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Are We Becoming a Society of Suspects - Veronia School District 47J v. Action: Examining Random, Suspicionless Drug Testing of Public School Athletes

Nancy D. Wagman

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ARE WE BECOMING A SOCIETY OF SUSPECTS?
VERNONIA SCHOOL DISTRICT 47J v. ACTON:
EXAMINING RANDOM, SUSPICIONLESS
DRUG TESTING OF PUBLIC
SCHOOL ATHLETES

I. INTRODUCTION

The influx of drugs into America's schools has forced educators to implement drug testing programs which were unnecessary only a few years ago. Many of these programs specifically target student athletes as opposed to the entire school population. This targeting of athletes has resulted in an increased number of challenges to school board imposed drug testing, thereby forcing the courts to consider whether random, suspicionless drug testing of public school athletes is constitutional.

1. Mary L. Scott, Is Innocence Forever Gone? Drug Testing High School Athletes, 54 Mo. L. Rev. 425, 425 (1989). According to the United States Department of Education and the Department of Health and Human Services, schools are turning not only toward educational programs to help combat the nation's drug problem but also to drug testing. Id. A 1990 survey found that eight percent, or 1.6 million youths between the ages of 12 and 17 reported using illicit drugs within the past month and 24%, or 4.8 million, reported using alcohol. NAT'L INST. ON DRUG ABUSE, NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE: HIGHLIGHTS 1990, 13, 14 (1991) [hereinafter HIGHLIGHTS], cited in Eugene C. Bjorklun, Ed.D., Drug Testing High School Athletes and the Fourth Amendment, 83 EDUC. L. REP. 913, 913 (1993). For young adults between the ages of 18 and 25, 15%, or 4.3 million, had used illicit drugs and 63%, or 18.1 million, had used alcohol within the past month. HIGHLIGHTS, supra, at 16. Although data from the National Institute indicates a decrease in the use of illicit drugs and alcohol since the late 1970s, when drug use peaked, other studies indicate that there has been no decline in usage. See, e.g., Jessica Portner, Study Showing Rise in Drug Use Called Into Question, XII EDUC. WEEK 8 (Oct. 28, 1992).


3. Charles Feeney Knapp, Note, Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge, 76 IOWA L. REV. 107, 109-10 (1990). Starting in 1987, the federal courts began to consider the constitutionality of student athlete drug test-
In cases where public school athletes are tested for drug use, the Fourth Amendment protections against unreasonable searches and seizures are at issue. Fourth Amendment protection extends not only to conduct of police officers, but also protects students from actions taken by public school officials. All government searches, not just those conducted by law enforcement, are limited by the Fourth Amendment. Traditionally, a Fourth Amendment search would be deemed reasonable only upon the issuance of a warrant based upon probable cause. The Supreme Court has recognized an exception to the Fourth Amendment warrant and probing. Id. at 109. For a discussion of cases on athletic drug testing, see supra note 2 and accompanying text.

4. The Fourth Amendment to the Constitution provides:

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.

U.S. Const. amend. IV.

A Fourth Amendment search is deemed unreasonable if it unjustifiably intrudes upon the privacy of an individual. See, e.g., Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (holding that Fourth Amendment protects against unreasonable infringement of right to personal security); Katz v. United States, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring) (recognizing that Fourth Amendment protects against unreasonable invasion of privacy).

The Supreme Court has recognized that the purpose of this amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. See, e.g., Delaware v. Prouse, 440 U.S. 648, 663 (1979) (permitting police officers to conduct suspicionless road block searches for registrations and driver's licenses); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (holding that checkpoint stops are limited interruption to motorists while vehicle is subjected to cursory visual inspection); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (allowing border stops when officer has reasonable suspicion that car may contain illegal aliens); United States v. Ortiz, 422 U.S. 891, 896-97 (1975) (forbidding border patrol officers, in absence of consent or probable cause, to search private vehicles at traffic checkpoints removed from border); McDonald v. United States, 335 U.S. 451, 455-56 (1948) (holding that search without warrant is not justified unless exigent situation makes search imperative).

5. See generally New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (holding that Fourth Amendment restriction on unreasonable searches applies to searches conducted by public school officials). Although students possess constitutional rights when attending school, including the right to be free from unreasonable searches and seizures, courts have granted school officials greater discretion in searching students than they have granted to police in searching adults or children outside of the school setting. Id. at 340. For further discussion of T.L.O., see infra notes 65-72 and accompanying text.


able cause requirements in cases where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . .”8 A search is reasonable under this exception if the government’s interests outweigh the privacy concerns of the individual.9 A compulsory drug test of an athlete attending a public school is not a law enforcement search. This search is subject to the special needs balancing of interest test.

When a public school requires its athletes to submit to a random drug test, competing issues arise between the student’s right to be free from unreasonable searches and seizures and the school district’s desire to keep drugs out of its schools.10 Vernonia School District 47J v. Acton, the topic of this Note, addressed these concerns and found the random suspicionless drug testing of public school athletes constitutional.11 This Note will examine the various tests created by the Supreme Court to determine the reasonableness of a Fourth Amendment search. Additionally, this Note will discuss how these tests are applied in the school setting. This Note will also explore the holding of the Acton Court and analyze the decision in light of previous caselaw. Finally, this Note will consider the repercussions of Acton and how the Court’s decision will affect future drug testing of public school students.

II. FACTS AND PROCEDURAL HISTORY

In 1989, the school system in Vernonia, Oregon enacted a policy which randomly tested its student athletes for drug use.12 This

8. French, supra note 7, at 138 (quoting T.L.O., 469 U.S. at 351 (Blackmun, J., concurring)). In a school, therefore, requiring a warrant and probable cause would unduly interfere with the maintenance of the educational environment. T.L.O., 469 U.S. at 340.
12. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1516 (9th Cir. 1994), vacated and remanded, 115 S. Ct. 2386 (1995). Vernonia, Oregon is a small logging town of 3,000 people. Id. Between 1985 and 1989, teachers and administrators began to notice an increase in disciplinary problems as well as a glorification of the drug culture. Id. The students formed two groups, the “Big Elk,” which was composed mainly of athletes, and the “Drug Cartel.” Id. Athletic coaches noted a number of incidents involving students who had, or were suspected to have, used drugs in the past. Id. The coaches witnessed some of the problems, and were told of others. Id. Some of these incidents included witnessing students smoking marijuana at a shop across from the high school, essays which described and glorified
policy was initiated after parents, teachers and administrators perceived a dramatic increase in drug use throughout the district's one high school and three grade schools.\textsuperscript{13} School officials concluded that the Vernonia drug culture centered around the schools' student athletes.\textsuperscript{14}

After special classes, speakers, presentations designed to deter drug use and a drug sniffing dog failed to decrease drug use in the schools, district officials began considering a drug testing program.\textsuperscript{15} The Student Athlete Drug Policy (Policy) was implemented in 1989 "to prevent student athletes from using drugs, to protect athletes' health and safety, and to provide drug users with assistance programs."\textsuperscript{16} The Policy requires all students wishing to participate in interscholastic athletics to sign a consent form authorizing the district to perform a drug test on a urine sample provided by the student.\textsuperscript{17}

The Policy also requires all athletes to be tested at the beginning of each season and random sampling of athletes are tested each week throughout the season.\textsuperscript{18} The testing procedure differs

\begin{itemize}
\item student alcohol and drug use, injuries to athletes performing basic maneuvers and a hotel room smelling of marijuana at a wrestling meet. \textit{Id.}
\item Prior to 1985, only a small group of students used drugs and alcohol and there were very few discipline problems in the schools. \textit{Id.} The number of disciplinary referrals in Vernonia schools between 1988 and 1989 more than doubled those reported in the early 1980s. \textit{Acton}, 115 S. Ct. 2386, 2388 (1995). The administration described the increase in the disciplinary problems as reaching "epidemic proportions." \textit{Id.} at 2389.
\item School sports are a major focus of the town's life and student athletes are admired as role models in their schools and in the community. \textit{Id.} at 2388. More than half of the high school and elementary school students participate in District sponsored athletics. \textit{Acton}, 796 F. Supp. at 1356. Not only were athletes included among the suspected drug users, the District believed that they were the leaders of the drug culture. \textit{Id.} at 1357.
\item After receiving the blessing of the administration, a unanimous vote from the parents and the approval of the superintendent, the Vernonia School Board unanimously adopted the Student Athlete Drug Policy in the Fall of 1989. \textit{Id.}
\item Student athlete drug use particularly concerned the District because drug use increases the risk of sports-related injury. \textit{Id.} In addition to its other detriments, drug use affects the motivation, memory, judgment, reaction, coordination and performance of the student athlete. \textit{Id.}
\item The testing requirement is applied to all students wishing to participate in interscholastic activities. \textit{Id.} It is limited to determining whether the student has been using illegal drugs. \textit{Acton}, 796 F. Supp. at 1358.
\item During the season, the names of all students who are participating in sports are placed in a "pool." \textit{Acton}, 796 F. Supp. at 1358. Nearly 10\% of the names are drawn from the pool each week. \textit{Id.} The students whose names are drawn are tested one at a time throughout the day. \textit{Id.}
\end{itemize}
slightly for males and females. A faculty monitor gives the student a testing packet which includes a cup and a vial. The boys, accompanied by a male faculty monitor, go to the urinals in the boys locker room. Each boy, fully clothed, produces a specimen in the cup, while the monitor stands approximately twelve to fifteen feet behind the student. The girls' samples are produced in an enclosed bathroom stall, with the monitor standing outside. Each sample is then returned to the monitor, who checks it for temperature and obvious signs of tampering.

The samples are transferred into the vial and sent to a private company that specializes in urinalysis drug testing. The company tests the samples for traces of amphetamines, cocaine and marijuana. Results are mailed directly to the district's superintendent and are reported by telephone to authorized district personnel, only after that person provides an authorization code to the company. If a test returns positive, a second test is administered as soon as possible to confirm the results. A student who returns two positive tests is given two options. The student may either particip-

19. Acton, 796 F. Supp. at 1358. Each student is required to complete a specimen control form which contains an assigned number. Acton, 115 S. Ct. at 2389. The student must identify prescription medication that he or she is taking by providing a copy of the prescription or a doctor's authorization. Id.

