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ARTICLES

The *Acton* Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs

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I. Introduction

Random drug testing is currently viewed as a key element of the "war on drugs" because of its reputed investigative results and deterrent effect.[1] The use of random drug testing has been expanded beyond its original intended use as a deterrent. It is now used to discover drug use by employees in positions affecting public safety.[2] Recently, however, drug testing has crossed over from

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1. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 629-30 (1989) (finding that employees' knowledge that they could be terminated following a positive test was an effective deterrent to drug use). *But see Skinner*, 489 U.S. at 634 (Stevens, J., dissenting)(stating that mere threat of loss of employment is not a significant deterrent to drug use).

2. For instance, in 1989, the Supreme Court determined that employees such as railroad engineers who controlled trains could be legitimately tested for drug use because the need for testing outweighed concerns of privacy. *Skinner*, 489 U.S. at 634. The *Skinner* Court held that testing railroad employees following serious train accidents was reasonable even in the absence of any suspicion. *Id.* at 624. The Court found that the prevention of train accidents brought on by drug or alcohol impairment was such a compelling interest that it overcame any intrusion the testing placed on the employees' expectations of privacy. *Id.* at 627. The Court also determined that the employees had reduced expectations of privacy by virtue of their employment in a "pervasively regulated" industry, such as the railroad

justifiable employment testing to other arenas. With an eye towards preventing drug use by children, schools from grade schools to universities have implemented or considered implementing random drug testing programs.[3]

Courts have quickly squelched attempts to drug test all students, as opposed to a discrete segment of the student body.[4] In light of these holdings, schools have had to narrow their programs to drug test only a segment of the student population — generally those students participating in interscholastic athletics. Naturally these testing programs tread on an individual's privacy

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industry. *Id.* For further discussion of the "pervasively regulated industry" reasoning, see *infra* notes 115-17 and accompanying text.

In a companion case to *Skinner*, the Court in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989), found that random drug testing of drug interdiction agents (firearm-carrying border agents) was reasonable given the government's compelling interests in protecting the "integrity of our Nation's borders." The Court found that drug-impaired interdiction agents were susceptible to breaking the law. *Id.* at 660. The Court did not, however, extend its holding in *Von Raab* to customs agents with classified knowledge, as the factual findings were barren as to the government's need to test these agents or how these employees would endanger the public's safety. *Id.* at 677-79.

3. This Article does not address the problems faced by colleges and universities who wish to drug test student-athletes. Three state supreme courts have different views on the constitutionality of randomly drug testing student-athletes. *Compare* Hill v. NCAA, 865 P.2d 633 (Cal. 1994) (upholding NCAA's random testing program as applied to Stanford University student-athletes under Fourth Amendment and California Constitution) *and* Bally v. Northeastern University, 532 N.E.2d 49 (Mass. 1989) (upholding Northeastern's random testing program under Massachusetts Constitution) *with* University of Colo. v. Derdeyn, 863 P.2d 929 (Colo. 1993) (invalidating University of Colorado's random drug testing program under both Fourth Amendment and Colorado Constitution), *cert. denied*, 114 S. Ct. 1646 (1994). For a more in-depth analysis of drug testing in colleges and universities and suggestions for designing a constitutional program, see Stephen F. Brock et al., *Drug Testing College Athletes: NCAA Does Thy Cup Runneth Over?*, 97 W. VA. L. REV. 53 (Fall 1994).

4. Brooks v. East Chambers Consolidated Indep. Sch. Dist., 730 F. Supp. 759, 766 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991) (holding that testing the entire high school student body for drugs was unwarranted and violated the Fourth Amendment); Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985) (holding that the school's policy requiring drug testing of any student who violated school drug and alcohol code was improper and unconstitutional); Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist., 510 A.2d 709 (N.J. Super. 1985) (holding that the school's policy requiring all students to submit urine for drug testing at the yearly school physical was unconstitutional).

rights,[5] and may run afoul of the Fourth Amendment's proscription against illegal searches.

In *Vernonia School District 47J v. Acton*,[6] the United States Supreme Court ruled on the constitutionality of the random drug testing of students participating in interscholastic athletics in public grade and high schools. The case arose when the school district of Vernonia, Oregon implemented a random drug testing program for its student-athletes.[7] The school district cited circumstantial evidence as justification for implementing its drug-testing program.[8] Based on this circumstantial evidence, the school district decided to test its athletes randomly for drugs. The athletes in this district were viewed as role models, and the school district reasoned that preventing drug use by athletes would contribute to halting drug use by all students.[9]

One athlete, James Acton, challenged Vernonia's program, alleging that it violated his right to be free from illegal searches and seizures under the Fourth Amendment[10] and the Oregon Constitution. The United States District Court for the District of Oregon ruled in favor of the school district, finding that the program was reasonable under both the Fourth Amendment and the Oregon Constitution.[11] The Ninth Circuit Court of Appeals reversed the

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5. Schools commonly conduct urine tests to detect drug use by students. In *Skinner*, the Court stated:

> It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting samples to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.

Skinner, 489 U.S. at 617.

6. 115 S. Ct. 2386 (1995).

7. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354 (D. Or. 1992), *rev'd*, 23 F.3d 1514, 1516 (9th Cir. 1994), *rev'd*, 115 S. Ct. 2386 (1995).

8. Some of the circumstantial evidence noted by the court included: drug use and drug culture were glorified by the student body; one wrestler was injured and a coach smelled marijuana in the wrestler's room the day after the injury; and, several incidents of drug use and drug-related crime occurred among both students and student-athletes. *Acton*, 23 F.3d at 1516.

9. The school district also articulated the prevention of athletic injuries as a reason for testing student-athletes. *Id.* at 1516, 1519.

10. Since the Supreme Court's ruling in *Skinner*, it has been settled law that urinalysis constitutes a search for Fourth Amendment purposes. *Skinner*, 489 U.S. at 617.

11. *See* Acton v. Veronia Sch. Dist. 47J, 796 F. Supp. 1354 (D. Or. 1992).

> The Oregon Constitution contains a provision similar to the Fourth Amendment: No law shall violate the right of the people to be secure in their persons, house, papers, and effects, against unreasonable search, or seizure; and no warrant shall

district court based on its finding that there was no compelling government need to test student-athletes.[12] The Supreme Court reversed the Ninth Circuit, finding no violation of the Fourth Amendment.[13]

Drug testing prospective employees in positions that potentially endanger public safety raises few eyebrows and is begrudgingly accepted as a necessary evil.[14] However, when drug testing is applied to high school or grade school student-athletes, the evil is no longer necessary and the testing becomes particularly invasive.

Against this background, this Article first will examine relevant drug testing and Fourth Amendment law. This Article will then analyze the *Acton* litigation and the Supreme Court's holding. Finally, this Article will conclude with suggestions as to the implementation of constitutionally sound drug testing programs.

II. Background

A. Skinner *and* Von Raab

Every drug testing case should begin with an analysis of the seminal Supreme Court holdings of *Skinner v. Railway Labor*

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

OR. CONST. art. I, § 9. The Fourth Amendment reads:

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable search, or seizure *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 (emphasis added — differences between the Fourth Amendment and the Oregon Constitution are italicized).

The Ninth Circuit in *Acton* stated that the differences between the Fourth Amendment and Article I, section 9 of the Oregon Constitution are of no moment. *Acton*, 23 F.3d at 1518 (citing State v. Flores, 570 P.2d 965, 968-69 (Or. 1977)).

12. *See* Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994).

13. *Acton*, 115 S. Ct. at 2397. The Court remanded the case to the Ninth Circuit for further proceedings relating to the Ninth Circuit's holding under the Oregon Constitution. *Id.* For further discussion of the effect of the Court's remand, see *infra* notes 82-84 and accompanying text.

14. The late Justice Thurgood Marshall cautioned that invoking the war on drugs as justification for drug testing is not sufficient to overcome its intrusion on privacy:

> Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.

Skinner, 489 U.S. at 635 (Marshall, J., dissenting).

