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## Drug Testing of Student Athletes in Veronica School District v. Action: Orwell's 1984 Becomes Veronica's Reality in 1995

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# NOTE

## DRUG TESTING OF STUDENT ATHLETES IN *VERNONIA SCHOOL DISTRICT V. ACTON*: ORWELL'S 1984 BECOMES VERNONIA'S REALITY IN 1995

### I. INTRODUCTION

America is in the midst of an intense battle against childhood drug abuse. What makes the battle more poignant is the shockingly young age of the children who are "playing" with illegal drugs. The National Institute on Drug Abuse reported in 1990 that approximately twenty-three percent of children, ranging in age from twelve to seventeen, acknowledged use of one or more illicit drugs, and forty-eight percent admitted drinking alcohol.<sup>1</sup> American schools are also battling drug abuse on the athletic fields. In fighting the war against drug abuse, schools are implementing random, suspicionless drug testing programs focused on student athletes.<sup>2</sup> These types of programs, however, raise several constitutional concerns.<sup>3</sup> Schools' random drug testing programs may constitute unreasonable searches and seizures in direct violation of the Fourth Amendment. This, in turn, violates privacy rights of students subjected to these programs.

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1. NATIONAL INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: MAIN FINDINGS 1990, DHHS PUBLICATION NO. (ADM) 91-1789, WASHINGTON, D.C. at 14, 20 (1991).

2. See U.S. DEP'T OF EDUCATION AND U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT TO CONGRESS AND THE WHITE HOUSE ON THE NATURE AND EFFECTIVENESS OF FEDERAL, STATE, AND LOCAL DRUG PREVENTION/EDUCATION PROGRAMS 70 (Oct. 1987). The report stated that "[b]ased on a random, stratified sample of 700 school districts, respondents indicate that nearly three-fourths of the districts have a written policy on substance abuse and three-fifths require substance abuse education for at least some grade levels." *Id.* at part 1, § 1, at 19-20 (footnote omitted).

3. Random drug testing has raised constitutional issues in a variety of contexts, including schools and railroads. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (challenging a Federal Railroad Administration regulation authorizing railroads to administer breath and urine tests to employees who violate safety rules); *Schail v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833 (N.D. Ind. 1988) (challenging school drug testing program on Fourth Amendment grounds).

Yet, in the wake of student athletes' fatal drug overdoses,<sup>4</sup> schools may have little choice but to challenge the limits of Fourth Amendment protection against unreasonable searches and seizures in the hope of preventing drug abuse by students.

In recent years, several students have challenged the constitutionality of drug testing programs.<sup>5</sup> In March 1995, the United States Supreme Court faced this legal question in *Vernonia School District v. Acton* 47J.<sup>6</sup> Specifically, the Court decided whether the Fourth Amendment allows a school to conduct suspicionless, random drug testing of its student athletes.<sup>7</sup> In a six-three decision, the Supreme Court ruled that public schools can require student athletes to submit to random drug tests prior to participating in sports.<sup>8</sup> Yet the rationale of this decision is far from flawless. This Note focuses on the "reasonableness" of the random, suspicionless drug testing program implemented by the Vernonia School District. It explores the case of James Acton, a seventh grade student at Washington Elementary School in Vernonia, Oregon, who just wanted to play football. His opposition to the conditions placed on his participation in a school sport escalated into a United States Supreme Court decision. In defining the constitutional notion of "privacy," the Court upheld the drug testing program and severely limited student athletes' privacy rights.

Part II of this Note discusses the background of the Vernonia School District's drug testing policy, the beginning of James Acton's fight for his constitutional rights, and the Supreme Court's interpretation of the Fourth Amendment's meaning of privacy. Part III details the Oregon district court's and the Ninth Circuit's opinions of the case. Part IV examines the Supreme Court decision in *Acton I*. Part V analyzes the flaws of the Court's decision. Finally, Part VI concludes that the Supreme Court decided the case on moral grounds rather than on precedent. This Note contends that that is an unacceptable basis for a Supreme Court decision, especially one that affects thousands of innocent students.

4. See Susan Schmidt & Tom Kenworthy, *Cocaine Caused Bias' Death Autopsy Reveals*, L.A. TIMES, June 25, 1986, at Part III.

5. See *Vernonia Sch. Dist. v. Acton* 47J, 115 S. Ct. 2386 (1995) [hereinafter *Acton I*] (student challenging the random drug testing program as violating the Fourth and Fourteenth Amendments); *Schail v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833 (N.D. Ind. 1988) (two students involved in extra-curricular sports challenging the constitutionality of the drug testing program).

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

7. *Id.*

8. David G. Savage, *High Court OKs Routine Testing Of Students For Drugs*, L.A. TIMES, June 27, 1995, at A1.

## II. BACKGROUND

### A. *The Need for Drug Testing in Vernonia*

Vernonia is a small logging community of approximately 3000 residents located on the coast of Oregon, about one hour west of Portland.<sup>9</sup> Approximately 700 students attend the four schools that the Vernonia School District ("the District") operates,<sup>10</sup> and about sixty to seventy-five percent of elementary school and high school students participate in a District-sponsored sport.<sup>11</sup> In the mid-to-late 1980s, the District determined that a drug abuse problem existed within the student body. Athletes appeared to be the leaders of the school's drug movement.<sup>12</sup> Teachers reported that students frequently expressed an interest in drugs. Along with that expressed interest came an increased number of disciplinary problems.<sup>13</sup> Also, the District was also concerned because drug abuse might increase the risk of sports-related injuries.<sup>14</sup>

The District's initial response to the alleged drug problem was to offer special lectures and assemblies to convince students that drugs are harmful.<sup>15</sup> Subsequently, the District implemented the Student Athlete Drug Policy ("the Policy") in the fall of 1989.<sup>16</sup> The Policy's stated purpose is "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."<sup>17</sup>

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9. Respondents' Brief at \*6, *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386 (No. 94-590) (1995) (available in LEXIS, Genfed library, Dist file) [hereinafter Respondents' Brief].

10. *Id.*

11. Brief of the Petitioner *Vernonia Sch. Dist.* at \*9-10, 115 S. Ct. 2386 (No. 94-590) (1995) (available in LEXIS, Genfed library, Dist file) [hereinafter Petitioners' Brief]. The District offers basketball, cross country, football, golf, track, wrestling, and volleyball. *Id.*

12. *Acton I*, 115 S. Ct. at 2388-89.

13. *Id.* at 2388.

14. *Id.* at 2389.

15. Respondents' Brief, *supra* note 9, at \*7. Respondent alleged that the District blatantly overstated the drug "problem." The Actons claimed that there was "no evidence of any athletes in Vernonia ever competing while on drugs, let alone causing or sustaining injury." Respondent contended that the evidence the District presented was almost exclusively the perception of a few teachers and administrators. *Id.*

16. *Acton I*, 115 S. Ct. at 2389.

17. *Id.*

### B. The Policy

The Policy requires that any student who desires to participate in interscholastic athletics sign a consent form authorizing the District to conduct random urinalysis drug testing.<sup>18</sup> In addition, the student's parents must sign the form.<sup>19</sup> All athletes are tested at the beginning of their particular sport season and then are placed in a pool each week from which ten percent are chosen randomly for testing.<sup>20</sup> Gender determines testing protocol. Boys are taken to the locker room where they must produce a urine specimen at a urinal while an adult monitor watches and listens to ensure accuracy; girls produce their samples in an enclosed stall while a female monitor listens for the normal sounds of urination.<sup>21</sup> Any student randomly selected who refuses to be tested is suspended automatically from the sports program for the rest of the season.<sup>22</sup> A student who is taking any prescription medications must identify them with a copy of the prescription or a doctor's note.<sup>23</sup> Samples are sent to an independent laboratory where they are tested for amphetamines, cocaine and marijuana, but not for alcohol or performance enhancing drugs, such as steroids.<sup>24</sup>

Confidentiality is maintained in the testing process, due to the sensitive nature of the information that drug testing yields. The laboratory is unaware of the identities of the students whose specimens are being tested.<sup>25</sup> In addition, the laboratory is authorized only to report test results to the District superintendent and personnel only if an authorization code

18. *Id.* The form reads in 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.

