FOURTH & FOURTEENTH AMENDMENTS — SEARCH AND SEIZURE — PUBLIC SCHOOLS MAY CONSTITUTIONALLY REQUIRE STUDENTS TO SUBMIT TO RANDOM DRUG TESTING IN ORDER TO PARTICIPATE IN VARSITY ATHLETICS — *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995).

John M. Burke

I. INTRODUCTION

The Fourth Amendment to the United States Constitution safeguards against unreasonable searches and seizures by governmental actors.[1] These safeguards are incorporated to apply to the states through the Fourteenth Amendment.[2] Historically, the government does not have the right to seize or search property without a warrant, probable cause, or a noted exception to these requirements.[3]

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[1]The Fourth Amendment to the United Sates Constitution provides:

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

U.S. CONST. amend. IV.

[2]Justice White expounded upon selective incorporation in Duncan v. Louisiana, 391 U.S. 145 (1968), stating:

> In resolving conflicting claims concerning this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects Fourth Amendment rights to be free from unreasonable searches and seizures.

Id. at 148.

[3]*See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (holding that warrants to search premises require that a neutral and detached magistrate consider the totality of the circumstances to determine whether or not there is a fair probability that fruits or instrumentalities used in the commission of a crime will be found in a certain place); United States v. Watson, 423 U.S. 424 (1976) (upholding the warrantless arrest and search

The term "governmental actors" is not limited solely to those law enforcement personnel that carry badges and guns or individuals that work for state and federal agencies. For example, public school teachers and administrators are considered governmental actors for Fourth Amendment purposes, and therefore are subject to its constraints.[4] Notwithstanding, the

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of a person suspected of selling stolen credit cards merely because the police had probable cause to believe that the suspect had committed a crime). In *Watson*, the fact that the police did not seek an arrest warrant, even though it was practicable for them to do so, did not invalidate the arrest or search. *Id.*; *see also* United States v. Robinson, 414 U.S. 218, 236 (1973) (upholding the search of a motorist pursuant to his valid arrest). In *Robinson*, the defendant was stopped by a police officer who had probable cause to believe that the driver had his license revoked. *Id.* at 221. Pursuant to the stop, the officer placed the defendant under arrest, searched his person and found a pack of crumpled cigarettes containing heroin. *Id.* at 222. The Court held that the police practice of searching a person and the area of immediate control around the person after their arrest was justified in order to protect the officer from concealed weapons, and to gather evidence. *Id.* at 236.

The Supreme Court distinguished the standard necessary for an arrest from that necessary to simply stop a person and thereby established an exception to the probable cause and warrant requirements. Terry v. Ohio, 392 U.S. 1, 23 (1968). In *Terry*, a veteran police officer watched the defendant and another man acting suspiciously outside a jewelry store, which led the officer to believe they were about to attempt a robbery. *Id.* at 5. The officer approached the defendant, identified himself and asked their names. *Id.* at 6-7. When the men did not reply, the officer spun Terry around and patted his jacket pocket; the officer found a gun for which he arrested both men. *Id.*

The Court noted that the Fourth Amendment applies when a police officer *seizes* a person, accosts him, and does not let him walk away. *Id.* at 19. The Court held that the constitutionality of the seizure depends upon the reasonableness of the police officer's actions. *Id.* at 20. The Court declared that a police officer may stop an individual and conduct a limited search, or "pat down," for weapons when he has a reasonable suspicion that a crime is afoot and that the person is armed and dangerous. *Id.* at 23. This limited, protective search for weapons is not justified in order to preserve evidence, but merely to protect the officer's safety and the safety of others. *Id.*

[4]In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Court upheld the decision of a public high school principal to censor two articles from a student newspaper. *Id.* at 276. One article described the effects of divorce on the student body in which a student blamed her father for the divorce; the other article discussed teen pregnancy. *Id.* at 263. The principal asserted that he was concerned about the frank discussion regarding sexual activity and birth control, and that it was not proper material for the younger children at the school who had access to the newspaper. *Id.*; *see* Goss v. Lopez, 419 U.S. 565, 582 (1975) (holding that the Due Process Clause of the Fourteenth Amendment applies to state actors in the educational setting). The *Goss* Court explained that the amount of process that is due depends on the potential loss to the student. *Id. at 584* For example, if the school administrators seek to impose a disciplinary suspension on a student for a substantial time, the student must be given notice of the charges against him, an explanation of the evidence and an opportunity to rebut the charges and give his version

Supreme Court has traditionally recognized that public school students enjoy less liberty than the general citizenry due to the restricted setting of a school.[5] Accordingly, the Court has held that public school students do not retain the same liberties within the walls of a school that they might enjoy outside the school settings.[6] In turn, their freedom of speech is restricted when within the school's parameters.[7] Considerations of order also mandate that the Court apply a less heightened level of scrutiny in reviewing the actions of school officials.[8]

Recently, in *Vernonia School District 47J v. Acton,*[9] the United States Supreme Court considered the constitutionality of random, suspicionless, drug testing of public school student-athletes.[10] In upholding a mandatory drug testing program, the Supreme Court extended the permissive authority of school administrators to "search" student-athletes.[11] Specifically, the Court held that random drug testing of student-athletes, without any showing of reasonable suspicion, is a constitutionally permissible search by school officials that does not violate the Fourth and Fourteenth Amendments.[12]

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of the story. *Id.* at 581.

