

Drug Testing Students in California— Does It Violate the State Constitution?

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State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.¹

I. INTRODUCTION

The issue of student drug testing generates divisive debate.² Although the recent Bush administration strongly supported drug testing of students,³ several organizations ardently opposed such programs.⁴ In addition to

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. See, e.g., Annette Fuentes, Editorial, *Student Drug Tests Aren't the Answer*, USA TODAY, June 10, 2005, at 23A; Donna Leinwand, *Principal: Drug Testing Students Works*, USA TODAY, July 12, 2006, at 3A; Donna Leinwand, *More Schools Test for Drugs*, USA TODAY, July 12, 2006, at 1A; Phil McKenna, *Schools Urged into Divisive Drug Crackdown*, NEW SCIENTIST, Apr. 21, 2007, at 8; Sara B. Miller, *Steps Toward More Drug Testing in Schools*, CHRISTIAN SCI. MONITOR, May 20, 2005, at 1; Shari Roan, *Put to the Test*, L.A. TIMES, May 21, 2007, at F1; Michael Winerip, *Drawing the Line on Drug Testing*, N.Y. TIMES, Nov. 23, 2008, at NJ4.

3. See, e.g., Maureen Magee, *Student Drug Testing Focus of S.D. Summit*, SAN DIEGO UNION TRIB., Feb. 22, 2006, at A1; *About Us*, STUDENT DRUG-TESTING INSTITUTE, <http://sdti.ed.gov/about.aspx> (last visited Aug. 12, 2010); OFFICE OF NAT'L DRUG CONTROL POLICY, WHAT YOU NEED TO KNOW ABOUT DRUG TESTING IN SCHOOLS 4–5, <http://news.findlaw.com/hdocs/docs/drugs/schldrgtst802whrpt.pdf> (last visited Aug. 12, 2010).

4. See, e.g., FATEMA GUNJA ET AL., ACLU DRUG POLICY LITIG. PROJECT, MAKING SENSE OF STUDENT DRUG TESTING: WHY EDUCATORS ARE SAYING NO (2004), available at <http://www.aclu.org/FilesPDFs/makingsensesdt.pdf>; Press Release, Drug Policy Alliance Network, White House Pushes Controversial Student Drug Testing Agenda at Summit in Omaha on October 21 (Oct. 20, 2008), <http://www.drugpolicy.org/news/pressroom/pressrelease/pr102008.cfm>; STUDENTS FOR SENSIBLE DRUG POLICY, ELIMINATE THE HARMFUL AND COSTLY STUDENT DRUG TESTING GRANTS, <http://ssdp.org/campaigns/srp/drug-testing-backgroundunder.pdf> (last visited Aug. 12, 2010).

providing political support of drug testing, the Bush administration provided significant financial support for such programs.⁵ During the period from 2003 to 2008, the Office of Safe and Drug-Free Schools (OSDFS) of the Department of Education awarded approximately \$30 million in grants to school districts throughout the United States for their student drug-testing programs.⁶

Although the United States Supreme Court has sanctioned the drug testing of student athletes⁷ and students engaged in competitive extracurricular activities,⁸ state courts have not uniformly approved of testing such students. For example, the Supreme Courts of Indiana⁹ and New Jersey¹⁰ found the challenged student drug-testing programs constitutional under their respective constitutions, but the Supreme Courts of Pennsylvania¹¹ and Washington¹² ruled that drug-testing programs in their respective states violate their state constitutions. Thus, the Supreme Courts of Pennsylvania and Washington provide greater protection to students under their state constitutions than the United States Supreme Court does under the Federal Constitution.

It is not only state constitutions that may provide greater protection to the privacy interests of students. In a number of states, legislatures have taken steps to adopt statutes to protect the privacy interests of public school students from random drug testing.¹³ Under these statutes, suspicionless drug testing of students is prohibited.¹⁴ The school must have reasonable suspicion before it can drug test a student.¹⁵

Since the Department of Education began granting federal funds to public schools to implement drug-testing programs, it has awarded eight California school districts financial support for drug testing of student

5. U.S. DEP'T OF EDUC., SCHOOL-BASED STUDENT DRUG-TESTING PROGRAMS: FY 2008 AWARDS, <http://www.ed.gov/programs/drugtesting/awards.html> (last updated June 4, 2008).

6. *Id.*

7. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 665 (1995).

8. *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002).

9. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 985 (Ind. 2002).

10. *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 654 (N.J. 2003).

11. *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 96 (Pa. 2003).

12. *York v. Wahkiakum Sch. Dist.*, 178 P.3d 995, 1006 (Wash. 2008).

13. *See infra* notes 76–88 and accompanying text.

14. *Id.*

15. *Id.*

volunteers and those engaged in athletics and cocurricular and extracurricular activities.¹⁶ Between 2005 and 2008, the Department of Education awarded \$1,181,245 to California school districts to initiate and maintain drug-testing programs.¹⁷ No California court has fully examined these programs to determine their validity under the California Constitution.¹⁸ Before any additional California schools adopt drug-

16. In 2005, the California Grant Award Recipients were the Imperial County Office of Education, Oceanside Unified School District, Paradise Unified School District, and Vista Unified School District. U.S. DEP'T OF EDUC., SCHOOL-BASED STUDENT DRUG-TESTING PROGRAMS: FY 2005 AWARDS, <http://www.ed.gov/programs/drugtesting/2005awards.html> [hereinafter U.S. DEP'T OF EDUC., 2005 AWARDS]. In 2006, the California Grant Award Recipient was the Orange County Department of Education. U.S. DEP'T OF EDUC., SCHOOL-BASED STUDENT DRUG-TESTING PROGRAMS: FY 2006 AWARDS, <http://www.ed.gov/programs/drugtesting/06awards.html> [hereinafter U.S. DEP'T OF EDUC., 2006 AWARDS]. In 2007, there were no California Grant Award Recipients. U.S. DEP'T OF EDUC., SCHOOL-BASED STUDENT DRUG-TESTING PROGRAMS: FY 2007 AWARDS, <http://www.ed.gov/programs/drugtesting/07awards.html> [hereinafter U.S. DEP'T OF EDUC., 2007 AWARDS]. In 2008, the California Grant Award Recipients were W. Hart Union High School District, Shasta Union High School District, and the Fresno County Office of Education. U.S. DEP'T OF EDUC., *supra* note 5.

17. 2005 California Grant Award Recipients: Imperial County Office of Education, \$300,000; Oceanside Unified School District, \$175,845; Paradise Unified School District, \$47,171; Vista Unified School District, \$211,008. U.S. DEP'T OF EDUC., 2005 AWARDS, *supra* note 16. 2006 California Grant Award Recipient: Orange County Department of Education, \$124,433. U.S. DEP'T OF EDUC., 2006 AWARDS, *supra* note 16. 2007: No California Grant Award Recipients. *See* U.S. DEP'T OF EDUC., 2007 AWARDS, *supra* note 16. 2008 California Grant Award Recipients: W. Hart Union High School District, \$71,988; Shasta Union High School District, \$100,800; Fresno County Office of Education, \$150,000. U.S. DEP'T OF EDUC., *supra* note 5.

18. On December 11, 2008, during the writing of this Article, the American Civil Liberties Union of Northern California and the law firm of Pillsbury Winthrop Shaw Pittman LLP filed a lawsuit in Shasta County Superior Court on behalf of Benjamin Brown challenging the constitutionality of Shasta Union High School District's suspicionless drug-testing program of students involved in cocurricular and extracurricular activities. Press Release, ACLU, ACLU Lawsuit Seeks To Stop Shasta Union High School District's Invasive Mandatory Drug Testing Policy (Dec. 11, 2008), http://aclunc.org/news/press_releases/aclu_lawsuit_seeks_to_stop_shasta_union_high_school_districts_invasive_mandatory_drug_testing_policy.shtml. On May 6, 2009, Superior Court Judge Monica Marlow granted a preliminary injunction enjoining the Shasta Union High School District from enforcing its drug-testing program. *Brown v. Shasta Union High Sch. Dist.*, No. 164933 (Cal. Super. Ct. May 7, 2009), *appeal docketed*, No. C061972 (Cal. Ct. App. May 27, 2009); Press Release, ACLU, Student Privacy Gets an Early Win in School Drug Testing Case (May 6, 2009), http://www.aclunc.org/news/press_releases/student_privacy_gets_an_early_win_in_school_drug_testing_case.shtml. The school district appealed the court's decision on the preliminary injunction. That appeal was denied on September 2, 2010. *Brown v. Shasta Union High Sch. Dist.*, No. C061972, 2010 WL 3442147 (Cal. Ct. App. Sept. 2, 2010). There has not yet been a trial on the merits. E-mail from Michael Risher, Attorney, ACLU, to Floralyne Einesman, Professor, California Western School of Law (Sept. 22, 2009, 09:48 PST) (on file with author).

testing programs, the legality of these programs should be examined under the California Constitution. This Article seeks to accomplish that task.

Part II summarizes the United States Supreme Court decisions on student drug testing. Part III examines state law on student drug testing. Part IV focuses on student drug testing in California. It addresses the state's history of, and current status with respect to, student drug testing. It then examines provisions of the California Constitution that apply to the subject: article I, section 1, the right to privacy; and article I, section 13, the right to be free from unreasonable searches and seizures. The Article discusses California judicial decisions on these provisions and then analyzes whether the drug testing of students engaged in athletics and extracurricular activities is constitutional. Part V offers a conclusion on the constitutionality of student drug testing under the California Constitution.

II. UNITED STATES SUPREME COURT DECISIONS ON STUDENT DRUG TESTING

The United States Supreme Court has sanctioned the drug testing of students in two separate decisions. In *Vernonia School District v. Acton*, the Court upheld a drug-testing program of student athletes, finding the program did not violate the Fourth Amendment.¹⁹ Subsequently, in *Board of Education of Pottawatomie County v. Earls*, the Court upheld the drug testing of students engaged in extracurricular activities, ruling that the program constituted a reasonable search under the Fourth Amendment.²⁰

The Court dispensed with the warrant requirement in both cases by finding “special needs” in the public school context—regulating the conduct of the affected students rather than investigating them for a crime.²¹ Consequently, the Court simply balanced the interests to determine the reasonableness of the search.²² Weighing the “nature of the privacy interest,” “character of the intrusion,” “nature and immediacy of the

19. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 665 (1995). For a detailed analysis of decisions on student drug testing by the United States Supreme Court, as well as the New Jersey, Pennsylvania, and Indiana Supreme Courts, see Florallynn Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL'Y 231, 234–56 (2007).

20. *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002).

21. *Vernonia*, 515 U.S. at 653; see *Earls*, 536 U.S. at 829.

22. See *Earls*, 536 U.S. at 829; *Vernonia*, 515 U.S. at 665.

governmental concern,” and “efficacy of this means for meeting it,” the Court concluded in both cases that the testing programs were reasonable.²³

In *Vernonia*, the Court found that student athletes had a low privacy interest.²⁴ Although all students have a reduced expectation of privacy because they are required to submit to a myriad of rules and regulations, student athletes should expect even less privacy than other students.²⁵ They dress and shower together, their conduct is highly regulated, and they must undergo medical exams in order to participate in school sports.²⁶ Further, in *Earls*, the Court ruled that although students engaged in extracurricular activities do not have as diminished an expectation of privacy as student athletes, they too have a lesser privacy interest than ordinary students.²⁷ Like student athletes, they must also obey specific, intrusive rules of conduct due to their participation in extracurricular activities.²⁸

In both cases, the “character of the intrusion” was found to be minimal because there was no direct monitoring of student urination.²⁹ The conditions under which the students provided urine samples were similar to those found in any public bathroom.³⁰

The Court found the “nature and immediacy of the governmental concern” was compelling.³¹ The school district sought to deter drug use by students so as to protect the students from harm.³² Substance abuse affected not only the specific students involved but also the entire school community.³³ It disrupted the teaching mission and resulted in a general lack of order in the classroom.³⁴ Moreover, those taking the drugs exposed themselves to serious injuries.³⁵ Student athletes using drugs were particularly vulnerable to such harms.³⁶ Additionally, because student athletes served as role models for the student community, they had the power to influence others to experiment with drugs.³⁷ Although the

23. *Vernonia*, 515 U.S. at 654–65; *see Earls*, 536 U.S. at 830–38.

24. *Vernonia*, 515 U.S. at 657.

25. *Id.*

26. *Id.*

27. *Earls*, 536 U.S. at 831–32.

28. *Id.* at 832.

29. *Vernonia*, 515 U.S. at 658; *see Earls*, 536 U.S. at 832–33.

30. *Earls*, 536 U.S. at 832–33; *Vernonia*, 515 U.S. at 658.

31. *Vernonia*, 515 U.S. at 661; *see Earls*, 536 U.S. at 834.

32. *Earls*, 536 U.S. at 837; *Vernonia*, 515 U.S. at 661.

33. *Vernonia*, 515 U.S. at 662.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 663.

Court found it less likely that those engaged in extracurricular activities would act as role models to other students, it nonetheless concluded that the nation's drug problem among adolescents rendered this governmental concern serious.³⁸ In both instances, the Court concluded that the testing program was an effective means to prevent, detect, and deter drug use.³⁹

III. STATE LAW ON STUDENT DRUG TESTING

Relying on the above United States Supreme Court cases, local school districts have implemented and expanded their drug-testing programs. In addition to testing student athletes and students engaged in extracurricular activities, schools also test students who participate in cocurricular activities,⁴⁰ those who seek permits to park on campus, or those who attend school dances or plays.⁴¹ In response, students and parents have challenged these programs as violating the search and seizure clause of their respective state constitutions.⁴²

A. State Supreme Court Decisions

Using the framework outlined in *Vernonia* and *Earls*, the supreme courts of three states balanced the same factors as the United States Supreme Court—nature of the privacy interest, character of the privacy interest, nature and immediacy of the governmental concern, and efficacy of the program—to determine the constitutionality of the relevant policies.⁴³ In two instances, the state high courts found the programs constitutional,⁴⁴ whereas in one case the state supreme court

38. Bd. of Educ. v. Earls, 536 U.S. 822, 837–38 (2002).

39. *Id.* at 837; *Vernonia*, 515 U.S. at 663.

40. *See, e.g.*, Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 975 (Ind. 2002). “Co-curricular activities are activities, participation or membership in which [is] an extension of and outside the normal school day and for which academic credit or grades are earned, such as band and choir.” *Id.* at 975 n.1.

41. Jennifer K. Turner, A “Capricious, Even Perverse Policy”: *Random, Suspicionless Drug Testing Policies in High Schools and the Fourth Amendment*, 72 MO. L. REV. 931, 932 (2007).

42. *See, e.g.*, Linke, 763 N.E.2d at 976; Joye v. Hunterdon Cent. Reg’l High Sch. Bd. of Educ., 826 A.2d 624, 632 (N.J. 2003); Theodore v. Del. Valley Sch. Dist., 836 A.2d 76, 80 (Pa. 2003); York v. Wahkiakum Sch. Dist., 178 P.3d 995, 999 (Wash. 2008).

43. Linke, 763 N.E.2d at 979–86; Joye, 826 A.2d at 642–48; Theodore, 836 A.2d at 88–96.

44. Linke, 763 N.E.2d at 986; Joye, 826 A.2d at 648.

found the policy unconstitutional.⁴⁵ To determine how California courts might rule on this issue under its state constitution, it is critical to examine the reasoning of these state court decisions.