*Striking a Balance on School Drug Tests*, PHOENIX GAZETTE, June 28, 1995, at B6.

19. *Acton I*, 115 S. Ct. at 2389.

20. *Id.*

21. *Id.*

22. Respondents' Brief, *supra* note 9, at \*18.

23. *Acton I*, 115 S. Ct. at 2389.

24. *See id.* It is very surprising that the District, being so concerned about drug use by student athletes, would not test for alcohol (a substance to which school children have easy access, sometimes even in their own homes) or steroids (a drug that students likely might take to enhance their athletic performance), two typical drugs that are probably more available to students than marijuana and cocaine. If the true purpose is to stop or prevent drug abuse by student athletes, the District's test appears to be underinclusive and probably not as effective as it could be. *See also* discussion *infra* part V.B.

25. *Acton I*, 115 S. Ct. at 2389.

is used and confirmed.<sup>26</sup> Only the District superintendent, principals, vice-principals, and athletic directors have access to test results.<sup>27</sup>

A student who tests positive for drugs is tested a second time as soon as possible to confirm the result.<sup>28</sup> If the second test result is negative, there is no further action.<sup>29</sup> If the second test is positive, the student's parents are notified and the school principal holds a meeting with the student and parents to discuss the options available to the student.<sup>30</sup>

### C. *Acton's Battle Begins*

In 1991, James Acton, a seventh grade student at Washington Elementary School, signed up to play football.<sup>31</sup> He was not allowed to participate, however, because both he and his parents declined to sign the consent form authorizing random drug testing.<sup>32</sup> Alleging that the Policy violated James's rights under the Fourth and Fourteenth Amendment of the United States Constitution and Article One, Section Nine of the Oregon Constitution, James and his parents filed suit seeking declaratory and injunctive relief from compliance with the Policy.<sup>33</sup>

### D. *The Fourth Amendment*

The Fourth Amendment to the United States Constitution provides for protection of personal privacy and from unreasonable searches or intrusions by the state.<sup>34</sup> A brief overview of the history of the Court's

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26. *Id.*

27. *Id.*

28. *Id.* at 2390.

29. *Id.*

30. *Acton I*, 115 S. Ct. at 2390. The options given to a student testing positive for the first time are: (1) six weeks participation in an assistance program with weekly urinalysis; or (2) suspension from athletics for the remainder of the current season and the entire next athletic season. A second offense results in automatic imposition of the second option, and the third offense results in automatic suspension for the remainder of the current season and for the next two athletic seasons. *Id.*

31. *Acton I*, 115 S. Ct. at 2390.

32. *Id.* There was no reason to believe that James was using drugs nor any evidence to support that contention. James's father testified that he believes "the drug test is an invasion of James's privacy and a violation of his civil rights." Respondents' Brief, *supra* note 9, at \*21.

33. *Acton I*, 115 S. Ct. at 2390.

34. The Fourth Amendment provides:

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

interpretation of the Fourth Amendment sets the stage for a discussion of the *Vernonia School District v. Acton* decision.

### 1. Searches in Public Schools

Courts historically have held that school officials act *in loco parentis*,<sup>35</sup> rather than as state actors, and therefore upheld searches at public schools.<sup>36</sup> However, in *New Jersey v. T.L.O.*,<sup>37</sup> the Supreme Court held that the Fourth Amendment protects students' privacy rights. The Supreme Court rejected the notion that schools act as parental surrogates, and held that school officials are representatives of the state and "cannot claim the parents' immunity from the strictures of the Fourth Amendment."<sup>38</sup> Thus, *T.L.O.*'s holding established that school officials are state actors for purposes of the Fourth Amendment analysis.

### 2. Whether Certain Conduct Constitutes a "Search" That Is "Reasonable"

Upon determination that the Fourth Amendment is implicated in the public school setting, the next issue is whether or not the conduct constitutes a search. An activity constitutes a search for Fourth Amendment purposes if it infringes upon a person's "reasonable expectation of privacy."<sup>39</sup> In *Skinner v. Railway Labor Executives' Associ-*

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U.S. CONST. amend. IV.

35. The term *in loco parentis* means: "In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

36. See *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (holding that a canine sniff at a junior and senior high school was not a search because school officials were acting *in loco parentis*).

37. 469 U.S. 325 (1985). In *T.L.O.*, school authorities found a student who was violating school rules by smoking cigarettes in the restroom. The student was taken to meet with the Assistant Vice Principal, who asked her if she had been smoking. Upon her denial and based on the report of the teacher finding her in the restroom, the Assistant Vice Principal searched her purse and found cigarettes. After pulling out the cigarettes, he noticed cigarette rolling papers, which he recognized were used to roll marijuana cigarettes. He then searched more thoroughly, finding a pipe, marijuana and other drug paraphernalia. The Assistant Vice Principal turned the items over to police, and as a result, delinquency charges were brought against the respondent. At her trial, respondent moved to suppress based on the exclusionary rule. The Supreme Court held that the search was valid because it was based on "reasonable suspicion." The Court further stated that the search was valid because the need for the school to maintain an environment conducive to learning outweighed respondent's expectation of privacy. *Id.*

38. *Id.* at 336-37.

39. *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

ation,<sup>40</sup> the Supreme Court held that state collection and testing of urine does, in fact, constitute a "search" subject to the conditions of the Fourth Amendment.<sup>41</sup> Therefore, the District's activity of collecting and testing students' urine samples constitutes a search regulated and protected by the Fourth Amendment.

Pursuant to the Fourth Amendment, a governmental search is constitutional only if it is reasonable.<sup>42</sup> The Supreme Court previously held that the "reasonableness" of a specific search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."<sup>43</sup> In general, a warrant must be issued to meet the reasonableness requirement,<sup>44</sup> and due to the importance of the warrant requirement, the Court consistently has allowed very few exceptions.<sup>45</sup> The Supreme Court, however, has held that a search is reasonable even if conducted without a warrant "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."<sup>46</sup> The critical question, then, is whether searches in public schools, such as random drug testing of student athletes, make the warrant and probable cause requirements unrealistic.

In *New Jersey v. T.L.O.*,<sup>47</sup> the Court upheld a search based on individual suspicion rather than probable cause. The Court noted that in public school settings, the requirement of obtaining a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures," and "strict adherence to the requirement that searches be based upon probable cause" would undermine "the substantial need of teachers and administrators for freedom to maintain order in the schools."<sup>48</sup>

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40. 489 U.S. 602 (1989).

41. *Id.* at 617.

42. *Katz*, 389 U.S. at 361.

43. *Acton I*, 115 S. Ct. at 2386, 2388 (quoting *Skinner*, 489 U.S. at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979))).

44. *See Katz*, 389 U.S. at 357. Issuing a warrant serves two constitutional protections: (1) to prohibit searches without probable cause because "any intrusion in the way of search or seizure is an evil[.]" and "no intrusion at all is justified without a careful prior determination of necessity;" and (2) any search that is deemed necessary "should be as limited as possible." To be avoided is "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

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

46. *Acton I*, 115 S. Ct. at 2391 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

47. 469 U.S. 325 (1985).