20. Acton, 23 F.3d at 1517. A monitor opens the packet and provides the student with the cup. Acton, 796 F. Supp. at 1558.

21. Acton, 23 F.3d at 1517. Either Mr. Aultman, the school's principal or Mr. Svenson, a coach, serve as the male faculty monitor. Id.

22. Id. At no time does the monitor have a view of the student's genitals. Id. The monitors testified that they generally listen for the normal sounds of urination and do not always watch the student. Id.

23. Acton, 796 F. Supp. at 1358. For the girls, a female school official acts as the monitor. Id.

24. Acton, 23 F.3d at 1517.

25. Id. Security procedures have been designed to protect the chain of possession. Id. The lab technicians are unaware of the identity of the student being tested and rely solely on numbers assigned for identification purposes. Acton, 796 F. Supp. at 1558.

26. Acton, 23 F.3d at 1517. The testing procedure is 99.94% accurate. Id. Traces of other drugs may be tested for at the request of the District, but a particular student's identity does not determine which drugs will be tested. Acton, 115 S. Ct. at 2389.

27. Acton, 115 S. Ct. at 2389. Strict procedures are followed regarding the chain of custody and access to test results. Id. Only certain District officials, the superintendent, principals, vice-principals and the athletic Directors, have access to the results, which are kept for a year or less. Id.

28. Acton, 23 F.3d at 1517. The student's parents are notified after the second positive test. Id. If the second test returns negative, no further action is taken. Id.

29. Id. After two positive tests are returned, a hearing is conducted with the student and the student's parents to determine the options available. Acton, 796 F. Supp. at 1559.
pate in a drug counseling program for six weeks or accept a suspension from the athletic program for the remainder of the current season and the following athletic season. Following a second offense, the student is suspended from participating in athletics for the remainder of the current season and the next athletic season. For the third offense, the student is suspended for the remainder of the current season plus the next two athletic seasons with no opportunity to reduce the penalty. If at any time a student refuses to submit to a drug test, he or she is suspended from the team for the remainder of the athletic season.

During the 1991-1992 football season, James Acton, a seventh grade student, tried out for the Washington Grade School football team. At the first practice he was given a consent form for his parents to sign which would allow the district to test James' urine for drugs. James and his parents decided not to consent to this procedure. Because he refused to submit to the drug tests, James was suspended from interscholastic athletics. There was no evidence to suggest that James had ever used or was using drugs. James' parents subsequently brought an action claiming that the drug testing policy violated James' right to be free from unreasonable searches under both the United States and Oregon Constitutions. The United States District Court for the District of Oregon

30. Acton, 23 F.3d at 1517. The student is retested before beginning the next season for which he or she is eligible. Acton, 796 F. Supp. at 1359.

31. Acton, 23 F.3d at 1517. The principal of the school testified at trial that, although not specified in the written policy, a student athlete who commits a second offense may continue to participate in the athletic program if he or she submits to counseling and weekly urinalysis. Acton, 796 F. Supp. at 1359.

32. Acton, 23 F.3d at 1517.

33. Id.

34. Id.

35. Id.

36. Acton, 23 F.3d at 1517. James and his parents scheduled a meeting with Mr. Aultman, the principal of Washington Grade School. Acton, 796 F. Supp. at 1359. At the meeting, the Actons voiced their objection to the drug testing policy because it required James to submit to a urinalysis in the absence of any evidence that he had ever used drugs or alcohol. Id.

37. Acton, 23 F.3d at 1517. At the meeting between Mr. Aultman and the Actons, Mr. Aultman told the Actons that James would be unable to participate in District sponsored athletics unless he consented to the urinalysis. Acton, 796 F. Supp. at 1359. Ellis Mason, the District superintendent, was informed of the Actons' decision and confirmed that James would not be allowed to participate. Id.

38. Acton, 23 F.3d at 1517. The policy was applied to James in the same way it was applied to all other students who wished to participate in interscholastic athletics and was not based on any individualized suspicion that James had used drugs or alcohol. Acton, 796 F. Supp. at 1359.

39. Acton, 23 F.3d at 1517.
found the drug testing policy reasonable since the school’s compelling interest in protecting its students from drugs outweighed James’ privacy concerns. The United States Court of Appeals for the Ninth Circuit, however, reversed and held that the Policy violated both the United States and Oregon Constitutions. Recognizing the magnitude of this national problem, the United States Supreme Court granted certiorari and vacated the Ninth Circuit’s opinion, thereby affirming the district court’s holding that random, suspicionless drug testing of student athletes is constitutional under the United States Constitution.

III. BACKGROUND

In Acton, the Supreme Court addressed whether the Vernonia School District violated the Fourth Amendment of the United States Constitution by conducting urinalysis drug testing of student athletes without suspicion of drug use. A discussion of the Fourth Amendment is necessary to properly put the Supreme Court’s reasoning in Acton into context.

A. An Overview of Fourth Amendment Jurisprudence

The Fourth Amendment protects individuals from unreasonable searches and seizures of their persons, houses, papers and possessions. An important objective of the amendment is to protect “expectations of privacy” — “the individual’s legitimate expectations that in certain places and at certain times he has the ‘right to be let alone — the most comprehensive of rights and the right most valued by civilized men.’”

40. Acton, 796 F. Supp at 1364. The court found the government’s interest in maintaining a healthy and productive scholastic atmosphere outweighed James’ privacy interest. Id. at 1368.

41. Acton, 23 F.3d at 1527. The Ninth Circuit held that James’ legitimate expectation of privacy in his excretory functions was not outweighed by any interests asserted by the government. Id. at 1526-27.

42. 513 U.S. 571 (1994).

43. See U.S. Const. amend. IV, supra note 4 and accompanying text. The Fourth Amendment only applies when a search is conducted by a government official. Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 613-14 (1989). If the search is undertaken by a private actor the Fourth Amendment and its protections do not apply. Id. at 614.

The initial inquiry in any Fourth Amendment analysis examines whether the activity being questioned constitutes a search. Once a determination is made that a search has occurred within the meaning of the Fourth Amendment, the government must show that the search was reasonable to survive constitutional scrutiny. There are several ways in which a Fourth Amendment search may be reasonable. Traditionally, a reasonable search required a warrant issued upon a showing of probable cause. However, over the years, the Supreme Court has upheld a number of searches which were conducted without the prior procurement of a warrant but with either probable cause or reasonable suspicion. These warrantless searches are considered valid if they fall within one of the narrowly defined exceptions to the search warrant requirement. Exceptions to the warrant requirement include:


46. Kathryn A. Buckner, Note, School Drug Tests: A Fourth Amendment Perspective, 1987 U. ILL. L. REV. 275, 279 (1987). A search is reasonable if it is supported by a warrant and by probable cause under a traditional analysis or whether the interests of the state outweigh the privacy interests of an individual under the balancing analysis. Id. at 279-80.

47. Stuart C. Berman, Note, Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception, 66 N.Y.U. L. REV. 1077, 1084 (1991). The conventional interpretation of the Fourth Amendment is based on the premise that, except for certain exceptions, a search is presumptively unreasonable if not based upon a warrant issued upon probable cause. Id. at 1084-85. Under the less restrictive "general reasonableness" interpretation, the Court uses a balancing test to determine the validity of a search. Id. at 1086.

48. Id. at 1085-86. A warrant is required to reduce the likelihood that law enforcement officers or other governmental officials will arbitrarily invade an individual’s privacy. Buckner, supra note 46, at 280. A warrant may be obtained from an impartial magistrate if a government official supplies specific information describing who or what is to be searched. FED. R. CRIM. P. 4(a)-(c), 41(a)-(c). The magistrate must determine whether probable cause exists to believe an offense was committed, and whether the search or seizure is justified. Buckner, supra note 46, at 280. Probable cause has been defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

A search may still be unreasonable, however, even with the prior procurement of a warrant based on probable cause. See Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that despite probable cause to arrest, use of deadly force was unreasonable when officer correctly believed suspect to be unarmed); Winston v. Lee, 470 U.S. 753, 759 (1985) (noting that court compelled surgery may be unreasonable even if likely to produce evidence of crime).

49. See infra notes 50-60 and accompanying text for a description of valid warrantless searches.

50. Buckner, supra note 46, at 280.
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searches incident to a lawful arrest;\textsuperscript{51} searches where exigent circumstances such as "hot pursuit"\textsuperscript{52} or imminent destruction of evidence exist;\textsuperscript{53} automobile searches;\textsuperscript{54} searches where the evidence is in plain view;\textsuperscript{55} searches based on the consent of the person being searched;\textsuperscript{56} stop and frisk searches;\textsuperscript{57} border searches;\textsuperscript{58} inventory searches;\textsuperscript{59} and administrative searches.\textsuperscript{60}

In addition, the Court has approved some searches by balancing the extent of the intrusion on the individual's privacy against the government's legitimate interest.\textsuperscript{61} When the governmental interests are found to outweigh an individual's privacy interests, a search conducted without a warrant may still be constitutional.\textsuperscript{62}

\begin{itemize}
  \item 51. Schmerber v. California, 384 U.S. 757, 770-71 (1966) (warrant not necessary to perform blood test on suspected drunk driver during search incident to driver's arrest).
  \item 53. Cupp v. Murphy, 412 U.S. 291, 295-96 (1973) (police may take fingernail scrapings from suspect without warrant to prevent destruction of evidence).
  \item 54. Carroll v. United States, 267 U.S. 132, 153-54 (1925) (police may search car if individualized suspicion of wrongdoing exists, since warrant requirement is impractical for easily mobile object).
  \item 55. Payton v. New York, 445 U.S. 573, 587 (1980) (seizure of property in plain view is reasonable where there is probable cause to associate property with criminal activity).
  \item 56. Washington v. Chrisman, 455 U.S. 1, 9-10 (1982) (consent which is freely and intelligently given will validate warrantless search); Schneckloth v. Bustamonte, 412 U.S. 218, 247-48 (1973) (holding that police officer may search arrestee and area within arrestee's control with individual's consent).
  \item 57. Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (search is reasonable if officer has reasonable suspicion that suspect was engaged in criminal activity and possibility existed that person was "armed and presently dangerous").
  \item 61. See Berman, supra note 47, at 1086-87. A search is unreasonable if it unjustifiably intrudes on the privacy of an individual. Knapp, supra note 3, at 129-30 (citing National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989)). See also, Terry, 392 U.S. at 20-21 (requiring that government's interest justifying search must be balanced against intrusion on individual); Katz v. United States, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring) (Fourth Amendment protects against unreasonable interference of privacy).
  \item 62. French, supra note 7, at 126. When a search is conducted without a search warrant, the court must determine whether the search is otherwise reasonable and
\end{itemize}
Searches conducted without either a warrant or probable cause have been held constitutional when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable . . . ." Therefore, some searches are reasonable even in the absence of a warrant, individualized suspicion or probable cause.