Executives Association[15] and *National Treasury Employees Union v. Von Raab*.[16] In *Skinner*, the Court conclusively determined that urinalysis was a search for Fourth Amendment purposes.[17] First determining that drug testing fit under the "special needs" exception to the Fourth Amendment and thus vitiated the warrant and probable cause requirements of the Fourth Amendment,[18] the Court then assessed the searches at issue in *Skinner*[19] and *Von Raab*[20] using a Fourth Amendment reasonableness inquiry.

Under the reasonableness inquiry, the Court in both *Skinner* and *Von Raab* measured the extent of the search's intrusion against the importance of the government interest that was served by the search.[21] The *Skinner* Court determined that testing railway workers served the compelling government interest of protecting

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15. 489 U.S. 602 (1989).

16. 489 U.S. 656 (1989).

17. *Skinner*, 489 U.S. at 617 n.4 (collecting circuit court cases holding that urinalysis is a Fourth Amendment search).

18. Generally, all government-conducted searches require the issuance of a warrant that is supported by probable cause, prior to a search, unless the search falls into a judicially created exception, such as the search incident to arrest. *See* Maryland v. Buie, 494 U.S. 325 (1990); Rawlings v. Kentucky, 448 U.S. 98 (1980). The Court's "special needs" exception applies to non-criminal searches where the requirement of securing a warrant prior to conducting a search would effectively vitiate the efficacy of the search. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

In *Skinner*, the Court concluded that a post-train wreck accident site would be too chaotic to preserve evidence. *Skinner*, 489 U.S. at 631; *see Von Raab*, 489 U.S. at 668 (finding warrant requirement impedes conduct of routine administrative searches). The *Von Raab* Court stated that it would be extremely burdensome if a warrant were required before the government could drug test its employees. *Von Raab*, 489 U.S. at 666. The Court also stated that the primary function of warrants was to notify citizens of the legality of the impending search and, in the *Von Raab* case, employees were well aware of the testing program. *Id.* at 667.

In New Jersey v. T.L.O., 469 U.S. 325, 340 (1985), the Court stated that requiring teachers to obtain warrants before searching students unduly interfered with the "swift and informal disciplinary procedures needed in the schools."

19. The test at issue in *Skinner* involved mandatory testing of railroad workers following certain serious train accidents. *Skinner*, 489 U.S. at 609. Employees were also subject to permissive suspicion based testing. *Id.* at 611.

20. The test at issue in *Von Raab* involved testing all customs agents who were promoted to or hired for covered positions, including drug interdiction and firearm bearing agents. *Von Raab*, 489 U.S. at 660-61.

21. *See Skinner*, 489 U.S. at 619 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)); *Von Raab*, 489 U.S. at 665-66 (stating that where a Fourth Amendment intrusion serves special governmental needs, "it is necessary to balance the individual's privacy expectations against the Government's interest . . . ."); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 556-558 (1976) (balancing the government's interest in apprehending and deterring illegal aliens from entering the U.S. against an individual's Fourth Amendment privacy interest not to be stopped at roadside checkpoints).

the public from drug impaired railway workers and that the test was fairly unintrusive because the workers had reduced privacy rights.[22] The *Von Raab* Court only permitted testing of drug interdiction and firearm-bearing United States Customs Agents, since the Court determined that there was insufficient evidence to justify testing all Customs employees.[23]

B. Schaill: *The Seventh Circuit's Take on Drug Testing High School Student-Athletes*

As a backdrop to the Supreme Court's ruling in *Acton*, in 1988 the Seventh Circuit ruled on the constitutionality of a high school drug testing program that was remarkably similar to the program at issue in *Acton*. In *Schaill v. Tippecanoe County School Corp.*,[24] the Seventh Circuit held that the school system's random drug testing of athletes and cheerleaders was constitutional under the Fourth Amendment.[25]

The drug testing program in *Schaill* was imposed after a Tippecanoe County School District baseball coach ordered urinalysis for his team and discovered that 5 of 16 players were using drugs or alcohol.[26] Concerned by these results and nationwide reports of increased student drug use, Tippecanoe County decided to randomly drug test its student-athletes and cheerleaders.[27] The program differed little from the Vernonia program, except that visual monitoring was not permitted as it was in *Acton*.[28]

To assess the Tippecanoe County School District's tests, the Seventh Circuit first determined that student-athletes have reduced privacy expectations because they change clothes in locker rooms where there is an element of "communal undress."[29] The *Schaill*

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22. *Skinner*, 489 U.S. at 628. The Court found that the railway workers had reduced expectations of privacy based on their employment in an extensively regulated industry.

23. *Von Raab*, 489 U.S. at 679. The Customs agency had sought to test agents with classified knowledge, thereby exposing a broad spectrum of employees to drug testing.

24. 864 F.2d 1309 (7th Cir. 1988).

25. *Id.* at 1310.

26. *Id.*

27. *Id.* at 1310-11.

28. *Id.*

29. *Schaill*, 864 F.2d at 1318. The court did not mention cheerleaders as being subject to the "communal undress" reasoning. However, cheerleaders also had reduced expectations of privacy because they, like other athletes, were subject to additional rules and regulations and were required to take a physical examination prior to participating. *Id.*

court also concluded that the school had significant interests, mainly related to safety concerns, in maintaining a drug-free athletic program.[30] Finally, the court stated that the punishment for failing a drug test was a loss of a student's right to participate in athletics — not a deprivation of anything approaching a fundamental right.[31] Based on this combination of reduced privacy expectations and a significant government interest, the *Schaill* court was constrained to find in favor of the school district.

Serving as a further aid to understanding the Court's decision in *Acton*, the United States Supreme Court has held consistently in other contexts that school children have legitimate, although reduced, expectations of privacy,[32] reduced due process guarantees[33] and lesser rights to free speech.[34] In *Schaill*, the Seventh Circuit relied heavily on the Supreme Court's holding in *New Jersey v. T.L.O.* to support drug testing based on students' lowered expectation of privacy. The Court's holding in *Acton* is the most recent addition to the line of cases reducing the constitutional rights of students.

C. *Facts in* Acton

In the mid-1980s, teachers and administrators in the Vernonia, Oregon school district[35] noticed an increase in drug use by

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30. *Id.* at 1321.

31. *Id.* at 1319-20. The court of appeals distinguished loss of employment for failing a drug test from suspension from participating in athletics. *Id.*

32. *See* New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985). In *T.L.O.*, the Court examined whether the search of a student's purse, based on suspicion falling short of probable cause, violated the Fourth Amendment. The Court determined that the protections of the Fourth Amendment do extend to searches in a school setting. *Id.* at 336-37. However, the school's interest in maintaining discipline was termed a "substantial" interest and outweighed any intrusion caused by the search. *Id.* at 341.

Based on these factors, the Court crafted a two-part inquiry to assess the constitutionality of student searches: (1) the search must be "justified at its inception" by the existence of "reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or the rules of the school," and (2) the search must be reasonably tailored and as free from intrusiveness as possible. *Id.* at 342.

33. *See* Ingraham v. Wright, 430 U.S. 651, 675-76 (1977) (finding imposition of corporal punishment on grade school students, without due process, was constitutional given the long history of permitted use of corporal punishment in schools).

34. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (permitting censorship of student-written newspaper).

35. *Acton*, 796 F. Supp. at 1356. Vernonia is a town of nearly 3,000 residents when small surrounding communities are included. *Id.* The Vernonia school district includes a grade school and a high school. *Acton*, 23 F.3d at 1516.

students and a coincident rise in disciplinary problems. The school district determined that the increase in disciplinary problems was traceable to the increased drug use. As a result, the district implemented various programs to attempt to combat drug use.[36] After these drug programs proved unsuccessful, the school district effectuated a random drug testing program for all students who participated in interscholastic athletics.[37]

Under the random drug testing program, all student-athletes were tested prior to the athletic season and at random during the season on a weekly basis.[38] The urinalysis test detected the

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36. *Acton*, 796 F. Supp. at 1356-57. The school district tried drug education classes, seminars and speakers to no avail. *Id.* The school district also temporarily and unsuccessfully employed a drug-sniffing dog. *Id.* at 1357.

