AN EXTENSION OF THE SPECIAL NEEDS DOCTRINE TO PERMIT DRUG TESTING OF CURFEW VIOLATORS

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The U.S. Supreme Court has determined that the government has a significant interest in protecting the welfare of minors. It has also recognized that children's constitutional rights are limited and that intrusions on those rights may be justified by "compelling state interests." For instance, the "special needs doctrine" enables states to circumvent the warrant and probable cause requirements of the Fourth Amendment as applied to minors when certain requirements are met. Namely, the state must articulate a "special need" for the search or seizure, after which the court will balance the governmental interest against the individual's privacy interests. Under this doctrine, federal courts have upheld warrantless, suspicionless drug-testing programs as applied to certain groups of minors.

The author argues that the strong governmental interest in caring for the welfare and development of minors provides a constitutional basis for curfew ordinances restricting a minor's freedom of movement during certain nighttime hours. In addition, she advocates for an extension of the "special needs doctrine" to permit, for the limited purpose of rehabilitation and treatment, drug testing of minors who voluntarily violate such ordinances.

I. INTRODUCTION

Though advances in technology and education open many doors for today's children, before they can take advantage of such opportunities, children must overcome various obstacles. Most notably, they have to confront the ever-present problem of drug use. Not only are children exposed to drugs in many circumstances, but they are also confronted with pressure from their peers to use drugs.

Studies indicate that drug use among minors is declining;[1] however, the problem has not been eradicated.[2] A main basis for this conclusion is *America's Children: Key National Indicators of Well-Being, 1999*, the

1. *E.g.*, David A. Vise, *Survey Finds Teens Using Cigarettes, Drugs Less*, WASH. POST, Sept. 1, 2000, at A03 (stating that drug use by teenagers declined by 9% in 1999).

2. *See Drug Use Up, Sex Down Among Teens, CDC Says*, COM. APPEAL (Memphis, Tenn.), June 9, 2000, at A18 (quoting CDC director Jeffrey Koplan as stating, "we have much left to do.").

third annual report on the condition of America's children.[3] Recent government studies reveal that America's children "drink too much, smoke too often and more than a quarter of high school seniors are using drugs."[4] Reports indicate high levels of youth drinking, drug use, and involvement in violent crime, whether as perpetrators or victims. According to the report, alcohol is the most commonly used substance among adolescents, even though it is associated with increased crime and violence, motor-vehicle accidents, injuries, and even deaths.[5]

In addition, drug use remains a problem among adolescents. The same study noted that drug use by adolescents could have health consequences that are both immediate and long-term in nature.[6] Thus, as was the case with alcohol, drug use is "a risk-taking behavior by adolescents that has serious negative consequences."[7]

Finally, the study revealed statistics regarding children as both victims and perpetrators of violent crimes.[8] In a summary, the study notes that violence affects the lives of all involved parties. In addition to any physical harm resulting from the violent crimes, there also may be an effect on "victims' mental health and development, and [an] increase[d] likelihood that they themselves will commit acts of serious violence."[9] Such consequences are significant given that children ages twelve to sev-

3. Federal Interagency Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being, 1999*, *at* http://www.childstats.gov/ac1999 (last visited Nov. 3, 2000) [hereinafter *America's Children*].

4. Paul Recer, *Kids Today Are Better Off, but Problems Persist Study Shows that Efforts to Cut Teen Drinking, Smoking and Drug Use Are Failing*, WALL. ST. J., July 14, 2000, at 6A (citing *America's Children*, *supra* note 3).

5. *America's Children*, *supra* note 3. In 1998, heavy drinking remained at the same rate as in prior years with 32% of twelfth-graders, 24% of tenth-graders, and 14% of eighth-graders reporting they had consumed at least five drinks in a row over the two weeks prior to the study. *Id.* (noting that this trend of 32% of twelfth-grade student use is a continuation of a rising prevalence since 1993 when the rate was 28%).

6. *Id*.

7. *Id.* The results of the study revealed that 26% of twelfth-graders reported using illicit drugs in the thirty days prior to the study, as did 22% of tenth-graders and 12% of eighth-graders. *Id.* (noting these percentages remained stable between 1997 and 1998). The study noted that although illicit drug use increased dramatically among students between 1992 and 1996, since 1996 the rates either remained stable or decreased. *Id.*

Though use remains stable, the numbers are still quite high. More than a quarter of all fifteen-year-old children claim to have used drugs in the last year, and as many as 34% of school children aged eleven to fifteen and 61% of fifteen-year-old children say they have been offered drugs. David Brindle, *Society: Tempting Fate*, GUARDIAN, Aug. 2, 2000, *available at* 2000 WL 25043042. According to a study conducted by the Institute for Policy Studies, not only can children get drugs more easily than ever because of their low prices, but children can get them also at a younger age. Eric E. Sterling, *Introduction* to THE L.A. CITIZEN'S COMM'N ON U.S. DRUG POLICY, THE WAR ON DRUGS: ADDICTED TO FAILURE 5 (2000), *available at* http://www.ips-dc.org (introducing the results found in the Drug Policy Project conducted by the Institute for Policy Studies suggesting that drug use by junior-high students has tripled). The report also states that drug purity is as high as ever, and society is failing to provide treatment for many addicts in need of help. *Id.* (summarizing data found during the Drug Policy Project conducted by the Institute for Policy Studies).

8. *See America's Children*, *supra* note 3.

9. *Id.*

enteen are almost three times more likely than adults to be victims of violent crimes.[10]

Though each of these areas alone is a cause for concern, society needs to look beyond immediate problems. As Howard Simon, spokesman for the Partnership for a Drug Free America, stated, "If a group starts using drugs at a younger age, there is the possibility they will continue using drugs if we don't do more for people to find treatment."[11] With early intervention and access to treatment, not only will drug use among minors decrease further, but their age group will be less likely to continue using drugs later in life.[12] The same is true whether it is the use of alcohol or drugs, or the involvement in violent crime. As a result, substance use by minors is an area of great concern for American society.[13]

Two governmental responses aimed at protecting society's interest in its children, which were upheld by the U.S. Supreme Court, involved the use of administrative searches[14] and suspicionless drug testing.[15] These cases emphasized the limitations imposed on a child's freedom in the school setting. In both *New Jersey v. T.L.O.* and *Vernonia School District 47J v. Acton* (*Vernonia*), the Court's focused on the existence of a "compelling state interest."[16] This phrase originates in the Fourth Amendment context when relating to searches and seizures to describe "an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[17] This note elaborates on the government's "compelling state interest" to protect

10. *Id.* (citing MELISSA SICKMUND ET AL., U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 4 (1997)). The accompanying definition of violent crimes includes rape, aggravated assault, robbery, and homicide. Specifically, in 1997, the rate at which children were victims of violent crimes was twenty-seven crimes per 1000 juveniles, which totaled about 620,000 crimes. *Id.* (noting that this number is down since violent crimes against minors peaked in 1993 with forty-four violent crimes per 1000 children). The study also noted that younger teens, those between twelve and fourteen, are slightly less likely than older teens, those between fifteen and seventeen, to be victims. *Id.* The official numbers were twenty-four violent crimes per 1000 children for younger teens and thirty-one per 1000 for older teens. *Id.*

Unfortunately, children are not always just victims of violent crimes. Rather, in 1997, the serious violent juvenile offender rate was thirty-one crimes per 1000 juveniles ages twelve to seventeen, which totaled 706,000 crimes. *Id.* (noting this number is down from the peak that occurred in 1993 with fifty-two violent crimes per 1000 minors). However, this number does not represent the number of juvenile offenders. Rather, it just represents the number of crimes committed involving juveniles. This discrepancy results from more than one offender involved in an estimated 53% of all serious violent juvenile crimes, yet there is insufficient detail to determine the age of each offender involved. *Id.*

11. Vise, *supra* note 1, at A03.

12. *See id.*

13. The interplay between drug and alcohol use and violent crime is particularly significant to the government because there is a strong connection between such use and the perpetration or victimization of violent crimes. *See America's Children*, *supra* note 3.