1. Development of the Special Needs Test

The special needs exception emerged in New Jersey v. T.L.O. In T.L.O., the Supreme Court addressed the Fourth Amendment rights of students in the public school context. The T.L.O. Court upheld the search of a high school student based upon a reasonable suspicion that the student had violated school rules. A school principal's warrantless search of a student's purse was characterized as reasonable by the Court. By applying a balancing whether the search falls within one of the exceptions to the warrant requirement.

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63. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). The "special needs balancing of interest" standard involves a two-step analysis:

(1) a showing that governmental interests presenting special needs beyond law enforcement justify departure from the warrant and probable cause requirements, [and] (2) a weighing of the personal privacy interest that is invaded by the search with the governmental interests that is furthered to determine whether the search is reasonable.


66. Id. at 332-33. See also Berman, supra note 47, at 1077 (recognizing T.L.O. as first case implicating Fourth Amendment rights of students).

67. T.L.O., 469 U.S. at 340. T.L.O. extended the administrative search warrant exception to searches of the property of schoolchildren. Id. The T.L.O. Court approved using the reasonable suspicion standard as opposed to probable cause. Id. at 340-41. The Court concluded that "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." Id. at 341.

68. Id. at 327-28. A teacher at a New Jersey high school took T.L.O. to the principal's office after discovering her and a friend smoking cigarettes in a school lavatory in violation of a school rule. Id. at 328. After T.L.O. denied to the assistant vice principal that she had been smoking, he requested to see her purse. Id. The assistant vice principal inspected the purse and found cigarettes, rolling paper, marijuana, a pipe, plastic bags, money and index cards with names of people who owed T.L.O. money. Id.

The items found in T.L.O.'s purse were subsequently turned over to the police who brought criminal proceedings against T.L.O. Id. at 328-29. In juvenile court, T.L.O. argued that the vice principal's search was illegal and moved to suppress both the evidence found in her purse and a confession made to the police,
test, the Court disregarded the traditional Fourth Amendment requirements of a warrant and probable cause. Under this judicially created "special needs balancing of interest test," a school's need to conduct a search is balanced against a student's reasonable expectation of privacy. The Court recognized that if the Fourth Amendment restrictions on unreasonable searches and seizures applied to searches conducted by public school officials, these restrictions must be lessened in order to preserve order and maintain an adequate educational environment. is significant because it justified the suspension of traditional Fourth Amendment restrictions on governmental searches when the "special needs" of the government make the probable cause and warrant requirements impractical.

B. The Special Needs Test and Random Drug Testing

In 1989, the Supreme Court held, in two employment cases, that the government's needs outweigh the privacy rights of individ-
uals and allowed for suspicionless drug testing in the workplace.\footnote{73} The Court revisited the special needs exception in \textit{Skinner v. Railway Labor Executives' Association}.\footnote{74} In \textit{Skinner}, the Court addressed the constitutionality of mandatory employee drug testing by an employer without the prior procurement of a warrant and without the establishment of either probable cause or reasonable suspicion.\footnote{75} The Court held that when "special needs" are implicated, a drug test can be constitutional even in the absence of both probable cause and individualized suspicion.\footnote{76}

Based upon results of a Federal Railroad Administration (FRA) study of drug and alcohol use by railroad personnel,\footnote{77} the FRA promulgated regulations requiring blood and urine tests to be conducted on employees following certain major train accidents, impact accidents or other incidents involving a fatality to an on-duty railroad employee.\footnote{78} The \textit{Skinner} Court initially determined that the collection and subsequent analysis of the biological samples required or authorized by the regulations constituted a search of the person subject to the Fourth Amendment.\footnote{79} The Court acknowledg-


\footnote{74. 489 U.S. 602 (1989). Previously, the Supreme Court further developed the special needs test in the following cases: Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (holding parole officer's search of probationer's house was constitutional because of government's "special need" in probation system); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (holding search and seizure of papers in doctor's office may have been constitutional because of hospital's "special need" in operation of psychiatric ward).}

\footnote{75. \textit{Skinner}, 489 U.S. at 621-24.}

\footnote{76. \textit{Id.} at 619-20. The Court recognized the government's interest in regulating railroad employees as a special need that justified departure from the warrant and probable cause requirements. \textit{Id.} at 620.}

\footnote{77. 50 Fed. Reg. 31,508-09, 31,514-25 (1985).}

\footnote{78. \textit{Skinner}, 489 U.S. at 609. The FRA found that from 1972-1983, "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor" and that these accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars)." \textit{Id.} at 607 (quoting 48 Fed. Reg. 30,726 (1983)).}

A "major train accident" was defined as any train accident that involves: (1) a fatality; (2) the release of hazardous material accompanied by an evacuation or a reportable injury; or (3) damage to railroad property of $500,000 or more. 49 C.F.R. § 219.201(a)(1) (1989). An "impact accident" was defined as a collision that results in a reportable injury or damage to railroad property of $50,000 or more. \textit{Id.} § 219.201(a)(2).

\footnote{79. \textit{Skinner}, 489 U.S. at 616-17. The Court upheld its recognition that a compelled intrusion into the body for blood to be tested for alcohol content and the chemical analysis which follows to constitute a search. \textit{Id.} at 616. \textit{See}, e.g., Winston v. Lee, 470 U.S. 753, 760 (1985) (holding court ordered surgery to remove bullet is search); Schmerber v. California, 384 U.S. 757, 767-68 (1966) (testing blood for alcohol is search). Similarly, the breath test authorized by the railroad's regula-
edged that collecting and testing urine constituted a search because it "intrudes upon expectations of privacy [as to medical information and the act of urination] that society has long recognized as reasonable."80

In determining whether a suspicionless drug test is reasonable, the Skinner Court recognized that the reasonableness test normally requires balancing the governmental interest against the individual's privacy interests.81 Although the government's search in Skinner lacked both a warrant and probable cause, the Court upheld the drug and alcohol tests promulgated by the FRA as reasonable under the Fourth Amendment since the government's compelling safety interest outweighed the individual's privacy interest.82 In making this determination, the Court applied the special needs ex-
ception, thereby extending it to include the need for a safe railroad transportation system.83

In National Treasury Employees Union v. Von Raab,84 a case decided the same day as Skinner, the Court went one step further by upholding a urine testing program conducted without any evidence of individualized or targeted class drug use.85 In Von Raab, the United States Custom Service implemented a drug screening program which required urinalysis tests on Custom Service employees seeking transfers or promotions to positions either having a direct involvement in drug interdiction, requiring the incumbent to carry firearms or to handle "classified" material.86

The Court held that the public interest in the program must be balanced against the individual’s privacy concerns implicated by the test to determine whether a warrant, probable cause or some level of individualized suspicion is required in the particular context.87 The Court found that employees entrusted with the responsibilities of drug interdiction and firearm possession have a diminished expectation of privacy due to the nature of their duties.88 In essence, the Court held that a search is reasonable if there are valid public

85. In Skinner, the Court approved urine testing of a class of people, railroad workers. Skinner, 489 U.S. at 633. In Von Raab, however, the Court stated that:
   The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program’s validity . . . . The Service’s program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.
86. Von Raab, 489 U.S. at 674-75.
87. Id. at 665-66. The Court determined that, as in Skinner, the Custom Service’s goal of deterring drug use and preventing the promotion of drug users to sensitive positions presented a special need that justified departure from the warrant and probable cause requirements. Id. at 666.
88. Id. at 672. The Von Raab Court said that employees who are involved with drug interdiction should expect inquiries into their fitness and probity. Id. This is true for employees who must carry firearms as well. Id. Since their jobs depend on their judgment and dexterity, they cannot reasonably expect to keep from the Custom Service information that bears directly on their fitness. Id.

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interests that outweigh the interference with an individual's privacy rights. 89

Skinner and Von Raab promoted the use of a balancing test for determining whether a drug testing program is reasonable under the Fourth Amendment. 90 The Court found that prior drug use or suspicion of drug use of the individual or group to be tested is not an essential prerequisite to the drug testing of urine. Even though both Skinner and Von Raab involved drug testing in employment situations, their principles have been extended to encompass students in the public school setting. 91

IV. NARRATIVE ANALYSIS

In Vernonia School District 47J v. Acton, 92 the Supreme Court applied the special needs analysis of Skinner and Von Raab to the testing of student athletes. The Court determined that drug testing high school athletes without probable cause or individualized suspicion was a reasonable search within the Fourth Amendment. 93 By examining the intrusion of the search into a student's privacy and balancing this against the school's interest in safety for its students, the Court concluded that random, suspicionless drug testing is permissible. 94 The dissent argued that the District's Policy was too broad and too imprecise to be reasonable under the Fourth Amendment. 95

89. Id. at 671. The Court agreed with the government's assertion that the public should not bear the risk of employees who suffer from impaired perception and judgment. Id. at 670-71.

