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NOTES

A Casualty of the "War on Drugs": Mandatory, Suspicionless Drug Testing of Student Athletes in *Vernonia School District 47J v. Acton*

For more than two decades, the United States has engaged in an extensive war both at home and abroad against the production and sale of illicit drugs.¹ This war has taken on special importance in our nation's schools, where the use of illicit drugs has reached epidemic proportions.² Unfortunately, the "War on Drugs"³ has been largely unsuccessful on all fronts in the interdiction of drug imports and eradication of drug use.⁴ As a result, the use of drug testing to combat the drug crisis has increased.⁵ In light of such intrusive tactics, we must remember that "the greatest threats to our constitutional freedoms come in times of crisis."⁶ Whether the

1. See Alfred W. McCoy & Alan A. Block, *U.S. Narcotics Policy: An Anatomy of Failure*, in *WAR ON DRUGS: STUDIES IN THE FAILURE OF U.S. NARCOTICS POLICY* 1, 1-10 (Alfred W. McCoy & Alan A. Block eds., 1992).

2. See *Schall by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988) (discussing the "plague of illicit drug use which currently threatens our nation's schools").

3. President Nixon initiated the War on Drugs in 1972. *Drug Policy: The Enemy Within*, *THE ECONOMIST*, May 15, 1993, at 31, 31. Under Nixon, the War on Drugs targeted primarily the production of heroin abroad. See JAMES A. INCIARDI, *THE WAR ON DRUGS II: THE CONTINUING EPIC OF HEROIN, COCAINE, CRACK, CRIME, AIDS, AND PUBLIC POLICY* 156 (1992). However, "it was not until George Bush's term that the war began in earnest." *Drug Policy: The Enemy Within*, *supra*, at 31. President Bush appointed a "drug czar" and spent \$40 billion in an attempt to win the War on Drugs. *Id.*

4. See David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 237 (stating that "the War on Drugs has failed to reduce significantly, much less eliminate, drugs as a problem in our society"); Kevin B. Zeese, *America Has Already Lost the War on Drugs*, in *WAR ON DRUGS: OPPOSING VIEWPOINTS* 36, 40 (Neal Bernards ed., 1990) [hereinafter *OPPOSING VIEWPOINTS*] (stating that "interdiction programs and eradication efforts have not stopped the flow of drugs into the United States"). But see *The War on Drugs is Necessary*, in *OPPOSING VIEWPOINTS*, *supra*, at 17, 19 (declaring that the War on Drugs has been successful).

5. See Steven Wisotsky, *The War on Drugs Violates Civil Liberties*, in *OPPOSING VIEWPOINTS*, *supra* note 4, at 59, 60-62.

6. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2407 (1995) (O'Connor, J., dissenting). One commentator contends that "[a]s long as we approach the problem of drugs in terms of warfare, and total war with the objective of unconditional surrender at that, it is likely that civil liberties will suffer as they have during other wars." Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL.

United States Supreme Court's acceptance of suspicionless drug testing of student athletes is a "hysterical overreaction[]" or whether this crisis "serve[s] precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights"⁷ remains to be seen. One must wonder, however, if the Court's recent decision in *Vernonia School District 47J v. Acton*⁸ signifies that "the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."⁹

In *Acton*, the Supreme Court found that the suspicionless drug testing of student athletes was constitutional under the Fourth and Fourteenth Amendments to the United States Constitution.¹⁰ The Court engaged in a balancing of interests and ruled that the intrusion upon the student athletes did not outweigh the interest of school officials in deterring drug use among the student population and preventing injuries caused by the impairment of student athletes.¹¹

This Note first discusses the facts of *Acton*, the outcomes in the lower courts, and the various opinions of the Supreme Court Justices.¹² Following an examination of the history of administrative

Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1390 (1993) (footnotes omitted); see also Steven A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 25 (1986) (declaring that the "most important victim of illegal drugs may be the liberty of a nation"); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 907 (1987) (stating that Fourth Amendment rights have been "whittled away" by the War on Drugs).

7. *Acton*, 115 S. Ct. at 2407 (O'Connor, J., dissenting).

8. 115 S. Ct. 2386 (1995).

9. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting). Courts are in a position to curtail these encroachments upon our liberty by "stand[ing] between forces seeking to investigate and convict and the individuals who are the targets of these forces." Saltzburg, *supra* note 6, at 3. According to Professor Saltzburg, "Courts that turn their backs on constitutional principles do no service to the nation in the long run, notwithstanding any perceived short run gains resulting from their toleration of practices that ought to be condemned." *Id.*

10. *Acton*, 115 S. Ct. at 2397. The Fourth Amendment states:

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

U.S. CONST. amend. IV. The Fourteenth Amendment "extends this constitutional guarantee to searches and seizures by state officers." *Acton*, 115 S. Ct. at 2390 (citing *Elkins v. United States*, 364 U.S. 206, 213 (1960)).

11. *Acton*, 115 S. Ct. at 2396-97.

12. See *infra* notes 17-64 and accompanying text.

and "stop and frisk" searches under the Fourth Amendment,¹³ the Note highlights recent judicial treatment of school searches and drug testing.¹⁴ The Note then analyzes the standing and influence of *Acton* within this line of precedent.¹⁵ Finally, the Note considers *Acton*'s focus upon student athletes and discusses the possible extension of suspicionless drug testing to all of our nation's students.¹⁶

In the logging community of Vernonia, Oregon, the Vernonia School District 47J controls the operations of one high school and three grade schools.¹⁷ No drug problem existed in the Vernonia Schools until the latter part of the 1980s.¹⁸ An escalating number of disciplinary actions taken by the school during this time reflected this growing problem,¹⁹ although drug use was not limited to any one segment of the school population, the district court found that student athletes were the "leaders of the drug culture."²⁰ Student athletes' use of drugs persuaded school officials that drug use affected the entire student body and added to the risk of injury to athletes who competed while under the influence of drugs.²¹

In response to the drug use, therefore, school officials, with the approval of the parents and the school board, implemented a Student Athlete Drug Policy.²² The policy covers all students who wish to

13. See *infra* notes 65-105 and accompanying text.

14. See *infra* notes 106-62 and accompanying text.

15. See *infra* notes 163-208 and accompanying text.

16. See *infra* notes 209-30 and accompanying text.

17. *Acton*, 115 S. Ct. at 2388.

18. *Id.*

19. *Id.* The disciplinary actions came in response to rude behavior and "outbursts of profane language." *Id.* As the district court explained:

The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperception about the drug culture.

Id. at 2389 (quoting *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1357 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995)).

20. *Id.* at 2388-89 (citing *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1357 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995)). This finding resulted from an investigation that was conducted by the school's administration. *Acton*, 796 F. Supp. at 1357. The administration believed that "the corruption of the school's leading athletes might have a significant poisoning impact upon the broader student population." *Id.*

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

22. *Id.* The Student Athlete Drug Policy was approved unanimously by all parents who attended a special "input night." *Id.* Before the adoption of the drug policy, school officials tried a program of "special classes, speakers, and presentations." *Id.* This

participate in the interscholastic athletics program.²³ Student athletes and their parents must sign a written form consenting to drug testing at the beginning of each sport's season and to random drug testing throughout the season.²⁴ The drug policy requires the student to provide a urine sample while under the supervision of a monitor.²⁵ After the student provides the sample, a private laboratory tests the urine for cocaine, marijuana, and amphetamines.²⁶

Upon completion of the testing, the laboratory releases the results only to the school superintendent, principals and vice-principals, and athletic directors.²⁷ If a urinalysis produces a positive result, the school immediately tests the student a second time.²⁸ If the second test is also positive, the school gives the student the option of participating in a drug assistance program or "suffering suspension from athletics for the remainder of the current season and the next athletic season."²⁹

program proved to be an ineffective means of deterring drug use, as did the use of a drug-sniffing dog. *Id.*

23. *Id.*

24. *Id.* The school conducts the random testing as follows: "[O]nce each week of the season the names of the athletes are placed in a 'pool' from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing." *Id.*

25. *Id.* The policy requires the student to produce the urine sample in an empty locker room under supervision of an adult. *Id.* Boys produce a sample while standing at a urinal with their back to the monitor. *Id.* Girls are allowed to produce a sample in a bathroom stall. *Id.* During testing of both sexes, the monitor listens for "normal sounds of urination." *Id.*

26. *Id.* The urine may also be tested for traces of other drugs, such as LSD, at the request of the school. *Id.* Curiously, student athletes are generally not tested for alcohol or steroids. Petitioner's Brief at 9, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590). As the respondent noted, alcohol is "perhaps the most commonly abused drug, at all age levels." Respondents' Brief at 9, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590); see also RICHARD R. POWELL ET AL., CLASSROOMS UNDER THE INFLUENCE: ADDICTED FAMILIES/ADDICTED STUDENTS 36 (1995) (stating that "from 1976 to 1984, alcoholic beverages were tried at least once by over 90% of the student population"). Additionally, a study released in 1994 estimated that steroids, which are often used to enhance athletic performance, were taken by "more than 200,000 high school males nationwide . . . within the year." Skip Rozin et al., *Steroids: A Spreading Peril*, BUS. WK., June 19, 1995, at 138. A similar study estimated that the number was closer to 500,000. *Id.* If deterring drug use among the student population is a goal that schools hope to achieve, then it would seem that schools must test for alcohol and steroids—two drugs that have been proven to be prevalent among high school students. The efficacy of a drug testing program that does not test for alcohol or steroids is questionable.

