Denver Law Review

Volume 73 | Issue 2 Article 7

January 1996

Vernonia School District 47J v. Acton: Flushing the Fourth Amendment - Student Athletes' Privacy Interests Go Down the Drain

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COMMENT

VERNONIA SCHOOL DISTRICT 47J V. ACTON: FLUSHING THE FOURTH AMENDMENT— STUDENT ATHLETES' PRIVACY INTERESTS GO DOWN THE DRAIN

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[1]

INTRODUCTION

In the fall of 1991, the government became a lawbreaker. This occurred when a school district in Vernonia, Oregon imposed an unconstitutional mandate upon middle and high school students wishing to participate in their athletic programs. In order to compete, the students were required to submit to random drug testing of their urine.

In an effort to support the federal government's "War on Drugs," the Court sanctioned this illegal behavior when it failed to strike a balance between governmental power and individual rights. On June 26, 1995, the Court, in *Vernonia School District 47J v. Acton*,[2] held constitutional under the Fourth Amendment a district-wide policy authorizing random, suspicionless, urinalysis drug testing of students who participate in the District's public school athletic programs.[3] Despite the Court's efforts to follow what the Constitution prescribes, the Court did not adhere to precedent and instead created its own social agenda dictating how society should view the threat of drug use in our public schools.

This Comment analyzes the Court's decision regarding the constitutionality of the Vernonia School District's drug testing policy. Part I discusses the Fourth Amendment in both the criminal search and administrative search contexts. Additionally, Part I examines the various cases in which the Court developed a balancing test to resolve whether an administrative search is reasonable. Part II provides the factual background and procedural history of *Acton*. Part III scrutinizes the Court's reliance on *New Jersey v. T.L.O.*[4] as precedent for upholding the District's drug testing program. It specifically addresses how the majority's inaccurate application of *T.L.O.* undermines the Court's prior

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1. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
2. 115 S. Ct. 2386 (1995).
3. *Acton*, 115 S. Ct. at 2397.
4. 469 U.S. 325 (1985).

decisions, which held that full, intrusive, suspicionless searches were reasonable if a compelling government interest beyond law enforcement was present. Finally, this Comment argues that the *Acton* opinion represents an unclear and unnecessary departure from Fourth Amendment standards. The decision effectively strips public school students of their legitimate expectations of privacy and security guaranteed by the Fourth Amendment.

I. BACKGROUND

A. *The Scope of the Fourth Amendment*

The Fourth Amendment to the United States Constitution "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their discretion."[5] This language protects individuals from two types of governmental invasions: "searches" and "seizures."[6] A "search" occurs when a person's reasonable expectation of privacy is infringed upon.[7] A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interest in that property.[8] In order to trigger Fourth Amendment protection against unreasonable governmental intrusions, an intrusion, as a threshold matter, must occur in an area where a citizen has a reasonable expectation of privacy.[9] A reasonable expectation of privacy exists if a person has an expectation of privacy that society is prepared to recognize as objectively reasonable.[10]

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5. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-14 (1989) (citing Camara v. Municipal Court, 387 U.S. 523, 528 (1967)). The Court has espoused an exclusionary remedy for violations of a defendant's constitutional rights. The first such decision was Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that it was prejudicial error for a trial court to refuse to return letters and documents to the accused, and to allow their use in his trial, when obtained through a warrantless search conducted by a United States official under color of office). The exclusionary doctrine was later applied to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule is enforceable against the states through the Fourteenth Amendment's Due Process Clause, due to the broad scope of the Fourth Amendment's right of privacy). This rule prohibits the use of evidence or testimony obtained by government officials through means violative of the Constitution. *Id.* at 648. Therefore, all evidence obtained by law enforcement officials through means lacking the constitutionally required degree of suspicion necessary to proceed are deemed invalid and inadmissible at trial if the defendant can establish that the evidence was obtained in an unconstitutional manner. Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983) ("In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts."). Likewise, evidence subsequently derived from evidence erroneously obtained is inadmissible under the "fruit of the poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471, 484, 488 (1963).

6. U.S. CONST. amend. IV.

7. *Railway Labor Executives' Ass'n*, 489 U.S. at 616.

8. *Id.*

9. Katz v. United States, 389 U.S. 347, 351-52 (1967). A governmental intrusion is deemed reasonable if the intrusion was predicated either upon the issuance of a warrant by a detached and disinterested magistrate upon a showing of probable cause, Payton v. New York, 445 U.S. 573, 582 n.17 (1979), or for compelling reasons which would justify an exception to the warrant requirement, McDonald v. United States, 335 U.S. 451, 454 (1948). *See generally* 2 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987) (discussing the Fourth Amendment in detail).

10. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

1. The Fourth Amendment in the Criminal Search Context

An intrusion is reasonable in the criminal search context when a warrant[11] to search is issued based upon a showing of probable cause and a description of the things or people to be seized.[12] Once presented with an affidavit explaining, with particularity, the reasons for the intrusion and a description of the premises, a neutral and detached magistrate signs a court order issuing the warrant.[13] Probable cause to search exists when the facts and circumstances would cause a man of reasonable caution to believe that seizable objects are located in the place to be searched.[14]

The Court, however, carves out various exceptions to the warrant and probable cause elements of the reasonableness requirement, which apply in certain instances. The Court has not mandated warrants in searches: (1) while in hot pursuit of a criminal suspect;[15] (2) if there is imminent destruction of evidence;[16] (3) of automobiles;[17] (4) of items in plain view when an officer is already at a lawful vantage point;[18] (5) incident to a lawful arrest;[19] (6) of inventory pursuant to an arrest;[20] (7) where consent has been given;[21] and (8) where probable cause is impracticable because the purpose of the search is to satisfy some special need beyond law enforcement.[22] Furthermore, in other

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11. "A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope." *Railway Labor Executives' Ass'n*, 489 U.S. at 622; *see* United States v. Place, 462 U.S. 696, 701 (1983) (stating that a seizure of personal property is per se unreasonable when accomplished without a judicial warrant issued upon probable cause and particularly describing items to be seized); Payton v. New York, 445 U.S. 573, 586 (1980) (stating that searches and seizures within a home without a warrant are presumptively unreasonable).

12. U.S. CONST. amend. IV.

13. Johnson v. United States, 333 U.S. 10, 13-15 (1948).

14. New Jersey v. T.L.O., 469 U.S. 325, 363-64 (1985) (citing Carroll v. United States, 267 U.S. 132, 161 (1925)).

15. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 305 (1967).

16. Schmerber v. California, 384 U.S. 757, 770 (1966) (holding that the need for evidence of blood alcohol content, given the rate at which the body metabolizes alcohol, and the fact that the arresting officer incurred delays in seeking medical treatment for the petitioner, justified taking a blood sample without a warrant).

17. Carroll v. United States, 267 U.S. 132, 154-55 (1925) (holding that officers are indemnified for stopping and seizing automobiles reasonably believed to be illegally transporting contraband liquor).

18. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

19. United States v. Robinson, 414 U.S. 218, 224 (1973) (noting that this exception extends to searches of the person and to the area within the person's control being arrested).

20. Colorado v. Bertine, 479 U.S. 367, 371-73 (1987) ("[A]n inventory search may be reasonable under the Fourth Amendment even though it is not conducted pursuant to a warrant based on probable cause."); Illinois v. Lafayette, 462 U.S. 640, 643 (1983) ("[T]he inventory search constitutes a well-defined exception to the warrant requirement.").

21. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Davis v. United States, 328 U.S. 582, 593-94 (1946).

22. CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 144-293 (1986); Greg Knopp et al., *Warrantless Searches and Seizures*, 83 GEO. L.J. 692, 692 (1995). For minimally intrusive searches, the Court reasons that a lesser degree of suspicion could still satisfy the Fourth Amendment's ultimate mandate of "reasonableness." It would be excessive for the Court to require a warrant, for example, every time a police officer briefly asks minimally intrusive questions of a person exhibiting suspicious behavior. *See* Terry v. Ohio, 392 U.S. 1 (1968). Because the warrant exceptions grant police officers wide discretion, the Court created the exclusionary rule to deter officers from abusing the exceptions. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

instances, the Court employs a balancing test,[23] permitting searches and seizures on a showing of less than probable cause, allowing reasonable suspicion to sometimes suffice.[24] The Court balances the government's interests in maintaining societal order and providing effective law enforcement against the relative intrusiveness to the individual.[25]

2. The Fourth Amendment in the Administrative Search Context

Administrative searches, also called regulatory, civil, or "special needs" searches, can occur in a variety of contexts, and the intrusiveness of such searches can range from minimal to highly invasive.[26] As in the criminal context, these searches, too, can occur with or without a warrant and with or without individualized suspicion. Administrative searches sometimes do not require a warrant, because the purposes of a warrant would not be furthered.[27] Ordinarily, a warrant is only useful for law enforcement purposes, in which a full criminal search targets specific individuals.[28] In an administrative search, however, the goal is not law enforcement, but some other public policy goal.[29] For instance, the goal of municipal fire, health, and housing inspec-

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23. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

24. *Id.* at 538; *see also Terry*, 392 U.S. at 21-22 (sanctioning the use of a balancing test to replace individualized suspicion).