90. See Skinner, 489 U.S. at 619; Von Raab, 489 U.S. at 665 (discussing balancing test used in Fourth Amendment analysis).


Skinner established four propositions which apply to urine testing high school athletes: (1) urine testing is a search subject to the Fourth Amendment; (2) a search warrant is not required for urine testing; (3) probable cause is not required; and (4) individualized suspicion of the person to be tested is not a necessary prerequisite to urine testing. Charles A. Palmer, Drugs vs. Privacy: The New Game in Sports, 2 MARQ. SPORTS L.J. 175, 184 (1992).


93. Id. at 2397.

94. Id. at 2396.

95. For a full discussion of the dissenting opinion, see infra notes 140-176 and accompanying text.
A. The Majority Opinion

Justice Scalia, writing for the majority, first provided a brief explanation of the Fourth Amendment, including its requirements and restrictions. The Court noted its previous recognition of "special needs" existing in the public school context and proceeded to base its decision on that precedent. Ultimately, the Court determined that a random suspicionless drug test conducted in a public school setting was reasonable and hence constitutional for three reasons. First, students have a low expectation of privacy in communal locker rooms and restrooms. Second, the program was designed to be as unobtrusive as possible. Third, the Policy

96. Justice Scalia was joined in the majority opinion by Chief Justice Rehnquist and Justices Kennedy, Thomas, Ginsburg and Breyer.

First, the Court established that the testing of urine required by the Policy is a search subject to scrutiny under the Fourth Amendment. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2390 (1995) (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989)). See also National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (recognizing urine testing as search). For a full discussion of Skinner, see supra notes 74-83 and accompanying text; for a full discussion of Von Raab, see supra notes 84-89 and accompanying text.

Second, the Court reiterated that once an activity is deemed a search, to be constitutional, it must be reasonable. Acton, 115 S. Ct. at 2390-91. Reasonableness is measured by "balancing a [search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." Skinner, 489 U.S. at 619 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)). Generally, reasonableness requires the obtaining of a warrant with a showing of probable cause. For a discussion of the history of the warrant and probable cause requirements, see supra notes 47-48 and accompanying text. However, a warrant is not required for all government searches to be reasonable and, therefore, probable cause is not always required either. Acton, 115 S. Ct. at 2390-91. A search without probable cause may be constitutional when "special needs" make the warrant and probable cause requirement infeasible. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

97. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). In the public schools, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." Id. at 340-41. Justice Scalia noted that the search of T.L.O.'s purse was based on individualized suspicion but acknowledged that "the Fourth Amendment poses no irreducible requirement of such suspicion." Id. at 342 n.8 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).

Also, suspicionless searches have been upheld with respect to railroad personnel involved in train accidents, customs officers who carry arms or who are involved in drug interdiction and automobile checkpoints seeking illegal immigrants, contraband or drunk drivers. See Skinner, 489 U.S. at 633; Von Raab, 489 U.S. at 672; Martinez-Fuerte, 428 U.S. at 562; and Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 447 (1990).

98. Acton, 115 S. Ct. at 2392-93.

99. Id. at 2393-94.
served an important interest in combating drug use in an effective manner.100

1. The Nature of the Privacy Interest

Relying on T.L.O., the Court recognized that the Fourth Amendment only protects privacy interests that society recognizes as legitimate.101 The Court explained that legitimacy varies with the context of the search.102 The Court emphasized that in this case the subjects of the search are children who have been committed to the temporary custody of the state as schoolmaster and, therefore, a privacy interest that might be considered legitimate out of school might not be considered legitimate in school.103

The foundation of the Court's opinion was that unemancipated minors lack some of the most fundamental of rights.104 In finding that children do not have the same rights as adults, the Court quoted T.L.O., stating that "a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."105 The Court concluded that Fourth Amendment rights are different in public schools than elsewhere, thus the inquiry into reasonableness must take this into

100. Id. at 2395-96.
102. Id. (citing T.L.O., 469 U.S. at 337).
103. A legitimate expectation of privacy depends on the context in which it is asserted. T.L.O., 469 U.S. at 337. For example, the definition of legitimate varies if a person is in his home, at work, in a car or in a public place. Acton, 115 S. Ct. at 2391. Also, a person's privacy interest with respect to the state depends on the legal relationship between that person and the state. Id. See, e.g., Griffin v. Wisconsin, 483 U.S. 868, 873-75 (1987) (recognizing that relationship between parolee and state justifies parolee's diminished expectation of privacy).
104. Acton, 115 S. Ct. at 2391. For example, the Court noted that minors lack the right to self-determination, including the right to come and go at will. Id. In addition, children are continually under the control of their parents or guardians and once a child is placed in school, he or she is entrusted to the care of the teachers and administrators of those schools. Id. A parent:
may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.
Id. (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)).
105. Acton, 115 S. Ct. at 2392 (quoting T.L.O., 469 U.S. at 339). The Court emphasized the fact that T.L.O. held that the nature of the student/teacher relationship is custodial and tutelary, allowing for a degree of supervision and control over children that could not be exercised over free adults. Id.
In reaching its decision that school children have a diminished expectation of privacy, the Court relied on the fact that children are routinely required to submit to various physical exams and vaccinations. These examinations, the Court reasoned, supported the proposition that "students within the school environment have a lesser expectation of privacy than members of the population generally."

Next, the Court emphasized that athletes, in particular, have a diminished legitimate expectation of privacy. The Court stated that athletes shower and change for activities in a public school locker room and, therefore, by choosing to play a sport, athletes voluntarily subject themselves to higher regulation than that imposed on non-student athletes. In this sense, the Court concluded that student athletes are similar to adults working in closely regulated industries.

106. Id. The Court noted that children do not "shed their constitutional rights . . . at the schoolhouse gate" but the nature of a child's rights must take into consideration what is appropriate for children in school. Id. (quoting Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969)). See also, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school publications in certain circumstances); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (holding that public school can prohibit use of offensive and vulgar language in public discourse); Goss v. Lopez, 419 U.S. 565, 581-82 (1975) (holding that right to due process for suspended student includes only informal discussion about misconduct shortly after its occurrence).

107. Acton, 115 S. Ct. at 2392.

108. Id. (quoting T.L.O., 469 U.S. at 348 (Powell, J., concurring)). According to health officials, most public schools provide for vision, hearing, dental, dermatological, as well as scoliosis checks at certain grade levels. COMMITTEE OF SCHOOL HEALTH, AMERICAN ACADEMY OF PEDIATRICS, SCHOOL HEALTH: A GUIDE FOR HEALTH PROFESSIONALS 2 (1987). Also, all 50 states require public school students to be vaccinated against diphtheria, measles, rubella and polio. UNITED STATES DEPT. OF HEALTH & HUMAN SERVICES, PUBLIC HEALTH SERVICE, CENTERS FOR DISEASE CONTROL, STATE IMMUNIZATION REQUIREMENTS 1991-1992, p.1.

109. Acton, 115 S. Ct. at 2392. Justice Scalia noted that "[s]chool sports are not for the bashful." Id. Students are required to change into athletic clothing before practices or events and shower afterwards in a school locker room. Id. Justice Scalia described the locker rooms in Vernonia as "typical:" without individual dressing rooms; unseparated shower heads lined up against a wall; and toilet stalls without doors. Id. at 2393. Also, there is "an element of 'communal undress' inherent in athletic participation." Id. at 2393 (quoting Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988) (upholding random, suspicionless drug testing of high school athletes)).

110. Acton, 115 S. Ct. at 2993. For example, students who participate in interscholastic athletics must submit to preseason physicals, acquire insurance coverage or sign an insurance waiver, maintain a minimum grade point average and comply with the rules established for each sport by the coach and athletic director of the school. Id.

111. Id. Like these adults, student athletes have a reason to expect intrusions upon normal rights and privileges, including privacy. Id. See Skinner v. Railway
2. The Character of the Intrusion

Having discussed the narrow scope of the legitimate expectation of privacy of student athletes, the Court turned to the character of the intrusion. According to the Court, the degree of intrusion depends on how the testing authority obtained the sample. Under the District's Policy, where the male students produce samples at a urinal along a wall and females in an enclosed stall, the privacy interests compromised by the process of obtaining the urine samples are minimal.

In addition to the act of urination's infringement on a student's privacy, urinalysis testing discloses information concerning the state of the subject's body and the materials he or she has ingested. The Court, however, pointed out the significance that the Policy tests only for the presence of drugs and not for other health problems. Important to the Court's decision was the fact that the drugs the Policy tests for were limited, the results of the tests were disclosed only to a small class of people and the results were not turned over to law enforcement authorities.

Interestingly, the Court agreed that the Policy was intrusive because it required students to identify, in advance, any prescription medication they were taking. However, the Court ultimately rejected this argument, citing *Skinner*, because requiring advance disclosure of medical conditions is not per se unreasonable. Further,
by reading the plain language of the Policy, the Court concluded that a student may choose to disclose the requested information in a confidential manner, for example, in a sealed envelope to the testing lab, thereby preserving the student’s privacy. Therefore, according to the Court, as in Skinner, the invasion into a student’s privacy was insignificant.

3. The Nature and Immediacy of the Governmental Concern, and the Efficacy for Meeting It

In this section of the opinion, the Court initially criticized the Oregon District Court’s and the Ninth Circuit’s reliance on compelling government interests justifying searches. Characterizing this reliance as a mistake, the Court emphasized that “the phrase ‘compelling state interest,’ in the Fourth Amendment context, [does not] describe a fixed, quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here?” Rather, the Court noted that the compelling state interest standard describes an interest important enough to justify the particular search, in light of other factors which show that the search intruded upon a genuine expectation of privacy. However, even though a relatively high degree of governmental concern might not be necessary, the Court concluded that even if it was, the School District met it in the present case.

be construed as a greater invasion of privacy than to the government personnel analyzing the tests in Skinner was not important enough to the Court to deem the search too invasive. Acton, 115 S. Ct. at 2394.