37. *Id.* at 1358. Students wishing to participate in interscholastic athletics were first required to sign a consent form authorizing drug testing. *Id.*

38. *Acton*, 796 F. Supp. at 1358. The district court describes the procedure of specimen collection under Vernonia's program in great detail. The court explained:

> The names of all students participating in sports during that season are placed in a "pool" and approximately ten percent of the names are drawn from the "pool" each week. A student draws numbers representing names from the "pool," but is not aware of the names he or she draws. Students whose numbers are drawn are tested one at a time throughout the day.
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> The procedure for the test varies slightly for boys and girls. Boys begin the process by filling out of a portion of a specimen control form which assigns the student a number. The student is then given a testing packet which contains a cup and a vial. The student enters an empty locker room with a male school official acting as a monitor. . . . The student then proceeds to a urinal to produce the sample. While producing the sample, the student remains fully clothed and has his back to the monitor. The monitor is present to assure that there is no tampering and remains 12 to 15 feet behind the student.
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> . . . .
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> The procedure for girls differs only in that a female school official acts as a monitor and the sample is produced in an enclosed stall with a toilet. The monitor remains outside the stall and listens for signs of tampering.
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> The samples are sent for testing to [a lab] under security procedures designed to protect the chain of possession. [The lab] technicians do not know the identity of the person being tested and rely solely upon the assigned numbers for identification. . . . Test results are reported by telephone to authorized Vernonia School District personnel. Positive results are also mailed to the district superintendent.
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> If a student's test is positive, a second test will be administered as soon as possible to confirm the results. . . . If the second test is negative, no further action will be taken. If the second test is positive, the school notifies the parents or guardians and conducts a hearing with the student and his or her parents. At this hearing, the student will be given the option of either participating in an assistance program and taking the weekly drug test for six weeks or suspension from the athletic program for the remainder of the current season and the next athletic season.

presence of amphetamines, cocaine, marijuana and alcohol in the urine.[39] Any student-athlete who failed the test was suspended from participating in interscholastic athletics.[40]

In 1991, James Acton, a seventh grader, decided to try out for the grade school football team. However, James refused to sign the random testing consent form, and the school district denied James the opportunity to play football. James responded to this ineligibility by bringing suit in the United States District Court for the District of Oregon seeking declaratory and injunctive relief from the random program.[41]

D. The District Court and Ninth Circuit's Rulings

Ruling in the school district's favor, the district court made the following findings: the school district was beset by disciplinary problems caused by increased drug use by students; other methods of combatting drug use had failed; the schools' athletes were viewed as role models in the small community;[42] and, drug testing these role models would and did have a deterrent effect on drug use by others.[43] The court stated that "[n]o evidence was presented that refuted any of the facts set forth nor the conclusions reached by school officials."[44]

The court concluded that Vernonia's program would be constitutional under the Fourth Amendment only if the government evinced a "compelling need" to test the student-athlete that outweighed the intrusion on the individual's privacy.[45] The court

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Acton, 796 F. Supp. at 1358-59.

39. *Id.* at 1359.

40. *Id.*

41. *Id.* at 1356, 1359.

42. As the district court stated: "The entertainment opportunities in Vernonia are fairly limited so that interscholastic athletics play a dominant role in the community and student athletes are well known and admired." *Acton,* 796 F. Supp. at 1356; *see* Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1320-21 (7th Cir. 1988)(terming high school student-athletes a "widely admired" group). In *Schaill*, the Seventh Circuit stated: "This court may take judicial notice of the fact that in society at large drug usage by athletes is highly publicized and is a matter of great concern . . . [and] is likely to affect the behavior of others. . . ." *Schaill*, 864 F.2d at 1320-21. *Compare Courting Controversy*, SPORTS ILLUSTRATED, July 10, 1995, at 11 (questioning why athletes are singled out for testing).

43. *Acton*, 796 F. Supp. at 1356-57, 1368. The school district asserted that discipline normalized and there were no athletic injuries attributable to drug use following the implementation of the random drug testing program. *Id.* at 1368.

44. *Id.* at 1357.

45. *Id.* at 1360. The district court stated that this test was unannounced, but reflected the Supreme Court's clear intention that probable cause was not a requirement in all non-

decided that this test essentially was an inquiry into the program's reasonableness under the Fourth Amendment.[46]

The district court employed a four-prong test developed in *State v. Tourtillott*,[47] to examine the Vernonia testing program. To test stops at random checkpoints under the Oregon Constitution, the Oregon Supreme Court in *State v. Tourtillott* utilized the following four factors in a balancing test: (1) the significance of the government's interest; (2) the "psychologically and physically intrusive nature of the" stop; (3) the stop's efficacy; and (4) the discretion the stop affords government agents.[48] Applying the *Tourtillott* test, the district court found in favor of the Vernonia school district on all four factors.

The district court found the government's compelling need, articulated broadly as the deterrence of drug use in Vernonia's schools, existed based on testimony regarding the worsening discipline problem and the logical inference that drug use caused the problem.[49] Swayed by the one-sided evidence before it, the district court determined that Vernonia's program was "justified at its inception" and was borne out to be effective by a subsequent decrease in discipline problems.[50]

The Ninth Circuit reversed the district court,[51] holding that Vernonia's testing program violated James Acton's rights under the Oregon Constitution, and by implication, the Fourth Amend-

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criminal searches. *Id.*

46. The court noted that the program would also be assessed under the Oregon Constitution using the Fourth Amendment's reasonableness inquiry.

The Fourth Amendment specifically forbids "unreasonable" searches. U.S. CONST. amend. IV. Criminal searches that are unsupported by a warrant issued upon probable cause or searches that are not authorized by a judicially-created exception to the warrant/probable cause requirement are held to be *per se* unreasonable. Katz v. United States, 389 U.S. 347, 357 (1967). In the non-criminal search context, courts apply a variety of balancing tests, weighing in broad strokes the need for the search against the individual's privacy rights and the search's intrusion thereon. *See generally Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 632-33 (Both *Von Raab* and *Skinner* applied balancing tests in non-criminal contexts.).

47. 618 P.2d 423 (Or. 1980), *cert. denied*, 451 U.S. 972 (1981).

48. *See id.* at 433. The Oregon Supreme Court acknowledged that its test only applied to the constitutionality of a stop as opposed to a search. *Id.* at 434. The *Tourtillott* test is derived from a reasonable interpretation of the Supreme Court's balancing test in Delaware v. Prouse, 440 U.S. 648 (1979). *Tourtillott*, 618 P.2d at 433.

49. *Acton*, 796 F. Supp. at 1363. The court determined that protecting "student safety in athletic programs" was another compelling interest behind Vernonia's program. *Id.*

50. *Id.* at 1365, 1368.

51. *Acton*, 23 F.3d 1514 (9th Cir. 1994).

ment.[52] However, due to the lack of relevant Oregon law relating to random drug testing, the Ninth Circuit was constrained to apply Fourth Amendment concepts as well as Oregon cases involving other types of searches.[53]

The Ninth Circuit applied the same four factor test as the district court to assess the constitutionality of the Vernonia program under the Oregon Constitution.[54] But, while the district court in *Acton* found that each of the four *Tourtillott* factors weighed in favor of drug testing, the Ninth Circuit determined that the *Tourtillott* factors weighed in favor of James Acton's privacy rights.

The Ninth Circuit agreed with the district court that Vernonia's program was effective and that the random nature of the program removed any discretion from the school officials regarding which students to test.[55] However, on the dispositive issues of the government's interest and the intrusiveness of the testing program,[56] the Ninth Circuit found in favor of James Acton. The Court of Appeals first pointed out that drug testing previously had been justified only to serve important government interests when the public's safety was clearly at risk. The court felt that this broad interest was not impinged by the Vernonia situation.[57] Further-

52. Although the Ninth Circuit decided the case on the basis of the Oregon Constitution, the provisions against illegal searches and seizures in Oregon were determined to be at least coextensive with the Fourth Amendment. *Id.* at 1518-19.

53. *Id.* at 1523.

54. *Compare Acton*, 23 F.3d at 1521 *with Acton*, 796 F. Supp. at 1366. The Ninth Circuit stated that the *Tourtillott* test was probably formulated using Fourth Amendment concepts and may not represent the extent of protections under the Oregon Constitution. *Acton*, 23 F.3d at 1521.

