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Message in a Bottle: The United States Supreme Court Decision in Vernonia School District 47J v. Acton

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I. INTRODUCTION

Vernonia School District 47J v. Acton[1] presented the United States Supreme Court with the issue of whether the Student Athlete Drug Policy (the "Policy") adopted by School District 47J (the "District") in Vernonia, Oregon mandating random urinalysis drug testing for all students participating in school-sponsored athletics violates the Fourth[2] and Fourteenth[3] Amendments to the United States Constitution. The Court held that the District's Policy was reasonable and, therefore, constitutional.[4]

Twelve-year-old James Acton was not an accused drug user.[5] However, he was not allowed to play football on his school's team because he refused to submit a urine sample for drug testing purposes.[6] James was in the seventh grade at Washington Grade School when his school implemented the drug testing policy. He wanted to play football for his school, but James and his parents refused to sign the consent form authorizing the school to perform drug testing. The Actons explained to the school principal that they objected to the testing because there was no evidence James was using drugs. The principal agreed that James was not suspected of using drugs and explained that every member of the team had to be tested even if they were not suspected drug users.[7]

After this meeting the Actons filed suit seeking declaratory and injunctive relief from enforcement of the school district's Policy. The Actons alleged the Policy violated the Fourth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Oregon Constitution.[8]

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1. 115 S. Ct. 2386 (1995).

2. The Fourth Amendment states in relevant part "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

3. The Fourteenth Amendment states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

4. *Acton*, 115 S. Ct. at 2396.

5. Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1363 (D. Or. 1992).

6. *Id.* at 1359.

7. *Id.*

8. Or. Const. art. 1, § 9 provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon

The district court balanced James's legitimate expectations of privacy against the "district's need to maintain order and protect its students from injury by use of the least intrusive means available to it."[9] The district court made four important findings of fact: (1) drugs were prevalent in Vernonia School District 47J; (2) school athletes were using drugs and playing sports unsafely during their use; (3) athletes were role models in the small, rural community; and (4) athletes were bragging about drug use to others.[10] The district court also found that the school district proved its drug testing program served a "compelling need," a requirement the court read previous Supreme Court cases to include. Therefore, the district court found the drug testing program constitutional. The Ninth Circuit Court of Appeals reversed, finding that the balance weighed in favor of James's privacy interests. The Ninth Circuit, also reading the prior United States Supreme Court cases to require a compelling government need, found no such need present.[11] The United States Supreme Court reversed the Ninth Circuit's ruling.[12]

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probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

An analysis of the Policy in terms of the Oregon Constitution is beyond the scope of this note. The Supreme Court spoke on this issue only in remanding the case stating:

> The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9 of the Oregon Constitution. Our conclusion is that the former holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2397 (1995).

On remand, the Ninth Circuit denied a request to certify to the Oregon Supreme Court the question of whether Vernonia's drug testing policy should be struck down under the Oregon Constitution and stated that "[p]ursuant to the United States Supreme Court's decision in Vernonia School District v. Acton and because we are of the opinion that the Oregon Supreme Court would not offer greater protection under the provisions of the Oregon Constitution in this case, we affirm the judgment of the district court." Acton v. Vernonia School Dist. 47J, 66 F.3d 217 (9th Cir. 1995) (citations omitted). Thus, the Policy will be implemented in Vernonia's public schools.

The one dissenting judge who would grant the motion to certify stated:

> I am not prepared to say that the Oregon Supreme Court will decide that the rights of its school children must be shaped by the national frenzy over the war-on-drugs. To the contrary, given its history of rugged individualism and its concern for constitutional rights, Oregon might well opt for a more generous and enlightened reading of its constitution.

Acton v. Vernonia School Dist. 47J, 66 F.3d 217, 220 (9th Cir. 1995) (Reinhardt, J., dissenting).

9. Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1364 (D. Or. 1992).

10. *Id.* at 1363.

11. Acton v. Vernonia School Dist. 47J, 23 F.3d 1514, 1526 (9th Cir. 1994).

12. Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386 (1995). In so holding, Justice Scalia wrote for the majority with Chief Justice Rehnquist and Justices Kennedy, Thomas, Ginsburg, and Breyer joining. Justice Ginsburg filed a concurring opinion. Justice O'Connor dissented with Justices Stevens and Souter joining.

A. Background Facts of Acton

Vernonia, Oregon is a small logging town that offers few entertainment choices.[13] School sports play an important part of daily life and school athletes are respected and admired.[14] Before the early 1980s, there were no real discipline problems at Vernonia schools. However, in the mid-to-late 1980s, the staff "began noticing a startling and progressive increase in students' use of drugs and alcohol."[15] The teachers were asked to watch for signs of drug or alcohol abuse to help the administration judge the extent of the problem. As time went on, the "glamorization"[16] and drug and alcohol use became more obvious. Students bragged about drug use and disrupted the classroom. The situation was intolerable.[17]

Drug and alcohol use were also prevalent in the athletic program. Student athletes drank alcohol on the bus after a game. A coach testified at trial that students' use of drugs would slow down their reaction time and increase their risk of injury.[18]

The administration conducted an investigation and found that the leaders of the school's drug culture were the leading student athletes. To combat the problem, the school implemented educational programs, special classes, special speakers, seminars and theatrical presentations to highlight the evils of drug use. A drug dog was also brought into the school. However, all of these tactics failed to impact the drug problem. Finally, hoping to end the drug problems, the administration approved a drug testing program for athletes.[19]

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13. The district court reported that Vernonia has a population of only 3000 persons, including those living near the city limits. There are few entertainment opportunities in Vernonia and athletics are important to all citizens of the small logging community. Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1356 (D. Or. 1992).