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

28. *Id.* at 2390.

29. *Id.* If the second test is negative, no action is taken against the student. *Id.* A third offense results in suspension for the current season and the two following seasons. *Id.*

In 1991, James Acton, a seventh-grader in the Vernonia schools who wanted to play football, refused to consent to drug testing.³⁰ As a result, the Vernonia School District denied him the opportunity to participate.³¹ In response, James and his family brought suit seeking injunctive and declaratory relief on the grounds that the drug policy violated the Fourth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Section 9 of the Oregon Constitution.³² At the conclusion of a bench trial, the district court denied the Actons' claim, finding that the Student Athlete Drug Policy was reasonable.³³ Upon denial, the Actons appealed, and the Court of Appeals for the Ninth Circuit reversed.³⁴ The court of appeals focused primarily on the Oregon Constitution³⁵ in finding that the school's interest in preventing drug use was not so compelling as to outweigh the student athletes' right to privacy.³⁶

The United States Supreme Court vacated the judgment and remanded the case to the Ninth Circuit.³⁷ Justice Scalia, writing for

30. *Id.*

31. *Id.*

32. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1356 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995); *see supra* note 10 (quoting the Fourth and Fourteenth Amendments to the United States Constitution). The Oregon Constitution states in pertinent part:

No law shall violate the right of the people to be secure in their persons, papers, and effects, against unreasonable search, or seizure; and no warrant shall 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. 1, § 9. See *infra* note 151 for a discussion of other cases involving state constitutional challenges to drug testing programs for student athletes.

33. *Acton*, 796 F. Supp. at 1368.

34. *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1527 (9th Cir. 1994), *vacated*, 115 S. Ct. 2386 (1995).

35. Because the Oregon Constitution could provide more protection than the United States Constitution, the court of appeals chose to "refer to the guideposts set out . . . by the Oregon courts." *Id.* at 1519. However, in the "specific area of urine testing—the core issue in this case—[the court of appeals] unabashedly refer[red] to federal law." *Id.*

36. *Id.* at 1521-27.

37. *Acton*, 115 S. Ct. at 2397. Justice Scalia wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, Ginsburg and Breyer. *Id.* at 2388. Justice Ginsburg wrote a concurring opinion. *Id.* at 2397 (Ginsburg, J., concurring). Justice O'Connor wrote a dissent, in which she was joined by Justices Stevens and Souter. *Id.* at 2397 (O'Connor, J., dissenting).

The majority remanded the case for further proceedings because the court of appeals had ruled that the drug policy violated the Oregon Constitution as well as the United States Constitution. *Id.*; *see supra* notes 35-36 and accompanying text. Upon remand, the Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. *Acton v. Vernonia Sch. Dist.* 47J, 66 F.3d 217, 218 (9th Cir. 1995). The court of appeals held that the "Oregon Supreme Court would not offer greater protection under the provisions of

the majority, began by reiterating that the Fourth Amendment guarantee against "unreasonable search and seizure" extends to public schools through the Fourteenth Amendment,³⁸ and by confirming that urine testing is considered a "search" for Fourth Amendment purposes.³⁹ Under the Fourth Amendment, he wrote, the "ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"⁴⁰ Although generally a warrant and probable cause are required for a search to be reasonable, the Court noted that these requirements do not apply to an administrative search when "special needs" make them impractical.⁴¹ The Court declared that the attributes of the school setting created these "special needs," making the Warrant Clause of the Fourth Amendment inapplicable.⁴² The Court further stated that the Fourth Amendment did not mandate that individualized suspicion be present in a school search.⁴³

In determining the "reasonableness" of the search, the Court balanced the intrusion on James Acton's Fourth Amendment interests

the Oregon Constitution in this case." *Id.* Writing in dissent, Judge Reinhardt "strongly disagree[d]" with the failure of the court of appeals to certify this question to the Oregon Supreme Court. *Id.* (Reinhardt, J., dissenting). In his view, the Oregon Supreme Court should be allowed to interpret the Oregon Constitution:

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

Id. at 220 (Reinhardt, J., dissenting).

38. *Id.* at 2390; *see supra* note 10 (quoting the Fourth and Fourteenth Amendments to the United States Constitution).

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

40. *Id.*

41. *Id.* at 2390-91. An administrative search is distinguished from a criminal search based upon the purpose and consequences of the search. *Acton v. Vernonia Sch. Dist.*, 47 F.3d 1514, 1520 n.2 (9th Cir. 1994) ("If the consequences of noncompliance with whatever standards the inspection is meant to uphold are noncriminal, the search is 'civil' or 'administrative.'"), *vacated*, 115 S. Ct. 2386 (1995). The Court has defined "special needs" as needs "beyond the normal need for law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)). *See generally* Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV. 1013, 1030-38 (1990) (discussing the emergence of the "special needs" doctrine and its application to drug testing cases).

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

43. *Id.* (citing *T.L.O.*, 469 U.S. at 342 n.8). The Court distinguished *T.L.O.*, a school search case which involved individualized suspicion. *Acton*, 115 S. Ct. at 2391; *see infra* note 123 and accompanying text.

against the school's interest in preventing drug use.⁴⁴ The Court began this analysis by examining the legitimacy of the "privacy interest upon which the search here at issue intrude[d]."⁴⁵ The majority stated that the privacy expectations of minors are diminished while they are attending school.⁴⁶ The Court also emphasized that the school district acted in its "custodial and tutelary" capacity, and for many purposes the school officials acted *in loco parentis*.⁴⁷ Although the Court acknowledged that the students do not " 'shed their constitutional rights . . . at the schoolhouse gate,' "⁴⁸ it qualified this statement by explaining that the "nature of [these] rights is what is appropriate for children in school."⁴⁹ Moreover, the majority emphasized that student athletes have an even lesser expectation of privacy and should expect intrusions upon this right.⁵⁰

The Court next turned its attention to the nature of the intrusion.⁵¹ Justice Scalia examined the procedures utilized under the drug policy and found the intrusion upon privacy to be "negligible."⁵² The majority noted that the test does not reveal any other medical information, such as pregnancy or diabetes, and that the results are disclosed only to school officials.⁵³ Finally, the majority rejected the argument that the policy is overly intrusive because it

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

45. *Id.* at 2391.

46. *Id.* at 2391-92.

47. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)). *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). In *Mercer v. State*, the Court of Civil Appeals of Texas declared that a search conducted by a school official did not violate the Fourth Amendment because the official acted *in loco parentis*. 450 S.W.2d 715, 717-18 (Tex. Civ. App. 1970). According to the *Mercer* court, the school official was not a governmental actor when he "demanded that appellant disclose the contents of his pockets." *Id.* at 717. This view "enlarge[s] and extend[s] the legal doctrine of *in loco parentis* to unconstitutional proportions." *Id.* at 718 (Hughes, J., dissenting).

48. *Acton*, 115 S. Ct. at 2392 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

49. *Id.*

50. *Id.* at 2392-93. The majority observed that an " 'element of "communal undress" [is] inherent in athletic participation.' " *Id.* at 2393 (quoting *Schalll by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)).

51. *Id.* at 2393.

52. *Id.* See *supra* note 25 for a discussion of the urinalysis procedures.

53. *Acton*, 115 S. Ct. at 2393. The Student Athlete Drug Policy does not allow school officials to notify law enforcement authorities of positive test results. *Id.*

requires students to identify in advance any prescription medications they are taking.⁵⁴

In the final segment of the opinion, the Court addressed the nature and immediacy of the governmental interest, as well as the efficacy of suspicionless drug testing in addressing this interest.⁵⁵ The majority found the dual interest in preventing the use of drugs by students and safeguarding student athletes from injury to be compelling.⁵⁶ Additionally, the Court cited the chaotic academic atmosphere resulting from drug use as support for its finding of immediacy.⁵⁷ In examining the efficacy of the drug policy, the Court focused upon the status of student athletes as role models and the approval of the drug policy by the students' parents.⁵⁸

Justice O'Connor, writing in dissent, emphasized the absence of a suspicion requirement in the Student Athlete Drug Policy.⁵⁹ The dissent maintained 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."⁶⁰ This assertion rested upon an examination of the intent of the Framers of the Fourth Amendment.⁶¹ According to the dissenters, the Framers strongly opposed general searches, which their use of an objective standard of probable cause evinces.⁶² The *Acton* dissenters favored a policy based upon suspicion because it would lead to the testing of fewer students and would give students control over whether they were tested.⁶³ The dissenters recognized the crisis caused by the use of drugs, yet they warned the majority that the "greatest threats to our constitutional freedoms come in times of crisis."⁶⁴

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause" and prohibits "unreasonable searches and seizures."⁶⁵ The aim of these clauses is to curtail the discretion given

54. *Id.* at 2394.