In *Linke v. Northwestern School Corp.*, students argued that their school district's drug-screening program violated their right to be free from unreasonable search and seizure under the Indiana Constitution.⁴⁶ The Indiana Supreme Court disagreed, upholding the program, which tested students involved in school sports, extracurricular or cocurricular activities, or those parking cars on campus.⁴⁷ The court rejected the need for individualized suspicion because the drug-testing policy was not motivated by a criminal investigation of the student.⁴⁸ Rather, the court balanced the intrusion on the reduced privacy interest of the students against the need and efficacy of the program.⁴⁹ It decided the intrusion on the students' privacy interests was minimal, and the need for the program was significant.⁵⁰ The district's interest in deterring drug use and preventing harm to the students involved outweighed the minimal privacy intrusion on the students who volunteered for these activities and who consented to the drug testing.⁵¹

In *Joye v. Hunterdon Central Regional High School Board of Education*, parents challenged the constitutionality of the district's drug-testing policy that applied to students who participated in athletics or extracurricular activities and those who possessed school parking permits.⁵² The parents argued the policy violated article 1, paragraph 7 of the New Jersey Constitution, which prohibits "unreasonable searches and seizures by government agents."⁵³

Following the United States Supreme Court's analysis in *Vernonia and Earls*, the New Jersey Supreme Court balanced the students' "expectation of privacy," the search's "relative obtrusiveness," and the "strength of the government's asserted need" in conducting the testing.⁵⁴ The court found the targeted students' privacy interests were reduced because, as compared to the nontargeted students, they had to obey additional rules

45. *Theodore*, 836 A.2d at 96.

46. *Linke*, 763 N.E.2d at 976.

47. *Id.* at 975, 985.

48. *Id.* at 978.

49. *Id.*

50. *Id.* at 985.

51. *Id.* at 983–85.

52. *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624, 632 (N.J. 2003).

53. *Id.* at 632, 637.

54. *Id.* at 642–48.

and regulations.⁵⁵ Just as the United States Supreme Court found in *Vernonia*, the New Jersey Supreme Court maintained that student athletes had a lower expectation of privacy because they shared locker rooms, showered, and undressed together.⁵⁶ The court determined the degree of obtrusiveness—the urine collection process—was minimal because the students were permitted to use the restroom without any monitoring.⁵⁷ Furthermore, the policy contained provisions to prevent false positives, and the test results were kept confidential.⁵⁸ Lastly, the court found a need for the testing because the district had shown a significant segment of its campus consumed prohibited drugs and alcohol.⁵⁹ After considering these factors, the court concluded the program was constitutional.⁶⁰

In contrast to the New Jersey Supreme Court's decision in *Joye*, the Supreme Court of Pennsylvania reached a contrary result in *Theodore v. Delaware Valley School District*.⁶¹ The court reviewed the policy implemented by the school district, which authorized random drug screening of students who participated in extracurricular activities, including sports, and those who used school parking permits, to determine its reasonableness under the search and seizure clause of the Pennsylvania Constitution.⁶² The court found the students' privacy interest was significant. Moreover, the district had not established that a drug problem affected the district or that the tested students were using controlled substances.⁶³ Furthermore, the policy was overbroad; although it was aimed at student activities for which drug use could prove dangerous, that is driving or sports, it also targeted student clubs for which no such hazard would be presented, that is the Scholastic Bowl or the National Honor Society.⁶⁴ Finally, the policy was not directed at students who were most prone to be drug abusers—those *not* engaged in any school activity.⁶⁵

55. *Id.* at 642.

56. *Id.* at 642–43.

57. *Id.* at 643.

58. *Id.*

59. *Id.* at 645–46.

60. *Id.* at 648.

61. *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 96 (Pa. 2003).

62. *Id.* at 79.

63. *Id.* at 91.

64. *Id.* at 91–92.

65. *Id.* at 92.

More recently, the Supreme Court of Washington issued a divided opinion regarding the drug testing of student athletes.⁶⁶ Although all the justices agreed the relevant policy authorizing the suspicionless testing of student athletes violated the state constitution,⁶⁷ the justices could not reach a majority opinion as a basis for their decision. A plurality of the court noted that in some areas, article I, section 7 of the Washington Constitution provides greater protection than its federal counterpart—the Fourth Amendment.⁶⁸ Although the cornerstone of the Fourth Amendment is “reasonableness,” that of article 1, section 7 is “authority of law”—a warrant.⁶⁹

First, the plurality found that, despite a student’s reduced expectation of privacy, requiring a student athlete to present a urine sample for analysis is still a significant intrusion on his right to privacy.⁷⁰ Secondly, the plurality stated that unless such an intrusion of privacy is conducted pursuant to a warrant, the intrusion must be supported by a valid exception rooted in the common law.⁷¹ The plurality, however, rejected the application of the “special needs” exception used in *Vernonia* and *Earls* because it found that, under common law, no such exception existed.⁷² It could find no other exception that supported the legality of the search.⁷³ Consequently, the plurality found the district’s policy mandating the suspicionless drug screening of student athletes violated article 1, section 7 of the Washington Constitution.⁷⁴

B. State Legislative Action

Some states have adopted legislation to address the issue of student drug testing. In 2005, New Jersey passed section 18A:40A-23 of the New Jersey Code, which allows a board of education to adopt a policy for random drug testing of students in grades nine through twelve who

66. *York v. Wahkiakum Sch. Dist.*, 178 P.3d 995, 998 (Wash. 2008) (plurality opinion).

67. *Id.* at 1006. Article I, section 7 of the Washington State Constitution states: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, § 7.

68. *York*, 178 P.3d at 1001 (plurality opinion).

69. *Id.* at 1000–01.

70. *Id.* at 1001.

71. *Id.* at 1003.

72. *Id.* at 1005.

73. *Id.* at 1005–06.

74. *Id.* at 1006. For a more detailed analysis of *York v. Wahkiakum School District*, see Jonathan F. Duncan & Kristina V. Giddings, *Which Washington: Constitutions in Conflict?*, 19 MARQ. SPORTS L. REV. 231, 238–46 (2008).

engage in school athletics, participate in extracurricular activities, or possess school parking permits.⁷⁵ Furthermore, section 18A:40A-12 authorizes a “teaching staff member, school nurse or other educational personnel of any public school” to report *any* student who appears to be under the influence of a controlled substance.⁷⁶ The student is then subject to “immediate examination” by a doctor.⁷⁷ The United States District Court for the District of New Jersey interpreted this statute to require individualized suspicion before a school district could test a student for drug use.⁷⁸

Section 49-6-4213 of the Tennessee Code permits the drug testing of *any* student “if there are *reasonable indications* to the principal that such student may have used or be under the influence of drugs.”⁷⁹ A principal may learn of the need to drug test a student through reasonable information provided by a teacher, a staff member, or another student.⁸⁰ The Tennessee State Attorney General has opined that a school district may not subject Tennessee students engaged in extracurricular activities to suspicionless, random drug testing.⁸¹ In view of section 49-6-4213, which permits drug testing of students only when there are “reasonable indications to the principal that such student may have used or may be under the influence of drugs,” the Tennessee Attorney General concluded that random drug testing violates that statute.⁸²

In Mississippi, the school board has the authority “[t]o prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools.”⁸³ The Mississippi Attorney General has opined that it would be lawful for a Mississippi school to test

75. N.J. STAT. ANN. § 18A:40A-23 (West Supp. 2009).

76. *Id.* § 18A:40A-12 (West 1999).

77. *Id.*

78. *Gutin v. Wash. Twp. Bd. of Educ.*, 467 F. Supp. 2d 414, 423 (D.N.J. 2006) (“It is important to note at the outset that the policy at issue is not one of suspicionless or random testing. Rather, the School District’s policy provides for testing only upon an individualized suspicion that a particular student is under the influence of drugs in school.”).

79. TENN. CODE ANN. § 49-6-4213 (2002) (emphasis added).

80. *Id.*

81. Constitutionality of HB 2858 / SB 2653 Authorizing Student Drug Testing, 109 Op. Tenn. Att’y Gen. 08-106 (2008), 2008 WL 2036776.

82. *Id.*

83. MISS. CODE ANN. § 37-7-301(l) (West Supp. 2009).

students suspected of using drugs without a parent's consent.⁸⁴ As long as there was individualized suspicion for the test, it was reasonable under state law.⁸⁵ Utah requires a person have "reasonable cause to believe that an individual has committed a prohibited act" before notifying the principal or other official.⁸⁶ Use of drugs by a student is a prohibited act.⁸⁷ If notice is given, then an investigation may follow. A search of a student "must be based on at least a reasonable belief that the search will turn up evidence of a violation of this chapter."⁸⁸

On the other hand, Illinois recently adopted a law authorizing the Illinois High School Association to randomly test high school athletes for performance-enhancing drugs when these students are participating in Association-sponsored events.⁸⁹ The athlete's parents must provide a written acknowledgement of the drug-testing program before their child is allowed to participate in the athletic program.⁹⁰ Virginia authorizes the Board of Education, in consultation with the Attorney General's Office, to develop "guidelines for school boards for . . . voluntary and mandatory drug testing . . . consistent with relevant state and federal laws and constitutional principles."⁹¹ Nothing in the Virginia Code is to be "construed to require any school board to adopt policies requiring or encouraging any drug testing in schools."⁹²

Most states have not legislated on the issue of student drug testing. For those states that have done so, a majority requires individualized suspicion before a school official may compel a student to undergo a urinalysis. No testing is permitted unless either a student consents to the test or the school official has reasonable suspicion to believe that a student is under the influence of a controlled substance while the student is at school.

84. Drug Testing Policy, 377 Op. Miss. Att'y Gen. 06-00513 (2006), 2006 WL 3824135.

85. *Id.*

86. UTAH CODE ANN. § 53A-11-1302 (LexisNexis Supp. 2009).

87. *Id.* at § 53A-11-1301.

88. *Id.* at § 53A-11-1304.

89. 105 ILL. COMP. STAT. ANN. 25/1.5 (West 2009).

90. *Id.*

91. VA. CODE ANN. § 22.1-279.7 (2006).

92. *Id.* § 22.1-279.6 (2006 & Supp. 2009).

IV. STUDENT DRUG TESTING IN CALIFORNIA

A. *History of Student Drug Testing in California*

Student drug testing in California has had a conflicted history.⁹³ In August 2004, the California Legislature considered Senate bill 1386, authored by State Senator John Vasconcellos and Assemblymember Jackie Goldberg, requiring both parental consent and reasonable suspicion of recent drug use by a student to test the student.⁹⁴ This bill would have prohibited suspicionless drug testing of students.⁹⁵ The California Attorney General, the California PTA, Planned Parenthood, and the NAACP supported the bill, whereas the Office of National Drug Control Policy and the Bush administration strongly opposed it.⁹⁶ Ultimately, the California Legislature passed a compromise measure, allowing for the drug testing of students only with parental and student consent.⁹⁷ The results of the testing would only be provided to the parents of the tested student.⁹⁸ Nonetheless, Governor Schwarzenegger vetoed the bill on September 18, 2004.⁹⁹ He opined that the bill would “compromise[] local control” and would deprive schools of the flexibility they need to make decisions concerning their own affairs.¹⁰⁰ The Governor stressed his desire to allow local school districts to “make decisions based on the needs and values of their community.”¹⁰¹

Since that time, various drug-testing programs have emerged in schools throughout California. A number of California school districts have received grants from the United States Department of Education to implement a student drug-testing program.¹⁰² In 2005, the Imperial County Office of

93. See Roan, *supra* note 2, at F1.

94. S. 1386, 2003–2004 Leg., Reg. Sess. (Cal. 2004) (as amended Apr. 12, 2004).

95. *Id.*

96. Gabrielle Banks, *State PTA Backs Ban on Random Drug Testing*, L.A. TIMES, July 19, 2004, at B1.

97. S. 1386, 2003–2004 Leg., Reg. Sess. (Cal. 2004) (as amended Aug. 21, 2004).

98. *Id.*

99. To view the legislative history of S. 1386, see *Bill Information*, <http://www.leginfo.ca.gov/bilinfo.html> (enter bill and legislative session information) (last visited Aug. 12, 2010).

100. Governor Schwarzenegger’s Message to Members of the California State Senate Vetoing Senate Bill 1386 (Sept. 18, 2004), http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1351-1400/sb_1386_vt_20040918.html.

101. *Id.*

102. See *infra* notes 103–10 and accompanying text.

Education received a grant of \$300,000 to test students who engaged in athletics or competitive extracurricular activities and those who volunteered for testing.¹⁰³ Oceanside Unified School District obtained a three-year grant of \$175,845 to drug test student athletes.¹⁰⁴ Paradise Unified School District was awarded a \$47,141 grant for a three-year program to test student athletes, student volunteers, and those engaged in competitive extracurricular activities.¹⁰⁵ Vista Unified School District was awarded a three-year grant of \$211,008 to test student athletes, students in extracurricular and cocurricular activities, and student volunteers.¹⁰⁶ In 2006, the United States Department of Education awarded the Orange County Department of Education in Costa Mesa \$124,433 to test student athletes and students engaged in competitive extracurricular activities.¹⁰⁷ In 2008, the Department awarded \$71,988 to W. Hart Union High School District in Santa Clarita to undertake a voluntary student drug-testing program,¹⁰⁸ \$150,000 to the Fresno County Office of Education to test students engaged in sports or extracurricular activities,¹⁰⁹ and \$100,800 to the Shasta Union High School District to test student athletes and those engaged in extracurricular and cocurricular activities.¹¹⁰

Other California schools have offered students a voluntary drug-testing program. For the past several years, schools throughout Orange County, California, have relied on consensual drug testing.¹¹¹ Public schools in San Clemente, Fullerton, Huntington Beach, Laguna Beach, and Tustin have provided voluntary drug testing to its middle and high school students.¹¹² Carmel High School District in Northern California

103. Grant Application Submitted by Imperial County Office of Education on Aug. 13, 2005 (on file with author); U.S. DEP'T OF EDUC., 2005 AWARDS, *supra* note 16.

104. Grant Application Submitted by Oceanside Unified School District on Aug. 14, 2005 (on file with author); U.S. DEP'T OF EDUC., 2005 AWARDS, *supra* note 16.

105. Grant Application Submitted by Paradise Unified School District on Aug. 16, 2005 (on file with author); U.S. DEP'T OF EDUC., 2005 AWARDS, *supra* note 16.

106. Grant Application Submitted by Vista Unified School District on Aug. 12, 2005 (on file with author); U.S. DEP'T OF EDUC., 2005 AWARDS, *supra* note 16.

107. Grant Application submitted by Orange County Department of Education on Aug. 14, 2006 (on file with author); U.S. DEP'T OF EDUC., 2006 AWARDS *supra* note 16.

108. U.S. DEP'T OF EDUC., *supra* note 5; WILLIAM S. HART UNION HIGH SCH. DIST., "THE CADRE PROGRAM": COMPREHENSIVE ALCOHOL AND DRUG REDUCTION EDUCATION, http://hartdistrict.org/files/docs/CADRE_Parent_Brochure.pdf (last visited Aug. 12, 2010).

109. Telephone Interview with Vince Wesson, Grant Administrator, Fresno Office of Education (Oct. 29, 2009); U.S. DEP'T OF EDUC., *supra* note 5.

110. Grant Application Submitted by Shasta Union High School District on Mar. 17, 2008 (on file with author); U.S. DEP'T OF EDUC., *supra* note 5.

111. Jenifer B. McKim, *Students Put to the Test*, ORANGE COUNTY REG., Oct. 29, 2006, http://www.ocregister.com/ocregister/homepage/abox/article_1338238.php.