48. *Id.* at 340-41.



Therefore, based on the *T.L.O.* rationale, a public school district could conduct drug testing of students suspected of drug use.

### 3. Individual Searches Without Individual Suspicion

Logically, the next question is whether warrantless searches are constitutional even though they lack individual suspicion. Although the factual situation of *T.L.O.* involved individual suspicion, the Court stated in dicta that its decision did not stand for the proposition that individualized suspicion was an element of the reasonableness test of a Fourth Amendment search.<sup>49</sup> The *T.L.O.* Court, borrowing from *Delaware v. Prouse*,<sup>50</sup> restated the rule that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only when the privacy interests implicated by a search are minimal" and where additional safeguards are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"<sup>51</sup>

The Supreme Court has found governmental searches lacking individualized suspicion constitutional when grave danger exists and substantial harm could occur if rule violations, such as drug or alcohol use, are taking place. In *Skinner*,<sup>52</sup> the Court upheld suspicionless drug testing of railroad employees involved in train accidents.<sup>53</sup> Further, in *Treasury Employees v. Von Raab*,<sup>54</sup> the Supreme Court allowed the government to

49. See *id.* at 341.

50. 440 U.S. 648 (1979).

51. *Id.* at 654-55 (citing *Camara v. Municipal Ct.*, 387 U.S. 523, 532 (1967)).

52. 489 U.S. 602 (1989). In *Skinner*, the Federal Railroad Administration (FRA) obtained evidence indicating that alcohol and drug use by railroad employees either caused or contributed to several train accidents. One study depicted 23% of operating personnel as problem drinkers; 13% of employees admitted that they came to work slightly drunk and 5% admitted that they were very drunk while at work. *Id.* at 607 n.1. In response to this evidence, the FRA promulgated regulations authorizing, inter alia, blood and urine tests of employees after certain major train accidents, and breath and/or urine tests of employees who violate specified safety rules. The Court upheld the regulations, stating that the government's interest in preventing train accidents was compelling because targeted employees must participate in the "discharge [of] duties [that are] fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628. The Court decided that these safety concerns outweighed the privacy interests of the employees, and that the search was constitutional. *Id.*

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

54. 489 U.S. 656 (1989). *Von Raab* involved a drug testing program for customs agents who either were directly involved in drug interdiction, handled classified material, or carried firearms. The Court cited *Skinner* regarding the incredible risk of injury that custom agents may pose if they use drugs, especially if they participate in the three above activities. It concluded that in exceptional cases, where the government's interest in testing to prevent grave danger outweighs

conduct random drug tests on federal customs officers who carry weapons or who work in drug interdiction.<sup>55</sup> Finally, the Court upheld mobile checkpoints intended to look for illegal immigrants and contraband under the Fourth Amendment as well.<sup>56</sup> Thus, it is possible for a search, subject to Fourth Amendment scrutiny, to be considered constitutional even without individualized suspicion under circumstances that pose an ominous threat of danger.

### III. DECISIONS OF THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS

#### A. *The District Court's Ruling*

Prior to *Acton I*, there was no straight-forward rule regarding the constitutionality of suspicionless searches in public schools. The only case analogous to *Acton* is *New Jersey v. T.L.O.*,<sup>57</sup> yet even the facts of that case differ significantly from those presented in *Acton*.<sup>58</sup>

The *Actons* began their fight against the Vernonia School District in the United States District Court for the District of Oregon. The district court interpreted the *T.L.O.* decision as standing for the proposition that the limitations of the Fourth Amendment are "relaxed"<sup>59</sup> in the public school setting. After discussing *T.L.O.*, *Schail v. Tippecanoe County School District*,<sup>60</sup> and cases challenging drug testing programs at the collegiate

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an individual's privacy expectations, the suspicionless drug test is constitutional. *See id.* at 665-66.

55. *Von Raab*, 489 U.S. at 668.

56. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In *Martinez-Fuerte*, the search in question involved Border Patrol's routine stopping of a vehicle at a permanent checkpoint on a major California highway near the Mexican border. The Court said that the search was constitutionally sound, even in the absence of individualized suspicion. The Court reasoned that it would be impracticable to have individualized suspicion for illegal aliens, when the border was near a heavily travelled major highway. The Court also said that based on the circumstances of the checkpoint stops, which did not involve searches, the governmental interest outweighed the privacy interest of the individual. *Id.*

57. 469 U.S. 325 (1985).

58. *See supra* note 37 and accompanying text. *T.L.O.* is different factually from *Acton I*. In *T.L.O.*, the Assistant Vice Principal had some suspicion that the student was smoking; therefore, the Court held that the search of her purse was constitutional. In *Acton I*, on the other hand, the Policy administers random drug tests, which are not suspicion-based.

59. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1360 (Or. 1992) [hereinafter *Acton II*].

60. 864 F.2d 1309 (7th Cir. 1988) (upholding the constitutionality of random urinalysis testing of participants in interscholastic athletics).

level,<sup>61</sup> the district court determined that to evaluate the "reasonableness" of the Policy, it had to apply a balancing test. Since James was not suspected of drug use, the District had to demonstrate a compelling need for the program that outweighed the intrusion upon James' privacy rights.<sup>62</sup>

The court focused on several factors in determining whether the District's Policy was reasonable. The first factor the court considered important was that coaches had observed both poor student performance in athletics and actual student drug use.<sup>63</sup> Second, the court found that the testimony of a doctor provided support for the Policy. He reported that a random drug testing program could have a deterrent effect on actual drug use.<sup>64</sup> The court also thought that because athletes were subjected to a number of rules and regulations when they chose to participate in school athletics, the drug test should be considered just another rule to follow.<sup>65</sup> Another factor the court recognized was the District's effort to limit the extent of the intrusion, in that the randomness of the Policy limits the degree of discretion that school administrators may exercise.<sup>66</sup> Finally, the court recognized that the District actually tried alternative methods to deal with the increase in drug-related problems, thereby suggesting that the Policy was the next "logical step."<sup>67</sup> Weighing these factors against the

61. See generally *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985) (holding unconstitutional the urinalysis of individual students suspected of marijuana use, given the unreliability of test results and the lack of evidence to justify the intrusive procedures); *Derdeyn v. University of Colo.*, 832 P.2d 1031 (Colo. App. 1991), *aff'd*, 863 P.2d 929 (Colo. 1993) (holding that drug testing in college athletic program violated the Fourth Amendment because the University's interest in securing a drug free athletic program was not compelling); *Hill v. NCAA*, 801 P.2d 1070 (1990) (holding a college drug testing program invalid under the California constitution because the evidence of a compelling state interest did not outweigh the student's right to privacy).

62. *Action II*, 796 F. Supp. at 1363.

63. *Id.*

64. *Id.*

65. See *id.*

66. *Id.* at 1364. The court noted that because the urine testing was random, the administrators did not have a chance to exercise discretion on who would and would not be tested. *Action II*, 796 F. Supp. at 1364.