55. *Id.* at 2394-96.

56. *Id.* at 2394-95.

57. *Id.* at 2395.

58. *Id.* at 2395-96.

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

60. *Id.* at 2398 (O'Connor, J., dissenting).

61. *Id.* at 2398-99 (O'Connor, J., dissenting).

62. *Id.* (O'Connor, J., dissenting).

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

64. *Id.* at 2407 (O'Connor, J., dissenting).

65. U.S. CONST. amend. IV; *see supra* note 10 (stating the Fourth and Fourteenth Amendments to the United States Constitution). The interaction between these two clauses has led to a plethora of litigation and a morass of confusion for the Court. Craig

to government officials by imposing a standard of reasonableness upon their searches.⁶⁶ The plain language of the Amendment appears to require that a warrant be issued prior to any search and that the warrant be issued only if probable cause exists.⁶⁷ However, the Supreme Court has created certain exceptions to the warrant requirement.⁶⁸ The Court has allowed these exceptions when the "burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,"⁶⁹ or when a compelling governmental interest justifies.⁷⁰ The Court has also recognized that in certain contexts, such as administrative and "stop and frisk" searches, the reasonableness of a search may be judged under a less stringent standard than traditional probable cause.⁷¹

Modern notions of the relationship between the Fourth Amendment and administrative searches can be traced to *Camara v.*

M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985); see Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974); Jeanette C. James, Comment, *The Constitutionality of Federal Employee Drug Testing*: National Treasury Employees Union v. Von Raab, 38 AM. U. L. REV. 109, 117 n.64 (1988) (discussing the differing theories regarding the interplay between the two clauses of the Fourth Amendment).

66. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). In *Schmerber v. California*, Justice Brennan declared that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." 384 U.S. 757, 767 (1966).

67. See U.S. CONST. amend. IV; see *supra* note 10 (discussing the Fourth and Fourteenth Amendments to the United States Constitution). The standard of probable cause aspires to be a "compromise" between the interests of citizens in avoiding "rash and unreasonable interferences with privacy" and the interests of law enforcement "in enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

68. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (border search); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) ("plain view" search); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (search under the automobile exception); *Weeks v. United States*, 232 U.S. 383, 395 (1914) (search incident to lawful arrest).

69. *Camara*, 387 U.S. at 533.

70. *Terry v. Ohio*, 392 U.S. 1, 23-27 (1968).

71. See *Delaware v. Prouse*, 440 U.S. 648, 655-56 (1979). For many years, the standard of probable cause stood as a "monolith" under which the reasonableness of all searches and seizures was judged. Amsterdam, *supra* note 65, at 388. The modern view of probable cause in the criminal context is illustrated in *Illinois v. Gates*, 462 U.S. 213 (1983). In *Gates*, the Court espoused a "totality of the circumstances" approach, which allows for flexibility in the determination of probable cause. *Id.* at 230-39. Under this approach, a magistrate who is deciding whether to issue a warrant must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238.

Municipal Court,⁷² in which the Supreme Court examined the constitutionality of a suspicionless administrative search of a housing unit.⁷³ In *Camara*, an apartment resident refused to allow a housing inspector to make a warrantless search of his dwelling.⁷⁴ Justice White, writing for the majority, stressed the need for a warrant in such searches.⁷⁵ According to the Court, the proper threshold for the issuance of a warrant for an administrative search is "reasonableness."⁷⁶ As the Court stated: "[T]he warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest."⁷⁷ The Court conducted the reasonableness test "by balancing the need to search against the invasion which the search entails."⁷⁸ Using this balancing test, the Court found that *Camara* "had a constitutional right to insist that the inspectors obtain a warrant to search."⁷⁹

One year later, in *Terry v. Ohio*,⁸⁰ the Court used the balancing test of *Camara* in a different setting.⁸¹ *Terry* was searched by an

72. 387 U.S. 523 (1967).

73. *Id.* at 525-28. This issue was addressed by the Court previously in *Frank v. Maryland*, 359 U.S. 360, 372-73 (1959), and *Eaton v. Price*, 364 U.S. 263, 270-71 (1960) (*per curiam*) (affirmed by an equally divided Court). In *Camara*, the Court overruled the holdings of *Frank* and *Eaton*, two cases that held that "the fourth amendment's full protections did not extend to housing inspections." Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 391 (1988).

74. *Camara*, 387 U.S. at 525-27. The search was part of a city-wide program to improve housing conditions. *Id.* at 535.

75. *Id.* at 540.

76. *Id.* at 539. In using the reasonableness standard, the Court left open the continued possibility of warrantless searches: "[N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." *Id.*

77. *Id.* The Court distinguished an administrative search from a criminal search by emphasizing that the approach for an administrative search does not "endanger[] time-honored doctrines applicable to criminal investigations." *Id.*

78. *Id.* at 537. The use of "reasonableness" did not "make[] a nullity of the probable cause requirement in this area." *Id.* at 539. The balancing test of *Camara* merely provides a mechanism for the determination of probable cause in the context of an administrative search. *See id.*

79. *Id.* at 540.

80. 392 U.S. 1 (1967).

81. *Id.* at 21. The Court has also employed this balancing test in other contexts, such as searches of automobiles at American borders for illegal aliens. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permanent border checkpoints); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving border patrols). In *Martinez-Fuerte*, the Court found the government's interest in reducing the number of illegal aliens to be great and the intrusion upon the Fourth Amendment interests of the parties to be "limited." *Martinez-Fuerte*, 428 U.S. at 557. Accordingly, the Court upheld the use of permanent

officer who had become "thoroughly suspicious" when he observed Terry and his friends pace back and forth in front of a store.⁸² After stopping Terry, the officer frisked him, found a pistol, and arrested him.⁸³ The Court found that the "stop and frisk" did come within the realm of the Fourth Amendment;⁸⁴ it ruled, nevertheless, that this type of police action did not require a warrant.⁸⁵ Accordingly, the Court reasoned that the requirement of probable cause, which is tied to the Warrant Clause, does not apply to a "stop and frisk."⁸⁶ Under the *Camara* balancing test, the *Terry* Court weighed the governmental interest in "crime prevention and detection," as well as the interest in police safety, against Terry's interest in personal security.⁸⁷ In upholding this search, the Court concluded that a "stop and frisk" must be based upon "reasonable suspicion" to be constitutional.⁸⁸

In *Delaware v. Prouse*,⁸⁹ the Court examined the constitutionality of a suspicionless search conducted by a Delaware patrolman to check the license and registration of the driver of an

checkpoints as a means of deterring the transportation of illegal aliens. *Id.* at 566-67. One year earlier in *Brignoni-Ponce*, the Court struck down the use of random stops by roving border patrol officers. *Brignoni-Ponce*, 422 U.S. at 885-87. The Court found these stops to be unconstitutional due to the possibility of "unlimited interference with the use of highways" and the potential for abuse by border patrol officers. *Id.* at 882-83. The *Martinez-Fuerte* Court distinguished permanent checkpoints from roving patrols based upon two characteristics of permanent checkpoints: the limited intrusion upon motorists and the limited possibility of abuse due to the reduced amount of discretion given to the officers. *Martinez-Fuerte*, 428 U.S. at 559.

82. *Terry*, 392 U.S. at 6.

83. *Id.* at 6-7.

84. *Id.* at 16-20. The Court reasoned that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16. Furthermore, it would be "sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'" *Id.*

85. *Id.* at 20.

86. See *id.*; Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 126 (1989). But see *Terry*, 392 U.S. at 38 (Douglas, J., dissenting) (stating that the "infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him").

87. *Terry*, 392 U.S. at 22-25.