25. *Camara*, 387 U.S. at 534-37; *see Terry*, 392 U.S. at 21-25 (discussing the use of a balancing test).

26. *See* Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2393 (1995) (deeming random urinalysis drug testing of students who participate in athletics programs as an administrative search); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620-21, 630 (1989) (finding drug and alcohol testing authorized by Federal Railroad Administration regulations to be administrative search); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (finding United States Custom Service's drug testing of employees applying for promotion to positions which involve stopping transportation of illegal drugs or requiring them to carry firearms at nation's borders to be administrative search); New York v. Burger, 482 U.S. 691 (1987) (finding warrantless administrative search of junkyard); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding vehicle stop at fixed checkpoint, Mexico-U.S. border, to determine citizenship to be administrative search); Lesser v. Epsy, 34 F.3d 1301 (7th Cir. 1994) (finding warrantless administrative search of animal dealer facilities); United States v. Branson, 21 F.3d 113 (6th Cir.) (finding warrantless administrative search of auto repair shop), *cert. denied*, 115 S. Ct. 223 (1994); *In re* Kelly-Springfield Tire Co., 13 F.3d 1160 (7th Cir. 1994) (noting administrative search conducted on showing that OSHA violated); Winters v. Board of County Comm'rs, 4 F.3d 848, 853 (10th Cir. 1993) (finding warrantless administrative search of pawn shop), *cert. denied*, 114 S. Ct. 1539 (1994); United States v. Seslar, 996 F.2d 1058, 1063 (10th Cir. 1993) (deeming warrantless random stop of trucks to determine whether trucks carrying commercial load as administrative search); United States v. Johnson, 994 F.2d 740 (10th Cir. 1993) (noting administrative search of taxidermy shop); Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) (holding random urinalysis testing of students who participate in interscholastic sports to be administrative search); Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991) (holding urinalysis drug testing of students participating in extra-curricular activities to be administrative search).

27. The Court analyzes the public interest involved:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Camara, 387 U.S. at 533.

28. *Railway Labor Executives' Ass'n*, 489 U.S. at 619.

29. *Railway Labor Executives' Ass'n*, 489 U.S. at 606-09; *Von Raab*, 489 U.S. at 660-61;

tions is public safety;[30] likewise, railroad employees and U.S. Customs Service employees may be subject to drug and alcohol testing in the interest of public safety.[31]

a. *The Warrant & Probable Cause Requirements*

A warrant supported by probable cause may be issued in an administrative context. Unlike the criminal arena, however, administrative searches typically are not subjected to a neutral, detached evaluation because the persons searched are given notice that they are subject to such random searches.[32] Either a person has signed a consent form at some point prior to the search,[33] or the very nature of the person's environment provides a lesser expectation of privacy.[34] In these instances, the need to check an arbitrary abuse of government discretion—the purpose of a warrant—is eliminated. Courts justify this exception because random searches promote the special benefits of deterrence and accuracy. These benefits may be lost during the time necessary to procure a warrant.[35] If the search is reasonable, therefore, a warrant requiring probable cause is not necessary to conduct an administrative search.

b. *The Reasonableness Balancing Test*

In the absence of a warrant or individualized suspicion, both criminal and administrative searches can require a balancing of interests in determining whether or not a search is reasonable. The Court again balances the privacy and security interests of the individual against the government's interest in conducting the search.[36] In the criminal context, the government seeks individual convictions; whereas in the administrative context, the government seeks to uphold a regulation or policy providing for public safety.[37] An important distinction between administrative and criminal searches is that in an administrative search, the government's interests are not driven by law enforcement purposes. Because the government interest is clear, the Court has an easier time fashioning the appropriate balancing test.[38] The reasonableness balancing test required for criminal searches is clearly distinguishable from the

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Camara, 387 U.S. at 533.

30. *Camara*, 387 U.S. at 533-34.

31. *Railway Labor Executives' Ass'n*, 489 U.S. at 606-09; *Von Raab*, 489 U.S. at 660-61.

32. *Railway Labor Executives' Ass'n*, 489 U.S. at 622.

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

34. *Id.* at 2392-93; *Railway Labor Executives' Ass'n*, 489 U.S. at 628; *Von Raab*, 489 U.S. at 672; New Jersey v. T.L.O., 469 U.S. 325, 348 (1985).

35. *See Railway Labor Executives' Ass'n*, 489 U.S. at 623; *T.L.O.*, 469 U.S. at 340; Donovan v. Dewey, 452 U.S. 594, 603 (1981); *Camara*, 387 U.S. at 533.

36. *Railway Labor Executives' Ass'n*, 489 U.S. at 606-09; *Von Raab*, 489 U.S. at 660-61.

37. *See, e.g., Railway Labor Executives' Ass'n*, 489 U.S. at 606-09 (discussing the public policy goal of preventing alcohol and drug use by railroad employees, which had possibly caused or contributed to a significant number of train accidents); *Von Raab*, 489 U.S. at 660-61 (discussing the public policy goal of preventing drug use by front line, drug interdiction Customs agents).

38. *Railway Labor Executives' Ass'n*, 489 U.S. at 606-09, 620-21; *Von Raab*, 489 U.S. at 660-61; *see Camara*, 387 U.S. at 529.

reasonableness balancing test employed by the courts in administrative searches.[39]

c. *Application of the Reasonableness Balancing Test*

In order to apply a reasonableness analysis in an administrative search context, the Fourth Amendment first requires that a search occur.[40] In the absence of a warrant, the search must then be distinguished from a criminal search.[41] To determine if a search is administrative rather than criminal, courts examine several factors. One characteristic demonstrating this difference is the randomness of administrative searches, which means a low probability for an abuse of discretion. Another is that the environment in which the search is conducted merits a lower expectation of privacy. An additional distinguishing characteristic of administrative searches is that the persons to be searched have notice of the policy. Fourth, the purposes of requiring a warrant are not served in the administrative context. Fifth, and perhaps most important, is that such a search does not further a criminal investigation; therefore, the government's interests go beyond normal law enforcement.

The final requirement of the reasonableness analysis is that the government action be reasonable.[42] Reasonableness "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."[43] If the degree of invasion is outweighed by the government's need to search, the search is likely to be found reasonable.[44] In making this determination, it appears as though the Court has employed two standards of review which can be labeled as: (1) legitimate interests, which satisfy minimally intrusive searches;[45] and (2) compelling interests, which justify highly

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39. *Railway Labor Executives' Ass'n*, 489 U.S. at 606-09; *Von Raab*, 489 U.S. at 660-61; *see Camara*, 387 U.S. at 529.

40. *See Railway Labor Executives' Ass'n*, 489 U.S. at 614-18; *Von Raab*, 489 U.S. at 664-65; *see also* California v. Greenwood, 486 U.S. 35 (1988) (finding that a search of trash did not constitute a search); California v. Ciraolo, 476 U.S. 207 (1986) (finding that an aerial search did not contitute a search). As stated above, a search is an infringement on an expectation of privacy that society is prepared to recognize as reasonable. *Railway Labor Executives' Ass'n*, 489 U.S. at 616; *see, e.g., Greenwood*, 486 U.S. at 43; United States v. Jacobsen, 466 U.S. 109, 113 (1984). This means that a government actor must invade a person's reasonable expectation of privacy. While the Fourth Amendment applies to federal actors, it also applies to state actors through the Fourteenth Amendment. The Fourteenth Amendment, therefore, prohibits an unreasonable invasion of a person's reasonable expectation of privacy by state officials. *See* Elkins v. United States, 364 U.S. 206, 213 (1960); *see also* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (determining that the Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers).

41. *Railway Labor Executives' Ass'n*, 489 U.S. at 620-21 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)) (stating that there are "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements").

42. *See id.* at 624-34.

43. *Id.* at 619 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

44. *See id.*

45. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding the detection and detention of illegal aliens through checkpoint border stops).