67. *Id.* The court gave significant weight to the testimony of Dr. DuPont, who stated that because some people do not display outward manifestations of drug or alcohol use, an individualized suspicion standard for testing would be ineffective in preventing accidents. *Id.* It is ironic that the court gave this testimony such weight while simultaneously supporting the constitutionality of the Policy with the testimony of school personnel. Coaches and teachers observed students acting out and noticed, to use the words of the doctor, "outward manifestations" of the effects of drug use. The testimony of the doctor and the testimony of the school personnel plainly contradict each other.

privacy interests of students, the district court held that the Policy was constitutional.<sup>68</sup>

### B. *The Ninth Circuit Court of Appeal's Opinion*

The Ninth Circuit reversed the district court's holding and invalidated the Policy. In its decision, the Ninth Circuit immediately recognized the Actons' assertion that even if a drug problem existed in Vernonia schools, it did not justify a random testing program.<sup>69</sup> After determining that the conduct of the school constituted a search under the Fourth Amendment and that the officials who executed the test had the authority to do so, Judge Fernandez addressed the reasonableness of the search.<sup>70</sup> Under *Delaware v. Prouse*, courts should weigh the following factors in assessing the reasonableness of a non-suspicion-based test:

- (1) the importance of the governmental interests; (2) the degree of physical and psychological intrusion on the citizen's rights; (3) the amount of discretion the procedure vests in individual officials; and (4) the efficiency of the procedure—that is how well it contributes to the reaching of its purported goals and how necessary it is.<sup>71</sup>

The Ninth Circuit found that the District's Policy only met two prongs (three and four) of the *Prouse* reasonableness test: contributing to reaching its desired goal (prong four), and vesting no discretion in the school administrators (prong three).<sup>72</sup> The importance of the school's interests (prong one) and the intrusiveness of the search (prong two), however, caused the Policy to fail the reasonableness test.<sup>73</sup>

The appellate court discussed at great length the importance of balancing the governmental interests against an individual's right of privacy. The District argued that because the Oregon Supreme Court previously held that compliance with hunting and fishing laws was a sufficient state interest to justify a random search procedure for checking hunting licenses, the interest in "freeing schools from the pernicious effects

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68. *Id.* The court found that because the Actons "failed to demonstrate that the defendant's drug testing program unconstitutionally interfered with their son's right to be free from unreasonable searches and seizures under the Fourth Amendment," the Policy was constitutional. *Id.* at 1365.

69. *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514 (9th Cir. 1994) [hereinafter *Acton III*].

70. *See id.* at 1519-20.

71. *Acton III*, 23 F.3d at 1521 (citing *Delaware v. Prouse*, 440 U.S. 648, 653-63 (1979)).

72. *Id.* at 1522.

73. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)).

of illegal drugs" was equally sufficient to justify the Policy.<sup>74</sup> The court rejected this proposition, stating that the two situations were not comparable because the level of intrusion of privacy was different.<sup>75</sup> In addition, the Ninth Circuit recognized that in the Oregon Supreme Court decision, the government interest only needed to be legitimate, while Supreme Court cases dealing with random drug testing require a compelling state interest.<sup>76</sup>

In determining that the Policy did not sufficiently satisfy the reasonableness test, the Ninth Circuit compared this case to previous Supreme Court decisions upholding random drug testing. The Ninth Circuit found two distinct differences: (1) the privacy interests of student athletes have not been diminished to the level of workers in high-risk industries or high security government positions; and (2) the District's desire to prevent unnecessary athletic injuries, to reduce the fascination and use of drugs, and to rectify discipline problems does not compare to the kinds of dangers and hazards involved in prior Supreme Court cases.<sup>77</sup> The opinion of the appellate court considered the tragedy of drug abuse and its impact on children and society in general. However, it went on to recognize that "it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless testing."<sup>78</sup> Thus, the appellate court did not find the District's interest sufficiently compelling to outweigh a student athlete's expectation of privacy. As a final note, the appellate court wisely recognized that given the standard of *T.L.O.*, the District's interests would probably warrant individualized, suspicion-based drug testing. The interests did not, however, justify random drug testing.<sup>79</sup>

74. *Id.* (citing *State v. Tourtillot*, 618 P.2d 423, 430 (Or. 1980)).

75. *Id.* at 1522.

76. *Acton III*, 23 F.3d at 1522.

77. *Id.* at 1525-26. The court cast aside the District's contention that athletes enjoy a reduced expectation of privacy because participating in the sports program carries with it many rules that make the situation analogous to federal employees or railroad workers. *See id.* at 1525 (citing *IBEW, Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521, 525 (9th Cir. 1992); *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 507 (9th Cir. 1991); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990)). The court also disregarded the notion that conditions in a school locker room reduce an athlete's expectations of privacy. *Acton III*, 23 F.3d at 1525. "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 urine." *Id.* In discussing the District's interests, the court rejected the idea that the danger of injury inflicted while playing sports under the influence of drugs is analogous to the risk of a train wreck or a nuclear power plant disaster. *Id.* "The concern that our children will fail to acquire knowledge or respect is also real enough, but it, too, does not reach the level of the concerns that have permitted suspicionless testing." *Id.* at 1526.

78. *Acton III*, 23 F.3d at 1526.

79. *Id.*

probably warrant individualized, suspicion-based drug testing. The interests did not, however, justify random drug testing.<sup>79</sup>

#### IV. THE SUPREME COURT'S DECISION

##### A. *The Majority Opinion*

The U.S. Supreme Court, reversing the Ninth Circuit, held that random drug testing in the Vernonia School District was constitutional and did not violate James Acton's rights under the Fourth and Fourteenth Amendments.<sup>80</sup> The majority, spearheaded by Justice Scalia, articulated a similar decision to that of the district court. Applying the "reasonableness test" to determine if the District's search was constitutional, the majority opinion focused on the balance between two factors: (1) the degree of intrusion on a person's Fourth Amendment privacy interests; and (2) the promotion of "legitimate governmental interests."<sup>81</sup>

##### 1. Student Athletes Harbor a Lower Expectation of Privacy

Generally a warrant will be issued for a governmental search once probable cause has been established. The majority highlighted an exception to this general rule.<sup>82</sup> Although the Court never before expressly held that the Fourth Amendment requires suspicion for a search to be considered constitutional, dicta in *T.L.O.* implied this notion.<sup>83</sup> The majority, therefore, leaped to the conclusion that because the Court had never said that suspicion was necessary under the Fourth Amendment, it was not necessary in the case of random, suspicionless drug testing.

Having decided that suspicion was not a prerequisite for a governmental search, the majority continued its discussion of the privacy factor of the reasonableness test. The majority recognized two elements leading to the conclusion that student athletes have a lower expectation of privacy:

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79. *Id.*

80. *Vernonia Sch. Dist. v. Acton* 47J, 115 S. Ct. at 2386 (1995) [*Acton I*].

81. *Id.* at 2390 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979))).

82. *Id.* at 2391.

83. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)). Although the majority in *Acton I* describes this proposition as "explicitly acknowledged," in actuality, the statement was made in a footnote in *T.L.O.*. *Acton I*, 115 S.Ct. at 2391.

(1) students are children who have been entrusted temporarily to the state's custody;<sup>84</sup> and (2) student athletes specifically choose to subject themselves to a higher degree of regulation.<sup>85</sup> The Court previously recognized in *T.L.O.* that due to the nature of the custodial relationship between public schools and students, public school officials can exercise a higher amount of supervision and control than could be exercised over "free adults."<sup>86</sup> The second element, however, had not been addressed previously.

Surprisingly, the majority did not give much thought to the second element of the privacy factor. The majority facilely stated that because athletes choose to participate in sports, they subject themselves to higher regulations than non-participating students and must have lower expectations of privacy as well.<sup>87</sup> In addition, the opinion referred to the internal design of the locker room to support its contention that student athletes have lower privacy expectations because the showers, dressing rooms, and toilet stalls are not partitioned.<sup>88</sup> The majority, therefore, implied that student athletes actually expect less privacy protection under the Fourth Amendment, and random drug testing should not be treated differently than other requirements that athletes must fulfill.