88. See *id.* at 27. According to Professor Wasserstrom, the *Terry* decision set a "fixed evidentiary standard" for "stop and frisk" searches. Wasserstrom, *supra* note 86, at 126. Under this standard, a "stop and frisk" is constitutional if the police officer can "point to specific and articulable facts that give rise to a reasonable, individualized suspicion—not merely a hunch—that the suspect is engaged in criminal activity." *Id.*

89. 440 U.S. 648 (1979).

automobile.⁹⁰ Upon conducting the search, the patrolman discovered marijuana "in plain view" and the respondent was "subsequently indicted for illegal possession of a controlled substance."⁹¹ To determine the reasonableness of the search, the Court examined four factors.⁹² First, the majority addressed the character of the privacy interest.⁹³ The interest involved in *Prouse* was that in remaining free from an unreasonable seizure brought about by "stopping an automobile and detaining its occupants."⁹⁴ Second, the Court addressed the nature of the intrusion.⁹⁵ The majority found the intrusion to be "physical and psychological" and compared it to the intrusions at issue in cases involving border patrol searches for illegal aliens.⁹⁶ The Court found the *Prouse* search to be similar to roving patrols by border patrol agents because both "interfere[d] with freedom of movement, [were] inconvenient, . . . consume[d] time," and "may create substantial anxiety."⁹⁷ Third, the Court addressed the importance of the governmental interest.⁹⁸ The interest that the State of Delaware put forth was one of "promoting public safety upon its roads,"⁹⁹ and the Court agreed that this was an "important end[.]"¹⁰⁰ The fourth factor the Court addressed was the efficacy of the random spot checks in achieving Delaware's legitimate interest.¹⁰¹ The majority found itself "unconvinced that the incremental contribution to highway safety of the random spot check justify[d] [its] practice under the Fourth Amendment."¹⁰² The majority accepted a policy of acting upon violations that officers

90. *Id.* at 650. Whether the respondent was the driver or an occupant of the automobile was unclear, although the automobile was registered to the respondent. *Id.* at 650 n.1.

91. *Id.* at 650.

92. *Id.* at 653-61. The Court examined these four factors as a means of "balancing [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654 (citations omitted).

93. *Id.* at 653-55.

94. *See id.* at 653.

95. *Id.* at 655-57.

96. *Id.*; *see supra* note 81 (examining *Martinez-Fuerte* and *Brignoni-Ponce*).

97. *Prouse*, 440 U.S. at 657. The majority agreed with the distinction made between random stops and permanent checkpoints in *Martinez-Fuerte*. *Id.*

98. *Id.* at 658, 659.

99. *Id.* at 658. The Court recognized the "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." *Id.*

100. *Id.* at 659.

101. *Id.* at 659-61.

102. *Id.* at 659.

observe, since such a policy is the most effective means of protecting public safety.¹⁰³ The Court warned of the "evil" present in the "standardless and unconstrained discretion" officers may exercise in random spot checks.¹⁰⁴ Accordingly, the Court held that the random and suspicionless search conducted by the patrolman in *Prouse* was unreasonable under the Fourth Amendment.¹⁰⁵

The Supreme Court took Fourth Amendment analysis into the schoolhouse in *New Jersey v. T.L.O.*¹⁰⁶ In *T.L.O.*, the Court addressed the search of a student's purse by an assistant vice-principal at a New Jersey high school.¹⁰⁷ The official originally based his search of T.L.O.'s purse upon a suspicion that she had been smoking cigarettes.¹⁰⁸ During the search, the assistant vice-principal discovered marijuana.¹⁰⁹ The Court granted certiorari ostensibly to "examine the appropriateness of the exclusionary rule as a remedy for [unconstitutional] searches . . . by public school [officials]."¹¹⁰ The Court ultimately avoided this question, however, by finding that the search did not violate the Fourth Amendment.¹¹¹

In its analysis, the *T.L.O.* majority first declared that the Fourth Amendment "applies to searches conducted by public school officials."¹¹² The Court found the view that school officials should be "exempt from the dictates of the Fourth Amendment" because they

103. *Id. But cf. id.* at 666 (Rehnquist, J., dissenting) (declaring that the majority's belief that acting upon observed violations is more effective than random spot checks is incorrect because "[t]he whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed").

104. *Id.* at 661.

105. *Id.* at 663. The majority recognized an exception for those cases involving "at least articulable and reasonable suspicion." *Id.*

106. 469 U.S. 325, 328-29 (1985). This is not to say that the Fourth Amendment was not already there. Presumably, it was always present in the schoolhouse. See ARVAL A. MORRIS, *THE CONSTITUTION AND AMERICAN PUBLIC EDUCATION* 291-93 (1989) (discussing pre-*T.L.O.* school search cases in lower courts). *T.L.O.*, however, allowed the Court to clarify to what extent the Fourth Amendment protects students. See *T.L.O.*, 469 U.S. at 333-43.

107. *Id.* at 328.

108. *Id.* *T.L.O.* was allegedly smoking with a friend in the lavatory. While the friend admitted breaking the school rule against smoking, *T.L.O.* "denied that she had been smoking . . . and claimed that she did not smoke at all." *Id.*

109. *Id.*

110. *Id.* at 327. The exclusionary rule excludes evidence obtained through a search or seizure that violates the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383, 398 (1914). See generally Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 257 n.2 (1984) (explaining *Weeks* and the exclusionary rule).

111. *T.L.O.*, 469 U.S. at 327-28.

112. *Id.* at 333.

act *in loco parentis* to be "in tension with contemporary reality."¹¹³ Pronouncing the correct view, the majority stated: "[S]chool officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."¹¹⁴

Next, the Court turned to balancing the student's interest in privacy against the interest of school officials "in maintaining discipline in the classroom and on school grounds."¹¹⁵ According to the majority, students have a legitimate right to privacy, as well as a right to "carry with them a variety of legitimate, noncontraband items."¹¹⁶ However, the extreme importance of providing a strong learning environment "requires some easing of the restrictions to which searches by public authorities are ordinarily subject."¹¹⁷ Consequently, the Court recognized that a warrant or probable cause requirement for a school search would be impractical.¹¹⁸ Justice White, writing for the majority, explained that the "legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."¹¹⁹

The *T.L.O.* Court held that determining the reasonableness of a search requires a twofold inquiry.¹²⁰ First must come a determination of whether the search was " 'justified at its inception.' "¹²¹ Second, the search actually performed must be " 'reasonably related in scope to the circumstances which justified the interference in the

113. *Id.* at 336.

114. *Id.* at 336-37. *But see supra* note 47 (discussing *Mercer v. State*, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970), which declared that school officials do act *in loco parentis*).

115. *T.L.O.*, 469 U.S. at 339.

116. *Id.* at 338-39. The Court disagreed with the State of New Jersey's contention that students have "no legitimate expectation of privacy." *Id.* at 338. Under this view, a student would be viewed in the same manner as a prisoner, and as the Court declared: "We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *Id.* at 338-39.

117. *Id.* at 340.

118. *Id.*

119. *Id.* at 341. In a concurring opinion, Justice Blackmun disagreed with the majority's "implication that the balancing test for reasonableness is the rule rather than the exception." *Id.* at 352 (Blackmun, J., concurring in the judgment). In his view, the balancing test should be used only when "special needs" exist that "make the warrant and probable-cause requirement impracticable." *Id.* at 351 (Blackmun, J., concurring in the judgment). He believed that such a "special need" exists in a school setting and therefore agreed with the majority's holding. *Id.* at 352-53 (Blackmun, J., concurring in the judgment).

120. *Id.* at 341.

121. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

first place.’ ”¹²² As the Court stated, a search will usually withstand the first part of the reasonableness test “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”¹²³ The scope of the search, furthermore, will be acceptable when the “measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.”¹²⁴ In applying these standards to the facts of *T.L.O.*, the Court found the search to be reasonable under the Fourth Amendment.¹²⁵

The Court first addressed the issue of mandatory drug testing in *Skinner v. Railway Labor Executives’ Association*.¹²⁶ *Skinner* involved Federal Railway Administration (FRA) regulations that mandated drug testing by private railroads after serious train accidents and allowed railroads to perform drug tests on employees who violated certain safety rules.¹²⁷

The Court found that the drug testing in *Skinner* was a state action and that it was a “search” under the Fourth Amendment.¹²⁸ In deciding the proper standard for its analysis, the *Skinner* Court followed the rationale put forth by Justice Blackmun in *T.L.O.* and reiterated that a warrant and probable cause are not required when

122. *Id.* (quoting *Terry*, 392 U.S. at 20).

123. *Id.* at 341-42. Although this seems to support a suspicion requirement, the Court explicitly stated that it declined to pass on “whether individualized suspicion is an essential element of the reasonableness standard.” *Id.* at 342 n.8. However, the Court’s reasoning seems to support a finding that suspicion is necessary unless the elements generally required for an exception to the suspicion requirement—minimal privacy interests and limited discretion—are present. *See id.*

124. *Id.* at 342.

125. *Id.* at 343-48.