In *Martinez-Fuerte*, government officials were permitted to stop, question, and visually inspect the exterior of any vehicle. *Id.* at 558. However, the officials were not permitted to search the interior of the vehicle or the occupants. *Id.* The Court reasoned that the heavy flow of traffic

intrusive searches.[46]

B. *The Development of the Compelling Interest & Highly Intrusive Standard of Review*

1. *Skinner v. Railway Labor Executives' Ass'n*[47]

Faced with the possibility that alcohol and drug abuse by railroad employees caused or contributed to a significant number of train accidents, the Federal Railroad Administration (FRA) promulgated regulations[48] mandating blood and urine toxicological tests of all employees involved in a "major train accident."[49] Under these regulations, the railroad has the additional duty "of collecting samples for testing after an 'impact accident.'"[50] Following an occurrence that triggers the railroad's duty to test, all crew members and covered employees directly involved in the accident are taken to an independent medical facility for the collection of blood and urine samples.[51] After collecting the samples, the railroad sends them by prepaid air freight to the FRA laboratory for analysis.[52]

The FRA also adopted regulations authorizing, but not requiring, railroads to conduct breath and urine tests where, after a reportable accident or incident, a supervisor has "reasonable suspicion" that an employee's acts or omissions

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at the border justified stopping each car without reasonable suspicion. *Id.* at 557. In addition, the Court recognized that the government's goal of deterring aliens at the border furthered the purposes of conducting random searches. *Id.* To make this determination, the Court balanced what they believed to be a minimal intrusion on the motorists' privacy, with the effectiveness of the program, the ineffectiveness of alternatives, and the legitimate interests of society in controlling the flow of illegal aliens into this country. *Id.* at 556-57; *see also* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (finding the questioning of all oncoming traffic at roadblock-type stops to be a minimally intrusive method to promote the government's interest in maintaining highway safety); *Camara*, 387 U.S. at 538 (authorizing suspicionless searches of residential and commercial buildings for fire, health, and safety violations). In *Prouse*, the Court found the intrusion of stopping an automobile and detaining the driver in order to check his or her driver's license and the registration of the automobile to be an unreasonable intrusion when the driver is subsequently indicted for illegal possession of a controlled substance in the absence of reasonable suspicion that a motorist is unlicensed, or that an automobile is not registered. *Prouse*, 440 U.S. at 663. The Court did sanction states for stopping and questioning all oncoming traffic at roadblock-type stops even though they involved less intrusion. *Id.*

46. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (finding testing of railroad employees for drug use by urinalysis to be a highly intrusive invasion of privacy, yet justified because of the government's compelling interest in preventing catastrophic train accidents involving substantial casualties); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (finding the testing of United States Customs Service employees for drug use by urinalysis to be a highly intrusive invasion of privacy, yet justified because of the government's compelling interest in promoting safety and national security).

47. 489 U.S. 602 (1989).

48. 49 C.F.R. § 219.101-.905 (1994).

49. *Railway Labor Executives' Ass'n*, 489 U.S. at 609. Under the regulations, the definition of a "major train accident" is any train accident involving "(i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of $500,000 or more." *Id.* (citing 49 C.F.R. § 219.201(a)(1) (1987)).

50. *Id.* An "impact accident is a collision that results in a reportable injury, or in damage to railroad property of $50,000 or more." *Id.* (citing 49 C.F.R. § 219.201(a)(2) (1987)).

51. *Id.*

52. *Id.* at 610 (citing 49 C.F.R. § 219.205(d) (1987)).

contributed to the incident or to the severity of the accident.[53] In addition, the railroad administers these tests to employees who violate specific safety rules.[54] In all situations, the samples are only tested for alcohol and drug use, and not for any other medical information.[55] Significantly, the Court noted that although test results are not intended to be released to drug enforcement officials, the regulations do not expressly prohibit the release of such results.[56]

In reviewing the constitutionality of these regulations, the Court scrutinized the level of intrusion involved. The Court initially determined that the collection and testing of urine intruded upon expectations of privacy that society recognizes as reasonable, because the invasion affected the privacy interests of the employees' bodies.[57] However, the Court continued to discount this expectation by finding that the employees tested pursuant to these regulations have long been the focus of regulatory concern, and that they therefore possessed a diminished expectation of privacy.[58] In balancing this intrusion with the government's "compelling"[59] interest in preventing disastrous train accidents involving great human loss, the Court reasoned that the government interest outweighed the intrusion.[60] The Court found persuasive FRA statistics demonstrating the high incidence of drug and alcohol abuse in the industry, the FRA's estimations concerning the extent of property damage, and the number of fatalities and injuries caused by such abuses.[61] Likewise, the Court

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53. *Id.* at 611 (citing 49 C.F.R. § 219.301(b)(2) (1987)).

54. *Id.* (citing 49 C.F.R. § 219.301(b)(3) (1987)). Sub-part D of the regulations, entitled "Authorization to Test for Cause," also provides that a breath test may be conducted where a supervisor has a "reasonable suspicion" that an employee is under the influence of alcohol, based upon personal observations of the employee's appearance, behavior, speech, or body odor. *Id.* (quoting 49 C.F.R. § 219.301(b)(1) (1987)). If impairment is suspected, urine tests may be required, but only if the decision to conduct such a test is made by two supervisors. *Id.* (citing 49 C.F.R. § 219.301(c)(2)(i) (1987)). Lastly, if drugs are suspected of causing impairment, one of the supervisors making the determination must be specially trained in detecting drug intoxication. *Id.* (citing 49 C.F.R. § 219.301(c)(2)(ii) (1987)).

55. *Id.* at 626.

56. *Id.* at 621 n.5 (stating that although the biological samples had never been released and are not intended for release to drug enforcement officials, the procedures do not expressly prohibit such release). In dicta, the Court implied that release to law enforcement authorities was unlikely. *Id.* at 621.

57. *Id.* at 617.

58. *Id.* at 628.

59. *Id.*

60. *Id.* at 633.

61. *Id.* at 607. The Court referenced a study conducted by the FRA:

> The FRA noted that a 1979 study examining the scope of alcohol abuse on seven major railroads found that "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year." In addition, "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year," and "13% of workers reported to work at least 'a little drunk' one or more times during that period." The study also found that 23% of the operating personnel were "problem drinkers," but that only 4% of these employees "were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures."

Id. at 607 n.1 (citations omitted). The FRA also reported that:

> [A]fter a review of accident investigation reports from 1972 to 1983, "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor," and that these accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately

viewed the ineffectiveness of previous attempts to control such abuses as dispositive of the reasonableness of maintaining these regulations.[62] In a 6-2 decision upholding the constitutionality of the alcohol and drug testing regulations, the Court held that under the totality of the circumstances, the search of the employees satisfied the Fourth Amendment's reasonableness test.[63]

2. *National Treasury Employees Union v. Von Raab*[64]

Decided the same day as *Railway Labor Executives' Ass'n*, *Von Raab* also involved drug testing.[65] However, the program involved United States Customs Service employees.[66] In implementing the drug testing program, the Commissioner of Customs authorized testing only for employees in positions meeting one or more of three criteria: (1) employment involving front line drug interdiction, (2) the possession of a firearm, or (3) the handling of "classified" material.[67] After an employee qualifies for a position covered by the

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$27 million in 1982 dollars)."

Id. at 607 (citations omitted).

62. *Id.* at 607-08.

63. *Id.* at 634. Justices Marshall and Brennan dissented. *Id.* at 635-55. The dissent strongly criticized the majority's cursory treatment of the Fourth Amendment's requirements. *Id.* at 637. They argued that the majority unjustifiably dispensed with the probable cause requirement for the search at issue. "Without the content which [that provision gives] to the Fourth Amendment's overarching command that searches and seizures be 'reasonable,' the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term." *Id.*

Likewise, the dissent scrutinized the majority's insistence on widening the "special needs" exception to the probable cause requirement. *Id.* at 640-41. Justice Marshall asserted that in doing so, the majority had undertaken the final and necessary steps toward eliminating the probable cause requirement altogether. *Id.* at 640. "[T]he majority substitutes a manipulable balancing inquiry under which, upon the mere assertion of a 'special need,' even the deepest dignitary and privacy interests become vulnerable to governmental incursion." *Id.* at 640-41. The dissent maintained that the majority was interested only in results:

> The fact is that the malleable "special needs" balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution . . . .

Id. at 641. "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not." *Id.* at 637.

Finally, the dissent suggested that the majority should have evaluated the FRA's testing regime by using the traditional analytical framework condoned by the Court in cases involving full-scale searches implicating the Fourth Amendment. *Id.* at 641-48. Specifically, Justice Marshall commented that the majority should have first asked whether a search had taken place. *Id.* at 641-42. Second, they should have inquired as to "whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement." *Id.* at 642. Next, the Court should have asked "whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive." *Id.* Justice Marshall remarked that the final question should have been whether the search was conducted in a reasonable manner. *Id.*

The dissent concluded that the majority's constitutional framework for allowing such a search was devoid of the "time-honored and textually based principles" which the Framers intended to include in the Fourth Amendment. *Id.* at 654-55.