120. Acton, 115 S. Ct. at 2394. Even though the District took medical information from the students at the time of the test, that practice was neither set forth in nor required by the Policy. Id. The Policy said that “[s]tudent athletes who . . . are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor’s authorization) prior to being tested.” Id. The Court interpreted this to mean that a student could provide medical information directly to the lab. Id.

121. Id.

122. Id. at 2394-95. The compelling state interest found in Skinner was the government’s interest in preventing railroad accidents. Skinner, 489 U.S. at 628. In Von Raab, the interest was in insuring fitness of customs officials to interdict drugs and handle firearms. Von Raab, 489 U.S. at 670. Based on these two cases, the Oregon District Court and the Ninth Circuit both said that the District’s program of testing without individualized suspicion called for a compelling need. See Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1363 (D. Or. 1992), 23 F.3d 1514, 1526 (9th Cir. 1994), vacated and remanded, 115 S. Ct. 2386 (1995).

123. Acton, 115 S. Ct. at 2394.

124. Id. at 2394-95.

125. Id. at 2395.
Again, comparing the facts of Acton to Skinner and Von Raab, the Court held that deterring drug use by schoolchildren is at least as important an interest as enhancing efficient enforcement of the nation's laws against the importation of drugs or deterring drug use among engineers and trainmen. More important to the Court was that the necessity of deterring drug use is enhanced by the fact that it concerns not just individuals at large, but children for whom the State has undertaken a special responsibility of care and direction. In addition, the Policy is directed towards drug use by athletes, where there is an increased risk of harm to the athlete or to others.

The Court, discussing the efficacy of the means used for addressing the problem, concluded that a drug problem fueled by the "role model" effect of athletes' drug use would be best addressed by making sure that athletes do not use drugs. Referring to the Actons' argument that less intrusive means were available to the District, namely testing only students who were suspected of drug use, the Court responded that it has never mandated that only the least intrusive search can be reasonable under the Fourth Amendment. In addition, the Court found substantial difficulties with testing based on suspicion of drug use. First, parents might not

126. Id. The effects of drug abuse are the most severe to school aged children. Id. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound ...." Richard A. Hawley, The Bumpy Road to Drug-Free Schools, 72 PHI DELTA KAPPAN 310, 314 (1990). In addition, the whole education process is disrupted when a school becomes drug infested. Acton, 115 S. Ct. at 2395. For a discussion of the government interests found in Skinner and Von Raab, see supra notes 79, 81-85 and accompanying text.

127. Acton, 115 S. Ct. at 2395.

128. Id. The drugs tested for by the Policy impair judgment, reduce reaction time, lessen the perception of pain and pose physical risks to the athlete. Id. The Court accepted the District's findings that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion" and that "disciplinary action had reached 'epidemic proportions.'" Id. (quoting Acton, 796 F. Supp. at 1357). For Justice O'Connor's criticisms of the District's findings, see infra notes 150-153 and accompanying text. The Court characterized the problem in Vernonia as an even bigger crisis of greater proportion than what existed in Skinner and Von Raab. Id. Skinner upheld the testing without proof that a problem even existed in the particular railroads whose employees were subject to the test. Skinner, 489 U.S. at 607. In Von Raab, there was no evidence of drug use by any customs officials, yet the testing was found constitutional. Von Raab, 489 U.S. at 673, 683 (Scalia, J., dissenting).

129. Acton, 115 S. Ct. at 2395-96.

130. Id. at 2396. See Skinner, 489 U.S. at 629 n.9 (citing Illinois v. Lafayette, 462 U.S. 640, 647 (1983)) (holding that reasonableness of search does not hinge on existence of less intrusive means); United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 n.12 (1975) (recognizing that less restrictive alternative arguments could pose insurmountable barriers to all search and seizure power).
accept drug testing of their children which is conducted in an accusatory manner.\footnote{131} Second, teachers would be required to serve a new function as spotters of drug abuse, a function for which they are not trained.\footnote{132} Finally, the Court concluded that testing based on "suspicion" of drug use would be worse than the random, suspicionless procedures required by the Policy.\footnote{133}

In conclusion, the Court found that the diminished expectation of privacy of student athletes, the relative unobtrusiveness of the search and the severity of the problem helped by the search, mandated a finding that the Policy is reasonable and, therefore, constitutional.\footnote{134} Reiterating the fact that this case involved the government's responsibilities in a public school system as guardian and tutor of children under its care, the Court limited its holding by cautioning that suspicionless drug testing might not pass constitutional muster in other contexts.\footnote{135} The relevant question still is whether a reasonable guardian and tutor would undertake such a search.\footnote{136} Since the decision of the Ninth Circuit rested upon the premise that the search was unconstitutional under the Fourth Amendment and, therefore, unconstitutional under the Oregon Constitution, the Court remanded the case to the court of appeals in light of its decision.\footnote{137}

\footnote{131. Acton, 115 S. Ct. at 2396. According to Justice Scalia, accusatory drug testing creates a "badge of shame." \textit{Id.} Also, testing by suspicion only, bears the risk that teachers will arbitrarily test children who are troublesome but not necessarily drug users. \textit{Id.} According to the Court, this would increase the expense of defending lawsuits. \textit{Id.}}

\footnote{132. \textit{Id.} (citing Skinner, 489 U.S. at 628) (recognizing that drug impaired individuals rarely display outward signs which are detectable by ordinary lay persons and in many cases, not even by physicians).}

\footnote{133. \textit{Id.}}

\footnote{134. \textit{Id.}}

\footnote{135. \textit{Id.}}

\footnote{136. Acton, 115 S. Ct. at 2396. Based on the findings of the District, the Court concluded that this testing was one that a reasonable guardian would undertake. \textit{Id.} at 2397. The Court also pointed to the fact that no parents objected to the testing of the students when a public meeting was held to discuss the issue. \textit{Id.}}

\footnote{137. Acton, 115 S. Ct. at 1297. On remand from the Supreme Court, the Ninth Circuit affirmed the district court and held that the Oregon Supreme Court would not offer greater protection under the Oregon Constitution. Acton v. Vernonia School Dist. 47J, No. 92-35520, 1995 WL 546206, at *1 (9th Cir. Sept. 15, 1995). In dissent, Judge Reinhardt argued that this affirmation of the Supreme Court's decision contradicted the court's previous declaration that "it is highly likely that [the Oregon Constitution] will be found to offer more protection." \textit{Id.} (quoting Acton, 23 F.3d at 1518).}
B. The Concurrence

Justice Ginsburg, in a brief concurrence, reiterated that the Policy only applies to students who voluntarily participate in interscholastic athletics.\(^{138}\) According to Justice Ginsburg, the Court's opinion reserved the question whether the District could constitutionally impose drug testing on all students attending school.\(^{139}\)

C. The Dissent

In dissent, Justice O'Connor, joined by Justices Stevens and Souter, criticized the majority's analysis of the Fourth Amendment and its requirements. According to Justice O'Connor, the majority dispensed with the amendment's individualized suspicion requirement based on policy grounds.\(^{140}\) The dissent found that in making its arguments, the majority sidestepped important countervailing privacy concerns, such as blanket searches posing a greater threat to liberty than individualized suspicion searches.\(^{141}\) According to the dissent, even if the majority's policy arguments were valid, the Court should not have based its decision on policy grounds when suspicionless searches have generally been considered unreasonable under the Fourth Amendment.\(^{142}\) In *Vernonia*, it was not proven that a suspicion based regime would have been

\(^{138}\) *Acton*, 115 S. Ct. at 2386 (Ginsburg, J., concurring). Justice Ginsburg pointed to the recognition by the Court that the most severe punishment allowed under the Policy is suspension from participation in extracurricular athletics. *Id.* (Ginsburg, J., concurring). The results of the tests are not turned over to the authorities and other than suspension from athletics, no further punishment is sought. *Acton*, 796 F. Supp. at 1358-59.

\(^{139}\) For a discussion of this broader question being reserved, see *infra* note 192 and accompanying text.

\(^{140}\) *Acton*, 115 S. Ct. at 2397 (O'Connor, J., dissenting). First, Justice O'Connor disagreed with the majority's explanation that there was no concern that school officials might act arbitrarily since every student athlete is being tested. *Id.* (O'Connor, J., dissenting). Second, the dissent denounced the majority for finding that a broad based search regime diminishes the accusatory nature of the search. *Id.* (O'Connor, J., dissenting).

\(^{141}\) *Id.* (O'Connor, J., dissenting). Blanket searches pose a greater threat to liberty since they involve testing more people than searches based on individualized suspicion. *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting). Also, suspicion based searches provide potential targets with control over whether they will be searched since a person can avoid the search by not acting in a suspicious way. *Acton*, 115 S. Ct. at 2397 (O'Connor, J., dissenting). Since the ideal way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of individualized suspicion are minimal. *Id.* at 2397-98 (O'Connor, J., dissenting).

\(^{142}\) *Acton*, 115 S. Ct. at 2398 (O'Connor, J., dissenting). According to Justice O'Connor, a judge should decide, on policy grounds, which type of testing is better or worse. *Id.* (O'Connor, J., dissenting).
ineffective. The dissent disapproved of making any exceptions to the requirements of the Fourth Amendment.

The dissent criticized the majority's analysis because it ignored the long standing history of the Fourth Amendment. Relying on the fact that blanket searches are traditionally "intolerable and unreasonable," the dissent indicated that even though the Policy treated all athletes alike, evenhanded treatment is not a substitute for individualized suspicion. The dissent admitted, however, that when the Fourth Amendment was adopted, individualized suspicion was not required for all searches. However, those searches that did not require individualized suspicion share two characteristics: (1) they affected only one person at a time and (2) they could have been avoided by refraining from wrongdoing.

