

## **Drug Testing In Schools**

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CONRAD WILTON\*

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\* Copyright © 2016 Conrad Wilton. Conrad Wilton is best known as the host of “Conrad’s Corner®” Radio - Est. 2010. He graduated from the UC Davis School of Law in 2016 after earning his Bachelor of Arts in broadcast journalism at the University of Southern California in 2013. Conrad currently works in entertainment litigation and transactional law as an associate attorney with Fox Rothschild LLP in Los Angeles, California. He attributes his continued success to the unconditional love and support of Edward and Beatrice Weiss, Ron and Betty Wilton, Baron Wilton and his incredible dog Hunter.

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## Introduction

The harmful psychological and physical damage drugs cause the human body is well documented.<sup>1</sup> Unsurprisingly, adolescents are particularly vulnerable to use drugs given their developing brains and strong susceptibility to peer pressure.<sup>2</sup> Even drugs generally perceived as safe, like marijuana, can cause a child irreversible brain damage impairing memory, coordination, and learning capacity.<sup>3</sup> Overall, adolescent substance abuse has been linked to poor performance in school, depression, anti-social behavior, and delinquency.<sup>4</sup> Additionally, substance abuse increases recidivism and often prolongs a child's interaction with the juvenile justice system.<sup>5</sup>

In response, many schools nationwide have implemented drug testing programs that require all student athletes and, in more extreme examples, all students participating in extracurricular activities, to submit to mandatory testing. Despite critics' claims that the Fourth Amendment's prohibition against unreasonable searches and seizures bars these programs, the United States Supreme Court has upheld the constitutionality of drug testing in schools rendering the search reasonable to shield children from drugs in both athletic and extracurricular contexts.

This paper analyzes the U.S. Supreme Court's justification of drug testing in two seminal cases and examines scholarly notes with different views as to whether drug testing yields favorable policy. Furthermore, the paper reveals how a California appellate court upheld a preliminary injunction against drug testing all extracurricular participants because of a strong likelihood that it constitutes an impermissible invasion of privacy not narrowly tailored to achieve the state goal of eliminating adolescent drug use. The paper finally explores how other states have determined the constitutionality of drug testing in schools, evaluates the overall

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<sup>1</sup> *Most Commonly Used Addictive Drugs*, NAT'L INST. OF DRUG ABUSE (Sept. 2014), <http://www.drugabuse.gov/publications/media-guide/most-commonly-used-addictive-drugs>.

<sup>2</sup> A. Rae Simpson, *Brain Changes*, MASS. INST. OF TECH. (2008), <http://hrweb.mit.edu/worklife/youngadult/brain.html>.

<sup>3</sup> *Most Commonly Used Addictive Drugs*, NAT'L INST. OF DRUG ABUSE (Sept. 2014), <http://www.drugabuse.gov/publications/media-guide/most-commonly-used-addictive-drugs>.

<sup>4</sup> U.S. DEP'T OF JUSTICE, *Drug Identification and Testing in the Juvenile Justice System*, 7 (1998), <https://www.ncjrs.gov/pdffiles/167889.pdf>.

<sup>5</sup> Shiloh Carter, *The Relationship Between Substance Abuse and Teen Crime*, RECLAIMING FUTURES (Oct. 15, 2012), <http://reclaimingfutures.org/substance-abuse-among-teen-offenders>.

effectiveness of drug testing in both the athletic and extracurricular contexts, and presents potentially more effective solutions to reducing adolescent drug use.

## I. The Constitutionality of Drug Testing Under Federal Law

### A. Drug Testing Student Athletes

In the seminal case *Vernonia School District v. Acton*,<sup>6</sup> the U.S. Supreme Court held the school district's random and mandatory urinalysis drug testing program of student athletes did not violate the Fourth Amendment's prohibition of unreasonable searches and seizures. James Acton, a seventh grader, lost his eligibility to play football after his parents refused to consent to the district's drug testing policy.<sup>7</sup> Acton challenged the policy as unconstitutional and sought to enjoin its implementation.<sup>8</sup> The Court found the policy constituted a search within the scope of the Fourth Amendment, but held that neither obtaining a warrant nor establishing probable cause is necessary to render a search reasonable if special needs make doing so impracticable.<sup>9</sup> The Court then determined special needs exist in a school setting and evaluated the reasonableness of the search by balancing the invasion of a student athlete's privacy interest against the legitimate state interest in reducing drug use.<sup>10</sup>

In evaluating the student's privacy interest, the Court cited the doctrine of *in loco parentis*, which allows teachers and administrators to assume parental authority and use restraint and correction to serve the best interests of the child.<sup>11</sup> The Court considered the school's custodial and tutelary responsibility for children and held that a student's Fourth Amendment rights are less than those of an emancipated adult.<sup>12</sup> For example, all public school students are obligated by law to attend school and therefore lack the liberty to come and go at will.<sup>13</sup> In contrast, adults cannot be legally required to attend school from the early morning to the afternoon. Additionally, students are routinely required to submit to various physical examinations and vaccinations to protect their health and the

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<sup>6</sup> 515 U.S. 646 (1995).

<sup>7</sup> *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 651 (1995).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 652-53.

<sup>10</sup> *Id.* at 653-54.

<sup>11</sup> *Id.* at 654-55.

<sup>12</sup> *Id.* at 656.