64. 489 U.S. 656 (1989).

65. *Von Raab*, 489 U.S. at 660.

66. The United States Customs Service is a bureau of the Department of Treasury. *Id.* at 659.

67. *Id.* at 660-61. The Court reasoned that because the Customs Service is the nation's first line of defense against the smuggling of illicit narcotics into the country, they could not perform

Service's testing program, the Service advises the employee that final selection is contingent upon satisfying the drug test.[68] An independent contractor then contacts the employee to arrange a time and place for producing and collecting the urine sample.[69] The contractor then tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine.[70] If an initial screening test produces a positive result, the contractor conducts a second test to confirm those results.[71] If that test verifies the positive result, the contractor notifies the Agency, and the Agency dismisses the employee from the Service.[72] Unlike the regulations in *Railway Labor Executives' Ass'n*, however, the Court maintained that the Customs Service's rules expressly prohibited the release of test results to law enforcement authorities.[73]

In analyzing the Customs Service's drug testing program, the Court first acknowledged that the program implicated the Fourth Amendment, since the tests invaded reasonable expectations of privacy.[74] Next, because the intrusion on the Custom Service's employees served special governmental needs beyond the normal need for law enforcement, the Court applied the Fourth Amendment balancing test for administrative searches.[75] The Court then balanced the employee's privacy expectations against the government's interest.[76] The Court's analysis focused on the fact that the Customs Service is the nation's first line of defense against the smuggling of illicit narcotics into the country.[77] Therefore, the Court reasoned that a drug abusing front-line Customs employee is susceptible to bribes and blackmail against the government, risking "extraordinary safety and national security hazards."[78] Additionally, the Court determined that an armed Customs Service agent with impaired perception posed a further danger to the general public.[79]

The government provided no evidence of an existing drug problem among employees, nor did they contend that they even perceived such a problem.[80]

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such a vital task for this country if they were abusing drugs. *Id.*

68. *Id.* at 661.

69. *Id.* Upon producing the sample, the employee signs a chain-of-custody form, the monitor initials the form, seals the sample in a plastic bag, and sends it to a laboratory. *Id.*

70. *Id.* at 662. Phencyclidine is an anesthetic used in veterinary medicine, which is also used illegally as a hallucinogen. It causes elevated blood pressure, rapid pulse, increased skeletal muscle tone, and occasionally myoclonic jerks. AM. JUR. PROOF OF FACTS, CYCLOPEDIC MEDICAL DICTIONARY 1383 (3d ed. 1989) It is also referred to as "PCP or angel dust." *Id.*

71. *Id.* Confirmed positive results are reported to a "Medical Review Officer," defined as "'[a] licensed physician . . . who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history, and any other relevant biomedical information.'" *Id.* at 662-63 (quoting Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970, 11,980 (1988)).

72. *Von Raab*, 489 U.S. at 663.

73. *Id.*

74. *Id.* at 665.

75. *Id.* This was the same test adopted in *Railway Labor Executives' Ass'n*, 489 U.S. at 619-20. *Von Raab*, 489 U.S. at 665.

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

77. *Id.* at 668. The Court identified such smuggling as a "veritable national crisis" in law enforcement. *Id.* (citing United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).

78. *Id.* at 674.

79. *Id.* at 671.

80. *Id.* at 673.

Nonetheless, the Court held that the government's interest in ensuring that front line interdiction customs agents are physically fit and possess unimpeachable integrity and judgment,[81] was compelling enough to justify such an intrusion.[82]

The Court next explained why customs employees have a diminished expectation of privacy because of the nature of their positions within the Service.[83] The Court reasoned that employees involved in drug interdiction should expect such an invasion of privacy, because their health and fitness bear directly on their ability to perform sensitive duties.[84]

In balancing both interests, the Court concluded that the government's compelling interests outweighed the privacy interests of the Customs Service employees.[85] Thus, in a 5-4 decision, the Court held that the Customs Service's drug testing program met the reasonableness requirement of the Fourth Amendment.[86]

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81. *Id.* at 670.
82. *Id.* at 672.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 679. Justice Scalia, joined by Justice Stevens, dissented:

> The Court agrees that [the requirement that an employee produce excretion and give it to the government for chemical analysis] constitutes a search for purposes of the Fourth Amendment—and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.

Id. at 680. (Scalia, J., dissenting). Justice Scalia found particularly persuasive the lack of evidence demonstrating that a "real problem" of drug use existed within the Customs Service. *Id.* at 681. He continued to disparage the majority's response to this evidentiary problem when they made the blanket statement that "'[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem' of drug abuse." *Id.* at 684. Justice Scalia remarked, "[I]f such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed." *Id.* Justice Scalia concluded by criticizing the Court's blindness toward the Government's underlying reasons for requiring such an invasive bodily intrusion:

> What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? . . . I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search . . . . Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Id. at 686-87. Justice Marshall, joined by Justice Brennan, also dissented. ("Here, as in Skinner, the Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable.") *Id.* at 679-80 (Marshall, J., dissenting).

3. *New Jersey v. T.L.O.*[87]

In *T.L.O.*, the Court upheld the constitutionality of a high school principal's warrantless search of a student's purse without probable cause.[88] The search was precipitated by a teacher observing the student smoking in a school lavatory.[89] The teacher took T.L.O. to the principal's office because smoking in the lavatories violated a school rule.[90] Once in the office, the assistant vice principal questioned T.L.O. about whether she had been smoking.[91] T.L.O. denied that she had been smoking, and claimed she did not smoke at all.[92] After this brief questioning, the principal asked T.L.O. to go into his private office, where he searched her purse and found a pack of cigarettes.[93] As he reached into the purse for the cigarettes, he also noticed a package of cigarette rolling papers.[94] At that point, the principal associated the possession of such materials with the use of marijuana.[95] Therefore, he proceeded to search T.L.O.'s purse thoroughly, intending to find further evidence of drugs.[96] The second search of a separate zippered compartment in the purse revealed a small amount of marijuana, a pipe, empty plastic bags, a number of one dollar bills, an index card which appeared to him to be a list of students owing T.L.O. money, and two letters implicating T.L.O. in the distribution of marijuana.[97] The assistant vice principal then notified T.L.O.'s mother, and turned the evidence of drug dealing over to the police.[98]

Subsequently, the police requested that T.L.O. and her mother go to police headquarters, where T.L.O. confessed to selling marijuana at school.[99] Based on the confession and the evidence seized by the assistant vice principal, the state brought delinquency charges against T.L.O. in the county juvenile court.[100] The juvenile court found the search of T.L.O.'s purse reasonable under the Fourth Amendment, and sentenced her to a year's probation.[101] An appellate court affirmed this finding.[102] T.L.O. appealed, and the Supreme

87. 469 U.S. 325 (1985).
88. *T.L.O.*, 469 U.S. at 328.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 329. The principal also suspended T.L.O. for three days for smoking in a nonsmoking area and seven days for possession of marijuana. *Id.* at 329 n.1. Based on T.L.O.'s motion, the Superior Court of New Jersey, Chancery Division, found that the principal seized the evidence of marijuana in violation of the Fourth Amendment, and thus, the court set aside the seven-day suspension. *Id.* (citing T.L.O. v. Piscataway Bd. of Educ., No. C.2865-79 (N.J. Super. Ct. Ch. Div., Mar. 31, 1980)).
101. *Id.* at 329-30.
102. *Id.* at 330. The appellate court afffirmed the lower court's finding that there had been no Fourth Amendment violation. It vacated, however, the adjudication of the delinquency conviction and remanded for a determination as to whether T.L.O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. *Id.*

Court of New Jersey reversed, ordering the suppression of the evidence seized from T.L.O.'s purse.[103] New Jersey then petitioned for and was granted certiorari in the United States Supreme Court.[104]

In its opinion, the Court recognized that the Fourth Amendment prohibits unreasonable searches and seizures by public school officials.[105] The Court focused next on balancing T.L.O.'s legitimate expectations of privacy and personal security against the school's need to maintain order[106] and an environment conducive to learning.[107] Acknowledging the value of preserving the informality of the student-teacher relationship[108] and the need for swift discipline in schools,[109] the Court concluded that while students have an expectation of privacy, they nonetheless have a diminished one.[110] Since the principal searched the zippered compartment with individualized suspicion of criminal activity, and the intent to further law enforcement goals, the Court analyzed the intrusion as a criminal, rather than an administrative search.[111] The Court first examined "'whether the . . . action was justified at its inception.'"[112] Second, the Court examined whether the search "'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[113]

In applying this test, the Court considered how T.L.O. had been accused of smoking, and had denied the accusation.[114] The Court explained that under those circumstances, a determination of whether T.L.O. possessed cigarettes

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103. *Id.*

104. *Id.* at 331.

