VERNONIA SCHOOL DISTRICT 47J V. ACTON: A STEP TOWARD UPHOLDING SUSPICIONLESS DOG SNIFF SEARCHES IN PUBLIC SCHOOLS?

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INTRODUCTION

Drug abuse among our nation's schoolchildren is reaching alarming proportions.[1] In an effort to curb the increasing use of illegal drugs by children in their schools, many school districts are developing drug detection programs.[2] In 1995, the Supreme Court, in *Vernonia School District 47J v. Acton*,[3] upheld a school district's drug testing policy authorizing random urinalysis drug testing of student athletes. Because *Vernonia* applied only to the testing of student athletes—a fairly small segment of the student population—the question of whether random drug searches of all students will survive constitutional scrutiny remains open.

Although the constitutionality of random drug searches in public schools remains uncertain, some school districts have begun to use drug detecting dogs in their efforts to cut down on the illegal drug use in their schools.[4] The lower courts that have

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1. Results from a national study on drug use by high school students, for example, show that the percentage of eighth-grade students who have used crack has risen from 1.3% in 1991 to 2.7% in 1995, an increase of 108%. *See* John Leland, *The Fear of Heroin Is Shooting Up*, NEWSWEEK, Aug. 26, 1996, at 55. Within the same time period, the number of eighth-grade students who have used heroin has increased by 92%, the number of students who have used cocaine has increased by 83%, the number of students who have used marijuana has increased by 95%, and the number of students who have used hallucinogens has increased by 63%. *See id.* In September 1996, the Clinton Administration released statistics showing a 105% increase in drug use by the nation's youth since President Clinton took office. *See* Joshua Wolf Shenk, *The Phony Drug War*, THE NATION, Sept. 23, 1996, at 11.

2. *See, e.g.*, Michelle Barbercheck, *School Board Seeks New Anti-Drug Strategy; Survey Reveals Drug Use by High School Students Is Up 150%; Urine Tests, Sniffer Dogs Are Possible*, INDIANAPOLIS STAR, Aug. 1, 1996, at E1; Sarah Talalay & Paul Scott Abbott, *Schools Fight Back in Drug War; Dogs, Searches Help Officials*, FT. LAUDERDALE SUN-SENTINEL, June 16, 1996, at 1B.

3. 115 S. Ct. 2386 (1995).

4. *See, e.g.*, Jim Benning, *Dog Will Put Nose to Work at High School*, ORANGE COUNTY REG., Feb. 6, 1996, at B5; Christopher Broderick, *Board OKs Drug-Sniffing Dogs for Montbello High*, ROCKY MTN. NEWS, Mar. 17, 1995, at 5A; Sarah Klein, *School Trustees Back Drug Searches by Dogs*, L.A. TIMES, Jan. 18, 1996, at B3;

addressed the issue, both state and federal, have reached different conclusions on the constitutionality of dog sniff searches in public schools.[5] This comment examines the current law on dog sniff searches of students' lockers and students' persons and the likelihood of such searches being upheld by the Supreme Court.

Part I provides a general examination of searches under the Fourth Amendment. Part II reviews *New Jersey v. T.L.O.*[6] and *Vernonia School District 47J v. Acton*, two Supreme Court cases that address the constitutionality of drug searches in public schools. Part III addresses the constitutionality of dog sniff searches as a general matter and examines the split in authority over whether a dog sniff constitutes a "search" within the meaning of the Fourth Amendment.

Parts IV and V focus specifically on dog sniff searches in the public school context and the likelihood of such searches being upheld by the Supreme Court. Part IV examines dog sniffs of student lockers, and begins with an examination of whether a locker search, dog sniff or otherwise, is a search for Fourth Amendment purposes.[7] This analysis turns on whether students have a reasonable expectation of privacy in their lockers. Part IV then focuses specifically on whether a dog sniff outside a student's locker is a search, and, if so, whether such a search is reasonable absent individualized suspicion. Part V discusses dog sniffs of students' persons—in particular, whether they constitute searches under the Fourth Amendment, and, if so, whether they are reasonable absent individualized suspicion.

Finally, this comment concludes with the future outlook for dog sniff searches in public schools. The Supreme Court's opinion in *Vernonia* deliberately leaves open the possibility that suspicionless drug searches of all students could be held constitu-

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Donna McGuire, *Drug Dogs Will Patrol Lockers in High Schools*, KAN. CITY STAR, Sept. 1, 1995, at C1; Doreen Iudica Vigue, *Schools Enlist Help of Police Dogs in Fight Against Drugs*, S.F. CHRON., Nov. 27, 1995, at A6.

5. *See infra* Parts IV.B, V.A.

6. 469 U.S. 325 (1985).

7. Several courts have held that a locker search is simply not a search within the meaning of the Fourth Amendment. *See, e.g.*, Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); State v. Stein, 456 P.2d 1 (Kan. 1969); People v. Overton, 249 N.E.2d 366 (N.Y. 1969). Thus, it has not been necessary for these courts to reach the more specific issue of whether dog sniffs of lockers are searches. *See Zamora*, 639 F.2d at 662.

tional.[8] Under the analysis used in *Vernonia*, the Supreme Court should uphold suspicionless dog sniffs of students' lockers.[9] The constitutionality of dog sniffs of students' persons is a closer question because of the greater degree of intrusion on the student, but such searches may nonetheless be upheld where there is a significant drug problem within the school.[10]

I. "SEARCHES" AND THE FOURTH AMENDMENT

Before considering the constitutionality of dog sniff searches, a brief examination of what types of government action constitute searches under the Fourth Amendment is useful. 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 person or things to be seized.[11]

In *Katz v. United States*,[12] the Supreme Court addressed the threshold issue of when government action constitutes a search under the Fourth Amendment. In his well-known concurring opinion in *Katz*, Justice Harlan set forth a two-part test for making that determination.[13] Under Harlan's test, government action constitutes a search if (1) the person who is the subject of

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8. *See infra* text accompanying notes 75-76.
9. *See infra* text accompanying notes 143-53.
10. *See infra* text accompanying notes 174-78.
11. U.S. CONST. amend. IV.
12. 389 U.S. 347 (1967). In *Katz*, FBI agents attached an electronic listening and recording device to the outside of a public telephone booth that the defendant used. *See id.* at 348. Based on evidence obtained from the device, the defendant was convicted of transmitting wagering information by telephone to several states in violation of federal law. *See id.* The Court reversed the conviction, finding that the government's actions in recording and listening to the defendant's telephone conversations violated the defendant's expectation of privacy in using the booth, and therefore constituted a search under the Fourth Amendment. *See id.* at 353. The Court reasoned that what a person seeks to preserve as private, even in a public place, may nevertheless be protected by the Constitution. *See id.* at 351-52. After finding that the government's actions amounted to a search, the Court held the search unreasonable and therefore unconstitutional because the government failed to obtain a warrant before conducting the search. *See id.* at 359.
13. *See id.* at 361 (Harlan, J., concurring).

the government action exhibits an actual, subjective expectation of privacy, and (2) that expectation of privacy is one that society recognizes as "reasonable."[14]

If government action constitutes a search, the Fourth Amendment generally requires the government to obtain a search warrant supported by probable cause before the search can be deemed reasonable.[15] However, the Supreme Court has established various exceptions to the warrant and probable cause requirements as prerequisites to a reasonable search.[16] As the Court recently acknowledged in *Vernonia*, "A search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement[s] impracticable.'"[17]

Where the warrant and probable cause requirements are impracticable and therefore not prerequisites to a reasonable search, the government conduct that amounts to a search must be tested by the Fourth Amendment's general prohibition against

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14. *See id.* (Harlan, J., concurring). The Supreme Court and lower courts have subsequently adopted this test in determining whether government action in a particular case amounts to a search. *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (finding that although defendants did not expect that the contents of their garbage bags would become known to the public or police, that expectation is not one that society recognizes as objectively reasonable because defendants deposited their garbage in an area particularly suited for public inspection for the express purpose of having third parties pick it up and take it away); United States v. Jacobsen, 466 U.S. 109, 123 (1984) (stating that a test that discloses only whether a particular substance is an illegal drug is not a search because an individual does not have a legitimate expectation of privacy in possessing illegal drugs); Smith v. Maryland, 442 U.S. 735, 739-42 (1979) (stating that the government's use of a pen register to record numbers dialed from defendant's home did not constitute a search because an individual has no legitimate expectation of privacy in the numbers dialed on his or her telephone); People v. Wieser, 796 P.2d 982 (Colo. 1990) (finding that a dog sniff of a rented storage locker for drugs was not a search because an individual does not have a reasonable expectation of privacy in contraband items).

15. *See Katz*, 389 U.S. at 357.

16. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (stating that neither a warrant nor probable cause is required for searches of schoolchildren); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (finding that neither a warrant nor probable cause, nor reasonable suspicion, is required for a border search); Chimel v. California, 395 U.S. 752, 763 (1969) (stating that neither a warrant nor probable cause is required for a limited search incident to a lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (finding that neither a warrant nor probable cause is required for a "stop and frisk" search where reasonable suspicion is present).

17. *Vernonia*, 115 S. Ct. 2386, 2391 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)). The Court noted that it has found such "special needs" to exist in the public-school context. *See id.*; *see also infra* text accompanying notes 33-36.

unreasonable searches and seizures.[18] Thus, as articulated by the Supreme Court in *Camara v. Municipal Court*,[19] the ultimate standard is "reasonableness," which can only be determined "by balancing the need to search against the invasion which the search entails."[20]

The Supreme Court applied the *Camara* balancing test to an officer's pat-down search of a suspect for weapons in *Terry v. Ohio*.[21] In that case, the Court balanced the intrusion on an individual's personal security that accompanies a pat-down search against both the government's general interest in effective crime prevention and the police officer's more immediate interest in protecting himself and other potential victims of violence.[22] Although the Court acknowledged that even a limited search of outer clothing for weapons is a severe intrusion on personal privacy, it concluded that a police officer must be permitted to conduct a limited search for weapons when the officer reasonably believes that he or she is dealing with an individual who is armed and dangerous, regardless of whether the officer has probable cause to search or arrest the individual.[23]

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18. *See Terry*, 392 U.S. at 20; *see also* Camara v. Municipal Court, 387 U.S. 523 (1967).

19. 387 U.S. 523 (1967).

20. *Id.* at 536-39. In *Camara*, the Court held that administrative searches of residences by municipal health and safety inspectors are significant intrusions upon the privacy interests protected by the Fourth Amendment. *See id.* at 534. However, the Court further held that such searches are reasonable because the governmental interest in preventing the development of hazardous conditions, which can only be done through routine periodic inspections of all structures, outweighs the invasion of the individual's privacy, which was relatively limited because the inspections were neither personal in nature nor aimed at the discovery of evidence of a crime. *See id.* at 535-37.

21. 392 U.S. 1 (1968). In *Terry*, the police officer observed three men behaving suspiciously in front of a store window. *See id.* at 5-6. Suspecting that the men were preparing to rob the store and fearing that they might be carrying guns, the officer approached the men and proceeded to pat down their clothing for weapons. *See id.* at 6-7. The officer retrieved a .38-caliber revolver from the left breast pocket of the defendant's overcoat, which led to the defendant's conviction for carrying a concealed weapon. *See id.* at 4, 7.

22. *See id.* at 1.

23. *See id.* at 27. The Court then examined the conduct of the officer in *Terry* to determine whether his search of the defendant was reasonable. *See id.* at 27-28. The Court stated that the determination of whether the search by the officer was reasonable involved a two-fold inquiry: (1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. The Court found that the officer's search was reasonable both at its inception and as

Just as it would be impracticable to require an officer to obtain a warrant and have probable cause before the officer could constitutionally conduct a pat-down search of an individual for weapons, the Supreme Court has held that requiring school administrators to obtain a warrant and have probable cause before they could search a student for drugs would be similarly impracticable.[24] Thus, the constitutionality of a school search turns upon its reasonableness, which is determined by balancing the student's privacy interest against the school's need to conduct the search.[25]

II. THE SUPREME COURT'S POSITION ON DRUG SEARCHES IN PUBLIC SCHOOLS

The issue of drug searches in public schools has been addressed by the Supreme Court in two cases: *New Jersey v. T.L.O.*[26] and *Vernonia School District 47J v. Acton.*[27] In *T.L.O.*, the Supreme Court held that the search of a student's purse based on reasonable suspicion of wrongdoing did not constitute an unreasonable search in violation of the Fourth Amendment.[28] In reaching its decision, the Court held initially that searches conducted by public school officials fall within the purview of the Fourth Amendment.[29] The Court then employed the *Terry* balancing test to determine the reasonableness of the search, weighing the student's legitimate expectations of privacy against the school administrators' interest in maintaining discipline in the classroom and on school grounds.[30] Applying the test, the Court acknowledged that the search of a student's person, closed purse, or bag violates the student's expectations of privacy.[31]

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conducted, concluding that a reasonable person would have been warranted in believing that the defendant was armed and therefore presented a danger to the safety of the officer and the public, and the officer's search was confined to what was minimally necessary to learn whether the defendant was armed. *See id.* at 28-30.

24. *See infra* text accompanying notes 33-36.

25. *See infra* text accompanying notes 30, 48.

26. 469 U.S. 325 (1985).

27. 115 S. Ct. 2386 (1995).

28. *See T.L.O.*, 469 U.S. at 325.

29. *See id.* at 333.

30. *See id.* at 337.

31. *See id.* at 337-38. The Court specifically noted that it did not address the question of whether students have legitimate expectations of privacy in their lockers, nor did it express an opinion on the standards governing searches of lockers by

However, it also found that the school has a substantial interest in maintaining an environment in which learning can take place.[32]

In balancing the student's legitimate expectations of privacy against the school administrators' "equally legitimate" need to maintain an environment conducive to learning, the Court concluded that the school setting requires an easing of the restrictions to which searches by public authorities are normally subject.[33] The Court reasoned that the warrant requirement is particularly unsuited to the school environment because requiring a teacher to obtain a warrant before searching a student suspected of violating a school rule "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[34] Thus, the Court held that school officials do not need to obtain a warrant before searching a student who is under their authority.[35]

In addition, the Court held that the school setting also requires modification of the level of suspicion needed to justify a search; therefore, probable cause is not required.[36] What is required instead is that the search of the student be reasonable under all the circumstances.[37] Reasonableness involves a two-part inquiry: (1) "whether the search was justified at its inception," and (2) whether the search "was reasonably related in scope to the circumstances which justified the [search] in the first place."[38] Regarding the first inquiry, the Court stated that ordinarily a search of a student will be justified at its inception when there are "reasonable grounds for suspecting" that the

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school officials. *See id.* at 337 n.5.

32. *See id.* at 339. Regarding the school's substantial interest, the Court stated:

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires [sic] close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."

Id. at 339-40 (quoting Goss v. Lopez, 419 U.S. 565, 580 (1975)) (citations omitted).

33. *See id.* at 340-41.

34. *Id.* at 340.

35. *See id.*

36. *See id.* at 340-41.

37. *See id.* at 341.

38. *Id.* (quoting Terry v. Ohio, 392. U.S. 1, 20 (1968)); *see also supra* note 23.

search will produce evidence that the student has violated or is violating either the law or school rules.[39] However, the Court expressly stated that it did not decide whether individualized suspicion is an *essential* element of the reasonableness standard, only that a search is justifiable at its inception when such suspicion is present.[40] Because the search of the student's purse in *T.L.O.* was based upon individualized suspicion, the Court declined to consider the circumstances that might justify school authorities in conducting searches absent such suspicion.[41]

The issue of whether drug searches may be conducted in the absence of individualized suspicion was addressed by the Supreme Court ten years later in *Vernonia School District 47J v. Acton*.[42] In *Vernonia*, the Court held that suspicionless urinalysis testing of student athletes for illegal drugs did not constitute an unreasonable search.[43] The Court began its analysis by noting that state-compelled urinalysis testing is a search under the Fourth Amendment.[44] The Court explained that the standard for determining the constitutionality of a search is "reasonableness," which is determined by balancing the intrusion of the search on the individual's Fourth Amendment interests against the legitimate governmental interests in conducting the search.[45]

The Court then reiterated its explicit acknowledgment in *T.L.O.* that the Fourth Amendment imposes no requirement of individualized suspicion.[46] In doing so, the Court noted that it has upheld suspicionless drug searches in other contexts.[47]

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39. *See T.L.O.*, 469 U.S. at 341-42. In other words, a search of a student will ordinarily be justified at its inception when there is individualized suspicion of wrongdoing.

40. *See id.* at 342 n.8. The Court noted that in other contexts, it has held that although some amount of individualized suspicion is usually a prerequisite to a constitutional search, the Fourth Amendment imposes no requirement of such suspicion. *See id.*; *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) (finding that individualized suspicion is not required for a border search).

41. *See T.L.O.*, 469 U.S. at 342 n.8.

42. 115 S. Ct. 2386 (1995).

43. *See id.*

44. *See id.* at 2390; *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (finding suspicionless drug testing of railroad personnel not to be an unreasonable search).

45. *See Vernonia*, 115 S. Ct. at 2390; *see also* Camara v. Municipal Court, 387 U.S. 523 (1967). The Court in *Vernonia* affirmed its prior holding in *T.L.O.* that neither a warrant nor probable cause is required in the public school context. *See Vernonia*, 115 S. Ct. at 2390-91; *see also T.L.O.*, 469 U.S. at 340-41.

46. *See Vernonia*, 115 S. Ct. at 2391.