Next, the dissent acknowledged that in the past the Court has upheld several evenhanded searches, but only after balancing the invasion of privacy against the government's interest. These searches, which were held constitutional, however, could be distin-

143. Id. (O'Connor, J., dissenting).
144. Id. (O'Connor, J., dissenting).
145. Acton, 115 S. Ct. at 2398 (O'Connor, J., dissenting). "For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment." Id. (O'Connor, J., dissenting).
146. Id. at 2399 (O'Connor, J., dissenting). In Carroll v. United States, the Court held that a warrantless car search was unreasonable unless supported by some level of individualized suspicion. 267 U.S. 132, 153-54 (1925). The Carroll Court clearly indicated that evenhanded treatment was not a substitute for individualized suspicion. Id. (O'Connor, J., dissenting). The Court said that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." Id. (O'Connor, J., dissenting).

Therefore, the dissent concluded that the touchstone of the Fourth Amendment is the protection of privacy, not evenhanded treatment. Acton, 115 S. Ct. at 2399 (O'Connor, J., dissenting). In criminal law, mass, suspicionless searches, however evenhanded, are generally unreasonable if the search is more than minimally intrusive. See Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 447 (1990) (upholding brief roadblock searches for intoxication); Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979) (invalidating evenhanded patdown searches of all patrons of tavern even where there was probable cause to believe drug deal was going on). Accordingly, if evenhandedness was enough to justify a search regime, the warrant clause, which presupposes that individualized suspicion is non-negotiable, would be irrelevant. Acton, 115 S. Ct. at 2400 (O'Connor, J., dissenting).
147. Acton, 115 S. Ct. at 2399 (O'Connor, J., dissenting). For example, searches conducted incident to an arrest did not require individualized suspicion.

149. Acton, 115 S. Ct. at 2400 (O'Connor, J., dissenting).
guished because they (1) involved searches not of a personally intrusive nature\textsuperscript{150} or (2) involved searches in unique contexts such as prisons.\textsuperscript{151} Realizing that searches like those found constitutional in \textit{Skinner} and \textit{Von Raab} cannot be explained by the grounds stated above, the dissent distinguished those cases by pointing out that the Court upheld the suspicionless search only after recognizing the Fourth Amendment's preference for suspicion based searches and then demonstrating legitimate reasons why such a testing standard would be unworkable under the circumstances.\textsuperscript{152} The dissent noted that the negative implication of the search approved by the Court in \textit{Skinner} was that, if an individualized suspicion requirement would not place the government's objective in jeopardy, then the requirement should not be eliminated.\textsuperscript{153} The dissent also recognized that, in cases where searches were allowed without the requirement of suspicion, testing based on suspicion was impractical because not testing could yield serious consequences for many people.\textsuperscript{154}

According to the dissent, the environment in Vernonia stood in marked contrast to those places where random searches are allowed.\textsuperscript{155} Justice O'Connor criticized the majority's failure to discuss the historical and precedential facts which established that individualized suspicion is "usually required" under the Fourth Amendment and that, for intrusive personal searches, exceptions

\begin{itemize}
  \item \textsuperscript{151} See, e.g., Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (upholding visual body cavity searches of prisoners following contact visits).
  \item \textsuperscript{152} \textit{Acton}, 115 S. Ct. at 2401 (O'Connor, J., dissenting). For example, the \textit{Skinner} Court recognized that "some quantum of individualized suspicion" is "usually required" under the Fourth Amendment. \textit{Skinner}, 489 U.S. at 624 (quoting Martinez-Fuerte, 428 U.S. at 560). This requirement was built into the \textit{Skinner} test, i.e. "[i]n 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." \textit{Id.} (O'Connor, J., dissenting). Thus, in \textit{Skinner}, an individualized suspicion requirement would have been impractical because of the chaotic scene following a railway accident. \textit{Id.} at 631 (O'Connor, J., dissenting).
  \item \textsuperscript{153} \textit{Acton}, 115 S. Ct. at 2401 (O'Connor, J., dissenting). \textit{See also} \textit{Von Raab}, 489 U.S. at 665-66.
  \item \textsuperscript{154} \textit{Acton}, 115 S. Ct. at 2402 (O'Connor, J., dissenting). \textit{See}, e.g., Camara v. Municipal Court, 387 U.S. 523, 535 (1967) (recognizing that even one violation of safety code could cause "fires and epidemics [that] ravage large urban areas"); \textit{Skinner}, 489 U.S. at 628 (recognizing that even one train wreck can lead to "great human loss"); \textit{Von Raab}, 489 U.S. at 670, 674, 677 (recognizing that even one customs official involved in drugs could result in breach of national security or in delivery of "sizable drug shipmen[t]" which could injure thousands).
  \item \textsuperscript{155} \textit{Acton}, 115 S. Ct. at 2402 (O'Connor, J., dissenting).
\end{itemize}
are made only when a suspicion-based scheme would be ineffective.\textsuperscript{156} By not mentioning individualized suspicion, the majority essentially ignored the requirement and its history in Fourth Amendment jurisprudence.\textsuperscript{157}

The dissent disagreed with the Court's acceptance of the School District's findings that concerns about a suspicion based testing program were outweighed by concerns about the adversarial nature of such a program.\textsuperscript{158} For instance, the dissent noted that there are safeguards against abuses of a suspicion based policy.\textsuperscript{159} Further, schools already conduct their disciplinary procedures in an adversarial way.\textsuperscript{160} The dissent rejected the District's concern with a suspicion based policy and argued that the District did not pay enough attention to the less intrusive nature of such a policy.\textsuperscript{161} After explaining its disappointment with the District's findings, Justice O'Connor concluded that even if the District was correct, its conclusions are irrelevant because the individualized suspicion requirement is grounded in such strong historical and legal precedent and should not be disturbed.\textsuperscript{162}

\begin{itemize}
  \item \textsuperscript{156} \textit{Id.} (O'Connor, J., dissenting). According to the dissent, the majority never mentioned individualized suspicion regardless of whether a warrant and probable cause are required. \textit{Id.} (O'Connor, J., dissenting).
  \item \textsuperscript{157} \textit{Id.} (O'Connor, J., dissenting). "The Court treat[ed] a suspicion-based regime as if it were any run-of-the-mill, less intrusive alternative — that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability." \textit{Id.} (O'Connor, J., dissenting).
  \item \textsuperscript{158} \textit{Acton}, 115 S. Ct. at 2402 (O'Connor, J., dissenting). For the majority's discussion of the District's findings, see supra notes 133-34 and accompanying text.
  \item \textsuperscript{159} \textit{Acton}, 115 S. Ct. at 2402 (O'Connor, J., dissenting). Reasonable suspicion would still be required in the school context for a drug test to be administered and any discomfort from a false accusation could be minimized by keeping the process confidential. \textit{Id.} (O'Connor, J., dissenting). With regard to reasonable suspicion being necessary in the school context, Justice O'Connor noted that the Court's previous decision in \textit{New Jersey v. T.L.O.} would be controlling. \textit{Id.} (O'Connor, J., dissenting). See \textit{T.L.O.}, 469 U.S. at 340-42. For a full discussion of \textit{T.L.O.}, see supra notes 65-72 and accompanying text.
  \item \textsuperscript{160} \textit{Acton}, 115 S. Ct. at 2402-03 (O'Connor, J., dissenting). Disciplinary rules in the schools already require teachers and many administrators to investigate student wrongdoing; to make determinations about whether any wrongdoing occurred; and to impose punishment. \textit{Id.} at 2402 (O'Connor, J., dissenting). Adding suspicion based drug testing to these rules would be only minor according to the dissent. \textit{Id.} (O'Connor, J., dissenting).
  \item \textsuperscript{161} \textit{Id.} at 2403 (O'Connor, J., dissenting). A suspicion based scheme would be less intrusive because it would invade the privacy of only a few students rather than many and would give potential search targets control over whether they will be searched. \textit{Id.} (O'Connor, J., dissenting).
  \item \textsuperscript{162} \textit{Id.} (O'Connor, J., dissenting). Individualized suspicion, can only be forsaken when a suspicion based search would be ineffectual. \textit{Id.} (O'Connor, J., dissenting). According to the dissent, the record did not support these findings. \textit{Id.} (O'Connor, J., dissenting).
\end{itemize}
Characterizing the majority as "misconstru[ing] the fundamental role of the individualized suspicion requirement in Fourth Amendment analysis," the dissent criticized the majority for never seriously analyzing the practicality of an individualized suspicion requirement for Vernonia. 163 The dissent asserted that individualized suspicion may only be forsaken when it is ineffectual, however, a school is exactly the kind of place where individualized suspicion would work. 164 For example, Justice O'Connor pointed to evidence in the record that demonstrated that the students who were acting suspiciously were readily identifiable and thus could have been tested under a reasonable suspicion standard. 165 Having a suspicion based testing scheme, therefore, might have solved Vernonia's drug problem while preserving the Fourth Amendment rights of students in the town. 166

Recognizing the counter-argument that the Fourth Amendment is more lenient with respect to school searches, Justice O'Connor asserted that it is not so permissive that mostly innocent students may be denied the Fourth Amendment's most basic protection against personally intrusive, blanket searches. 167 Next, the dissent characterized the choice of cases relied upon by the major-

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163. Id. (O'Connor, J., dissenting).

164. Id. (O'Connor, J., dissenting). In most schools, all of the potential people to be searched are under the constant supervision of teachers, administrators and coaches. Id. (O'Connor, J., dissenting). See T.L.O., 469 U.S. at 339 ("[A] proper educational environment requires close supervision of schoolchildren.").

165. Acton, 115 S. Ct. at 2403 (O'Connor, J., dissenting). The evidence of a drug problem consisted of stories of particular students acting in ways that gave rise to a reasonable suspicion of drug use and would have justified a search under T.L.O.. See T.L.O., 469 U.S. at 340-42. For example, there was testimony that small groups of students were observed smoking marijuana at a restaurant across the street from school during school hours, another group of students were caught skipping school and using drugs at one of the student's houses, several students admitted their drug use to school officials, one student was sent home by his teacher for being drunk at school and another student was observed dancing and singing at the top of her lungs during class. Acton, 115 S. Ct. at 2403 (O'Connor, J., dissenting).