55. *Acton*, 23 F.3d at 1522. The Ninth Circuit stated that evidence demonstrating testing's efficiency was based solely on the testimony of teachers and school officials and thus this factor weighed only slightly in favor of Vernonia. *Id.*

56. *Id.* The court of appeals stated: "That leaves importance and intrusiveness. In this case, they are dispositive. They dispose of the Policy." *Id.* The district court had apparently disagreed, finding that Vernonia's program was the least intrusive method possible in part because direct observation was merely optional and Vernonia's interests in deterring drug use were deemed to be "highly significant." *Acton*, 796 F. Supp. at 1367-68.

57. *Acton*, 23 F.3d at 1524. The Ninth Circuit Court of Appeals noted that the *Von Raab* Court only permitted testing of "frontline and gun-toting workers," not all employees of the Customs Department. The Ninth Circuit distinguished drug testing employees in sensitive areas or those entrusted with the public safety from testing young student-athletes. The appeals court duly noted that lives were not at stake in Vernonia's athletic program.

more, the Ninth Circuit found that the student-athletes' expectations of privacy were not diminished and remained vital.[58]

III. Narrative Analysis

A. The Supreme Court's Holding in Acton

In *Acton*, the Supreme Court, by a 6 to 3 majority, ruled that the Vernonia School District's drug testing program did not violate the Fourth Amendment.[59] Justice Scalia drafted the majority opinion and was joined by Chief Justice Rehnquist and Justices Thomas, Kennedy, Breyer and Ginsburg.[60] Justice O'Connor dissented and was joined by Justices Stevens and Souter.[61]

The Court disagreed with the Ninth Circuit as to the relative sparseness and effect of the district court's findings.[62] Justice Scalia accorded the district court's findings of fact significant weight, despite the apparent transparency of the school district's evidence. First, Justice Scalia accepted the school district's unsubstantiated assertions that the student-athletes were "leaders of the drug culture."[63] Second, Justice Scalia stated that, as a matter of common sense, it is very likely that drug use imperils

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58. The appeals court found that the additional rules and requirements placed upon student-athletes did not compel a finding that they were "pervasively regulated." *Acton*, 23 F.3d at 1525. The court stated, "Normal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination." *Id.*

59. *Acton*, 115 S. Ct. at 2396. The Court remanded the case to the Ninth Circuit for a ruling based solely on the protections afforded James Acton under the Oregon Constitution. *Id.* at 2397. The potential impact of the Court's remand is discussed *infra* at notes 81-83 and accompanying text.

60. Justice Ginsburg concurred in the majority opinion and added that she did not view the majority as allowing random drug testing of all students. *Acton*, 115 S. Ct. at 2397 (Ginsburg, J., concurring).

61. Justice O'Connor dissented primarily on the ground that the majority's opinion authorized suspicionless testing which was a substantial departure from the Court's Fourth Amendment jurisprudence. *Id.* at 2398 (O'Connor, J., dissenting).

62. The Ninth Circuit was emphatic when it reviewed the district court's findings:

> However, we reemphasize that what the evidence shows, and all it shows, is that there was some drug usage in the schools, that student discipline had declined, that athletes were involved, and that there was reason to believe that one athlete suffered an injury because of drug usage and others may have.

Acton, 23 F.3d at 1519.

63. *Acton*, 115 S. Ct. at 2389.

athletic safety.[64] Third, the Court believed that "[d]isciplinary problems had reached epidemic proportions," and the student "rebellion" was being fueled by alcohol and drug abuse.[65] Fourth, Justice Scalia emphasized that while the drug tests can be monitored, the monitors often do not watch the test taker.

With these findings as its basis, the Court assessed the Vernonia drug tests under the Fourth Amendment's broad reasonableness inquiry. In so doing, the Court confirmed the Ninth Circuit's assessment of drug testing athletes under a reasonableness standard, stating that school drug testing fell into the "special needs" exception[66] for searches that do not require the issuance of a warrant supported by probable cause.[67] Under the Fourth Amendment reasonableness inquiry, the Court weighs the degree of testing's intrusiveness against the nature and importance of the privacy right that is assailed, and also against the importance of the

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64. Justice Scalia, however, ignored the fact that the connection between drug use by and consequent injury to drug-using Vernonia athletes rests solely on the unsubstantiated assertion by one high school coach who believed that one wrestler injured his ribs after using marijuana. The district court stated that the coach testified "that *suspected* drug use contributed to the injury of a wrestler who failed to execute a basic maneuver." *Acton*, 796 F. Supp. at 1357 (emphasis added). The district court later extended the coach's testimony and stated that there "was *evidence* in the record of specific instances in which coaches have observed athletes perform poorly and unsafely while under the influence of some intoxicant." *Id.* at 1363 (emphasis added). The record is in fact devoid of any such evidence beyond the wrestling coach's simplistic and flawed logic.

65. The district court's rhetoric and the Supreme Court's acceptance of it raises two questions: First, are the district court's findings simply a product of a generation gap in which the act of wearing a tie-dyed t-shirt is (mis)interpreted as a badge of drug use? The Ninth Circuit acknowledged that the district court's findings were based on perceptions not facts. *Acton*, 23 F.3d at 1519.

Second, if problems at schools in Vernonia, Oregon, a community of some 3,000 people, were thought to have reached epidemic proportions, how should we characterize conditions in larger, urban schools? Both the district court and the Ninth Circuit acknowledged that "[w]hat appears to be a problem in one place might seem to be a minor annoyance elsewhere." *Acton*, 23 F.3d at 1519; *see Acton*, 796 F. Supp. at 1364-65 (recognizing that Vernonia's program may not be justified in other larger communities).

66. The Supreme Court created an exception to the Fourth Amendment's warrant/probable cause requirement "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)(citation omitted). The *Skinner* Court decided that drug testing railway workers following a serious train accident fit into the "special needs" exception because the evidence sought was perishable. *Skinner*, 489 U.S. 602, 620 (1989).

67. The California and Colorado Supreme Courts reached the same conclusions in assessing college drug testing programs. *See* Hill v. NCAA, 865 P.2d 633 (Cal. 1994) (finding random drug testing fit within "special needs" exception); University of Colo. v. Derdeyn, 863 P.2d 929 (Colo. 1993), *cert. denied*, 114 S. Ct. 1646 (1994).

government interest that is served by the testing.[68] Finally, the Court measures whether feasible, equally effective, but less intrusive alternatives exist.

B. The Court's View of the Privacy Rights Enjoyed by Student-Athletes

The Court determined that the privacy rights of the Vernonia student-athletes were virtually nonexistent. The Court reasoned that schoolchildren, while not completely devoid of privacy rights, are subject to reduced expectations of privacy. Justice Scalia stated that location, as much as any other factor, determines the scope of an established privacy right. Thus, privacy rights are clearly reduced in public places such as "in a car, or in a public park."[69] Justice Scalia also considered that schoolchildren are in the State's custodial care as a factor which tended to diminish the scope of an established privacy right.[70]

In addition, Justice Scalia reasoned that because student-athletes participate in interscholastic athletics in an environment akin to a "closely regulated industry," they have diminished expectations of privacy.[71] Justice Scalia also explicitly accepted the "communal undress" reasoning first expressed in *Schaill*, stating that because athletes must change their clothes and shower in a public area, they are further divested of their right to complete privacy.[72]

C. Intrusiveness of the Drug Tests

The Court also determined that Vernonia's drug tests are not particularly invasive. Justice Scalia emphasized that direct monitoring is rarely employed by school monitors: boys naturally have their backs to monitors while testing and monitors rarely make an

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68. The *Skinner* Court stated that the privacy right impinged by drug testing was the individual's "excretory function." *Skinner*, 489 U.S. at 626. The Court has stated that this right was generally accorded great protection. *Id.*; *see also Schaill*, 864 F.2d at 1318.

69. *Acton*, 115 S. Ct. at 2391. Public schools qualify as public places.

70. Justice Scalia noted that the school stands in *loco parentis* to its students and enjoys considerable custodial leeway. *Id.* at 2391-92.

