the same rights against state actors.<sup>171</sup> State actors include public school officials.<sup>172</sup> When the public school requires the mandatory collection of urine or other body specimens in drug testing programs, the Supreme Court has consistently held that the programs constitute searches within the meaning of the Fourth Amendment.<sup>173</sup> Thus, a public school's drug testing program must comply with Fourth Amendment protections.

Usually, the Court requires an in-depth inquiry into the existence of probable cause and the issuance of a warrant to fulfill the requirements of the Fourth Amendment.<sup>174</sup> The Supreme Court, however, recognizes a "special needs" exception, allowing the abandonment of the Fourth Amendment's warrant and probable cause requirements, in some situations.<sup>175</sup> The Court has held that this "special needs" rationale exists not only in the law enforcement context,<sup>176</sup> but also in the public school context.<sup>177</sup> The Court has abandoned the probable cause and warrant requirements within the school context, invoking the "special needs" exception when swift and informal disciplinary methods are necessary to maintain a conducive learning environment for students.<sup>178</sup> A pronounced drug problem in a

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170. See U.S. CONST. amend. IV (precluding the federal government from violating "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.").

171. See *Elkins v. United States*, 364 U.S. 206, 213 (1960).

172. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (explaining that "school officials act as representatives of the state" when performing searches or disciplining students).

173. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (applying a Fourth Amendment analysis to a drug testing program for student athletes); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (agreeing with unanimous conclusions of the Federal Courts of Appeals that collecting and testing urine are searches governed by the protections of the Fourth Amendment); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (applying a Fourth Amendment analysis to a drug testing program of the United States Customs Service).

174. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Payton v. New York*, 445 U.S. 573, 586 (1980).

175. See *Acton*, 515 U.S. at 653; *Griffin*, 483 U.S. at 873; see also *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment).

176. *Griffin*, 483 U.S. at 873 ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'").

177. See *Acton*, 515 U.S. at 653 ("We have found such 'special needs' to exist in the public school context.").

178. See *id.*

public school will usually justify extending the "special needs" rationale to allow for a suspicionless drug testing regime.<sup>179</sup>

Furthermore, a school performs a custodial and tutelary role, allowing it to wield substantially more control over students than the government may use with respect to free adults.<sup>180</sup> As part of that role, the school closely supervises students and enforces rules to maintain a proper learning environment.<sup>181</sup> Consequently, the school inculcates manners of civility into its students, a central rationale that the Court has used in upholding drug testing programs.<sup>182</sup> In fulfilling its role, the public school exercises a significant degree of control over the freedom of the individual student. Students lack some of the basic rights of freedom that adults enjoy outside the school context.<sup>183</sup> The school's restriction on students' freedom is thus a legitimate and appropriate function of the school.<sup>184</sup>

The Court has recognized that students have a diminished expectation of privacy in the school setting.<sup>185</sup> With long hours in close association with each other and their teachers, routine physical and medical examinations, and repeated vaccinations for various diseases, public school students' privacy rights are reduced in the interest of promoting a safe environment conducive to learning and free from disruptive behavior.<sup>186</sup>

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179. See *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373-74 (6th Cir. 1998). Although *Knox* asserts the rationale to apply to testing employees, the Sixth Circuit reviewed *Skinner* and *Acton* to justify its conclusion that when a demonstrated drug problem exists it will usually favor invoking the "special needs" rationale necessary to uphold a suspicionless testing program. See *id.* ("[T]he existence of a pronounced drug problem within the group of employees targeted for testing typically tips the equities in favor of upholding suspicionless testing."); see also *Solid Waste Dep't Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1073 (10th Cir. 1998) (reviewing *Skinner*, *Von Raab*, and *Acton*, asserting that a testing program's validity depends on the adoption of a documented drug abuse problem); see generally *Chandler v. Miller*, 520 U.S. 305, 306 (1997) ("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.") (internal citation omitted).

180. See *Acton*, 515 U.S. at 655.

181. See *id.*

182. See *id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (noting that schools have the "power and indeed the duty to 'inculcate the habits and manners of civility' into its students")). The Court further observed that "[t]he most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Id.* at 665.

183. See *id.* at 654.

184. See *id.* at 654-56.

185. See *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring); see also *Acton*, 515 U.S. at 658 n.2; *Willis II v. Anderson Community Sch. Corp.*, 158 F.3d 415, 421 (7th Cir. 1998).