166. Acton, 115 S. Ct. at 2403-04 (O'Connor, J., dissenting). Justice O'Connor noted that a suspicion based testing regime could have been supplemented by having parents of the school children encourage their children to voluntarily submit to the drug testing program. Id. at 2404 (O'Connor, J., dissenting). The dissent concluded that under the circumstances in Vernonia, a mass, suspicionless search regime is categorically unreasonable. Id. (O'Connor, J., dissenting).

167. Id. (O'Connor, J., dissenting). Justice O'Connor pointed to the Court's explanation that schools have traditionally had special responsibilities with respect to children and this necessitates a degree of constitutional discretion. See supra notes 101-111 and accompanying text discussing the nature of the privacy interest. Such discretion explained the search upheld in T.L.O. even though the same children enjoy more protection in the non-school setting. T.L.O., 469 U.S. at 348 (Powell, J., concurring).
ity as "ironic," since they affirmed that schools have considerable discretion in responding to particularized wrongdoing.\(^{168}\) In addition, the dissent disagreed with the majority's reliance on physical examinations and vaccinations since they are not conducted to find evidence of wrongdoing and are non-accusatory in nature.\(^{169}\)

In addition to the belief that suspicionless drug testing is unjustified by the facts, the dissent found two additional Fourth Amendment flaws in the Policy. First, no evidence was presented of a drug problem at Washington Grade School, where James Acton attended school when the suit was initially brought.\(^{170}\) Second, the school's choice of student athletes as the individuals to subject to these tests appears to have been grounded in the belief that such a policy was the only kind of testing regime that would pass constitutional scrutiny.\(^{171}\) Although there was evidence of a drug problem in the high school, there was minimal evidence presented that drug-related sports injuries were a problem.\(^{172}\) This anomaly reinforced Justice

\(^{168}\) *Acton*, 115 S. Ct. at 2405 (O'Connor, J., dissenting). For example, in *T.L.O.*, school officials were given discretion in investigating particularized wrongdoing, in *Ingraham v. Wright*, school officials were given discretion in punishing particularized wrongdoing and in *Goss v. Lopez*, school officials were given discretion in choosing procedures by which particularized wrongdoing is punished. *T.L.O.*, 469 U.S. at 341; *Ingraham v. Wright*, 430 U.S. 651, 676 (1977); *Goss v. Lopez*, 419 U.S. 565, 570-71 (1975).

\(^{169}\) *Acton*, 115 S. Ct. at 2405 (O'Connor, J., dissenting). Physical exams and vaccinations are like blanket searches. *Id.* (O'Connor, J., dissenting). The dissent noted, however, that a suspicion requirement for searches of this sort would not make sense. *Id.* (O'Connor, J., dissenting). In addition, the doctors performing the exams are not searching for anything in particular. *Id.* (O'Connor, J., dissenting). Furthermore, a physical exam based on suspicion would not make sense either because what those exams are testing for, i.e. heart conditions, do not exhibit observable behavior like drug use. *Id.* (O'Connor, J., dissenting).

\(^{170}\) *Id.* at 2406 (O'Connor, J., dissenting). Washington Grade School includes grades seven and eight, but the witnesses who testified at trial were high school coaches and teachers. *Id.* (O'Connor, J., dissenting). Justice O'Connor found no evidence of a drug problem at the grade school except for a declaration by the principal that the drug problems experienced in Vernonia did not start at the high school level. *Id.* (O'Connor, J., dissenting).

\(^{171}\) *Id.* (O'Connor, J., dissenting). The original program was designed to search all students involved in any extracurricular activity. *Id.* (O'Connor, J., dissenting). Justice O'Connor opined that the real reason behind the Policy was to stop the rise of drug related disorder and disruption in the classrooms and not to prevent injuries of athletes. *Id.* (O'Connor, J., dissenting). In addition, the principal of the school, Randall Aultman, has been quoted as saying that the reason the requirement was restricted to athletes was because "we were afraid we'd be sued to hell if we went to all students." Aaron Epstein, *School Athlete Drug Tests Upheld, PHILA. INQ.*, June 27, 1995, at A1. *See also Nightline: Supreme Court Hears Student Drug Test Case* (ABC television broadcast, March 28, 1995) (transcript on file with author) [hereinafter *Nightline*].

\(^{172}\) *Acton*, 115 S. Ct. at 2406 (O'Connor, J., dissenting). In fact, the record disclosed only one injury to a wrestler that could be attributed to drug use. *Acton*, 796 F. Supp. at 1357. Pressed at oral argument about the number of athletes in-
O'Connor's argument that it would have been reasonable to focus testing on the class of students found to have violated school rules and who were also suspected of drug use.\footnote{173}

In conclusion, the dissent noted that "the greatest threats to our constitutional freedoms come in times of crisis."\footnote{174} Therefore, a judge's job is to make decisions based on the record alone.\footnote{175} Ultimately, Justice O'Connor found the District's Policy of suspicionless testing of all student athletes swept too broadly and too imprecisely to be reasonable under the Fourth Amendment.\footnote{176}

V. CRITICAL ANALYSIS

The Supreme Court's determination that a drug test conducted in a public school system without suspicion of any wrongdoing is reasonable and thus constitutional ignored the long standing history of the Fourth Amendment and the elements which are traditionally required for a search to be reasonable. In addition, the Court's decision created a new Fourth Amendment standard, leaving many important questions unanswered.

According to the Court, a child's legitimate expectation of privacy differs from that of the general population.\footnote{177} This proposition effectively demotes children to second class citizens.\footnote{178} More specifically, the Court held that student athletes have an even lesser expectation of privacy than their fellow students.\footnote{179} Athletes were

\footnote{173. Acton, 115 S. Ct. at 2406 (O'Connor, J., dissenting). A suspicion based Policy would test fewer students and give students the control as to whether they are tested, i.e. by behaving properly. \textit{Id.} (O'Connor, J., dissenting).}

\footnote{174. \textit{Id.} at 2407 (O'Connor, J., dissenting).}

\footnote{175. \textit{Id.} (O'Connor, J., dissenting). Sometimes, the governmental response to a real crisis will serve as the compelling state interest, so to make sure the government is not overreacting to a crisis, it is important to base judgments on the record before the Court. \textit{Id.} (O'Connor, J., dissenting).}

\footnote{176. \textit{Id.} (O'Connor, J., dissenting).}

\footnote{177. The Court stated that in determining the legitimacy of an expectation of privacy, the fact that the searched parties are children who are under the temporary custody of the state must be considered. \textit{Acton}, 115 S. Ct. at 2391.}

\footnote{178. Rich Radford, \textit{Athletes Rights Are The Latest Casualty of War on Drugs, Virginia-Pilot & Ledger-Star}, June 28, 1995, at C1 (quoting Jerry Sheehan, legislative director of American Civil Liberties Union).}

\footnote{179. \textit{Acton}, 115 S. Ct. at 2392. The majority held that school sports are not for the bashful since athletes must change and shower for their respective activities in a public school locker room. \textit{Id.} In addition, school athletes are susceptible to more regulation since they voluntarily play a sport. \textit{Id.} at 2393. However, in a town like Vernonia, where entertainment opportunities are limited, athletics are
chosen in Vernonia, in part, because that was the only way that the
school board's Policy would pass Fourth Amendment scrutiny. 180

The majority also emphasized that because public school chil-
dren are required to submit to physical exams before entering
school, at least with regard to medical exams, students have a lower
expectation of privacy. 181 However, the school environment cannot
justify the Court's use of lowered Fourth Amendment requirements
in a balancing test involving students' interests in the integrity of
their bodies. 182 While the unique nature of schools may require
students to have a lower expectation of privacy in the items they
commonly display to their fellow students and teachers, this is not
so of their bodily functions. 183 According to Justice Scalia, one of
the reasons the Court upheld the Acton search was the minimal na-
ture of the intrusion. 184 This reasoning contradicts precedent
which clearly held that "[t]here are few activities in our society

very important to the community. Acton v. Vernonion Sch. Dist. 47J, 796 F. Supp.
1354, 1356 (D. Or. 1992). According to some commentators, student athletes are
no different than other students except for the fact that they play sports. Kevin B.
Blackistone, Drug-test Discrimination; Supreme Court Ruling to Allow Screening of High

180. Appearing on Nightline, Randall Aultman, the school's principal, justified
testing students who participated in extra-curricular activities on the basis that "[i]
we had gone for the entire school population, I know that we'd have been in court
faster than two years." Nightline, supra note 171.

The generalization that athletes have a lower expectation of privacy supports a
warped view that this nation has on the importance of athletes. Radford, supra
note 178. Athletes were chosen in Vernonia because they were the most logical
guinea pig and the District could justify its Policy as an appropriate means of pro-
tecting the safety of athletes. Id. Athletes often get breaks, but drug testing is not
the price to be paid for special treatment. Id. Even at the high school level, ath-
letes are often placed on pedestals and are considered role models. Id. In some
cases, student athletes get privileges that other students do not, such as extra atten-
tion from teachers and guidance counselors. Id.

181. Acton, 115 S. Ct. at 2992. The dissent was correct when it asserted that
subjecting public schools to the Fourth Amendment requirements in order to re-
quire students to undergo a physical before entering school would simply not
make sense. Id. at 2405 (O'Connor, J., dissenting). The problem with this propo-
sition is that school exams are designed to make sure that students are in good
health and not to search for illegal activity. Id. at 2405 (O'Connor, J., dissenting).

182. Id. at 2406 (O'Connor, J., dissenting).

183. Acton, 23 F.3d 1514, 1525 (9th Cir. 1994). A student's interest in the
privacy of their urine is no less important because they are in school. Id. Courts
have held that "the Fourth Amendment applies with its fullest vigor against any
intrusion on the human body." Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d
470, 478 (5th Cir. 1982).