126. 489 U.S. 602 (1989). Prior to 1989, lower courts had upheld drug testing in a number of different contexts. *See, e.g.,* *Shoemaker v. Handel*, 795 F.2d 1136, 1443 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (upholding drug testing for jockeys); *American Fed’n of Gov’t Employees v. Dole*, 670 F. Supp. 445, 448-49 (D.D.C. 1987) (upholding drug testing for Department of Transportation employees); *Mulholland v. Department of the Army*, 660 F. Supp. 1565, 1569-70 (E.D. Va. 1987) (upholding drug testing of civilian employees of the U.S. Army).

127. *Skinner*, 489 U.S. at 606.

128. *Id.* at 606-13.

a situation involves "special needs."¹²⁹ Furthermore, the Court dispensed with the need for individualized suspicion:

In 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 suspicion. We believe this is true of the intrusions in question here.¹³⁰

After explaining its methodology, the *Skinner* majority turned to the facts of the case.¹³¹ First, the Court addressed the intrusion of the blood, breath, and urine tests upon the individual.¹³² It did not find the blood and breath tests to involve a great imposition upon the individual's integrity,¹³³ and, although urine tests involve an "excretory function traditionally shielded by great privacy," the Court declared that this intrusion is minimal when the procedure occurs in a "medical environment."¹³⁴ The opinion also emphasized the diminished expectation of privacy based upon the employees' "participation in an industry that is regulated pervasively to ensure safety."¹³⁵

129. *Id.* at 619; see *New Jersey v. T.L.O.*, 469 U.S. 325, 351-53 (Blackmun, J., concurring in the judgment). But see *Skinner*, 489 U.S. at 637 (Marshall, J., dissenting) (criticizing the majority for its use of "special needs" because, in Justice Marshall's view, "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not"). The majority found that special needs existed in this case due to the interest of the government in "regulating the conduct of railroad employees to ensure safety." *Id.* at 620.

130. *Skinner*, 489 U.S. at 624. But see *id.* at 643 (Marshall, J., dissenting) (stating that the Court has, "without exception, demanded that even minimally intrusive searches of the person be founded on individualized suspicion").

131. *Id.* at 624.

132. *Id.* at 625-27.

133. *Id.* at 625. The Court characterized blood tests as " 'commonplace.' " *Id.* (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)). Breath tests were described as minimally intrusive because they "do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment." *Id.* at 625.

134. *Id.* at 626. In his dissent, Justice Marshall wrote: "Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion." *Id.* at 645-46 (Marshall, J., dissenting).

135. *Id.* at 627. The Court qualified this statement: "We do not suggest, of course, that the interest in bodily security by those employed in a regulated industry must always be considered minimal." *Id.* at 628. The Court continued by stating that in the railroad industry "employees have long been a principal focus of regulatory concern." *Id.* Therefore, it appears that the Court will infer a minimal expectation of privacy in a given industry if the industry has been subject to regulation for a long period of time.

The majority contrasted the minimal intrusion upon the individual with the "compelling" interest of the government in conducting suspicionless drug tests.¹³⁶ Without the tests, the government would be unable to detect many impaired railroad employees who could "cause great human loss."¹³⁷ In sum, the Court held that the tests were not an "undue infringement on the justifiable expectations of privacy of covered employees" and upheld the testing.¹³⁸

In the same year, the Supreme Court examined the constitutionality of drug testing of employees of the United States Customs Service in *National Treasury Employees Union v. Von Raab*.¹³⁹ The drug testing program under scrutiny required testing of employees in positions involving drug interdiction, the carrying of firearms, or the handling of "classified" information.¹⁴⁰ Relying on *Skinner*, the Court began its analysis by restating that urinalysis constitutes a "search" under the Fourth Amendment and, therefore, "must meet the reasonableness requirement."¹⁴¹ The majority found, moreover, that the testing served a "special governmental need[], beyond the normal need for law enforcement."¹⁴² When a need exists beyond the "normal need" for law enforcement, courts must balance the government's interest against the privacy interest of the individual, in order to determine if the warrant and probable cause requirements may be waived.¹⁴³ In striking this balance, Justice Kennedy, writing for the majority, cited the drug crisis and the necessity that people who carry firearms not be impaired.¹⁴⁴

136. *Id.* at 628.

137. *Id.* But see *id.* at 653 (Marshall, J., dissenting) (disagreeing with the deterrence effect of postaccident testing because "[i]t is, of course, the fear of the accident, not the fear of a postaccident revelation, that deters").

138. *Id.* at 633, 634. In his dissent, Justice Marshall admonished the majority: "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens." *Id.* at 636 (Marshall, J., dissenting).

139. 489 U.S. 656, 660-61 (1989).

140. *Id.* at 660-61. The Court did not address the constitutionality of the testing of employees handling "classified" information because it found the record to be inadequate on this point. *Id.* at 677-78. Cf. *Harmon v. Thornbaugh*, 878 F.2d 484, 496 (D.C. Cir. 1989) (declaring that "all [Department of Justice] employees holding top secret clearances may constitutionally be required to undergo random urinalysis").

141. *Von Raab*, 489 U.S. at 665.

142. *Id.* The drug testing in this instance was beyond the "normal need" of law enforcement because the "[t]est results [could] not be used in a criminal prosecution of the employee without the employee's consent." *Id.* at 666.

143. *Id.* at 665.

144. *Id.* at 668-72.

Furthermore, the majority emphasized the diminished expectation of privacy enjoyed by customs officials.¹⁴⁵ Consequently, the *Von Raab* Court held that the "compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm."¹⁴⁶

Writing in dissent in *Von Raab*, Justice Scalia played upon what he believed to be a distinction between *Von Raab* and *Skinner*.¹⁴⁷ In contrast with *Skinner*, Justice Scalia found no "real evidence of a real problem" in *Von Raab*.¹⁴⁸ In his view, the majority's finding of a compelling interest was supported by "nothing but speculation."¹⁴⁹ Concluding his argument, Justice Scalia warned the majority of the possibility of a slippery slope if real evidence is not used as support for findings of compelling governmental interests.¹⁵⁰

Prior to *Skinner* and *Von Raab*, the Seventh Circuit addressed the constitutionality of random drug testing of student athletes in *Schaill by Kross v. Tippecanoe County School Corp.*¹⁵¹ Relying on

145. *Id.* at 672. The Court stated: "[E]mployees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." *Id.*

146. *Id.* at 677.

147. *Id.* at 680 (Scalia, J., dissenting).

148. *Id.* at 681 (Scalia, J., dissenting).

149. *Id.* at 682 (Scalia, J., dissenting). The evidence offered by the majority does appear to be speculative: "The physical safety of these employees *may* be threatened, and many *may* be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the service." *Id.* at 669 (emphasis added).

150. *Id.* at 686 (Scalia, J., dissenting). Justice Scalia stated: "Moreover, there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens . . . would also be constitutional." *Id.* (Scalia, J., dissenting).

151. 864 F.2d 1309, 1310 (7th Cir. 1988). The school required athletes and cheerleaders to sign consent forms that allowed it to conduct the random tests throughout the athletic season. *Id.* at 1310-11. Drug testing of college athletes has been challenged in various state courts. See Steven O. Ludd, *Athletics, Drug Testing and the Right to Privacy: A Question of Balance*, 34 HOW. L.J. 599, 618-25 (1991); Allison Rose, Comment, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?*, 16 PEPP. L. REV. 45, 58-59 (1988). A student athlete at Northeastern University filed suit claiming that mandatory drug testing violated the Massachusetts State Civil Rights Act and Massachusetts' right of privacy statute. *Bally v. Northeastern Univ.*, 532 N.E.2d 49, 50 (Mass. 1989); see Massachusetts Civil Rights Act, MASS. ANN. LAWS ch. 12, §§ 11H, 11I (Law. Co-op. 1988) (Civil Rights Act); MASS. ANN. LAWS ch. 214, § 1B (Law. Co-op. 1986) (right of privacy act). The Massachusetts Supreme Judicial Court held that the drug testing program did not violate these statutes. *Bally*, 532 N.E.2d at 54. Student athletes at the University of Colorado challenged mandatory, random, suspicionless drug testing.