14. *See* New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985).

15. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995).

16. *Id.* at 661; *T.L.O.* at 350.

17. *Id.* at 661.

children from exposure to drugs and the harmful effects such exposure produces.

As was suggested above, though children do have rights worthy of protection, their rights do not equal those of adults. The Court noted that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate."[18] Traditionally, minors have been protected from more harms than just exposure to drugs. Government entities have tried to look out for the best interests of children by imposing certain limitations on their abilities. For instance, children are not allowed to vote until age eighteen,[19] they are not allowed to legally drink alcohol until age twenty-one, they are subject to compulsory education laws, and most significant for purposes of this note, many cities and states have curfew laws that restrict a child's movement late at night.[20] Nocturnal-curfew ordinances originated in response to increased crime and drug use in many cities.[21] Though some individuals view juvenile-curfew laws as an infringement on individual rights, others view them as serving two very important state purposes: deterring juvenile crime and protecting children from crime committed at night.[22]

This note seeks to link together the concepts of juvenile drug testing and curfew laws. Although the Court ruled in *Vernonia* that student athletes could be drug tested constitutionally,[23] this note seeks to determine if the ruling could foreseeably be extended to encompass curfew violators.[24] In other words, could a state or municipality construct a law that requires that all curfew violators be subjected to drug tests for the purpose of detection, with the results used for rehabilitation and treatment, rather than punishment?

This note advocates extending the special needs considerations to allow drug testing of curfew violators because such an extension likely would be constitutional and would promote the government's interest in safeguarding its youth. The history of the special needs exception will be examined in Part II. Then, in Part III, background will be given regarding the history of curfew laws and their rationale. Once the necessary

18. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

19. U.S. CONST. amend. XXVI, § 1.

20. *See, e.g.*, 55 ILL. COMP. STAT. 5/5-1078 (1993) (establishing that counties may institute curfews for minors); 720 ILL. COMP. STAT. 555/1 (1993) (outlining the state's curfew guidelines); IND. CODE ANN. § 31-37-3-2 (West 1999) (outlining state curfew ordinance for minors aged fifteen, sixteen, or seventeen); MICH. COMP. LAWS ANN. § 722.752 (West 1993) (outlining curfew for minors under sixteen years old); MICH. COMP. LAWS ANN. § 722.754 (West 1993) (establishing a continuing right of townships and cities to regulate the curfew of minors); TENN. CODE ANN. § 39-17-1702 (1997) (outlining the state curfew ordinance for minors).

21. Brant K. Brown, Note, *Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents*, 53 VAND. L. REV. 653, 656 (2000).

22. *Id.* at 653–54.

23. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995).

24. Numerous law review articles discuss the possibility of extending this ruling to allow the drug testing of students in all extracurricular activities, but none were found that sought to extend it to a group such as curfew violators.

background is given, this note will describe the level of drug testing that the Court has deemed permissible under the special needs exception, along with the boundaries surrounding such acceptable testing. Finally, this note will try to illustrate the potential for extending the special needs exception to encompass drug testing of curfew violators, given the government's compelling interest in protecting children and preserving their future physical and mental development. This progression will reveal that the special needs rationale may be extended to curfew violators.

II. BACKGROUND

A. Background of the Special Needs Exception

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[25]

However, as the Court has determined, this language should not be interpreted to mean that no exceptions are allowed. Rather, the Court has noted that:

> a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.[26]

As a result of such findings, administrative searches and special needs situations were deemed exceptions.

1. Administrative Searches

The Supreme Court first constructed a special doctrine for administrative searches in *Camara v. Municipal Court*.[27] Though the Court retained the warrant requirement, it rejected the need for individualized suspicion in administrative searches, given the minimal intrusion that such searches imposed.[28] In addition, the searches under analysis were neither for law enforcement purposes nor punitive in

25. U.S. CONST. amend. IV.

26. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989) (citation omitted).

27. 387 U.S. 523, 536–37 (1967) (examining routine, areawide building inspections by city health and safety officials).

28. *Id.* at 537.

nature.[29] Rather, the basis for judgment was a reasonableness test, which balanced the individual's privacy interests against the government's reasons for conducting the search.[30] Within five years of this decision, the Court completely removed the warrant requirement in the administrative search context.[31]

2. *Special Needs Doctrine*

The special needs doctrine finds part of its foundation in *Camara*.[32] Though this doctrine also tries to circumvent the warrant and probable-cause requirements of the Fourth Amendment, it shares few of the procedural hurdles that proved to be impediments in *Camara*.[33] Rather, the special needs doctrine has only three basic requirements:

> [First, the] government must articulate a special need for the search that goes beyond . . . law enforcement prerogatives. Second, the warrant requirement must provide little constitutional protection and be excessively burdensome and impractical in the context of the search. And finally, the officials conducting the search must be unable to articulate probable cause or comprehend the legal standard, or the probable cause requirement must defeat the underlying purpose of the search itself.[34]

After these factors are found, the Court uses the reasonableness-balancing test.[35] However, it has been noted that this final step is largely a formality because "once a special need is found, the government almost always prevails."[36] The Court "accepted a departure from the protections of the Fourth Amendment because the governmental action was designed to further public health, safety, and welfare and did not threaten individual liberty."[37] This concept is illustrated in a sequence of "special needs" cases.

a. *New Jersey v. T.L.O.*

In *New Jersey v. T.L.O.*,[38] the Court dealt with a motion to suppress evidence found during a search of a student's purse. The Court held that

29. *Id.*

30. *Id.* at 536–37 ("[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.").

31. *See* United States v. Biswell, 406 U.S. 311, 317 (1972).

32. Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 798 (1999).

33. *Id.* (explaining that the only characteristic the special needs doctrine carries over from its predecessors is the "reasonableness balancing test").

34. *Id.* (citations omitted).

35. *Id.* at 799. For clarification of the reasonableness balancing test, see *supra* note 29 and accompanying text.

36. Luna, *supra* note 32, at 799.

37. Michael Book, Comment, *Group Suspicion: The Key to Evaluating Student Drug Testing*, 48 U. KAN. L. REV. 637, 643 (2000).

38. 469 U.S. 325 (1985).

the inspection of the student's purse was justified given the "reasonable grounds for suspecting that the search [would] turn up evidence that the student [had] violated or [would violate] either the law or the rules of the school."[39] In addition, the Court explained that the acquisition of a warrant was not necessary because it was "unsuited to the school environment . . . [given it would] unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[40] Though this case provided an example of a government interest,[41] it was only a faint example for special needs analysis because it was based on individualized suspicion. The Court did "not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion."[42]

b. Drug Testing

In all four of the cases the Supreme Court handled regarding drug testing, it found that government-mandated testing implicates the Fourth Amendment because the procurement of a sample is deemed both a search and a seizure.[43] The Court also determined that the special needs doctrine provides the appropriate framework for analysis, balancing the government interest behind the drug testing against the individual's privacy interests.[44]

i. *Skinner v. Railway Labor Executives' Association*

One of the first drug cases decided by the Court, *Skinner v. Railway Labor Executives' Association*,[45] dealt with postaccident drug screening of railroad employees. The Court determined that the government's interest in regulating the conduct of railroad employees as a safety precaution presented a "special need" beyond normal law enforcement.[46] Given the narrow definition of circumstances that justified drug testing of railroad employees, limits placed on the intrusions, and the employees' general knowledge of the policies, the Court found no need for a

39. *Id.* at 342.

40. *Id.* at 340.

41. In this case, the government interest was promoting a student's compliance with both school rules and the law.

42. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985).

43. *See* Chandler v. Miller, 520 U.S. 305, 313 (1997); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616–18 (1989).

44. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 653–54; *Von Raab*, 489 U.S. at 665–66; *Skinner*, 489 U.S. at 619–20.

45. 489 U.S. at 602.

46. *Id*. at 620.

warrant to justify the search.[47] Rather, the employees' privacy expectations were diminished given their participation in a regulated activity.[48]

In addition, the Court found it impractical to require that a warrant be obtained given the rate at which alcohol and other drugs are broken down and eliminated from the blood stream.[49] Rather, the tests to measure the existence of these substances would need to be administered as soon as possible for an accurate determination. If the test is not done immediately, the delay caused by requiring a warrant "may result in the destruction of valuable evidence."[50] Along the same line, the Court determined that a requirement of particularized suspicion of drug use would drastically hinder the employer's ability to acquire the necessary information.[51]

ii. *National Treasury Employees Union v. Von Raab*

In *National Treasury Employees Union v. Von Raab*,[52] a companion case to *Skinner*, the Court examined a drug-testing program for customs employees who were in positions relating to drug interdiction or who carried firearms. Here, the Court reiterated that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[53] It appeared clear that the drug-testing program in question was not designed to serve the ordinary needs of law enforcement.[54] As a result, the substantial government interests that accompanied drug-free employees in these positions also constituted a "special need" which called for a departure from normal warrant and probable-cause requirements.[55]

Once again, the Court, when examining the interaction between these drug tests and privacy expectations, identified that certain employees, such as customs agents, may have reduced privacy expectations.[56] These limited privacy expectations were not considered to outweigh the government's interests in safety and border integrity.[57]

47. *Id.* at 622.
48. *Id*. at 627.
49. *Id*. at 623.
50. *Id.*
51. *Id*. at 631.
52. 489 U.S. 656 (1989).
53. *See id.* at 665.
54. *Id.* at 666.
55. *See id*.
56. *See id*. at 671–72.
57. *Id*. at 672.

iii. *Vernonia School District 47J v. Acton*

The third case, *Vernonia School District 47J v. Acton*,[58] came before the Court eight years later and dealt with drug testing of student athletes. Once again, the Court turned to the special needs analysis when formulating its decision.[59] The Court pointed out that the Fourth Amendment only protects expectations of privacy that society views as "legitimate."[60] It also recognized that the legitimacy of certain expectations would perhaps depend on the "individual's legal relationship with the state."[61] The Court noted that unemancipated minors lack some of the fundamental rights of self-determination that adults have, a concept carried over into schools where the state has the power to exercise levels of supervision and control over students that it could not exercise over adults.[62]

In addition, as was a common theme in *Skinner* and *Von Raab*, the Court noted that children who participate in school athletics, much like employees of "closely regulated industries," expect intrusions on their "normal rights and privileges."[63] Another key component in their decision was the manner in which the production of a urine sample was to be monitored, which led the Court to conclude that the compromised privacy interests were negligible.[64] Because the other privacy-invasive aspect of urinalysis is the information that the test discloses, the Court found it significant that the tests in this case would only indicate drug presence.[65] Finally, the Court was focused on the fact that test results were disclosed to only a limited group of school personnel, and would not be turned over to law enforcement authorities or serve any school disciplinary function.[66]

Thus, the Court determined that the government's interest in the healthy development of children outweighed the athletes' limited privacy interests. The basis for this determination came from the facts that the

58. 515 U.S. 646 (1995). For a more thorough analysis, see discussion *infra* Part III.C.2.

59. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 653.

60. *Id*. at 654.

61. *Id*.

62. *Id*. at 654–55.

63. *Id*. at 657. Though it was suggested before that some scholars envision the possibility of drug tests extending to all students, such an extension may not be warranted because the students would not be voluntarily deciding to attend school given compulsory education laws. As a result, they may not have the "expectation" that their rights may be limited. As will be seen below, such an extension could be possible for curfew violators because they could expect that their privacy interests would be limited given their voluntary decision to violate the curfew law. *See* discussion *infra* Part V.

64. *Vernonia Sch. Dist. 47J*, 515 U.S. at 658 (stating that the practices of male students being monitored only from behind as they faced a wall urinal while still fully clothed, and female students producing samples in an enclosed stall, with a female monitor standing outside the stall listening only for indications of tampering, were conditions deemed little different from circumstances encountered by people normally in a public restroom).

65. *See id.* (explaining that the use of the tests would not be permitted if they tested for epilepsy, pregnancy, diabetes, HIV/AIDS, etc.).

66. *Id*. at n.2 (stressing that the search imposed by the drug test is undertaken only for purposes of protecting children and deterring future use by the student population, which are both distinctly nonpunitive purposes).

"[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe,"[67] drugs in schools affect not only the users, but the entire school population disrupting the educational process,[68] and the evil of drug use would be impacting a group of individuals upon which the government had "undertaken a special responsibility of care and direction."[69]

The Court emphasized that it had repeatedly refused to declare that only the "least intrusive" search can be reasonable under the Fourth Amendment and continued to refuse to adopt such an interpretation in the case at issue.[70] Though it had been suggested that suspicion-based testing would be less intrusive, and consequently the better approach, the Court found numerous problems with such an approach.[71] Instead, it came to the conclusion that individualized suspicion was not required and, in fact, would be worse than the existing policy.[72]

iv. *Chandler v. Miller*

The final drug-testing case decided by the Court, *Chandler v. Miller*,[73] resulted in a different outcome than the first three. This case revolved around a claim by candidates running for office in Georgia that the statute requiring all candidates to submit to and pass a drug test before qualifying for state office was unconstitutional. The Court reiterated that according to its precedents, the government's special need for drug testing must be substantial enough to outweigh the individual's pri-

67. *Id*. at 661 (basing this on the facts that "[m]aturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor") (citations omitted).

68. *Id*. at 662.

69. *Id.* (discussing these issues as well as the position for immediate physical and psychological harm that student athletes are placed in, whether they are the drug user or participants in a sport with the drug user who is high). In addition, the Court pointed out that the immediate crisis that was created with drug use by student athletes was greater than that posed in *Skinner*, where the Court upheld a drug-testing program based on findings of drug use by railroad employees nationwide, without proof specific to that geographic location, and greater than what existed in *Von Raab*, where there was no documentation of prior drug use by any customs officials. *Id*. at 663. Thus, the Court could not question the district court's finding that these concerns were immediate.

70. *Id*. at 663.

71. *Id*. at 663–64 (discussing such foreseeable problems as: impracticability because parents were willing to permit random drug testing for athletes but probably would not be willing to accept accusatory drug testing of all students because they would view it as more of a "badge of shame"; teachers arbitrarily imposing testing on students who may be troublesome but not drug-likely; added expense of litigation stemming from such arbitrary applications as well as increased costs of the drug tests themselves; and the imposition of a duty on teachers that they are ill-prepared for because their profession involves teaching and not drug detection).

72. *Id*. at 664. However, the Court specifically cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id*. at 665. Rather, it stressed that the most significant element in the present drug-testing case was that the testing program was in furtherance of the state's responsibility as guardian of children entrusted to its care in the public school system. *See id*.

73. 520 U.S. 305 (1997).

vacy interest.[74] When applying this test to the facts at issue, the Court found that the state had not demonstrated enough of a danger to depart from the Fourth Amendment's requirements of probable cause and a warrant.[75] It noted that although the identification of a drug use problem among the tested group was not always necessary, it would solidify a special need substantial enough to warrant a suspicionless-search program.[76]

Thus, over the course of the development of the special needs doctrine, the Court has focused on particular factors. Most notably, the Court balances a compelling government interest against the individual's expectation of privacy. In the three cases where the Court upheld the drug-testing program, the individual had a lesser expectation of privacy, whether due to being a minor who participated in school athletics,[77] or an adult who worked in a controlled environment such as customs or the railroad.[78] Though there was a focus on the need to test immediately in order to detect any drugs before they could leave the body, in at least one case, *Vernonia*, there was an emphasis on the method imposed for collection of the sample to make sure it was not overly embarrassing or unreasonable.[79]

c. Relationship Between Minors and Drug Testing

Even though the special needs doctrine is applied in situations involving groups of adults as well as children, it is obvious from *Vernonia* that the governmental watchdog function allows for more intrusive testing on children.[80] Permissible adult-testing programs deal with more safety-oriented areas that are limited in scope. For instance, in *Skinner*, only those railroad employees who were involved in accidents were sub-

74. *Id*. at 318.