## 2. The District's "Compelling Interest"

The Supreme Court's discussion of the District's compelling interest paralleled that of the Oregon district court. The district court relied on holdings in prior cases stating that the District had to demonstrate a compelling need for the drug testing program because it was not suspicion-based.<sup>89</sup> The Court stated that "the phrase [compelling interest] 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."<sup>90</sup> Rather than weighing each factor of the "reasonableness test" separately and then balancing them to determine the random drug testing program's constitutionality, the

84. *Acton I*, 115 S. Ct. at 2391.

85. *Id.* at 2393.

86. *Id.* at 2392.

87. *Id.* at 2393. The majority decided that since there were requirements for participating in school sports—such as maintaining a specific grade point average, submitting to a physical exam, and obtaining adequate insurance—student athletes had lower expectations with regard to governmental searches. *Id.*

88. *Id.*

89. *Acton I*, 115 S. Ct. at 2394 (citing *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1363 (1992) [*Acton II*]).

90. *Id.* at 2394-95.

majority used the previously determined lower expectation of privacy to decide the weight of the District's interest.<sup>91</sup>

The Court mentioned several important issues in support of its finding that the District's motivation for implementing the Policy satisfied the "compelling interest" requirement. First, the majority discussed the serious effects of drug use, especially on young children.<sup>92</sup> Next, the opinion discussed the district court's finding that a large portion of the student body was "in a state of rebellion."<sup>93</sup> Finally, the Court summarily dismissed the issue of whether a more narrowly tailored test, namely one based on individualized suspicion, would be appropriate here.<sup>94</sup> Keeping these factors in mind, the majority stated that the District met the compelling interest requirement in order to subject persons to non-suspicion-based searches.

The Court balanced the privacy expectations of student athletes against the District's governmental interests. In light of the student athlete's lowered privacy expectations and the District's compelling interests, the Court definitively stated that the Policy was reasonable. In

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91. It is troubling that the Court did not independently weigh the factors of the reasonableness test, especially when dealing with an important constitutional right. Perhaps the decision would have been different if the Court had examined the District's compelling interest without the Court-determined diminished value of the student athlete's privacy right. Given that the majority did not articulate specifically what the District's compelling interest in implementing the Policy was, however, weighing this factor independently would be difficult.

92. *Acton I*, 115 S. Ct. at 2395. The majority opinion devoted more time equating the importance of preventing drug abuse by children with the governmental concern of deterring drug use by railroad employees than discussing the privacy expectations of student athletes. It is ironic that the Court devoted more time to discussing what might happen if a child uses drugs as opposed to what did happen to a student athlete's Fourth Amendment rights when they were subjected to random drug testing not based on individualized suspicion.

93. *Id.* (quoting *Acton II*, 796 F. Supp. at 1357). The Court stated that this epidemic was "an immediate crisis of greater proportion than existed in *Skinner*." *Id.* (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 607 (1989)). In *Skinner*, the Court upheld random drug testing of railroad employees without specific proof that a drug problem existed. *Id.* Yet the magnitude of potential harm in each situation seems to contradict this contention. An inebriated railroad engineer could cause the death of many railroad passengers and employees; the same cannot be said of a student who uses illicit drugs. The Court makes inappropriate, unsupported comparisons in terms of magnitude of harm caused by the drug use of railroad employees versus student athletes.

94. *Id.* at 2396. The Court stated that just because there was a "less intrusive" search available, it did not mean that the program at issue was necessarily unconstitutional. Yet, the Court did not describe when a "less intrusive" test could render a particular search unconstitutional. Instead, the majority discussed the implications of a suspicion-based drug testing policy, describing it as unpleasant because (1) parents would not agree to support it; (2) if a student was accused of using drugs it would be a "badge of shame;" and (3) teachers might suspect a "troublesome but not drug-likely" student of using drugs and subject that student to unnecessary testing. *Id.* See discussion *infra* part V.A.



a six-three decision, the United States Supreme Court held that random, non-suspicion-based drug testing did not violate the constitutional protections of the Fourth and Fourteenth Amendments.<sup>95</sup>

### B. Justice Ginsburg's Concurring Opinion

Justice Ginsburg concurred that the District's random drug testing policy was constitutional. She affirmed the Court's findings that student athletes have a lower privacy expectation and that drug use by student athletes can potentially cause harm to other players.<sup>96</sup> Justice Ginsburg filed a separate opinion to clarify that she disagreed that the Court's decision could be applied inferentially to "routine drug testing . . . on all students required to attend school."<sup>97</sup> Justice Ginsburg may be saying that, through the *Acton I* decision, the Court was only considering the constitutionality of a mandatory random drug testing program for student athletes, not programs encompassing all public school students.

### C. The Dissent

Justice O'Connor, writing for the dissent, began with a firm statement of disapproval for the majority's holding. The overall concern was that, based on the rationale of the Court's ruling, millions of student athletes could be stripped of their constitutionally protected privacy rights, unsupported by any kind of suspicion whatsoever.<sup>98</sup> The dissenters based their view that the District's Policy was unconstitutional on several grounds: (1) the history of the Fourth Amendment precluding suspicionless searches; (2) the Fourth Amendment's per se invalidity of blanket, non-suspicion-based searches; (3) the propensity for an individualized search requirement; and (4) an alternative to random drug testing was available to the District.<sup>99</sup>

#### 1. The History of the Fourth Amendment

The dissent focused on the history of the Fourth Amendment as an introduction to its disagreement with the majority's decision. Justice O'Connor recognized the general rule that under the Fourth Amendment,

95. *Acton I*, 115 S. Ct. at 2397.

96. *Id.* at 2397 (Ginsburg, J., concurring).

97. *Id.*

98. *Id.* at 2397 (O'Connor, J., dissenting).

99. *Id.* at 2397-2407 (O'Connor, J., dissenting).

"mass, suspicionless searches" are *per se* unreasonable.<sup>100</sup> She then considered the recently recognized exception that non-suspicion-based searches may be constitutional if it has been shown clearly that a suspicion-based procedure was ineffective.<sup>101</sup> She concluded that *Acton* did not fit the exception.<sup>102</sup>

The dissent presented several authorities illustrating that, with very few exceptions, the framers of the Fourth Amendment were extremely hostile to the notion of general searches.<sup>103</sup> This portion of the dissent focused specifically on *Carroll v. United States*.<sup>104</sup> In *Carroll*, the Court illustrated that the Fourth Amendment only condemns searches that are unreasonable.<sup>105</sup> In addition, the Court determined that a search of an automobile was not unreasonable for lack of warrant because obtaining a warrant would be impractical.<sup>106</sup> Rather, "a warrantless car search was unreasonable unless supported by some level of individualized suspicion, namely probable cause."<sup>107</sup> *Carroll* established the unreasonableness of conducting uniform searches without probable cause. Subjecting all persons lawfully using the highways to a search would be intolerable and inconvenient.<sup>108</sup>

## 2. Upholding Blanket Searches?

Justice O'Connor did not hesitate to acknowledge that the Court had previously upheld some blanket searches, but only after balancing the privacy interests of the individual being searched against the governmental interest.<sup>109</sup> The dissent, however, distinguished these cases from *Acton*

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100. *Acton I*, 115 S. Ct. at 2398 (O'Connor, J., dissenting).

101. *Id.*

102. *Id.*

103. *Id.* Justice O'Connor referred to a 1990 Ph.D. dissertation by W. Cuddihy, that thoroughly analyzed the original meaning of the Fourth Amendment, stating that "what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Id.* (citations omitted).