T.L.O., the *Tippecanoe* court stated that the probable cause and warrant requirements were not applicable to this school search due to the "special needs" of the school setting.¹⁵² The court listed four elements that characterize warrantless, suspicionless searches that are constitutional under the Fourth Amendment: (1) an individual's diminished expectations of privacy; (2) "weighty" governmental interests and ineffective alternative means; (3) limited discretion for the officials conducting the search; and (4) no intention by those conducting the search of seeking criminal sanctions.¹⁵³ In applying the facts of *Tippecanoe* to these elements, the court concluded that student athletes have diminished privacy expectations and that the school's interest in drug prevention is substantial.¹⁵⁴ Moreover, the Court held that the school adequately limited the discretion of school officials conducting the search and highlighted the use of the test for "noncriminal and rehabilitative purposes."¹⁵⁵ Based upon these findings, the court ruled that the drug testing did not violate the Fourth Amendment.¹⁵⁶

In another case affirmed by the Fifth Circuit, *Brooks v. East Chambers Consolidated Independent School District*,¹⁵⁷ the United States District Court for the Southern District of Texas struck down the drug testing by a Texas school district of all students participating in extracurricular activities.¹⁵⁸ The *Brooks* court, under a

University of Colorado v. Derdeyn, 863 P.2d 929, 930 (Colo. 1993). The Colorado Supreme Court determined that the drug testing constituted an unreasonable search under the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution. *Id.* at 935; see U.S. CONST. amend. IV; COLO. CONST. art. II, § 7. Student athletes at Stanford University brought a similar suit against the National Collegiate Athletic Association (NCAA) alleging that the NCAA's program of random drug testing violated the Privacy Initiative of the California Constitution. *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 641 (Cal. 1994); see CAL. CONST. of 1849, art. I, § 1 (amended 1974). The Supreme Court of California upheld the drug testing program based upon the voluntary nature of intercollegiate athletics and the NCAA's interest in maintaining drug-free competition. *Hill*, 865 P.2d at 658, 669.

152. *Tippecanoe*, 864 F.2d at 1313-16. The court focused upon the "special needs" for quick response to disciplinary problems in schools, as well as the need to "teach students in a safe and secure learning environment." *Id.* at 1314.

153. *Id.* at 1317-18.

154. *Id.* at 1322. In addressing the governmental interest, the court stated that student athletes and cheerleaders could be singled out "[b]ecause of their high visibility and leadership roles." *Id.* at 1320.

155. *Id.* at 1322.

156. *Id.*

157. 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

158. *Id.* at 760. The principal of East Chambers High School conducted his initial investigation into the drug problem in the district's schools by having three students look

reasonableness standard, found no evidence that participants in extracurricular activities were more likely than nonparticipants to use drugs.¹⁵⁹ The court also disagreed with the school district that its plan would be an effective means of curbing drug use.¹⁶⁰ It consequently held that the compelling interest the school put forth did not reach the level of sufficiency of the interests championed in *Skinner* and *Von Raab*.¹⁶¹ Accordingly, the court ruled that "[t]he intrusion on personal privacy that the school child must undergo in the East Chambers County school system cannot be justified by the global goal of prevention of substance abuse."¹⁶²

The split between the Seventh and Fifth Circuits regarding drug testing of students set the stage for the Supreme Court's analysis in *Acton*.¹⁶³ To resolve this split, the majority balanced the competing interests within a framework similar to that used by the Court in *Prouse*.¹⁶⁴ In order to analyze the reasonableness of the search, however, the Court first had to dispense with the probable cause and warrant requirements by showing the existence of a "special need."¹⁶⁵ The Court relied upon its holding in *T.L.O.* and found that the school setting creates special needs for "swift and informal disciplinary procedures" that make the warrant and probable cause requirements impractical.¹⁶⁶ Additionally, the Court dismissed the

through the yearbook and answer questions about the student population. *Id.* This "investigation" led to an estimate that 97% of the student body used alcohol and one-third used drugs. *Id.*

159. *Id.* at 764. The court stated: "[L]ogic would dictate that students who participate in athletics and other extra-curricular activities are, in fact, less likely to use drugs and alcohol" *Id.*

160. *Id.* at 765.

161. *Id.* at 766. In distinguishing the facts of *Brooks* from those of *Skinner* and *Von Raab*, the federal district court stated, "School activities, on campus and off, do not carry the inherent risks associated with the enforcement duties with which Customs employees are charged or with the responsibility that railway employees have with heavy machinery and sometimes dangerous cargo." *Id.*

162. *Id.* at 766.

163. *Acton*, 115 S. Ct. at 2386. Compare *Shaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988) (upholding drug testing of student athletes) with *Brooks*, 730 F. Supp. at 766 (finding drug testing of all students participating in extracurricular activities to be unconstitutional).

164. *Acton*, 115 S. Ct. at 2391-96; see *supra* notes 89-105 and accompanying text.

165. *Acton*, 115 S. Ct. at 2390-91.

166. *Id.* at 2391; see *Lewis, supra* note 41, at 1030-38. This rationale was sound in the context of *T.L.O.*, in which a school official was forced to respond immediately to the suspicion of smoking. See *New Jersey v. T.L.O.*, 469 U.S. 325, 328-29 (1985). The search at issue in *Acton*, however, was part of a formal program of drug testing lasting an entire school year. *Acton*, 115 S. Ct. at 2389-90. This does not comport with a need for "swift and informal" procedures. See *id.* at 2391. This extension of *T.L.O.* could reflect a settled

requirement of individualized suspicion for drug testing within the school setting.¹⁶⁷ Although the school search upheld in *T.L.O.* was based upon individualized suspicion, the Court found two reasons to dismiss the need for suspicion for school drug testing. First, a footnote of *T.L.O.* held open the possibility of suspicionless school searches in other contexts.¹⁶⁸ Second, the Court had upheld suspicionless drug testing in both *Skinner* and *Von Raab*.¹⁶⁹

The first part of the reasonableness test required the majority to address the nature of the privacy interest.¹⁷⁰ This inquiry led the Court to retreat from much of its holding in *T.L.O.* regarding the diminished expectations of privacy held by students in a public school setting.¹⁷¹ In *T.L.O.*, the Court held that school officials "act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."¹⁷² However, the *Acton* majority sidestepped the position of *T.L.O.* by stressing the "custodial and tutelary" duties of school officials.¹⁷³ By couching the argument in different terms,

belief by the Court that any search conducted by school officials within the school involves "special needs." See generally Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 833-39 (1992) (discussing the relationship between the Fourth Amendment and the "special needs" of the school setting created by violence).

167. *Acton*, 115 S. Ct. at 2390-91. The lack of suspicion was the main point of contention for the dissent. *Id.* at 2397-98 (O'Connor, J., dissenting); see *infra* notes 205-08 and accompanying text. The Court failed to consider whether a test based upon the level of suspicion used in *Terry*—"reasonable suspicion"—may have been feasible in this context. See *supra* note 88 and accompanying text.

168. *Acton*, 115 S. Ct. at 2391. In *T.L.O.*, the Court refused to decide whether individualized suspicion is an "essential element" of all school searches. *T.L.O.*, 469 U.S. at 342 n.8; see *supra* note 123. The acceptance of suspicionless drug testing may give school officials more leeway in other contexts, such as school locker searches. The *T.L.O.* Court refused to address this issue. See *T.L.O.*, 469 U.S. at 337-38 n.5.

169. See *Acton*, 115 S. Ct. at 2391; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) (drug testing of railroad employees); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (drug testing of Customs officials). The Court has also acknowledged the constitutionality of suspicionless searches of automobiles for illegal aliens, *United States v. Martinez-Fuerte*, 428 U.S. 543, 564-67 (1976), and drunk drivers, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-55 (1990). *Acton*, 115 S. Ct. at 2391.

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

171. *Id.* at 2391-92. In *T.L.O.*, the Court rejected the idea that school officials act *in loco parentis* in relation to students. *T.L.O.*, 469 U.S. at 336-37. But see *supra* note 47 (discussing *Mercer v. State*, 450 S.W.2d 715, 717-18 (Tex. Civ. App. 1970), in which the court declared that school officials act *in loco parentis* to the extent necessary to effect the school's purpose).

172. *T.L.O.*, 469 U.S. at 336-37.

173. *Acton*, 115 S. Ct. at 2392.

the Court succeeded in further reducing students' rights by lowering their supposed expectation of privacy.¹⁷⁴ Additionally, the majority tipped the scales in favor of the use of drug testing by explaining that student athletes possess even lower expectations of privacy than the rest of the student body.¹⁷⁵ The majority found support for this position in *Tippecanoe*, while disregarding contrary sentiments from *Brooks*.¹⁷⁶ Furthermore, the majority analogized the position of student athletes to that of "adults who choose to participate in a 'closely regulated industry,' " noting that they "have reason to expect intrusions upon normal rights and privileges, including privacy."¹⁷⁷

In *Skinner*, the Court had emphasized that urination is a "function traditionally shielded by great privacy."¹⁷⁸ Accordingly, the *Acton* Court focused its attention upon the manner in which this act was monitored under Vernonia's drug policy.¹⁷⁹ The tests performed under the Vernonia program required a monitor to stand and listen for the "sounds of urination."¹⁸⁰ These tests also required the students to inform the school, including teachers and coaches, of any prescription medications they were taking prior to this test.¹⁸¹ The Court conceded that "this raise[d] some cause for concern."¹⁸² This concern, however, was apparently minor, the Court dismissing it for failure to establish "a difference that respondents are entitled to rely on here."¹⁸³ Whether this came in response to the status of James

174. See *id.* The belief that students have a diminished expectation of privacy is not in accord with language of prior holdings: "The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards." *Goss v. Lopez*, 419 U.S. 565, 574 (1975); see also *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (pronouncing that students do not "shed their constitutional rights . . . at the schoolhouse gate").