71. Justice Scalia pointed out that student-athletes are required to submit to medical examinations, must achieve a certain grade point average and are subject to various other rules and regulations not applicable to non-athlete students. *Id.* at 2393.

72. *Id.* at 2392-93.

effort to observe.[73] In addition, the Court stressed that only limited disclosure of test results to selected officials occurred. Thus, the majority concluded that there was "negligible" invasiveness in the process of specimen collection.[74]

Finally, Justice Scalia rejected Acton's arguments that testing forced the disclosure of a student-athlete's use of medications to school district officials prior to taking a drug test to avoid a false positive, by emphasizing that distribution of the test results to only a few selected school officials militated against Acton's argument.[75] Justice Scalia indicated that no aspect or announced rule of the drug testing program prevented a student from enclosing medications in a sealed envelope to school district officials. However, this conclusion ignores the fact that a positive test will require the eventual disclosure of the private medical information to a school district official. At that point, a student athlete's use of contraceptives or pregnancy medication will be revealed. That information is often critically private to young individuals. Disclosure to anyone other than that individual's doctor could have serious societal ramifications.[76]

D. Government Interest and the Efficacy of the Drug Tests as the Means Employed To Meet the Government Interest

Whereas both the district court and the Ninth Circuit required the government to demonstrate a compelling need to test for drugs, the Supreme Court applied a lesser standard, stating that the government's interest must only be sufficiently important to justify testing.[77] The Court found that the government's interest was

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73. *Id.* at 2389. The Court steadfastly maintained that monitors are present during testing, only to ensure that no "tampering" with the specimen occurs. *Acton*, 115 S. Ct. at 2393; *see supra* note 38.

74. *Id.* at 2393.

75. The Court's assertion that students must first disclose the use of prescription medications prior to taking the drug test is the first published mention of this aspect of the Vernonia program. *See id.* at 2389. The disclosure of medication argument was either not raised below or was ineffectually raised.

76. For example, it is not hard to imagine that a sexually active teenage female would be inhibited from using birth control pills if she feared her use of those pills could be disclosed to her parents and teachers.

77. *Id.* at 2394. The Supreme Court majority chastised the Ninth Circuit for requiring Vernonia to demonstrate a compelling interest. In Justice Scalia's view, courts are required to determine the significance of the government's interest only "in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.* at 2394-95. Left undetermined is what quantum of government interest will suffice when the

important and nearly compelling; it was certainly sufficiently important to justify limited intrusions on the weakened privacy rights possessed by student-athletes.[78] The Court determined that drug testing student-athletes was effective and satisfied both the role model and injury prevention goals.[79] The Court reiterated that only feasible alternatives will be considered and that no requirement exists that the test be the least intrusive method.[80]

E. No Hope in the Remand

The Supreme Court remanded the case to the Ninth Circuit because the appeals court did not consider whether testing would violate student athletes' right to privacy under the Oregon Constitution.[81] The Ninth Circuit had concluded that the protections afforded under the Oregon Constitution are at least coextensive with the Fourth Amendment. Thus, the court's finding that Vernonia's program violated the Fourth Amendment preempted an extensive inquiry into protections under the Oregon Constitution.

On remand, the Ninth Circuit in a brief 2 to 1 opinion held that the Oregon Constitution's protections were not greater than those provided for in the United States Constitution.[82] The Ninth Circuit did not elaborate on how it reached its terse conclusion.[83] Justice Reinhardt dissented and pointed out that the Ninth Circuit had made an abrupt about-face that conflicted with its 1994 opinion.[84]

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other factors favoring testing are weak.

78. *Acton*, 115 S. Ct. at 2394. The discipline crisis was also thought to require immediate attention. *Id.*

79. *Id.* at 2394-95. Testimony in the record as to improved discipline no doubt compelled this conclusion.

80. The Actons argued that suspicion-based testing was a superior method of testing and reduced the intrusiveness of testing. The Court, however, believed that suspicion-based testing would lead to a host of evils, including transforming testing into a "badge of shame." *Id.* at 2396.

81. *Id.* at 2397.

82. *Acton v. Vernonia Sch. Dist. 47J*, 66 F.3d 217, 218 (9th Cir. 1995). The court refused to certify the question to the Oregon Supreme Court. *Id.* at n.1.

The Ninth Circuit had previously stated, "Nonetheless, Oregon insists that its constitutional provision can give more protection than the federal constitution and that it sometimes does." *Id.* at 217. In fact, the Ninth Circuit concluded previously that "[i]t is highly likely that it [Oregon Constitution] will be found to offer more protection" than the Fourth Amendment. *Id.*

83. *Id.* at 218.

84. *Acton*, 66 F.3d at 218 (Reinhardt, J., dissenting). Justice Reinhardt stated: "The majority's inexplicable willingness to certify the question and its rash, peremptory conclusion

F. Justice O'Connor's Dissent

Justice O'Connor dissented on the ground that the *Acton* majority dispensed with the element of individualized suspicion in authorizing random drug testing.[85] Justice O'Connor asserted that the majority's position that blanket searches are less intrusive or more constitutional than searches of individuals selected on the basis of suspicion was flawed. Justice O'Connor rested this assertion on the proposition that suspicion is a necessary precondition to all searches, unless it would be impracticable to demonstrate the validity or existence of suspicion.[86] The notion that schools no longer need to require suspicion prior to searching its student-athletes was particularly galling to the dissent because each previous search case involving schools contained at least some element of suspicion.[87]

Justice O'Connor was troubled by the lack of factual findings justifying testing in the Vernonia grade school as opposed to the high school.[88] In addition, Justice O'Connor was struck by the

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that the Oregon Constitution affords no greater protection than does the Fourth Amendment . . . stands in direct contradiction to our prior opinion — more specifically to the part that was not overruled by the Supreme Court." *Id.* Justice Reinhardt continued: "The majority cites no intervening Oregon case law to explain its swift and total capitulation on this issue nor does it explain what, if any, reasoning underlies its conclusion." *Id.* at 219. Justice Reinhardt thought the best course of action was to certify the question to the Oregon Supreme Court. *Id.* at 220.

85. *Acton*, 115 S. Ct. at 2397-98 (O'Connor, J., dissenting). Justice O'Connor noted that "[f]or most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual." *Id.* at 2398.

86. Justice O'Connor explained that cases permitting suspicionless searches under the "special needs" exception involved chaos or urgency and a reasonable fear that the evidence would dissipate while a warrant was being secured. *Id.* at 2401 (O'Connor, J., dissenting). Justice O'Connor distinguished *Skinner*, 489 U.S. 602 (1989), from the situation presented in the *Acton* case on the grounds that a post-train accident scene is chaotic. The railway workers in *Skinner* were only tested following a train wreck, thus the search in *Skinner* was implicitly based on at least a modicum of individualized suspicion. *Acton*, 115 S. Ct. at 2401 (O'Connor, J., dissenting).

87. Notwithstanding the Court's statement in *T.L.O.* that individualized suspicion is not an "irreducible element," the search conducted in *T.L.O.* was based on some level of suspicion. New Jersey v. T.L.O., 469 U.S. 325, 341 n.7 (1985). Moreover, the test the Court formulated in *T.L.O.* requires that the school officials have some level of suspicion prior to undertaking a search. *Id.* at 342.

88. *Acton*, 115 S. Ct. at 2406 (O'Connor, J., dissenting). Justice O'Connor accepted *arguendo* that Vernonia presented sufficient evidence with respect to the need to test its high school student-athletes. *Id.*

absence of findings justifying testing of student-athletes as opposed to another segment of the student population.[89] The dissent concluded that Vernonia should only test students based on individualized suspicion. The suspicion, however, does not have to rise to the level of probable cause.

IV. Difficulties with the Court's Holding in *Acton*

A. Findings

Justice Scalia asserted that more evidence of drug use was produced in *Acton* to support a need for drug testing than in *Von Raab*.[90] Justice Scalia's statement lacks credibility because no documented evidence of drug use by student-athletes exists in *Acton*.[91] In *Von Raab*, both Justice Scalia and Justice Stevens dissented from the majority's opinion because they found no evidence to support testing of all Customs Service employees.[92] Thus, Justice Scalia's opinion in *Acton* was a significant departure from his dissent in *Von Raab*.[93]

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89. *Id.* (O'Connor, J., dissenting). The dissent noted that the real purpose behind the Vernonia program was to improve discipline in the schools. However, Vernonia failed to present sufficient evidence that the student-athletes were the root cause of the worsening discipline situation. *Id.* (O'Connor, J., dissenting).