[5]In *New Jersey v. T.L.O.*, 469 U.S. 325 (1984), the Court determined that a search occurred when a teacher observed a student smoking cigarettes and brought her to the vice principal's office, where the vice principal opened her purse to see if it contained cigarettes. *Id.* at 328. Subsequently, the teacher found marijuana and drug paraphernalia and reported the student's activities to the police. *Id.* At trial the student's lawyer attempted to have the marijuana suppressed. *Id.* at 329

The Court first noted that teachers are government actors for Fourth Amendment analysis. *Id.* Next, the Court found that the search at issue was not based upon probable cause but only on a reasonable suspicion. *Id.* at 333. Normally, probable cause is necessary to justify such a search, but the Court posited that, in this case, reasonable suspicion would suffice because the need for teachers and administrators to maintain order in the classroom outweighs the students expectation of privacy in her purse. *Id.* at 340-41.

[6]*See supra* notes 4 and 5 and accompanying text.

[7]*See supra* note 4 and accompanying text.

[8]*See supra* notes 4 and 5 and accompanying text.

[9]115 S. Ct. 2386 (1995).

[10]*Id.* at 2397.

[11]*Id.*

[12]*Id.*

II. STATEMENT OF THE CASE

The Vernonia School District operated a high school and three grammar schools in the rural logging community of Vernonia, Oregon.[13] Teachers and administrators in the district testified that they noticed an appreciable increase in drug use in the schools during the mid-1980s.[14] Many students became disruptive and unruly in class and a teacher testified that he witnessed several students smoking marijuana across the street from the school.[15] Student-athletes were blamed for the problem and deemed to be at the forefront of the drug "rebellion."[16] In addition, a coach testified that he witnessed a wrestler injure himself and attributed the injury to the wrestler's drug use.[17]

To no avail, the school district initially offered drug awareness classes, motivational speakers, and drug-sniffing dogs to combat the drug problem.[18] Eventually, the school board voted to implement a drug testing program for its student-athletes with the express purpose of preventing injuries to the athletes and providing treatment assistance for those athletes caught using marijuana or cocaine.[19]

The testing procedure for male and female athletes was almost

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[13]*Id.* at 2388.

[14]*Id.*

[15]*Id.* at 2389. Teachers claimed that some students boasted about their drug use. *Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.* (citing *Acton v. Vernonia Sch. Bd.*, 796 F. Supp. 1354, 1357 (D.Ore. 1992) ("The administration was at its wits end and . . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion.")).

[19]The policy required the parents of the student-athletes to sign a consent form for their children to be tested for drug use. *Id.* Consequently, any student refusing to comply would thereafter be ineligible for participation. *Id.* All athletes were tested at the start of their respective sports season. *Id.* Once a week during their season, all of the eligible athletes' names were placed in a pool from which a fellow classmate, under the supervision of two adults, drew names until ten percent of eligible student-athletes were picked. *Id.* When a student-athlete's name was picked, the student had to report to an empty locker room, accompanied by a faculty member of the same sex, and produce a urine specimen. *Id.*

identical.[20] When a male student-athlete was selected for testing, the athlete would go to the lavatory with a faculty member.[21] He then gave the specimen to the faculty member, who checked that the athlete had, in fact, produced the specimen.[22] Female student-athletes were tested in a similar manner, except that the accompanying faculty member remained outside a closed bathroom stall while the student produced the sample.[23]

The collected urine samples were then tested for amphetamines, cocaine and marijuana.[24] Students taking prescription medicines were instructed to disclose the names of each medication.[25] If a student tested positive for one of the controlled narcotics, the student would be required to take another test as soon as possible.[26] If the second test came back negative, no additional action was taken against the student.[27] If the student failed the second test, however, he or she would have one of two options: (1) participate in a six-week assistance program that required weekly urinalysis and continue to participate in athletics; or (2) sit out the remainder of the season, as well as the following athletic season.[28]

A second violation of the drug policy resulted in an automatic imposition of the second option. The student would also forfeit their eligibility for the remaining portion of the athletic season, as well as the

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[20]*Id.*

[21]*Id.*

[22]*Id.* The male athlete was instructed to urinate in a cup while a male faculty member stood about fifteen feet behind the athlete and listened for the normal sounds of urination. *Id.*