47. *See id.*; *see also* Treasury Employees Union v. Von Raab, 489 U.S. 656

Against this backdrop, the Court moved on to consider the suspicionless searches involved in *Vernonia*, applying a three-factor analysis for reasonableness that balanced the interests of the students in maintaining privacy against the interests of the school administrators in conducting the searches.[48] The first factor the Court considered was the nature of the privacy interest.[49] In discussing this factor, the Court emphasized that "[c]entral . . . to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[50] The Court noted that children lack some of the most fundamental rights possessed by adults, such as the freedom to come and go at will; rather, they are subject to the control of their parents or guardians. In addition, the Court reasoned that when parents place their children in public schools, the schools are given a degree of supervision and control that could not be exercised over adults.[51]

(1989) (stating that suspicionless drug testing of federal customs officers who carry arms or are involved in drug interaction did not constitute an unreasonable search); *Skinner*, 489 U.S. at 602 (finding that suspicionless drug testing of railroad personnel did not constitute an unreasonable search); United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) (stating that individualized suspicion is not required for a border search).

48. *See Vernonia*, 115 S. Ct. at 2391-96. The Court's three-factor analysis departs from the two-part test used in *Terry* and *T.L.O.* *See T.L.O.*, 469 U.S. at 341; Terry v. Ohio, 392 U.S. 1, 20 (1968). Presumably, the reason for the Court's departure is that the searches in both *Terry* and *T.L.O.* were based upon individualized suspicion, whereas the search in *Vernonia* was conducted in the absence of such suspicion.

49. *See Vernonia*, 115 S. Ct. at 2391-93.

50. *Id.* at 2391.

51. The Court noted that "for many purposes school authorities act *in loco parentis*." *Id.* at 2392 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 403 U.S. 675, 684 (1986)). *In loco parentis* means "in the place of a parent." BLACK'S LAW DICTIONARY 787 (6th ed. 1990). Some lower courts, in upholding searches of students in public schools under the Fourth Amendment, have pointed to the schools' right and duty *in loco parentis* to supervise students and maintain an environment conducive to education. *See, e.g.*, Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981). The Court in *Vernonia* acknowledged that in *T.L.O.* it had rejected the idea that public schools, like private schools, exercise only parental power over students, which is not subject to the Fourth Amendment. *See Vernonia*, 115 S. Ct. at 2391-92; *see also T.L.O.*, 469 U.S. at 336. However, the Court noted that it had also emphasized in *T.L.O.* that the nature of a school's power is "custodial and tutelary"; therefore, while children do not "shed their rights . . . at the schoolhouse gate, the nature of those rights is what is appropriate for children in school." *Vernonia*, 115 S. Ct. at 2392 (citations omitted); *see also T.L.O.*, 469 U.S. at 339.

Thus, the Court reasoned, Fourth Amendment rights are different in the public school setting; "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[52]

The second factor the Court considered was the character of the intrusion.[53] The Court concluded that the privacy interests compromised by the process of obtaining the urine samples were negligible because the conditions under which the samples were taken were nearly identical to those encountered in public restrooms.[54] In addition, the tests only checked for drugs, and the results of the tests were not turned over to law enforcement officials or used for any internal discipline, but rather were only disclosed to those school personnel who had a need to know—the superintendent, principal, vice-principal, and athletic director.[55]

The third and final factor the Court considered was the nature and immediacy of the governmental concern and the efficacy of suspicionless urinalysis testing for meeting it.[56] The Court held that the nature of the governmental concern in *Vernonia* was important and perhaps compelling for a number of reasons.[57] First, the physical, psychological, and addictive effects of drugs are most severe during the school years because children grow chemically dependent more quickly than adults and their nervous systems are more critically impaired by drugs.[58] In addition, drug use affects not just users, but the entire student body and faculty as the educational process is disrupted.[59]

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52. *Vernonia*, 115 S. Ct. at 2392. For example, the Court noted that children in public schools are regularly required to submit to physical examinations and to receive vaccinations for various diseases. *See id.* The Court stated that privacy interests are even less with regard to student athletes, as they must change and shower in locker rooms, submit to a pre-season exam, and acquire insurance or sign a waiver. *See id.* at 2392-93.

53. *See id.* at 2393-94.

54. *See id.* at 2393. Under the school district's policy, male students produce samples at a urinal; they remain fully clothed and are observed only from behind, if at all. Females produce samples in an enclosed stall, and a female monitor stands outside the stall to listen for sounds of tampering. *See id.*

55. *See id.* at 2389, 2393.

56. *See id.* at 2394-96.

57. The Court noted that deterring drug use by schoolchildren is at least as important as enhancing efficient enforcement of laws prohibiting the importation of drugs, the concern in *Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), or deterring drug use by engineers and trainmen, the concern in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). *See Vernonia*, 115 S. Ct. at 2395.

58. *See Vernonia*, 115 S. Ct. at 2395.

59. *See id.*

Moreover, the necessity for the state to act is magnified by the fact that the effects are being felt by children for whom it has undertaken a special responsibility.[60] Finally, the Court reasoned that the policy is directed at drug use by student athletes, where the risk of immediate harm is especially high.[61]

As for the immediacy of the concern, the Court pointed to the district court's findings that a large segment of the student body, particularly athletes, was in a state of rebellion, that disciplinary actions had reached epidemic proportions, and that the rebellion was being fueled by alcohol and drug abuse.[62] Finally, the Court found no problem with the efficacy of the random urinalysis testing of athletes for addressing the drug problem. It reasoned that "a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."[63]

The Court rejected the argument that the suspicionless drug testing policy was unconstitutional because a less intrusive means—drug testing based on individualized suspicion—was

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60. *See id.*

61. *See id.* The Court explained that apart from psychological effects, including impaired judgment, slowed reaction time, and lessened perception of pain, the drugs screened by the school district's policy have been shown to pose substantial physical risks to athletes.

> Amphetamines produce an "artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them a "very dangerous drug when used during exercise of any type." Marijuana causes "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction."

Id. (quoting Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance*, *in* H. Appenzeller, MANAGING SPORTS AND RISK MANAGEMENT STRATEGIES 90-91, 94 (1993)) (citations omitted) (alterations in original).

62. *See id.* at 2395; *see also* Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992). The Court noted that *Vernonia* reflects greater immediacy than existed in *Skinner*, 489 U.S. at 602, where the Court upheld a random drug testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. *See Vernonia*, 115 S. Ct. at 2395. The Court further noted that *Vernonia* reflects a much greater immediacy than existed in *Von Raab*, 489 U.S. at 656, where there was no documented history of drug use by any customs officials. *See Vernonia*, 115 S. Ct. at 2395.

63. *Vernonia*, 115 S. Ct. at 2395-96.

available.[64] The Court noted that it has repeatedly refused to hold that only the "least intrusive" search feasible can be reasonable under the Fourth Amendment.[65] Furthermore, the Court reasoned that there are significant difficulties with an individualized suspicion approach.[66] First, the Court pointed out that parents who are willing to accept suspicionless drug testing for athletes may not be willing to accept "accusatory drug testing" among the student body, which carries with it a "badge of shame" as individual students are singled out for testing.[67]

In addition, the Court reasoned that a policy based on individualized suspicion necessarily involves the risk that teachers will arbitrarily impose testing on "troublesome but not drug-likely students."[68] That in turn creates the expense of defending lawsuits that claim such "arbitrary imposition."[69] Finally, such a policy would place yet another burden on teachers to spot drug abuse, "a task for which they are ill-prepared . . . ."[70] Thus, the Court concluded that "[i]n many respects . . . testing based on 'suspicion' of drug use would not be better, but worse."[71]

After taking the three factors into account—"the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search"—the Court concluded that the school district's drug testing policy was reasonable and therefore constitutional.[72] On a final note, the Court cautioned against the assumption that suspicionless drug testing policies would be held constitutional in other contexts.[73] Notably, however, it stated that "[t]he most significant element in this case is the first we discussed: that the [drug testing policy] was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[74]

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64. *See id.* at 2396.
65. *See id. See, e.g., Skinner*, 489 U.S. at 629 & n.9; Colorado v. Bertine, 479 U.S. 367, 373-74 (1987); Illinois v. Lafayette, 462 U.S. 640, 647 (1983).
66. *See Vernonia*, 115 S. Ct. at 2396.
67. *See id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *See id.*
74. *Id.*

Although *Vernonia* dealt specifically with suspicionless drug searches of student athletes, the Court left open the possibility that suspicionless drug searches of all students could be held constitutional. In delivering its opinion, the Court relied much more heavily on the fact that the drug testing policy applied to students committed to the temporary custody of public schools than it did on the fact that the policy applied specifically to student athletes, whose safety is of primary concern.[75] The emphasis placed on this factor concerned Justice Ginsburg enough to write a brief concurring opinion in which she took special care to express that she read the majority's opinion as reserving the question of whether the school district could, on no more than the showing made in *Vernonia*, constitutionally impose suspicionless drug testing not only on athletes but on all students.[76]

Since *Vernonia* addresses only the specific issue of suspicionless drug testing of student athletes, it leaves many questions unanswered both as to the types of searches public schools may conduct to detect drugs and as to whether these searches require individualized suspicion.