<sup>13</sup> *Id.* at 654.

welfare of their peers while adults are not subjected to these requirements in the workplace.<sup>14</sup>

The Court then noted student athletes' expectation of privacy is significantly diminished compared to a regular student given the communal realities of a locker room environment and stringent physical examination requirements.<sup>15</sup> The district's locker rooms contained open showers and stalls without curtains or partitions.<sup>16</sup> Student athletes were also instructed to submit to a preseason physical examination that included a urine sample unrelated to the sample required by the drug testing policy.<sup>17</sup> To conclude, although the Court acknowledged collecting urine samples intruded upon an excretory function traditionally shielded by privacy, the Court found a student athlete's privacy interest in not providing a urine sample for drug testing to be negligible.<sup>18</sup>

In evaluating the school district's interest, the Court determined there was a strong and arguably compelling interest in deterring student drug use.<sup>19</sup> The physical, psychological, and addictive effects of drugs are most severe during adolescence.<sup>20</sup> Drug use disrupts the educational process for both drug users and their peers.<sup>21</sup> Additionally, drug use by student athletes creates especially high risks of harm by decreasing reaction time, impairing judgment, and numbing pain.<sup>22</sup> Amphetamines artificially increase a student's heartbeat, blood pressure, and peripheral vasoconstriction making them particularly dangerous if used before exercising.<sup>23</sup> Cocaine also causes vasoconstriction, elevated blood pressure, and increases a student athlete's risk for artery spasms and heart attacks.<sup>24</sup> Moreover, marijuana reduces the blood's ability to carry oxygen and inhibits sweating, resulting in dangerously high internal body temperatures.<sup>25</sup>

The Court then recognized a large segment of the district's student body to be in a state of rebellion fueled by pervasive alcohol and drug

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<sup>14</sup> *Id.* at 656.

<sup>15</sup> *Id.* at 657.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 658.

<sup>19</sup> *Id.* at 661.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 662.

<sup>23</sup> HERB APPENZELLER, *MANAGING SPORTS AND RISK MANAGEMENT STRATEGIES* (1993).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

abuse.<sup>26</sup> Before administering the test, the district enacted anti-drug educational programs and introduced drug dogs to randomly search students' belongings, but the epidemic persisted.<sup>27</sup> Given these circumstances and the special danger drugs pose in athletics, the Court upheld the policy as reasonable and constitutional.<sup>28</sup>

### B. Drug Testing Extracurricular Participants

The Court took a step further in *Board of Education of Pottawatomie County v. Earls* by upholding the constitutionality of drug testing for students who participate in any competitive extracurricular activity, rendering it a reasonable means of preventing drug use among all students.<sup>29</sup> In *Earls*, the district required that all middle and high school students consent to random drug testing to participate in competitive extracurricular activities such as band, choir, the Academic Team, and Future Farmers of America.<sup>30</sup> The urinalysis only detected recreational drugs and not prescription medication.<sup>31</sup> Respondents Lindsay Earls and Daniel James, both high school students, challenged the policy as unconstitutional under the Fourth Amendment.<sup>32</sup> On appeal, the Court applied the test articulated in *Vernonia* and balanced the students' privacy interests to avoid having to provide a urine sample against the school's interest in preventing and detecting student drug use.<sup>33</sup>

In evaluating the students' privacy interests, the Court found the distinction between students participating in non-athletic extracurricular activities and those playing sports was not legally significant.<sup>34</sup> The Court reasoned that students competing in extracurricular activities voluntarily curb their freedom by subjecting themselves to bolstered GPA requirements and other rules regarding eligibility that non-participating students need not obey.<sup>35</sup> Additionally, band, choir, and theater students often engage in communal undress on buses or backstage much like student athletes don uniforms in locker rooms.<sup>36</sup> Finally, the Court found the drug testing

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<sup>26</sup> *Vernonia*, 515 U.S. at 661, 662-63.

<sup>27</sup> *Id.* at 649.

<sup>28</sup> *Id.* at 663, 666.

<sup>29</sup> 536 U.S. 822 (2002).

<sup>30</sup> Bd. of Educ. of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 826 (2002).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 830.

<sup>34</sup> *Id.* at 831.

<sup>35</sup> *Id.* at 832.

<sup>36</sup> *Id.*

process to be virtually identical to that upheld in *Vernonia* where males urinate with their backs to the supervisor and females urinate inside a closed stall with the supervisor waiting outside listening for sounds of tampering.<sup>37</sup>

In evaluating the district's interest in preventing and detecting student drug use, the Court cited the War on Drugs and concluded the interest to be sufficiently compelling to justify the program.<sup>38</sup> The Court rejected the premise that any district seeking to impose random suspicionless drug testing as a condition to participation in a school activity must demonstrate that there is some identifiable problem among a sufficient number of students subjected to testing.<sup>39</sup> Additionally, the fact that students participating in extracurricular activities are often less likely to abuse drugs than non-participants did not render the district's policy unreasonable or its interest in deterring drug use less urgent.<sup>40</sup> To conclude, the Court held that drug testing all extracurricular participants, including those outside of athletics, does not run afoul of the Fourth Amendment but expressed no opinion as to the wisdom of the policy.<sup>41</sup>

### *C. Policy Impact of Drug Testing Extracurricular Participants*

A cleverly titled article from the *Vanderbilt Law Review* advocated the extension of *Vernonia* to all extracurricular activities because students voluntarily choose to participate in extracurricular activities, extracurricular participants are often school leaders wielding considerable influence over their peers, and the use of drug testing as a prerequisite to participation is a prophylactic non-punitive process.<sup>42</sup>

First, the drug testing programs are a prerequisite to participating in optional extracurricular activities, so students can choose to avoid the test.<sup>43</sup> Moreover, students who participate in extracurricular activities implicitly

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 834.