104. 267 U.S. 132, 143-54 (1925). In *Carroll*, the Court emphasized that the Fourth Amendment does not condemn all searches or seizures. Rather, only unreasonable searches are unconstitutional. *Id.*

105. *Id.*

106. *Id.* at 153; see *Katz v. United States*, 389 U.S. 347, 357 (1967) "[S]earches . . . without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." The Court in *Katz* cited *Carroll* as an example of an established exception. *Id.* at 357 n.19.

107. *Acton I*, 115 S. Ct. at 2398 (O'Connor, J., dissenting).

108. *Carroll*, 267 U.S. at 153-54.

109. *Acton I*, 115 S. Ct. at 2400 (O'Connor, J., dissenting).

because they involved either searches not of a "personally intrusive nature," or searches occurring in prisons or other particular contexts.<sup>110</sup> *Acton*, however, dealt with the delicate issues of children's privacy rights and monitored urination in the public school setting. In addition, the *Acton* scenario is inapposite to situations like *Von Raab* and *Martinez-Fuerte*, where the Court held blanket, non-suspicion-based searches constitutional. Given the clear differences, realizing the delicate nature of the search, and recognizing the importance of the constitutional rights at issue, the dissenting Justices did not believe that the blanket, suspicionless drug testing program implemented by the District was warranted.

### 3. Distinguishing *Acton* from *Skinner*

The dissent clearly stated that prior Court decisions held that suspicionless searches were constitutional only after pointing out that the Fourth Amendment preference is to require suspicion-based searches.<sup>111</sup> Only after applying the general rule did the Court go on to find particular reasons why such a requirement would be ineffective in an unusual or troublesome factual situation, such as the one in *Skinner*.

In *Skinner*, the Federal Railroad Administration collected evidence indicating that alcohol and/or drug abuse by railroad workers did, or at least may have, contributed to several critical train accidents.<sup>112</sup> Recognizing that the Fourth Amendment usually requires some form of individualized suspicion, the Court held that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."<sup>113</sup> Thus, in *Skinner*, the Court recognized that a requirement of individualized suspicion for drug testing railroad employees would not be practicable because of the incredibly confusing environment occurring after serious railroad acci-

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110. *Id.* See generally *New York v. Burger*, 482 U.S. 691 (1987) (allowing a warrantless search of a business under the Fourth Amendment); *Bell v. Wolfish*, 441 U.S. 520 (1979) (discussing the constitutionality of body cavity searches of prisoners following contact visits with persons from outside the institution).

111. *Acton I*, 115 S. Ct. at 2398 (O'Connor, J., dissenting).

112. See generally *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (recognizing that in extraordinary circumstances where the individual has negligible privacy interests and the governmental interest is important, a search not based on individualized suspicion is reasonable).

113. *Id.* at 624.

dents.<sup>114</sup> In addition, the Court mentioned several other cases where it held that due to the unusual circumstances presented, satisfying the individualized suspicion requirement was unrealistic.<sup>115</sup>

The dissent recognized that *Acton* was significantly different from the exceptional circumstances such as those in *Skinner* and *Von Raab*.<sup>116</sup> Justice O'Connor asserted that the majority failed to recognize the history and precedent establishing individualized suspicion as a factor in determining the reasonableness of a search for Fourth Amendment purposes.<sup>117</sup> Further, she condemned the majority for easily dismissing the suspicion requirement as "just any run-of-the-mill, less intrusive alternative" if outweighed by policy concerns separate from the search's practicability.<sup>118</sup>

#### 4. The Suspicion-Based Alternative

The dissent addressed the possibility of implementing a suspicion-based drug testing program, and found it hard to justify the majority's dismissal of this less intrusive alternative. Justice O'Connor criticized the District's argument that a suspicion-based program would create an unwanted adversarial atmosphere.<sup>119</sup> The dissent argued that schools are already inundated with adversarial schemes in the form of disciplinary actions that require teachers and administrators to investigate student misbehavior.<sup>120</sup> Therefore, using suspicion-based drug testing in the school environment would be an insignificant addition of "adversarial" actions.<sup>121</sup> Consequently, the dissent stated that the District was overstating its concerns with a drug testing program based on suspicion. In fact, a suspicion-based drug testing program would invade fewer students' privacy rights, thus making this alternative substantially less intrusive.<sup>122</sup> More importantly, a suspicion-based program has been tolerated historically and

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114. *Id.* at 631.

115. *See, e.g.,* *Camara v. Municipal Ct.*, 387 U.S. 523, 535 (1967) (noting the threat of serious fires if even one safety code is violated); *Treasury Employees v. Von Raab*, 489 U.S. 656, 670, 674, 677 (1989) (finding that the potential for injuring thousands of people, or possibly breaching national security, due to even one custom official being bribed, was a situation where individualized suspicion was impractical).

116. *Acton I*, 115 S. Ct. at 2401-02.

117. *Id.* at 2402.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Acton I*, 115 S. Ct. at 2402.

122. *Id.* at 2403.

generally required by the Fourth Amendment. This requirement "may only be forsaken, [as] our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual."<sup>123</sup>

Several factors contributed to the dissent's reasoning that a suspicion-based program would be effective in the school context. First, the dissent recognized that basing drug testing on individualized suspicion was an easy task given the school setting, where students are under the constant supervision of teachers, administrators, and coaches.<sup>124</sup> Second, a majority of the evidence that the District used to justify the Policy identified students acting in a manner consistent with the *T.L.O.* line of suspicion-based searching.<sup>125</sup> In consideration of all of the evidence and given the school setting, the dissent stated that an actively enforced suspicion-based drug testing program "would have gone a long way toward solving Vernonia's school drug problem while preserving the Fourth Amendment rights of James Acton and others like him."<sup>126</sup> Thus, *Acton* did not represent a particular situation where the Court should forgo the individualized suspicion requirement of the reasonableness test.

### 5. Constitutional Protections Come With a Price

The dissent, while strongly criticizing the majority's holding, recognized that Fourth Amendment protection does not come without a price. Even though the dissenters felt this situation required application of the Fourth Amendment's general rule, they did appreciate that a suspicion-based drug testing program might be less effective than blanket, random drug testing.<sup>127</sup> Society pays the price for constitutional protection in the form of a less effective justice system.<sup>128</sup> Certainly justice would be

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123. *Id.*

124. *Id.*

125. *Id.* Supporting the dissent's point are the words of the District itself:

Students were observed sharing and smoking marijuana at a small restaurant near the high school. . . . Drug paraphernalia, such as marijuana pipes, was confiscated on school grounds. . . . On one occasion, students admitted to a school official that they had used marijuana. . . . In classrooms, hallways and at sporting events, teachers overheard students boast about their drug and alcohol use . . . .

Petitioners' Brief, *supra* note 11, at \*12 (citations omitted). In addition, the District uses the increase of classroom disciplinary problems as support for implementing the program in the first place. *Id.*

126. *Acton I*, 115 S. Ct. at 2403-04.

127. *Id.*

128. *Id.* The dissent quoted from *Arizona v. Hicks*, 480 U.S. 321, 329 (1987), where the Court had stated that "there is nothing new in the realization that Fourth Amendment protections come with a price." *Acton I*, 115 S. Ct. at 2404 (O'Connor, J., dissenting). In addition, Justice O'Connor elaborated on this price within the criminal context, stating "the price we pay is higher

more efficient if police could search anytime and anywhere. But that would be done at too great a constitutional price. In other words, the dissent would support a drug testing program based on individualized suspicion because this better protects an individual's constitutional right to be free from unwarranted searches and privacy rights.