III. THE CONSTITUTIONALITY OF DOG SNIFF SEARCHES

A dog sniff search employs the keen olfactory senses of a trained dog to detect the presence or absence of narcotics.[77] The use of narcotics detection dogs in drug enforcement is invaluable, as the dogs can quickly and with minimal intrusion search objects and persons for drugs using their superhuman sense of smell.[78] As the Supreme Court has recognized: "[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[79]

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75. *See id.* at 2395-96.

76. *See id.* at 2397 (Ginsburg, J., concurring).

77. *See* Lina Shahin, *The Constitutional Posture of Canine Sniffs*, 9 TOURO L. REV. 645, 673 (1993).

78. *See, e.g.*, United States v. Morales-Zamora, 914 F.2d 200 (10th Cir. 1990); United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989); State v. Snitkin, 681 P.2d 980 (Haw. 1984).

79. United States v. Place, 462 U.S. 696, 707 (1983).

A. The Supreme Court's Position

The Supreme Court first addressed the constitutionality of dog sniff searches in *United States v. Place*.[80] In *Place*, the Court relied on the *Terry* balancing test in concluding that law enforcement officials may temporarily detain luggage for exposure to a dog sniff test where there is reasonable suspicion that the luggage contains narcotics.[81] However, on the specific facts in *Place*, the Court held that the ninety-minute detention of the defendant's luggage by officials went beyond the narrow authority they possessed to briefly detain luggage reasonably suspected to contain narcotics.[82]

The most important aspect of *Place*, however, was the Court's statement in dicta that a dog sniff of luggage does not constitute a search within the meaning of the Fourth Amendment.[83] In reaching this conclusion, the Court acknowledged that an individual possesses a privacy interest in the contents of his or her luggage that is protected under the Fourth Amendment.[84] However, the Court reasoned that a dog sniff of luggage does not require opening the luggage and does not expose noncontraband items; rather, it only exposes the presence or absence of narcotics, which are contraband.[85] Thus, both the information obtained and

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80. *Id.* In *Place*, the defendant's suspicious behavior drew the attention of law enforcement officers as he waited in line to purchase a plane ticket at Miami International Airport. *See id.* at 698. The officers relayed their suspicions to DEA agents at La Guardia Airport, the defendant's destination, who then seized the defendant's luggage for 90 minutes to subject it to a dog sniff search for narcotics. *See id.* at 698-99. The dog reacted positively to one of the defendant's bags, and upon obtaining a search warrant, the agents opened the bag and found a large quantity of cocaine. *See id.* at 699.

81. *See id.* at 697-98, 706. The Court reasoned that some brief detentions of luggage, such as immediate exposure of the luggage to a dog sniff search, are so minimally intrusive upon an individual's Fourth Amendment rights that substantial countervailing governmental interests will justify a seizure based upon reasonable suspicion that the luggage contains narcotics. *See id.* at 705-06.

82. *See id.* at 698, 710. The Court reasoned that such a seizure can effectively restrain a person by disrupting the person's travel plans, since he or she must remain with his or her luggage or arrange for its return. *See id.* at 708. Thus, the officials' conduct placed the seizure within the general rule requiring probable cause for a seizure and outside the *Terry* exception to that rule. *See id.* at 708-09; *see also* Terry v. Ohio, 392 U.S. 1 (1968).

83. *See Place*, 462 U.S. at 707.

84. *See id.*

85. *See id.*

the manner in which it is obtained are so limited as to not constitute a search under the Fourth Amendment.[86]

The Court reaffirmed its position on dog sniffs in *United States v. Jacobsen*.[87] In *Jacobsen*, the Court held that a chemical test performed by a DEA agent on a white powdery substance found in a damaged package did not amount to a search under the Fourth Amendment.[88] The Court reasoned that a test that merely discloses whether or not a particular substance is cocaine does not infringe upon an expectation of privacy that society is prepared to recognize as reasonable.[89] This conclusion, the Court continued, was dictated by its "holding"[90] in *Place* that a dog sniff of luggage was not a Fourth Amendment search because the sniff revealed nothing about noncontraband items and therefore did not intrude upon a legitimate privacy interest.[91]

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86. *See id.*

87. 466 U.S. 109 (1984). In *Jacobsen*, employees of a private freight carrier found a damaged package and opened it in order to examine its contents pursuant to a written company policy. *See id.* at 111. Inside the box the employees found a tube; they cut it open and found several plastic bags, one containing a white powdery substance. *See id.* Upon observing the white powder, they notified the Drug Enforcement Administration and replaced the items in the box before the agents arrived. *See id.* When the first agent arrived, he noticed that one end of the tube had been cut open. He then removed the plastic bags and saw the white powder. The agent removed a trace of the powder and performed a chemical test on it, which identified the powder as cocaine. *See id.* at 111-12. Based on this finding, a warrant was obtained to search the place to which the package was addressed, which led to the defendants' arrest and conviction for possession of an illegal substance with intent to distribute. *See id.* at 112. The Court held that the agents' actions in opening the box and the tube and removing the plastic bags did not amount to a search. The Court reasoned that the agents learned nothing that had not been previously discovered during the initial search by the freight carrier employees, which was private action not subject to the Fourth Amendment. *See id.* at 119-20.

88. *See id.* at 125.

89. *See id.* at 123-24. Specifically, the Court stated: "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* at 123.

90. Although the Court's conclusion in *Place* that a dog sniff of luggage is not a search under the Fourth Amendment was dicta, the Court characterized its conclusion as a "holding" in *Jacobsen*, 466 U.S. at 123, and numerous state and federal courts have considered the Court's *Jacobsen* position on dog sniffs to be binding. *See, e.g.*, United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991); United States v. Morales-Zamora, 914 F.2d 200 (10th Cir. 1990); State v. Boyce, 723 P.2d 28 (Wash. Ct. App. 1986).

91. *See Jacobsen*, 466 U.S. at 123-24.

B. The Lower Courts

Numerous lower courts have addressed the issue of whether a dog sniff is a search within the meaning of the Fourth Amendment, and the majority view in both federal and state courts is that a dog sniff of an object or a place is not a search.[92] In so concluding, these courts generally rely on one or more of four rationales.[93] First, many courts that have held a dog sniff as not implicating the Fourth Amendment have reasoned, relying on *Place* and *Jacobsen*, that a dog sniff only reveals the presence or absence of contraband; thus, it does not infringe upon an expectation of privacy that society recognizes as legitimate.[94]

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92. *See, e.g., Morales-Zamora*, 914 F.2d at 200 (finding that dog sniffs of vehicles stopped at a roadblock set up for the purpose of checking drivers' licenses, vehicle registrations, and proofs of insurance are not searches); United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981) (finding that a dog sniff of luggage is not a search); People v. Wieser, 796 P.2d 982 (Colo. 1990) (stating that a dog sniff of a rented storage locker was not a search).

Dog sniffs of persons, however, are another matter. *See, e.g.*, Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (stating that a dog sniff of a student's locker or vehicle is not a search, but a dog sniff of a student's person is a search); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980) (finding that a dog sniff of a student's person constitutes a search). *See also* United States v. Harvey, 961 F.2d 1361 (8th Cir. 1992) (holding that a dog sniff of luggage was not a search and noting that the dog sniff did not require any contact with the owner of the luggage); United States v. Beale, 731 F.2d 590, 595 (9th Cir. 1983) (stating that a dog sniff of a person would be an "egregious violation of reasonable expectation of privacy in one's body"); United States v. Bronstein, 521 F.2d 459, 462 n.5 (2d Cir. 1975) (noting that the court was not presented with the issue of a personal search, but only a search of luggage). *But see* Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981) (stating that dog sniffs of students' persons are not searches).

93. *See* People v. Dunn, 553 N.Y.S.2d 257, 262 (N.Y. App. Div.), *aff'd on other grounds*, 564 N.E.2d 1054 (N.Y. 1990), *cert. denied*, 501 U.S. 1219 (1991). A few courts have simply held that a dog sniff is not a search without setting forth any reasoning. *See, e.g.*, United States v. Seals, 987 F.2d 1102 (5th Cir. 1993) (exterior of car); United States v. Johnson, 660 F.2d 21 (2d Cir. 1981) (luggage).

