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TO TEST OR NOT TO TEST: ARTICLE I, SECTION 7 AND RANDOM DRUG-TESTING OF WASHINGTON'S PUBLIC SCHOOL STUDENT-ATHLETES

Kristi L. Helgeson

Abstract: In Vernonia School District 47J v. Acton, the U.S. Supreme Court held that the Fourth Amendment to the U.S. Constitution does not protect the privacy interests of the nation's public school student-athletes from mandatory, random urinalysis drug-testing. This Comment argues that article I, section 7 of the Washington State Constitution provides Washington's student-athletes greater protection than the Fourth Amendment and, consequently, proscribes mandatory, random urinalysis drug-testing. It concludes by providing parameters for student-athlete drug-testing programs that will pass state constitutional muster.

In 1943, the U.S. Supreme Court announced its landmark decision, West Virginia Board of Education v. Barnette.¹ Upholding the constitutional liberties of public school students, the Court said:

The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have . . . important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.²

Over fifty years later, a very different Supreme Court handed down the definitive opinion on drug-testing for the nation’s public school student-athletes. In Vernonia School District 47J v. Acton,³ the Court held that random, mandatory urinalysis drug-testing of students wishing to participate in public school athletics did not violate these students' rights under the U.S. Constitution.⁴

Washington’s courts have not addressed the constitutionality of drug-testing programs for elementary or secondary public school student-

1. 319 U.S. 624 (1943).
2. Id. at 637.
4. Id.
athletes under the Washington State Constitution. Should this issue come before the Washington Supreme Court, the court could choose to undertake an independent state constitutional analysis. The Washington Supreme Court has often resorted to an independent analysis when it has been dissatisfied with the reasoning of the U.S. Supreme Court. Ultimately, Washington’s courts are free to decide whether a student-athlete’s rights are broader under the Washington Constitution than under the U.S. Constitution as interpreted in Vernonia.

Part I of this Comment reviews the current status of search and seizure law as it relates to mandatory, random urinalysis drug-testing programs in public elementary and secondary schools. This discussion focuses on both the Fourth Amendment to the U.S. Constitution—particularly the U.S. Supreme Court’s recent decision in Vernonia School District 47J v. Acton—and article I, section 7 of the Washington State Constitution.

Part II asserts that, within the framework of the facts of Vernonia, Washington’s constitutional, common, and statutory law proscribes mandatory, random urinalysis drug-testing as a condition to participating in interscholastic athletics. Part III recommends parameters for student-athlete drug-testing programs in Washington’s public schools.

5. However, in 1987, Judge Mattson of the King County Superior Court held that the University of Washington’s mandatory, random, collegiate drug-testing program violated the Washington Constitution. O’Halloran v. University of Washington, No. 87-2-08775-1, Oral Opinion of the Court, Superior Court of the State of Washington, King County (July 23, 1987), rev’d on other grounds, 856 F.2d 1375 (9th Cir. 1988).


8. See generally Nock, supra note 6; Utter, Freedom and Diversity, supra note 6.

9. The Fourth Amendment states, in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .” U.S. Const. amend IV.

10. Washington Constitution article I, section 7 states: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”
I. PRIVACY AND THE PUBLIC SCHOOL STUDENT

A. Federal Law: Fourth Amendment to the U.S. Constitution

The Fourth Amendment to the U.S. Constitution provides a right of privacy by prohibiting "unreasonable searches and seizures." Fashioned by the Framers of the Constitution in response to the evil of general warrants, which the Crown frequently issued during pre-Revolutionary times, the Fourth Amendment generally requires that the government procure a warrant predicated on probable cause prior to conducting a search or seizure. There are few exceptions to this rule.

The Fourth Amendment is not implicated unless the search or seizure at issue intrudes upon a reasonable, subjective expectation of privacy. Consequently, privacy analysis under the Fourth Amendment turns upon the "reasonableness" of one's privacy expectations. Proceeding upon these basic principles of Fourth Amendment search and seizure law, two key Supreme Court decisions provide the framework for evaluating the constitutionality of searches and seizures and drug-testing in the public school environment: New Jersey v. T.L.O. and Vernonia School District 47J v. Acton.

I. New Jersey v. T.L.O: The School Search Exception and Students' Legitimate Privacy Expectations

While upholding the privacy rights of public school students, the U.S. Supreme Court has recognized an exception to the warrant requirement

11. U.S. Const. amend IV.

12. A "general warrant" is one which does not specify the particular persons to be arrested, things to be seized, or places to be searched. Black's Law Dictionary 1585 (6th ed. 1990).


16. Id. at 360.


in the school setting. In \textit{New Jersey v. T.L.O.}, the Court held that school searches, conducted by school officials, may be "reasonable" under the Fourth Amendment even in the absence of a warrant or probable cause. However, school officials act as representatives of the state, not merely in loco parentis when carrying out searches and other disciplinary functions. Consequently, the Court turned its attention to determining the "reasonableness" of a given search by balancing the student's "legitimate expectations of privacy and personal security" on the one hand, with the government's interest in maintaining discipline and school order, on the other.

Because Fourth Amendment protections are triggered only where there is a "legitimate" expectation of privacy, the \textit{T.L.O.} Court first considered whether students have such expectations in their personal effects. Noting that "legitimacy" varies according to context, the Court found that it is indeed legitimate for students to expect privacy in their personal possessions while at school.