<sup>39</sup> *Id.* at 836.

<sup>40</sup> *Id.* at 838. "Vernonia did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students." *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> James McCray, Note, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387, 420-21 (2000).

<sup>43</sup> *Id.* at 421.

agree to follow rules, conduct, and regulations not required in general academics.<sup>44</sup> Such regulations include adhering to dress codes, undergoing physical examinations, obtaining insurance, and signing waivers releasing the school from liability in the event of injury or death.<sup>45</sup> Submitting to a drug test is merely another regulation students who seek to participate in extracurricular activities must follow.<sup>46</sup>

Second, a student's participation in extracurricular activities carries enhanced prestige and special status as a role model at school.<sup>47</sup> Thus, the district's interest in ensuring its extracurricular participants are drug-free transcends protecting the physical safety of students.<sup>48</sup> Extracurricular participants are often leaders in their peer group who wield great influence over other students by virtue of their extracurricular involvement, which instills valuable leadership and teamwork skills not often learned in an ordinary classroom.<sup>49</sup> Thus, the district has a strong interest in ensuring these participants are sober so that they can positively influence other students to get involved, represent their school, and contribute to the community.<sup>50</sup> With great leadership and influence comes great responsibility. A drug-free school not only benefits from strong able-bodied students but also appreciates the intangible advantages from having respectful and disciplined student leaders who choose bettering their school and community over deleterious drugs.

Finally, students do not face criminal punishment for noncompliance with drug-testing programs.<sup>51</sup> They are a preventative measure that rids drugs from the school's extracurricular activities.<sup>52</sup> Conditioning participation on a drug test leaves students with the choice not to take the test without fear of reprisal, yet forfeiture of extracurricular activity eligibility can be a steep price to pay.

Extracurricular activities convey invaluable skills and experience that help a student develop not only academically but also socially, personally, and professionally. However, although they are an indispensable to a student's education, extracurricular activities are

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 421-22.

<sup>47</sup> *Id.* at 422.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 423.

<sup>52</sup> *Id.*

privileges not rights. The article correctly recognizes how extracurricular programs condition participation on a variety of factors including consent waivers, dress code, and physical examinations. For example, a program like concert band or choir can require its members take private lessons just as the Academic Decathlon team can require competitors pass a rigorous scholastic examination before joining the squad. Therefore, although students have a right to public education, there is no right to extracurricular participation despite the importance outside school activities play in adolescent development.

In contrast, an article from the *Health-Matrix: Journal of Law and Medicine* argued a student's right to privacy is fundamental and triggers strict scrutiny, which requires a compelling interest and a narrowly tailored solution.<sup>53</sup> The article asserted that the drug testing of all extracurricular participants is not sufficiently justified by the general interests of reducing adolescent drug use and fostering healthy student leaders.<sup>54</sup>

To establish a compelling need, only an extreme set of facts similar to those found in *Vernonia* warrant suspicionless drug testing in schools.<sup>55</sup> These facts include a special risk of harm caused by the combination of drug use and physical activity, a well-documented drug culture within the school, statistics showing the students targeted by the policy are at a significantly higher risk of abusing drugs than their counterparts, and an exhaustion of alternative methods to reduce drug use.<sup>56</sup> The article noted that the special risk of harm caused by drug use in sports cannot alone justify suspicionless drug testing because it would permit schools to test physical education participants, which in reality would target all students.<sup>57</sup>

Even if the school demonstrates a compelling need to drug test all extracurricular participants, the policy is not narrowly tailored to achieve the state interest in reducing adolescent drug use. Drug testing extracurricular participants targets low-risk students actively involved in outside programs while high-risk kids with plenty of time and little to do escape detection. It also discourages high-risk kids battling substance abuse from participating in healthy activities.<sup>58</sup>

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<sup>53</sup> Amanda E. Bishop, Note, *Students, Urinalysis and Extracurricular Activities: How Vernonia's Aftermath is Trampling Fourth Amend. Rights*, 10 HEALTH MATRIX: J. OF LAW & MED. 217, 232-33 (2000).

<sup>54</sup> *Id.* at 228, 237

<sup>55</sup> *Id.* at 235.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 236.

<sup>58</sup> *Id.* at 240.

A more narrowly tailored alternative to reduce adolescent drug use is increased vigilance and observation for signs of substance abuse.<sup>59</sup> Various studies show drug use is more easily deterred when kids are kept in supervised environments like extracurricular activities.<sup>60</sup> Indeed, extracurricular participation has been scientifically proven to reduce drug use.<sup>61</sup> Additionally, the peak time for juvenile crime is from 3-4pm due to the lack of supervision after school and before parents return home from work.<sup>62</sup> Thus, supervision of students is key to reducing risky behavior. Finally, detecting drug use is not difficult since drugs often noticeably impair a student's academic performance.<sup>63</sup>

Another alternative is to only test students reasonably suspected to have used drugs.<sup>64</sup> This approach protects the dignity of students and avoids sending a message of categorical distrust. Additionally, it helps restore students' faith in the Fourth Amendment and the presumption of innocence until proven guilty.