#### V. WHERE IS THE REASON IN THIS "REASONABLE" DECISION?

##### A. *What Is Wrong with Suspicion-Based Drug Testing?*

One of the major criticisms of the *Acton I* holding is that the majority did not thoroughly address suspicion-based drug testing. From the District's own account, the identities were available of those students who were seen drunk, under the influence of drugs, or telling a school employee that the student was under the influence of drugs.<sup>129</sup> Therefore, the Policy could have targeted students that the District suspected of drug abuse. A suspicion-based drug testing program is targeted at resolving the District's drug problem while protecting the rights of student athletes who are not suspected of drug use.<sup>130</sup> Rather than adopting the non-suspicion-based alternative, the District should have employed a testing program based on individual suspicion. The route the District took, and which the Supreme Court upheld, minimizes the importance of protecting the constitutionally guaranteed right of privacy.

The United States Constitution protects the rights of individuals, sometimes even at a steep price. For instance, the criminal justice system is based on the principle that a person is innocent until proven guilty; that it is better to let a guilty person go free than to put an innocent person in jail. This principle is embedded in the strict burden of proof in criminal matters: a person must be guilty "beyond a reasonable doubt" before the trier of fact can convict him or her of a crime. By upholding random drug testing in public schools, the Court is conveying to children the message that all athletes are guilty of using drugs until proven innocent.<sup>131</sup> This is the wrong message to be sending to the next generation.

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in the criminal context, given that police do not closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause." *Id.*

129. *Acton I*, 115 S. Ct. at 2403.

130. *Id.*

131. Mary L. Scott, Note, *Is Innocence Forever Gone? Drug Testing High School Athletes*, 54 MO. L. REV. 425, 441 (1989).

Arguably, the foundation of the American legal system takes a toll on individual's and society's rights. In the drug context, this price is quite high. Undeniably, drugs kill people every day. Infringing on children's privacy rights when there is a *feasible alternative*, however, is equally offensive. Accordingly, "in our zeal to protect ourselves from [drug abuse], even more important values are at risk of being swept aside because of our 'war on drugs.'"<sup>132</sup>

### B. *The Underinclusive Drug Test*

When looking to the District's "compelling interest," one must consider the drug test itself. Once a student has been randomly chosen to submit his or her urine to be tested, the laboratory performs tests for the presence of "amphetamines, cocaine and marijuana,"<sup>133</sup> and for the presence of other drugs as requested by the District.<sup>134</sup> When looking at the issue of implementing random drug testing in public schools, any analysis should include both the policy behind the program as well as the ramifications of the implementation itself. The majority opinion, however, pays very little attention to the District's Policy but instead focuses its analysis on the implementation of a random drug testing program. The Court may miss a vital issue by not looking at the Policy because the Policy's purported purpose included preventing student athletes from using drugs and protecting their health and safety.<sup>135</sup> If the Policy only tests for marijuana, cocaine and amphetamines, the possibility exists that the actual test may be ineffective in accomplishing the "compelling interest."

While the testing may cover a portion of drugs used by students, it does not cover all such drugs. The District should not, however, be responsible for identifying all illicit drugs used by student athletes. For the District to further its goals, it must test for at least a significant number of the drugs that student athletes might be using. For example, alcohol is probably one of the most readily available drugs to students because it can be found in most homes. Steroids are another class of drugs that student athletes are susceptible to using because they enhance performance, and peer pressure may influence athletes to "be better than the rest." Heroin and many other popular drugs are also not included in the Policy.

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132. Steven O. Ludd, *Athletics, Drug Testing and the Right to Privacy: A Question of Balance*, 34 HOW. L.J. 599, 631 (1991).

133. Petitioners' Brief, *supra* note 11, at \*19.

134. *Acton I*, 115 S. Ct. at 2389.

135. *Id.*

The fact that the District does not test for the drugs that students most typically use puts in question whether the Policy serves its "compelling interest." If the Court allows the District to infringe on a constitutionally based right, the means should be closely related to the District's ends. The District cannot effectively "prevent student athletes from using drugs," "protect their health and safety," and "provide drug users with assistance programs"<sup>136</sup> if it is not consistently testing for more than three drugs. Thus, the Court overlooked one analytical avenue that could have affected the decision in this case, a decision that denied constitutional rights to a student athlete who was never under suspicion of drug use in the first place.

*C. A Lower Level of Privacy Expectations or  
a Judicial Judgment Call?*

The majority's discussion of a student athlete's expectation of privacy must not escape criticism. In his discussion, Justice Scalia glosses over the finding in *Tinker v. Des Moines Independent Community School District* that children do not "shed their constitutional rights . . . at the schoolhouse gate."<sup>137</sup> The majority opinion continues with a broad statement that when students choose to play a sport, they subject themselves to a higher degree of regulation, and therefore lower their expectations of privacy.<sup>138</sup> This Note contends that the majority makes too great a leap in judgment.

Justice Scalia expresses that "[s]chool sports are not for the bashful."<sup>139</sup> For instance, Scalia states that the locker room is constructed so that athletes must change and shower in front of each other.<sup>140</sup> This argument is flawed because it assumes that all student athletes change or shower at school, when this is not necessarily correct. Assuming, arguendo, that they do, does this necessarily affect a student athlete's right to be free from unreasonable searches and seizures? Quite simply, the answer is a resounding "no." The inference that students forfeit certain constitutional rights once they engage in changing clothes in other students' presence in the locker room is unsupported and dangerous. As one critic stated, "[s]hould we read them a variation of the Miranda warning before they grab a towel and a bar of soap? ('You have the right to remain

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136. *Id.*

137. *Id.* at 2392 (quoting *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

138. *Id.* at 2393.

139. *Acton I*, 115 S. Ct. at 2392.

140. *Id.* at 2392-93.



sweaty. If you give up that right, your precious bodily fluids are fair game for the coach and the principal.'")<sup>141</sup>

The logical extension of Justice Scalia's opinion is that students who are recognized as having a lower expectation of privacy in the public school setting also participate in gym class and thus change and probably shower collectively as well. According to the majority's line of reasoning, all students would have a lower expectation of privacy. Consequently, so long as the state asserts a compelling interest, the Court could very likely find random drug testing of all students to be constitutionally permissible. Although our society is afraid of the destructive and often tragic effects of drugs, it should also be leery of the majority's reasoning. The more power granted to the government "under the guise of safety," the less constitutional protection remains within society itself.<sup>142</sup> "In the meantime, we should demand that the expanded authority some want to give government be the least needed to achieve the desired result. The Vernonia School District drug policy fails that test."<sup>143</sup>

#### *D. Circular Reasoning Is Not An Acceptable Basis for a Supreme Court Decision*

As the majority incessantly points out in its decision, student athletes have a diminished expectation of privacy. As discussed above, this seems to be a judicial judgment call on the majority's part rather than a decision based on precedent. Taking this concept one step further unveils a circular argument. The majority recognized that the government cannot invade the constitutionally protected right of privacy because of the very obvious as well as implied protection afforded by the Constitution. Stated in the contrapositive, if there is no right, or if there is a diminished expectation of a constitutional right, then the government can invade our privacy. The majority opinion manipulates the situation in the District's school and decides that student athletes have a diminished expectation of privacy, and hence, the government can impose random, non-suspicion-based drug testing.

In *T.L.O.*, the Supreme Court decided that probable cause in a government search is not required in the context of searches in schools.<sup>144</sup> The majority stated that "[w]here a careful balancing of governmental and

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141. Peter Callaghan, *Supreme Court's School Drug-Test Ruling Flunks Fairness Test*, NEWS TRIB. (Tacoma, Wash.), June 29, 1995, at A15.