175. *Acton*, 115 S. Ct. at 2393.

176. *Id.*; see *supra* notes 151-62 and accompanying text.

177. *Acton*, 115 S. Ct. at 2393 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989); *United States v. Biswell*, 406 U.S. 311, 316 (1972)). This analogy could be extended to all students who participate in voluntary extracurricular activities.

178. *Skinner*, 489 U.S. at 626.

179. *Acton*, 115 S. Ct. at 2393-94.

180. *Id.* at 2389.

181. *Id.* at 2394.

182. *Id.* The Court stated that it was "significant that the tests at issue here only look for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." *Id.* at 2393. A requirement, however, that students disclose that they are using oral contraceptives, for example, or medication to control epilepsy, should have raised the same concerns for the Court.

183. *Id.* at 2394. In *Von Raab*, Justice Scalia expressed much more concern for the invasion of privacy caused by urinalysis. See *National Treasury Employees Union v. Von*

Acton as a student, or whether the Court no longer views close monitoring of urination and advance disclosure of prescription medications as significant intrusions of privacy, is unclear.¹⁸⁴

In the analysis of administrative searches, the nature of the state's interest apparently had been the deciding factor in a determination of reasonableness.¹⁸⁵ In examining this second factor, however, the *Acton* Court quickly dispelled this notion.¹⁸⁶ In the majority's view, the sole question is not whether the governmental interest reaches a level to make it compelling.¹⁸⁷ Rather, a court must ask whether the interest is "important enough to justify the particular search at hand, in light of other factors."¹⁸⁸ Therefore, according to the Court, one must look not only at the "quantum" of governmental interest, but at whether that "quantum" of governmental interest is enough to justify the search at hand.¹⁸⁹

Justice Scalia characterized the interest in *Acton* as one of "[d]eterring drug use by our Nation's schoolchildren."¹⁹⁰ Viewing the interest in *Acton* in the aggregate provided a profitable comparison with the interest in *Von Raab* (enforcement of drug interdiction) and *Skinner* (prevention of drug-related railroad accidents).¹⁹¹ Very few people would dispute that the interest in preventing schoolchildren's drug use is extremely compelling. Upon declaring this to be the interest, however, the Court apparently realized that this aggregate interest was not narrowly tied to the drug testing of student athletes in the Vernonia schools.¹⁹² The Court qualified its

Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting). Justice Scalia stated that it is "obvious" that production of a urine sample while being closely monitored by a member of the same sex "is a type of search particularly destructive of privacy and offensive to personal dignity." *Id.* (Scalia, J., dissenting). Furthermore, he expressed his dismay in *Von Raab* that "[u]ntil today this Court has upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Id.* (Scalia, J., dissenting).

184. The respondents argued that the *Von Raab* and *Skinner* drug tests required the employees to disclose information only to medical personnel. *Acton*, 115 S. Ct. at 2394.

185. *See id.*

186. *See id.*

187. *Id.*

188. *Id.* at 2394-95.

189. *Id.*

190. *Id.* at 2395.

191. *See id.* But cf. *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 766 (S.D. Tex. 1989) (stating that the school district's drug testing program could not be "justified by the global goal of prevention of substance abuse"), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

192. *See Acton*, 115 S. Ct. at 2395.

statement of the interest by stressing that "this program is directed more narrowly to drug use by school athletes"¹⁹³ At this point, however, the Court had already expanded the interest, which easily allowed the state's interest in *Acton* to reach the level of the interests in *Skinner* and *Von Raab*.¹⁹⁴

The immediacy of the governmental interest also factored into the discussion of whether the interest was "important enough" to justify the search.¹⁹⁵ The Court's finding of immediacy was based on reports by school officials in Vernonia that the discipline problem had reached intolerable levels within the schools.¹⁹⁶ The focus on immediacy may reflect the Court's concern with the War on Drugs and the nationwide epidemic of drug use among students.¹⁹⁷ Perhaps this concern also explains Justice Scalia's switch from the dissent in *Von Raab* to the majority in *Acton*.¹⁹⁸

The threat of continued drug use by students also explains the majority's reasoning in examining the efficacy of Vernonia's drug program. As if it were an undisputed fact, the Court declared that it was "self-evident" that student athletes were "role model[s]" and that drug testing of these athletes would eliminate a school-wide problem "largely fueled" by these athletes.¹⁹⁹ Furthermore, the majority

193. *Id.*

194. Whether the interest in preventing injury of athletes through the elimination of drug use, standing alone, would have been sufficient to justify the drug testing procedures is unclear.

195. *Acton*, 115 S. Ct. at 2395. Immediacy was not one of the factors utilized by the Prouse Court. See *Delaware v. Prouse*, 440 U.S. 648, 655-61 (1979).

196. *Acton*, 115 S. Ct. at 2395.

197. See *supra* notes 2-5 and accompanying text.

198. In *Von Raab*, Justice Scalia alleged that the majority reached its holding through speculation. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681-85 (1989) (Scalia, J., dissenting); see *supra* notes 147-50 and accompanying text. The incidents alleged in *Acton* may have also lacked factual support. According to the respondents, there was "little evidence of Vernonia students using drugs, and no evidence of any athlete in Vernonia ever competing while on drugs, let alone causing or sustaining injury." Respondents' Brief at 2, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590). Furthermore, "the District conceded, in a pre-trial interrogatory, that it [was] unable to confirm so much as one drug-related injury in its entire history of the sports program." *Id.* at 6.

199. *Acton*, 115 S. Ct. at 2395-96. In *Brooks*, the district court judge argued that this logic was completely faulty:

[L]ogic would dictate that students who participate in athletics and other extra-curricular activities are, in fact, less likely to use drugs and alcohol, if only because Texas law forbids students who fail courses from participating in extra-curricular activities, and presumably, heavy drug or alcohol use will have a negative impact on academic performance.

confirmed the notion from *Skinner* that the least intrusive means is not necessary in order for the means to be effective.²⁰⁰ The majority bolstered this position in the school context by relying once again on the proposition that school officials act *in loco parentis*.²⁰¹ Utilizing this notion, the majority declared that it "may be impracticable" to use suspicion-based testing because parents who favor random drug testing may not favor testing based upon suspicion.²⁰² Furthermore, the Court viewed "accusatory" testing as "transform[ing] the process into a badge of shame."²⁰³ The Court seemed unconcerned with the level of accusation and shame resulting from a positive test result under Vernonia's suspicionless testing scheme.²⁰⁴

The majority's repudiation of a less-intrusive suspicion-based test triggered a dissent from Justice O'Connor, whom Justices Stevens and Souter joined, that recognized the need for a response to the drug problem in American schools, yet acknowledged in a different manner the strong protections that the Fourth Amendment bestowed.²⁰⁵ The dissent argued that suspicion should be the rule, rather than the exception, and stated that suspicionless searches have been allowed only "where it has been clear that a suspicion-based regime would be

Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 764 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991). If the goal of drug testing is to deter drug use in the school, the test should cover all drugs, especially alcohol and steroids. However, the Vernonia drug policy failed to mandate this. See *supra* note 26 (discussing the failure of the drug testing program to test for alcohol and steroids).

200. See *Acton*, 115 S. Ct. at 2396; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989).

201. See *supra* note 47.

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

203. *Id.*

204. See *id.* at 2405 (O'Connor, J., dissenting). Justice O'Connor argued that the accusation in the Vernonia drug program results from a student testing positive, and the shame comes from the notification of the student's parents and the possible suspension from athletic competition that would effectively put other students on notice that the suspended student had tested positive for drugs. See *id.* (O'Connor, J., dissenting). Justice O'Connor further stated:

[A]ny testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student's perspective, the motives for the program notwithstanding; and for the same reason, the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably—and quite reasonably—understood as punishment.

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

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

ineffectual.”²⁰⁶ Although the majority attempted to provide a rationale for a finding that such a search program would be ineffective, the lack of sufficient support for this rationale demonstrates that the debate is not settled.²⁰⁷ Although a testing program covering all student athletes would almost certainly be more effective than any suspicion-based testing program, the protections of the Constitution, and more specifically the Fourth Amendment, “come with a price.”²⁰⁸ This is not to say, however, that a plan that tests all athletes is cost-free.