112. *Id.*

became the first school district in that area to institute a voluntary drug-testing program.¹¹³

B. The California Constitution and Drug Testing

Students may rely on two provisions of the California Constitution to challenge the constitutionality of mandatory drug testing: article I, section 1—the right to privacy; and article I, section 13—the right to be free from unreasonable searches and seizures.¹¹⁴

1. Article I, Section 1: Right to Privacy

Article I, section 1 of the California Constitution provides: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”¹¹⁵

The right to privacy was added to the California Constitution by the Privacy Initiative, which was adopted by the state’s voters on November 7, 1972.¹¹⁶ “[T]he moving force behind the new constitutional provision was a more [focused] privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.”¹¹⁷ “The new provision’s primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.”¹¹⁸

113. Jennifer Olney, *Are School Drug Tests Invading Privacy?*, ABC 7 NEWS, June 19, 2006, http://abclocal.go.com/kgostory?section=news/assignment_7&id=4286495.

114. See CAL CONST. art. I, §§ 1, 13. Because the majority of student drug-testing programs in California test students engaged in athletics, extracurricular, or cocurricular activities, this Article will focus on the constitutionality of those programs.

115. *Id.* at art. I, § 1.

116. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 641 (Cal. 1994); Carmen M. v. Superior Court (*In re Carmen M.*), 46 Cal. Rptr. 3d 117, 125 n.10 (Ct. App. 2006).

117. *White v. Davis*, 533 P.2d 222, 223 (Cal. 1975).

118. *Id.* The election brochure for the constitutional amendment sets forth its only “legislative history”:

First, the statement identifies the principal “mischiefs” at which the amendment is directed: (1) “government snooping” and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack

Minors, in addition to adults, are protected by this state constitutional right to privacy.¹¹⁹ An individual who claims a violation of this right to privacy under article I, section 1 may seek a declaratory judgment,¹²⁰ an injunction,¹²¹ or monetary damages.¹²²

For a number of reasons, the California Supreme Court has found the California Constitution's right to privacy "broader and more protective of privacy" than the right to privacy found in the Federal Constitution.¹²³ First, the right to privacy is set forth explicitly in article I, section 1 of the California Constitution¹²⁴ rather than implicitly in the Fourth, Fifth, and Fourteenth Amendments of the Federal Constitution.¹²⁵ Additionally, the California right protects individuals from an invasion of privacy by private, as well as state, actors.¹²⁶ Lastly, the California courts have interpreted the right to privacy in the California Constitution as providing greater substantive protection to individuals than its federal counterpart.¹²⁷

California courts have explained that mandatory drug testing of individuals implicates the right to privacy under article I, section 1 of the

of a reasonable check on the accuracy of existing record. Second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for every Californian."

Id. at 234.

119. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 814 (Cal. 1997).

120. *See, e.g., Cent. Valley Chapter of 7th Step Found., Inc. v. Younger*, 157 Cal. Rptr. 117, 122 (Ct. App. 1979).

121. *See, e.g., White*, 533 P.2d at 225.

122. *See, e.g., Payton v. City of Santa Clara*, 183 Cal. Rptr. 17, 17 (Ct. App. 1982). *But see Nesby v. City of San Francisco*, No. A115620, 2009 WL 414605, at *14 n.26 (Cal. Ct. App. Feb. 19, 2009); *Richardson-Tunnell v. Sch. Ins. Program for Emps.*, 69 Cal. Rptr. 3d 176, 184 (Ct. App. 2007).

123. *Lungren*, 940 P.2d at 808.

124. *Id.*; *Carmen M. v. Superior Court (In re Carmen M.)*, 46 Cal. Rptr. 3d 117, 125–26 n.11 (Ct. App. 2006).

125. "[I]n the context of traditional search and seizure by police to detect criminal conduct, the article I, section 1, privacy clause does not establish broader protection than that established by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 200 n.4 (Ct. App. 1989) (citing *People v. Crowson*, 660 P.2d 389, 392 (Cal. 1983)). Mandatory drug testing of students, however, is not covered by this "traditional search and seizure" context because the search is *not* conducted by the police and the testing is not undertaken to detect criminal conduct.

126. *See Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 712–13 (9th Cir. 2005); *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 644 (Cal. 1994).

127. *Lungren*, 940 P.2d at 808–10.

California Constitution.¹²⁸ In 1994, the California Supreme Court examined a drug-testing program for university student athletes.¹²⁹ Due to a concern with the use of performance-enhancing drugs such as steroids,¹³⁰ the National Collegiate Athletic Association (NCAA), a private entity that governs intercollegiate sporting events in the United States, adopted a mandatory random drug-testing program of student athletes engaged in NCAA-sponsored competitions.¹³¹ Athletes at Stanford University in California sued the NCAA, arguing the NCAA's drug-testing program violated their right to privacy under article I, section 1 of the California Constitution.¹³² The Supreme Court of California disagreed.¹³³

Initially, the court had to determine the scope of the initiative because the initiative did not specify whether it applied only to government actors or to private actors as well.¹³⁴ To do so, the court examined the intent of the voters who supported the measure.¹³⁵ The official ballot contained arguments for and against the initiative.¹³⁶ Both sides repeatedly referred to nongovernmental, private interests as being affected by the measure.¹³⁷ Consequently, the court decided the voters intended for private, as well as public, bodies to be covered by the initiative.¹³⁸

Next, the court examined the legal standard for a claim of invasion of privacy. The court determined that to allege an invasion of privacy in violation of article I, section 1, a plaintiff must establish the following elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy."¹³⁹

128. See, e.g., *Loder v. City of Glendale*, 927 P.2d 1200, 1226 (Cal. 1997); *Hill*, 865 P.2d at 644; *Carmen M.*, 46 Cal. Rptr. 3d at 118–19; *Kraslawsky v. Upper Deck Co.*, 65 Cal. Rptr. 2d 297, 302 (Ct. App. 1997).

129. *Hill*, 865 P.2d at 644.

130. William MacKnight, *Drug Testing in Intercollegiate Athletics*—*Hill v. National Collegiate Athletic Association*, 26 Cal. Rptr. 2d 834 (Cal. 1994), 5 SETON HALL J. SPORT L. 529, 529 (1995); see also *Hill*, 865 P.2d at 659–60.

131. *Hill*, 865 P.2d at 637.

132. *Id.*

133. *Id.*

134. *Id.* at 641–44.

135. *Id.* at 642.

136. *Id.*

137. *Id.* at 644.

138. *Id.*

139. *Id.* at 657.

A defendant may overcome the plaintiff's case by negating any one of these three elements or by establishing by "an affirmative defense, that the invasion of privacy is justified."¹⁴⁰ A plaintiff may then rebut the defendant's assertion by establishing that there are alternatives to defendant's conduct that are less invasive of privacy.¹⁴¹

a. Legally Protected Privacy Interest

First, the court found the NCAA's drug-testing program affected a "legally protected privacy interest[]." ¹⁴² By directly "monitoring an athlete's urination" and by "collecting and testing an athlete's urine and inquiring about his or her ingestion of medications," the NCAA intruded on the athletes' privacy interests.¹⁴³ The monitoring implicated "autonomy privacy," an interest in being free from observation while performing a normally private function.¹⁴⁴ The collecting and testing for drugs implicated "informational privacy," an interest in restricting access to confidential information about one's body.¹⁴⁵

b. Reasonable Expectation of Privacy

Next, the court determined that, due to a student athlete's participation in intercollegiate sports, an NCAA student athlete had a reduced expectation of privacy.¹⁴⁶ As in *Vernonia*, the court found that because athletes' activities are highly regulated and because they shower and undress together, their expectation of privacy is diminished.¹⁴⁷ In addition, they routinely share and exchange medical information with various people, such as doctors, coaches, and trainers.¹⁴⁸ Moreover, the NCAA provided advance notice of the drug-testing program to the student athletes and obtained consent from them before the testing.¹⁴⁹ Because the students had no legal right to engage in intercollegiate sports, they were required to adhere to the rules adopted democratically by the NCAA.¹⁵⁰ The court concluded that, due to the notice and

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 657–58.

144. *Id.* at 658.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 658–59.

150. *Id.* at 659.

consent features of the program, the student athletes had an even lower expectation of privacy.¹⁵¹

c. Serious Invasion of Privacy

Finally, the court examined the conduct of the NCAA to determine the seriousness of the invasion of privacy.¹⁵² The court found the NCAA's program of *direct* monitoring of urination by the student athletes to be "particularly intrusive."¹⁵³ Rather than merely handing the athlete a cup and asking for a sample, as a doctor would do, the NCAA actually watched as the athlete urinated.¹⁵⁴ This invasion of privacy was serious, despite the students' reduced expectation of privacy.¹⁵⁵

Additionally, the court analyzed the depth of the student athletes' invasion of privacy when the students were asked about medical conditions and treatments before their drug tests.¹⁵⁶ The court decided that, in view of the students' reduced expectation of privacy and the routine nature of these questions for athletes, the invasion was not significant.¹⁵⁷

Finally, the court reviewed the competing interests behind the NCAA's request for medical information.¹⁵⁸ The NCAA demanded this information in order to ensure the accuracy and validity of the drug tests.¹⁵⁹ This served to accomplish the objective behind the program, protecting the integrity of the sport through the accurate testing of the athletes. Consequently, the court determined that the NCAA's interest justified its intrusion into this area.¹⁶⁰

Because the plaintiffs established the necessary elements for a claim of invasion of privacy, the court then examined whether the NCAA's actions furthered any legitimate and important competing interests.¹⁶¹ "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as

151. *Id.* at 658–59.

152. *Id.* at 659.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 665.

157. *Id.* at 666.

158. *Id.*

159. *Id.*

160. *Id.* at 669.

161. *Id.* at 659–60.

an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.”¹⁶² The plaintiff may then rebut the affirmative defense by establishing that less intrusive means are available to accomplish the defendant’s objectives.¹⁶³

The court examined the defendant’s countervailing interests. It determined that the NCAA sought to protect the “integrity of intercollegiate athletic competition” and the “health and safety of student athletes.”¹⁶⁴ The court found the NCAA had a genuine concern in both of these interests.¹⁶⁵ Based on the experience of other sports organizations and due to its own study of the issue, the NCAA had ascertained that student athletes abused various drugs, including performance-enhancing drugs.¹⁶⁶ Therefore, the NCAA was appropriately concerned that this drug use would damage intercollegiate sports by compromising competitions.¹⁶⁷ Furthermore, as a promoter of athletic activities, the NCAA was correctly interested in protecting the well-being of students engaged in NCAA sports.¹⁶⁸ A drug-abusing athlete could exacerbate the risk of injury to himself and others.¹⁶⁹ Although the athletes complained that some of the tested drugs were not performance-enhancing substances, the court found that because the testing was legitimate, the NCAA could test for any substance whose use was illegal or potentially dangerous.¹⁷⁰

As a matter of law, the California Supreme Court ruled that the lower courts had erred in requiring the NCAA to establish that its drug-testing program promoted a “compelling interest.”¹⁷¹ To establish a compelling interest, the lower courts had demanded that the NCAA prove the following:

1. the program furthered its stated purposes, i.e., to safeguard the integrity of athletic competition and to protect the health and safety of student athletes;
2. the utility of the program manifestly outweighed any resulting impairment of the privacy right; and
3. there were no alternatives to drug testing less offensive to privacy interests.¹⁷²

162. *Id.* at 657.

163. *Id.*

164. *Id.* at 659.

165. *Id.* at 660.

166. *Id.*

167. *Id.* at 660–61.

168. *Id.* at 661.

169. *Id.*

170. *Id.* at 662–63.

171. *Id.* at 661.

172. *Id.* at 640.

The court found that no such showing was required.¹⁷³ The history of the Privacy Initiative did not indicate that the supporters of the amendment intended to have the “compelling interest” standard apply to private entities.¹⁷⁴ The compelling interest standard, like the “least restrictive alternative,” applies only to defendants who are agents of the government, not private associations like the NCAA, or actions that “involve clear invasions of central, autonomy-based privacy rights, particularly in the areas of free expression and association, procreation, or government-provided benefits in areas of basic human need,”¹⁷⁵ which were not implicated in the case before the court.¹⁷⁶

Because the NCAA had justified its drug-testing program with legitimate and important competing interests, the plaintiffs were required to prove the availability of alternatives to direct monitoring.¹⁷⁷ The court found the plaintiffs’ options—educational programs and suspicion-based testing—were inappropriate.¹⁷⁸ Education requires commitment and is not effective for those who are not interested in learning about the detrimental effects of drugs.¹⁷⁹ Suspicion-based testing requires both resources to observe the suspicious behavior and reliable evidence of the suspicious behavior.¹⁸⁰ Because the NCAA had neither consistent nor frequent contact with the athletes, the plaintiffs could not provide adequate proof that a suspicion-based program was feasible. Consequently, the court found inadequate proof of either of these in the record, and it concluded that the plaintiffs had failed to prove their case.¹⁸¹

173. *Id.* at 661.

174. *Id.* at 654. “Nothing in this passage compels the conclusion that the phrase ‘compelling public need’ was intended to supply a single, all-encompassing legal test for privacy rights.” *Id.* at 645.

175. *Id.* at 663.

176. *Id.* at 664 (“We have been directed to no case imposing on a private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the ‘least offensive alternative’ possible under the circumstances. Nothing in the language [or] history of the Privacy Initiative justifies the imposition of such a burden; we decline to impose it.”).

177. *See id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

2. Refining the Hill Test

The California Supreme Court has tried to refine this constitutional analysis in several cases that followed *Hill*. In *Loder v. City of Glendale*, the court examined whether drug testing of city job applicants and promotion candidates violated, inter alia, article I, section 1 of the California Constitution.¹⁸² In a divided opinion, the plurality declared *Hill*'s three elements establishing a prima facie case of invasion of privacy under article I, section 1 were merely "threshold elements" that were to be used to "screen out" trivial claims that did not implicate a substantial invasion of privacy.¹⁸³ The court stressed that even with the establishment of these elements, the court would still have to balance the need for the program against the intrusion on the individual's privacy.¹⁸⁴

With respect to promotion candidates, the court did not review drug testing under the right to privacy because it had already found that testing those individuals violated the Fourth Amendment.¹⁸⁵ As to job applicants, the court found no violation of the right to privacy.¹⁸⁶ Although the urinalysis intruded upon both autonomy and informational privacy interests protected by article I, section 1, the expectation of privacy of the job applicants was reduced because they were *already* required to undergo a preemployment medical exam, part of which included a urinalysis for medical conditions.¹⁸⁷ But because this urinalysis disclosed *additional* private information regarding drug use, the employer was required to justify it.¹⁸⁸ The court cited "absenteeism, increased safety concerns, tardiness, reduced productivity, and increased risk of turnover" as potential problems of drug abusers that employers would justifiably want

182. *Loder v. City of Glendale*, 927 P.2d 1200, 1203 (Cal. 1997) (plurality opinion).

183. *Id.* at 1230; *see also* *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 712 (9th Cir. 2005) ("To prove a claim under the California right to privacy, a plaintiff must first demonstrate three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy interest. These elements do not constitute a categorical test, but rather serve as threshold components of a valid claim to be used to 'weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant.' The defense should prevail on its motion for summary judgment if it negates, as a matter of law, any one of these three threshold elements." (citations omitted)).

184. *Loder*, 927 P.2d at 1230 (plurality opinion).

185. *Id.* at 1221.

186. *Id.* at 1222.

187. *Id.* at 1232–33.