The Court then enunciated a two-part test for assessing a particular search's legality in the absence of a warrant or probable cause. First, the action must be "justified at its inception," and second, the scope of the search, as conducted, must be reasonably related to the circumstances prompting the search. Where there are "reasonable grounds" to believe that there has been a violation of either school policies or the law, or that a search will discover evidence of such a violation, a search by a school official will ordinarily be considered "justified at inception." The method of searching, however, must be "reasonably related to the

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20. \textit{Id.} at 340–41. \textit{T.L.O.} involved the search of a student's purse after the student had been discovered smoking in the school lavatory, violating school policy. \textit{Id.} at 328–30.
22. \textit{Id.} at 337.
23. \textit{Id.} at 339.
26. \textit{Id.} at 337–38. For example, the Court noted that the need to maintain order in prisons results in the prisoner's lack of "legitimate expectations of privacy" in the prison cell. \textit{Id.} at 338. However, the Court held that it is "not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." \textit{Id.} at 338–39; see also Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2404 (1995) (O'Connor, J., dissenting).
28. \textit{Id.} at 341–42 (citations omitted).
29. \textit{Id.}
objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”

Although the Court specifically declined to decide whether this rule requires individualized suspicion in determining “reasonableness,” in dictum the Court intimated that individualized suspicion is typically required except where the privacy interests involved are “minimal” and the intrusiveness of the search is buffered by “other safeguards.” The Court also noted that “the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.”

In Vernonia School District 47J v. Acton, the Court built upon T.L.O. by evaluating the contours of the “legitimate” privacy interests of students. In particular, the Court held that given the student-athlete’s “decreased expectation of privacy,” mandatory, random urinalysis drug-testing did not violate the Fourth Amendment.


The specific facts of Vernonia School District 47J v. Acton were central to the Court’s rationale. There was a perception that there was a severe drug problem in the district and that student-athletes were the ring-leaders of this problem. Teachers and school officials noted increased disciplinary problems. Students began “glamorizing” drug use in school assignments and in discussions overheard by teachers, counselors, coaches, and other school officials. The district first responded to this “problem” with special classes and speakers regarding the deleterious effects of drug use. A drug-sniffing dog was also employed.

Noting no changes in behavioral and disciplinary problems, school officials obtained parental input and then implemented the mandatory,

30. Id. at 342.
31. Id. at 342 n.8.
32. Id.
33. Id. at 343 (emphasis added).
35. Id. at 2396.
36. The facts involved in Vernonia are discussed at length in the opinion of the Supreme Court, id. at 2388–90, in the opinion of the Ninth Circuit Court of Appeals, 23 F.3d 1514, 1516–17 (9th Cir. 1994), and in the district court’s opinion, 796 F. Supp. 1354, 1356–59 (D. Or. 1992).
37. Vernonia, 115 S. Ct. at 2388.
38. Id. at 2389.
random drug-testing program at issue. The program required all students wishing to participate in interscholastic athletics to sign a testing consent form. Students were also required to provide prescription information in the form of either a copy of the prescription or a doctor's authorization. Parents were required to give written consent to the testing program. If either parent or student refused consent, the student was denied participation in athletics until consent was given.\footnote{Id.}

Once consent was secured, the testing program began. All student-athletes were tested at the beginning of the sport seasons in which they participated. Additionally, once each week ten percent of the season's athletic participants were randomly selected for testing that day. A student selected for testing received an assigned specimen control number and was then tested in an empty locker room, accompanied by a same sex adult monitor, typically a coach or other school official. Male athletes were monitored with their backs to the school official, standing at a urinal, fully clothed, while female athletes produced their sample in an enclosed bathroom stall. The adult monitor listened for sounds of normal urination, checked each sample for temperature and tampering, and then transferred the sample to a testing vial. The samples were then sent to an independent laboratory and were tested for amphetamines, cocaine, marijuana and alcohol. As a matter of course, the school's testing program did not request that the laboratory screen for steroids. However, additional drugs could be screened at the district's request. This additional screening, when requested, was not based upon the identity of a particular student. Results were reported to be 99.94 percent accurate.\footnote{Id.}

Once the sample was tested, the test results were mailed to the district's superintendent. Test results were also released by phone to the district's superintendent, principals, vice-principals, and athletic directors, provided that an authorization code was confirmed. The results were kept for one year. Positive tests were followed by a second test.\footnote{Id. at 2390.} If the second test was negative, no further action was taken; if positive, the athlete's parents were notified, the principal met with the student and his or her parents, and the student chose either participation in a six-week drug program including weekly urinalysis, or suspension from athletic participation for the remainder of the current season and the next season. Prior to the next season of eligibility, the student was then tested again as

\begin{footnotes}
\item[39.] Id.
\item[40.] Id.
\item[41.] Id. at 2390.
\end{footnotes}
were all other participating students. However, a second offense automatically resulted in the suspension option, and a third offense resulted in suspension from the current season plus suspension for the next two seasons.\(^\text{42}\)

James Acton wanted to play junior high school football. Although James was not suspected of drug or alcohol abuse, he was required to submit to testing as a condition of participating in school athletics. Because he and his parents refused to sign the district’s consent forms, James was denied the opportunity to participate.\(^\text{43}\)


In Vernonia, the Court employed a three-part analysis to determine whether the Fourth Amendment recognizes and protects a particular asserted privacy interest and whether such interest is violated by the State: (1) the nature of the privacy interest upon which the search at issue intrudes;\(^\text{44}\) (2) the character, or degree, of the intrusion;\(^\text{45}\) and (3) the nature and immediacy of the governmental concern and the efficacy of the chosen means for meeting it.\(^\text{46}\)

The Court applied the first prong of the test and found that central to determining the legitimacy of a student-athlete’s privacy interest was that while in school, children are under the temporary custody of the state.\(^\text{47}\) Modifying T.L.O.’s recognition of legitimate privacy interests of students while in school, the Court found that student-athletes have a “reduced expectation of privacy” and “have reasons to expect intrusions upon normal rights and privileges, including privacy.”\(^\text{48}\)

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Id., at 2391. This is essentially the “legitimate expectations of privacy” analysis presented in T.L.O. See supra part I.A.1.