142. *Id.*

143. *Id.*

144. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."<sup>145</sup> In the particular context of public schools, where it would be impractical to require public school officials to obtain a warrant prior to searching a student's purse, *T.L.O.* held that according to the Fourth Amendment, the search was reasonable.<sup>146</sup> The difference between the facts of *T.L.O.* and *Acton I* is that the student in *T.L.O.* was under suspicion of smoking cigarettes at the time of the search, whereas in *Acton*, James was under no suspicion whatsoever of using illicit drugs. To allow the *Acton I* Court to arbitrarily decide when suspicion is or is not necessary without clearly defining when "the public interest is best served" is intolerable.<sup>147</sup>

In *Acton I*, the Court decided that because student athletes have a lower expectation of privacy, the policy is reasonable. The support for this determination that the policy is reasonable is that student athletes harbor a lower level of privacy protection. This reasoning is circular and illogical. In support of the majority's finding of the diminished privacy expectation, it offers as proof descriptions of the guidelines that student athletes must follow as well as a written tour of the locker room. Yet, where is the logic in concluding that because a student chooses to participate in a sport and voluntarily subjects himself or herself to the stringent guidelines of maintaining certain grade point averages, practice routines, and perhaps even changing in front of other athletes, a student athlete voluntarily gives up the right to the constitutional protection of individual privacy? Just because a student athlete voluntarily participates in a program with exacting guidelines does not necessarily mean that he or she voluntarily gives up a totally unrelated expectation of privacy. Even the argument that a student athlete must not care about privacy because participating in sports requires undressing and showering in front of teammates is illogical. What a person chooses to do in terms of physical privacy is unconnected to the constitutional right of privacy, nor is it apparent from the facts that all student athletes change or shower in front of each other. Before infringing on the constitutional concept of privacy, the Court should demand significantly more convincing proof that the individual has in fact knowingly given up this right. In the instant case, disrobing or showering should not be equated to shedding an individual's constitutionally protected privacy right.

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145. *Id.*

146. *Id.* at 326.

147. *Id.* at 341.

The Court must not be allowed to base decisions on such grounds. Society cannot allow Supreme Court justices to tell it that a particular group has less constitutional protection than others without legitimate reasons, if at all. The problem with circular reasoning is that each statement supports the other, with no independent support for either proposition. We expect valid reasons for Supreme Court decisions, rather than decisions based on the Justices' personal opinions. Circular reasoning without valid support should not be accepted as a basis on which to rest a Supreme Court decision, especially when dealing with the existence, or lack thereof, of a constitutionally protected right.

### *E. Judicial Discretion Leads to Unacceptable Results*

The approach the majority takes with the *Acton* case is not surprising. As far back as 1951, the United States Supreme Court invalidated government searches when it decided that the search was unreasonable. In *Rochin v. California*,<sup>148</sup> three California law enforcement officers entered a home based on minimal evidence that a resident was selling drugs. When asked about capsules on the bedside table, the defendant swallowed the pills. The officers took the defendant to a hospital and had his stomach pumped after striking him failed to produce the capsules. The capsules contained morphine, and the defendant was convicted of possessing "a preparation of morphine."<sup>149</sup> The United States Supreme Court reversed the conviction, referring, *inter alia*, to the Due Process Clause of the Fourteenth Amendment.<sup>150</sup> The majority opinion based the decision on the behavior of the law enforcement officers. The Court stated that the process by which the evidence was obtained "shocked the conscience,"<sup>151</sup> and thus the conviction could not constitutionally be upheld.

Two Justices concurred with the majority that the method used to obtain evidence violated the Due Process Clause of the Fourteenth Amendment. In his concurring opinion, however, Justice Black criticized

148. 342 U.S. 165 (1952).

149. *Id.* at 166.

150. *Id.* at 165.

151. To elaborate:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of [sic] constitutional differentiation.

*Id.* at 172.

the majority for the ad hoc basis of its holding. Justice Black recognized the majority opinion as "empower[ing] this Court to nullify any state law if its application offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"<sup>152</sup> He referred to several cases in which the Court, using its judicial power, denied states the right to implement programs in order to quell "evil economic practices."<sup>153</sup> Justice Black recognized that there are constitutional provisions, such as the Fourth Amendment, that require courts to determine what is an "unreasonable" search and seizure.<sup>154</sup> He implied that judicial discretion potentially infringes on constitutional rights. He concluded his concurring opinion with a concern that this type of decision making would be used to "inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."<sup>155</sup>

*Acton I* is the fruition of Justice Black's feared prediction. The *Rochin* approach is clearly visible within *Acton I*. While the District did not require "pumping" anything out of James' body, it did force him to submit to a drug test when he was under no suspicion whatsoever of illicit drug use. Indeed, the District did require James to urinate in front of a monitor. The District's Policy constitutes an unreasonable search and seizure because it invaded the privacy of a young child who was not suspected of drug use. The majority opinion represents another example of the Court exercising its discretion. In this case it took away James' constitutionally given privacy right. In *Rochin*, the Court's holding that the officer's actions constituted an "unreasonable" search and seizure seems reasonable given the nature of the search and the severity of their actions. In *Acton I*, however, the Court's decision that the Policy is reasonable is unacceptable. Although the Policy is not as physically offensive as the officer's actions in *Rochin*, the emotional effects of a child having to urinate in front of an adult monitor is "unreasonable," especially given that the child was under no suspicion of illicit drug use.

It seems that the Court, in its decision, was focusing more on drug abuse and its devastating impact on children rather than on the actual situation in *Acton*. If it had considered the Policy and how it affected children like James, who were under no suspicion of illicit drug use, it

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152. *Id.* at 175 (Black, J., concurring).

153. *Rochin*, 342 U.S. at 177 (Black, J., concurring). See also *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (preventing bakers from switching smaller loaves of bread for larger loaves of bread); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (denying a state the right to fix gasoline prices).

154. *Id.* at 176 (Black, J., concurring).

155. *Id.* at 177 (Black, J., concurring).

would have determined that the Policy unreasonably infringed on James' privacy rights. There is no doubt that drug abuse is a destructive phenomenon that is infesting society, especially considering that children are using illicit drugs at very young ages. This does not, however, give the Court the right to let the consequences of drug abuse influence the exercise of judicial discretion in determining whether a search is reasonable under the Fourth Amendment. As the dissent emphasized, the Constitution has a history that generally requires suspicion as a requirement for subjecting people to government searches. The Court, in not imposing a suspicion requirement in random drug testing programs of student athletes, has exercised its discretion and has "imperil[ed] all the individual liberty safeguards specifically enumerated in the Bill of Rights."<sup>156</sup>

## VI. CONCLUSION

The implications of the U.S. Supreme Court's decision in *Acton I* are dangerous. Morally speaking, many people might agree with the decision as it applies to public school students who participate in school athletics given the seriousness of drug abuse by children. The Court's decision, however, lacks precedential support, logical reasoning, and factual support—elements which should appear in all Supreme Court decisions.

In *Acton I*, the Court dismissed the obvious alternative of suspicion-based drug testing, thereby damaging the future of privacy rights in public schools. It is clearly reasonable under the Fourth Amendment to require student athletes to submit to drug testing based on some form of individualized suspicion. The Court in *Acton I* ignored the fact that there was individualized suspicion for particular student athletes, for they were observed using drugs and disrupting class. Conducting suspicionless, random drug testing, however, is unreasonable. By turning a blind eye to the facts, the Court infringed on constitutionally protected rights. The next time, this infringement might not be in the context of something as morally reprehensible as drug abuse.

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156. *Id.*

\* This Note is dedicated to my beautiful mother, Mina Osheroff, for her continuous love, support, inspiration, and encouragement. Special thanks for their hard work and invaluable assistance go to the staff members and editors who worked on this Note. In loving memory of Butch and Tony.