105. *Id.* at 333-34. The Court further stated, "'[T]he basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" *Id.* at 335 (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

The Court determined that since school officials are subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment, the concept of school officials acting as parents, and not as the state, when they search students "is in tension with contemporary reality and the teachings of [the] Court." *Id.* at 336. "[T]he Court has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'" *Id.* (quoting Ingraham v. Wright, 430 U.S. 651, 662 (1977)). *See generally* 59 AM. JUR. 2D *Parent and Child* §§ 10-22, at 75-76 (1987) (describing the rights, duties, and authority of parents over their children, and the rights, duties, and authority of persons acting *in loco parentis*).

106. *T.L.O.*, 469 U.S. at 341.

107. *Id.* at 340; *see* Knopp et al., *supra* note 22, at 763-64 (discussing how the Court allowed the state to dispense with the warrant and probable cause elements when special needs exist, and instead, balanced the government's interests against the intrusion on individual privacy).

108. *T.L.O.*, 469 U.S. at 340.

109. *Id.* at 329.

110. *See id.* at 339-40. In striking the balance, the Court determined that in the school setting, the restrictions to which searches by public authorities are ordinarily subject require some easing. *Id.* at 340. In addition, the Court noted that in a school setting, "some modification of the level of suspicion of illicit activity [is] needed to justify a search." *Id.*

111. *See id.* at 341.

112. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). The Court stated that "a search of a student by a teacher or other school official will be 'justified at its inception' 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." *Id.* at 341-42.

113. *Id.* at 341 (quoting *Terry*, 392 U.S. at 20).

114. *Id.* at 345.

was relevant to the charges against her.[115] Possession of cigarettes by T.L.O., the Court reasoned, would both corroborate the accusation that T.L.O. had been smoking and undermine the credibility of T.L.O.'s defense to the charge of smoking.[116] Thus, the Court determined that if the assistant vice principal had a reasonable suspicion that T.L.O. had cigarettes in her purse, then the search was justified and reasonably related to the circumstances which justified the intrusion at the outset.[117]

The Court's conclusion that the first search was reasonable prompted them to analyze whether the second search for marijuana, after the pack of cigarettes was located, was reasonable.[118] The Court found that the discovery of the rolling papers gave rise to a reasonable suspicion that T.L.O.'s purse contained marijuana, which in turn allowed the assistant vice principal to search T.L.O.'s purse further.[119] The Court concluded that it was not unreasonable to extend the search to a separate zippered compartment of the purse and examine the contents of that compartment.[120] Therefore, the search of T.L.O.'s purse was reasonable under the Fourth Amendment.[121]

II. *VERNONIA SCHOOL DISTRICT 47J V. ACTON*[122]

A. *Facts and Procedural History*

In the fall of 1991, James Acton, then in the seventh grade, signed up to play football at his middle school.[123] However, school officials would not allow Acton to participate because Acton and his parents refused to sign consent forms authorizing the school to conduct a drug test of Acton's urine.[124] Vernonia School District 47J ("the District") operates one high school and three grade schools in the logging community of Vernonia, Oregon.[125] The District had not experienced a problem with drugs until the mid-to-late 1980s, when teachers and administrators observed a sharp increase in drug use.[126]

In support of their observations, high school teachers and administrators offered testimony that they had witnessed students discussing their attraction to the drug culture.[127] During this time, students became increasingly rude

115. *Id.*

116. *Id.* The Court stated, "The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary 'nexus' between the item searched for and the infraction under investigation." *Id.*

117. *Id.* at 345-46.

118. *Id.* at 347.

119. *Id.*

120. *Id.*

121. *Id.* at 347-48.

122. 115 S. Ct. 2386 (1995).

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

124. *Id.*

125. *Id.* at 2388. Vernonia, Oregon has a population of approximately 3,000, including those living within or near the city limits. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1356 (D. Or. 1992).

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

127. *Id.* Allegedly, the organizations which formed within the "drug culture" adopted names such as the "Big Elks" and the "Drug Cartel." *Acton*, 796 F. Supp. at 1356. "Loud 'bugling' or 'head butting' were the calling cards of these groups." *Id.*

during class, and used profanity more often.[128] This led to a drastic increase in the number of disciplinary referrals, and several students were suspended.[129]

In addition, the District believed that student high school athletes were not only involved in such drug use, but were also the leaders of the high school's "drug culture."[130] The District felt that drug use could increase "the risk of sports-related injuries."[131] For example, the high school football and wrestling coach observed "a severe sternum injury suffered by a wrestler, [as well as] various omissions of safety procedures and misexecutions by football players."[132] The coach did not attribute these incidents to other possible causes, such as aggressive play, nervousness, or mere misexecutions caused by the opponent or opposing team. Instead, he attributed the incidents to drug use.[133]

Initially, the District offered special classes, speakers, and presentations designed to educate students about the harmful effects of drug use.[134] However, after the District found these measures ineffective, they implemented a "Student Athlete Drug Policy" ("the Policy").[135] The stated purpose of the Policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."[136] Under the Policy, all students participating in school sponsored athletics, and their parents, are required to sign a form consenting to the student's urine testing.[137] At the beginning of the fall, winter, and spring sports seasons, the District tests athletes participating in sports for that season.[138] In addition, during each week of the season, ten percent of the athletes from the entire athletic population for that season are randomly selected for testing.[139] Athletes selected for testing are notified and tested later the same day.[140]

Before administering the tests, the District requires each student to complete a "specimen control form which bears an assigned number."[141] At this time, students must reveal all prescription medications that they are taking, and show proof by providing a copy of the prescription or a doctor's authorization.[142]

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

129. *Id.* The Court recognized that "[b]etween 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's." *Id.*

130. *Id.* at 2388-89 (citing *Acton*, 796 F. Supp. at 1357).

131. *Id.* at 2389.

132. *Id.*

133. *Id.*

134. *Id.*

135. The Court found that there had been "unanimous" parental approval for the Policy, which had been presented for consideration at a "parent input night." *Id.* The Policy applied to all student athletes. *Id.*

136. *Id.*

137. *Id.* "Approximately 60-65% of the high school students and 75% of the elementary school students participate in district sponsored athletics." *Acton*, 796 F. Supp. at 1356.

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

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* For example, the form would require the student to reveal prescribed medication for

An individual student is then accompanied by an adult monitor of the same sex into an empty locker room, where the student produces a sample.[143] The boys produce a sample at a urinal, remaining fully clothed with their backs to the monitor.[144] The girls produce samples in an enclosed bathroom stall, where a monitor listens for the normal sounds of urination, but does not visually observe the student.[145] The monitor checks the sample for temperature and tampering.[146] The monitor then transfers the urine to a vial.[147]

Thereafter, the District sends all samples to an independent laboratory for testing.[148] The laboratory tests every sample for the presence of marijuana, cocaine, and amphetamines.[149] The District permits the laboratory to send test reports to the superintendent of the District, and to give the test results to the District by telephone "after the requesting official recites a code confirming his authority."[150] The superintendent, principals, vice-principals, and athletic directors all have access to the test results.[151]

Once a sample tests positive, the lab confirms the result by administering a second test.[152] If the sample tests negative the second time, no further action is taken.[153] However, if the sample tests positive, the school principal meets with the student and his or her parents.[154] The student then receives the option of entering a six week drug assistance program (which requires weekly urinalysis), or being suspended from athletics for the remainder of the current and next athletic seasons.[155] Students selecting the latter option are retested at the beginning of the next athletic season for which they are eligible.[156] If a student violates the policy a second time, he or she is automatically suspended from participation in athletics for the remainder of the current and next athletic seasons.[157] If a student violates the policy a third time, he or she is suspended for the current and next two athletic seasons.[158]

James Acton and his parents refused to consent to the District's drug testing procedures.[159] Instead, they filed suit in United States District Court for the District of Oregon, seeking declaratory and injunctive relief from

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epilepsy, AIDS, or birth control pills. *See id.*

143. *Id.*

144. *Id.* The monitor stands approximately 12 to 15 feet behind the student. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* "The laboratory procedures are 99.94% accurate." *Id.*

149. *Id.* "Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested." *Id.* The identity of a student who produces a sample is not revealed to the laboratory. *Id.*

150. *Id.* Test results "are not kept for more than one year." *Id.*

151. *Id.*

152. *Id.* at 2390.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

enforcement of the Policy, on the grounds that it violated the Fourth and Fourteenth Amendments and Article I, section 9 of the Oregon Constitution.[160] At the conclusion of a bench trial, the district court dismissed the action, denying each claim on the merits.[161] The Actons appealed the decision and the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the policy violated both the Fourth and Fourteenth Amendments and the Oregon Constitution.[162] The court reasoned that the students in the Vernonia School District had legitimate expectations of privacy in their excretory functions. Further, neither a student's participation in interscholastic athletics nor a student's use of the school's locker rooms, diminished a student's expectation of privacy.[163] The court determined that the District's interest in reducing drug use was not compelling enough to justify the highly intrusive random tests of the students' urine.[164] The District appealed to the Supreme Court.