Beyond the question of the constitutionality of a random drug testing program for student athletes lie two interrelated inquiries. The first is whether adequate arguments exist to support the singling out of student athletes. The second is whether *Acton* sets the stage for the extension of student drug testing beyond athletes. These questions probe deeply into the motivations and repercussions of drug testing of student athletes and help provide insight into the future of such programs.

In *Acton*, the Court felt that the status of student athletes as “role models” and the potential for serious injury to impaired athletes justified their selection as the sole subjects of drug testing.²⁰⁹ However, as the dissent avowed, student athletes may have been selected so that the drug policy would “pass constitutional muster.”²¹⁰ Furthermore, this program provides a backhanded method of testing nearly the entire student body.²¹¹

The first basis put forth by the Court for treating athletes differently was the “‘element of “communal undress” inherent in

206. *Id.* at 2398 (O'Connor, J., dissenting). In support of this proposition, one commentator has stated that individualized suspicion should be a “component of reasonableness” because “it recognizes the historical importance of individualized suspicion to the framers of the Constitution, and it provides needed guidance to courts and governmental officials, avoiding the slippery slope of an unprincipled reasonableness analysis.” Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 MEM. ST. U. L. REV. 483, 627 (1995).

207. See *Acton*, 115 S. Ct. at 2396; *id.* at 2403 (O'Connor, J., dissenting) (stating that the “Court never seriously engage[d] the practicability of [a suspicion] requirement in the instant case”).

208. *Id.* at 2404 (O'Connor, J., dissenting) (citing *Arizona v. Hicks*, 480 U.S. 321, 329 (1987)).

209. *Id.* at 2392-93, 2396.

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

211. Two-thirds of the high school and three-fourths of the junior high students participated in interscholastic athletics. Respondents' Brief at 48 n.31, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590); Petitioner's Brief at 3, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590).

athletic participation.’ ”²¹² Although it may be true that athletes have a lesser expectation of privacy in their roles as athletes, this expectation does not cross over to their roles as students.²¹³ Furthermore, the concept of “communal undress” could just as easily be applied to any student participating in a voluntary gym class.

The Court found additional support for the separate treatment of athletes in the decision of athletes to participate voluntarily in sports.²¹⁴ This decision carries with it the obligation to submit to a physical examination, and apparently the Court equated the intrusion of the examination with the intrusion resulting from urinalysis.²¹⁵ As the dissent pointed out, however, these two situations are easily distinguishable.²¹⁶ Moreover, if voluntariness is the touchstone, then a system in which all students involved in voluntary extracurricular activities would be tested for drug use is easy to imagine.

The Court also emphasized the greater threat to drug-impaired student athletes due to “impairment of judgment, slow reaction time, and a lessening of the perception of pain.”²¹⁷ As the majority noted, however, in an environment of learning, the impairment caused by drug use hinders the learning process and provides distractions to all students.²¹⁸ Therefore, although drug use may pose a greater physical threat to athletes, one can not discount the psychological and physiological effects of drug use upon all students.²¹⁹

The majority’s perception of student athletes as “role models” also contributed to its acceptance of a program designed to test only this segment of the student population.²²⁰ Although this perception

212. *Acton*, 115 S. Ct. at 2393 (quoting *Schail* by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (1988)).

213. Arguably, athletes who are tested in order to combat the drug problem in the entire school are tested in their capacity as students.

214. *Acton*, 115 S. Ct. at 2393.

215. *Id.* at 2392.

216. *Id.* at 2405 (O’Connor, J., dissenting). Justice O’Connor emphasized that physical examinations and vaccinations “are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive.” *Id.* (O’Connor, J., dissenting).

217. *Id.* at 2395.

218. *Id.* The majority stated: “And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.” *Id.*

219. The effects of drug use and addiction are not confined to certain segments within the school population or society as a whole. See POWELL ET AL., *supra* note 26, at 41. Furthermore, the adverse impacts of drug use upon learning are not confined to student athletes. See *id.* at 46-47. In general, all students who are addicted to drugs “demonstrate behaviors that are counterproductive to learning in school classrooms.” *Id.*

220. See *Acton*, 115 S. Ct. at 2395-96.

may find truth in a portion of our nation's schools, it is somewhat outdated.²²¹ Different extracurricular activities attract different types of students, and not all students view athletes as role models. Furthermore, the fact that two-thirds of the Vernonia student population participates in athletics diminishes the aggregate impact on the school from the influence of the conduct of athletes upon non-athletes.²²²

The possible extension of *Acton* to the drug testing of all public school students was a noticeable concern for a majority of the Court.²²³ The language of the majority opinion, however, makes it unclear whether such an extension is permissible.²²⁴ The Court's concern is apparent in the words of the majority: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."²²⁵ This appears to cut against the possibility of an extension of *Acton* to suspicionless drug testing of all students. In qualifying this statement, however, the Court declared: "The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."²²⁶ This concern is present within any drug testing scheme for students, including mass testing of an entire student population.

221. In many schools, athletes are viewed as role models. DONNA EDER ET AL., *SCHOOL TALK: GENDER AND ADOLESCENT CULTURE* 13 (1995). However, students participating in other highly visible activities, such as drama or cheerleading, are also viewed as role models in modern schools. *Id.*

222. This point was underscored by the respondents: "Not everyone can be a role model. And there can't be more students leading than being led." Respondents' Brief at 48 n.31, *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (No. 94-590).

223. *See Acton*, 115 S. Ct. at 2396; *see id.* at 2397 (Ginsburg, J., concurring). This extension could be limited to all students participating in extracurricular activities. *But see Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 766 (S.D. Tex. 1989) (striking down a program designed to test all students participating in extracurricular activities), *aff'd*, 930 F.2d 915 (5th Cir. 1991). An extension to all students involved with extracurricular activities could utilize the *Acton* majority's emphasis on the voluntary nature of athletic participation. *See Acton*, 115 S. Ct. at 2393; *see supra* notes 214-16 and accompanying text.

224. *See Acton*, 115 S. Ct. at 2396. In New Jersey, a school district attempted to include drug testing as part of its annual physical examinations of all students. *See Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist.*, 510 A.2d 709, 709-10 (N.J. Super. Ct. Ch. Div. 1985). The court found this policy to be unconstitutional because the school's policy violated the students' "right to be free of unreasonable search and seizure . . . rights to due process and . . . legitimate expectation of privacy and personal security." *Id.* at 713.

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

226. *Id.* (footnote omitted).

Additional language of the majority opinion furnishes subsequent litigators with plenty of support for a school-wide drug testing program. First, the majority designated the central issues in the case to be the status of the test subjects as students "who have been committed to the temporary custody of the State as school-master."²²⁷ Second, the majority referred to the primary governmental interest at issue in *Acton* as the interest in "[d]eterring drug use by our Nation's schoolchildren."²²⁸ These two elements are present in a policy that mandates the drug screening of all students. Furthermore, a strong argument could be made that the interest in preventing drug use by the schoolchildren of our nation would be better served by the testing of all students.

Perhaps in recognition of the open-ended nature of the majority opinion, Justice Ginsburg authored a concurrence, in which she expressed her interpretation of the opinion: "I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."²²⁹ Although Justice Ginsburg sought to make clear that *Acton* did not confer approval upon school-wide testing, her concurrence, in conjunction with the language of the majority opinion, foreshadows and perhaps invites future litigation upon this very issue. If *Acton* is any indication of the Court's leniency in the area of school searches, and more specifically drug testing, then an era of school-wide drug testing may be near.²³⁰

The Supreme Court's approval of suspicionless drug testing of student athletes leaves unanswered the question of whether random

227. *Id.* at 2391.

228. *Id.* at 2395. In applauding the Supreme Court's decision in *Acton*, President Clinton foreshadowed the possible extension of drug testing to all students:

My administration's support for the right of school officials to properly test their high school athletes is part of our overall strategy to make schools places where young people can be safe and drug-free. I believe that to be a good student or a good athlete a student cannot use drugs. Drug use at schools will not and should not be tolerated.

Statement on the Supreme Court Decision on the Student Athlete Drug Testing Case, 31 WEEKLY COMP. PRES. DOC. 1136 (June 26, 1995).

229. *Acton*, 115 S. Ct. at 2397 (Ginsburg, J., concurring).

230. If the testing programs instituted by school districts are voluntary, they will be impossible to challenge. KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL § 7.02[3] (1994). Moreover, some evidence suggests that voluntary programs are more successful than mandatory programs. *See id.*

drug testing of *all* schoolchildren may be a constitutionally acceptable weapon in the nation's War on Drugs. Although most would agree that something must be done to fight this epidemic, *Acton* does little to quell doubts as to the efficacy of suspicionless drug testing of student athletes. Whether an extension of *Acton* will pass constitutional muster remains to be seen. Further litigation will undoubtedly ensue, and the freedom from intrusion upon privacy for *all* students will hang in the balance.

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