## II. The Constitutionality of Drug Testing Under State Law

### A. California's Right to Privacy

In an unpublished but pivotal opinion, a California appellate court upheld a preliminary injunction against imposing a mandatory drug testing program on all students participating in extracurricular programs because of a strong likelihood the policy violates California's constitutional right to privacy.<sup>65</sup> Two high school students, both band members with strong GPAs, challenged the policy as an impermissible invasion of privacy and waste of taxpayer money.<sup>66</sup> The trial court agreed and granted the students injunctive relief, which allowed them to continue participating in band and other extracurricular activities without taking a drug test until their case was

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<sup>59</sup> *Id.* at 243-44.

<sup>60</sup> *Id.* at 242-43.

<sup>61</sup> Jeanne E. Jenkins, *The Influence of Peer Affiliation and Student Activities on Adolescent Drug Involvement*, 31 *ADOLESCENCE* 297, 304 (1996).

<sup>62</sup> James Alan Fox and Sanford A. Newman, *After-School Crime or After-School Programs: Tuning in to the Prime Time for Violent Juvenile Crime and Implications for National Policy*, *FIGHT CRIME: INVEST IN KIDS* 1, 3, 4 (1997), [http://www.popcenter.org/problems/vandalism/PDFs/Fox&Newman\\_1997.pdf](http://www.popcenter.org/problems/vandalism/PDFs/Fox&Newman_1997.pdf).

<sup>63</sup> Bishop, *supra* note 53, at 239.

<sup>64</sup> *Id.* at 246-47.

<sup>65</sup> *Brown v. Shasta Union High Sch. Dist.*, No. C061972, 2010 WL 3442147, at \*1 (Cal. Ct. App. Sept. 2, 2010).

<sup>66</sup> *Id.* at \*4.

decided on the merits.<sup>67</sup>

In upholding the injunction, the California Third District Court of Appeal found that the California Constitution expressly protects the right to privacy unlike the U.S. Constitution.<sup>68</sup> To determine whether that right was infringed, the court considered 1) whether the students had a legally protected interest in avoiding the drug test, 2) whether the students had a reasonable expectation of privacy under the circumstances, and 3) whether there was a serious invasion of privacy.<sup>69</sup>

First, the court held the students had a legitimate privacy interest in avoiding the test because it interfered with the personal activity of urination.<sup>70</sup> Students were required to urinate with a supervisor outside listening for sounds of tampering and the subsequent urinalysis revealed information about the students' bodies.<sup>71</sup> Additionally, the test required students to reveal any prescription medication they were currently taking.<sup>72</sup>

Second, although the court acknowledged students are subject to strict control and supervision in school, they still have a reasonable expectation of privacy.<sup>73</sup> The court distinguished *Hill v. National Collegiate Athletic Ass'n*, a California Supreme Court decision upholding drug testing of college athletes based upon the public realities of playing sports like disrobing in locker rooms and submitting to various physical examinations.<sup>74</sup> In contrast, the court found that not all California students are subject to physical examinations and vaccinations.<sup>75</sup> Additionally, the court reasoned extracurricular activities constitute an integral component of public education whereas college athletics are not essential to a college education.<sup>76</sup> Indeed, a relatively small percentage of students play college sports,<sup>77</sup> but almost 57% of Shasta Union High School District students

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<sup>67</sup> *Id.* at \*1, \*12-\*13.

<sup>68</sup> *Id.* at \*6.

<sup>69</sup> *Id.* at \*7.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at \*3.

<sup>72</sup> *Id.* at \*7.

<sup>73</sup> *Id.* at \*8.

<sup>74</sup> See *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (1994).

<sup>75</sup> *Brown*, 2010 WL 3442147, at \*8.

<sup>76</sup> *Id.* at \*9.

<sup>77</sup> *NCAA College Athletes Statistics*, STATISTIC BRAIN (2016) (revealing the number of NCAA student athletes to be 420,000), <http://www.statisticbrain.com/ncaa-college-athletics-statistics/>; *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STATISTICS (2012) (projecting the number of undergraduate students at American universities to exceed 20 million),

participate in competitive extracurricular activities.<sup>78</sup> To conclude, the court held that the plaintiffs' expectation of privacy was somewhat diminished due to their voluntary participation in extracurricular activities but stronger than the college athletes' expectation of privacy in *Hill*.<sup>79</sup>

Third, the court held the drug test constituted a serious invasion of privacy.<sup>80</sup> Although the test required a supervisor to hear but not see the students urinate, the court found the average student could feel uncomfortable and embarrassed peeing with knowledge a supervisor is listening.<sup>81</sup> The court noted teenagers are generally more self-conscious and thus monitored urination is likely to cause embarrassment and humiliation.<sup>82</sup> In fact, peeing under the pressure of a drug test can trigger strong feelings of anxiety and cause temporary constipation.<sup>83</sup> If the latter occurs, a teen would be unable to produce urine during the test.<sup>84</sup> In more extreme examples, a teen can develop Paruresis, otherwise known as Shy Bladder Syndrome.<sup>85</sup> Paruresis often starts with an embarrassing incident, such as having to pee in a cup with someone listening outside.<sup>86</sup> Since teenagers are particularly susceptible to psychological pressure and stress, a drug test can cause more harm than good for those with bashful bladders.

After considering all three factors, the court balanced the students' privacy interests against the district's interest in detecting drug use and found the former outweighed the latter.<sup>87</sup> The district presented no evidence of a drug or alcohol epidemic in its schools' extracurricular programs.<sup>88</sup> Plus, the court found the effectiveness of random drug testing to be in sharp dispute.<sup>89</sup>

To conclude, the court sustained the preliminary injunction and held

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[http://nces.ed.gov/programs/digest/d14/tables/dt14\\_105.20.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_105.20.asp?current=yes).