94. *See, e.g., Rodriguez-Morales*, 929 F.2d at 780 (stating that a dog sniff of the exterior of a car is not a search); *Morales-Zamora*, 914 F.2d at 200 (vehicles stopped at roadblock); United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) (train sleeper compartment); United States v. Beale, 736 F.2d 1289 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (*Beale III*) (luggage); *Wieser*, 796 P.2d at 982 (rented storage locker). The Ninth Circuit's opinion in *Beale III* is significant because it marks a radical departure from its holdings in *Beale I* and *Beale II*. *See* United States v. Beale, 731 F.2d 590 (9th Cir. 1983) (*Beale II*); United States v. Beale 674 F.2d 1327 (9th Cir. 1982) (*Beale I*). In *Beale I*, the court held that a dog sniff of luggage is a search within the Fourth Amendment, reasoning that an individual has a reasonable expectation of privacy in the contents of his or her luggage. *See Beale I*, 674 F.2d at

Second, some courts have relied on a "plain smell" rationale analogous to the "plain view" doctrine.[95] These courts have reasoned that an odor detected by a law enforcement official positioned in a place where he has a right to be is not a search.[96] Thus, they have argued, a law enforcement official's use of a dog to sniff in places where the officer has a right to be is likewise not a search because the dog's sense of smell simply enhances the officer's sense of smell, much as the use of binoculars and flashlights enhance an officer's vision.[97]

Third, some courts that have held a dog sniff as falling outside the purview of the Fourth Amendment have reasoned that a dog does nothing more than detect odors flowing from the

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1332. The court rejected the "public smell" and "air space" rationales used by other courts holding that a dog sniff is not a search. *See id.* at 1333-34; *see also infra* notes 95-98 and accompanying text. The Supreme Court subsequently vacated *Beale I* and remanded the case to the Ninth Circuit for "further consideration" in light of the Court's decision in *Place*. *See* United States v. Beale, 463 U.S. 1202 (1983). On remand, the Ninth Circuit affirmed its holding in *Beale I*, pointing out that the Supreme Court's statement in *Place* that a dog sniff of luggage is not a search was dictum. *See Beale II*, 731 F.2d at 593-94. However, the Ninth Circuit once again revisited the issue after the Supreme Court decided *Jacobsen*. *See Beale III*, 736 F.2d at 1289. In *Beale III*, the court noted that the Supreme Court in *Jacobsen* had referred to its conclusion in *Place* that a dog sniff of luggage is not a search as a holding. *See Beale III*, 736 F.2d at 1290-91. Whether or not the statement in *Place* was a holding or dictum, the *Beale III* court reasoned, "the Supreme Court has clearly directed the lower courts to follow its pronouncement." *Id.* at 1291.

95. *See, e.g.*, *Horton*, 690 F.2d at 470 (stating that dog sniffs of students' lockers and automobiles were not searches); *Goldstein*, 635 F.2d at 356 (luggage); *Bronstein*, 521 F.2d at 459 (luggage); State v. Morrow, 625 P.2d 898 (Ariz. 1981) (luggage); People v. Mayberry, 644 P.2d 810 (Cal. 1982) (luggage). Under the "plain view" doctrine, a law enforcement officer may seize evidence in plain view without a warrant, provided that the officer did not violate the Fourth Amendment in arriving at the place where the evidence could be plainly viewed. *See, e.g.*, Horton v. California, 496 U.S. 128 (1990).

96. *See, e.g.*, *Goldstein*, 635 F.2d at 356; United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980) (luggage); *Bronstein*, 521 F.2d at 459.

97. *See, e.g.*, *Horton*, 690 F.2d at 470; *Goldstein*, 635 F.2d at 356; *Bronstein*, 521 F.2d at 459; *Mayberry*, 644 P.2d at 810. A few courts have distinguished the use of a dog's sense of smell from the impermissible use of more sophisticated mechanical devices, such as a magnetometer or X-ray machine, arguing that unlike the latter devices, which are "indiscriminate" in their intrusion into one's personal effects, dog sniffs only detect the presence or absence of contraband and therefore the intrusion is much more restricted. *See, e.g.*, *Bronstein*, 521 F.2d at 459; *Mayberry*, 644 P.2d at 810. *But see Jones*, 499 F. Supp. at 233 (stating that a dog replaces, rather than enhances, the perceptive abilities of humans and therefore is much more analogous to an electronic "bug" than to a flashlight); State v. Elkins, 354 N.E.2d 716, 718 (Ohio Ct. App. 1976) (stating that a dog is a "sophisticated device" that enables authorities to perceive something completely undetectable by human senses).

object or place being sniffed, and an individual does not have a reasonable expectation of privacy in the air space surrounding that object or place.[98] Finally, courts have relied on the observation, made by the Supreme Court in *Place*, that dog sniffs are carried out quickly and reliably with minimal intrusion, inconvenience, and embarrassment.[99]

Although most courts have found that a dog sniff of objects or places does not constitute a search under the Fourth Amendment, a few courts have held otherwise.[100] For example, in *United States v. Thomas*,[101] the Second Circuit, in holding that a dog sniff outside an apartment door was a search, reasoned that "[i]t is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search."[102] According to the *Thomas* court, the critical question in determining whether a dog sniff amounts to a search is whether it intrudes on a

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98. *See, e.g.*, Garcia v. United States, 42 F.3d 604 (10th Cir. 1994) (holding a dog sniff of luggage in the baggage car of a train not to be a search); United States v. Harvey, 961 F.2d 1361 (8th Cir. 1992) (luggage); *Morales-Zamora*, 914 F.2d at 200 (vehicles stopped at roadblock); *Goldstein*, 635 F.2d at 356; *Mayberry*, 644 P.2d at 810 (luggage); State v. Garcia, 535 N.W.2d 124 (Wis. Ct. App. 1995) (vehicle parked in motel parking lot).

99. *See Place*, 462 U.S. at 705-06. *See, e.g.*, *Morales-Zamora*, 914 F.2d at 200 (vehicles stopped at roadblock); *Colyer*, 878 F.2d at 469 (train sleeper compartment); *Beale III*, 736 F.2d at 1289 (luggage); State v. Snitkin, 681 P.2d 980 (Haw. 1984) (packages in cargo holding room of a private carrier); State v. Boyce, 723 P.2d 28 (Wash. Ct. App. 1986) (safety deposit box).

100. *See, e.g.*, United States v. Thomas, 757 F.2d 1359 (2d Cir.) (stating that a dog sniff outside an apartment door was a search), *cert. denied*, 474 U.S. 819 (1985); People v. Unruh, 713 P.2d 370 (Colo. 1986) (holding that a dog sniff of a stolen safe seized by police constituted a search); *Elkins*, 354 N.E.2d at 716 (finding that a dog sniff of a package amounted to a search). In addition, some state courts have held that while a dog sniff does not constitute a search under the Fourth Amendment, it does constitute a search under the applicable state constitution, reasoning the latter to be more protective of individual rights than the Federal Constitution. *See, e.g.*, Pooley v. State, 705 P.2d 1293 (Alaska Ct. App. 1985) (luggage); State v. Pellicci, 580 A.2d 710 (N.H. 1990) (exterior of automobile); People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990) (dog sniff outside an apartment door); State v. Juarez-Godinez, 900 P.2d 1044 (Or. Ct. App.), *cert. granted*, 907 P.2d 247 (Or. 1995) (automobile); Commonwealth v. Diaz, 659 A.2d 563 (Pa. Super. Ct. 1995) (shipping box). Other state courts, however, have not held a dog sniff to be a search under the applicable state constitution. *See, e.g.*, People v. Wieser, 796 P.2d 982 (Colo. 1990) (rented storage locker); *Snitkin*, 681 P.2d at 980 (packages in cargo holding room of private mail carrier); *Boyce*, 723 P.2d at 28 (safety deposit box).

101. 757 F.2d 1359 (2d Cir. 1985).

102. *Id.* at 1366. Other courts have criticized *Thomas*, relying on the *Place-Jacobsen* rationale that an individual has no legitimate expectation of privacy in non-contraband items. *See, e.g.*, *Colyer*, 878 F.2d at 469; *Dunn*, 564 N.E.2d at 1054.

legitimate expectation of privacy.[103] The court distinguished *Place* on this ground, comparing the heightened privacy interest that an individual has in his or her residence with the diminished privacy interest a person has in the contents of his or her luggage at a public airport.[104]

In addition to reasoning that the critical determination in dog sniff cases is whether the sniff intrudes on a legitimate expectation of privacy, courts holding a dog sniff to fall within the purview of the Fourth Amendment have reasoned that the dog actually replaces, not enhances, the human sense of smell.[105] For example, in *State v. Elkins*,[106] the court reasoned that a dog trained to sniff for drugs is a "sophisticated device" used to detect something hidden from the human senses, and therefore a dog sniff is no different than an electronic device attached to the outside of a telephone booth, which the Supreme Court held to be a search in *Katz*.[107]

Where a federal or state court finds that a dog sniff does constitute a search under the Fourth Amendment, it must then inquire as to whether the search was reasonable.[108] For example, in *State v. Pellicci*,[109] a New Hampshire court held that a dog sniff search of the exterior of a car was reasonable because it disclosed only limited information and was based upon reasonable suspicion that narcotics were in the vehicle.[110] Similarly, in *People v. Dunn*,[111] a New York court held that a dog sniff search outside an apartment door was reasonable because it was far less intrusive than a "full-blown" search of an individual's home, as the dog sniff search did not require entry into the apartment or expose the occupant's personal effects to the police, and was based upon reasonable suspicion that the apartment contained narcotics.[112]

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103. *See Thomas*, 757 F.2d at 1366 (citing Katz v. United States, 389 U.S. 347 (1967)); *see also Unruh*, 713 P.2d at 377; *Dunn*, 564 N.E.2d at 1058.