B. *Supreme Court Decision*

1. Majority Opinion

The majority opinion, written by Justice Scalia, held that the Vernonia School District's student-athlete drug policy did not violate the student's federal or state constitutional right to be free from unreasonable searches, as required by the Fourth and Fourteenth Amendments and Article I, section 9 of the Oregon Constitution.[165] First, the majority opinion acknowledged that the District had determined that athletes in Vernonia played a large role in contributing to the use of drugs in the District's high school.[166] The Court referenced several injuries sustained by high school athletes, which school officials attributed to drug use.[167] In addition, the Court noted the District's perception of a sharp increase in disciplinary problems.[168]

The Court next addressed whether under the Fourth Amendment, pursuant to the Fourteenth Amendment, the constitutional guarantee to be free from unreasonable searches and seizures extended to the actions of state officials.[169] In answering this question, the Court turned to precedent and

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160. *Id.* The Oregon Constitution provides in pertinent part:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

OR. CONST. art. I, § 9.

161. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1368 (D. Or. 1992). The court found that the record contained "ample evidence" to substantiate the District's concern that the classroom disciplinary problems were being caused by drug and alcohol abuse. *Id.* at 1367. Additionally, the court reasoned that the program would most likely repress the District's problem. *Id.* at 1363.

162. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1527 (9th Cir. 1994).

163. *Id.* at 1525.

164. *Id.* at 1526.

165. *Acton*, 115 S. Ct. at 2397.

166. *Id.* at 2388.

167. *Id.* at 2389.

168. *Id.* at 2388. The Court relied on the district court's assessment that "[d]isciplinary problems had reached 'epidemic proportions.'" *Id.* at 2389.

169. *Id.* at 2390 (citing Elkins v. United States, 364 U.S. 206, 213 (1960) (holding that this

concluded that the "state compelled collection and testing of urine, [as required] by the [District's] Policy constitutes a 'search' subject to the demands of the Fourth Amendment."[170]

After establishing that the District's urine collection constituted a search under the Fourth Amendment, the majority addressed whether individualized suspicion is necessary for a Fourth Amendment analysis in an administrative search context.[171] The majority conceded that *T.L.O.* was based on individualized suspicion of wrong-doing; however, the Court explained that "the Fourth Amendment imposes no irreducible requirement of such suspicion."[172] The Court noted that since its decision in *T.L.O.*, it had upheld suspicionless searches and seizures in an administrative context.[173]

The fourth issue discussed by the majority was the nature of the privacy interest involved in the search.[174] The Court emphasized that the Fourth Amendment only protects expectations of privacy that society recognizes as legitimate.[175] In analyzing the interests of the students in *Acton*, the Court noted that the reasonableness inquiry mandated by the Fourth Amendment could not "disregard the school's custodial and tutelary responsibility for children."[176] Therefore, the majority found that students have a legitimate, yet diminished, expectation of privacy.[177] Moreover, student-athletes have an even lesser expectation of privacy.[178]

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guarantee is extended to searches and seizures by state officers)); *id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 333-34 (1985) (finding that public school officials are state officers)).

170. *Id.* (citing *Railway Labor Executives' Ass'n*, 489 U.S. at 617; *Von Raab*, 489 U.S. at 665).

171. *Id.* at 2391.

172. *Id.* (citing *T.L.O.*, 469 U.S. at 340, 341).

173. *Id.* Examples cited were *Railway Labor Executives' Ass'n* for its drug testing of railroad employees involved in train accidents, and *Von Raab*'s drug testing of armed customs officials involved in drug interdiction. *Id.* Also cited were the maintainence of "automobile checkpoints looking for illegal immigrants and contraband," United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976), and looking for drunk drivers, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990). *Id.*

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

175. *Id.* (citing *T.L.O.*, 469 U.S. at 338).

176. *Id.* at 2392. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *Id.* (citing *T.L.O.*, 469 U.S. at 339).

177. *Id.* Interestingly, as the Court made this determination that public school officials maintain a large degree of control over the actions and conduct of students, they also explained how this does not constitutionally create a duty for those same officials to protect the students. *Id.* (citing DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989)).

178. *Id.* at 2392-93. The majority stated:

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

Id. Furthermore:

> By choosing to "go out for the team," [athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam, . . . they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related

The majority then scrutinized the character of the intrusion posed by urinalysis.[179] The Court explained that the degree of intrusion depends on how the production and collection of the urine is monitored.[180] The Court determined that the privacy interests involved in the collection of urine samples were not significant.[181] The majority found important that under the District's policy, male students produce their samples against a wall, fully clothed, and that the female students provide their samples behind an enclosed stall.[182] Thus, these conditions are identical to those typically encountered in public rest rooms, which are used by men, women, and students on a daily basis.[183] The Court further noted that another privacy-invasive aspect of urinalysis is the information it discloses about the person's body and the materials they have ingested.[184] The majority believed this intrusion was permitted, because the urine is tested only for drugs, and not for whether the student is epileptic, pregnant, or diabetic.[185]

Finally, the majority examined the nature of the District's interests.[186] Instead of following the *Railway Labor Executives' Ass'n* and *Von Raab* requirement of a "compelling" government interest, the majority explained that this phrase "describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."[187] Therefore, the Court reasoned that whether the District's concern was important enough was of no consequence, because it had been met.[188] Furthermore, the Court explained that the individualized suspicion requirement established in *Railway Labor Executives' Ass'n* could be set aside if the District demonstrated an "immediate" concern, meaning if their concerns required prompt action.[189] The majority believed that deterring drug use by the nation's schoolchildren was important enough.[190] They did not, however, address whether the District's concerns needed to be addressed with any sort of urgency. Regard-

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matters as may be established for each sport by the head coach and athletic director with the principal's approval."

Id. at 2393.

179. *Id.*

180. *Id.* (citing *Railway Labor Executives' Ass'n*, 489 U.S. at 626).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id. But see supra* notes 141-42 and accompanying text (explaining that students were required to disclose any medications they were taking).

186. *Acton*, 115 S. Ct. at 2394.

187. *Id.* at 2394-95.

188. *Id.* at 2395.

189. *Id.*

190. *Id.* The majority stated:

School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor."

Id. (quoting Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 PHI DELTA KAPPAN 310, 314 (1990)).

less, the Court concluded that the nature and immediacy of the government's concerns were sufficient.[191]

In balancing the students' privacy and security interests against the District's interests, the Court found the latter to outweigh the former, and held the Policy to be "reasonable and hence constitutional."[192]

2. Concurring Opinion

Written by Justice Ginsburg, the concurring opinion agreed with the majority's decision, but questioned whether the Policy adopted by the Vernonia School District could constitutionally be imposed not only on those students seeking to engage in scholastic athletics, but on all students required to attend school.[193]

3. Dissenting Opinion

Justice O'Connor, joined by Justices Stevens and Souter, strongly dissented, criticizing the majority for ignoring the individual suspicion requirement.[194] Justice O'Connor explained that the Court overlooked this requirement on "policy grounds."[195] She admonished such an approach by stating that because blanket searches can potentially be conducted of many people, they present a greater threat to liberty than suspicion-based searches, because they affect only one person at a time.[196] However, the dissenters emphasized that whether blanket searches are better than searches based on individualized suspicion is not the issue.[197] They claimed that the decision "is not open to judges or government officials to decide on policy grounds which is better and which is worse."[198] In support of their assertion, the dissent then discussed how precedent had established that "mass, suspicionless searches [were] generally considered per se unreasonable within the meaning of the Fourth Amendment."[199] The dissenters added that while there were exceptions to this rule, such exceptions only apply when a suspicion-based regime is ineffectual.[200] Justice O'Connor concluded that this was not the situation in *Acton*.[201]

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191. *Id.*

192. *Id.* at 2396.

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

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

195. *Id.* "In making these policy arguments . . . the Court sidesteps powerful, countervailing privacy concerns." *Id.* "First, [the majority] explains that precisely because every student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing who to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search." *Id.*

196. *Id.* (citing Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting)).

197. *Id.*

198. *Id.*

199. *Id.* at 2398.