14. *Id.* This ardent interest in school athletics provides athletes with a high profile in the town. Consequently, 60-65% of all high school students participate in athletics and 75% of all elementary school students participate in district-sponsored athletics. *Id.*

15. *Id.*

16. *Id.* The term "glamorization" means bragging about or glorifying drug use. *See* United States Supreme Court Official Transcript of Vernonia School Dist. 47J v. Acton Oral Argument No. 94-590, 1995 WL 353412, *3-4 (March 28, 1995).

17. The district court characterized the grave situation by stating:

> Outbursts of profane language during class, rude and obscene statements directed at other students, and a general flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol typified a usual day. Organizations formed within the student drug culture taking such names as the "Big Elks" or the "Drug Cartel." Loud "bugling" or "head butting" were the calling cards of these groups. Drug paraphernalia was confiscated on school grounds, and open use of drugs was observed at a local cafe across the street from the high school.

Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1356-57 (D. Or. 1992).

18. *Id.* at 1357.

19. *Id.* at 1358.

B. Vernonia School District's Drug Testing Policy

The drug testing policy instituted by the school district requires that all students who participate in school sports, along with their parents, sign consent forms allowing the District to perform drug tests on samples of urine provided by each student-athlete.[20] The tests are 99.94% accurate and screen for amphetamines, cocaine, marijuana and LSD.[21]

Each athlete is tested at the beginning of each athletic season in which he participates. Subsequently, students are subjected to random weekly testing. After the students are randomly selected for testing, they are notified and taken for testing by monitors. A male monitor accompanies the boy into the locker room. The student must produce a urine sample in an open urinal. However, he remains fully clothed and keeps his back to the monitor, who remains twelve to fifteen feet behind the student.[22] The procedure is essentially the same for female athletes, except they produce their samples in an enclosed stall with a toilet. A female monitor remains outside the stall and listens for normal sounds of urination.[23]

After the sample is handed to the monitor, it is checked for temperature and signs of tampering. If everything seems to be in order, the vial, identified only by a specimen control number randomly assigned to the student before the test was performed, is sealed and sent to a lab for testing. If a test is positive, a second test is performed to confirm the results. If the second test is negative, no further steps are taken.[24] Parents of the student are informed of the results only if the second test is positive. If the second test is positive, a hearing is held with the student and his parents. At the hearing, the student may choose to either participate in a drug assistance program and be tested weekly for drugs, or he may choose to be suspended from the athletic program for the current season and the next athletic season.[25] No criminal action is instituted by the school against a student who tests positive for drug use.

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20. The General Authorization Form reads in pertinent part:

> I . . . authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student.

Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2394 (1995).

21. Acton v. Vernonia School Dist. 47J, 23 F.3d 1514, 1517 (9th Cir. 1994).

22. Acton v. Vernonia School District 47J, 796 F. Supp. 1354, 1358 (D. Or. 1992).

23. *Id.*

24. *Id.* at 1358-59.

25. *Id.* at 1359. For a second offense, a student is suspended from participating in athletics for the current season and the next season, with no option to enroll in the counseling program. For a third offense, the student is suspended for the current season and the next two athletic seasons, also without opportunity to reduce the penalty and enroll in the drug assistance program. Acton v. Vernonia School Dist. 47J, 23 F.3d 1514, 1517 (9th Cir. 1994).

II. THE LAW PRIOR TO THE *ACTON* DECISION

A. The Supreme Court Cases

The Fourth Amendment of the United States Constitution controls all searches and seizures conducted by government agents. The primary purpose of the Fourth Amendment "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials ... in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"[26] The Supreme Court interprets the Fourth Amendment to require a warrant for all searches and seizures.[27] Recognizing that the warrant requirement is only a "judicial gloss on the Amendment,"[28] the Supreme Court established exceptions to this general rule. Included within these exceptions are investigatory detentions, warrantless arrests, searches incident to valid arrests, seizures of items in plain view, exigent circumstances, consent searches, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause requirement impracticable.[29] The Court also allows a warrantless search or seizure if probable cause is shown.[30] The exceptions relevant to the discussion of the law prior to the *Acton* decision are investigatory detentions and searches where the special needs of law enforcement make the probable cause requirement impracticable.

1. Investigatory Detentions

The exception of investigatory detentions reduces the probable cause requirement to a requirement of reasonable suspicion. In *Terry v. Ohio*,[31] the

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26. Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396 (1979) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312, 98 S. Ct. 1816, 1820 (1978)). *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S. Ct. 3074, 3081 (1976); Cady v. Dombrowski, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527 (1973); Terry v . Ohio, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879 (1968); Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730 (1967). *See generally* Paul P. Bolus, Comment, *Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights?*, 62 Tul. L. Rev. 1373, 1377-80 (1988).

27. Louis G. Alonso, Jr., Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 Geo. L.J. 665 (1995).

28. *Id.*

29. Greg Knopp, et al., Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 Geo. L.J. 692 (1995). This article contains a detailed discussion of each of these exceptions and the jurisprudence that established each of them.

30. *See* Alonso, *supra* note 27, at 665. This article states that the Fourth Amendment consists of two separate clauses. The first of these clauses is "a prohibition against unreasonable searches and seizures," and the second is "a requirement that warrants be supported by probable cause." *Id.* at 665. As the author explains, the Fourth Amendment does not literally call for warrants or probable cause, but the Supreme Court has nevertheless imposed these requirements in the context of searches and seizures. *Id.* In support of these propositions, the author cites Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967) and Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925).

31. 392 U.S. 1, 88 S. Ct. 1868 (1968).