104. *See Thomas*, 757 F.2d at 1366-67.

105. *See, e.g., Thomas*, 757 F.2d at 1359; *Elkins*, 354 N.E.2d at 716.

106. 354 N.E.2d 716 (Ohio Ct. App. 1976).

107. *See id.* at 718; Katz v. United States, 389 U.S. 347 (1967); *see also* Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 232 (E.D. Tex. 1980) (considering use of a dog more analogous to an electronic "bug" than a flashlight).

108. *See Katz*, 389 U.S. at 347.

109. 580 A.2d 710 (N.H. 1990).

110. *See id.* at 716-17.

111. 564 N.E.2d 1054 (N.Y. 1990), *cert. denied*, 501 U.S. 1219 (1991).

112. *See id.* at 1058.

IV. SUSPICIONLESS DOG SNIFFS OF STUDENTS' LOCKERS

If and when the constitutionality of suspicionless dog sniffs of student lockers is addressed by the Supreme Court, the dog sniffs should be upheld on one of two theories. The Court may decide that dog sniffs do not implicate the Fourth Amendment, either because a locker search itself, without regard to how the search is carried out, is not a search,[113] or because a dog sniff outside a locker—a more limited search because it does not require opening the locker—is not a search.[114] Alternatively, the Court may decide that suspicionless dog sniffs of lockers do constitute searches, and accordingly apply the *Vernonia* three-factor analysis to determine the reasonableness of the searches.[115]

A. Whether a Locker Search Implicates the Fourth Amendment

The question of whether a dog sniff of a locker is constitutional could be decided according to whether a locker search itself, without regard to the manner in which the search is carried out, is a search under the Fourth Amendment.[116] This in turn depends on whether a student has a reasonable expectation of privacy in his or her locker.[117] Some courts have held that students do not have a right to privacy in their lockers as against the school and its officials;[118] therefore, the Fourth Amendment is not implicated. For example, the courts in *State v. Stein*[119] and *People v. Overton*[120] concluded that students only have control over their lockers as against other students, not against the

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113. *See infra* Part IV.A.

114. *See infra* Part IV.B.

115. *See infra* Part IV.C.

116. *See, e.g., Katz*, 389 U.S. at 347. When a court decides that locker searches as a general matter do not fall within the purview of the Fourth Amendment, the more specific issue of whether dog sniffs of lockers implicate the Fourth Amendment is not reached. *See* Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

117. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Supreme Court specifically left this question unanswered in *T.L.O.* *See* New Jersey v. T.L.O., 469 U.S. 325, 337 n.5 (1985).

118. *See, e.g., Zamora*, 639 F.2d at 662; State v. Stein, 456 P.2d 1 (Kan. 1969), *cert. denied*, 397 U.S. 947 (1970); People v. Overton, 229 N.E.2d 596 (N.Y. 1967), *aff'd on reh'g*, 249 N.E.2d 366 (N.Y. 1969).

119. 456 P.2d 1 (Kan. 1969).

120. 229 N.E.2d 596 (N.Y. 1967).

school and its officials, who keep a master list of all combinations and a master key that will open every locker.[121]

On the other hand, several courts have expressly held that the Fourth Amendment applies to locker searches.[122] For example, in *State v. Engerud*,[123] a New Jersey court held that a student had an expectation of privacy in the contents of his locker, reasoning that: "For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal 'effects' protected by the Fourth Amendment."[124] Similarly, in *In re Dumas*,[125] a Pennsylvania court, applying the reasoning of *T.L.O.*, stated that it was "unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in [a] school locker provided for . . . storage of personal items."[126]

Although the courts are split on the question of whether students have a reasonable expectation of privacy in their lockers, most agree that it is important to consider the effect of a school policy on lockers.[127] For example, in *Commonwealth v. Snyder*,[128] a Massachusetts court held that a school policy stating that a student has a right not to have his or her locker subjected to an unreasonable search created a reasonable expectation of privacy in lockers.[129] Conversely, in *In re Isiah B.*,[130] a Wisconsin court held that the school district's policy that lockers were the property of the school system and subject to inspection when

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121. *See Stein*, 456 P.2d at 1; *Overton*, 229 N.E.2d at 596. These courts further concluded that not only do school officials have a right to inspect lockers, that right becomes a duty when suspicion arises that something illegal may be contained in a locker. *See Stein*, 456 P.2d at 3; *Overton*, 229 N.E.2d at 597-98; *see also Zamora*, 639 F.2d at 670-71.

122. *See, e.g.*, State v. Engerud, 463 A.2d 934 (N.J. 1983), *rev'd on other grounds sub nom. T.L.O.*, 469 U.S. at 325; *In re* Dumas, 515 A.2d 984 (Pa. Super. Ct. 1986); *see also* S.C. v. Mississippi, 583 So.2d 188 (Miss. 1991); State v. Michael G., 748 P.2d 17 (N.M. Ct. App. 1987); State v. Joseph T., 336 S.E.2d 728 (W. Va. 1985).

123. 463 A.2d 934 (N.J. 1983).

124. *Id.* at 943.

125. 515 A.2d 984 (Pa. Super. Ct. 1986).

126. *Id.* at 985.

127. *See* Com v. Carey, 554 N.E.2d 1199, 1202 (Mass. 1990). *See, e.g.*, Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass. 1992); *In re* Isiah B., 500 N.W.2d 637 (Wis.), *cert. denied*, 510 U.S. 884 (1993).

128. 597 N.E.2d 1363 (Mass. 1992).

129. *See id.* at 1366.

130. 500 N.W.2d 637 (Wis. 1993).

deemed necessary or appropriate eliminated any reasonable expectation of privacy that students may have had in their lockers.[131] Similarly, the Tenth Circuit's holding in *Zamora v. Pomeroy*[132] that students did not have a right to privacy in their lockers as against school officials was based on the fact that the school district had adopted and distributed to students a locker policy stating that lockers remained under the school's jurisdiction and that the school reserved the right to inspect all lockers at any time.[133] Finally, both the New Jersey Supreme Court in *State v. Engerud*[134] and the concurrence in *In re Dumas*[135] noted that had the school established a policy of regularly inspecting students' lockers, students might not have developed a reasonable expectation of privacy.[136]

B. Whether a Dog Sniff Outside a Student's Locker Is a Search

As an alternative to holding that all locker searches fall outside the purview of the Fourth Amendment because students do not have a reasonable expectation of privacy in their lockers, the Supreme Court could decide that dog sniffs outside lockers—more limited searches in that they do not require opening the lockers—do not implicate the Fourth Amendment.[137] Only one court that has addressed the constitutionality of dog sniffs of student lockers has analyzed the issue according to whether a dog sniff outside a student's locker constitutes a search under the

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131. *See id.* at 639, 641.

132. 639 F.2d 662 (10th Cir. 1981).

133. *See id.* at 665.

134. 463 A.2d 934 (N.J. 1983), *rev'd on other grounds sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

135. 515 A.2d 984, 986-88 (Pa. Super. Ct. 1986) (Kelly, J., concurring).

136. *See Engerud*, 463 A.2d at 943; *In re* Dumas, 515 A.2d at 988 (Kelly, J., concurring).

137. The Court could find that a dog sniff outside a student's locker is not a search under one or more of the following rationales: the search only reveals the presence or absence of contraband items for which the student does not possess a legitimate expectation of privacy; the dog's senses merely aid those of school officials, whose actions in wandering the halls in an attempt to detect the smell of illegal drugs would not constitute a search; a student does not have a legitimate expectation of privacy in the air space surrounding his or her locker; a dog sniff of a locker can be carried out quickly with minimal intrusion, embarrassment, and inconvenience. *See supra* text accompanying notes 93-99.