\(^{45}\) Id. at 2393.

\(^{46}\) Id. at 2394.

\(^{47}\) Id. at 2391.

\(^{48}\) Id. at 2393. Speaking for the majority, Justice Scalia said:

Fourth Amendment rights . . . are different in public schools than elsewhere . . . For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases . . .

. . . Legitimate privacy expectations are even less with regard to student-athletes. School sports are not for the bashful. They require “suiting up” before each practice or event, and showering and changing afterwards.
Applying the second prong of the test, the Court identified two aspects of Vernonia's drug-testing program that were potentially intrusive: (a) the method of monitoring the production of the urine sample;\(^4\) and (b) the information produced by the urinalysis.\(^5\) The Court recognized that students have an interest in both intrusions, but determined that given the school district's procedures, "the invasion of the privacy was insignificant."\(^6\)

Under the third prong of the test, the Vernonia Court declined to require the school district to demonstrate a compelling concern.\(^7\) Rather, in the school setting, the Court framed the "compelling state interest" standard as one which is "important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."\(^8\) Under this standard, the Court found Vernonia's policy to be "reasonable and hence constitutional."\(^9\)

4. A "Reasonable" Search Need Not Be the "Least Intrusive" Search

In Vernonia, the Court declined to hold that only the "least intrusive" search is reasonable for purposes of the Fourth Amendment.\(^10\) Unlike the T.L.O. Court, which expressly declined to decide whether individualized suspicion was required, the Vernonia Court specifically rejected the argument that suspicion-based drug-testing was required by the Fourth Amendment. Indeed, the Court upheld the school district's program as an effective and appropriate means for insuring that student-athletes do not use drugs.\(^11\) Writing for the majority, Justice Scalia's reasoning focused upon the assumption that suspicion-based drug-testing would place...
impracticable burdens on school teachers to detect drug use by students, "a task for which they are ill prepared."\textsuperscript{57} Rather, the Court speculated that suspicion-based testing might be more intrusive rather than less so.\textsuperscript{58}

**B. Washington State Law: Article I, Section 7 of the Washington Constitution**

Article I, section 7 of the Washington Constitution is the state's counterpart to the Fourth Amendment. It reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."\textsuperscript{59} Whereas a privacy analysis under the Fourth Amendment turns upon the "reasonableness" of one's "expectations of privacy,"\textsuperscript{60} the article I section 7 "private affairs" analysis turns upon "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."\textsuperscript{61} Thus, when conducting a private affairs analysis, Washington courts will focus upon whether an individual's private affairs have been unreasonably invaded by the government, rather than whether the person's "expectation of privacy," is "reasonable" or legitimate.\textsuperscript{62}

Washington courts have continually recognized that article I, section 7 may provide greater protection than the Fourth Amendment.\textsuperscript{63} However, before a Washington court may find that the Washington Constitution provides greater privacy protection than the Fourth Amendment, it must

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\textsuperscript{57} Id. at 2396.

\textsuperscript{58} Id. Justice Scalia was concerned with teachers, likely to be personally acquainted with students, accusing students of drug use, and the resulting "badge of shame." Id. In her dissent, Justice O'Connor criticized this reasoning, noting that the harm of false accusations can be minimized by efforts to keep suspicion-based testing confidential. Id. at 2402–03 (O'Connor, J., dissenting).

\textsuperscript{59} Wash. Const art. I, § 7; see supra note 9.

\textsuperscript{60} See supra notes 15–16 and accompanying text.


\textsuperscript{63} See supra note 7.
first make a threshold determination that an independent state constitutional analysis is warranted. The following sections will examine when an independent analysis is appropriate, and then address how Washington's courts have applied article I, section 7 analysis to school searches.

1. Independent Constitutional Analysis Under State v. Gunwall

To determine whether to undertake an independent state constitutional analysis, and as a prerequisite to evaluating whether Washington's constitution provides greater protection to its citizens than the U.S. Constitution, Washington courts look to six non-exclusive factors enunciated in State v. Gunwall: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Although a party generally must brief all the Gunwall factors for the court to consider an independent state constitutional analysis, when a claimant seeks broader protection under article I, section 7, only the fourth and sixth factors need be analyzed.

When applying the fourth Gunwall factor, Washington courts will consider the scope and nature of preexisting state law. If an issue under review is one of first impression, such as random, mandatory urinalysis drug-testing in Washington's public schools, the court nonetheless may decide to undertake an independent constitutional analysis, especially

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64. 106 Wash. 2d 54, 720 P.2d 808 (1986).
65. Id. at 58, 720 P.2d at 811.
68. Gunwall, 106 Wash. 2d at 61-62, 720 P.2d at 812. The court stated:

Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

Id.