184. The Court admitted, however, that the Skinner decision held that urinal-
ysis testing invades "an excretory function traditionally shielded by great privacy." Skinne
more personal or private than the passing of urine." 185 The testing of urine is not an insignificant privacy interest. A search of bodily fluids is certainly more intrusive than the search of a purse, as upheld in T.L.O., where it was determined that reasonable suspicion is necessary for such a search to be constitutional. 186 Although Justice Scalia authored the majority opinion in Acton, he dissented in Von Raab, saying "I think it is obvious that [this search] is a type of search particularly destructive of privacy and offensive to personal dignity." 187

The dissent pointed out the importance of basing a decision solely on the particular facts of the record and not reacting to the demands of society, especially when dealing with a case that confronts issues arising during times of crisis. 188 The majority, however, consistently referred to the fact that the testing regime was constitutional because it pertains to children, yet also reasoned that privacy interests were supposedly lessened because only athletes were being tested. 189 When the Court talked about athletes, it established that drug testing athletes is important because of the increased risk of physical harm to the user and other players. 190 Despite this reasoning, the testing lab did not test for steroid or alcohol abuse, drugs which are common among athletes. 191

The Court's decision left many critical Fourth Amendment questions unanswered through its failure to create any definitive

185. Id. at 617 (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (1987)).
187. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting). Justice Scalia's contradiction of himself is difficult to justify given that adults surely have more freedom to choose where they work than children have freedom to choose where they go to school.
188. Acton, 115 S. Ct. at 2407 (O'Connor, J., dissenting).
189. Id. at 2392. See also supra note 111 and accompanying text.
190. It was established at oral argument before the Supreme Court that since the program was implemented in 1989, only two or three tests have been positive. Oral Arg., supra note 172 at *4-5. This serves as proof that either the Policy was very effective or that athletes were not the real problem in Vernonia at all. Id. at *18.
191. One commentator has noted that the risk of harm to student athletes is not as critical as the risk of harm in other professions. Blackistone, supra note 179, at C14. "[T]hsn't as if [athletes] are passenger airplane pilots or have their fingers on the red button. They are baseball players, wrestlers, high jumpers, gymnasts." Id.
190. The lab which tests the samples routinely tests for traces of amphetamines, cocaine and marijuana. Acton, 115 S. Ct. at 2389. At oral argument, Timothy Volpert surmised that alcohol was not tested for because alcohol is easily detected on the breath and by its effect on behavior. Oral Arg., supra note 172, at *19. Steroids, on the other hand, were not tested for because steroid testing is very expensive. Id. at *20.
standards or boundaries for school boards to follow. For example, the decision failed to address the broader question of whether a school district could subject all of its students to random drug testing. \(^{192}\) Although Justice Scalia cautioned against extending this decision, it could easily be interpreted to permit such suspicionless testing of an entire student body. \(^{193}\)

The Court’s opinion answered the question left open in *T.L.O.*, concerning whether individualized suspicion is required before a school official may search a student. \(^{194}\) By answering this question in the negative, the Court has effectively ignored the Fourth Amendment and its requirements, at least in the school environment.

### VI. IMPACT

Millions of American children attend public schools. The majority’s decision to uphold random suspicionless drug tests has created a gaping hole in the Fourth Amendment rights of students, and, more specifically, student athletes. Because of the Court’s decision, millions of students who participate in interscholastic sports may be required to submit to an intrusive bodily search. This search will be required regardless of any indication of drug abuse. While drug abuse in America’s schools is clearly an enormously important topic and efforts to counter drug use through education and intervention should and must continue, chipping away at the foundation of the Constitution is an unacceptable way to solve this problem. Every potential Michael Jordan, Steve Young or Chris Evert, by the time they are twelve, will have to forfeit their privacy to prove their innocence. \(^{195}\)

\(^{192}\) It was alluded to at oral argument by Mr. Volpert that under the facts in *Vernonia*, the School District probably made a sufficient case for drug testing the entire student body. Oral Arg., *supra* note 172, at *11. When this issue had been previously tried however, it has failed. Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist., 510 A.2d 709, 713 (N.J. Super. Ct. Ch. Div. 1985) (invalidating random testing of entire school population).

\(^{193}\) For a discussion of authors suggesting the broader implications of the opinion, see *infra* notes 196-198 and accompanying text. Such broad interpretation of this opinion suggests that Justice Ginsburg’s concurrence cautioning against extension will not be followed. *Acton*, 115 S. Ct. at 2397 (Ginsburg, J., concurring).

\(^{194}\) *T.L.O.*, 469 U.S. at 342 n.8.

\(^{195}\) In fact, Wayne Acton, James’ father, testified at trial that “[suspicionless testing] sends a message to children who are trying to be responsible citizens . . . that they have to prove that they are innocent . . . and I think that kind of sets a bad tone for citizenship.” *Acton*, 115 S. Ct. at 2405 (O’Connor, J., dissenting) (quoting Trial Trans. at 9). In the American system of jurisprudence an accused
It is unclear what the final impact of this decision will be, since the Court's decision does not suggest any guidelines for school districts. After the decision was handed down, for instance, speculation that schools may use the ruling as a first step toward testing the entire student body for drugs abounded.\textsuperscript{196} The decision left open the broader question of whether a school district could subject all of its students to random drug testing.\textsuperscript{197} According to some, the decision also gives permission to public colleges and universities to test their athletes for drug use.\textsuperscript{198} Moreover, in another school it might be a different class of students, not athletes, who are suspected of drug use — will drug testing this group be constitutional?\textsuperscript{199} What about schools that cannot afford a policy that tests all of the school’s athletes? Are they forced to choose only one or two sports to test and, if so, which sports will be included or exempted? What about non-contact sports such as golf, where the risk of injury due to drug use is low if it exists at all? Also, can performing drug tests be implemented as a preventative measure in schools that do not have a drug problem?

Unfortunately, many questions were left unresolved by the Court's decision, and it is uncertain how far a school board will be allowed to go in trying to prevent drug abuse. By not imposing any specific guidelines for school implemented drug testing and by merely holding that a urine test is unintrusive and students have a diminished expectation of privacy, the opinion suggests that all of the above searches might be constitutional.

\textsuperscript{196} Aaron Epstein, \textit{School Athlete Drug Tests Upheld}, PHILA. INQ., June 27, 1995, at A1 (quoting Timothy Volpert saying that the Court’s reasoning could support testing the general school population); Paul M. Barrett, \textit{Court Says Schools Can Do Random Drug Tests}, WALL. ST.J., June 27, 1995, at B1.

\textsuperscript{197} Epstein, \textit{supra} note 196. According to the deputy general counsel for the National School Board Association, drug testing could easily be extended to students participating in extracurricular activities. \textit{Id}. Further, the ruling would potentially justify a high school program that grants parking spaces only to students who consent to drug searches of their cars. \textit{Id}. \textit{See also} Linda Greenhouse, \textit{High Court Upholds Drug Tests For Some Public School Athletes}, N.Y. TIMES, June 27, 1995 at A1. The types of behavior which the \textit{Acton} decision could reach, beyond athletics, are both unpredictable and frightening.

\textsuperscript{198} Barrett, \textit{supra} note 196.

\textsuperscript{199} The United States District Court for the District of Oregon recognized that in some large metropolitan high schools the students who engage in drug use may not participate in or have contact with student athletes. \textit{Acton v. Vernon School Dist. 47J}, 796 F. Supp. 1354, 1365 n.8 (D. Or. 1992). A drug program at these schools may not be constitutional. \textit{Id}. at 1364-65.
It is additionally unclear what kind of effect this testing regime will have on deterring drug use. To avoid drug testing, a student only has to avoid non-compulsory athletic activity. Will this policy weed out abusers or make them think twice about playing sports? There will always be some athlete who thinks he or she can beat the system.200 A policy which requires individualized suspicion would surely be more pragmatic in this regard. Furthermore, the Court’s decision was allegedly based upon concern for the safety of a school’s athletes since the consequences of drug abuse and threat of injury were deemed more severe to them than for the general school population. Following the Court’s logic, if safety for children is enough of an interest to justify drug testing, a more practical approach would allow a state to drug test all teenagers as they get their driver’s licenses. Statistically, more teenagers die or are injured from automobile accidents than from getting hurt on the playing field.201 Although the Court voiced its concern for athletes as a special class of students, the Policy implemented in Vernonia does not test for steroids which are drugs frequently used by athletes, nor does it test for alcohol.

The war on drugs continues to be fought at the expense of our nation’s children. James Acton’s only crime was wanting to play for his seventh grade football team. Although the problem of drugs in America’s schools is very real, it is tragic that the Supreme Court believes the problem has reached the point where it is necessary to infringe upon the constitutional rights of all student athletes to detect a few offenders. After this decision, it appears as though the Court is moving even closer to universal drug testing of all citizens. The essence of the Fourth Amendment used to be that the government was forbidden from invading a citizen’s privacy without a clear basis to think he or she had done something wrong. The Acton decision, however, effectively teaches our nation’s school chil-

200. Examples of players who think they can beat the system exist at the college and professional levels. One need look no further than University of Miami football player Warren Sapp and baseball players Darryl Strawberry, Steve Howe and Dwight Gooden. Radford, supra note 178.

201. According to the National Highway Traffic Safety Administration, no age group has more accidents than the 26 million teen drivers in the United States. Teresa M. McAleavy, Road to Freedom A Driver’s License Comes With New Responsibilities and Expense, THE REC., Oct. 9, 1995, at E1. Statistics show that of every 1,000 teen drivers, about 170 have accidents each year. Id. Teenagers, who make up about seven percent of the population, make up 17% of the victims of fatal crashes. Id.

Although there are no statistics on deaths in organized sports, the American Academy of Pediatrics reports that the number of fatalities in high school football was four in 1985. Dick Kaukas, Children vs. Sports Injuries; Better Equipment Keeps Risks In Minor League, COURIER-J., Mar. 26, 1995, at 1H.
dren a frightening lesson: government officials can invade our personal privacy without suspicion of wrongdoing. 202 Now, instead of free people, we are becoming “a society of suspects.” 203

Nancy D. Wagman

202. Tracey Maclin, Court is Off Base on Student Drug Tests, NEWSDAY, Aug. 9, 1995, at A32. Essentially, the opinion makes a mockery of prior declarations by the Court that students “do not shed their constitutional rights at the schoolhouse gate.” Id.