Fourth Amendment.[138] In *Horton v. Goose Creek Independent School District*,[139] the court held that dog sniffs of student lockers are not searches under the Fourth Amendment. In reaching this conclusion, the court noted that the majority view is that dog sniffs of objects do not constitute searches.[140] Furthermore, it relied on the "public smell" doctrine in reasoning that the if school principal wandered past the lockers and smelled marijuana, a search would not have occurred, and the use of the dog's nose to do the same thing has not been treated any differently.[141]

C. *Whether a Dog Sniff Search of a Student's Locker Is Reasonable Absent Individualized Suspicion*

If the Supreme Court should find that suspicionless dog sniffs of student lockers are searches that implicate the Fourth Amendment, it must balance the intrusion of the dog sniff searches on the students' privacy interests against the legitimate interests of school administrators in conducting the search. In balancing these interests, the Court would apply the three-part test it used to analyze the reasonableness of the suspicionless drug testing policy for student athletes in *Vernonia*.[142] Suspicionless dog sniff searches of lockers easily satisfy the *Vernonia* test. First, the

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138. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983). The two other courts that have addressed the constitutionality of dog sniffs of lockers based their decisions on other grounds. In *Zamora v. Pomeroy*, the court upheld dog sniffs of students' lockers on the ground that locker searches in general, without regard to the manner in which they are conducted, are not subject to the Fourth Amendment where there is a school policy permitting such searches. *See Zamora*, 639 F.2d at 662; *see also supra* Part IV.A. Thus, the specific issue of whether dog sniffs of lockers constitute searches was not reached. In *Commonwealth v. Cass*, the court held that a dog sniff of a locker was a search under state law, reasoning that dog sniffs in general are considered searches in that state. *See Cass*, 666 A.2d 313 (Pa. Super. Ct. 1995). However, the court did not analyze the dog sniff under the Fourth Amendment.

139. 690 F.2d 470 (5th Cir. 1983).

140. *See id.* at 476; *see also supra* note 92 and accompanying text.

141. *See Horton* at 477 (citing United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981)); *see also supra* notes 95-97 and accompanying text.

142. The three-part test used by the Supreme Court in *Vernonia* balances the nature of the privacy interest and the character of the intrusion against the nature and immediacy of the governmental concern and the efficacy of the challenged means for meeting it. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2391-96 (1995); *see also supra* text accompanying notes 49-63. Individualized suspicion is not a requirement for a search to be reasonable under the Fourth Amendment. *See Vernonia*, 115 S.Ct. at 2391.

privacy interest with regard to suspicionless dog sniff searches of student lockers is identical to what the Court considered the most important factor affecting the privacy interest in *Vernonia*—the subjects of the search are minors who have been committed to the temporary custody of the school.[143]

Second, as for the character of the intrusion, dog sniff searches of student lockers are much less intrusive than urinalysis testing. Unlike urinalysis testing, dog sniff searches of lockers can be done without any encroachment on the students' persons. Furthermore, dog sniff searches of student lockers do not require opening the lockers and do not reveal the contents of the lockers; rather, they only reveal the presence or absence of contraband.[144]

The third part of the *Vernonia* analysis addresses the nature and immediacy of the school district's concern and the efficacy of the challenged means for meeting it.[145] The nature of the school district's concern is important for most of the same reasons stated in *Vernonia*: school years are the time when the effects of drugs are most severe; drug use affects the entire student body by disrupting the educational process; and the necessity for the state to act is heightened by the fact that the effects of drug use are being felt by children for whom it has undertaken a special responsibility.[146]

As for the immediacy of concern, the Court in *Vernonia* concluded that the district court's finding that a large segment of the student body was "in a state of rebellion" fueled by drug use was more than enough to satisfy the immediacy requirement.[147] Thus, a suspicionless dog sniff search of a locker would undoubtedly be upheld under this part of the test if the school could demonstrate a very serious drug problem requiring immediate action.

However, it may not be necessary to make such an extreme showing. In *Vernonia*, the Court noted that the immediacy reflected in that case was much greater than that shown in two previous cases in which the Court upheld suspicionless drug

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143. *See supra* text accompanying notes 50-52, 74.

144. *See* United States v. Place, 462 U.S. 696, 706-07 (1983) (stating that the investigative procedure of subjecting luggage to a sniff test by a well-trained narcotics dog does not constitute a search within the meaning of the Fourth Amendment).

145. *See supra* text accompanying notes 56-63.

146. *See Vernonia*, 115 S. Ct. at 2395.

147. *See id.*

testing programs.[148] In *Skinner v. Railway Labor Executives' Association*,[149] the Court upheld a suspicionless drug testing program based solely on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test.[150] Additionally, in *Treasury Employees v. Von Raab*,[151] the Court upheld a suspicionless drug testing program for customs officials who either carry arms or are involved in drug enforcement, despite the fact that there was no documented history of drug use by any customs officials.[152] Furthermore, because the *Vernonia* test balances the competing interests of the student and the school, the fact that dog sniff searches of student lockers are less intrusive than the urinalysis testing considered in *Vernonia* may justify a lesser showing of immediacy by the school administrators. Thus, a school district may be able to satisfy the immediacy aspect of the *Vernonia* test on findings of drug use by students nationwide or statewide, or at least upon a showing of a drug problem within the school district.

Finally, as for the efficacy of dog sniff searches of student lockers for meeting the drug problem, using the reasoning applied in *Vernonia*,[153] dog sniff searches effectively address a drug problem reflected in the student body by ensuring that students do not use drugs. Although an argument can be made that dog sniff searches of student lockers do not prevent drug use as effectively as random urinalysis testing, it is unlikely that dog sniff searches of lockers will be held unreasonable for this reason. Dog sniff searches of student lockers are nevertheless a significant deterrent, and they are less intrusive and thus less invasive of the students' privacy than urinalysis testing. Furthermore, locker searches deter drug dealers as well as drug users, whereas urinalysis testing does not deter drug dealers who are not also drug users.

In addition to satisfying the three-factor analysis set forth in *Vernonia*, a policy authorizing suspicionless dog sniff searches of student lockers is consistent with the Court's significant

148. *See id.*; *see also* Treasury Employees v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

149. 489 U.S. 602 (1989).

150. *See id.* at 618-33.

151. 489 U.S. 656 (1989).

152. *See id.* at 673-75.

153. *See supra* text accompanying note 63.

conclusion that, in general, suspicionless drug testing is "better" than testing based on individualized suspicion.[154] Not only are suspicionless dog sniff searches of lockers minimally intrusive, they also do not involve the "badge of shame" and accusations of "arbitrary imposition" that would come with testing for drugs only upon individualized suspicion.[155]

Thus, if the constitutionality of suspicionless dog sniffs of student lockers is brought before the Supreme Court, such dog sniffs should be upheld. The Supreme Court could find that students do not have a reasonable expectation of privacy in their lockers or that dog sniffs outside students' lockers are not searches, and therefore the Fourth Amendment is not implicated. Alternatively, if the Court found that such searches do fall within the purview of the Fourth Amendment, it should find that they are reasonable given the decreased expectation of privacy that public school students possess, the minimal degree of intrusion that the dog sniff searches entail, and the importance of the needs met by the searches.

V. SUSPICIONLESS DOG SNIFFS OF STUDENTS' PERSONS

As with suspicionless dog sniffs of lockers, the Supreme Court's analysis of the constitutionality of suspicionless dog sniffs of students' persons will take one of two approaches. First, the Court may decide that dog sniffs of students' persons do not implicate the Fourth Amendment.[156] Alternatively, the Court may decide that dog sniffs of students' persons are searches under the Fourth Amendment, and therefore apply the three-factor analysis used in *Vernonia* to determine the reasonableness of the searches.[157]

A. Whether a Dog Sniff of a Student's Person Is a Search

As with dog sniffs of student lockers, only a few courts have addressed the issue of whether a dog sniff of a student's person is a search under the Fourth Amendment.[158] In *Horton v. Goose*

154. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995).
155. *See supra* text accompanying notes 66-69.
156. *See infra* Part V.A.
157. *See infra* Part V.B.
158. *See, e.g.*, Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir.

Creek Independent School District,[159] the court distinguished dog sniffs of student lockers, which it held not to be searches, from dog sniffs of students' persons, which it held do constitute searches under the Fourth Amendment.[160] The court distinguished dog sniffs of students' lockers and persons on two bases: first, students' persons, unlike lockers, are not subject to lowered expectations of privacy; and second, "a dog's sniffing technique—*i.e.*, sniffing around each child, putting its nose on the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive."[161] Similarly, the court in *Jones v. Latexo Independent School District*[162] stated that a dog sniff of a student's person is "virtually equivalent to a physical entry into the student's pockets and personal possessions" and therefore constitutes a search.[163]

The Seventh Circuit, in *Doe v. Renfrow*,[164] is the only circuit to have held that dog sniffs of schoolchildren are not searches.[165] In *Renfrow*, the court reasoned that the presence of the dog and its trainer, at the request of school officials, served merely to aid the school administrator in detecting the scent of marijuana.[166] In addition, the court reasoned that public school students experience various intrusions into their classroom environment, and the presence of the dogs for a few minutes was a minimal

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1982), *cert. denied*, 463 U.S. 1207 (1983); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

159. 690 F.2d 470 (5th Cir. 1982).

160. *See id.* at 475-79.

161. *Id.* at 478-79.

162. 499 F. Supp. 223 (E.D. Tex. 1980).

163. *Id.* at 233.