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where Washington's courts and legislature have examined related issues.\textsuperscript{69}

Under the sixth factor, the court asks whether a matter is of particular state interest or local concern, or whether there appears to be a need for national uniformity.\textsuperscript{70} If the issue is local, it may be more appropriate to analyze the issue under the state constitution.\textsuperscript{71}

Once the \textit{Gunwall} factors have been properly briefed, Washington's courts will proceed with an independent state constitutional analysis. The following section examines state common, statutory, and constitutional law as it relates to searches conducted in state public schools.

2. \textit{Article I, Section 7 Recognizes the "School Search Exception"}

Like the Fourth Amendment to the U.S. Constitution, article I, section 7 protects Washington's citizens from warrantless searches and seizures absent a showing of special circumstances.\textsuperscript{72} Washington courts, like the federal courts, have also held that such special circumstances exist in the school setting.\textsuperscript{73} Thus, the "school search" exception to the Fourth Amendment and article I, section 7 permits school officials to conduct certain searches on the school premises absent a warrant or probable cause.\textsuperscript{74} Additionally, article I, section 7 requires that a search be conducted under "authority of law."\textsuperscript{75} Washington's courts will find searches conducted without authority of law per se unconstitutional.\textsuperscript{76} This Comment proceeds upon the assumption that any drug-testing policy implemented in the state's public schools would be authorized by

\begin{footnotes}
\item 69. \textit{Id.} at 66, 720 P.2d at 815 (finding sufficient statutory protection of telephonic and electronic communications generally); \textit{Yeager}, 67 Wash. App. at 45-46, 834 P.2d at 75 (holding independent analysis appropriate because Washington's courts had examined related vehicle stop issues).
\item 70. \textit{Gunwall}, 106 Wash. 2d at 62, 720 P.2d at 813.
\item 71. \textit{Id.} (finding that state policy considerations outweigh objective of national uniformity).
\item 74. \textit{See supra} note 73.
\item 75. \textit{See, e.g.}, \textit{Mesiani}, 110 Wash. 2d at 457-58, 755 P.2d at 777 (holding warrantless searches conducted under sobriety checkpoint program invalid under article I, section 7 because there was no showing of "authority of law").
\item 76. \textit{Id.}
\end{footnotes}
statute or official school policy and, therefore, would meet the "authority of law" requirement of article I, section 7.\textsuperscript{77}

3. \textit{School Searches Must Be Reasonable Considering All of the Circumstances}

In Washington, students may be searched by school officials without a warrant or probable cause so long as the search is "reasonable".\textsuperscript{78} In \textit{State v. Brooks}\textsuperscript{79} the Washington State Court of Appeals adopted \textit{T.L.O.}'s two-part inquiry for determining whether a warrantless school search is reasonable: (1) whether the search is justified at its inception; and (2) whether the search as conducted was reasonably related in scope to the circumstances initially justifying the intrusion.\textsuperscript{80} The case involved the search of a locker based on a student informant's tip that Brooks was selling marijuana out of the locker and a blue metal box kept in the locker.\textsuperscript{81} Brooks's teacher also believed Brooks to be a drug user based upon reports by other teachers and personal observation.\textsuperscript{82} On these facts, the \textit{Brooks} court held that the search was justified at its inception because there were reasonable grounds\textsuperscript{83} to believe that the search would reveal that Brooks was violating school policy.\textsuperscript{84} Furthermore, the search was justified in its scope because it was limited to the locker and metal box.\textsuperscript{85} The court then declared that article I, section 7 does not afford students any greater protection than the Fourth Amendment as interpreted in \textit{T.L.O.}\textsuperscript{86}

\textsuperscript{77} \textit{See infra} part II.A.
\textsuperscript{78} \textit{State v. McKinnon}, 88 Wash. 2d 75, 81, 558 P.2d 781, 785 (1977).
\textsuperscript{80} \textit{Id.} at 567–68, 718 P.2d at 840–41 (citing \textit{McKinnon}, 88 Wash. 2d at 81, 558 P.2d at 784).
\textsuperscript{81} \textit{Id.} at 564, 718 P.2d at 839.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} The "reasonable grounds" standard has also been called the "reasonable belief" standard by the Washington Supreme Court. \textit{See} Kuehn v. Renton Sch. Dist. No. 403, 103 Wash. 2d 594, 595, 694 P.2d 1078, 1079 (1985). The two terms are used interchangeably throughout this Comment.
\textsuperscript{84} \textit{Brooks}, 43 Wash. App. at 565, 718 P.2d at 839.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 568, 718 P.2d at 841. This announcement by the \textit{Brooks} court is applicable to article I, section 7 analysis only insofar as it encompasses the "reasonable grounds" requirement enunciated in \textit{T.L.O}. Furthermore, when evaluating whether the search was reasonably related in its scope to the circumstances justifying the search, the \textit{Brooks} court relied upon \textit{McKinnon} and applied a more extensive list of factors than the \textit{T.L.O}. Court. \textit{Id.} at 567–68, 718 P.2d 840–41. These factors were:

the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.
Responding to *Brooks*, Washington’s legislature enacted statutory provisions permitting reasonable-suspicion searches of school-issued lockers by school officials. Following the rules of both *McKinnon* and *T.L.O.* for searches of personal effects, the legislature required that searches of school lockers employ methods that are both “reasonably related to the objectives of the search” and are not “excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction.” However, this statute expressly denies students any right or expectation of privacy in their use of school issued or assigned lockers.

In addition to the locker search provisions, Washington law expressly prohibits school officials from subjecting students to strip or body cavity searches.