<sup>78</sup> *Brown*, 2010 WL 3442147, at \*3.

<sup>79</sup> *Id.* at \*9.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at \*10.

<sup>82</sup> *Id.*

<sup>83</sup> Victoria State Gov't, *Shy Bladder Syndrome*, BETTER HEALTH CHANNEL (2015), <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/shy-bladder-syndrome>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Brown*, 2010 WL 3442147, at \*11.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

the drug testing policy likely violates California's right to privacy.<sup>90</sup>

### *B. Drug Testing Student Athletes in Washington*

Drug testing student athletes has been found constitutional under federal law since, as illustrated in *Vernonia*, drug use presents an especially high risk of harm in sports. Nevertheless, the Supreme Court of Washington in *York v. Wahkiakum School District* held randomly drug testing student athletes violated their state constitutional right to privacy.<sup>91</sup>

In *York*, the school district presented undisputed evidence of a documented adolescent drug and alcohol problem within the community.<sup>92</sup> Forty percent of sophomores reported previously using illicit drugs with 19% using them within the last 30 days.<sup>93</sup> Forty-two percent of seniors reported previously using illicit drugs with 12.5% using them within the last 30 days.<sup>94</sup> The most troublesome statistic revealed 50% of all student athletes self-identified as drug and/or alcohol users.<sup>95</sup> In response, the district required all student athletes to submit to a random drug test or risk losing eligibility.<sup>96</sup> The test was no different as the one upheld in *Vernonia* where students provided urine samples in enclosed bathroom stalls with a supervisor outside.<sup>97</sup> If the test was positive, the student was suspended from competition and referred to drug counseling.<sup>98</sup> The test results were not sent to law enforcement or included in the student's academic record.<sup>99</sup>

Aaron and Abraham York were student athletes in the Wahkiakum School District and their parents sought to enjoin the district from implementing its drug testing policy.<sup>100</sup> In holding the policy violated the Yorks' constitutional right to privacy, the Washington Supreme Court considered whether requiring a student athlete to provide a urine sample for a drug test intrudes upon the student's private affairs, and if so, whether state law permits this intrusion.<sup>101</sup> In evaluating the first factor, the court

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<sup>90</sup> *Id.* at \*13.

<sup>91</sup> *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 316 (2008).

<sup>92</sup> *Id.* at 300.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 301.

<sup>97</sup> *Id.* at 305. "The Wahkiakum School District modeled its policy after the one used by the Vernonia School District." *Id.*

<sup>98</sup> *Id.* at 301.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 301-02.

<sup>101</sup> *Id.* at 306.

conceded that student athletes voluntarily subject themselves to a communal lifestyle undressing and showering in locker rooms.<sup>102</sup> Additionally, the court found the district's urinalysis to be relatively unobtrusive.<sup>103</sup>

Nevertheless, the court held state law did not permit the intrusion since a student athlete has a genuine and fundamental privacy interest in controlling his or her bodily functions and a mandatory urinalysis significantly invades this interest.<sup>104</sup> Furthermore, the court found a random and suspicionless drug test to be a warrantless search which, to be lawful in Washington, requires exigent circumstances not present in the case.<sup>105</sup> The court reasoned that permitting the district to justify its suspicionless drug testing policy with the community's general problem of substance abuse would allow the district to ultimately test students participating in any extracurricular activity or every student enrolled in the district.<sup>106</sup> Therefore, the court held the policy unlawful under the Washington Constitution.<sup>107</sup>

By holding drug testing student athletes violates the state constitution despite the special danger drugs present in the athletic context, the court made it difficult if not impossible for a Washington school to lawfully drug test any of its students without suspicion. However, the court fails to explain why the law cannot permit a school from drug testing its athletes yet prohibit the testing of all extracurricular participants. In *York*, 50% of the district's student athletes self-reported as drug and/or alcohol users yet the court denied the district the power to identify and remove intoxicated athletes from the field to protect their safety and the safety of competitors. A more nuanced approach that accounts for the special danger drugs present in athletics and the existence of a substance abuse problem in a particular district would better protect athletes from drug-induced injury yet still recognize their right to privacy.

### C. Drug Testing Extracurricular Participants in Pennsylvania

Rather than categorically prohibit suspicionless drug testing in schools, the Supreme Court of Pennsylvania articulated a refined approach that permits testing extracurricular participants upon a showing of a specific

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<sup>102</sup> *Id.* at 308.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 310.

<sup>106</sup> *Id.* at 315-16.

<sup>107</sup> *Id.* at 316.

need for the policy and a sound basis for believing that the policy will effectively address that need.