200. *Id.*

201. *Id.* The dissent then detailed an historical analysis beginning with Carroll v. United States, 267 U.S. 132 (1925). Justice O'Connor stated, "The Carroll Court's view that blanket searches are 'intolerable and unreasonable' is well-grounded in history." *Acton*, 115 S. Ct at 2398. In addition, Justice O'Connor stated that this has been confirmed in an exhaustive analysis of the original meaning of the Fourth Amendment. *Id.* (citing William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate

The dissenters criticized the majority's finding that accusatory suspicion-based searches are ineffectual, because it was not based on the reality of public schools.[202] The dissent noted that the District's disciplinary scheme listed many offenses that students are punished for, and therefore, suspicion-based drug testing for student athletes could easily have been added to the list.[203]

The dissent, referring to the evidence introduced by the District to justify suspicionless testing as a great irony, pointed out that such evidence consisted of stories of individual, identifiable students conducting themselves in a manner which plainly gave rise to reasonable suspicion.[204] For example, drug paraphernalia was confiscated on school grounds, and some teachers allegedly observed students using drugs at a local cafe across the street from the high school.[205] Moreover, since the impetus for the drug testing policy was to combat the rise in drug-related disorder and disruption in the classrooms, the dissent criticized the District for not simply testing those students causing the disruptions.[206] The dissent concluded that intrusive blanket searches of students—most of whom are innocent—sends the wrong message.[207]

The final issue raised by the dissent was the lack of evidence in the court record of a drug problem in the Washington Grade School which James Acton attended.[208] Indeed, three of the four witnesses who testified to drug-related incidents were teachers or coaches at the high school, and the fourth witness had been the principal at the high school prior to implementation of the Policy.[209]

The Justices concluded that "the greatest threats to our constitutional freedoms come in times of crisis,"[210] and that here, the Policy implemented by the District was too broad and imprecise to satisfy the Fourth Amendment's reasonableness analysis.[211]

III. ANALYSIS

The United States Supreme Court's decision in *Acton* is but another case which marks the erosion of the fundamental constitutional requirement that all searches satisfy the reasonableness test of the Fourth Amendment. Rather than

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School)). The dissent noted that mass, suspicionless searches, are generally unreasonable in the criminal context. *Id.* at 2400. "As stated, a suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns." *Id.* at 2403.

202. *Id.* at 2402-03.

203. *Id.*

204. *Id.* at 2403.

205. *Acton*, 796 F. Supp. at 1356-57.

206. *Acton*, 115 S. Ct. at 2406.

207. *Id.* at 2405. "[Suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they're innocent . . . , and I think that kind of sets a bad tone for citizenship." *Id.* (quoting the testimony of Acton's father, Tr. at 9 (Apr. 29, 1992)).

208. *Id.* at 2406.

209. *Id.*

210. *Id.* at 2407. The "crisis" the Justices are referring to is the District's drug problem.

211. *Id.*

protect the privacy and security interests of student athletes in the Vernonia School District, the majority authorized highly intrusive, random, suspicionless searches based on less than compelling interests.

Relying on its prior decision in *New Jersey v. T.L.O.*,[212] the *Acton* majority held that children in school have a lower expectation of privacy than other persons in our society.[213] In addition, the Court cited *T.L.O.* for the proposition that "special needs" exist in the public school setting, thereby alleviating the practicability of a warrant.[214] Justice Scalia concluded that because the Court in *T.L.O.* authorized a warrantless search of a high school student's purse without probable cause, the search in *Acton* had to be upheld because the District's twofold interest—maintaining order and discipline in the classroom and athletic safety—outweighed the privacy and security interests of the students.[215] This misinterpretation resulted in a violation of the Vernonia student-athletes' constitutional right to be free from unreasonable searches under the Fourth Amendment.

At first glance, *T.L.O.* appears relevant to the Court's reasoning and decision in *Acton*.[216] The Court certainly relied on *T.L.O.* when deciding the constitutionality of the drug testing program at issue in *Acton*.[217] *T.L.O.* involved a search of a student,[218] and the degree of privacy accorded students.[219] Since *Acton* also involved a search of a student, *T.L.O.* would seem controlling. However, while *T.L.O.* is instructive regarding the expectations of privacy in a school environment, a close examination of *T.L.O.* demonstrates that the two cases have different legal significance.

The majority's reliance on *T.L.O.* is misplaced. *T.L.O.* involved a criminal search; *Acton*, however, involved an administrative case. Although the search of a purse in *T.L.O.* was highly intrusive, it nonetheless was not random or suspicionless. An individual student was targeted on reasonable suspicion.[220] Furthermore, the search uncovered marijuana, and the student suffered criminal penalties.[221] The *T.L.O.* school officials conducting the search for mari-

212. 469 U.S. 325 (1985).
213. *Acton*, 115 S. Ct. at 2392.
214. *Id.* at 2391.
215. *Id.* at 2395-96.
216. *See id.* at 2386.
217. Throughout the *Acton* opinion, the Court cited *T.L.O.* to support their findings of fact and conclusions of law. For example, the Court cited *T.L.O.* for the proposition that the Fourteenth Amendment extends the constitutional guarantees of the Fourth Amendment to searches and seizures by public school officials. *Id.* at 2390. The Court also cited *T.L.O.* to establish that in the public school setting, "special needs" exist, thereby alleviating the practicability of a warrant. *Id.* at 2391. In addition, the Court explained that a school search based on less than probable cause was reasonable in *T.L.O.* *Id.* at 2391. The Court emphasized that in *T.L.O.* they rejected the notion that public schools, like private schools, exercise only parental power over their students. *Id.* The Court explained further that such a proposition "is not entirely consonant with compulsory education laws" and is "inconsistent with [the Court's] prior decisions treating [public] school officials as state actors for purposes of the Due Process and Free Speech Clauses." *Id.* at 2392 (citations omitted). Finally, the Court cited *T.L.O.* for the proposition that students generally have a lesser expectation of privacy than other members of the population. *Id.*
218. *T.L.O.*, 469 U.S. at 328.
219. *Id.* at 326.
220. *Id.* at 347.
221. *Id.* at 328-29.

juana were not furthering a special governmental need beyond law enforcement; the purpose and consequence of the search was criminal. This raised the question of whether school discipline was a special need in *T.L.O.* The answer is yes, with respect to the principal's search for cigarettes. However, the character of the second search for marijuana was undoubtedly criminal.

The warrant exception recognized in *T.L.O.* is not due to any administrative aspect of the search, but rather is an extension of *Terry v. Ohio*.[222] The Court's reliance on *T.L.O.* is flawed because *T.L.O.* applied *Terry*'s reasonableness test rather than an administrative search analysis.[223] The *Terry* decision authorized limited, warrantless searches of individuals, even when the purpose of a warrant would be furthered, on a reasonable suspicion of criminal activity, usually combined with warrant impracticability and a lesser expectation of privacy.[224] *Terry* only authorized such limited searches on a reasonable and articulable individualized suspicion of criminal activity; it never authorized a highly intrusive suspicionless search of the kind involved in *Acton*. Despite the temptation to combine these school search cases, they are factually and legally quite different. Because *T.L.O.* is a criminal search case, it is not controlling in an analysis of the constitutionality of *Acton's* administrative search; therefore, the Court's reliance on *T.L.O.* is misplaced.

In addition, by allowing such a highly intrusive search without individualized suspicion, the majority ignored the guiding principles established by precedent, concerning the proper interpretation of the Fourth Amendment.[225] Professor Thomas Clancy argues that the Court "has failed to attend to the basic task of understanding the [Fourth] Amendment. The Court must return to the fundamentals: history does provide guidance; the Fourth Amendment was designed to protect individual liberty; reasonableness does have meaning; and individualized suspicion is a core component of reasonableness."[226]

In addition, as the *Acton* dissent noted, it is a "great irony" that the evidence introduced by the District to justify suspicionless testing consisted of incidents recanting "particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion."[227] The District argued on the one hand that individualized suspicion was impracticable, then on the other hand argued that officials were able to identify particular students—the individual athletes. Several Justices focused on this flawed reasoning in the District's oral argument; this inconsistency remains unresolved.[228]

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222. 392 U.S. 1 (1968) (holding that a limited, protective, pre-arrest search for weapons by the police was reasonable if a reasonably prudent person in the same circumstances would justifiably believe the suspect posed a danger).

223. *T.L.O.*, 469 U.S. at 341-42.

224. *Terry*, 392 U.S. at 30-31.

225. *See* Carroll v. United States, 267 U.S. 132, 147 (1925) ("The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable.").

226. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 635 (1995).

227. *Acton*, 115 S. Ct. at 2403.