188. *Id.* at 1233.

to know of before they hired any applicant.¹⁸⁹ In balancing the “employer’s substantial interest in conducting suspicionless drug testing of a job applicant against the relatively minor intrusion upon such an applicant’s reasonable expectations of privacy when the drug testing is conducted as part of a general preemployment medical examination,” the court concluded that the city’s drug-testing program did not violate article I, section 1.¹⁹⁰

In *Pioneer Electronics (USA), Inc. v. Superior Court*, the Supreme Court of California reiterated the elements for a privacy claim under article I, section 1.¹⁹¹ Relying on *Hill*, the court declared the claimant “must possess a ‘legally protected privacy interest,’” emanating from either informational or autonomy privacy.¹⁹² Second, the claimant must enjoy a “reasonable expectation of privacy under the particular circumstances.”¹⁹³ Voluntary consent to a reduction in privacy should be considered.¹⁹⁴ Lastly, the “invasion of privacy . . . must be ‘serious’ in nature, scope, and actual or potential impact to constitute an ‘egregious’ breach of social norms.”¹⁹⁵ If the claimant met these criteria, the privacy interest must then be balanced against the state’s competing interests.¹⁹⁶

Recently, in *Sheehan v. San Francisco 49ers, Ltd.*, the California Supreme Court reaffirmed the elements of a privacy claim under article I, section 1. Again, the court returned to the framework set forth in *Hill* to clarify that, in a constitutional right to privacy action, a plaintiff must establish “(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.”¹⁹⁷ In order to prevail in such an action, a defendant may either negate any one of these three elements or may prove an affirmative defense that the intrusion on privacy was warranted because it advanced a countervailing interest.¹⁹⁸ If the defendant presented an affirmative defense, the plaintiff could respond by proving the availability

189. *Id.*

190. *Id.*

191. *Pioneer Elecs. (USA), Inc. v. Superior Court*, 150 P.3d 198, 204 (Cal. 2007).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472, 477 (Cal. 2009).

198. *Id.*

of alternative measures that would be less invasive on one's privacy interest.¹⁹⁹

As the plurality in *Loder* had declared twelve years earlier, the court in *Sheehan* now stressed that the three elements constituting a claim under article I, section 1 were merely threshold elements that courts may use to weed out insignificant claims of privacy violations.²⁰⁰ Even if a plaintiff establishes these elements, to determine whether a violation of article I, section 1 has occurred, the court must still balance the need for the conduct against the degree of the intrusion.²⁰¹ Furthermore, the court stressed that in determining the reasonableness of the policy, it is critical for the court to consider whether it is a private or a government entity that is acting.²⁰² A government entity must provide stronger justification for its intrusion on privacy interests because its power is pervasive and coercive.²⁰³ Additionally, an individual has fewer alternatives when dealing with the government than when interacting with a private entity.²⁰⁴

3. *The Lower Courts' View of Drug Testing*

In a series of cases, the lower courts in California have examined whether drug testing in various contexts violates the privacy provisions of article I, section 1 of the California Constitution.²⁰⁵ Generally, the courts have found that such testing does not violate the right to privacy.²⁰⁶

199. *Id.*

200. *Id.*

201. *Id.* (“*Hill* was the first case in which our court addressed the question whether the state constitutional privacy clause applies to *private* as well as to governmental entities. Having concluded that the privacy clause applies to private entities and also that the legal concept of ‘privacy’ potentially has a very broad sweep, the court in *Hill* determined that it was appropriate to articulate several threshold elements that may permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant. *Hill* cannot properly be read, however, to have adopted a sweeping new rule under which a challenge to conduct that significantly affects a privacy interest protected by the state Constitution may be rejected without any consideration of either the legitimacy or strength of the defendant’s justification for the conduct.”).

202. *Id.* at 479.

203. *Id.*

204. *Id.*

205. *See, e.g.,* *Kraslawsky v. Upper Deck Co.*, 65 Cal. Rptr. 2d 297, 298 (Ct. App. 1997).

206. *See infra* Part IV.B.3. In 1997, the California Attorney General addressed the matter of drug testing of prosecutors. The Attorney General was asked whether, in the absence of a preestablished policy, a county district attorney may order a deputy district attorney to submit to a drug test. The Attorney General opined yes, as long as the test was based on *individualized suspicion*. The Attorney General balanced the deputy’s diminished expectation of privacy due to his employment in a “law enforcement” capacity

In *Kraslawsky v. Upper Deck Co.*, the California Court of Appeal reversed the lower court's decision granting summary judgment.²⁰⁷ The employer, Upper Deck, had instituted a suspicion-based drug-testing program.²⁰⁸ Plaintiff Kraslawsky alleged there was no reasonable suspicion to test her.²⁰⁹ The court of appeal concluded that there was a factual dispute on that issue.²¹⁰ If the plaintiff prevailed and established there was no reasonable suspicion to test her, then the plaintiff could argue the company's drug test as applied to her violated her right to privacy under article I, section 1.²¹¹

Although Upper Deck argued that Kraslawsky had no reasonable expectation of privacy because she was not directly observed when urinating, the court noted that even when no direct monitoring is involved, a privacy claim may still be established.²¹² Moreover, just because Kraslawsky had submitted to a preemployment drug test did not mean that she surrendered her expectations of privacy while on the job.²¹³ Furthermore, when Upper Deck argued that Kraslawsky had consented to the drug test, the court responded that consent is merely one factor in the balancing test.²¹⁴ It is not a complete defense.²¹⁵ Finally,

against the government's legitimate interest of maintaining the integrity of an office that prosecutes drug cases. The Attorney General concluded that as long as there was reasonable suspicion to justify the test, the testing did not violate the California Constitution. 80 Ops. Cal. Att'y Gen. 354 (1997), 1997 WL 789632.

207. *Kraslawsky*, 65 Cal. Rptr. 2d at 307.

208. *Id.* at 299.

209. *Id.*

210. *Id.* at 302.

211. *Id.*

212. *Id.* at 305. When a urinalysis test is "monitored by a nurse listening for urination sounds outside the toilet area and employees [are] required to respond to a written inquiry concerning their current medications," the plaintiff's privacy claim is not eliminated. *Id.*

213. *Id.* at 306.

214. *Id.*

215. *Id.* In *TBG Insurance Services Corp. v. Superior Court*, the California Court of Appeal noted that *Hill* implied that consent was a complete defense to a privacy claim, but *Kraslawsky* viewed it only as one factor in the balancing test. *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 160–61 n.5 (Ct. App. 2002). This court noted the distinction between consent in the drug-testing cases and the case before it. *Id.* Consent in the drug-testing cases was particularly significant—when an individual is asked to consent to drug testing, if she refuses, she loses her athletic, extracurricular, or employment position. *Id.* When an employee is asked to consent to computer monitoring, to avoid any invasion of privacy, she must use her employer's computer only for the stated purpose—business rather than personal. *Id.* Consequently, unlike a

Kraslawsky's assent to provide medical information to her employer regarding requests for medical leave or for job-related injuries did not, for the purposes of drug testing, lead to her complete surrender of privacy rights.²¹⁶ Consequently, she could proceed with a claim that this drug test had violated her right to privacy.²¹⁷

In *Smith v. Fresno Irrigation District*, the California Court of Appeal reviewed whether the random drug testing of a state construction worker violated the worker's right to privacy under the California Constitution.²¹⁸ The court balanced the intrusion into the employee's privacy interest against the need for the employer's drug-testing program.²¹⁹ Undoubtedly, the collection and testing of the employee's urine implicated his right to privacy.²²⁰

With respect to his "autonomy privacy," the employee was allowed to visit a medical clinic to provide the urine sample.²²¹ He was permitted to provide the sample in a private manner and was not directly observed providing the sample.²²² Such indirect monitoring is considered minimally intrusive.²²³

Regarding his "informational privacy," the court recognized the employee had a "privacy interest in precluding dissemination or misuse of such sensitive and confidential information."²²⁴ Nevertheless, the employee's privacy interest was reduced because he had been given six months notice of the employer's plan to implement this drug-testing

drug-testing case, the court viewed the employee's consent in this computer-monitoring case as a complete defense to his invasion of privacy claim. *Id.*

216. *Kraslawsky*, 65 Cal. Rptr. 2d at 306. See also *Bazargan v. Hilton Universal City & Towers*, in which the California Court of Appeal noted:

Thus, assuming there is a protected privacy interest, that interest must be analyzed in the context of the circumstances, and other factors may affect a person's expectation of privacy. A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms . . . [T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant. Therefore, consideration of whether the plaintiff's expectation of privacy in any given situation is reasonable must take into account accepted community norms, advance notice, and whether the plaintiff had any opportunity to consent to or reject the circumstance constituting the invasion.

Bazargan v. Hilton Universal City & Towers, No. B186942, 2007 WL 103074, at *7 (Cal. Ct. App. Jan. 17, 2007) (internal citations and quotation marks omitted).

217. *Kraslawsky*, 65 Cal. Rptr. 2d at 307.

218. *Smith v. Fresno Irrigation Dist.*, 84 Cal. Rptr. 2d 775, 778 (Ct. App. 1999).

219. *Id.* at 785.

220. *Id.* at 784.

221. *Id.* at 785.

222. *Id.*

223. *Id.*

224. *Id.*

program.²²⁵ Advance notice reduces the element of surprise inherent in random drug testing.²²⁶ The randomness of the program effectively deters substance abuse on the job and eliminates the opportunity for targeted harassment.²²⁷

On the other hand, the employer adopted this policy to address safety concerns on the job.²²⁸ The court agreed that the employer had a legitimate interest in protecting the plaintiff's coworkers from the severe and immediate harm a drug-abusing worker could pose.²²⁹

Balancing the district's interest in reducing the risk of harm to its employees against the employee's interest in privacy, the court concluded that the district's interest was greater than the employee's interests.²³⁰ Consequently, the court found no violation of article I, section 1.²³¹

California appellate courts have also examined whether a drug-testing condition on a term of probation imposed on a juvenile offender violated the juvenile's right to privacy.²³² In *In re Kacy S.*, the court conflated its analysis under article I, sections 1 and 13, and found no violation of either right.²³³ To determine whether the drug-testing condition violated the defendant's right to privacy and the right to be free from unreasonable searches and seizures, the court simply balanced the probationer's expectation of privacy against the government's interest in monitoring the activities of the juvenile probationer.²³⁴ Although the court found the drug testing invaded the minor's privacy, it determined that the minor's privacy interest was diminished because he was on probation

225. *Id.* In *TBG Insurance Services Corp. v. Superior Court*, the California Court of Appeal also found that the company's advance notice to the employee gave the employee sufficient notice to accept or reject the new policy. The advance notice and written consent defeated his reasonable expectation of privacy because he knew that the company would monitor his computer, and he could have prevented any intrusion on his privacy by simply using the computer for its intended purpose—company business. *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 161–63 & n.5 (Ct. App. 2002).

226. *Smith*, 84 Cal. Rptr. 2d at 785.

227. *Id.*

228. *Id.*

229. *Id.* at 787–88.

230. *Id.*

231. *Id.* at 788.

232. *People v. Daniel A.* (*In re Daniel A.*), No. A102372, 2004 WL 245579, at *5 (Cal. Ct. App. Feb. 11, 2004); *People v. Kacy S.* (*In re Kacy S.*), 80 Cal. Rptr. 2d 432, 434 (Ct. App. 1998).

233. *Kacy S.*, 80 Cal. Rptr. 2d at 436–37.

234. *Id.*

and already subject to the rules and regulations of that condition.²³⁵ On the other hand, the government had a strong interest in rehabilitating the minor and protecting the public.²³⁶ When balancing the two interests, the court found the government's interest outweighed those of the probationer.²³⁷ Consequently, it found no violation of either constitutional right.²³⁸

In *In re Carmen M. v. Superior Court*, the California Court of Appeal examined whether the court-ordered drug testing of a "dependent" child violated the child's right to privacy under article I, section 1.²³⁹ The court concluded that it did not.²⁴⁰

Due to serious problems in the home and past drug use, sixteen-year-old Carmen M. was removed from her mother's custody and placed in a group home.²⁴¹ While at the group home, Carmen M. responded well to drug treatment, including random drug testing.²⁴² After six months in the group home, Carmen M. refused to return to her mother's residence and asked to stay in the group home.²⁴³ The Department of Children and Family Services sought a court order, finding Carmen M. a dependent child of the court.²⁴⁴ Ultimately, the court sustained the petition and ordered Carmen M. to continue living at the group home.²⁴⁵ While at the facility, she was to undergo drug testing if the staff suspected she was using drugs.²⁴⁶ Counsel for Carmen M. objected to the drug-testing provision, arguing that the drug-testing condition violated her right to privacy under article I, section 1.²⁴⁷

The Court of Appeal disagreed.²⁴⁸ The court noted:

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* In *Daniel A.*, the court agreed with the holding in *Kacy S. People v. Daniel A. (In re Daniel A.)*, No. A102372, 2004 WL 245579 at *5 (Cal. Ct. App. Feb. 11, 2004) ("Although urine testing constitutes an intrusion on privacy, the effect of the intrusion is outweighed by the government's legitimate interest in closely monitoring the rehabilitation of minors who are granted probation and returned to the custody of their parents.").

239. *Carmen M. v. Superior Court (In re Carmen M.)*, 46 Cal. Rptr. 3d 117, 119 (Ct. App. 2006).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 119–120.

245. *Id.* at 120.

246. *Id.* at 121.

247. *Id.*

248. *Id.* at 129.

Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a “compelling interest” must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central or in bona fide dispute, general balancing tests are employed. With respect to the privacy interest implicated by the drug-testing program at issue in *Hill*, the Supreme Court determined that a general balancing test, rather than a compelling interest test, was applicable.²⁴⁹

Generally, the court weighs the need for the intrusion on privacy against the depth of the intrusion.²⁵⁰ The context in which the alleged invasion of privacy occurs is critical to this analysis.²⁵¹ Here, Carmen M.’s status as a minor and as a dependent child diminished her right to privacy.²⁵² Due to Carmen M.’s status as a dependent child, the court was acting in the role of the parent.²⁵³ As such, the court acted to protect her health and welfare.²⁵⁴ Moreover, Carmen M. had used drugs in the past but now was doing well with drug counseling and testing.²⁵⁵ Consequently, the need to drug test Carmen M. was significant.²⁵⁶ The intrusion on her privacy was minimal due to her status as a dependent minor.²⁵⁷ Furthermore, the court had ordered that Carmen M. be tested only if the group home staff *suspected* that Carmen M. was using drugs.²⁵⁸ Thus, the testing was not random but was based on reasonable suspicion.²⁵⁹ In view of the court’s valid concern about Carmen M.’s well-being and the fact that the testing was grounded on suspicion, the court found that this limited intrusion on Carmen M.’s right to privacy was justified.²⁶⁰

249. *Id.* at 126 (internal citation and quotation marks omitted).

250. *Id.* at 127.

251. *Id.*

252. *Id.*

253. *Id.* at 128.

254. *Id.*

255. *Id.* at 129.

256. *Id.*

257. *Id.* at 128.

258. *Id.* at 129.