186. See *Acton*, 515 U.S. at 656-58.

Although urinating, a function reserved and performed usually by oneself and not upon demand by any person or entity, is traditionally shielded by the utmost right to privacy,<sup>187</sup> the Court has recognized that in some instances government may regulate this traditional function.<sup>188</sup> Because of the significance of this intrusion, the school may only invade the privacy of urination upon proof of a compelling need in light of the surrounding circumstances.<sup>189</sup> Courts must engage in the Fourth Amendment's balancing test of "reasonableness," weighing the public school's interest in maintaining a healthy learning environment against the privacy rights of the individual student.<sup>190</sup>

### B. *The Logical Extension of Acton to Extracurricular Activities*

Mandatory, suspicionless drug testing of students voluntarily participating in extracurricular activities<sup>191</sup> passes the Supreme Court's Fourth Amendment "reasonableness" test because: (1) students voluntarily enroll in extracurricular activities; (2) the student's participation is not only a privilege, but carries with it enhanced pres-

187. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987) (stating that the passing of urine is "traditionally performed without public observation"); see also *id.* at 646-47 (Marshall, J., dissenting) (remarking that urine collection is far from a "minimal" intrusion upon the individual); *Acton*, 515 U.S. at 658; *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1108 (Colo. 1998) ("Ordinarily, a student urinates simply because the body requires it, not because a school district insists that the student provide a urine sample on demand in order for the school district to search it for the presence of drugs."); Fried, *supra* note 52, at 487 (explaining that "in 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.").

188. See *Acton*, 515 U.S. at 661 (finding that the nature of deterring drug use by schoolchildren is undoubtedly compelling); see also *Von Raab*, 489 U.S. at 670 (compelling governmental interest in making sure Customs officials seeking promotions to positions interdicting drugs or handling firearms were drug-free); *Skinner*, 489 U.S. at 628 (compelling governmental interest in preventing future railway accidents).

189. See *Acton*, 515 U.S. at 661.

190. See *id.* at 652-53, 665 (noting that when the government acts as a custodian, the relevant analysis centers around determining whether a reasonable tutor or guardian would undertake such an action, in determining if a drug testing program will pass constitutional scrutiny).

191. For purposes of this Note, extracurricular activities are considered those activities students voluntarily participate in without receiving academic credit. Cf. *Lopez*, 963 P.2d at 1115 n.4 (Scott, J., dissenting) (noting that extracurricular activities are defined by the student not receiving academic credit, like drama performances; whereas, band is considered "co-curricular" because the student receives academic credit and grades for participation). Partial-credit activities (i.e. "co-curricular activities" as referred to in *Lopez*) invoke additional considerations of voluntariness. See *id.* at 1107 (finding that the Supreme Court's notion of voluntariness expressed in *Acton* did not apply to the present case because students who took for-credit music classes were required to participate in the marching band, thus, being subjected to mandatory testing as part of the school's curriculum instead).

tige, benefits, and possible leadership roles, where the student serves as an example to other students; and (3) given its prophylactic and non-punitive purposes, mandatory testing does not bar the student from participating, but only serves as a condition to the student's participation in the desired activity. For the reasons set forth below, *Acton's* extension is not only logical, but necessary.<sup>192</sup>

First, mandatory, suspicionless drug testing only applies to students who voluntarily participate in extracurricular activities.<sup>193</sup> When students exercise their own volition by enrolling in extracurricular activities, the student agrees to be a part of an organization,<sup>194</sup> and to abide by the organization's guidelines and rules of conduct.<sup>195</sup> A student participating in extracurricular activities expressly or impliedly agrees to subscribe to a heightened level of rules, conduct, and regulations not associated with everyday matriculation.<sup>196</sup> Depending on the activity, the student may have to submit to physical exams, obtain insurance or valid insurance waivers, follow a dress code and abide by other requirements.<sup>197</sup> While not all extracurricular activities

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192. *But see Acton*, 515 U.S. at 665 ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."). *Cf. id.* at 666 (Ginsburg, J., concurring) (expressly reserving such a question of extending drug testing to students voluntarily enrolling in extracurricular activities).

193. *Cf. Todd v. Rush County Sch.*, 133 F.3d 984, 985, 986 n.1 (7th Cir. 1998) (limiting its analysis to upholding drug testing consistent with the Fourth Amendment as to students wishing to or voluntarily participating in extracurricular activities).

194. *Cf. Acton*, 515 U.S. at 657 (stating that student-athletes have a reduced expectation of privacy because "[b]y choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally").

195. *See id.* (remarking that students who voluntarily participate subject themselves to additional rules and regulations not normally associated with a student attending school).