### 4. Defining “Reasonable Belief:” Individualized Suspicion and Less Intrusive Alternatives

Because *Brooks* involved a relatively minimally intrusive search based upon individualized suspicion, and *T.L.O.* declined to decide the issue of whether individualized suspicion was required in warrantless school searches, the *Brooks* court did not speak to the constitutionality of searches conducted absent individualized, reasonable suspicion. Yet in *Kuehn v. Renton School District*, just four days before the *T.L.O.* decision, the Washington Supreme Court held that article I, section 7 required the school official’s reasonable suspicion to be particularized.

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*McKinnon*, 88 Wash. 2d at 81, 558 P.2d at 784. Although not all of the factors need be found for a search to be constitutional, their complete absence makes the school search impermissible. *Brooks*, 43 Wash. App. at 568, 718 P.2d at 841 (citing *Kuehn*, 103 Wash. 2d at 598, 694 P.2d at 1081).


88. Wash. Rev. Code § 28A.600.230(2)(a), (b) (1995). But, where school officials wish to inspect all student lockers, the statute permits them to do so absent prior notice or a reasonable suspicion. Wash. Rev. Code § 28A.600.240 (1995). However, this license limits the search methods employed by school officials for any containers found during such a general search, and reasonably suspected to contain contraband, to the *T.L.O.* methods as codified at § 28A.600.230(2) (1995). See *supra* part I.A.1. The statutorily permissible “random” search of school issued lockers has not been constitutionally challenged in Washington’s courts and is ripe for review.


91. See *supra* part I.B.3.

and encouraged the use of less intrusive alternatives to random searches. Thus, although school officials may conduct warrantless school searches under the more relaxed "reasonable belief" of wrongdoing standard, searches conducted absent "individualized suspicion" are proscribed by article I, section 7.

Kuehn involved a mandatory luggage search of all members of the high school wind ensemble traveling to Canada on a voluntary school concert trip. Having had problems with student use of alcohol during a prior excursion, school officials implemented the search policy. The Washington Supreme Court found the policy unconstitutional, and held that "[t]he general search is anathema to Fourth Amendment and Const. article I, section 7 protections, and except for the most compelling situations, should not be countenanced." The court further concluded that the reasonable belief standard required school officials to have some basis for believing that each individual student searched would have contraband in his or her luggage. Thus, the absence of individualized suspicion bars a finding that a school search is "justified at its inception."

In Kuehn, the court also found the search could not be reasonably related in its scope to the circumstances initially justifying the search (prior alcohol problems on band outings) in the absence of the McKinnon factors. Indeed, the court found that "[t]he factors prescribed in McKinnon evidence the requirement of individualized suspicion." Without these factors, the search, as conducted, was not reasonably related in scope to the school's interest in conducting the search in the first place.

In addition, searches lacking individualized suspicion may implicate an impermissibly higher level of intrusion proscribed by article I, section

93. Id. at 599–601, 694 P.2d at 1081–82; see also Utter, 1988 Update, supra note 61, at 582.
94. Kuehn, 103 Wash. 2d at 599–600, 694 P.2d at 1081.
95. Id. at 596, 694 P.2d at 1079.
96. Id.
97. Id. at 601–02, 694 P.2d at 1082.
98. Id. at 599–600, 694 P.2d at 1081.
99. See supra text accompanying notes 79–80.
100. See id. at 598, 694 P.2d at 1078; supra note 86 and accompanying text.
101. Id. at 599, 694 P.2d at 1081.
102. See id. at 598, 694 P.2d at 1081.
In *Kuehn* the Washington Supreme Court recognized that "an important consideration in the weighing of public needs against individual rights is the availability of less burdensome alternatives to the intrusion." Since *Kuehn*, Washington's courts have held warrantless school searches constitutional where the searches were based upon individualized suspicion of wrongdoing.

In contrast, the courts have failed to uphold random, warrantless searches outside of the schoolhouse gates, largely on grounds that random searches are unnecessarily more intrusive than suspicion-based searches.

For example, in *Jacobsen v. Seattle*, the state supreme court held that a general search of rock concert patrons, primarily young persons, was constitutionally invalid. Responding to recent dangerous incidents at concerts—patrons throwing hard objects and bringing explosive devices, weapons, and alcohol to concert events—the Seattle Police Department subjected Seattle Center concert-goers to warrantless searches as a condition of admission. The court's decision rested heavily on its belief that "other less constitutionally questionable actions should be employed to control the behavior of [the attendees] . . . ." Also, the City could "establish less intrusive and more formal procedures for determining the presence of contraband." Thus, searches conducted by school officials absent individualized suspicion may suggest increased intrusion and, consequently, fail the requisite "reasonable belief" for school searches.

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103. See, e.g., *Seattle v. Yeager*, 67 Wash. App. 41, 49, 834 P.2d 73, 77 (1992) (distinguishing random sobriety checkpoint stops in *Mesiani* from individualized suspicion stop at issue, and describing latter as less intrusive because search was based upon individualized suspicion).


106. The distinction is made between "intrusive" and "non-intrusive" searches because warrantless searches of school-issued lockers are statutorily permissible. Wash. Rev. Code § 28A.600.240 (1995). However, locker searches are relatively "non-intrusive" when compared with observed urination.