90. *Id.* at 2396. In *Von Raab*, the Customs Service did not produce evidence of a single incident of drug use. The testing of Customs employees revealed that only a small number of employees failed the drug test. *Von Raab*, 489 U.S. at 683 (Scalia, J., dissenting).

91. The Court could have found that the district court's findings were clear error under FED. R. CIV. P. 52(a). Even findings which are made wholly on the basis of one party's evidence, as in *Acton*, can be rejected by an appeals court. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

92. *Compare Von Raab*, 489 U.S. at 683 (Scalia, J., dissenting) *with Skinner*, 489 U.S. at 607 (The railway agency in *Skinner* presented evidence of at least 21 accidents involving impairment.). Justice Scalia stated in his dissenting opinion in *Von Raab* that he only joined in *Skinner* because there was extensive evidence of drug use by railroad employees and consequent harm from such drug use that was utterly lacking in *Von Raab*. *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting). Ironically, Justice Scalia indicated in his *Von Raab* dissent that he felt that the Fourth Amendment was being reduced to meaningless surplusage by the increase of suspicionless testing. *Id.* at 680-81, 684 (Scalia, J., dissenting) ("[T]he Fourth Amendment has become frail protection indeed.").

93. Justice Scalia's position is even more remarkable given the utter lack of anything more than circumstantial evidence justifying the need for testing in *Acton*. In *Acton*, Justice Scalia should have heeded his wisdom in his *Von Raab* dissent, in which he stated:
"I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

The district court's findings in *Acton* mirror the testimony of the school district's witnesses. The court stated that the Actons presented no evidence refuting the school district's assertions of student drug use.[94] However, what the district court ignored is that the Actons were not challenging the legitimacy of the school district's concerns, which spurred the implementation of the drug tests; the Actons were only challenging Vernonia's chosen method of fighting the drug problem.[95] Thus, the court should not have expected, nor required the Actons to present evidence that pointed out the sparse and highly circumstantial nature of the school district's evidence.[96] Consequently, the Supreme Court was left not with the cold and unimpassioned decisions of a trier of fact drawing conclusions from conflicting testimony, but with a judge who adopted the rhetoric of the school district. Words such as "epidemic"[97] and "rebellion"[98] clearly indicate that the trial court judge accepted Vernonia's rhetoric.

Moreover, testimony by the school district's witnesses only established perceived increases in drug use by *students* in general; it did not establish an increase in drug use by athletes in particular.[99] Notably absent from the school district's evidence is any hard, empirical evidence of drug use by athletes specifically or by students generally.[100]

However, Justice Scalia did presage his opinion in *Acton* when he stated in *Von Raab* that social necessity, such as maintaining school discipline in the face of worsening drug use, may justify drug testing. *Id.* (Scalia, J., dissenting).

94. *Acton*, 796 F. Supp. at 1364.

95. On appeal to the Ninth Circuit, the Actons raised two arguments with regard to the sparse evidence: (1) the school district failed to establish that there was a drug problem in Vernonia, and (2) "even if there were a drug problem, it did not justify a random testing program." *Acton*, 23 F.3d at 1518. The Ninth Circuit stated that it only agreed with the Actons' second argument, but the appeals court later emphasized that the school district did not present sufficient evidence justifying testing of its athletes. *Id.*

96. The Actons also belatedly argued on appeal that much of what the school district introduced at trial was inadmissible hearsay.

97. *Acton*, 796 F. Supp. at 1357.

98. *Id.*

99. *See id.* at 1356.

100. For instance, the school district at one time employed a drug-sniffing dog, yet the school district never divulged the results of the canine's employment.

B. The Mythical Justification of Random Drug Testing — Preventing Athletic Injuries Caused by Drug Use

The district court stated that one of the original purposes of Vernonia's testing program was to reduce athletic injuries caused by drug use.[101] All drug testing of student-athletes rests on the proposition that drug problems exist among student-athletes (even on a nationwide basis) and that random drug testing is necessary to prevent athletic injuries by drug-impaired athletes. However, these propositions rest on virtually no empirical evidence.[102] For example, drug testing by the NCAA reveals virtually no drug use among its student-athletes.[103]

Furthermore, since traditional drug tests do not reveal steroid use, the Vernonia tests are not designed to detect the use of anabolic steroids. As a result, the school district's program failed to test for a category of drugs that are more frequently used and are arguably more dangerous to an athlete's health than drugs such as cocaine or marijuana. It is hypocritical for Vernonia to justify its testing of student-athletes on the basis of preventing athletic

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101. However, the court relied primarily on the role model goal, largely because the athletic safety exception would likely collapse on the foundation of lack of evidence.

102. For instance, the high school principal in Brooks v. East Chambers Consolidated Independent School District, 730 F. Supp. 759, 761 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991), stated that he had no evidence of any athletic injury resulting from drug use.

Drug use among high school students clearly exists in substantial numbers. *See* Abigail Trafford, *Winners & Losers; A Look at the Past Ten Years*, WASH. POST, Jan. 3, 1995, at 01 ("Federal statistics released in December showed no significant decline in the use of any illicit drug among high school students, and increases in many categories."); *see also infra* note 122. However, there is no evidence to date demonstrating: (1) athletes are more prone to use drugs or use drugs in numbers approaching the national average for all students, or (2) that a substantial number of athletes have been injured due to drug use.

While it is obvious that drug use must impair athletic performance and very likely could cause injuries to impaired athletes, evidence of injuries to drug-impaired athletes is nonexistent.

103. *See generally* NATIONAL COLLEGIATE ATHLETIC ASS'N, 1986-1987 DRUG TESTING PROGRAM (1986) [hereinafter NCAA 1986-1987 PROGRAM]. In 1986, the National Collegiate Athletic Association (NCAA) implemented a random drug-testing program. Student-athletes who tested positive in a urine test for drugs banned by the NCAA lost their eligibility to participate in intercollegiate athletics.

In 1987, twenty-four players were suspended from NCAA Division I football games for failing NCAA drug tests. Douglas Lederman, *32 Football Players Failed NCAA Drug Tests Last Fall*, CHRON. HIGHER EDUC., Mar. 16, 1988, at A39. In 1988, only four players were banned for failing drug tests. *Id.* From January 1992 to June 1992, one-half of one percent of all tested NCAA athletes failed drug tests. *Very Few Athletes Fail Drug-Testing Program*, NCAA NEWS, Sept. 2, 1992, at 6.

injuries when it fails to effectively test these athletes. Moreover, limiting testing to interscholastic athletics participants does not reduce the risk of injury to other vulnerable "student-athletes," such as participants in recreational athletics on school grounds or in physical education programs. If the school district's purpose is to prevent athletic injuries caused by drug use, it must first present credible evidence that student athletes use drugs and are imperiled, and then must implement testing that effectively prevents athletic injuries.

C. *Rights of Schoolchildren After* Acton

While never vitally strong, students' constitutional rights are further reduced by the Court's holding in *Acton*. The Supreme Court has stated that students do not "shed their constitutional rights . . . at the schoolhouse gate."[104] However, the *Acton* Court believes that the constitutional rights afforded to schoolchildren are "what is appropriate for children in school."[105] The Court fails to elaborate as to "what is appropriate for children in school," thereby granting virtually unbridled discretion to teachers and administrators to determine the extent of students' constitutional rights.

Against this legal backdrop, schools and school boards across the United States are now faced with the decision of whether they should implement their own versions of the Vernonia drug testing program. Although drug testing may be an overrated method of preventing the use of drugs, it can be a solution in areas besieged by drug use. However, notwithstanding the Court's holding in *Acton*, a school first should consider the privacy ramifications of drug testing before implementing such a program.[106]

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104. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). In *Tinker*, the Court found that a school's ban on wearing armbands to school violated the First Amendment.