[23]*Id.*

[24]*Id.* The samples were taken to an independent laboratory, which routinely tests for cocaine, marijuana, and amphetamines. *Id.* The laboratory could also test for other drugs, such as LSD, at the request of the school district. *Id.* The laboratory's results were 99.94% accurate. *Id.* The school district also had strict handling and chain of custody requirements. *Id.* The results were only accessible to a few administrators, the superintendent, principle, vice-principle, and athletic director. *Id.*

[25]*Id.*

[26]*Id.*

[27]*Id.*

[28]*Id.* at 2389.

following season.[29] A third offense disqualified the student-athlete from participating in the remaining portion of their current season and the next two athletic seasons.[30]

In 1991, James Acton was a seventh-grader in a Vernonia district junior high school.[31] Acton signed up to play football on the school's team, but the school denied him a place on the roster because he and his parents refused to sign the drug testing consent form.[32] Despite noncompliance with the school district's mandate, the Actons' sought an injunction to force the school board to allow James to play.[33] The Actons contended that the school's drug testing policy violated the Fourth and Fourteenth Amendments of the United States Constitution, as well as similar guarantees of the Oregon Constitution.[34]

Specifically, the Actons alleged that the school district failed to prove that there was a drug problem in Vernonia schools. Therefore, there was no compelling justification for the imposition of a drug testing program.[35] The Actons claimed, in the alternative, that if a drug problem existed in the schools, a random search of the students was an unconstitutional means of addressing the situation.[36] The district court, however, denied the Actons' claims on the merits and dismissed the action.[37]

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[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*Id.*

[33]*Id.*

[34]*Id.* at 2390.

[35]*Id.*

[36]*Id.*

[37]Acton v. Vernonia School District 47J., 796 F. Supp. 1354 (Dist. Ore. 1992). The district court held that "the state did produce ample evidence that coaches observed athletes perform poorly and unsafely while under the influence of some intoxicant." *Id.* at 1363. The district court also favored the potential deterring effect of a drug testing policy on the student-athletes' proclivity toward using drugs. *Id.* That fact that the school board had tried and failed at less restrictive methods of drug prevention also aided in the finding that the policy was constitutional. *Id.* at 1364. Finally, the district court stressed that the school board took steps to limit the intrusion of the search: namely, the tests were limited to only student-athletes, and the results were confidential, remained in the possession of

The United States Court of Appeals for the Ninth Circuit reversed and held that Vernonia's drug testing program violated the Fourth and Fourteenth Amendments as well as the Oregon State Constitution.[38]

The United States Supreme Court granted *certiorari* to determine whether Vernonia's drug testing policy for student-athletes was unconstitutional.[39] Relying on the extensive history of granting public school officials great leeway to organize and maintain school order, in conjunction with the decreased expectation of privacy afforded minors, the Court upheld Vernonia's drug testing program.[40]

III. PRIOR CASE HISTORY

Although *Acton* was the first case in which the Court addressed the constitutionality of a public school's drug testing program, the Court previously heard cases where governmental actors implemented drug testing programs affecting the general citizenry and government employees.[41] In addition, the Court ruled on the constitutionality of searches and seizures in the public school setting.[42]

The prior cases in which random suspicionless drug testing programs

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only a few administrators, and could not be turned over to the police. *Id.*

[38]Acton v. Vernonia School District 47J, 23 F.3d 1514, 1518 (8th Cir. 1994) (holding that the students had a legitimate privacy interest in their excretory functions. The Court reasoned that the athletes' privacy interests were not lessened by their voluntary participation in school athletics, and that the school's interest in reducing drug use among the students was not compelling enough to justify such an intrusive search). *Id.* at 1525.

[39]Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2391 (1995).

[40]*Id.* at 2397.

[41]*See* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 617 (1989); *see also* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[42]*See* New Jersey v. T.L.O., 469 U.S. 325 (1984) (upholding the search of a student's purse even though probable cause was lacking, but noting that there was a reasonable suspicion of contraband and that the search was conducted in a reasonable manner); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 276 (1988) (finding constitutional a principal's decision to remove two articles about teen pregnancy from the student run newspaper). In *Hazelwood,* the Court measured the principal's actions to determine whether they were reasonably related to legitimate pedagogical concerns. *Id.* The Court stressed the importance of granting administrators the ability to maintain order and to further educational efforts. *Id.*

were upheld were limited to searching employees; specifically, to private railroad workers in *Skinner v. Railway Labor Executives' Association*[43] and to United States customs agents in *National Treasury Employees Union v. Von Raab.*[44] In *Skinner,* the Court upheld the random suspicionless drug testing of railroad employees.[45] The Court observed that due to the potential danger for train wrecks when workers use drugs, there is a strong governmental interest in favor of a random, suspicionless drug test.[46] The *Skinner* Court also stressed that because of the chaotic nature of train wreck sites, it is not feasible to test workers after a crash.[47] Thus, the Court premised its justification for upholding these searches on strong public safety concerns.[48]