Court utilized a balancing test to determine the reasonableness of an officer's frisk of a person the officer suspected was about to commit an armed robbery. The *Terry* Court reduced the required level of suspicion from probable cause to reasonable suspicion to uphold the constitutionality of stop and frisks.[32] Though the Court stated that this individualized suspicion was necessary and must be specific,[33] this core requirement of reasonableness was "substantially eroded" by subsequent cases.[34]

Camara v. Municipal Court[35] is the first case that allowed a departure from individualized suspicion.[36] The *Camara* Court allowed search warrants to inspect for housing code violations to be issued on an area-wide basis. The Court did not require there to be a suspicion that a particular establishment was in violation of the code. In deciding that area-wide warrants could be issued, the Court balanced the government's need to search against the severity of the invasion.[37] *Camara* is important because it is "the fountainhead of many of the factors relied on by the Court to justify departures from individualized suspicion in later cases."[38]

Delaware v. Prouse,[39] decided twelve years after *Camara*, required the Court to decide whether it was constitutional under the Fourth Amendment to stop an automobile to check the license of the driver and the registration of the car where neither probable cause nor reasonable suspicion that laws were being broken or about to be broken existed. The Court set out a four-pronged balancing test to determine if such a suspicionless, random search is reasonable. The four prongs are: (1) the nature of the government's interest; (2) the "physical and psychological intrusion"[40] on the individual; (3) the level of discretion the government has in conducting the search; and (4) the necessity of the intrusion to produce the results (i.e., whether there are any equally effective but less intrusive alternatives).[41] Thus, the balancing test used in *Camara* is given more substance in *Prouse*.

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32. *Id.* at 20, 88 S. Ct. at 1879. *See also* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483 (1995) (explaining that this level of suspicion was accepted because stop and frisks are less intrusive than arrests and searches).

33. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1879-80.

34. Clancy, *supra* note 32, at 546.

35. 387 U.S. 523, 87 S. Ct. 1727 (1967).

36. Clancy, *supra* note 32, at 547. *See also* Knopp, *supra* note 29, at 758-61 and Robert C. Farley, Jr., *Recent Decision*, 68 Temp. L. Rev. 439, 443 (1995).

37. *Camara*, 387 U.S. at 534, 87 S. Ct. at 1735.

38. Clancy, *supra* note 32, at 548. These factors and subsequent cases are important to the development of the law leading up to the *Acton* decision, but are beyond the scope of this note. For a thorough history of the development of these specific exceptions, see *id.* at 549-84.

39. 440 U.S. 648, 99 S. Ct. 1391 (1979).

40. *Id.* at 657, 99 S. Ct. at 1398.

41. *Id.* at 655-61, 99 S. Ct. at 1397-1400. *See also* Farley, *supra* note 36, at 443-44. It should be noted that the factors were not listed in the majority opinion. They were simply the issues the

2. Special Needs of Law Enforcement

A warrant is not required "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[42] This "special need" exception to the warrant requirement is utilized when authorities require greater flexibility to adequately and promptly respond to unique situations.[43] In these "special needs" cases, "the Court evaluates the extent to which the requirements interfere with the unique government interests at stake and then balances these interests against the degree of intrusion upon individual privacy."[44]

In *New Jersey v. T.L.O.*,[45] the Court applied the balancing test begun in *Camara* and further developed in *Prouse* to the search of a high school student. In *T.L.O.*, a teacher caught two high school girls smoking cigarettes in violation of school rules. She took the girls to the principal's office whereupon one girl, identified as T.L.O. by the Court, denied she had been smoking. The principal then searched T.L.O.'s purse and found a pack of cigarettes, rolling papers, marijuana, and letters indicating that T.L.O. was involved in marijuana dealing. Consequently, the police were notified and the State brought charges against T.L.O.[46]

The Court first held that the Fourth Amendment restrictions applied to public school officials because they act as representatives of the State and not merely as substitutes for the parents.[47] Then the Justices determined that the search of T.L.O.'s purse was constitutional. The Court began by noting that the "school

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Court looked at in determining whether the search at issue was constitutional. The Court balanced the intrusion of the government's practice on the individual's Fourth Amendment interest against the promotion of the legitimate governmental concerns and, using its newly formed factors, concluded that the search was unconstitutional. *Prouse*, 440 U.S. at 663, 99 S. Ct. at 1401. Using the language of the Court, the specific holding of *Prouse* is:

> *[E]xcept in those situations in which there is at least articulable and reasonable suspicion* that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Prouse, 440 U.S. at 663, 99 S. Ct. at 1401 (emphasis added).

42. New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S. Ct. 733, 748 (1985) (Blackmun, J., concurring).

43. *Id.*

44. Knopp, *supra* note 29, at 763.

45. 469 U.S. 325, 105 S. Ct. 733 (1985).

46. *Id.* at 328-29, 105 S. Ct. at 735-36.

47. *Id.* at 336-37, 105 S. Ct. at 740. The Court reached this conclusion by stating:

> We have held school officials subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.

Id. at 336, 105 S. Ct. at 740 (citations omitted).

setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[48] The majority stated that this easing was needed because the warrant requirement was particularly unsuited to the school environment.[49] To demand that a warrant be obtained prior to any search would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[50] Thus, the Court held that school officials are not required to obtain a search warrant before conducting a search of a student under that school official's authority.[51]

Next, the Court reasoned that "probable cause is not an irreducible requirement of a valid search."[52] The core requirement, the Court noted, is reasonableness.[53] The determination of whether or not the search is reasonable requires a balancing of governmental and private interests while looking at all the circumstances involved. The *T.L.O.* Court set out a two-prong test to determine reasonableness: (1) "whether the . . . action was justified at its inception,"[54] and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[55] It is significant that the Court noted:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."[56]

This issue of individualized suspicion was not present because the principal had reasonable individualized suspicion to search T.L.O.'s purse.