259. *Id.*

260. *Id.*

4. Drug Testing of California Students

To determine whether student drug testing violates the right to privacy under article I, section 1 of the California Constitution,²⁶¹ it is necessary to analyze the issue under the criteria first set forth in *Hill v. National Collegiate Athletic Ass'n*²⁶² and most recently reiterated in *Sheehan v. San Francisco 49ers, Ltd.*²⁶³

a. Legally Protected Interest

Just as in *Hill*, a policy to drug test middle and high school student athletes and those engaged in extracurricular activities affects the students' legally protected privacy interest.²⁶⁴ A drug-testing program implicates both informational and autonomy interests.²⁶⁵ Unlike *Hill*, school officials generally are not testing for performance-enhancing drugs such as steroids;

261. On May 6, 2009, during the writing of this Article, Superior Court Judge Monica Marlow ruled on the ACLU's motion for preliminary injunction in the matter of *Brown v. Shasta Union High School District*. *Brown v. Shasta Union High Sch. Dist.*, No. 164933 (Cal. Super. Ct. May 7, 2009), *appeal docketed*, No. C061972 (Cal. Ct. App. May 27, 2009). In granting the preliminary injunction, enjoining the school district from enforcing its drug-testing policy as to students engaged in extracurricular and cocurricular activities, Judge Marlow found that the plaintiffs were likely to prevail on the merits of their case and that they would suffer irreparable harm if the injunction was not granted. *Id.* at 4. As to the right to privacy arguments under article I, section 1, Judge Marlow ruled that the students had a reasonable expectation of privacy because the students were indirectly monitored while urinating, their urine was analyzed, and the test results were provided to school officials. *Id.* The intrusion on privacy of the students engaged in extracurricular or cocurricular activities was significant because, unlike student athletes, the physical condition of these students was not regularly scrutinized. *Id.* at 5. Furthermore, there was insufficient notice of the program and the consent to be tested was unclear. Lastly, the targeted activities included those that students were required to pursue, either to satisfy academic requirements at the high school or to meet university entrance prerequisites. *Id.* at 5. On the other hand, the school district could not establish a compelling interest for testing the students engaged in these extracurricular and cocurricular activities. *Id.* The courts found no evidence that students in these activities were using drugs to enhance their performance or were more likely to be abusing drugs for recreational purposes. *Id.* at 5–6. With respect to the right to be free from unreasonable searches and seizures under article I, section 13, Judge Marlow found that the minimum requirement for searching a student is reasonable suspicion. *Id.* at 8. Because this drug-testing program was not based on reasonable suspicion, the court also found that plaintiffs were likely to prevail on the merits of this claim. *Id.* The California Court of Appeal for the Third District affirmed this decision on September 2, 2010. *Brown v. Shasta Union High Sch. Dist.*, No. C061972, 2010 WL 3442147 (Cal. Ct. App. Sept. 2, 2010).

262. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994).

263. *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472 (Cal. 2009); *see also Hernandez v. Hillsides, Inc.*, 211 P.3d 1063 (Cal. 2009).

264. *See Hill*, 865 P.2d at 654.

265. *See supra* notes 144–45 and accompanying text.

they are testing for the use of illicit substances such as marijuana, cocaine, and amphetamines.²⁶⁶ Also unlike *Hill*, the primary purpose of the testing is to prevent and deter drug use, not to protect the integrity of the activity.²⁶⁷

The student's interest in autonomy privacy is affected if there is direct monitoring of the student's urination.²⁶⁸ If there is only indirect monitoring of the urination—by accompanying the student to the restroom or waiting outside the stall and listening to urination noises—the student's privacy interest, albeit a lesser one, is still implicated.²⁶⁹ If a student must disclose the medications he takes and the reasons for taking those medications before testing, his informational privacy interest is also impacted.²⁷⁰ Moreover, the collection and analysis of the urine sample further implicates the student's privacy interests.²⁷¹ The student also has a privacy interest in maintaining the confidentiality of this sensitive information.²⁷²

b. Reasonable Expectation of Privacy

To determine whether an individual has a reasonable expectation of privacy, the court examines the context of the activity. To evaluate the reasonableness of the expectation of privacy, the court considers the “customs, practices, and physical settings surrounding particular activities,” as well as the opportunity to be notified in advance and to consent to the intrusion.²⁷³

Students have a reasonable expectation of privacy, but this expectation is reduced because they are in the custody and control of the school.²⁷⁴ They must follow the rules and regulations of the administration, which often limit their privacy.²⁷⁵ The United States Supreme Court has found

266. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 826 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650 (1995).

267. *Earls*, 536 U.S. at 834 (2002); *Vernonia*, 515 U.S. at 661–62 (1995).

268. *Hill*, 865 P.2d at 657.

269. See *supra* note 212 and accompanying text.

270. *Hill*, 865 P.2d at 657–58.

271. *Id.*

272. *Smith v. Fresno Irrigation Dist.*, 84 Cal. Rptr. 2d 775, 785 (Ct. App. 1999).

273. *Hill*, 865 P.2d at 655.

274. *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 656–57 (1995).

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

that students engaged in athletics and extracurricular activities have a lesser expectation of privacy than ordinary students because they must abide by the special rules of those activities.²⁷⁶

The student athlete has an even lower expectation of privacy than the ordinary student because the student athlete's activities are highly regulated. Further, athletes share locker rooms where they shower and change clothes together.²⁷⁷ Before they participate in sports, student athletes must also undergo physical exams and share medical information with their coaches.²⁷⁸ These actions diminish their privacy interests.²⁷⁹

On the other hand, students engaged in extracurricular activities, such as the choir or chess club, are not required to undergo this level of physical scrutiny and share this level of intimacy with other students.²⁸⁰ Unlike *Loder*, in which the employers were already requiring job applicants to undergo a full medical exam and urinalysis,²⁸¹ students involved in extracurricular activities are not required to undergo such exams.²⁸² As a result, the invasion of their privacy is greater than that of a student athlete.²⁸³

Student athletes usually have to undergo physical examinations to participate in sports.²⁸⁴ Even if they have to submit to a medical urinalysis to clear them for competition, *Loder* held that a urinalysis that tests for illicit substances is a further invasion of the person's expectation of privacy.²⁸⁵ Moreover, what permitted the drug testing in *Hill*—the concern for the integrity of the sport due to the abuse of performance-enhancing drugs²⁸⁶—is absent in these student drug-testing cases. Here, unlike *Hill*, the schools are not testing student athletes for harmful performance-enhancing drugs and, as an afterthought, also testing them for illegal

276. *Earls*, 536 U.S. at 831–32; *Vernonia*, 515 U.S. at 657. Despite the High Court's ruling, it is still difficult to understand how the privacy of members of the chess club or the school choir is diminished because they are required to attend regular meetings or travel to interschool competitions.

277. *Vernonia*, 515 U.S. at 657.

278. *Id.*

279. *Id.*

280. *Earls*, 536 U.S. at 846 (Ginsburg, J., dissenting); *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 84 (Pa. 2003); Christopher A. Gorman, *Public School Students' Fourth Amendment Rights After Vernonia and Earls: Why Limits Must Be Set on Suspicionless Drug Screening in the Public Schools*, 29 VT. L. REV. 147, 162–63 (2004).

281. See *supra* text accompanying notes 182–90.

282. *Theodore*, 836 A.2d at 84; Gorman, *supra* note 280, at 162–63.

283. Gorman, *supra* note 280, at 162–63.

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

285. *Loder v. City of Glendale*, 927 P.2d 1200, 1233 (Cal. 1997); see also *Vernonia*, 515 U.S. at 656–57.

286. See *supra* note 167 and accompanying text.

substances; the schools are primarily testing these student athletes for illegal substances simply to deter substance abuse.²⁸⁷ Unlike *Hill* and *Loder*, the invasion of privacy is not undertaken for a proven purpose such as protecting the integrity of sport²⁸⁸ or preventing absenteeism or reduced productivity;²⁸⁹ rather, it is being undertaken for the unproven purpose of deterring substance abuse.²⁹⁰

In determining the student's expectation of privacy, the court considers whether the student has had advance notice of the drug-testing program. Notice reduces the element of surprise and allows the student to mentally prepare for the fact that he may be drug tested at some point during his participation in athletics or extracurricular activities.²⁹¹ The student's expectation of privacy is diminished, as opposed to someone who is never forewarned that a drug test will be conducted in the future. Nonetheless, it is still jarring for the student to be publicly removed from the classroom by a teacher or a coach, accompanied to the restroom by a chaperone, and monitored, either directly or indirectly, while urinating in order to be drug tested on demand. This certainly differs from being asked to visit a medical clinic at one's own convenience, provide a urine sample, and await the results from the doctor.²⁹² Furthermore, if the student "fails" the drug test, the result of that test becomes publicly known when, due to his suspension, the "failing" student suddenly becomes consistently absent from the activity.²⁹³

Additionally, the court considers a student's voluntary consent to the program.²⁹⁴ The validity of the consent will be determined by the totality of the circumstances.²⁹⁵ Initially, it is important to note that students who attend public school and who participate in school athletics or extracurricular activities may have few other alternatives.²⁹⁶ Minors in

287. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 837–38 (2002); *Vernonia*, 515 U.S. at 661.

288. *Earls*, 536 U.S. at 837–38; *Vernonia*, 515 U.S. at 661

289. See *supra* note 189 and accompanying text.

290. See *infra* text accompanying notes 325–29.

291. See *supra* text accompanying note 150.

292. See *supra* text accompanying notes 221–23.

293. Michael T. Neaderbaomer, Comment, *Drug Testing Students in Public Schools: A New Lesson in the Unwarranted Expansion of the "Special Needs Balancing Test,"* 25 J. JUV. L. 56, 60 (2005).

294. *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472, 478 (Cal. 2009).

295. *Id.*

296. See *id.* at 479.

California between the age of six and eighteen are required to attend school full time.²⁹⁷ They may not be able to afford private schools. Students may consent to testing because they recognize that if they refuse to consent, they will forego their opportunity to participate in an essential component of public education—extracurricular activities.²⁹⁸ For some students, this could result in a lost opportunity to attend college²⁹⁹ or an inability to earn a scholarship or some other form of financial aid.³⁰⁰ For others, it may mean a loss of valuable vocational skills.³⁰¹ Faced with this dilemma, a student may feel obliged to consent.³⁰² Thus, the voluntariness of this consent is highly problematic.³⁰³

Moreover, unlike *Hill*, in which the California Supreme Court found that participating in college sports is not a “government benefit or an economic necessity that society has decreed must be open to all,”³⁰⁴ attending public school and engaging in free extracurricular activities are rights protected by the California Constitution.³⁰⁵ The government, therefore, should not be permitted to condition a student’s constitutional right to participate in extracurricular activities on the student’s consent to surrender his right to privacy.³⁰⁶

c. *Seriousness of the Invasion*

The court determines the seriousness of the invasion of the students’ privacy interests by the details of the collection process: where it was done, who conducted the test, and whether the program involved direct or indirect monitoring.³⁰⁷ Direct monitoring is considered a more serious invasion than indirect monitoring.³⁰⁸ Additionally, the court reviews to

297. CAL. EDUC. CODE § 48200 (West 2006).

298. See *Hartzell v. Connell*, 679 P.2d 35, 42–43 (Cal. 1984).

299. Gorman, *supra* note 280, at 164–65; Nicholas A. Palumbo, Comment, *Protecting Access to Extracurricular Activities: The Need To Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 BYU EDUC. & L.J. 393, 415.

300. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 845–46 (2002) (Ginsberg, J., dissenting); Neaderbaomer, *supra* note 293, at 59.

301. Gorman, *supra* note 280, at 164–65; Palumbo, *supra* note 299, at 415–16.

302. Gorman, *supra* note 280, at 165–66.

303. *Id.*; Neaderbaomer, *supra* note 293, at 62.

304. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 659 (Cal. 1994).

305. *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984).

306. *Hill*, 865 P.2d at 659; Gorman, *supra* note 280, at 165–66. The doctrine of unconstitutional conditions prescribes that the Government may not condition the exercise of one constitutional right on the surrender or nonassertion of another constitutional right. See, e.g., *Robbins v. Superior Court*, 695 P.2d 695, 704 n.20 (Cal. 1985); *Daniels v. McMahon*, 5 Cal. Rptr. 2d 404, 410 (Ct. App. 1992).

307. See *supra* text accompanying notes 153–55.

308. See *supra* text accompanying notes 153–55.

whom the results of the urinalysis were divulged and the reasons for taking the prescribed drugs.³⁰⁹ Moreover, the consequences of testing positive are critical. If the results were merely disclosed to a teacher, a coach, or the student and his parents, the court would likely view the invasion of privacy as a minor invasion.³¹⁰ If the results were divulged to law enforcement or if the results affected a student's academic standing, the seriousness of the invasion would be considered substantial.³¹¹

If the student can make this threshold showing, then the court balances the student's interest in privacy against the school district's interest in conducting the drug-testing program.³¹² The student does have an interest in privacy here, but it is diminished because the student operates under the school's rules and regulations.³¹³ A student athlete should expect less privacy than an ordinary student.³¹⁴ A student engaged in extracurricular activities has been found to have a lesser expectation of privacy than the ordinary student but a greater expectation of privacy than a student athlete.³¹⁵

*d. Invasion Is Justified Because It Serves a Legitimate
Competing or Countervailing Interest*

To justify the invasion of privacy, the school district must establish that it is promoting a legitimate competing or countervailing interest.³¹⁶ No compelling interest needs to be shown.³¹⁷ Such a defense is limited to instances in which "obvious government action impacting freedom of

309. See *supra* text accompanying notes 156–57.

310. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 833 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658 (1995) (stating that "the results of the tests are disclosed only to a limited class of school personnel who have a need to know").

311. See *Earls*, 536 U.S. at 833; *Vernonia*, 515 U.S. at 658 (stating that the test results "are not turned over to law enforcement authorities or used for any internal disciplinary function").

312. See *Sheehan v. S.F. 49ers, Ltd.*, 201 P.3d 472, 477 (Cal. 2009); see also *supra* text accompanying notes 197–99.

313. *Vernonia*, 515 U.S. at 657 ("[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally.").

314. *Id.*

315. *Earls*, 536 U.S. at 846 (Ginsburg, J., dissenting); *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 93 (Pa. 2003). ("Interscholastic athletes similarly require close safety and health regulation; a school's choir, band and academic team do not.").

316. See *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 659 (Cal. 1994).

317. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1073 (Cal. 2009); *Hill*, 865 P.2d at 654.

expression and association” or an “obvious invasion of an interest fundamental to personal autonomy” is involved.³¹⁸

Initially, the school district must show its schools suffer from a drug problem.³¹⁹ If the district is successful in establishing this element, it must show it is instituting the drug policy to prevent harm to those participating in these activities and to deter drug use by those tested and by the rest of the student body.³²⁰ Student athletes are particularly susceptible to injury if they are abusing drugs.³²¹ Additionally, the student athletes serve as role models for other students.³²² If they are sober, presumably this will serve to deter drug use among the rest of the student population. The case is harder to make with students engaged in extracurricular activities. There is little evidence that students engaged in extracurricular or cocurricular activities abuse drugs.³²³ Furthermore, these students are not more susceptible to injuries due to their alleged drug use.³²⁴ For these reasons, the court may find drug testing students involved in extracurricular and cocurricular activities does not serve a legitimate interest.

The additional weakness in the justification argument is the lack of research establishing that drug testing serves to deter student drug use.³²⁵

318. *Hill*, 865 P.2d at 653.

319. *See Earls*, 536 U.S. at 834; *Vernonia*, 515 U.S. at 662–63; *Theodore*, 836 A.2d at 93. “The program in *Joye*, like the program in *Vernonia*, was adopted in response to a documented drug problem within the high school.” *Id.* “[T]he suspicionless search policy at issue has not been supported by sufficient proof that there is an actual drug problem in the Delaware Valley School District; [or] by individualized proof that the targeted students are at all likely to be part of whatever drug problem may (or may not) exist” *Id.* at 96; *see also* Kari L. Higbee, Comment, *Student Privacy Rights: Drug Testing and Fourth Amendment Protections*, 41 IDAHO L. REV. 361, 400–01 (2005).

320. *See Vernonia*, 515 U.S. at 663.