196. *See id.*

197. *Cf. id.* (observing that student-athletes must submit to a preseason physical, acquire adequate insurance coverage or sign an insurance waiver, and additionally comply with "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval"). Students engaged in extracurricular participation often must obtain a physical exam (e.g. cheerleading), obtain adequate insurance or sign insurance waivers (e.g. any extracurricular activity that extends the school's liability beyond that normally associated within the school-context, much like field trips, outings, events, conferences, and competitions that many extracurricular students participate in as part of their established activities), and subscribe to additional requirements, such as when the extracurricular activity has a particular required attire (e.g. FFA), training rules (e.g. Drama Club, by mandating hours of practice and rehearsal), or other general regulations tailored to the organization's specific needs. *Cf. id.* Granted, extracurricular participation will not have the same elements of "communal undressing" and locker room debuts as that present in *Acton*, but many extracurricular activities possess elements of shared exposure to other student participants when performing specified activities, much like when one changes behind scenes for a drama production, the donning of an organization's uniforms, or the general need to change into a different required attire for a particular event. *Cf. id.* Consequently, in many contexts, extracurricular participation can be equated to the same volition the student must take to

are considered "not for the bashful,"<sup>198</sup> by virtue of participation in most extracurricular activities, the student agrees to comply with some heightened level of regulation.<sup>199</sup> Voluntary undertaking of an extracurricular activity is a student's affirmative choice to abide by a particular activity's additional rules and regulations,<sup>200</sup> which ensure that participants are drug-free.

Second, a student's participation in extracurricular activities is not only a privilege, but carries enhanced prestige and intrinsic benefits.<sup>201</sup> By virtue of their participation in extracurricular activities, students gain skills and experience, acquiring more skills than the student who participates in no extracurricular activities.<sup>202</sup> Extracurricular students can and do serve as positive examples to other students and serve as representatives of the school to the surrounding community.<sup>203</sup> Enhanced prestige, intrinsic benefits, and leadership roles equate to the tangible and intangible advancements acquired through athletic participation. "It is not unreasonable to couple these benefits with an obligation to undergo drug testing."<sup>204</sup>

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participate in an extracurricular activity, subjecting the student to the particular organization's or activity's heightened regulations.

198. See *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1107 (Colo. 1998) (referring to participation in the marching band).

199. See *supra* note 197.

200. See *Todd v. Rush County Sch.*, 133 F.3d 984, 986 (7th Cir. 1998) (explaining that "it is appropriate to include students who participate in extracurricular activities in the drug testing"). Cf. generally *Lopez*, 963 P.2d at 1107 (finding that because the marching band's participation was mandated through enrollment in a for-credit music class, the absence of voluntariness was one of the principle reasons to strike the drug testing program down as unconstitutional).

201. See *Todd*, 133 F.3d at 986.

202. See *id.*

203. See *id.* (observing that "extracurricular activities 'are considered valuable to the school experience, and [that] participation may assist a student in getting into college,'... extracurricular activities, like athletics, 'are a privilege at the High School'" and remarking that students participating in extracurricular activities, like athletes, "can take leadership roles in the school community and serve as an example to others"). But see *Lopez*, 963 P.2d at 1109 ("In our view, simply being a role model by virtue of participation in an extracurricular activity is insufficient to support a conclusion that the school's mandated drug testing program [is] reasonable.").

204. See *Todd*, 133 F.3d at 986 (citing *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1320 (7th Cir. 1988), which recognized the appropriateness of including students voluntarily participating in extracurricular activities in a public school's drug testing program). But see *Schaill*, 864 F.2d at 1319 ("Random testing of athletes does not necessarily imply random testing of band members or the chess team."); *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 766 (S.D. Tex. 1989) (striking down mandatory, suspicionless urinalysis of students participating in extracurricular activities). However, the Seventh Circuit decided both *Todd* and *Schaill*, subsequently upholding such testing in *Todd*. See *Todd*, 133 F.3d at 986-87 ("We conclude that Rush County Schools' drug testing program is sufficiently similar to the programs in Vernonia and *Schaill* to pass muster under the Fourth and Fourteenth Amendments.").