T.L.O. is best known as a special needs case even though the majority did not classify it as such.[57] Justice Blackmun, in concurrence, pointed out that the majority omitted this "crucial step" from their analysis.[58] Other special needs

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48. *Id.* at 340, 105 S. Ct. at 742.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 341, 105 S. Ct. at 742-43 (quoting Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 1897 (1968)).
55. *Id.*
56. *Id.* at 342 n.8, 105 S. Ct. at 743 n.8 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560-61, 96 S. Ct. 3074, 3084 (1976)).
57. *See* Clancy, *supra* note 32, at 572 n.421. Cases after *T.L.O.*, however, have recognized *T.L.O.* as a "special needs" case. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402 (1989).
58. New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S. Ct. 733, 747 (1985) (Blackmun, J., concurring).

exist in the context of searches of a probationer's home,[59] a public employee's office,[60] a railway employee's blood and urine after a major train accident,[61] and a Customs Service employee's urine after he applied for a transfer or promotion to certain positions.[62]

In *Skinner v. Railway Labor Executives' Ass'n*[63] the Supreme Court held a suspicionless urinalysis constituted a search by the government and was subject to Fourth Amendment limitations. Thus, to be constitutional, the search must be reasonable considering all the circumstances surrounding it.[64] This reasonableness, the Court said, is "'judged by balancing [the intrusion of the government's practice] on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[65] The Court found that the government's need to test railway employees after a train wreck to ensure safety was "compelling" and outweighed the intrusion on the individual's interests.[66] Thus, the search was constitutional.

National Treasury Employees Union v. Von Raab,[67] decided the same day as *Skinner*, involved the issue of whether the Fourth Amendment is violated when the United States Customs Service requires a urinalysis test from employees who request transfers or promotions to positions that involve enforcing drug laws, carrying firearms or handling classified materials. In beginning its analysis, the Court stated:

> [O]ur decision in Railway Labor Executives reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . . . [W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[68]

Thus, the Court concluded that conducting a balancing test was the proper measure of reasonableness. As in *Skinner*, the Court found that the government's

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59. Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164 (1987).
60. O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987).
61. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402 (1989).
62. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384 (1989).
63. 489 U.S. 602, 109 S. Ct. 1402 (1989).
64. *Id.* at 619, 109 S. Ct. at 1414.
65. *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 654, 99 S. Ct. 1391, 1396 (1979)).
66. *Id.* at 628, 109 S. Ct. at 1419. Before *Acton*, this statement was read by scholars and courts to require a compelling government need in order to justify a suspicionless search. *See* Farley, *supra* note 36, at 447-48; Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354, 1363 (1992); Acton v. Vernonia School Dist. 47J, 23 F.3d 1514, 1526 (1994).
67. 489 U.S. 656, 109 S. Ct. 1384 (1989).
68. *Id.* at 665-66, 109 S. Ct. at 1390-91.

interest in securing public safety was "compelling"[69] and outweighed the individuals' privacy interests which were diminished because public safety was implicated. The search, a urinalysis in the absence of reasonable suspicion, was therefore deemed constitutional.

B. The Lower Court Cases

Prior to the United States Supreme Court's decision in *Acton*, the lower courts were divided concerning the constitutionality of random drug tests. Of the federal circuits that confronted the issue, the Third,[70] Seventh,[71] Eighth,[72] and Tenth[73] Circuits declared some form of random drug tests constitutional. The Fifth[74] and Ninth[75] Circuits declared the random drug tests presented to them unconstitutional.

1. Circuits Declaring Random Drug Tests Constitutional

In *Shoemaker v. Handel*,[76] the first decision to permit random urinalysis drug testing,[77] the United States Third Circuit Court of Appeals held that the regulations adopted by the New Jersey Racing Commission that allow the State Racing Steward to conduct random breath and urine tests to detect alcohol and drug use by any official, jockey, trainer or groom were constitutional.[78] The plaintiffs urged that the regulations violated their Fourth Amendment rights. They argued that the tests could not be performed absent individualized suspicion that the particular person to be tested was under the influence of drugs or

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69. *Id.* at 670, 109 S. Ct. at 1393. The following statement, taken from the Von Raab decision contributed to the thought that the Constitution requires that the government have a compelling interest in conducting a search not supported by individual suspicion: "Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Id.* at 668, 109 S. Ct. at 1392. *See supra* note 66.

70. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986, 107 S. Ct. 577 (1986).

71. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

72. McDonnel v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

73. Lucero v. Gunter, 17 F.3d 1347 (10th Cir. 1994).

74. Brooks v. East Chambers Consolidated Independent School Dist., 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

75. Acton v. Vernonia School Dist. 47J, 23 F.3d 1514 (9th Cir. 1994).

76. 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986, 107 S. Ct. 577 (1986).

77. Bolus, *supra* note 26, at 1381.

78. *Shoemaker*, 795 F.2d at 1137. One challenged regulation requires officials, jockeys, trainers, and grooms to submit to breathalyzer tests that detect the use of alcohol when the State Steward orders them to. The second challenged regulation requires that every official, jockey, trainer, and groom submit to a urine test that detects the use of any controlled dangerous substance. Sanctions may be imposed for refusal to take a test and for positive results. *Id.* at 1138.

alcohol.[79] The Commission argued that while the tests are a warrantless search and seizure, they are reasonable in the highly regulated racing industry.[80]

The court began its analysis by determining whether a warrant was required in this case. It stated:

> In closely regulated industries, . . . an exception to the warrant requirement has been carved out for searches of premises pursuant to an administrative inspection scheme. Although it is clear that the New Jersey horse-racing industry is closely regulated, the question that arises in this case is whether the administrative search exception extends to the warrantless testing of persons engaged in the regulated activity.[81]

The court determined that the exception was extended and concluded that no warrant was required as long as there was a strong state interest in conducting the warrantless search and the individuals' privacy expectations were decreased due to the heavy regulation of the industry. The court held that these requirements were met and no warrant was required.[82]

The next question the court faced was whether the random nature of the regulations comported with Fourth Amendment requirements. The answer to this question turned on a factor articulated in *Delaware v. Prouse*[83]—whether the officer conducting the tests had discretion to decide who would be subjected to the testing in any particular instance. Since the tests in the scheme before the court were mandated administratively and the Steward had no discretion in conducting the tests, the court determined the regulations were consistent with the Fourth Amendment of the United States Constitution.[84]

The Seventh Circuit case of *Schaill v. Tippecanoe County School Corp.*[85] involved facts basically identical to those found in *Acton*. The *Schaill* court held

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79. *Id.* at 1137, 1141. The plaintiff jockeys conceded that if the racing officials were aware of objective, specific facts that indicated drug or alcohol use by one of them, a "warrantless production of a breath or urine sample could be demanded." *Id.* at 1141.