321. *Id.* at 662 (“Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”).

322. *Id.* at 663.

323. *Earls*, 536 U.S. at 853 (Ginsburg, J., dissenting); Gorman, *supra* note 280, at 173–74.

324. *Earls*, 536 U.S. at 852 (Ginsburg, J., dissenting); *Theodore*, 836 A.2d at 92 (“Students in the band, chess club, drama club, or academic clubs simply do not pose the same sort of danger to themselves or others”).

325. *See, e.g., Einesman & Taras, supra* note 19, at 264–66. The Department of Education’s Office of Safe and Drug Free Schools is currently undertaking an evaluation of its mandatory random student drug-testing program. *See* NAT’L CTR. FOR EDUC. EVALUATION & REG’L ASSISTANCE, *An Evaluation of the Impact of Mandatory Random Student Drug Testing*, http://ies.ed.gov/ncee/projects/evaluation/other_drugtesting.asp (last visited Aug. 12, 2010). The evaluation began in September 2006 and will continue until August 2010. *Id.* The final report will be announced on <http://ies.ed.gov/ncee>. *Id.*

No scientific study confirms that student drug testing deters drug use.³²⁶ In fact, most recent studies show that drug testing has little to no deterrent effect.³²⁷ Additionally, other commentators have voiced concern that drug testing may actually harm students.³²⁸ The American Academy of Pediatrics recommends that school-based “drug testing not be implemented before its safety and efficacy are established.”³²⁹

Consequently, when the court balances the student’s privacy interest against the school’s need for the program, the student’s privacy interest should prevail. This is particularly true with respect to students engaged in extracurricular and cocurricular activities whose privacy interests may only be slightly less than those of the general student population. Their privacy interests should outweigh the need for a school district’s drug-testing policy when no significant drug problem has been shown to exist and when there is no evidence that drug testing serves its stated purpose—deterring drug use. These students’ right to privacy under article I, section 1 would be violated by a drug-testing policy in a district

326. See Comm. on Substance Abuse & Council on Sch. Health, *Testing for Drugs of Abuse in Children and Adolescents: Addendum—Testing in Schools and at Home*, 119 PEDIATRICS 627, 628 (2007) (“Currently, there is little evidence of the effectiveness of school-based drug testing in the scientific literature.”); Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the Earls Decision on High School Random Drug Testing Policies*, 32 J. L. & EDUC. 297, 319 (2003) (“The most significant finding of all, however, may be that principals are making policy in the absence of data to show that random drug testing actually deters student drug use. Although intuition may suggest that testing will be a deterrent, little research has been conducted to find out if this is so.”); McKim, *supra* note 111 (“There is no compelling and convincing research that we know of to show that drug testing is effective,” said [Greg] Wolfe, of the Safe and Healthy Kids Program Office.”).

327. Linn Goldberg et al., *Outcomes of a Prospective Trial of Student-Athlete Drug Testing: The Student Athlete Testing Using Random Notification (SATURN) Study*, 41 J. ADOLESCENT HEALTH 421, 426 (2007); see also Robert Taylor, *Compensating Behavior and the Drug Testing of High School Athletes*, 16 CATO J. 351, 356–63 (1997); Ryoko Yamaguchi et al., *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 159–64 (2003); William C. Rhoden, *Plan B Needed To Deter Young Athletes from Drug Use*, N.Y. TIMES, Oct. 18, 2007, at D5. But see What Works Clearinghouse, U.S. Dep’t of Educ., *WWC Quick Review of the Article “Outcomes of a Prospective Trial of Student-Athlete Drug Testing: The Student Athlete Testing Using Random Notification (SATURN) Study,”* INSTITUTE OF EDUCATION SCIENCES (May 2008), http://ies.ed.gov/ncee/wwc/PDF/quickreviews/saturn_050608.pdf (criticizing the SATURN study because it “experienced high rates of sample attrition” and the “control students were different at baseline”).

328. Einesman & Taras, *supra* note 19, at 266–70.

329. Comm. on Substance Abuse & Council on Sch. Health, *supra* note 326, at 629.

where no demonstrated drug problem exists and where no effective drug-testing program could be shown.

5. *Article I, Section 13: Right To Be Free from Unreasonable Searches and Seizures*

Article I, section 13 of the California Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.³³⁰

The California Supreme Court has repeatedly declared that “the California Constitution ‘is, and always has been, a document of independent force.’”³³¹ Moreover, “the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution.”³³²

Furthermore, another provision of the California Constitution—article I, section 24—provides that “[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.”³³³ This provision was adopted by the people of California during the November 1974 election to reaffirm existing law that state constitutional guarantees were independent of those found in the Federal Constitution.³³⁴ Consequently, “even when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts’ interpretation of the corresponding provision contained in the federal Constitution.”³³⁵

Nevertheless, the California Supreme Court has acknowledged a general policy that state courts should defer to the United States Supreme Court in interpreting similar constitutional language in state and federal constitutions.³³⁶ The California Supreme Court has recognized that this policy is not absolute; it would not apply for “cogent reasons,” “independent

330. CAL. CONST. art. I, § 13.

331. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 808 (Cal. 1997) (quoting *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975), *superseded by constitutional amendment*, CAL. CONST. art. I, § 13).

332. *Id.*

333. CAL. CONST. art I, § 24.

334. *Brisendine*, 531 P.2d at 1114.

335. *Lungren*, 940 P.2d at 808.

336. *Raven v. Deukmejian*, 801 P.2d 1077, 1088 (Cal. 1990).

state interests,” or “strong countervailing circumstances.”³³⁷ Furthermore, the California Supreme Court reaffirmed the principle that it is “a court of last resort [in interpreting state constitutional guaranties]”³³⁸ and that with the adoption of article I, section 24 “California courts had the authority to adopt an independent interpretation of the state Constitution.”³³⁹

As a result, despite virtually identical language to that of the Fourth Amendment, article I, section 13 may,³⁴⁰ and has, provided greater protection against unreasonable searches and seizures than its federal counterpart.³⁴¹ For example, in *People v. Brisendine*, the California Supreme Court found that article I, section 13 “impose[s] a higher standard of reasonableness” than that required by the Fourth Amendment.³⁴² In *People v. Norman*, the court reaffirmed the “state’s power to impose a higher constitutional standard for searches and seizures based upon the California Constitution.”³⁴³

In the California primary election of June 1982, the electorate voted for Proposition 8, thereby adding section 28(d) to article I of the California Constitution.³⁴⁴ This section provides, inter alia: “Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding”³⁴⁵ Immediately after

337. *Id.*

338. *Id.*

339. *Id.*

340. In *Cooper v. California*, the U.S. Supreme Court made it clear that each state had “power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law.” *Cooper v. California*, 386 U.S. 58, 62 (1967).

341. *People v. Brisendine*, 531 P.2d 1099, 1110 (Cal. 1975) (“[O]ur holding today is based exclusively on article I, section 13, of the California Constitution, which requires a more exacting standard for cases arising within this state.”), *superseded by constitutional amendment*, CAL. CONST. art. I, § 13; *People v. Norman*, 538 P.2d 237, 244–45 (Cal. 1975), *superseded by constitutional amendment*, CAL. CONST. art. I, § 13; *see also* *People v. Mayoff*, 729 P.2d 166, 171 (Cal. 1986) (“On many occasions, we have concluded that the California Constitution accords greater protection to individual rights within our borders than federal law guarantees throughout the nation.”).

342. *Brisendine*, 531 P.2d at 1115.

343. *Norman*, 538 P.2d at 244.

344. *People v. Lance W.* (*In re Lance W.*), 694 P.2d 744, 747 (Cal. 1985); Grover C. Trask II & Timothy J. Searight, *Proposition 8 and the Exclusionary Rule: Towards a New Balance of Defendant and Victim Rights*, 23 PAC. L.J. 1101, 1102 (1992).

345. CAL. CONST. art. I, § 28(d).

adoption of this constitutional amendment, its scope was unclear. The California Supreme Court, nonetheless, quickly declared that “Proposition 8 did not repeal either section 13 or section 24 of article I. The substantive scope of both provisions remains unaffected by Proposition 8.”³⁴⁶

What the proposition did do was eliminate the judicially created remedy of exclusion of evidence in a criminal case for a violation of the search and seizure provision of the Federal Constitution or state constitution, except as required by federal law.³⁴⁷ Consequently, the California Supreme Court held that article I, section 28(d) repealed the California vicarious exclusionary rule and eliminated a defendant’s right to suppress evidence that met Fourth Amendment standards but violated article I, section 13 of the California Constitution.³⁴⁸

Although the remedy of exclusion of evidence in a criminal case for a violation of article I, section 13 of the California Constitution would now be determined by federal law, the substantive scope of article I, section 13 remained the same. It still could provide greater protection to the citizens of California than its Fourth Amendment counterpart. In a criminal context, however, this would be irrelevant because the remedy for a violation of article I, section 13 would be determined by federal law. In a civil context, however, when the remedy is not exclusion of evidence, but an injunction,³⁴⁹ declaratory relief,³⁵⁰ or monetary damages,³⁵¹ Proposition 8 is inapplicable.

Such is the case with drug testing of students. Those drug-testing programs that are awarded federal funds by the Department of Education

346. *Lance W.*, 694 P.2d at 752 (“What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution.”); *see also* *People v. McKay*, 41 P.3d 59, 71 (Cal. 2002) (“Proposition 8 left intact the substantive scope of state statutory and constitutional rights against arrest for minor offenses.”).

347. *Lance W.*, 694 P.2d at 752; *see also McKay*, 41 P.3d at 62–63 (“What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.”); *People v. Camacho*, 3 P.3d 878, 882 (Cal. 2000) (“Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.”).

348. *Lance W.*, 694 P.2d at 759.

349. *See, e.g.*, CAL. CIV. PROC. CODE § 526(3) (West 2006).

350. *See, e.g.*, *County of Butte v. Superior Court*, 96 Cal. Rptr. 3d 421, 426–29 (Ct. App. 2009).

351. *See, e.g.*, CAL. CIV. CODE § 52.1(b) (West 2006). For a discussion of remedies available under section 52.1, *see* Barry Litt & Genie Harrison, *Rights for Wrongs: Recent Clarifications Have Expanded the Reach and Remedies Available Under the Tom Bane Civil Rights Act*, L.A. LAW., Dec. 2005, at 27, 28.

are allocated grants only if the programs are part of a larger drug-prevention program that provides treatment or counseling to students who are found to be using drugs.³⁵² The programs receive funding on the condition that the testing results will be kept confidential and that the projects are consistent with “constitutional principles.”³⁵³ The United States Supreme Court specifically found the drug-testing program in *Earls* constitutional because the test results were not submitted to law enforcement and did not lead to any student discipline by the school.³⁵⁴ Consequently, Proposition 8 has no relevance to student drug-testing challenges under article I, section 13.

a. Reasonableness Under Article I, Section 13

1. School Searches

There is no question that public school officials are government agents whose actions are covered by article I, section 13 of the California Constitution.³⁵⁵ Moreover, drug testing constitutes a search for purposes of article I, section 13.³⁵⁶ The salient issue is what standard should apply under article I, section 13 to determine the reasonableness of a drug-test search conducted by public school officials upon students.³⁵⁷

The Supreme Court of California has recognized the special environment of schools and found that the appropriate standard of reasonableness for searches in schools is reasonable suspicion.³⁵⁸ The court recognized that both the privacy of the individual student as well as the security of the entire student body must be protected.³⁵⁹ The court noted that a student has the “highest privacy interests in his or her own person, belongings, and physical enclaves, such as lockers.”³⁶⁰ To protect the competing interests,

352. U.S. DEP’T OF EDUC., *supra* note 5.

353. *Id.*

354. Bd. of Educ. v. Earls, 536 U.S. 822, 833 (2002).

355. People v. William G. (*In re* William G.), 709 P.2d 1287, 1293 (Cal. 1985).

356. People v. Melton, 750 P.2d 741, 754 n.7 (Cal. 1988); *see also* Luck v. S. Pac. Trans. Co., 267 Cal. Rptr. 618, 625–27 (Ct. App. 1990).

357. “Because the California Constitution is a document of independent force, the rights it guarantees are not necessarily coextensive with those protected by the federal Constitution.” E. Bay Asian Local Dev. Corp. v. State, 13 P.3d 1122, 1138 (Cal. 2000) (citing *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 808 (Cal. 1997)).

358. *William G.*, 709 P.2d at 1294.

359. *Id.* at 1294–95.

360. *Id.* at 1295.

the court was required to weigh the privacy interests of the individual student against the governmental interest in maintaining a safe learning environment.³⁶¹ To accomplish this balance, the court concluded that “searches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute).”³⁶² The search must be “justified at its inception,” and the scope of the search has to be “reasonably related” to its initial purpose.³⁶³ Consequently, the court ruled that a school official’s suspicionless search of a student’s computer case violated article I, section 13, and all evidence derived from the search was suppressed.³⁶⁴

Relying on this precedent, the lower courts have repeatedly upheld the requirement of reasonable suspicion for searches of students on campus. In *In re Alexander B.*, the California Court of Appeal found that a cursory search of a group of students for weapons was reasonable because it was based on reasonable suspicion—information provided by a student to the dean that someone in the group possessed weapons.³⁶⁵ In *In re Cody S.*, the California Court of Appeal declared that in order to search a high school student’s locker and backpack, the campus security officer was required to have individualized suspicion that the student was breaking either an academic regulation or a criminal law.³⁶⁶ *In re Lisa G.* reaffirmed this principle, finding that a teacher’s search of a student’s purse was unreasonable because it was not supported by reasonable suspicion.³⁶⁷ The search was invalid because the teacher had no suspicion that the student had contraband in her purse.³⁶⁸

361. *Id.* at 1294.

362. *Id.* at 1295.

363. *Id.* at 1296.

364. *Id.* at 1297–98; *see also* *People v. William V. (In re William V.)*, 4 Cal. Rptr. 3d 695, 698–700 (Ct. App. 2003) (finding that even if a police officer assigned to the school as a resource officer conducted the search, the standard required to support the student search is reasonable suspicion and not probable cause).

365. *People v. Alexander B. (In re Alexander B.)*, 270 Cal. Rptr. 342, 344 (Ct. App. 1990), *overruled in part by In re Randy G.*, 28 P.3d 239, 246 (Cal. 2001).

366. *People v. Cody S. (In re Cody S.)*, 16 Cal. Rptr. 3d 653, 655–56 (Ct. App. 2004).

367. *People v. Lisa G. (In re Lisa G.)*, 23 Cal. Rptr. 3d 163, 166–67 (Ct. App. 2004).

368. *Id.* at 166. In 2000, the California Attorney General opined that public school officials could not conduct random, suspicionless canine sniffs on students’ personal belongings outside the presence of the students. The Attorney General concluded that the Federal and California Constitutions required individualized suspicion if a

Some lower courts have refined this standard when safety of the entire student community is at issue. Recognizing that article I, section 28(c) of the California Constitution provides that public school students and staff have “the inalienable right to attend campuses which are safe, secure and peaceful,”³⁶⁹ the courts have allowed random, suspicionless searches when a potential threat to the entire student body exists and there is no alternative means to confront that threat.³⁷⁰

Consequently, the court has permitted random metal detector weapon searches of students because the “special needs” of the school required it.³⁷¹ By balancing the strong interests of the school to maintain the safety of the campus against the minimal intrusion of the privacy of the student, the court found the search to be reasonable.³⁷² Moreover, the court concluded that requiring reasonable suspicion was unworkable in this situation.³⁷³ Short of waiting for the student to display the weapon at school, there was no way to determine if a particular student was hiding a weapon under his clothes and bringing it on to campus.³⁷⁴

The court has also permitted a suspicionless pat-down search of a minor who was not a student at the school.³⁷⁵ Citing article I, section 28(c), concern for campus safety, and the fact that the minor was not even a student at the school, the court balanced the interests.³⁷⁶ It found that the school’s significant interest in protecting the security of the campus outweighed the outsider’s privacy interest, which was less than that of a student who was authorized to be on campus.³⁷⁷

school sought to separate students from their belongings in order to have a drug detection dog sniff the items. 83 Ops. Cal. Att’y Gen. 257, 257, 262 (2000), 2000 WL 1729574.