105. *Acton*, 115 S. Ct. at 2392. The Court based its proposition that students have diminished expectations of privacy on the fact that many states have compulsory school attendance laws and teachers act in *loco parentis* to students. The Ninth Circuit, unlike the Court, stated that the fact students are compelled to attend school does not equate to a diminishment of a student's privacy expectations. *Acton*, 23 F.3d at 1525.

106. The district court noted that Vernonia first sought the advice of counsel before implementing its program. *Acton*, 796 F. Supp. at 1358.

V. Designing a Program That Satisfies *Acton* and Minimizes Random Drug Testing's Invasiveness

Schools are much more likely to implement random drug testing programs now that the apparent legal hurdles have been lifted by the Supreme Court.[107] In fact, many school districts plagued by drug use have publicly welcomed the Court's decision in *Acton* with open arms.[108] However, random testing will still invite legal challenges and entreaties to the Court to reconsider its holding in *Acton*. By following several guidelines, schools can minimize the intrusiveness of its drug testing program and decrease the risks of litigation.

A. The Drug Testing Program Should Not Permit Direct Visual Monitoring

Visual monitoring is the single most invasive physical act associated with random drug testing,[109] although testing is still considered a search for Fourth Amendment purposes even if there is no monitoring component.[110] The Actons argued that drug testing was invasive, partly because the athletes could be directly observed during the test.[111] While the Supreme Court held that the Vernonia tests were not unconstitutionally invasive, the Court emphasized that visual monitoring in the Vernonia program was clearly optional and did not always occur.

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107. Schools should be aware of the limits of the *Acton* Court's holding: (1) testing may still be unconstitutional under state Constitutions, which may provide greater protection to individual privacy than the Fourth Amendment; (2) the *Acton* holding does not authorize random drug testing of all students; and (3) *Acton* may have little or no application to college drug testing programs, especially in light of the Court's denial of certiorari in University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993) (finding that the University of Colorado's random drug testing procedure was unconstitutional under both the Fourth Amendment and the Colorado Constitution), *cert. denied*, 114 S. Ct. 1646 (1994).

108. *See School Kids Face More Drug Tests*, MIAMI HERALD, June 27, 1995, at 1A, 4A (reporting that Florida school districts in Dade and Broward Counties are considering the use of random drug testing programs).

109. *See Schaill*, 864 F.2d at 1318 (finding lack of visual monitoring reduced tests' invasiveness).

110. *Acton*, 796 F. Supp. at 1359 (finding testing was still a search because tests disclosed extraneous, private medical information); *see* Brooks v. East Chambers Consolidated Indep. Sch. Dist., 730 F. Supp. 759, 763 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

111. The Ninth Circuit in *Acton* asserted that the monitors were unable to or did not observe the act of urination, although they were present and in close proximity to the athletes. *Acton*, 23 F.3d at 1516.

The Supreme Court implicitly rejected the argument that monitoring the Vernonia athletes was invasive, stating that student-athletes had lessened expectations of privacy.[112] The Court invoked the so-called "communal undress" reasoning, which provides that athletes, by virtue of undressing and showering in a locker room, lose a good portion of their right to privacy and certainly are not offended by monitored urination. Yet the Court ignored the distinction that nudity in a locker room among one's peers is not monitored, nor is it compulsory.[113]

Other courts have also adopted the reduced invasiveness formulation in connection with student-athletes.[114] This reasoning stems from the regulated industry exception in which the Court has held that employees working in a "pervasively regulated industry" are afforded reduced expectations of Fourth Amendment privacy.[115] However, in *Acton*, the Ninth Circuit found that the type of regulations to which athletes are subject do not compel a finding that student-athletes operate in a "pervasively regulated" environment.[116] In light of the controversy surrounding direct visual

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112. The district court only mentioned in passing the communal nature of the Vernonia locker rooms. *Acton*, 796 F. Supp. at 1363.

113. The Ninth Circuit summarily rejected the "communal undress" argument. *Acton*, 23 F.3d at 1525; *see* Hill v. NCAA, 865 P.2d 633, 692 (Cal. 1994) (Mosk, J., dissenting) (asserting that student athletes should not be more open to urine testing than non-athletes just because they are regulated, supervised and function in a communal environment). The "communal undress" reasoning is factually flawed and logically deficient. Is the unwarranted strip search of an exotic dancer less invasive merely because the dancer is unclothed on stage? Of course not. The Court fails to recognize that people are able to compartmentalize aspects of their lives, thus changing clothes in front of one's peers is vastly different than being carefully observed by an authority figure while providing a urine specimen.

114. *See, e.g., Schaill*, 864 F.2d at 1318-19 (stating that because student-athletes are in the public eye more than non-athletes, it is implausible for student-athletes to have a strong expectation of privacy as to a urine test); Hill v. NCAA, 865 P.2d 633 (Cal. 1994) (asserting that student-athletes have a reduced expectation of personal privacy in their bodily conditions because of the unique set of demands that athletic participation carries with it).

115. *See Von Raab*, 489 U.S. at 672 (finding firearm-bearing customs agents "reasonably should expect effective inquiry into their fitness and probity"); *Skinner*, 489 U.S. at 627-28 (noting railroad workers work in pervasively regulated and monitored industry); New York v. Burger, 482 U.S. 691, 699-703 (1987) (noting junkyard dealers operate in pervasively regulated industry); Donovan v. Dewey, 452 U.S. 594, 602 (1981) (mine workers); United States v. Biswell, 406 U.S. 311, 315 (1972) (firearm dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970) (finding liquor business is licensed and subject to extensive regulation). The *Von Raab* Court identified the United States Mint as a quintessential "pervasively regulated industry," whose employees should expect to be validly searched at the end of each business day. *Von Raab*, 489 U.S. at 671.

116. *Acton*, 23 F.3d at 1525 (noting that student-athletes do not face extensive regulation or background checks). The appeals court concluded that "[a]thletes' right to privacy []

monitoring of student-athletes, schools implementing drug programs would be wise to prohibit or keep to a minimum any direct visual monitoring of students' urination.

B. Individualized Suspicion Should Be a Component of Any Random Drug Testing Program

The Ninth Circuit stated that a program based on individualized suspicion would probably be a more effective deterrent of drug use than Vernonia's random program.[117] The Ninth Circuit recognized, however, that suspicion-based programs are also subject to problems.[118]

Opponents of suspicion-based programs paint an effective picture of the problems inherent in suspicion-based testing: it creates an additional burden for administrators and teachers;[119] it exposes teachers and school officials to defamation and discrimination suits; it places too much discretion in the hands of school officials with respect to the decision of which students to test; teachers are unfamiliar with the dictates of the Fourth Amendment and probable cause requirements;[120] and, the results of suspicion-based tests are largely punitive, thereby transforming teachers into adjunct law enforcement officials.[121] However, a testing program built around the requirement of a showing of individualized suspicion would survive even Justice O'Connor's sharp inquiry.

Testing student-athletes rests on the flawed assumption that athletes are more likely to use drugs than other segments of the student population. Yet, the demands on an athlete's time and body make it unlikely that an athlete is more likely to use drugs than another student. The publicized instances of drug use among athletes erroneously magnify the amount of drug use by ath-

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remains robust." *Id.*

117. *Acton*, 23 F.3d at 1522.

118. *Id.* The appeals court found that a suspicion-based program would increase discretion and would be subject to risks and abuses.

119. *See Acton*, 115 S. Ct. at 2396.

120. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 343 (1985); *Schaill*, 864 F.2d at 1314.

121. Justice O'Connor noted that teachers already act in an investigatory capacity. *Acton*, 115 S. Ct. at 2402-03. (O'Connor, J., dissenting) (pointing to number of discipline categories teachers are charged with overseeing). Because teachers are charged with maintaining discipline, they often act as both police officer and judge when meting out punishment.

letes.[122] It is curious that, for instance, musicians are stereotypically more likely to use drugs, yet they are not selected for testing.[123]

School administrators clearly view testing student-athletes as a stepping stone to global testing despite legal precedent to the contrary.[124] Although testing of entire student bodies is not permitted or envisioned under the majority's opinion in *Acton*, a testing program based on individualized suspicion would expose all student drug users to potential testing.