80. *Id.* The Commission also points out the individuals subject to the tests are voluntary participants in the industry.

81. *Id.* at 1142 (citations omitted).

82. *Id.* The court was quick to point out that the "holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry. Thus it should not be read as dispositive of the distinct issue presented in testing of children subject to mandatory school attendance laws or the testing of motor vehicle drivers." *Id.* at 1142 n.5. Consequently, were this court faced with a situation similar to that in *Acton*, it is questionable whether it would have upheld the random drug testing procedure.

83. 440 U.S. 648, 661, 99 S. Ct. 1391, 1400 (1979). This is the question the court had the most trouble with since the United States Supreme Court in *Prouse* had held that random searches violated the Fourth Amendment. The court escaped this problem by distinguishing *Prouse* on the ground that in that case, the tests were made solely based on a field officer's discretion. However, in *Shoemaker*, the tests were conducted according to a lottery system.

84. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986).

85. 864 F.2d 1309 (7th Cir. 1988).

that random urinalysis drug testing of public school athletes did not violate the Fourth Amendment.[86]

The court began by holding that random urine drug testing is a search subject to the constraints of the Fourth Amendment.[87] Next, the court decided that the school corporation's testing program needed only to meet a reasonableness test to be valid.[88] To determine the reasonableness of the testing policy, the court conducted a balancing test, weighing the athletes' privacy interests against the government's interests in conducting the tests. The students' privacy expectations were reduced because the students were not visibly observed while urinating and because drug testing of athletes at the professional and collegiate levels was highly publicized.[89] Also, school athletes are subject to other regulations, such as minimum grade and residency requirements.[90] Thus, the court concluded that the important governmental interest in deterring drug use outweighed the students' reduced expectation of privacy.[91] Therefore, the testing program was reasonable and constitutional.[92]

In *McDonell v. Hunter*,[93] the Eighth Circuit was faced with the issue of the constitutionality of an Iowa Department of Corrections policy that subjects correctional institution employees to random searches of their vehicles and persons, including urinalysis tests. The employees filed a class action suit claiming the policy violated the Fourth Amendment and their constitutional right to privacy.

The court conducted a balancing test to determine whether the policy was reasonable and consistent with Fourth Amendment requirements. The test consisted of balancing the government's need for the search against the invasion on an individual's rights.[94] After engaging in this test, the court held:

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86. *Id.* at 1324.

87. *Id.* at 1313. This was a significant holding as *Skinner* and *Von Raab*, which explicitly held that random urinalysis drug testing was a search, had not yet been decided.

88. *Id.* at 1315.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1321. This court realized the far-reaching implications *Schaill* could have in the Fourth Amendment context and accordingly attempted to limit its application by stating that since sports are discernible from most other school-related activities, "[r]andom testing of athletes does not necessarily imply random testing of band members or the chess team." *Id.* at 1319. The court went on to note: "Our decision today should not be read as endorsing urine testing of all students attending a school." *Id.* at 1319 n.10.

93. 809 F.2d 1302 (8th Cir. 1987).

94. *Id.* at 1305. In conducting the balancing test, the court reasoned "[w]hile correction officers retain certain expectations of privacy, it is clear that, based upon their place of employment, their subjective expectations of privacy are diminished while they are within the confines of the prison." *Id.* at 1306. On the governmental side of the scale, the court determined that the government's interests in conducting the tests were important. The government's interests, according to the court, were in "assuring that the activities of those employees who come into daily contact with inmates are not inhibited by drugs or alcohol and are fully capable of performing their duties." *Id.* In

> Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we . . . hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons. Selection must not be arbitrary or discriminatory.[95]

The Tenth Circuit upheld the random drug testing of state prisoners. In *Lucero v. Gunter*,[96] the court conducted the balancing test and held that random drug testing of prisoners is reasonable in light of the substantial state interest in maintaining a drug-free prison system.

2. Circuits Declaring Random Drug Tests Unconstitutional

Like the Ninth Circuit's decision in *Acton*,[97] the Fifth Circuit also declared a random drug testing scheme unconstitutional. In *Brooks v. East Chambers Consolidated Independent School District*,[98] the Fifth Circuit, in an unpublished opinion, affirmed the district court's decision declaring unconstitutional a random urinalysis drug testing program for students who participate in extracurricular activities. The district court determined that a Fourth Amendment analysis was applicable and "call[ed] for the application of an objective reasonableness standard to searches in the schools."[99] The court relied on *T.L.O.* in reasoning that under ordinary circumstances a search of a student must be based upon individualized suspicion that the search will reveal wrongdoing by the student.[100] Thus, the court reasoned that for the drug testing program to be constitutional, it must have been induced by extraordinary circumstances.[101] Even if extraordinary circumstances are present, the court said, "*T.L.O.* still

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deciding this, the court cited *Shoemaker v. Handel* and stated: "We believe the state's interest in safeguarding the security of its correctional institutions is at least as strong as its interest in safeguarding the integrity of, and the public confidence in, the horse racing industry." *Id.* at 1308.