Finally, drug testing programs only serve prophylactic and non-punitive purposes.<sup>205</sup> Drug testing programs do not criminalize the individual student's behavior, but only protect students from injury and health risks associated with drug abuse.<sup>206</sup> Mandatory testing programs do not punish the individual student; rather, they serve only as a condition to the student's participation in the desired activity.<sup>207</sup> If the student wishes to partake in the activity, then the school should be able to ensure that the student is not under the influence of drugs while participating.<sup>208</sup> If the student desires to use drugs, the student may choose not to participate in extracurricular activities.<sup>209</sup> The student thus strikes a "bargain" with the public school, choosing to be drug-free for the privilege of participating in extracurricular activities.<sup>210</sup> Because drug testing programs only serve non-punitive and prophylactic purposes, testing students who voluntarily participate in extracurricular activities is a reasonable and constitutional search.<sup>211</sup>

### C. *Deterring Drug Use: A Cure for the Disease*

When drugs invade our school systems, threatening the safety of students and the tranquility of the learning environment, the

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205. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 n.2 (1995) (noting that the search was "undertaken for prophylactic and distinctly nonpunitive purposes (protecting student athletes from injury, and deterring drug use in the student population)").

206. See *id.*

207. See *Todd*, 133 F.3d at 986 (holding that the students' requirement to submit to random drug testing only serves as a condition of participation in the extracurricular activity); see also *Schall*, 864 F.2d at 1319.

208. See *Todd*, 133 F.3d at 986 (commenting that it is reasonable for a school to combine drug testing with a student's participation in extracurricular activities because the student gains benefits from the activity); see also *Schall*, 864 F.2d at 1320.

209. See *Acton*, 515 U.S. at 657 (holding that it is the student's voluntariness that provides reason for students to expect certain intrusions upon their individual privacy, not normally associated with matriculation).

210. See *Willis II v. Anderson Community Sch. Corp.*, 158 F.3d 415, 422 (7th Cir. 1998) (interpreting *Acton* and *Todd's* drug testing programs as negotiating a bargain with the student in return for the student's privilege to participate in his or her desired extracurricular activity).

211. Nevertheless, many writers criticize the Seventh Circuit's holding in *Todd*, arguing that it did not heed the Supreme Court's advice in *Acton*, nor did it adequately apply the reasonableness test because an adequate correlation does not exist between those students being tested and an established drug problem. See, e.g., Gibeaut, *supra* note 169, at 43-44 (arguing that the Seventh Circuit "glossed over the starting point for any Fourth Amendment analysis," and that it did not heed Justice Scalia's admonition in *Acton* where Scalia wrote: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."); see also *Recent Cases*, 112 HARV. L. REV. 713, 716-18 (1999) (arguing that the Seventh Circuit failed to consider any correlation between an established drug problem and the students being tested, ignoring well-established precedent in applying such an element of the "reasonableness" test).

school's interest outweighs that of the individual.<sup>212</sup> The school years serve as a critical impasse during a student's life. While attending school, the child faces a barrage of learning, whether in the social, physical, emotional, or academic realms. Yet, when drugs infect the school system, the learning process is crippled. Drugs' physical and psychological effects cause lifelong and profound losses.<sup>213</sup> Statistics demonstrate that drug use decreases the chances that a student will graduate high school.<sup>214</sup> Drug use creates danger in the classrooms when students use tools, machines, scalpels, and chemicals.<sup>215</sup> These deleterious consequences legitimize a school's interest in drug prevention.

Yet drugs not only affect the child, but they also taint the entire school system by disrupting the educational process.<sup>216</sup> The Supreme Court has recognized a school's duty to maintain an adequate learning environment, a component of which is restrained from abusing drugs.<sup>217</sup> Schools must be allowed to use all reasonable means

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212. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (noting the school has a legitimate interest in providing an adequate learning environment for the student). *But see id.* at 361-62 (Brennan, J., concurring in part and dissenting in part) (stating that the Fourth Amendment "rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men'"). Cf. *Willis II*, 158 F.3d at 425 (commenting that it is still "necessary to establish some boundaries so as not to sanction 'routine drug testing . . . on all students required to attend school,'" in striking down a school's drug testing of students suspended for fighting, as not justified by "special needs").

213. See *Acton*, 515 U.S. at 661.

214. See TETSUJI YAMADA ET AL., *THE IMPACT OF ALCOHOL CONSUMPTION AND MARIJUANA USE ON HIGH SCHOOL GRADUATION*, 13 NATIONAL BUREAU OF ECON. RESEARCH, Working Paper No. W4497 (1993); see also Anthony G. Buzbee, Note, *Who Will Speak for the Teachers? Precedent Prevails in Vernonia School District 47J v. Acton*, 33 HOUS. L. REV. 1229, 1231-33 (1996) (arguing that in light of *Acton*, drug testing of not only extracurricular students but all students is allowed).