C. Schools Should Only Use Narrowly Designed Tests

Another invasive feature of any drug testing program is that the tests reveal medical facts beyond illicit drug use. For instance, drug tests reveal the use of contraceptives or a pregnancy medication.[125] Although the Actons, as well as other plaintiffs, have challenged this aspect of the tests, the exposure of private medical

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122. Random drug tests conducted by the NCAA reveal that only a small percentage of tested athletes use drugs. *See, e.g.*, *Very Few Athletes Fail Drug-Testing Program*, NCAA NEWS, Sept. 2, 1992, at 6 (reporting that only one-half of one percent of all athletes during six month period failed NCAA drug tests). This number is far less than the average use by the general student population. For example, statistics gathered in Arizona showed that among the high school students polled, 44.4% had tried marijuana and 11% had tried cocaine. *That's a Fact*, ARIZ. REPUBLIC, Jan. 25, 1995, at 1.

123. Instances of drug use and abuse by popular musicians is legendary. It is important to note that the two justifications for testing student-athletes, if substantiated, are unique to student-athletes. *See Schaill*, 864 F.2d at 1319. The Seventh Circuit stated that testing athletes does not imply that testing of other students is permissible.

124. *See School Kids Face More Drug Tests*, MIAMI HERALD, June 27, 1995, at 4A. The deputy general counsel for the National School Boards Association stated that, after *Acton*, testing could be expanded to include students participating in other school-sponsored activities. *Id.* Counsel for Vernonia viewed *Acton* as permitting testing of *all* students when teachers were confronted with a drug "crisis" such as that which faced the Vernonia school district. *Id.*

However, the court in Brooks v. East Chambers Consolidated Independent School District, 730 F. Supp. 759, 766 (S.D.Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991), emphatically rejected testing of *all* students as a clear violation of the Fourth Amendment. *See, e.g.*, Anable v. Ford, 653 F. Supp. 22 (W.D.Ark. 1985); Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist., 510 A.2d 709 (N.J. Super. 1985). Even the Vernonia principal recognized that a global testing program was of questionable legality and stated that Vernonia scrapped a planned global program because "we were afraid we'd be sued to hell if we went to all students." *School Kids Face More Drug Tests*, *supra* at 4A (quoting Randall Aultman).

125. *Skinner*, 489 U.S. at 617; Jones v. McKenzie, 833 F.2d 335, 339 (D.C. Cir. 1987).

facts has never constituted the basis of a court's ruling invalidating drug testing.[126]

Whether tests can be designed that only reveal the presence of illegal drugs is a question best left to scientists. Certainly, the random tests should be designed to reveal only the use of illegal or dangerous narcotics.

D. Schools Should Test All Similarly Situated Student-Athletes

Most schools only drug test those athletes participating in extracurricular sports because they can tie participation in the athletic program to a supposed voluntary consent to drug testing.[127] However, schools that articulate a safety concern do not attempt to test all "student-athletes," i.e. those participating in physical education classes or intramural sports. These activities are often conducted in an unstructured and undersupervised arena, which is more likely to lead to injury of an impaired athlete than in an interscholastic athletic competition. To date, no attempt has been made to extend random drug testing programs to recreational sport or physical education participants. Therefore, the safety argument is more rhetoric than a reasoned basis for testing student-athletes.

VI. Conclusion: The Encroachment on Privacy Rights Is Not Justified by Drug Testing's Efficacy or Its Moral Purpose

The Court's holding in *Acton* will lead to further distrust between teachers and students. Adults are already perceived as

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126. *Acton*, 115 S. Ct. at 2394. The Seventh Circuit in *Schaill* minimized the importance of the disclosure of extraneous information because it was only disclosed after a student tested positive, and then, only to the school's athletic director. *Schaill*, 864 F.2d at 1322 n.19. The *Acton* Court agreed with the Seventh Circuit that the extraneous information disclosure argument was effectively rebutted by the possibilities that the information would only be disclosed after a positive test and that the information would be disclosed to a limited number of people. *Acton*, 115 S. Ct. at 2394.

127. The consent to be tested is not truly voluntary, as consent is conditioned on participation in interscholastic athletics. Both the *Schaill* and *Derdeyn* courts recognized that when consent is conditioned on the denial of a benefit in exchange for a waiver of Fourth Amendment rights, the consent is of no effect. *See Derdeyn*, 863 P.2d at 947; *Schaill*, 864 F.2d at 1319; *see also* Perry v. Sinderman, 408 U.S. 583, 597 (1972).

The *Acton* Court impliedly recognized that an athlete's act of consenting to random drug testing is not a waiver of constitutional rights because the Court declined to rely on the athlete's consent as a dispositive factor.

serving primarily an investigative and punitive role.[128] Random drug testing at schools only exacerbates the generational schism between adults and children.

Although popular among a vast segment of society — from government agencies to school boards — it is doubtful that random drug testing actually deters a significant amount of drug use. Programs that target only a sector of the student population, such as athletes, may only force drug users to drop out of athletic programs or out of school entirely.[129] Programs based on individualized suspicion are more likely to catch drug users than random tests, but they are also subject to abuses as the majority in *Acton* acknowledged.[130]

James Acton's testimony is stirring: "I feel that they have no reason to think I was taking drugs."[131] Public reaction to the *Acton* decision has centered on the elimination of suspicion and the belief that government has now placed the burden of proof on the individual. Thus, in the post-*Acton* world, everyone is guilty, and one must prove one's innocence.[132]

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128. Justice O'Connor articulated this point as she scoffed at critics who state that testing based on individualized suspicion will place teachers in an investigatory and hostile role. *Acton*, 115 S. Ct. at 2402-03 (O'Connor, J., dissenting). Justice O'Connor remarked that teachers are already viewed in that manner and, in fact, act in that capacity when supervising students.

129. In *Skinner*, Justice Stevens articulated the overrated nature of drug testing's deterrent effect by stating that even the threat of loss of employment may not be sufficient to break the hold of addiction. *Skinner*, 489 U.S. at 634 (Stevens, J., concurring in part). Similarly, the threat of the loss of participation in interscholastic athletics is not a significant penalty to deter anything more than experimental use. Serious or even casual drug users are unlikely to be deterred.

For instance, several successful college football players, such as Miami Hurricane lineman Warren Sapp, allegedly used drugs prior to an important professional football audition, which cost many of the players thousands, if not millions, of dollars. The fact that talented college athletes, such as these, are unwilling to refrain, on the eve of a significant drug test, from using drugs and are willing to sacrifice hundreds of thousands of dollars weakens the validity of the argument that participation rights in interscholastic athletics constitute an effective deterrent. *See* Hubert Mizell, *Sapp Eager to Prove His Critics Wrong as He Starts Pro Career*, ROCKY MOUNTAIN NEWS, July 30, 1995, at 1313 ("[D]raft day slippage cost Sapp a million dollars or two . . . .").

130. The extent of discretion afforded school officials in conducting the "search" is a factor considered in the privacy analysis. *Acton*, 115 S. Ct. at 2395-96.

131. *Id.* at 2405 (O'Connor, J., dissenting).

132. Acton's father echoed this feeling, stating that drug testing "sends a message to children that are trying to be responsible citizens . . . that they have to prove that they're innocent . . . and I think that kind of sets a bad tone for citizenship." *Id.* (O'Connor, J., dissenting).

Privacy rights must be zealously guarded or else government — the school board in this incarnation — may encroach on all fundamental rights.[133] The Ninth Circuit stated poignantly in *Acton*: "We have found that we must live with a certain amount of discomfort, even danger, if we are to maintain constitutional protections."[134] Drug testing violates a person's privacy in many ways. Therefore, its use should be discouraged, especially among schoolchildren.

The goal of testing is undoubtedly beneficial. However, the means are misdirected, discriminatory, ineffectual and invasive. The Court's holding in *Acton* sets a bad precedent by permitting government encroachment on fundamental privacy rights.

133. The Supreme Court has traditionally recognized that school boards are arms of the government which are capable of encroaching on individual liberties. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1943).

134. *Acton*, 23 F.3d at 1527.