95. *Id.* at 1308 (citations omitted).

96. 17 F.3d 1347 (10th Cir. 1994).

97. The Ninth Circuit recognized that *Schaill* would dictate a different result, but stated that the *Schaill* court minimized the privacy interests of the students. It also noted, incorrectly, that the post-*Schaill* decisions of *Skinner* and *Von Raab* would require that the governmental interest be compelling, something the *Schaill* court did not find. After attempting to justify not following the Seventh Circuit's decision in *Schaill*, the Ninth Circuit stated unabashedly: "[I]n a nutshell, we simply do not agree with the Seventh Circuit." Acton v. Vernonia School Dist. 47J, 23 F.3d 1514, 1527 (9th Cir. 1994). Apparently, the Supreme Court could have said the same thing about the Ninth Circuit decision as it reversed that court's *Acton* judgment.

98. 730 F. Supp. 759 (S.D. Texas 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

99. *Id.* at 764.

100. *Id.*

101. *Id.*

mandates that the students' Fourth Amendment rights may not be diluted any more than is necessary to preserve order in the schools."[102]

After stating this, the court then launched into an examination of the government's justifications for the program. It concluded that the program was not narrowly tailored to the goal of deterring drug use by the students. Therefore, the program could not be reasonable and constitutional. Furthermore, the court read *Skinner* and *Von Raab* as requiring the government's interest to be compelling in order to uphold a suspicionless search and concluded that there was no compelling interest present.[103]

III. EFFECT OF *ACTON* ON PRIOR LAW

A. The Acton *Decision*

The *Acton* majority began the analysis of the case by stating that the Fourteenth Amendment extends Fourth Amendment protection to searches and seizures by state officers, including public school officials.[104] Citing *Skinner*[105] and *Von Raab*,[106] the Court went on to say that the collection and testing of urine by the state was a search subject to Fourth Amendment limitations.[107]

After establishing the foregoing, the Court began the Fourth Amendment analysis of Vernonia's Drug Policy. It began with the general principle: "[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"[108] This is determined by balancing the intrusion of the search on the individual's Fourth Amendment interests against the government's legitimate interests.[109] This is the same general enunciation of the test that was employed in *Delaware v. Prouse*[110] and *Skinner v. Railway Labor Executives' Ass'n.*[111]

The Court next explained that it was using this balancing test, and not requiring a search warrant, because special needs were present which made the warrant and probable cause requirement unworkable.[112] The warrant require-

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102. *Id.*

103. *Id.* at 766. The court recognized that *Schaill* would compel a different result, but stated that because of the subsequent Supreme Court decisions in *Skinner* and *Von Raab*, *Schaill* might be decided differently today. Additionally, the court distinguished *Schaill* by stating: "[T]he law of the Seventh Circuit [which decided *Schaill*] is different from and less protective of student rights than Fifth Circuit law." *Id.*

104. Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2390 (1995) (citing New Jersey v. T.L.O., 469 U.S. 325, 336-37, 105 S. Ct. 733, 740 (1985)).

105. 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989).

106. 489 U.S. 656, 665, 109 S. Ct. 1384, 1390 (1989).

107. *Acton*, 115 S. Ct. at 2390.

108. *Id.*

109. *Id.*

110. 440 U.S. 648, 99 S. Ct. 1391 (1979).

111. 489 U.S. 602, 109 S. Ct. 1402 (1989).

112. *Acton*, 115 S. Ct. at 2391.

ment would restrict the freedom of teachers to quickly discipline students and maintain order in the schools.[113] The Court pointed out that although *T.L.O.* was a special needs case based on individualized suspicion of wrongdoing, in that case they "explicitly acknowledged . . . 'the Fourth Amendment imposes no irreducible requirement of such suspicion.'"[114]

After explaining why the reasonableness test would be used, the Court began the balancing test. It elucidated two factors to consider in assessing the impact of the search upon the individual student's privacy expectations. The first factor the Court considered is: "[T]he nature of the privacy interest upon which the search here at issue intrudes."[115] This factor was also called the scope of the student's expectation of privacy by the Court.[116] Under this factor, the Court noted that the Fourth Amendment protects only those expectations of privacy that society considers legitimate.[117] The legitimacy of those expectations varies with the context. Thus, while students do have privacy rights, they are also children who are subjected to the control of the state while they are in school.[118]

While *T.L.O.* rejected the idea that the school's power over its students is the delegated power of the parents, the *Acton* Court "emphasized that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[119] Public school students routinely are required to undergo physical examinations and vaccinations.[120] With respect to medical procedures, the Court reaffirmed that "'students within the school environment have a lesser expectation of privacy than members of the population generally.'"[121]

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113. *Id.*

114. *Id.* (quoting New Jersey v. T.L.O. 469 U.S. 325, 342 n.8, 105 S. Ct. 733, 743 n.8 (1985)).

115. *Id.*

116. *Id.* at 2393.

117. *Id.* at 2391.

118. *Id.* In making this point, the Court stated: "Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* The Court reinforces this view by later stating that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id.* at 2392.

119. *Id.* at 2392. The Court went on to say that although schools do not have a constitutional duty to protect their students, in many contexts school officials are required to act *in loco parentis*. They must act in this capacity because the have the "duty to 'inculcate the habits and manners of civility.'" *Id.* (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684, 106 S. Ct. 3159, 3165 (1986)).

120. *Id.*

121. *Id.* (quoting New Jersey v. T.L.O. 469 U.S. 325, 348, 105 S. Ct. 733, 746 (1985) (Powell, J., concurring)). This statement soundly rebutted the Ninth Circuit's statement in *Acton* that "[t]here is simply no sufficient basis for saying that the privacy interests of students are much less robust than the interests of people in general." Acton v. Vernonia School Dist. 47J, 23 F.3d 1514, 1525 (9th Cir. 1994).