228. *See* Oral Arguments at 6, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

The majority's decision also ignores the Court's prior decisions in *Railway Labor Executives' Ass'n* and *Von Raab*. These cases authorized full, intrusive, suspicionless searches, which demonstrated an overwhelming departure from the Constitution's original definition of reasonableness: a warrant supported by probable cause.[229] Nonetheless, these searches were reasonable in light of a compelling government interest beyond law enforcement. Likewise, because the District's urinalysis policy is highly intrusive, the District must demonstrate a compelling interest to survive a constitutional challenge. A legitimate or important interest is insufficient. Examples of compelling interests include railway collisions, as in *Railway Labor Executives' Ass'n*, and drug addicted, armed employees involved in front line drug interdiction, as in *Von Raab*. As the Ninth Circuit correctly explained, "The extreme dangers and hazards involved in the prior cases are simply not present here . . . . [The risk of athletic injury] is not a risk of the same magnitude as an airplane or train wreck, or a gas pipeline or nuclear power plant disaster."[230] The majority in *Acton* inexplicably lowered this threshold and did not adhere to precedent when it approved the Policy.

The majority held that athletes have a lower expectation of privacy than other students. This holding is flawed because a student-athlete does not lose his or her privacy by playing sports, in the way a railroad employee or a U.S. Customs Service agent may expect a deprivation of their privacy. Moreover, *Railway Labor Executives' Ass'n* and *Von Raab* require a compelling interest, despite a lower expectation of privacy. Without a compelling interest, the District's Policy does not pass constitutional muster. As the dissent correctly pointed out, nothing in the record demonstrated that a drug problem existed in the grade school James Acton attended. The evidence, therefore, did not support the majority's reasoning as it applied to James Acton.

Even assuming arguendo that a drug problem did exist in the middle school, one of the most glaring flaws in the Court's reasoning is that the Policy ultimately does not address the problem. Again, the District's interest is in discipline and athletic safety, not criminal enforcement of alcohol and narcotics laws. This is clearly distinguishable from the government's interest in *T.L.O.*, where the principal was clearly looking for evidence of criminal activity so that he could turn the evidence and student over to police.[231] Although illegal alcohol and drug use may have caused the discipline and safety problems claimed by District officials, the Policy was created out of disciplinary and safety concerns, not out of concern over the substances themselves. Only

229. U.S. CONST. amend. IV.

230. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1526 (9th Cir. 1994); *see* International Bhd. of Elec. Workers, Local 1245 v. Nuclear Regulatory Comm'n, 966 F.2d 521 (9th Cir. 1992) (involving drug testing in the nuclear power industry); Bluestein v. Skinner, 908 F.2d 451 (9th Cir.) (involving random drug testing of airline personnel with safety responsibilities), *cert. denied*, 498 U.S. 1083 (1991); International Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454 (9th Cir. 1990) (involving random drug testing of employees working with natural gas, liquified natural gas, and hazardous liquid pipelines).

231. *T.L.O.*, 469 U.S. at 328-29.

when District officials recognized that student drug use triggered disruptive behavior did the District decide to implement the Policy.[232]

Furthermore, although the dissent warned the Court about casting away established constitutional principles based on public policy concerns, it appears as though the majority did exactly that.[233] Masking their own policy goal of furthering the "War on Drugs" behind an interest in promoting discipline and athletic safety in the Vernonia School District, the Court succumbed to political pressures.[234] Instead of adhering to established precedent, the majority approved a policy which allowed school officials to "engage in a 'fishing expedition' for drug and alcohol use [in furtherance of] a moral crusade."[235]

Perhaps the most distressing aspect of Justice Scalia's majority opinion is his vehement departure from his dissent in *Von Raab*.[236] While at first this departure appears chameleon-like, it becomes obvious upon deeper reflection, that Justice Scalia's change in position reflects merely a distinction between searches imposed on adults and those imposed on children. In *Von Raab*, Justice Scalia found that making an adult employee urinate into a testing jar was a constitutionally impermissible "invasion of their privacy and affront to their dignity"; however, in the context of children, he finds the same drug testing so admirable that he is willing to write a majority opinion espousing its virtue. In Justice Scalia's eyes, drug testing of a person's urine is an unconstitutional intrusive search when applied to an adult. When applied to a child, it is converted into a disciplinary necessity. The rights of children are suppressed while the rights of adults are exalted. This follows a general trend in our country to criminalize the conduct of children.[237]

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232. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357-58 (D. Or. 1992).

233. *See Acton*, 115 S. Ct. at 2402.

234. As one commentator remarked:

> [T]he largely conservative ideology of the justices is matched by their views of the judiciary's role in society. Chief Justice William H. Rehnquist and Justice Antonin Scalia, among others, have spoken about the importance of leaving contentious issues to the political branches of government, at the federal level and below.
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> . . . .
>
> Focusing on what [cases] the Court is not taking may miss the far more important fact that sometimes the justices set an agenda by concentrating attention on only a handful of key cases.
>
> That concentration happened during the 1994-95 term, when the court's conservative majority set the agenda for the entire term by shrewdly selecting a half-dozen key cases at the start of the term.
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> . . . .
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> Among the . . . petitions granted by the Court at the start of the 1994-95 term that produced decisions favored by conservatives [was] . . . *Vernonia School District v. Acton*.

David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert Denials Suggest an Unfolding Agenda*, A.B.A. J., Dec. 1995, at 40, 40, 42.

235. *Acton*, 796 F. Supp. at 1363.

236. For a discussion of Justice Scalia's dissent in *Von Raab*, see *supra* note 86.

237. This is evidenced by juvenile facilities which mirror the environment in prisons, and the overwhelming support for imposing stiffer sentences on juveniles:

> The sentencing guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act. However, the sentence imposed upon a juvenile delinquent may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor sufficient to warrant

IV. CONCLUSION

In declaring the Vernonia School District's random, suspicionless, urinalysis drug testing policy constitutional, the majority stripped James Acton and other students seeking to participate in athletics of their legitimate expectations of privacy and security under the Fourth Amendment. Drug abuse is an overwhelmingly important societal problem that faces our entire nation. The Court, however, did not follow established precedent; rather, it based its decision on its own public policy view. Despite the Court's long held position that children do not "shed their constitutional rights . . . at the schoolhouse gate,"[238] this decision nonetheless demonstrates the Court's willingness to deny students the full protection of the Constitution and the Bill of Rights.

Joaquin G. Padilla

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an upward departure from that guideline range. Therefore, a necessary step in ascertaining the maximum sentence that may be imposed upon a juvenile delinquent is the determination of the guideline range that would be applicable to a similarly situated adult defendant.

See United States Sentencing Commission, *Guidelines Manual*, § 1B1.12 (Nov. 1995); *see also* Elaine R. Jones, *The Failure of the "Get Tough" Crime Policy*, 20 U. DAYTON L. REV. 803 (1995) (discussing the shortfalls of implementing a "Get Tough" Policy in the United States); Barry Krisberg et al., *What Works with Juvenile Offenders?: A Review of "Graduated Sanction" Programs*, 10 CRIM. JUST. 20 (1995) (examining various programs adopted around the country which have studied the issue of juvenile offenders and the appropriate response to the problems raised by this issue); George B. Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 360-65 (1995) (discussing how public perceptions concerning juvenile crime have generated a public sentiment toward "getting tough"). "These new laws and policies have included prosecuting younger children as adults for certain crimes, as well as imposing mandatory, longer and more restrictive placements of adjudicated delinquents and other young offenders." *Id.* One commentator questioned the effect on the entire juvenile justice sysyem:

> In recent years, many states have enacted laws specifically addressing the problem of serious and habitual juvenile crime. Several prominant commentators have interpreted this trend as an indication that society has rejected the juvenile court's traditional philosophy of rehabilitation in favor of more punitive, offense-oriented sanctions, and some have concluded that recent changes call into question the very viability of the juvenile court system.

Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 481 (1995); *see also Keep the Receiving Home Closed*, WASH. POST, Aug. 19, 1995, at A20; Guy Kelly, *ACLU Files Suit over Youth Center*, ROCKY MTN. NEWS, Dec. 10, 1994, at 4A; Guy Kelly, *Youth Facility Bursting at the Seams*, ROCKY MTN. NEWS, Sept. 9, 1993, at 16A; Nancy Lewis, *Much of D.C. Youth Facility Without Hot Water*, WASH. POST, Sept. 23, 1995, at B3. *Cf.* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1006-13 (1995) (reviewing the process of certifying juveniles for adult criminal prosecution); Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507 (1995) (reviewing the legal and policy implications of the recent wave of juvenile transfer laws). *See generally* Mark Curriden, *Hard Times for Bad Kids*, A.B.A. J., Feb. 1995, at 66 (examining the problems associated with the increase in juvenile crime, and the different responses to these issues).

238. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).