108. Id. at 669–70, 658 P.2d at 654.

109. Id. at 673, 658 P.2d at 656 (citing *Wheaton v. Hagan*, 435 F. Supp. 1134, 1145 (M.D. N.C. 1977)).

110. Id. at 675, 658 P.2d at 657.
II. ARTICLE I, SECTION 7 PROTECTS PUBLIC SCHOOL STUDENT-ATHLETES FROM MANDATORY, RANDOM URINALYSIS DRUG-TESTING

A. Crossing the Threshold: Meeting the Gunwall Factors

Although Brooks held that in the context of a locker search article I, section 7 provides no greater protection than the Fourth Amendment regarding school searches, this Comment asserts that Kuehn's requirement of individualized suspicion for school-related searches requires that random, urinalysis drug-testing of public school student-athletes be evaluated independently under article I, section 7 of the Washington Constitution. The analysis that follows examines the threshold requirements for independent state constitutional analysis111 and argues that, within the context of the facts of Vernonia, it is appropriate to analyze the legality of mandatory, random urinalysis drug-testing of Washington's student-athletes under article I, section 7 of the Washington Constitution.

First, drug-testing of high school student-athletes satisfies the fourth Gunwall factor: whether the issue has been addressed by Washington's courts and legislature in preexisting state law.112 Although such drug-testing will be an issue of first impression, Washington's courts have reviewed related school and youth privacy issues under independent state constitutional analysis.113 The state legislature also enacted legislation regulating searches of school lockers,114 body cavity and strip searches,115

111. Satisfying the threshold for arguing that the Washington Constitution provides public school student-athletes greater protection than the U.S. Constitution requires a briefing of the Gunwall factors. Specifically, a separate state analysis under article I, section 7 requires that the fourth and sixth factors are satisfied. See supra part I.B.1.


114. See supra notes 87-89 and accompanying text.

115. See supra note 90.
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and general student health. This legislative and judicial discussion fulfills the objectives of the fourth Gunwall factor.

Because school government and discipline are matters of particular local and state concern, the sixth Gunwall factor is also met. Washington’s constitution requires the state to provide an education to all of its children. Moreover, Washington’s school districts are separate political subdivisions of the state within the state’s cities and counties. Elected and appointed school officials create and enforce school policies at the state and local levels. Principals govern the daily disciplinary demands of their student bodies, and teachers control their own classrooms with an additional set of “policies” for student conduct. Having concluded that student-athlete drug-testing would meet the fourth and sixth Gunwall factors, the analysis now turns to article I, section 7 of the Washington Constitution.

B. Article I, Section 7 Provides More Protection for Washington’s Student-Athletes than Does the Fourth Amendment

The following section evaluates the constitutionality of a random, mandatory urinalysis drug-testing program for Washington’s public school student-athletes under article I, section 7. The section begins by asserting that such a program implicates the student-athlete’s “private affairs.” It then argues that the mandatory, random drug-testing program implemented in Vernonia fails the “reasonable belief” standard and, therefore, cannot be “justified at its inception” as required by article I,

117. See supra notes 68–69 and accompanying text.
118. See supra notes 70–71 and accompanying text.
119. Washington Constitution article IX, section 1 states: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders. . . .” Article IX, section 2 provides in part: “The legislature shall provide for a general and uniform system of public schools. . . .” See also Wash. Rev. Code § 28A.150.295 (1995) (stating that general and uniform public school system shall be maintained according to article IX).
section 7. Consequently, Washington’s school districts should avoid implementing such random testing programs.

1. **Urinalysis Drug-Testing Intrudes upon a Student-Athlete’s “Private Affairs”**

There are at least two “private affairs” involved in evaluating Vernonia’s mandatory, random urinalysis drug-testing policy under article I, section 7 that are particularly problematic: (1) the physical act of urination, whether or not the urination is observed; and (2) the information that must be disclosed prior to urinalysis testing.

First, the act of urination is a “private affair” that public school students “should be entitled to hold, safe from governmental trespass.” Although the Vernonia Court was not troubled by the prospect of high school boys being watched from behind while producing a urine sample for drug-testing, Washington’s courts do recognize a privacy interest in a public restroom even where there is no door on the stall. Even the “communal undress” in the locker room cannot overcome the fact that excretory functions are private affairs. Indeed, “[n]ormal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one’s urination.”

Next, prescription and other medical information which must be released as a condition of participating in the program is also a constitutionally protected “private affair.” Although the right to nondisclosure of personal information has not been recognized as “fundamental,” school officials must at least demonstrate that disclosure procedures are carefully tailored and are no greater than reasonably necessary. On the facts in Vernonia, this standard was not met; the district’s policy failed to outline any safeguards for prescription

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124. See supra notes 59, 61 and accompanying text.
127. State v. Berber, 48 Wash. App. 583, 589, 740 P.2d 863, 867 (1987). This rule has its limitations; it applies to the proper use of a stall or urinal. Id. at 590–91, 740 P.2d 867–68.
128. Vernonia, 115 S. Ct. at 2393 (quoting Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)).
130. Peninsula Counseling Ctr. v. Rahm, 105 Wash. 2d 929, 935, 719 P.2d 926, 929 (1986) (under both Washington and U.S. Constitution, state had legitimate interest in disclosing patient records to comply with federal statutory requirement to receive federal funds).
information revealed prior to testing, let alone "carefully tailored" procedures.\textsuperscript{131}

Where parental consent is involved, the issue may be even more problematic. For example, in Washington, young women are able to obtain contraception services without parental consent.\textsuperscript{132} It is possible, then, that female student-athletes may be prescribed birth control pills without parental knowledge or approval. However, a drug-testing program which mandates both student and parental consent unfairly requires a student to disclose a truly private affair—her decisions regarding birth control. The Washington Constitution should be interpreted to give public school student-athletes a right to avoid mandatory disclosure of such personal and potentially revealing and embarrassing information. Accordingly, Washington courts should not merely dismiss this governmental intrusion as insignificant.