75. *Id*. It should be noted that government candidates are in a less controlled activity than are railway operators or customs agents. In addition, here the testing was being imposed on adults in contrast to children as in *Vernonia*.

76. *Id.* at 319 (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 673–75 (1989)). The Court also contrasted what they considered to be effective testing programs in *Skinner*, *Von Raab*, and *Vernonia* with Georgia's program in this case, which was not well designed to identify candidates who violated drug laws, and would not deter drug users from seeking election to state office in the first place. *Id*. The reason for this was that the test date was to be scheduled by the candidate anytime within thirty days prior to qualifying for the ballot. Thus, drug users who were not addicted could always abstain for a "pretest period" necessary to avoid discovery. *See id.* at 319–20. The Court pointed out that even if it would be argued that a purpose was to detect drug addicts, not just users, no evidence was offered to suggest that such persons are likely candidates for public office. *Id*. at 320. In addition, the Court pointed out that unlike railroad workers and customs agents, political candidates are subject to constant scrutiny by the electorate and the press. Given this exposure and constant monitoring, drug tests are not as necessary to determine drug use. *See id*. at 321; *cf. Von Raab*, 489 U.S. at 674.

77. *Vernonia Sch. Dist. 47J*, 515 U.S. at 657.

78. *Von Raab*, 489 U.S. at 679 (customs employees); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989) (railroad employees).

79. *Vernonia Sch. Dist. 47J*, 515 U.S. at 658–60.

80. *Id.* at 654–55.

jected to drug testing.[81] Then, in *Von Raab*, the Court upheld a testing program applied to a very safety-sensitive group of customs employees who dealt with drugs and guns.[82] In *Vernonia*, however, the Court upheld a system that, though limited to student athletes, could be foreseeably extended to all minors given the government's compelling interest in preventing children from using drugs.[83]

This possibility is especially foreseeable when the limits on children's constitutional rights are considered. As evidenced in *T.L.O.* and *Vernonia*, though minors have some constitutional protection, the state is able to limit their rights in ways that would not be permitted when dealing with the rights of adults.[84] Consider, for instance, *Bellotti v. Baird*,[85] a 1979 Supreme Court case. This case arose following two cases by the same name decided in 1975[86] and 1976[87] respectively, and is commonly known as *Bellotti II*. In *Bellotti II*, the Court "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults."[88] The first reason offered by the Court was the "peculiar vulnerability of children"[89] based on a child's "needs for concern, . . . sympathy, and . . . paternal attention."[90] The second reason focused on a child's inability to make informed, mature decisions.[91] This demonstrates the Court's belief that children often lack the experience and maturity needed to make proper decisions.[92] The third and final reason offered by the Court acknowledged the significant role parents play in the development of their children.[93] It is a combination of these justifications that support the limitations imposed on children's rights by mandatory drug tests and curfew laws.[94]

81. *Skinner*, 489 U.S. at 609.
82. *Von Raab*, 489 U.S. at 679.
83. *Vernonia Sch. Dist. 47J*, 515 U.S. at 661–65.
84. *Id.* at 654–57; New Jersey v. T.L.O., 469 U.S. 325, 339–42 (1985).
85. 443 U.S. 622 (1979) (cited in this note as *Bellotti II*).
86. Bellotti v. Baird, 393 F. Supp. 847 (D. Mass. 1975).
87. Bellotti v. Baird, 428 U.S. 132 (1976).
88. *Bellotti II*, 443 U.S. at 634.
89. *Id.*
90. *Id.* at 635 (citation omitted).
91. *Id.* at 634.
92. *See* Brown, *supra* note 21, at 673.
93. *Bellotti II*, 443 U.S. at 637 (stating that "the guiding role of parents in the upbringing of their children justifies the limitations on the freedoms of minors").
94. This position, containing these three components, has been repeated over the last decade with the Court's statement that "the State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." Brown, *supra* note 21, at 682 (citing Hodgson v. Minnesota, 497 U.S. 417, 444 (1990)).

B. The Background of Curfew Laws

Even though case law has consistently held that children are deserving of constitutional rights,[95] it has also suggested that the rights held by minors are not equal to those held by adults.[96] The countervailing interests of minors' perceived rights and the state's interests in maintaining order and protecting minors results in one having to give way to the other.[97] Often, it is the rights of minors that are compromised.[98]

The difference between rights of children and those of adults was addressed in 1975 when the constitutionality of a juvenile-curfew ordinance was first tested.[99] While finding that a municipal ordinance that imposed a nighttime curfew on all minors under the age of eighteen was constitutional, the Court stated that although minors are "persons" under the Constitution, the "constitutional rights of adults and juveniles are not coextensive."[100] In 1981, the U.S. District Court for the District of New Hampshire also noted this distinction, stating that although minors are constitutional persons "possessed of fundamental rights which the State must respect," their "personal freedoms are not absolute" and acknowledging that children's "constitutional rights are in some instances not coextensive with those of adults."[101]

However, district courts are not the only courts to make a distinction between the rights of children and those of adults. In *Johnson v. City of Opelousas*,[102] the Fifth Circuit Court of Appeals supported this distinction by specifying that the rights of a child may be limited because "the state may have the power to place regulations upon the conduct of minors that would be unconstitutional if placed upon the conduct of adults."[103] The Fifth Circuit then reaffirmed this definition of rights in 1993 when it noted that "under certain circumstances, minors may be treated differently from adults."[104]

95. *See, e.g.*, Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 536 (2000) (citing Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

96. *Id.*

97. *See id*.

98. *See id*.

99. Howard T. Matthews, Jr., Comment, *Status Offenders: Our Children's Constitutional Rights Versus What's Right for Them*, 27 S.U. L. REV. 201, 205 (2000) (referring to Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op*., 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976)).

100. *Id.* at 205–06 (quoting *Bykofsky*, 401 F. Supp. at 1253–54).

101. McCollester v. City of Keene, 514 F. Supp. 1046, 1049 (D.N.H. 1981), *rev'd & remanded on other grounds*, 668 F.2d 617 (1st Cir. 1982). Though the curfew ordinance involved in this case was amended, the court rejected the amended version in 1984 and reaffirmed its opinion that minors "[do] not enjoy the full measure of personal liberties enjoyed by adults." McCollester v. City of Keene, 586 F. Supp. 1381, 1385 (D.N.H. 1984).

102. 658 F.2d 1065 (5th Cir. 1981).

103. *Id*. at 1072.

104. Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993).

In the alternative, one federal court has professed that no such distinction exists. In *Waters v. Barry*,[105] a constitutional challenge to a curfew ordinance, the court invalidated the curfew ordinance on the grounds that the rights of minors are entitled to the same level of constitutional protection as adults' rights.[106]

This split in authority continues in recent curfew challenges addressed by courts. First, in *Nunez v. City of San Diego*,[107] the Ninth Circuit found that *Bellotti II* did not actually reduce the standard for reexamining minors' rights, but rather "enabled courts to determine whether the state has a compelling interest justifying greater restrictions on minors than on adults."[108] Thus, the court found that the city had a compelling interest in reducing crime and victimization levels, though there was some concern regarding the proffered statistics used to show a correlation.[109] In that particular case, however, the court invalidated the curfew law because there were only four exceptions provided, none of which took account of First Amendment activities.[110] Thus, the lack of exceptions for First Amendment rights combined with the impact on parents' "substantive due process right to control the upbringing of their children"[111] provided the justification for invalidating the law.