369. CAL. CONST. art. I, § 28(c).

370. See, e.g., *People v. Latasha W.* (*In re Latasha W.*), 70 Cal. Rptr. 2d 886, 887 (Ct. App. 1998).

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *People v. Jose Y.* (*In re Jose Y.*), 46 Cal. Rptr. 3d 268, 270–71 (Ct. App. 2006).

376. *Id.*

377. *Id.*

2. School Seizures

The California Supreme Court has distinguished seizures from searches, and it has found reasonable suspicion was not required to support the reasonableness of a seizure in a school.³⁷⁸ Recognizing the “special needs” of preserving order in the schools, the court decided that when a school official briefly detains a student to question him outside the classroom, reasonable suspicion is not required.³⁷⁹ The seizure is valid as long as it is “not arbitrary, capricious, or for the purposes of harassment.”³⁸⁰ Distinguishing a seizure from a search, the court recognized that “[d]ifferent interests are implicated by a search than by a seizure, and a seizure is ‘generally less intrusive’ than a search.”³⁸¹ Consequently, a ten-minute detention and questioning of a student outside a classroom by a school security official did not require individualized suspicion as long as it was not arbitrary or harassing.³⁸² In the case before the court, it was neither, and therefore, it was not an unconstitutional seizure.³⁸³

The lower courts have also held that when detaining a minor who was *not* a student at the school but who was present on school grounds, reasonable suspicion is not required.³⁸⁴ To maintain the security of the campus, the school official acted reasonably in briefly detaining the outsider to ascertain his identity and purpose for being on school grounds.³⁸⁵

3. Searching Students by Drug Testing

Schools in California are testing middle and high school students engaged in athletics, extracurricular activities, and cocurricular activities.³⁸⁶ The question is whether this drug testing is reasonable under article I, section 13 of the California Constitution.³⁸⁷

378. *People v. Randy G. (In re Randy G.)*, 28 P.3d 239, 246 (Cal. 2001).

379. *Id.*

380. *Id.*

381. *Id.* (citations omitted).

382. *Id.*

383. *Id.* at 247.

384. *People v. Joseph F. (In re Joseph F.)*, 102 Cal. Rptr. 2d 641, 649 (Ct. App. 2000).

385. *Id.* at 651.

386. See *supra* text accompanying notes 103–10 on grants to California schools for student drug testing.

387. A recent decision of the California Supreme Court may help to answer this question. In *In re Jaime P.*, the court overruled *In re Tyrell*, ruling that a juvenile’s probationary search condition did not justify a suspicionless search of the juvenile

Under the Federal Constitution, the United States Supreme Court has examined drug testing of student athletes and students engaged in extracurricular activities.³⁸⁸ In each case, it has adopted the special needs test and found that under the circumstances special needs exist.³⁸⁹ Consequently, the United States Supreme Court has balanced the interests and found that the two drug-testing programs are reasonable.³⁹⁰

In California, the results may differ. Article I, section 13 has provided greater substantive protection to the privacy rights of the people of California than the Fourth Amendment.³⁹¹ If “independent state interest[s]” are required to depart from the United States Supreme Court’s Fourth Amendment analysis of student drug testing, those interests exist in this context.³⁹² The California Supreme Court has recognized that article I, section 24 confirms the authority of the California courts “to adopt an independent interpretation of the state Constitution.”³⁹³ Through a political initiative, Californians amended their state constitution to explicitly protect

probationer if the probation officer was *unaware* of the search condition. *People v. Jaime P.* (*In re Jaime P.*), 146 P.3d 965, 972 (Cal. 2006). The court found that juvenile probationers enjoy a reasonable, albeit reduced, expectation of privacy. *Id.* at 970. Balanced against that expectation of privacy are the “special needs” of the juvenile probation system—rehabilitation of the minor and reduction of crime. *Id.* at 970–71. Balancing those interests, the court concluded that requiring the probation officer to have either reasonable suspicion for the search, or awareness of the search condition, would justify the search. *Id.* at 972. Without reasonable suspicion or advance knowledge of the condition, the probation search would be arbitrary. *Id.* Moreover, the doctrine of *parens patriae* could not defeat the purpose of the exclusionary rule—deterring police misconduct. *Id.* at 971. Finally, if juvenile offenders have a greater need for repeated random searches, requiring the officers to be aware of the search condition would not impair that need. *Id.* This same reasoning can be applied to student drug testing. Students, like juvenile probationers, enjoy a reduced expectation of privacy. The “special needs” of the school system—regulation of the students’ conduct and administration of the academic curriculum—should be balanced against the students’ reduced expectation of privacy. This should result in a requirement of reasonable suspicion for the drug testing of students. Without reasonable suspicion, the drug testing would be arbitrary. The doctrine of *parens patriae* should not be used to defeat the reasonableness requirement of article I, section 13 of the California Constitution. Finally, if students have a need for repeated searches, requiring school officials to articulate some reason for those searches would not impair that need.

388. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 648 (1995).

389. *Earls*, 536 U.S. at 834; *Vernonia*, 515 U.S. at 661.

390. *See supra* text accompanying notes 19–39.

391. *See supra* text accompanying notes 341–43.

392. *Raven v. Deukmejian*, 801 P.2d 1077, 1088 (Cal. 1990).

393. *Id.*

the right to privacy.³⁹⁴ And although the California Supreme Court has stated that when “applied to police surveillance in the criminal context” this right to privacy is not broader than that provided for in the Fourth Amendment or article I, section 13 of the California Constitution,³⁹⁵ drug testing by school officials does not involve law enforcement engaged in a criminal case.³⁹⁶ Therefore, a higher degree of reasonableness should be required to support these student searches. Furthermore, as a matter of policy, Californians should not have the substance of their fundamental rights under their state constitution defined by a federal law that has proven to be inconsistent and uncertain.³⁹⁷

California courts have recognized that while in school, students have an expectation of privacy, albeit reduced, in their persons and belongings.³⁹⁸ Consequently, a government search of the students’ persons and belongings

394. See *supra* text accompanying notes 114–18.

395. *People v. Crowson*, 660 P.2d 389, 392 (Cal. 1983).

396. See also *People v. Superior Court (In re York)*, 892 P.2d 804, 813 (Cal. 1995), in which the California Supreme Court found that in “the search and seizure context, the article I, section 1 ‘privacy’ clause [of the California Constitution] has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution.” Consequently, the court balanced the intrusion on privacy against the need for the policy and found that a drug testing condition for those charged with a felony and released on their own recognizance (OR) did not violate either the Fourth Amendment or article I, section 13. *Id.* at 814–15. Because a defendant seeking OR release has a lesser expectation of privacy than one not charged with a crime or one who has posted reasonable bail—one consents to the drug testing condition in order to gain OR release and there are some instances where there is a need for such a condition—the policy did not violate either the Fourth Amendment or article I, section 13. *Id.* This contrasts sharply with students who are not charged with a crime and who should not be required to consent to random drug testing to exercise a constitutional right—access to free extracurricular activities while exercising their constitutional right to a free public education.

397. See *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 89 (Pa. 2003). The Pennsylvania Supreme Court noted the United States Supreme Court had “relaxed its scrutiny” in regard to suspicionless, random searches of students from the time it decided *Vernonia* to the time it decided *Earls* seven years later. *Id.* However, the Pennsylvania Supreme Court found no reason to reconsider the test it formulated in *In re F.B.*, 726 A.2d 361 (Pa. 1999), decided almost three years after the United States Supreme Court’s decision in *Vernonia* and four years before the Court’s decision in *Earls*. *Theodore*, 836 A.2d at 89. The Pennsylvania Supreme Court observed, “This is so not only because of the heightened right to privacy existing under Article 1, Section 8, but also because of sound state jurisprudential concerns. The necessity of maintaining a *cogent, consistent, and knowable state constitutional approach is particularly pressing where the corresponding federal law has been changeable or uncertain.*” *Id.* (emphasis added). Compare *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664–65 (1995) (upholding random drug testing for school athletes as constitutional), with *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (holding clandestine drug tests by state hospitals on pregnant patients meeting certain criteria unconstitutional).

398. *People v. William G. (In re William G.)*, 709 P.2d 1287, 1294–95 (Cal. 1985).

must be supported by reasonable suspicion, rather than probable cause, that the student has engaged or is engaging in a proscribed activity—a violation of a school rule or a criminal statute.³⁹⁹ Whether it is search of a student’s computer case, locker, backpack, purse, or person, there must be an individualized suspicion that the student has violated some regulation before he may be searched.⁴⁰⁰

In the case of random drug-testing programs, no such reasonable suspicion exists.⁴⁰¹ These are suspicionless tests of students merely because they are engaged in athletics, cocurricular, and extracurricular activities.⁴⁰² There is no individualized suspicion that the particular student tested has violated any rule or law.⁴⁰³ School officials are not required to articulate any facts that the student tested has consumed any drugs or alcohol. The students are randomly selected for testing. They are pulled from their activities, taken to a bathroom, and monitored while they urinate. Their urine is collected and analyzed. Due to this lack of reasonable suspicion, it can be argued that these drug-testing programs violate the students’ right to freedom from unreasonable searches under the California Constitution.

There are cases that do allow for school searches on the basis of “special needs” with less than reasonable suspicion.⁴⁰⁴ Those cases, however, involve a potential threat to the safety of the entire student community when there are no alternative means to deal with the threat.⁴⁰⁵ For example, the California Court of Appeal applied the “special needs” test when considering the use of handheld metal detectors to randomly search for weapons on students⁴⁰⁶ or a pat-down search of a minor for weapons who was not a student at the school.⁴⁰⁷

399. *Id.* at 1295; *People v. Lisa G. (In re Lisa G.)*, 23 Cal. Rptr. 3d 163, 165 (Ct. App. 2005); *People v. Cody S. (In re Cody S.)*, 16 Cal. Rptr. 3d 653, 657 (Ct. App. 2004); *People v. Alexander B. (In re Alexander B.)*, 270 Cal. Rptr. 342, 344 (Ct. App. 1990), *overruled in part by In re Randy G.*, 28 P.3d 239, 246 (Cal. 2001).

400. *See supra* text accompanying notes 358–68.

401. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia*, 515 U.S. at 665.

402. *Earls*, 536 U.S. at 837; *Vernonia*, 515 U.S. at 665.

403. *Earls*, 536 U.S. at 837; *Vernonia*, 515 U.S. at 665.

404. *See, e.g., People v. Latasha W. (In re Latasha W.)*, 70 Cal. Rptr. 2d 886, 887 (Ct. App. 1998).

405. *See, e.g., People v. Jose Y. (In re Jose Y.)*, 46 Cal. Rptr. 3d 268, 270 (Ct. App. 2006); *Latasha W.*, 70 Cal Rptr. 2d at 887.

406. *Latasha W.*, 70 Cal. Rptr. 2d at 886–87.

407. *Jose Y.*, 46 Cal. Rptr. 3d at 270–71.

These types of searches differ from drug testing student athletes and those engaged in extracurricular or cocurricular activities. Student athletes or those who engage in extracurricular activities who consume drugs and alcohol do not present the same type of threat to the school as those who bring weapons to the school.⁴⁰⁸ Although a student who uses drugs may be disruptive or harmful to himself, it is unlikely that he will be physically dangerous to the entire student body.⁴⁰⁹ On the other hand, as the court noted in *In re Latasha*, a student who brings a gun or a knife to school poses a serious physical threat to the students and staff at the school.⁴¹⁰ Furthermore, handheld metal detectors, which cursorily search over the clothes of a student, are less intrusive⁴¹¹ than the process of monitoring a student's urination, testing the urine for drugs, demanding disclosure of the student's medication history, and reporting the results to the student, school officials, and student's parents.⁴¹² Moreover, a student athlete or student engaged in an extracurricular activity at the school should enjoy significantly more privacy rights than a minor who is not even a student at the school.⁴¹³ Finally, unlike the unworkable nature of reasonable suspicion for a weapons search,⁴¹⁴ there is an alternative means to confront the issue of students who attend school under the influence of drugs—observe them.⁴¹⁵ There are many individuals—teachers, coaches, and staff—who can perceive if a student manifests any of the telltale signs of a person under the influence—bloodshot eyes, lethargic behavior, slurred speech, and lack of balance.⁴¹⁶ Unlike the

408. *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 92 (Pa. 2003) (“Although we do not for a moment downplay the seriousness of student use of drugs and alcohol, in this post-Columbine High School era otherwise-undetected alcohol and drug use by some students does not present the same sort of immediate and serious danger that is presented when students introduce weapons into schools.”).

409. *Id.*

410. *Latasha W.*, 70 Cal. Rptr. 2d at 887.

411. *Id.* (“The searches in the present case were minimally intrusive. Only a random sample of students was tested. Students were not touched during the search, and were required to open pockets or jackets only if they triggered the metal detector.”).

412. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658–59 (1995); *Theodore*, 836 A.2d at 90 (“[T]he students’ privacy rights . . . cannot be viewed as a trivial incursion on privacy. While students’ privacy expectations are lessened by virtue of their presence at school, students may reasonably anticipate that the privacy associated with their excretory functions will be diminished at school only modestly via the need to use public restrooms. We also agree with Justice Breyer that many students could reasonably consider production of a urine sample for testing to involve a greater imposition than the ordinary use of a public restroom.”).

413. *See supra* text accompanying notes 375–77.

414. *Latasha W.*, 70 Cal. Rptr. 2d at 887.

415. Gorman, *supra* note 280, at 176–77.

416. Neaderbaomer, *supra* note 293, at 65.

NCAA in *Hill*, these teachers and coaches have consistent and frequent contact with the students.⁴¹⁷ These school officials can observe students throughout the day and determine whether the student manifests any of the many signs of intoxication.⁴¹⁸ At this point, the student could be tested. These articulable facts will suffice for reasonable suspicion, a very low standard of proof.⁴¹⁹ If a student must disclose the medication he takes, his informational privacy interest is also impacted.

The California Supreme Court has also permitted seizures in schools based on “special needs,” rather than reasonable suspicion, because seizures are less intrusive than searches. As a result, a brief detention of a student or a nonstudent is reasonable as long as the seizure is not “arbitrary, capricious, or for the purposes of harassment.” Because drug testing involves both a seizure *and* a search of a student, this reasoning does not serve to justify drug testing.⁴²⁰

4. DNA Testing of Convicted Felons

The California courts’ recent examination of whether DNA testing of various groups of individuals constitutes an unreasonable search is also related to the discussion of student drug testing. In the DNA cases, the courts addressed the constitutionality of testing individuals for nontraditional criminal investigative purposes, just as courts are doing in the cases of drug testing students. Consequently, these cases offer important legal principles that may be applied to the issue of student drug testing.

California courts have repeatedly reviewed the issue of testing of biological samples of convicted felons for collection and storage in a DNA bank.⁴²¹ Each time, the court has upheld its constitutionality.⁴²²

417. Gorman, *supra* note 280, at 176–77.

418. *Id.*

419. The Supreme Court has declared that “[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.” *Alabama v. White*, 496 U.S. 325, 330 (1990).