The Court went on to say that student athletes have even less legitimate privacy expectations. On this point, the Court stated:

> School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. . . . [T]here is "an element of 'communal undress' inherent in athletic participation."[122]

Another reason athletes have a reduced expectation of privacy is because they voluntarily participate in athletics and they know the degree of regulation is higher for them than for students generally.[123]

The second factor the Court considered is the character of the intrusion. The Court noted that the degree of the intrusion depends on the "manner" in which the urine production is monitored.[124] The implementation of the Policy was carefully examined by the Court.[125] The Court concluded: "Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible."[126]

The Court then enunciated a factor to be used when evaluating the government's interests in carrying out the drug testing policy. This factor was phrased as "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it."[127] In addressing the nature of the government's interests, the Court noted that the lower *Acton* courts read *Skinner* and *Von Raab* to require a "compelling" government interest.[128] Although the government's interests in these two cases was characterized as compelling, the Court stated:

> It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest

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122. *Acton*, 115 S. Ct. at 2392-93 (quoting Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 2393. Specifically, the Court noted that males, when producing the sample, remain fully clothed and are observed only from behind by male monitors. Females produce the sample in an enclosed bathroom stall with a female monitor listening outside. This lead the Court to conclude "these conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily." *Id.*

127. *Id.* at 2394.

128. *Id.*

> here? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.[129]

The Court then stated that whether or not that high degree of concern was required, it was met in this case.[130]

Turning to the immediacy of the government's concerns, the Court noted that the drug problems at the District's schools, particularly acute among athletes, were escalating.[131] The Court found that the immediate crisis in Vernonia was of greater proportions than in *Skinner* and *Von Raab* where suspicionless drug testing was upheld with even less of a showing that a drug problem existed within the groups to be tested.

Finally, the Court explained that the drug testing policy at Vernonia was an effective means for dealing with the drug problem. It stated: "It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."[132] The majority recognized the Actons' argument that less intrusive means were available, namely suspicion-based testing.[133] However, the majority rejected this argument by stating that "we have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[134] Thus, the Court concluded that the government's interests were sufficient to justify the drug testing procedures.[135]

The Court summed up its findings in holding: "Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional."[136] Finally, the Court explained that the key to this case was that it was done to further the government's responsibilities as guardian and tutor to the schoolchildren in its care.[137] When this is the case, the relevant question is whether this search would be undertaken by a reasonable guardian and tutor. The Court concluded that, given the findings of need by the District Court, this search would be undertaken by a reasonable guardian or tutor.[138]

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129. *Id.* at 2394-95.
130. *Id.*
131. *Id.*
132. *Id.* at 2395-96.
133. *Id.*
134. *Id.* at 2396 (citing *Skinner*, 489 U.S. 602, 629 n.9, 109 S. Ct. 1402, 1420 n.9 (1989)).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 2397.

B. *Ramifications of* Acton

As Justice O'Connor's dissent points out, perhaps the most important implication of *Acton* is that the possibility of using a suspicion-based regime for drug testing is treated 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."[139] The problem with this treatment is that mass, suspicionless searches are generally considered unreasonable[140] and "history and precedent" teach that individualized suspicion is required under the Fourth Amendment unless a suspicion-based regime would be ineffective.[141] Thus, *Acton* could be cited in future cases as authority for first conducting the reasonableness balancing test on a suspicionless search scheme and later summarily dismissing a suspicion-based alternative as difficult,[142] rather than justifying the suspicionless search only after a suspicion-based one has been shown to be unworkable.

Another effect of *Acton* is that it seems to blur the distinction between "important" and "compelling" governmental interests in the Fourth Amendment context. The Court seems to say that a compelling state interest is one that is important enough to justify the intrusiveness of the search at issue.[143] Perhaps now, for suspicionless searches, compelling will be the same as important. That is, because compelling is defined in terms of importance, what was once two distinct levels of scrutiny could now be merged into one level of scrutiny that is not as strict as the old compelling level was thought to be. One thing is certain, *Skinner* and *Von Raab* do not require there to be a finding of a compelling state interest (i.e., a minimum level of governmental concern) before a suspicionless search can be deemed reasonable and, therefore, constitutional.

In addition to the compelling interest discussion, the Court also added to the governmental interest analysis by requiring the state's concern to be "immediate" in order to find the search reasonable.[144] In this case, the immediacy of the crisis is of "greater proportions" than in *Skinner* and of "much greater proportions" than in *Von Raab*.[145]

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139. *Id.* at 2402 (O'Connor, J., dissenting).

140. *See generally* Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925); Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979); Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338 (1979); Michigan State Dept. of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990).

141. Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2402 (1995) (O'Connor, J., dissenting).

142. *Id.* at 2396 ("Respondents' [suspicion-based] alternative entails substantial difficulties—if it is indeed practicable at all.").

143. *Id.* at 2394-95 (stating that a compelling state interest is one that "appears *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.").

144. *Id.* at 2394.

145. *Id.* at 2395.

C. *Questions Left Unanswered by* Acton

The *Acton* decision left many questions unanswered. The most important question is whether the holding will be read narrowly, applying to the specific facts of the case, or whether the holding will be extended to the drug testing of all student participants in extracurricular activities or even an entire student population. The majority, perhaps anticipating this question, stated: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."[146] This "answer" is vague. What other contexts? Does this holding apply to other extracurricular activities? If so, does it apply to other extracurricular activities that do not ordinarily require their participants to undress in each other's presence? Does it apply to all public school students? Is it necessary to find that the particular group of students to be tested is known to use drugs? Or, can a court simply note that drugs are a national problem?