The second case in this recent trilogy was *Schleifer v. City of Charlottesville*.[112] There, the majority concluded that the rights of juveniles are "not coextensive with those of adults."[113] Upon a finding that local crime rates had increased, the court agreed "that the curfew must be shown to be a meaningful step towards solving a real, not fanciful problem."[114] In that case, the court found a substantial interest in reducing the ever-increasing crime rate.[115]

The final case in this curfew-law split is *Hutchins v. District of Columbia.*[116] There, the D.C. Circuit relied on the observations that most juvenile crime occurred during curfew hours and that all age groups were more likely to commit serious crimes during curfew hours. It concluded that the curfew law was substantially related to the objective of crime reduction.[117]

105. 711 F. Supp. 1125 (D.D.C. 1989).
106. *Id*. at 1136–37.
107. 114 F.3d 935 (9th Cir. 1997).
108. *Id*. at 945.
109. *Id*. at 947–48.
110. *Id*. at 948–49.
111. Chudy, *supra* note 95, at 551 (citing *Nunez*, 114 F.3d at 951).
112. 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 199 S. Ct. 1252 (1999).
113. *Id*. at 847.
114. *Id*. at 849.
115. *Id*.
116. 188 F.3d 531 (D.C. Cir. 1999) (en banc).
117. *Id*. at 544.

In spite of the federal-court split regarding the extensiveness of minors' rights,[118] the Supreme Court has yet to provide guidance in this area. Rather, lower courts apply their own criteria, which leads to a lack of uniformity regarding the interpretation of children's rights.[119] A majority of courts, however, rely on *Bellotti II*, when examining the level of rights possessed by children.[120] Though *Bellotti II* dealt with the constitutionality of a state statute that required physicians to obtain consent from both parents before performing an abortion on a minor female, the Court offered a general opinion regarding children's rights when it stated:

> A child, merely on account of his minority, is not beyond the protection of the Constitution. . . . The Court long has recognized that the status of minors under the law is unique in many respects. . . . The unique role in our society of the family. . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.[121]

Many courts read this broad language in *Bellotti II* to embrace issues raised in curfew challenges.[122] The Court, however, has yet to render a decision in a curfew ordinance case providing a definitive answer to the puzzle surrounding the scope of children's rights.[123]

III. ANALYSIS

A. Curfew Ordinances

Though curfew ordinances became very prevalent in the 1970s, they have recently resurged given pronounced acts of teen violence within

118. *See* Chudy, *supra* note 95, at 522 (explaining that while the Third, Fourth, Fifth, and D.C. Circuits have upheld curfew laws as a valid exercise of police power, the Second and Ninth Circuits have held that some curfew laws violate the constitutional rights of minors).

119. *See* Matthews, *supra* note 99, at 208.

120. *See, e.g.*, *In re* T.W., 551 So. 2d 1186, 1193–94, 1196 (Fla. 1989); City of Panona v. Simmons, 445 N.W.2d 363, 368 (Iowa 1989); *see also* Prince v. Massachusetts, 321 U.S. 158, 167 (1994) (holding that child-labor laws are constitutional under the Equal Protection Clause and the First Amendment, while observing that the child-labor statute in question would be unconstitutional if applied to adults).

121. *Bellotti II*, 443 U.S. 622, 633–34 (1979).

122. *See* Chudy, *supra* note 95, at 538.

123. Jason J. Bach, Feature, *Students Without Rights: The Elimination of Constitutional and Civil Rights, as They Apply to Minors*, 1-JAN NEV. LAW. 19, 20 (2000); *see also* Chudy, *supra* note 86, at 520 (noting that the Court has declined chances to review the constitutionality of curfew laws on three separate occasions: Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999); Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994)); and Bykofsky v. Borough of Middletown, 535 F.2d 1245 (3d Cir. 1976) (unpublished table decision), *cert. denied*, 429 U.S. 964 (1976).

both classrooms and society in general. This focus on the "ills of this country" has led to a concern that society is unable to control the youth population.[124] In response, cities and states have turned to curfew ordinances as one means of regaining control over minors in an attempt to end this surge of youth violence.[125]

Although the Court has not specifically addressed curfew ordinances, it has dealt with issues that relate to the government interest in protecting society's children. As far back as 1944, the Court stated that the development of society is based on the proper development of children, implying an added state interest in securing this proper development.[126] This philosophy has continued over time, including the Court's recognition in *New York v. Ferber*[127] that a state has a compelling interest in the well-being of its youth.[128]

This protectionist idea has been developed in a variety of areas as they relate to minors. For example, in *Ginsberg v. New York*,[129] the Court held that a state may have a different definition of obscenity as it relates to minors than to adults because the state "has an independent interest in the well-being of its youth."[130] Numerous cases also have dealt with a minor's right to privacy when compared to that of an adult.[131]

Because the Court has previously determined that the government has a significant interest in protecting the welfare of minors, such an interest automatically extends to the need for curfew ordinances.[132] This interest has stemmed from the idea that when children are not on the street at night, they are less likely to perpetrate or become victims of

124. Bach, *supra* note 123, at 19.

125. *Id.*; *see also* Chudy, *supra* note 95, at 519 (discussing the public outcry for ways to curb juvenile violence and victimization).

126. Prince v. Massachusetts, 321 U.S. 158, 168 (1994) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. [The state] may secure this against impeding restraints and dangers within a broad range of selection.").

127. 458 U.S. 747 (1982).

128. *Id*. at 756–57 ("[A] State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'").

129. 390 U.S. 629 (1968).

130. *Id*. at 640 (noting that the power of the state to control a child's activities reaches beyond the authority the state has over adults); *cf*. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–14 (1969) (holding that students were allowed to wear black armbands in class to protest the Vietnam War because minors had fundamental rights the state must respect such as First Amendment freedoms).

131. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 424–25 (1990) (considering the constitutionality of a state's two-parent notification process); *Bellotti II*, 443 U.S. 622, 648 (1979) (holding that a minor's "constitutional right to seek an abortion may not be unduly burdened"); Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (considering whether a state may prohibit the distribution of contraceptives to minors by applying a standard less than that of a "compelling state interest"); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (framing the test regarding the constitutionality of a parental consent provision of Missouri's abortion statute as "whether there is any significant state interest . . . that is not present in the case of an adult").

132. *See* Benjamin C. Sassé, Note, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 725 (2000).

crime.[133] The Court has recognized that "[t]he 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."[134] Thus, provided the Court would analyze the imposition of a curfew ordinance in the same manner as it has these other areas, curfew laws should survive constitutional scrutiny as long as cities have a justification for passing them because they are significantly related to the compelling government interest of protecting children from crime.[135]

B. Challenges Facing Curfew Ordinances

However, as cities strive for this level of justification, certain problems have to be confronted when trying to narrowly tailor a law to address a compelling state interest. First is a time-dimension issue, which involves the correlation between the time of day during which juvenile crime and victimization occurs and the hours covered in the curfew ordinance.[136] Though some level of correlation is certainly required, courts often overlook imperfect statistics when analyzing curfew laws.[137]

The second problem that must be confronted is age correlation, which relates to the manner in which age classifications impact curfews.[138] National statistics show that juvenile crimes are committed more by seventeen-year-old minors than by younger minors.[139] Thus, even though it is a small portion of the minor population that commits criminal acts, general curfew laws impose restrictions on the entire juvenile population rather than targeting this particular group.[140] Once again, courts analyze this distinction differently.[141]

133. *See id*. at 722–24.

134. Schall v. Martin, 467 U.S. 253, 264 (1984) (holding that a state statute that authorized the pretrial detention of juveniles was constitutional).

135. *See* Sassé, *supra* note 132, at 728.

136. *See* Chudy, *supra* note 95, at 558.