Having concluded that urinalysis drug-testing pertains to "private affairs," the analysis now turns to the reasonableness of the search.\textsuperscript{133} In Washington, a school search must meet two criteria before it will be permissibly "reasonable" for article I, section 7 purposes. According to \textit{T.L.O.},\textsuperscript{134} which Washington courts have followed,\textsuperscript{135} the search must first be justified at its inception; and second, the search must be reasonably related in scope to the circumstances initially justifying the search.\textsuperscript{136}

In order to pass the first part of the \textit{T.L.O.} test, school officials must meet the "reasonable belief" standard.\textsuperscript{137} However, Washington case law adds an additional wrinkle to this rule; where there is no individualized suspicion, a search cannot be justified at its inception.\textsuperscript{138} Therefore,

\begin{itemize}
  \item \textsuperscript{131} \textit{Vernonia}, 115 S. Ct. at 2394.
  \item \textsuperscript{132} Washington State Dep't of Health, Reproductive Health Legal Issues (1989) (on file with the Washington Law Review).
  \item \textsuperscript{133} \textit{See supra} parts I.B.3. and I.B.4.
  \item \textsuperscript{134} 469 U.S. 325 (1985).
  \item \textsuperscript{135} \textit{See supra} part I.B.3.
  \item \textsuperscript{136} \textit{See supra} parts I.A.1. and I.B.3.
  \item \textsuperscript{137} \textit{See supra} part I.B.4.
  \item \textsuperscript{138} \textit{See supra} part I.B.4.
\end{itemize}
Washington's courts should hold that, absent individualized suspicion, mandatory urinalysis drug-testing is not reasonable.

In *Vernonia*, Justice Scalia expanded the Court's school search exception enunciated in *T.L.O.* and held that the Fourth Amendment did not require individualized suspicion. The *Vernonia* Court went even further to insist that drug-testing based upon individualized suspicion could be more, rather than less, intrusive and that teachers were ill-suited to identify potential student drug abuse.

The reasoning in *Vernonia*, from the vantage of Washington constitutional law, is unsatisfactory because it permits school officials to conduct intrusive searches absent individualized suspicion. In *Kuehn*, the state supreme court held:

> When school officials search large groups of students solely for the purpose of deterring disruptive conduct and without any suspicion of each individual searched, the search does not meet the reasonable belief standard.

A school mandated search of student-athletes, solely for the purpose of deterring drug use and without individualized suspicion, fails the "reasonable belief" standard for warrantless school searches.

Washington's courts have found relatively non-intrusive searches unconstitutional where such searches were conducted absent individualized suspicion. For example, in *Jacobsen* the court invalidated warrantless "pat down" searches at rock concerts, even though there were legitimate safety concerns involved. Emphasizing that most of the concert-goers were youth, the court said that "the damage to the understanding of constitutional guaranties of freedom from unreasonable searches on the part of these young persons is incalculable." Consequently, the court encouraged implementing less intrusive procedures. Similarly, in *Kuehn* the court invalidated the random search

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139. *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2391 (1995). The *T.L.O.* Court, however, explicitly refused to decide this issue. See supra part I.A.1. In dictum, the Court noted that exceptions to the individualized suspicion requirement are typically allowed only when the privacy concerns are minimal and there are other safeguards in place to protect the individual's reasonable expectation of privacy. New Jersey v. *T.L.O.*, 469 U.S. 325, 342 n.8 (1985).

140. *Vernonia*, 115 S. Ct. at 2396.

141. *Id.*. Ironically, it was the very observation by school teachers and coaches that led Vernonia School District to enact the mandatory drug-testing program at issue, prior to any attempt to implement a suspicion-based program. *Id.* at 2403 (O'Connor, J., dissenting).


144. *Id.* at 674, 658 P.2d at 657.
of student luggage, a policy also based on previous disciplinary problems.\footnote{145}{Kuehn, 103 Wash. 2d 594, 694 P.2d 1078.}

Compared to "pat down" searches at rock concerts and luggage searches, a urinalysis drug-test is significantly more intrusive. Especially intrusive is a testing regime involving monitored urination, at school, by familiar school officials.\footnote{146}{See infra note 143.} If less intrusive means are required for deterring violence at rock concerts, so ought less intrusive means be employed for deterring drug use among student-athletes. Even the \textit{T.L.O.} Court asserted that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."\footnote{147}{\textit{New Jersey v. T.L.O.}, 469 U.S. 325, 343 (1985).} This is especially true where the consequences of non-compliance, although not associated with criminal liability, are potentially severe. For example, a public school student’s athletic experience may be the crucial beginnings of an athletic career or may provide much needed funding for a student’s college education. Whatever the benefits of athletic participation, however, under the Washington Constitution, "the mere announcement that a constitutional right must be waived in order to participate in the school activity cannot make the search reasonable."\footnote{148}{Kuehn, 103 Wash. 2d at 600, 694 P.2d at 1082.}

Ultimately, a search will never be reasonable if it is not predicated on a particularized suspicion. Consequently, there is no need to examine the second prong of the \textit{McKinnon-T.L.O.} test, the search’s scope. Whatever the scope of the search, it cannot be justified if school officials lack individualized suspicion. This is the hallmark of Washington’s constitutional protection for youth, embodied in the uniquely defined sanctity of the "private affairs" provision of article I, section 7.