The Court stated: "[t]he most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[147] This limits the holding only marginally. It tells us merely that the government cannot impose under *Acton* a suspicionless drug testing scheme on, say, all residents of a notoriously drug-infested neighborhood. It still does not answer whether or not participants of other school-sponsored activities or their teachers, as guardians, may be subjected to random drug testing.

If one were on the side against drug testing another segment of the school population, it could be argued that *Acton* does not dictate a finding that the policy is constitutional since, in *Acton*, the district court found specifically that athletes were the leaders of the school's drug culture and role models for the entire community. Additionally, the selection of athletes used in *Acton* was truly random, not subject to the discretion of one school official and the procedure was set up to maximize confidentiality and minimize the intrusion upon athletes' privacy. On the other hand, someone arguing for the constitutionality of drug testing another segment of the student body could point to the broad language used by the majority indicating that students have a "lesser expectation of privacy than members of the population generally,"[148] that "testing based on 'suspicion' of drug use would not be better, but worse,"[149] and that the key is that the school was acting as tutor where the only limitation is that it act as a "reasonable guardian and tutor."[150]

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146. *Acton*, 115 S. Ct. at 2396.
147. *Id.*
148. *Id.* at 2392.
149. *Id.* at 2396.
150. *Id.* at 2397.

Though this language appears in the *Acton* decision, it seems that the better argument is for the narrower interpretation of the holding. This is because the Court points to the specific findings made by the district court that athletes were the leaders of the drug culture, were role models and were particularly susceptible to physical injuries caused by drug use.[151] This conclusion is further strengthened by the Court's statement that "given the findings of need made by the District Court" the search was reasonable.[152]

A related issue to *Acton* is the question of whether school teachers may be subjected to suspicionless drug testing. The most reasonable answer is that, under *Acton*, they cannot.[153] The *Acton* decision is based on the fact that the children being tested are under the tutorship of the school. Teachers are not under this tutorship. Additionally, teachers, as members of the general population, have a higher expectation of privacy than do students when they walk through the school's front doors.

A harder question to answer is whether or not all students of a public school may be randomly tested for drug use. Again, the most reasonable answer is that, under *Acton*, in the most typical public school setting, they cannot. This is because the type of findings in *Acton* and accepted by the United States Supreme Court could hardly be made. It would be almost impossible for a court to find that all students in a typical high school were role models for each other and the entire community in which the school was operating. However, one can imagine a public school in a small town that accepts for admission only the brightest students in the state. If a trial court could find, as a fact, that many of these students were openly using and glorifying drug use and that the school's

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151. *Id.* at 2395-96.

152. *Id.* at 2397.

153. An analysis of these questions presented under La. Const. art. I, § 5 is beyond the scope of this note. The answers proposed deal with Fourth Amendment principles under existing United States Supreme Court caselaw. It is possible that Louisiana could give even more protection to individual privacy in an *Acton*-type situation. *See* State v. Hernandez, 410 So. 2d 1381 (La. 1982), in which Justice Dennis, writing for the majority, states:

> Our state constitution's declaration of the right to privacy contains an affirmative establishment of a *right of privacy*, explicit protections against unreasonable searches, seizures or invasions of *property* and *communications*, as well as houses, papers and effects, and gives *standing* to any person adversely affected by a violation of these safeguards to raise the illegality in the courts. This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.

Hernandez, 410 So. 2d at 1385 (citations omitted). *See also* State v. Hutchinson, 349 So. 2d 1252, 1254 (La. 1977) (where the Court was "unwilling to hold that the rights safeguarded by Article I, § 5 of [the Louisiana Constitution] are merely coextensive with those protected by the Fourth Amendment to the federal constitution.") and State v. Abram, 353 So. 2d 1019, 1022 n.1 (La. 1977) (where the Louisiana Supreme Court noted again that Article I, § 5 of the Louisiana Constitution is not merely coextensive with the Fourth Amendment of the United States Constitution).

students, as a whole, were role models for the entire community, then perhaps it would be constitutional to subject the entire student body to random drug testing. However, this situation would be rare. The arguments might come down to how heavily the *Acton* Court relied on the fact that athletes playing sports while under the influence of drugs presented a danger to themselves and other players.

One final question to be examined is whether students involved in other extracurricular activities may be subjected to random drug testing. Under a reasonable and narrow interpretation of *Acton*, this would depend on the findings that could be made and the dangers posed to others by these students' drug use. The court must determine whether the members of this activity or club are using drugs, whether they are role models in the school and the whole community and whether others are aware of their drug use. If a court can make all of these findings of fact, then perhaps the balancing test used in *Acton* can be applied and the search declared constitutional.

IV. CONCLUSION

The *Acton* decision is a novel decision as it is the first time that the United States Supreme Court has addressed the issue of drug testing in the public schools. Furthermore, it is only the second time the Court has addressed the issue of Fourth Amendment rights of public schoolchildren.[154] This time, it seems, the Court has restricted those rights even more.

If *Acton* is read narrowly and literally, it seems to be a sound decision backed by valid policy concerns. It sends a strong message to our nation's youth and their parents—that drug use will not be tolerated. If, however, the language of the decision is stretched and pulled to apply to situations not covered by the facts of *Acton*, rights protected by the Fourth Amendment could be restricted in a way the Supreme Court, and indeed in a way that our nation's founders, never intended.

Courts must be cautious when examining the constitutionality of suspicionless searches and take care not to erode the rights all Americans hold dear. Justice O'Connor's warning rings clear: "[T]he greatest threats to our constitutional freedoms come in times of crisis."[155] We must not make hasty decisions when restricting constitutional freedoms and, in so doing, create an even larger crisis than the one discussed here.

Denise E. Joubert[*]

154. The first time this issue was discussed, of course, was in *T.L.O.*

155. Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2407 (1995) (O'Connor, J., dissenting).

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