In *Theodore v. Delaware Valley School District*, the district adopted a policy of suspicionless drug and alcohol testing of students who participate in voluntary extracurricular activities or hold parking permits.<sup>108</sup> Rather than cite a documented drug or alcohol problem in the community to justify the policy, the district claimed the policy was necessary to reduce substance abuse among driving students and student athletes given the special danger drugs and alcohol present in the driving and recreational contexts.<sup>109</sup> As for students participating in non-recreational extracurricular activities without parking permits, the district claimed they were “student leaders” wielding considerable influence over their peers and, thus, should be included in the program.<sup>110</sup>

Jennifer Lynn Theodore participated in non-athletic extracurricular activities such as the National Honor Society, Science Olympiad, and Scholastic Bowl, and her sister Kimberly Ann played several sports and held a parking permit.<sup>111</sup> Their parents sought injunctive relief claiming the district’s drug testing policy was an unreasonable search and seizure under the Pennsylvania Constitution.<sup>112</sup>

The court examined four factors before ultimately affirming the commonwealth court’s decision to reinstate the complaint after the trial court dismissed it as a matter of law: 1) the students’ privacy interests in not having to submit to a mandatory drug test upon participation in an extracurricular activity or receipt of a parking permit, 2) the nature of the intrusion, 3) whether ample notice was given to the students and their parents, and 4) the nature and immediacy of the district’s interest in reducing drug abuse among students and the efficacy of a drug test in addressing that interest.<sup>113</sup>

In evaluating the first factor, the students’ privacy interests, the court recognized there are few activities in society more private than the passing of urine.<sup>114</sup> Therefore, searching a student’s locker, clothes or personal belongings does not implicate the same privacy concerns as the capture of

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<sup>108</sup> *Theodore v. Del. Valley Sch. Dist.*, 575 Pa. 321, 324 (2003).

<sup>109</sup> *Id.* at 326.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 328.

<sup>112</sup> *Id.* at 328-29.

<sup>113</sup> *Id.* at 343.

<sup>114</sup> *Id.* at 345.

bodily fluids for the purpose of conducting a chemical analysis.<sup>115</sup> As a result, the court held students have a strong privacy interest in avoiding the drug test.<sup>116</sup>

In examining the second factor, the degree of intrusion, the court found it to be minimal given the district's established protocol in using trained medical personnel to retrieve the samples, policy of randomly testing students rather than targeting a select few, and commitment to preserving the students' privacy by sealing the test results from law enforcement.<sup>117</sup>

The third factor, whether ample notice was given to parents and students, also favored the district. Although not told when they would be tested, all students and parents received a general notice of the policy.<sup>118</sup> Furthermore, students were required to obtain a parent signature consenting to the test before participating in an extracurricular activity or applying for a parking permit.<sup>119</sup>

Nevertheless, the court found the district failed to prove its policy was a reasonable means of reducing student drug and alcohol consumption.<sup>120</sup> The court distinguished *Vernonia* on two grounds. First, unlike in *Vernonia* where the district adopted its drug testing policy as a last resort to address the pervasive drug culture infecting its schools, the Delaware Valley School District failed to exhaust viable alternatives to drug testing and was not responding to a well-documented drug epidemic.<sup>121</sup> Second, the district in *Vernonia* tailored its testing to just student athletes given the unique harm drugs present in sports.<sup>122</sup> In contrast, the Delaware Valley School District attempted to test all extracurricular participants based on the perplexing theory that extracurricular participants are student leaders who therefore must curtail their right to privacy to partake in activities outside academics.<sup>123</sup>

Overall, the court found the district's policy to be under-inclusive because it excluded high-risk students who did not participate in

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<sup>115</sup> *Id.* at 344.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 345.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 346-47.

<sup>121</sup> *Id.* at 347.

<sup>122</sup> *Id.* at 349-50.

<sup>123</sup> *Id.* at 347.

extracurricular activities.<sup>124</sup> Conversely, the court also found the district's policy to be over-inclusive because it targeted non-recreational extracurricular participants with a low risk of abusing drugs given their active involvement.<sup>125</sup> Indeed, tenth graders who reported spending no time in extracurricular activities were 49% more likely to have used drugs than those who spent 1-4 hours a week in such activities.<sup>126</sup>

In summary, the court held that a general need to deter drug use does not justify the expansive policy of randomly drug testing all extracurricular participants.<sup>127</sup> However, the court did not render every drug testing policy unconstitutional. It suggested that a drug testing policy taken in response to a documented drug problem, implemented as a last resort, and applied after a meticulous adoption process would likely survive judicial scrutiny. But targeting extracurricular participants solely because they are student leaders in the absence of any documented drug problem or special harm clearly constitutes an unreasonable search and seizure under the Pennsylvania Constitution.<sup>128</sup>

### III. The Limitations of Drug Testing

#### A. Prescription Medication Loophole and Circumvention Techniques

Despite the high cost, the average drug test does not detect many popular prescription drugs. A standard test only detects marijuana, tobacco, cocaine, heroin, amphetamines, barbiturates, and tranquilizers.<sup>129</sup> This leaves many prescription and over the counter drugs undiscovered. Indeed, the drug test in *Earls* did not identify prescription drugs. Fortunately, the rate of adolescent prescription drug abuse has decreased over the years. Less than five percent of high school seniors used Vicodin for non-medical reasons in 2014, down from nearly 10% in 2009.<sup>130</sup> Six percent of high school seniors used opioid pain relievers for recreational purposes down

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<sup>124</sup> *Id.* at 349-50.

<sup>125</sup> *Id.* at 348-49.

<sup>126</sup> Nicholas Zill, Christine Nord & Laura Loomis, *Adolescent Time Use, Risky Behavior and Outcomes*, WESTAT, INC. (1995), <http://files.eric.ed.gov/fulltext/ED395052.pdf>.

<sup>127</sup> *Theodore*, 575 Pa. at 348.

<sup>128</sup> *Id.* at 352.

<sup>129</sup> Ryoko Yamaguchi, Lloyd Johnston & Patrick O'Malley, *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use* 1 (2003), [http://www.drugpolicy.org/docUploads/Johnston\\_sdt\\_study.pdf](http://www.drugpolicy.org/docUploads/Johnston_sdt_study.pdf).