164. 475 F. Supp. 1012 (N.D. Ind. 1979).

165. *Renfrow* has been criticized by the Fifth Circuit and numerous commentators. *See, e.g.*, *Horton*, 690 F.2d at 477; Martin R. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803 (1980); Erica T. Helfer, Comment, *Search & Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U. L.J. 119 (1979); Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980).

166. *See Renfrow*, 475 F. Supp. at 1019-20; *see also supra* text accompanying notes 95-97. The court found that the presence of school officials in classrooms was not a search within the meaning of the Fourth Amendment but, rather, "was a justified action taken in accordance with the *in loco parentis* doctrine." *Renfrow*, 475 F. Supp. at 1019.

intrusion and therefore not significant enough to invoke the Fourth Amendment.[167]

A significant aspect of the court's analysis in *Renfrow* was its use of a balancing test that is very similar to the three-part test used by the Supreme Court in *Vernonia*.[168] The *Renfrow* court stated that a public school student has a diminished expectation of privacy in light of the student's continuous supervision while in school.[169] This diminished expectation of privacy, the court continued, must be balanced against "the school administrator's need to protect all students and the educational process."[170] As for the school administrator's need to search, the court found that the health and safety of all students was threatened by an increase in drug use.[171] Thus, "[w]eighing the minimal intrusion against the school's need to rid itself of the drug problem," the court held that the dog sniff was reasonable and thus not a search for Fourth Amendment purposes.[172]

B. Whether a Dog Sniff Search of a Student's Person Is Reasonable Absent Individualized Suspicion

If and when the constitutionality of suspicionless dog sniffs of students' persons is addressed by the Supreme Court, the Court will almost certainly hold that the dog sniffs implicate the Fourth Amendment and therefore will apply the *Vernonia* three-factor test to determine the reasonableness of the searches.[173] The

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167. *See Renfrow*, 475 F. Supp. at 1020.

168. *See id.* at 1019-22; *supra* text accompanying notes 49-63.

169. *See Renfrow*, 475 F. Supp. at 1022.

170. *Id.*

171. *See id.* The court found that the disciplining of students who used drugs resulted in classroom disruption and loss in learning time, and there was a general feeling among students that peer pressure favored using drugs while at school. *See id.* at 1016.

172. *Id.* at 1022. The court's reasoning in support of its conclusion that dog sniffs of students' persons were not searches is confused. Although the court's rationale that the dogs merely served to aid the senses of school officials and that the dogs presented a minimal intrusion supports its holding, the balancing test the court used is generally only used by courts to determine the reasonableness of action that it has already found to constitute a search. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995). Had the court in *Renfrow* concluded that a dog sniff of a student's person amounted to a search and then analyzed that search for reasonableness, it would not have received such a large degree of criticism from other courts and commentators. *See, e.g.*, Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980).

173. In contrast to locker searches, it is highly unlikely that the Supreme Court

greater degree of intrusion involved with dog sniff searches of students' persons makes the reasonableness of such searches in the absence of individualized suspicion a much more difficult question than the reasonableness of locker searches.[174] With regard to the first and third factors in *Vernonia*, the nature of the student's privacy interest and the nature and immediacy of the school district's concern and the efficacy of the means used for meeting that concern, the analysis applicable to locker searches applies equally to searches of students' persons.[175]

Thus, dog sniff searches of students' persons are significantly different from dog sniff searches of students' lockers in only one important respect: the character of the intrusion. Dog sniffing of of students' persons involves a much greater degree of intrusion than sniffing outside students' lockers. As mentioned in *Horton v. Goose Creek Independent School District* and *Jones v. Latexo Independent School District*, the use of large dogs trained to attack and the dogs' sniffing and possible touching of the child involve an intrusion on dignity and personal security.[176]

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will hold that students' persons are the subjects of lowered expectations of privacy or that dog sniffs of students do not constitute searches. With the exception of *Renfrow*, 475 F. Supp. at 1012, all courts that have addressed the issue of dog sniffs of persons have held or have stated in dicta that a dog sniff of a person is a search. *See supra* note 92 and text accompanying notes 159-63. Furthermore, the *Renfrow* court's reasoning is confused; although it ultimately held that dog sniffs of students' persons were not searches under the Fourth Amendment, part of its analysis in reaching that conclusion was identical to the analysis used by the Supreme Court in *Vernonia* to determine the reasonableness of action found to constitute a search. *See supra* note 172.

174. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980). In *Horton*, the court held that "the intrusion on dignity and personal security" involved with a dog sniff search of a student's person cannot be justified by the need to prevent drug and alcohol abuse in the absence of individualized suspicion. *Horton*, 690 F.2d at 481-82. Likewise, the court in *Jones* held that although the degree of intrusion of a dog sniff search is less extensive than a physical search, the use of large animals trained to attack, the physical touching of the child if the dog becomes overly excited, and the absence of individualized suspicion combined make such searches unreasonable. *See Jones*, 499 F. Supp. at 233-35. On the other hand, the court in *Renfrow* found that the presence of dogs in the classrooms for a few minutes was a "minimal intrusion at best." *Renfrow*, 475 F. Supp. at 1020.

175. *See supra* text accompanying notes 143, 145-53. In addition, with regard to the efficacy of dog sniff searches of students' persons for addressing the problem of drug use, dog sniff searches of students' persons arguably have more of a deterring effect than locker searches because students can avoid detection through locker searches by carrying drugs on their persons.

176. *See Horton*, 690 F.2d at 481-82; *Latexo*, 499 F. Supp. at 233-34.

On the other hand, a dog sniff search of a student's person is less or equally as intrusive as the suspicionless urinalysis testing of student athletes upheld in *Vernonia*. Although the decision was limited to student athletes, the Court itself emphasized the most significant element in its decision was the fact that the policy was implemented in accordance with the school administrators' responsibilities as guardians and tutors of children entrusted to their care.[177]

Nonetheless, a drug policy based on suspicionless dog sniff searches of students' persons would stand a better chance of being found reasonable if the school district were able to demonstrate a serious drug problem within its schools, and failure of other efforts to control the problem. The heightened nature and immediacy of the district's concern could justify the greater degree of intrusion involved with the search. Furthermore, as with suspicionless locker searches, suspicionless dog sniff searches of students' persons do not involve the arbitrariness and "badge of shame" that come with being singled out under a drug testing policy based on individualized suspicion.[178]

If the constitutionality of dog sniff searches of students' persons is raised before the Supreme Court, the reasonableness of the searches will turn on how the Court characterizes the degree of intrusion such searches entail and the effect of the intrusion on the balancing of the three *Vernonia* factors. If the Court adheres to its statement in *Vernonia* that the most important factor is the lowered expectation of privacy of students in public schools, and the school administrators' need to conduct the search is an important one, then the balance should weigh in favor of finding such searches reasonable even if the Court finds the degree of intrusion to be substantial.

CONCLUSION

Although the Supreme Court has only twice addressed the issue of drug searches in public schools, the two cases could signal the beginning of a trend toward expanding the scope of constitutionally permissible drug searches to include suspicionless searches of all students. The Court went from holding in *New*

177. *See Vernonia*, 115 S. Ct. at 2396.
178. *See supra* text accompanying notes 67-69.

Jersey v. T.L.O. that individualized suspicion is usually required for a search of a student to be found reasonable, to holding ten years later in *Vernonia School District 47J v. Acton* that individualized suspicion is not required for a drug testing program for student athletes, and concluding that suspicionless testing is generally preferable to testing based on individualized suspicion.[179] Although the drug testing policy in *Vernonia* was aimed only at student athletes, the Court in making its decision relied much more heavily on the fact that the policy applied to students committed to the temporary custody of public schools than it did on the safety concerns surrounding drug use by athletes.[180] The Court's emphasis on this fact coupled with the increasing incidence of drug abuse among our nation's schoolchildren could be enough to justify a suspicionless drug testing policy for all students.

Dog sniff searches are an important consideration for school districts contemplating drug detection programs because they are less intrusive than urinalysis testing. Both federal and state courts have reached different conclusions on the constitutionality of suspicionless dog sniffs of students' lockers and students' persons.[181] If and when the issue of suspicionless dog sniffs in public schools is brought before the Supreme Court, dog sniffs of student lockers should undoubtedly be upheld. Whether or not the Court holds that the dog sniffs are subject to the Fourth Amendment, they easily pass the three-part test set forth in *Vernonia*.[182] In addition, although the constitutionality of dog sniff searches of students' persons is a closer question, if the school can demonstrate a serious drug problem that it has been unable to control by other means, that may be sufficient to uphold such searches. The heightened nature and immediacy of the school district's concern could justify the greater degree of intrusion that the searches entail.[183]

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179. *See supra* Part II.
180. *See supra* text accompanying notes 74-75.
181. *See supra* Parts IV.B, V.A.
182. *See supra* text accompanying notes 49-63, 143-53.
183. *See supra* text accompanying note 178.