137. *E.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 543–44 (D.C. Cir. 1999) (en banc) (holding that the city had established a problem with juvenile crime and victimization during curfew hours because over 50% of juvenile arrests occurred during this time and most serious crimes surfaced then as well); Schleifer v. City of Charlottesville, 159 F.3d 843, 850 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1252 (1999) (holding that the curfew was constitutional even though only 17% of juvenile crime occurred during curfew hours with the peak actually occurring during after-school hours, and even though curfew-timed offenses actually increased after the institution of the curfew); Nunez v. City of San Diego, 114 F.3d 935, 947 (9th Cir. 1997) (upholding a curfew law after analyzing statistics that actually showed an increase in juvenile victimization during curfew hours after imposition of the curfew law and a very small percentage of arrests for juvenile crimes during these late night periods).

138. Chudy, *supra* note 95, at 562.

139. *Id*.

140. *See id*. at 578–79. This raises the question of whether it would be possible to have a more specific curfew law. Common sense indicates that there are problems, such as identification problems, stigmatization, etc., facing the use of a particularized curfew ordinance, which closely mirror issues that arise when discussing particularized suspicion for drug tests. *See* discussion *infra* Part III.C.2.

141. *See, e.g.*, *Hutchins*, 188 F.3d at 542–45 (holding that even though seventeen-year-old teenagers are more likely to commit curfew crimes, they could reasonably be left out of the law's coverage); *Schleifer*, 159 F.3d at 849–50 (declining to invalidate the statute although plaintiffs argued it was underinclusive for not including seventeen-year-old children); Qutb v. Strauss, 11 F.3d 488, 493 (5th Cir. 1993) (holding that precise data are not necessary).

One of the final difficulties faced by drafters is the need to ensure sufficient exceptions to a curfew law's coverage without circumventing the purpose of the rule.[142] Typical exceptions include three main categories: legal supervision, practical exceptions, and fundamental rights.[143] Exceptions under the legal-supervision category include activities where a guardian accompanies the minor, the minor is on an errand directed by his or her guardian, or the minor is emancipated.[144] For the practical exceptions, examples include school functions, employment, and emergency situations.[145] Finally, under the fundamental rights category are First Amendment activities and the right to interstate travel.[146]

Once the drafters take these various exceptions and components into consideration and draft an appropriate curfew law, there is no problem given the strong state interest justifying its inception. Courts have long determined that minors lack the ability to make necessary determinations for their well-being.[147] As a result, there is plenty of room for the government to step in and exercise its general police power to guide the development of the young generation.[148]

C. Drug Testing in Schools

Curfew impositions are not the only area where government can intervene for the best interests of the child. Rather, the Court has expressed such a government interest in the area of school drug testing.[149] Just as a minor's freedom of movement is restricted under curfew ordinances, a minor's Fourth and Fifth Amendment rights are diminished in the school context.[150] During the "War on Drugs" in the 1980s, public schools began using procedures such as drug-sniffing dogs, strip searches, surveillance techniques such as video cameras, and drug testing.[151] The use of such instruments stem from the perception that drugs not only

142. Chudy, *supra* note 95, at 564.
143. *Id*. at 565 (citations omitted).
144. *Id*.
145. *Id*.
146. *Id*.
147. *E.g.*, Bellotti v. Baird, 443 U.S. 622, 633–34 (1979) (explaining that minors' rights are more limited because of minors' vulnerability and inability to make informed decisions); Hodgson v. Minnesota, 497 U.S. 417, 444 (1990) (holding that the state has an interest in the welfare of its children given their inexperience).
148. *See Hodgson*, 497 U.S. at 444 (explaining that the state has a compelling interest in helping children to exercise their rights wisely). Common sense dictates there may be some concern regarding the imposition that such state activity has on parental rights. For more information regarding this topic, see *Troxel v. Granville*, 120 S. Ct. 2054 (2000), which elaborates on the concept of parental rights. In addition, there are numerous law review articles referencing this topic. *See, e.g.*, Brown, *supra* note 21, at 678–80.
149. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–62 (1995).
150. Bach, *supra* note 123, at 20–21.
151. *Id*. at 21.

hurt children in the present, but threaten their future as well.[152] As a result, parents, school administrators, and concerned citizens alike look for methods designed to curb drug use among America's children.

For purposes of this note, the procedure of importance is the imposition of drug testing. The Court has already determined that a junior high school can impose random, urinalysis drug searches on student athletes.[153] In a lot of ways, the Court's decision in *Vernonia* appears to be a sound approach to the youth drug problem. After balancing the government's interest in ending drug use against the intrusion on a minor's life that happens with such tests, the Court determined that the state's interests in deterring drug use and protecting the functioning of the educational process outweigh the intrusions on the child's privacy.[154] The Court relied on the reduced expectation of privacy that students, especially student athletes, have.[155]

In approaching the constitutionality of this random drug-testing program, the Court recognized that drug testing constitutes a Fourth Amendment search due to its invasion of a private function of the human body.[156] This is so whether the test is performed using a breathalyzer, urine samples, or blood samples.[157] Despite the Fourth Amendment warrant requirement to prevent unreasonable searches, federal courts have upheld warrantless and even suspicionless drug-testing programs.[158]

1. Skinner

In *Vernonia*, the Court finally clarified that the proper test for reviewing drug-testing policies can be found in *Skinner*.[159] In *Skinner*, the Court validated a mandatory drug-testing policy for all railroad employees following certain train accidents.[160] The Court identified a special governmental need to provide safe railways.[161] This need justified the privacy intrusion that resulted from the drug testing without either a

152. *See* John C. Martin, *Drug Testing All Students: The Wrong Answer to a Difficult Question*, 6 KAN. J.L. & PUB. POL'Y 123, 123 (1997).

153. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 664–65; *see also supra* text accompanying notes 58–72.

154. Sherri L. Toussaint, Note, *Something Is Terribly Wrong Here:* Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995)*, 75 NEB. L. REV. 151, 151 (1996).

155. John J. Bursch, Note, *The 4 R's of Drug Testing in Public Schools: Random Is Reasonable and Rights Are Reduced*, 80 MINN. L. REV. 1221, 1222 (1996) (citing *Vernonia Sch. Dist. 47J*, 515 U.S. at 655–57).

156. *Vernonia Sch. Dist. 47J*, 515 U.S. at 652 (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989)).

157. Bursch, *supra* note 155, at 1230–31.

158. *E.g.*, Comm. for GI Rights v. Callaway, 518 F.2d 466, 476–77 (D.C. Cir. 1975) (upholding warrantless, suspicionless drug testing in the military); Div. 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.) (per curiam) (upholding mandatory warrantless, suspicionless drug testing of public bus drivers following an accident), *cert. denied*, 429 U.S. 1029 (1976).

159. *Vernonia Sch. Dist. 47J*, 515 U.S. at 652–53.

160. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989).

161. *Id*. at 620.

warrant or suspicion.[162] Also significant was that the railroad employees voluntarily chose to participate in this profession, knowing that it was a highly regulated one.[163] Given this, the Court found that the employees had a lower expectation of privacy.[164] After balancing these various factors, the Court concluded that the government interests outweighed any invasion of privacy experienced by the employees.[165]

2. Vernonia

In 1995, the Court used a similar approach when a majority found that a school policy of random drug testing of student athletes did not violate the Fourth Amendment.[166] After recognizing that compelled urinalysis constituted a "search" under the Fourth Amendment,[167] the Court determined that the "special needs" of the school officials rendered the warrant requirement inapplicable.[168] The Court also determined that no suspicion was required.[169] Instead, the proper analysis only required a balancing of "the students' Fourth Amendment intrusion against the legitimate government interests at stake."[170]

During its analysis, the Court not only addressed the lesser rights and privacy expectation held by minors in general,[171] but also noted that the privacy expectation of student athletes was even lower.[172] Thus, it made a determination similar to that voiced in *Skinner*, where the decision to participate in a regulated activity resulted in a lesser expectation of privacy.[173]

Next, the Court examined the intrusiveness of the procedures outlined by the school. Although it reiterated that any tests involving excretory functions of the body were extremely personal and private, the conditions mandated by the school were very similar to normal conditions in

162. *Id*. at 619–21.