420. *See supra* text accompanying notes 378–83.

421. *See, e.g.*, *People v. Travis*, 44 Cal. Rptr. 3d 177 (Ct. App. 2006); *People v. Johnson*, 43 Cal. Rptr. 3d 587 (Ct. App. 2006); *People v. Adams*, 9 Cal. Rptr. 3d 170 (Ct. App. 2004); *People v. King*, 99 Cal. Rptr. 2d 220 (Ct. App. 2000).

422. *See infra* text accompanying notes 428–73.

The court has found that the nonconsensual collection of bodily fluids for chemical testing constitutes a search and seizure under the Fourth Amendment⁴²³ and article I, section 13 of the California Constitution.⁴²⁴ The courts have agreed that, in a typical criminal case, reasonableness is determined by a warrant based on probable cause.⁴²⁵ When “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable,” no warrant is required, and the court simply balances the interests to determine reasonableness.⁴²⁶ Moreover, in other situations, “where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted,” the reasonableness of the search is determined by balancing the interests.⁴²⁷

In *People v. King*, the court examined whether the DNA testing of convicted sex offenders violated the Fourth Amendment.⁴²⁸ For various reasons, the court found that such a DNA search did not require a warrant based on probable cause.⁴²⁹ First of all, the search did not involve a typical criminal investigation.⁴³⁰ In some instances, no crime had been committed yet, and no investigation has begun.⁴³¹ The person tested is not necessarily a suspect and should not fear further intrusions on his privacy.⁴³² Moreover, the person searched, a convicted felon, is already incarcerated, so his privacy is significantly reduced.⁴³³

The *King* court found it unnecessary to determine whether the extraction of bodily fluids for DNA testing of convicted sex offenders constituted a “special needs” search or whether it constituted a separate category of searches in which a simple balancing of interests was required.⁴³⁴ Instead, the court concluded that, because the withdrawal of bodily fluids was not the type of search that was “either approved or

423. *People v. Calvin S. (In re Calvin S.)*, 58 Cal. Rptr. 3d 559, 561 (Ct. App. 2007); *Johnson*, 43 Cal. Rptr. 3d at 603; *Adams*, 9 Cal. Rptr. 3d at 180; *King*, 99 Cal. Rptr. 2d at 224.

424. *Travis*, 44 Cal. Rptr. 3d at 185.

425. *King*, 99 Cal. Rptr. 2d at 224.

426. *Id.*

427. *Id.* at 225.

428. *Id.*

429. *Id.* at 226.

430. *Id.* at 225.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.* at 228 (“It therefore is unnecessary to determine if the taking of samples for DNA analysis might be deemed to answer to ‘special needs,’ beyond the normal need for law enforcement, or if it presents a separate category of search to which the per se requirement of probable cause does not apply.” (internal citations omitted)).

disapproved at the time the Fourth Amendment was enacted,” it was not the typical type of search undertaken in most criminal cases.⁴³⁵ The privacy interests involved here were substantially diminished, and therefore, a simple balancing of interests would suffice to determine the reasonableness of the search.⁴³⁶

The court concluded that the government’s interests outweighed the individual’s interests.⁴³⁷ Pursuant to a statute, the government secures bodily fluids of convicted felons within a specific class.⁴³⁸ There is no discretion as to who should be targeted. Every convicted sexual offender within the class is tested.⁴³⁹ There may not be an ongoing investigation when the fluid is collected.⁴⁴⁰ The fluid is taken merely for informational purposes so it can be stored in the DNA bank.⁴⁴¹ The government undertakes this task in an attempt to deter or prevent future crimes, solve past crimes, and ensure that innocent persons are not wrongfully convicted.⁴⁴² DNA testing is considered a highly effective tool in this effort.⁴⁴³

On the other hand, those affected are convicted sex offenders.⁴⁴⁴ Although prisoners retain some privacy interests, those interests are substantially reduced.⁴⁴⁵ Their freedom of movement is drastically curtailed.⁴⁴⁶ The inmates are subjected to regular searches for weapons and contraband.⁴⁴⁷ They are fingerprinted, photographed, and the government maintains a permanent record of their identity.⁴⁴⁸ Sex offenders are subjected to medical tests for specific diseases.⁴⁴⁹ The

435. *Id.*

436. *Id.* (“Whether the DNA testing procedures pass muster under the Fourth Amendment should be determined by balancing their intrusion on the individual’s privacy interests against their promotion of legitimate governmental interests. And in determining if the balance permits warrantless, suspicionless testing, we consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”).

437. *Id.* at 229.

438. *Id.* at 225.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 227.

443. *Id.*

444. *Id.*

445. *Id.* at 226.

446. *Id.*

447. *Id.*

448. *Id.* at 227.

449. *Id.* at 226.

nature of the intrusion—a blood test—is commonplace and minimally intrusive.⁴⁵⁰ Consequently, the court found the government’s need for the program outweighed the prisoner’s interest in privacy, and it upheld the DNA profiling in this case.

In subsequent cases, the court reached the same result. In *Alfaro v. Terhune*, the plaintiffs argued the unconstitutionality of a statute requiring those convicted of murder and sentenced to death to provide biological specimens for testing and storage in the state DNA bank.⁴⁵¹ The plaintiffs contended that one of the main objectives of the act—deterrence—was inapplicable in the case before the court because the plaintiffs had been sentenced to death.⁴⁵² Consequently, the government’s interest did not outweigh the individual’s interest in privacy.⁴⁵³

The court rejected this argument. On the one hand, those convicted of murder and sentenced to death have diminished privacy interests.⁴⁵⁴ Nonconsensual extraction of biological samples is minimally intrusive.⁴⁵⁵ On the other hand, the government’s interest is compelling.⁴⁵⁶ The DNA bank provides an accurate system to prevent and correct erroneous convictions.⁴⁵⁷ It also helps to solve past crimes.⁴⁵⁸ Lastly, the court found that even those sentenced to death are still capable of committing future crimes while in prison.⁴⁵⁹

In *People v. Adams*, the court also rejected the “special needs” requirement and relied on a simple balancing test to uphold the DNA testing of those convicted of serious felonies.⁴⁶⁰ The court found no “special needs” were required because “the class of persons subject to the Act is convicted criminals, not the general population . . . [who] do not enjoy the same expectation of privacy that nonconvicts do.”⁴⁶¹ Those convicted of such serious offenses as murder, rape, and kidnapping have a reduced expectation of privacy.⁴⁶² The government’s “compelling” interest in deterring or preventing crime and prosecuting crimes accurately

450. *Id.* at 229.

451. *Alfaro v. Terhune*, 120 Cal. Rptr. 2d 197, 201 (Ct. App. 2002).

452. *Id.*

453. *Id.*

454. *Id.* at 208.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *People v. Adams*, 9 Cal. Rptr. 3d 170, 182 (Ct. App. 2004).

461. *Id.*

462. *Id.* at 183.

outweighed the convicted criminals' minimal privacy interest.⁴⁶³ In *People v. Travis* and *People v. Johnson*, the respective courts found that statutes permitting the collection of bodily fluids from *all* convicted felons for DNA profiling were constitutional.⁴⁶⁴ Even though the statute expanded the "search" to all convicted felons and not all felonies are serious or violent, the courts found the government's legitimate interest in "maintaining a permanent, reliable record of identification of all convicted felons remains unassailable."⁴⁶⁵ This interest, along with the government's interest in deterring, preventing, and solving crimes, outweighed the minor intrusion on the convicted felon's reduced interest in privacy.⁴⁶⁶

Lastly, the California Court of Appeal found that a California statute requiring all juvenile convicted felons to provide a DNA sample for the state's DNA data bank is constitutional.⁴⁶⁷ Despite the special confidentiality protections of the juvenile court proceedings, the court found that juveniles do not have a stronger interest in privacy than their adult counterparts.⁴⁶⁸ These special judicial protections have no effect on the limited intrusion on privacy that results from the extraction of bodily fluids for DNA testing.⁴⁶⁹ The DNA profile may not be released to the public and may only be used by law enforcement for criminal identification or exclusion.⁴⁷⁰ Balanced against the minor intrusion on the juvenile's interest in privacy is the government's significant interest in protecting the public and rehabilitating the minor.⁴⁷¹ The DNA bank serves these interests by accurately prosecuting crimes and deterring and preventing crimes by those juveniles who have already committed felonies.⁴⁷² Consequently,

463. *Id.* at 182.

464. *People v. Travis*, 44 Cal. Rptr. 3d 177, 192 (Ct. App. 2006); *People v. Johnson*, 43 Cal. Rptr. 3d 587, 588 (Ct. App. 2006).

465. *Travis*, 44 Cal. Rptr. 3d at 192.

466. *Id.*

467. *People v. Calvin S. (In re Calvin S.)*, 58 Cal. Rptr. 3d 559, 563 (Ct. App. 2007). For an analysis and critique of this statute, see Steven Messner, Comment, *Law Enforcement DNA Database: Jeopardizing the Juvenile Justice System Under California's Criminal DNA Collection Law*, 28 J. JUV. L. 159 (2007).

468. *Calvin S.*, 58 Cal. Rptr. 3d at 562.

469. *Id.*

470. *Id.*

471. *Id.* at 563.

472. *Id.*

the government's legitimate interests outweighed the limited intrusion on the minor's privacy.⁴⁷³

5. Drug Testing Students

With respect to DNA testing of convicted felons, the California courts have dispensed with the traditional requirements of either a search warrant or reasonable suspicion, and instead simply balanced the competing interests. There is an argument for dispensing with reasonable suspicion in the student drug-testing cases. Like the DNA-testing cases, drug testing of student athletes and those engaged in extracurricular or cocurricular activities does not involve a typical criminal case. The student who is tested is not a criminal suspect. He is not being investigated for a criminal offense. The student should not fear further intrusions on his privacy after he is initially drug tested.

Unlike the DNA testing of convicted sexual offenders or death row inmates, however, not *every* student athlete or extracurricular participant is tested.⁴⁷⁴ Only those students who are randomly selected are tested.⁴⁷⁵ Because the system is random, some students may never be tested, but others may be tested repeatedly. Unlike DNA testing of all convicted felons, there is a focus on one or two students who are selected for testing.⁴⁷⁶ Those students may feel anxious or fearful that they have been singled out for testing for no reason. Without warning, in front of the rest of their classmates, these students are removed from their classroom and are accompanied to the bathroom where they are monitored as they urinate. School officials are trying to determine if those students have violated the rules by attending classes under the influence of drugs or alcohol. If they test positive for drug use, then consequences, such as suspension from the team or the extracurricular activity, will follow.⁴⁷⁷

Although DNA testing is an effective means of identifying the perpetrator of a crime, there is significant debate as to the effectiveness of student drug testing in accomplishing its goals.⁴⁷⁸ The advocates of drug testing in the schools strongly urge that it is an effective deterrent

473. *Id.*

474. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650 (1995); *People v. King*, 99 Cal. Rptr. 2d 220, 223 (Ct. App. 2000).

475. *Vernonia*, 515 U.S. at 650.

476. *See id.*

477. *Id.* at 651.

478. *See supra* text accompanying notes 325–29.

for student drug use.⁴⁷⁹ Several studies have raised serious doubts as to whether drug testing in schools accomplishes this goal.⁴⁸⁰ Although drug testing may serve to identify drug users, there is no scientific evidence that it serves to deter them or other students from drug use.⁴⁸¹

Finally, can the diminished expectation of privacy faced by a student athlete or one engaged in extracurricular or cocurricular activities be compared to that of a convicted felon? The courts have repeatedly stated that incarceration results in “a significant reduction in the expectation of privacy.”⁴⁸² The freedom of movement and the right to be free from government intrusion is greatly diminished for incarcerated felons.⁴⁸³ On the other hand, the California Supreme Court has made it clear that “public school students do not shed their constitutional rights upon reaching the schoolhouse door.”⁴⁸⁴

Students have a reduced expectation of privacy.⁴⁸⁵ According to the Supreme Court, the student athletes should expect even less privacy because they shower, change clothes, and dress with other student athletes.⁴⁸⁶ They undergo medical exams in order to compete and subject themselves to the rules and regulations of the athletic team.⁴⁸⁷ Students who engage in extracurricular or cocurricular activities do not engage in such intimate activities as showering and changing clothes, but some do travel together and must adhere to special rules and regulations pertaining to their activities.⁴⁸⁸ This results in an intrusion on their privacy.⁴⁸⁹ Nonetheless, can these limited reductions in privacy compare in any real

479. See David G. Evans, *Model Legislation for Student Drug-Testing Programs*, 2 DRUG TESTING LAW, TECHNOLOGY AND PRACTICE app. p at 533 (2007); Joseph R. McKinney, *The Effectiveness and Legality of Random Student Drug Testing Programs Revisited*, 205 EDUC. L. REP. 19, 21 (2006); ROBERT L. DUPONT ET AL., INST. FOR BEHAVIOR & HEALTH, PRELIMINARY STUDY: ELEMENTS OF A SUCCESSFUL SCHOOL-BASED STUDENT DRUG TESTING PROGRAM 12 (2009), <http://www.preventionnotpunishment.org/pdfs/ElementsofaSuccessfulSchoolBasedStudentDrugTestingProgram.pdf>.

480. See *supra* text accompanying notes 327–29.

481. See *supra* text accompanying notes 325–27.

482. *People v. Travis*, 44 Cal. Rptr. 3d 177, 187 (Ct. App. 2006); *People v. King*, 99 Cal. Rptr. 2d 220, 226 (Ct. App. 2000).

483. *Travis*, 44 Cal Rptr. 3d at 187; *King*, 99 Cal. Rptr. 2d at 227–29.

484. *People v. William G. (In re William G.)*, 709 P.2d 1287, 1291 (Cal. 1985).

485. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995).

486. *Id.*

487. *Id.* at 656–57.

488. *Bd. of Educ. v. Earls*, 536 U.S. 822, 832 (2002).

489. *Id.*

way with the reduction in privacy confronted by a convicted felon? It is difficult to fathom that the California Constitution, which, in the past, has provided greater substantive protection under article I, section 13 than the Fourth Amendment of the U.S. Constitution,⁴⁹⁰ would treat the intrusion on privacy of a student athlete or of a student engaged in extracurricular or cocurricular activities equivalently to that of a convicted sex offender or a death row inmate.

V. CONCLUSION

California schools are currently drug testing student athletes and students engaged in extracurricular or cocurricular activities. Although these drug-testing programs may meet federal constitutional standards set forth by the United States Supreme Court in *Vernonia* and *Earls*, the results may differ under the California Constitution.

California student drug-testing programs should be evaluated under the state constitution's right to privacy and right to be free from unreasonable searches and seizures. The right to privacy under article I, section 1 explicitly guarantees Californians the right to privacy. It protects privacy more broadly than the Federal Constitution. In the past, the right to be free from unreasonable searches and seizures under article I, section 13 has also provided greater protection than its federal counterpart. The constitutionality of these programs under the California Constitution depends on the specific details of each drug-testing program. Therefore, it is critical to ascertain: who is tested? how is the test conducted? to whom are the test results revealed? has the school demonstrated a drug problem among its student population? and has it shown that there is significant drug abuse among the targeted students? Due to the lack of any scientific research establishing that drug testing deters student drug use and depending on the specific attributes of the drug-testing program, the California courts could certainly conclude, as the Pennsylvania and Washington Supreme Courts have, that the student drug-testing programs violate the California Constitution.

490. See *supra* text accompanying notes 340–43.