III. RECOMMENDED PARAMETERS OF STUDENT-ATHLETE
DRUG-TESTING PROGRAMS IN WASHINGTON

Does this analysis preclude Washington’s public schools from all drug-testing of student-athletes? To the contrary, drug-testing may be permissible in certain circumstances. This section addresses alternatives to mass, suspicionless drug-testing of students. In particular, two types of drug-testing programs would comply with the requirements of article I, section 7: voluntary testing and testing based upon individualized,
reasonable suspicion. Because these programs must be conducted with
the student-athlete's "private affairs" in mind,\textsuperscript{149} drug-testing ought to be
conducted with an eye for minimizing governmental intrusion into the
private affairs involved. Both voluntary and suspicion-based programs
overcome the constitutional infirmities of \textit{Vernonia}'s mandatory, random
program and provide Washington's school officials a more appropriate
means for deterring drug use.

\textbf{A. Voluntary Urinalysis Drug-Testing}

Under both the Fourth Amendment and article I, section 7, searches,
no matter how intrusive, may be conducted when the subject of the
search consents.\textsuperscript{150} This consent must be voluntary; that is, it must not be
coeQed.\textsuperscript{151} In the school drug-testing context, a search is voluntary
provided athletic participation is not conditioned upon submitting to the
"voluntary" drug-testing program. Ultimately, a truly voluntary drug-
testing program would clearly pass constitutional muster.

\textbf{B. Testing Should Be Based Upon Reasonable, Individualized
Suspicion}

If a school district determines there is reliable evidence of widespread
drug use among student-athletes, and chooses to implement a testing
program, the drug-testing policy should, at a minimum, be based on
reasonable, individualized suspicion. Once a program is properly based
on particularized suspicion, it must meet the McKinnon-\textit{T.L.O.} factors;
the scope and nature of the testing program must not be excessively
intrusive given the age and sex of the student and the nature of the
suspected infraction.\textsuperscript{152}

\textbf{C. Less Intrusive Means of Conducting Testing Should Be Employed}

School officials should also limit the intrusiveness of a suspicion-
based testing regime by having all testing handled by an independent
party. Instead of school officials observing the urinating student or

\begin{footnotes}
\item[149] See \textit{supra} notes 56, 58 and accompanying text.
\item[151] See \textit{Acton v. Vernonia Sch. Dist. 47J}, 23 F.3d 1514, 1526-27 (9th Cir. 1994), \textit{vacated}, 115 S. Ct. 2386 (1995). The court noted that a "no testing, no playing" policy was not truly voluntary.
\item[152] See \textit{supra} note 88 and accompanying text.
\end{footnotes}
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checking for tampering, for example, the sample collection should be supervised by non-school officials and preferably at some location other than the school grounds.\textsuperscript{153} This would avoid the problem of the student’s urination being observed by someone who the student knows personally and with whom the student must interact in a subordinate relationship.

D. \textit{Scope of Disclosure Should Be Limited}

\textit{Vernonia School District}'s testing policy involved carefully defined parameters regarding the confidentiality and chain of custody of test results.\textsuperscript{154} These same procedures should be acceptable in Washington. However, there should be equally protective and narrowly tailored procedures regarding the student-athlete’s prescription information.\textsuperscript{155} Although all students wishing to participate in Washington interscholastic athletics must regularly obtain a physical examination,\textsuperscript{156} this should not summarily categorize a student-athlete’s privacy interest as “reduced”\textsuperscript{157} and, therefore, vulnerable to governmental intrusion. Rather, the procedures implemented in \textit{Von Raab}\textsuperscript{158} strike a balance between a school’s legitimate interest in maintaining discipline and insuring safety in student athletics, and the student-athlete’s right to be free from governmental intrusion into his or her “private affairs.”

IV. CONCLUSION

Washington’s school search and seizure law is at a constitutional crossroads. In the wake of the \textit{Vernonia} decision, local school officials

\textsuperscript{153} National Treasury Employees Union v. Von Raab 489 U.S. 656, 672 n.2 (1989). In \textit{Von Raab}, the Supreme Court evaluated the United States Customs’ drug-testing procedures and found that, as a whole, the testing procedures minimized the intrusiveness of the search and were, consequently, more palatable to the Fourth Amendment. The testing was conducted by an independent contractor, the testing subject could choose to produce the sample from behind a partition or within an enclosed stall, \textit{id.} at 661, and personal medical information, such as prescription information, was not disclosed unless a test was positive. \textit{Id.} at 672 n.2.

\textsuperscript{154} See supra part I.A.2.

\textsuperscript{155} See supra part II.B.1.


\textsuperscript{158} 489 U.S. at 672 n.2. School officials concerned about this balance should not require disclosure of prescription information until a particular student athlete has tested positive. Only then should the prescription information be disclosed to an independent laboratory.
may be tempted to respond to student disciplinary problems and perceived drug abuse by implementing a mandatory, random urinalysis drug-testing program. As this Comment suggests, however, this course of action is very likely unconstitutional under the heightened protection of students' "private affairs" secured by article I, section 7 of the Washington Constitution. Ultimately, Washington's courts, legislature, schools, and parents should seek policies which accomplish important disciplinary, health, and safety goals without unnecessarily compromising the constitutional rights of our public school students.