163. *Id*. at 627.

164. *Id*. This lower expectation was coupled with the conclusion that the drug testing procedures were no more intrusive than procedures often conducted during a physical examination by a doctor. *Id*. at 626–27.

165. *Id.* at 634.

166. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665–66 (1995).

167. *Id*. at 652.

168. *Id*. at 653.

169. *Id*. (acknowledging that "'the Fourth Amendment imposes no irreducible requirement of such suspicion'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985))).

170. Bursch, *supra* note 155, at 1236.

171. *See supra* Part II.B.

172. *Vernonia Sch. Dist. 47J*, 515 U.S. at 656–57.

173. *Compare id*. at 657 ("[B]y choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."), *with* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989) ("[T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety . . . ."). Among the regulations described were preseason physical exams, insurance coverage, maintenance of a particular grade point average, and compliance with rules issued by the coach of the sport in which they are participating. *Vernonia Sch. Dist. 47J*, 515 U.S. at 657.

a public restroom, ultimately reducing any possible invasion of privacy.[174] In addition, the tests were only searching for the presence of drugs, and the results here only disclosed to school officials "who [had] a need to know."[175] A final key consideration on this side of the balance was that the results of the tests were not used for any punitive reason.[176] Rather, the school officials received the test results, and the only potential punishment that the student would face would be suspension in conjunction with counseling and other substance abuse programs.[177]

After examining the "privacy expectation" side of the balance, the Court addressed the compelling state interest for conducting such tests. Here, the Court determined that the state's interest was "important enough to justify the particular search at hand."[178] The Court noted "that school-age children are in an impressionable state at a time 'when the physical, psychological, and addictive effects of drugs are most severe.'"[179] The state's interest covered not only the protection of children, but also the protection of the education process, which could be subverted by drug use among students.[180]

Once these factors were analyzed, the Court upheld suspicionless drug testing for student athletes. The justification for this stemmed from the idea that individualized suspicion stigmatizes students chosen for testing.[181] In addition, there is the potential for school officials to falsely claim suspicion when they are really targeting particular students.[182] Finally, requiring a teacher or school official to formulate suspicion before implementing a test is inherently problematic because such persons lack the proper training and experience required to determine whether such signs of drug use exist.[183] For these reasons, though the Court is hesitant

174. *Vernonia Sch. Dist. 47J*, 515 U.S. at 658. For elaboration of procedures used, see *supra* notes 60–63 and accompanying text.

175. *Vernonia Sch. Dist. 47J*, 515 U.S. at 658.

176. *Id*.

177. *Id.*

178. *Id*. at 661.

179. Diane S. Swanson, Casenote, *Random Urinalysis Testing of Student Athletes—the "Reasonable" Resolution of a Complex Problem:* Vernonia School District v. Acton*, 115 S. Ct. 2386 (1995)*, 21 S. ILL. U. L.J. 651, 659 (1997).

180. *Vernonia Sch. Dist. 47J*, 515 U.S. at 661–62. The Court also noted a special interest in relation to student athletes given the inherent dangers they are exposed to whether they use drugs or participate in sports with others under the influence of drugs. *Id*. Critics of *Vernonia* point out that testimony by witnesses in that case only went to developing a perceived increase in drug use by the student population, and did not establish an increase among athletes; in fact, little evidence showed drug use by any students. *See, e.g.*, Rhett Traband, *The* Acton *Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs*, 100 DICK. L. REV. 1, 19 (1995). It should be pointed out that when addressing suspicionless drug testing in other cases, the Court has refused to require evidence of actual drug use. *See* Toussaint, *supra* note 154, at 175 (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)).

181. *Vernonia Sch. Dist. 47J*, 515 U.S. at 663 (noting that suspicion-based drug testing "transforms the process into a badge of shame").

182. *Id*.

183. *Id.* at 664.

to uphold suspicionless drug testing within the population at large, it demonstrates a much greater impetus to permit its use in schools.[184]

D. Criticisms of Vernonia

Critics of the Court's approach in *Vernonia* seem troubled by the further limitation imposed upon children's rights.[185] They stress the need for individualized suspicion in drug-testing programs.[186] They also contend that the encroachment on rights that such testing permits is not justified by the ends that result. Namely, critics doubt that such random drug-testing procedures actually deter drug use among students.[187] Rather, by just targeting a select group such as student athletes, testing policies may simply force drug users to drop out of those targeted groups.[188] Thus, in schools such as Vernonia, where student athletes are the group subject to testing, critics argue that drug users will continue their drug use and will simply drop out of the programs that might lead to testing and subsequent detection.

E. Previously Considered Expansions of Vernonia

1. Drug Testing of All Extracurricular Activities

While some have criticized the *Vernonia* holding, others have looked to its foreseeable expansions. One possible extension is the testing of all students in extracurricular activities. *Vernonia* dealt with the drug testing of a particular extracurricular activity: student athletics.[189] Essentially, if the Court supported drug testing of student athletes, what would prevent them from logically supporting the drug testing of students in all extracurricular activities? Such an extension is especially foreseeable given that the dangers of drug use are as serious for nonathletes as for athletes.[190] Drug use in general leads to violence and potential harm from such violence.[191] An extension to all extracurricular activities seems perfectly logical given the fact that schools regulate all such

184. *See* Bursch, *supra* note 155, at 1241.

185. *See* Traband, *supra* note 180, at 21 ("While never vitally strong, students' constitutional rights are further reduced by the Court's holding in *Acton*."); Toussaint, *supra* note 154, at 162–63.

186. *See* Traband, *supra* note 180, at 24; *cf.* Toussaint, *supra* note 154, at 173 ("With the holding in *Vernonia*, the disappearance of the suspicion requirement in administrative searches is complete.").

187. *E.g.*, Traband, *supra* note 180, at 27.

188. *Id*. This is another reason to require individualized suspicion. *Id*. Those in favor of such a requirement urge that the government's search power should be continually limited to protect privacy expectations, rather than expanded to further erode such expectations. Toussaint, *supra* note 154, at 173.

189. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995).

190. Bursch, *supra* note 155, at 1250.

191. *Id*.

activities. Thus, for example, a student in the band has the same reduced expectation of privacy as a student athlete.[192]

2. Drug Testing of the Entire Student Population

The extension of drug testing to all extracurricular activities is foreseeable for many reasons that make other extensions impermissible. For example, one could argue that extending drug testing to the entire student body would help fight the war on drugs. This practice, however, would no longer have a voluntary component, which is central to the Court's test.[193] Students who engage in extracurricular activities voluntarily choose to participate in those regulated areas.[194] All minors, however, are compelled to attend school; they do not "choose" to participate in that activity.

These arguments can be contradicted with reasons supporting the extension of drug testing to the entire school. For example, all students have diminished privacy expectations, either generally considering their lesser rights or specifically considering the "parental" role of the school administrators and environment.[195] Secondly, even nonathletes are subject to health risks and injuries from violent outbursts that accompany drug use.[196]

Third, one of *Vernonia*'s reasons for supporting the drug-testing policy came from the recognition that student athletes serve as role models for other students, which could lead to replication of their drug-using habits. Student athletes, however, are not the only role models for others. Rather, such a label is "potentially applicable to any student, and any attempt to limit that portion of the Court's reasoning to student athletes is untenable."[197]

A final reason to support schoolwide expansion is that the state is not interested in stopping drug use among only athletes. Rather, their compelling interest extends to all minors as the state fights the war on drugs. Thus, school administrators are justified in trying to protect the safety of all minors in their care.[198] In fact, "if the purpose of the testing is to reduce and deter drug use among all students, it seems only logical

192. *Id.* at 1245 ("Given the many regulations schools customarily impose on participants in extracurricular activities, *Acton* permits a finding that students in athletics and students in extracurricular activities hold essentially the same privacy expectations." (citations omitted)).