<sup>130</sup> Nat'l Inst. on Drug Abuse, *Drug Facts: High School and Youth Trends* (Dec. 2014), <http://www.drugabuse.gov/publications/drugfacts/high-school-youth-trends>.

from 7.1% in 2013.<sup>131</sup> The results held steady for popular ADHD drugs.<sup>132</sup> More disconcerting is that 69% of teens viewed taking prescription medication for recreational purposes as harmful in 2009 compared to only 55.1% in 2014.<sup>133</sup> Thus, the promising trend of reduced prescription drug abuse may soon reverse and a drug test that fails to detect prescription drugs will become less effective at identifying the actual rate of student drug consumption.

An additional flaw of drug testing is the relative ease in circumventing it. Various magazines and websites teach students how to beat the test. A quick Google search of “how to beat a drug test” yields an informative wikiHow article that not only helps students defeat the test but also provides potentially dangerous methods to obtain a false negative. The article first recommends drinking plenty of water to flush out the drugs and consume Vitamin B-12 pills to restore the urine’s gold hue.<sup>134</sup> It also recommends all drug testers consume Midol to help flush out the body despite Midol only being designed to relieve female menstruation cramps.<sup>135</sup> It then suggests testers take four aspirin pills, which can lead to severe lightheadedness since the proper dosage is 1-2 pills, and zinc sulfate, which can cause harmful mineral deficiencies in the body.<sup>136</sup> The National Institute of Drug Abuse claims these circumvention techniques are ineffective at defeating a drug test, but that does not necessarily stop a substance abusing teen from employing these methods to obtain a false negative and avoid punishment.<sup>137</sup> Given what is at stake if a student fails the test, such as loss of athletic or extracurricular eligibility, parental notification, social humiliation, and other unwanted sanctions, there is a strong temptation to resort to risky behavior.

### *B. Research Mixed as to Effectiveness of Drug Testing in Schools*

Although drug testing high school students is legal under federal law, some studies show drug testing programs are costly to administer and fail to reduce adolescent drug use. For example, a 2007 Oregon Health and

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *How to Pass a Urine Drug Test*, WIKIHOW (May 2015), <http://www.wikihow.com/Pass-a-Urine-Drug-Test>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See Nat’l Inst. on Drug Abuse, *Frequently Asked Questions About Drug Testing in Schools* (Sept. 2014), <http://www.drugabuse.gov/related-topics/drug-testing/faq-drug-testing-in-schools>.

Science University study observed student athletes at five high schools with drug testing programs and athletes at six high schools with no drug testing program.<sup>138</sup> The study revealed no statistically significant differences in alcohol or drug use between the two groups.<sup>139</sup> Plus, a groundbreaking University of Michigan study in 2003, confirmed by the National Center for Education Evaluation, found a slightly higher rate of drug use in schools with drug testing than schools without it.<sup>140</sup> Moreover, the average expense of administering a single drug test can range between \$15 and \$35 potentially costing schools with large athletic programs thousands of dollars.<sup>141</sup>

Nevertheless, some studies show drug testing can effectively reduce drug use if supplemented with other substance abuse prevention programs. A 2012 study funded by the *Journal of Adolescent Health* found students subjected to mandatory testing reported less substance abuse than similarly situated students not subjected to testing.<sup>142</sup> Also in 2012, the *Journal of Youth and Adolescence* reported drug testing effectively deters female students from using drugs on campuses with a positive anti-drug climate.<sup>143</sup> It ultimately concluded that drug testing is most effective when administered in conjunction with educational programs designed to reduce drug use rather than as a stand-alone remedy.<sup>144</sup> Still, many researchers doubt whether drug testing is worth the cost and recommend implementing educational programs instead.

### C. Educational Alternatives to Drug Testing

The Adolescents Training and Learning to Avoid Steroids program (ATLAS) funded by the National Institute of Drug Abuse has been proven particularly effective in reducing drug use among high school football

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<sup>138</sup> Mary Pilon, *Differing Views on Value of High School Tests*, N.Y. TIMES (Jan. 5, 2013), [http://www.nytimes.com/2013/01/06/sports/drug-tests-for-high-school-athletes-fuel-debate.html?\\_r=0](http://www.nytimes.com/2013/01/06/sports/drug-tests-for-high-school-athletes-fuel-debate.html?_r=0).

<sup>139</sup> *Id.*

<sup>140</sup> M.H. Davis, *Facts & Statistics on Random Drug Testing of High School Students*, GLOBAL POST (Mar. 24, 2014), <http://everydaylife.globalpost.com/statistics-random-drug-testing-high-school-students-8400.html>.

<sup>141</sup> *Id.*

<sup>142</sup> James Burdumy, Brian Goesling, John Deke & Eric Einspruch, *The Effectiveness of Mandatory Random Student Drug Testing*, 50 J. OF ADOLESCENT HEALTH 172, 172 (2012).

<sup>143</sup> Sharon Sznitman, Sally Dunlop, Priya Nalkur, Anita Khurana & Daniel Romer, *Student Drug Testing in the Context of Positive and Negative School Climates*, 41 J. OF YOUTH ADOLESCENCE 146 (2012).