215. See Buzbee, *supra* note 214, at 1259-61 (noting that students using tools and dangerous substances in classes like biology and chemistry, along with participating in physical education classes and certain extracurricular activities like JROTC, serve as severe risks while under drugs' influence). See generally *id.* at 1259-60 nn. 280-81 & 285 (reviewing various possible accidents that may occur within the school system).

216. See *Acton*, 515 U.S. at 662 (stating that "the effects of a drug-infested school are visited not just upon the user, but upon the entire student body and faculty, as the educational process is disrupted").

217. See *T.L.O.*, 469 U.S. at 342 n.9 ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities."); see also *Acton*, 515 U.S. at 661 ("Deterring drug abuse by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . ."); *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988) (recognizing that a conducive learning environment must be maintained if the individual student is to learn at all).

to combat drug abuse if education is to be successful.<sup>218</sup> No one doubts the problem exists. Courts need to recognize that a cure exists. A school's mandatory, suspicionless drug testing of students voluntarily participating in extracurricular activities serves as the elixir to the problem.

## V. CONCLUSION

Mandatory, suspicionless drug testing of students voluntarily participating in extracurricular activities meets the Court's Fourth Amendment "reasonableness" test. Since 1985, the Court has consistently recognized that students possess diminished privacy interests in the school setting. Abandoning the Fourth Amendment's warrant and probable cause requirements, the Court has adopted a "special needs" rationale to justify using only a "reasonableness" test when determining whether a search by school officials violates the student's Fourth Amendment rights.

As society recognizes the need to curb the drug problem in America, the Court has extended the "special needs" rationale to drug testing programs. Mandatory, suspicionless drug testing programs may be constitutional if the school's interest is strong enough to override the student's individual privacy interests.

*Vernonia School District 47J v. Acton* attempted to resolve the issue of whether a school's interest in preventing athletes and students from using drugs outweighed the privacy interest of the individual students.<sup>219</sup> The Court upheld the school's drug testing program, focusing on the need of schools to conduct testing in light of demonstrated drug abuse problems in the school.<sup>220</sup> Although the Supreme Court reserved the question of whether drug testing programs may be extended to other contexts, such as to all students involved in extracurricular activities, the Seventh Circuit logically made this extension.<sup>221</sup> The Seventh Circuit's recent decision in *Todd v. Rush County*

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218. See *Schaill*, 864 F.2d at 1324 ("If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment."); see also *Todd v. Rush County Sch.*, 133 F.3d 984, 986 (7th Cir. 1998) (citing *Schaill* for the same proposition); John J. Bursch, Note, *The 4 R's of Drug Testing in Public Schools: Random Is Reasonable and Rights Are Reduced*, 80 MINN. L. REV. 1221, 1254 (1996) (arguing that random, school-wide drug testing "does not signal the 'death' of student constitutional rights but rather a narrow exception intended to give school officials a stronger weapon in the war against drugs").

219. *Acton*, 515 U.S. at 648.

220. See *id.* at 664-66.

221. See discussion *supra* Part III.A.



*Schools* sets forth persuasive reasons to allow the testing of students who voluntarily join extracurricular activities.<sup>222</sup>

This Note demonstrates that Fourth Amendment jurisprudence allows mandatory suspicionless drug testing of extracurricular students for three primary reasons. First, students voluntarily choose to participate in extracurricular activities, an affirmative choice by the individual student. A student decides whether the school should find out about illicit drug use; the choice being non-participation versus participation after undergoing drug treatment. Second, the student receives enhanced prestige, intrinsic benefits, and the privilege of participating in activities, where the student may serve as a role model to other students in the community. These benefits come with a small price, that those who receive and enjoy them are not under the influence of illicit drugs. Third, appropriate drug testing programs only have non-punitive and prophylactic purposes, seeking only to protect the student as well as other students. The programs do not jail a student who tests positive.

As drugs infect our school system, schools need a reasonable means to combat the disease. The Fourth Amendment requires balancing the student's individual privacy interests against the school's need to maintain a learning environment. Drugs have profound and lifelong effects on students' maturing minds and bodies. Drug use disrupts not only students and faculty, but the entire learning process. No one doubts that a drug problem exists, and that it will continue. With the precedent set, and the extension logical, mandatory suspicionless drug testing of students voluntarily participating in extracurricular activities is the constitutional cure.

*James M. McCray*

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222. *Todd*, 133 F.3d at 986-87.

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