193. *Id*.

194. *See id*. at 1246. One argument for why voluntariness may not be an essential element stems from the previous discussion regarding the severely reduced rights and privacy expectations maintained by children. *See id*.; *see also supra* Part II.B. In conjunction with this line of reasoning, schoolwide drug testing would simply further the government's compelling interest in fighting the war on drugs. *See* Bursch, *supra* note 155, at 1254.

195. *See* Joanna Raby, Note, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 CARDOZO L. REV. 999, 1013, 1024 (1999).

196. Bursch, *supra* note 155, at 1250.

197. Raby, *supra* note 195, at 1025.

198. *See id*. at 1028.

that the most effective means of accomplishing that goal is to test the entire student population."[199]

F. Group-Suspicion Requirement

In the end, it appears that a requirement for the Court is group suspicion. Though the Court found that individualized suspicion was not needed, group suspicion still should be present.[200] In order to establish group suspicion, three things must be found: "(1) a group to which a special need applies must be identified, (2) the group must demonstrate an actual and imminent problem, and (3) the governmental action must be limited to addressing that problem."[201] Though the Court used this factor analysis in *Vernonia*, the test is not limited to small groups such as student athletes. Rather, as long as the three prongs are satisfied, there is room for extension.[202] Thus, special-needs drug testing is permissible once there is identification of a special-needs group and demonstration of a problem within that group.[203]

As long as the implemented drug-testing policy is not used for law enforcement purposes and is not punitive in nature, it is aimed in the right direction.[204] In addition, the policy should not infringe on a student's privacy interests.[205] Possible infringement comes in various forms. For example, there should be no pretesting disclosure of medical or health information that a student does not want to disclose.[206] Test results should be handled and distributed in such a way that they are kept as confidential as possible.[207] Finally, respect of privacy interests during the collection of the materials tested is essential.[208]

IV. RESOLUTION

There is no requirement that the *Vernonia* holding be restricted to in-school testing of minors. Rather, as long as the group-suspicion requirement is met, including the compelling state-interest prong, and the rights of the group are not unduly infringed, a special needs exception is

199. *Id*. at 1032.

200. *See* Book, *supra* note 37, at 650–51.

201. *Id*. at 651 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662–64 (1995)).

202. *See id*. at 651–52 (arguing that *Vernonia* should not be read to apply only to student athletes, because that interpretation "ignores the correlation between the special needs group identified and the requisite showing of actual and imminent need within that group").

203. *Id*. at 654.

204. *See* Raby, *supra* note 195, at 1035–37 (outlining the proper guidelines for a schoolwide testing program).

205. *See id.* at 1037.

206. *See id*.

207. *See id*. at 1037–38.

208. *See id*. at 1038 (referring mainly to methods employed in collecting urine samples for urinalysis).

created for an administrative search.[209] As seen before, minors provide an easy case for such special-needs testing.[210] This originates from the fact that the rights of minors are not as extensive as those of adults.[211] In addition, the state has a perpetual compelling interest in protecting the safety and welfare of minors.[212] Thus, as long as the prongs for group suspicion and the *Vernonia* test are met, extensions are possible.[213]

One way to extend the *Vernonia* holding would be to apply it to curfew violators. This is very possible given that curfew violators are minors, which means they have a lower expectation of rights.[214] In addition, the testing of curfew violators would not require a warrant or individualized suspicion. This is because a warrant requirement would impede the government's interest in detecting the presence of drugs so that drug users can get appropriate treatment. If a warrant were required, problems similar to those in *Vernonia* and *Skinner* would be caused by drugs breaking down in the person's system prior to implementation of the test[215] and the difficulty of detecting drug use in some cases.[216] Though the problem of detection would be smaller because curfew violators have to interact with law enforcement personnel instead of school officials, a requirement of suspicion would increase the "shame" element experienced by those curfew violators selected for testing.

Curfew violators already demonstrate potential problems because they lack parental supervision, indicated by the fact that they are out after hours. In addition, some studies reveal a higher level of minor crime and victimization during curfew hours.[217] This raises implications that drug purchasing and use may be more frequent during such hours. By drug testing curfew violators as a group, it is possible for users to be identified so that the government can intervene with proper treatment and counseling.

Targeting curfew violators would not give rise to any questions of voluntariness because curfew violators voluntarily choose to be on the streets after hours. Though it is possible that some minors may be on the streets after hours involuntarily, their interests would be adequately represented in the exceptions that the curfew ordinances would have to provide.

If nothing else, minors who use drugs may simply avoid the activity that would lead to testing as critics of *Vernonia* have pointed out.[218] In

209. *See supra* Part II.A.
210. *See supra* Parts II.A.2.C., II.B.
211. *See supra* Part II.B.
212. *See supra* Part III.A.
213. *See supra* Parts III.E., III.F.
214. *See supra* Part II.B.
215. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 623 (1989).
216. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663–64 (1995).
217. Hutchins v. District of Columbia, 188 F.3d 531, 542–45 (1995) (en banc) (analyzing statistics used in this case and other curfew cases).
218. *See supra* Part III.D.

this case, minors may stop roaming the streets after the imposed curfew hours. Such would be an improvement because it would keep children inside where they will hopefully be monitored and possibly prevent them from purchasing and/or using drugs.

Though there are many reasons for extending drug testing to this group of minors, there are potential problems to overcome. First, critics will argue that because police officers are generally more skilled than school officials at detecting drug use, individualized suspicion, rather than just group suspicion, should be required. As addressed earlier, however, individualized suspicion stigmatizes those selected for testing.

In addition, the presence of law enforcement personnel would not affect the policy of helping drug users rather than punishing them. Though special-needs exceptions generally apply in administrative-search situations, here too there would be no criminal penalty for any drug use discovered during testing. Rather, although the minor would probably be punished for the curfew violation, test results indicating drug use would simply be handed over to social work personnel who could offer the proper counseling.

A final consideration would be the method of testing. As addressed in *Vernonia*, it would be important to make any method of urine collection or other sample collection as minimally intrusive as possible.[219] Regarding urinalysis in particular, it would be important to try to simulate the conditions a person would encounter in a public restroom.[220]

In addition to proper implementation of the tests, the purposes for which they are used also would be a consideration. The actual testing would have to be for drug presence only, and could not extend to other things such as pregnancy, AIDS, or other sexually transmitted diseases. It would be important for results to be disclosed to only a very small group of persons who need to know in order for the government to achieve its goal of detecting and stopping drug use by minors. Results would further this end only and would not be used as a basis for imposing criminal penalties.

To be valid, the state's testing procedure would have to satisfy the three criteria for group suspicion as well as tip the balance provided by *Vernonia* in favor of the compelling state interest. As long as these conditions are met, the state may subject curfew violators to drug testing under the rationale provided by *Vernonia*.

V. CONCLUSION

Though the Court has not yet addressed either curfew laws in general or drug testing of curfew violators, there is potential for interplay be-

219. *Vernonia Sch. Dist. 47J*, 515 U.S. at 658–60.

220. Here, cities could use the *Vernonia* testing procedures as an example of how such conditions could be met.

tween the special-needs doctrine and this area of drug testing. Given the strong governmental interest in caring for the welfare and development of minors, it is likely that the Court would be receptive to not only curfew ordinances, provided adequate exceptions were outlined, but also to the drug testing of minors who voluntarily choose to violate those ordinances. After all, by drug testing curfew violators, the state would be taking a small step toward reducing the nation's drug problem. Such testing seems like an indispensable extension of the *Vernonia* rationale.