<sup>144</sup> *Id.*

players.<sup>145</sup> ATLAS reported a 50% reduction in the use of anabolic steroids, less abuse of recreational drugs and less risky behavior.<sup>146</sup> A sister educational program designed to reduce drug use among female athletes, Athletes Targeting Healthy Exercise and Nutrition Alternatives (ATHENA), reported participating girls were three times less likely to use diet pills than girls in the control group.<sup>147</sup> ATHENA members were also less prone to injury than their counterparts.<sup>148</sup> In contrast, the U.S. Department of Education discovered the internationally renowned Drug Abuse Resistance Education program (DARE) once used in 80% of the nation's school districts is ineffective at reducing adolescent alcohol and drug use.<sup>149</sup>

#### D. Effectiveness of Community and Family-Focused Intervention

A powerful technique for reducing adolescent drug use lies outside the schools in the form of community and family-focused intervention. Promoting School Community University Partnerships to Enhance Resilience (PROSPER) is a community-based prevention program launched in 2013 by Iowa State and Penn State researchers that significantly reduced methamphetamine, marijuana, alcohol, cigarette, and inhalant use among middle and high school students.<sup>150</sup>

The program begins in the sixth grade once students start entering their teens and develop the temptation to engage in risky behavior.<sup>151</sup> Rather than having a law enforcement officer barrage students with ominous facts and premonitions about the dangers of drug abuse (DARE's approach), PROSPER consists of parents and educators who teach students to employ healthy solutions to complex problems with their peers.<sup>152</sup> Additionally, the

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<sup>145</sup> Nat'l Inst. of Drug Abuse, *NIDA-Funded Prevention Research Helps Reduce Steroid Abuse, Anabolic Steroid Abuse* (Aug. 2006),

<http://www.drugabuse.gov/publications/research-reports/anabolic-steroid-abuse/nida-funded-prevention-research-helps-reduce-steroid-abuse>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> David J. Hanson, *Drug Abuse Resistance Education: The Effectiveness of DARE, ALCOHOL ABUSE PREVENTION* (2014), <http://www.alcoholfacts.org/DARE.html>.

<sup>150</sup> A'ndrea E. Messer, *PROSPER Prevention Programs Dramatically Cut Substance Abuse Among Teens*, PENN STATE NEWS (June 4, 2013), <http://news.psu.edu/story/278460/2013/06/04/research/prosper-prevention-programs-dramatically-cut-substance-abuse-among>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

program teaches parents how to more effectively communicate with their teen and strike the delicate balance between providing adequate supervision while allowing enough freedom for growth.<sup>153</sup>

Overall, the program reduced overall drug use among participants 31.4% and was found to have a greater deterrent effect upon high-risk youth.<sup>154</sup> Perhaps more importantly, program participants had better relationships with their parents, improved life skills, and reduced behavioral problems.<sup>155</sup> PROSPER's researchers attribute the program's success to its ability to bring family, community, church, and school together to give the child a strong sense of support and unity.<sup>156</sup> It is self-evident that teens in touch with their family and community are far less likely to abuse drugs than teens who feel detached from loved ones and the world around them. Given the tremendous influence a child's parents and neighborhood wield in the pivotal years of adolescence, a community and family-focused intervention program has tremendous potential to reduce juvenile drug abuse.

### Conclusion

There is a strong state interest in reducing student substance abuse because of the harmful physical and psychological impact drugs unleash upon an adolescent's body. To achieve this goal, many school districts have adopted random suspicionless drug testing of not only student athletes but also students participating in non-recreational extracurricular activities. The U.S. Supreme Court held in *Vernonia* and *Earls* that drug testing student athletes and extracurricular participants is constitutional under federal law but offered no opinion as to the wisdom of these policies.

Indeed, the jury remains out as to whether drug testing is the most effective way at deterring and identifying adolescent drug use. The average drug test is expensive, tempting to circumvent, and incomplete as it fails to identify many popular prescription drugs. Additionally, state supreme courts in California and Pennsylvania have held suspicionless drug testing absent exigent circumstances violates a student's right to privacy. Other

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<sup>153</sup> *Id.*

<sup>154</sup> Richard Spoth, Cleve Redmond, Chungyeol Shin, Mark Greenberg, Mark Feinberg & Lisa Schainker, *PROSPER Community University Partnership Delivery System Effects on Substance Misuse Through 6 1/2 Years Past Baseline from a Cluster Randomized Controlled Intervention Trial*, 56 PREVENTATIVE MEDICINE 190, 196 (2013).

<sup>155</sup> Messer, *supra* note 150.

<sup>156</sup> Richard Spoth & Angie Hunt, *PROSPER Prevention Programs Dramatically Cut Substance Abuse Among Teens*, IOWA STATE UNIV. NEWS SERV. (Apr. 24, 2013, 5:30 PM), <http://www.news.iastate.edu/news/2013/04/24/prosperprevention>.

states like Washington have gone further practically banning the suspicionless drug testing of any public school student, even athletes. Thus, schools nationwide seeking to reduce drug use would be well advised to find less intrusive and more effective alternatives to drug testing.

The answer appears to be educational community based programs like PROSPER that not only educate students about avoiding drug use and other dangerous activities but also teach parents about how to effectively communicate with their teen in encouraging him or her to maintain a wholesome lifestyle. Creating a strong community-based support system upon which teens can trust appears to be a much more effective drug deterrent than forcing kids to submit to supervised urination or risk losing eligibility to participate in extracurricular activities. The latter distrusts students and attempts to reduce drug abuse through mandatory testing programs using extracurricular eligibility as leverage. The former strengthens community and family bonds while ultimately trusting students to make healthy choices.