In *National Treasury Employees Union v. Von Raab*, the Court held that United States customs agents may also be subject to random suspicionless drug testing, due to compelling governmental interests.[49] The Court recognized that customs agents play an integral part as the first line of defense against the smuggling of illegal contraband into America.[50] The Court reasoned that not only was the physical safety of customs agents endangered by colleagues using drugs, but that the easy access that the agents have to drugs could circumvent the mission of the Custom Agency.[51]

In *New Jersey v. T.L.O* the Court held that public school teachers and administrators have broad authority in conducting searches of students while on school grounds.[52] There, the Court determined that a search occurred when a teacher observed a student smoking cigarettes and brought her to the

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[43]489 U.S. at 617.

[44]489 U.S. 656 (1989).

[45]489 U.S. at 617.

[46]*Id.* at 621.

[47]*Id.*

[48]*Id.* at 633.

[49]489 U.S. 656, 669 (1989).

[50]*Id.* (noting that custom agents were shot, stabbed, and assaulted in the course of their employment).

[51]*Id.*

[52]469 U.S. 325, 337 (1985).

vice principal's office. When the student denied the incident, the vice principal opened her purse to see if it contained cigarettes.[53] Subsequently, the teacher found marijuana and drug paraphernalia in the student's purse and reported her activities to the police.[54]

The *T.L.O.* Court first noted that teachers are government actors for Fourth Amendment analysis.[55] Next, the Court found that the vice principal conducted the search based on reasonable suspicion, rather than probable cause.[56] The Court opined that while probable cause is normally necessary to justify such a search, reasonable suspicion sufficed under the circumstances because the need for teachers and administrators to maintain order in the classroom outweighed the student's expectation of privacy in her purse.[57] Therefore, the *T.L.O.* Court found that searches conducted by school personnel, done without probable cause, are constitutionally permissible as long as they are merely reasonable.[58]

In a recent case, *Vernonia School District 47J. v. Acton,* the Court blended the concepts of reduced constitutional freedoms of public school children with its prior analysis of the validity of random drug testing. Specifically, the Court decided the constitutionality of student-athlete drug testing programs.

A. JUSTICE SCALIA FINDS RANDOM DRUG TESTING TO BE JUSTIFIED IN THE SCHOOL SETTING

Writing for the majority, Justice Scalia posited that suspicionless drug testing of student-athletes is constitutionally permissible.[59] The Justice reasoned that constitutional analysis under the Fourth and Fourteenth Amendments is primarily triggered where a search by a governmental actor

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[53]*Id.* at 328.

[54]*Id.* The student confessed at the police station to selling marijuana. *Id.* at 329. At trial her lawyer attempted to have the marijuana suppressed. *Id.*

[55]*Id.* at 333.

[56]*Id.* at 341.

[57]*Id.* at 342.

[58]*Id.*

[59]Vernonia School District 47J. v. Acton, 115 S. Ct. 2386, 2397 (1995).

has occurred.[60] Justice Scalia further acknowledged that past Court decisions have consistently stated that public school officials are governmental actors subject to Fourth Amendment analysis.[61] The Court then pronounced that Vernonia schools' collection of urine samples constituted "a search" subject to the requirements of the Fourth Amendment.[62] Continuing, Justice Scalia noted that the ultimate measure of a search's constitutionality is its reasonableness.[63] Specifically, the Justice opined that the reasonableness of a search is measured by balancing its "intrusion on an individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[64]

The Court, having pronounced the basic Fourth Amendment principles, next addressed the traditional warrant requirement of probable cause.[65] Justice Scalia, however, demonstrated that warrantless searches as well as searches made without probable cause can be constitutional when it would be impracticable to obtain a warrant due to the "special needs" of the situation.[66] The majority also analogized that certain citizens, due to their

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[60]*Id.* at 2390 (citing New Jersey v. T.L.O. 469 U.S. 325 (1985); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617 (1989) (upholding random, suspicionless collection of urine samples of transit employees involved in train accidents and determining that the Fourth Amendment did not require an element of suspicion)).

[61]*See T.L.O.*, 469 U.S. at 333.

[62]*See* Nation Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989) (holding that governmental actors' random urinalysis searches of federal customs agents were searches within the parameters of the Fourth Amendment, but that the compelling governmental interests of safety and integrity of customs agents passed constitutional muster).

[63]*Acton*, 115 S. Ct. at 2390.

[64]*Id.* at 2390 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979) (holding that unless the police have a reasonable suspicion to stop an automobile, they may not stop a vehicle to check the driver's license and registration)).

[65]*See* Illinois v. Gates, 462 U.S. 213, 238 (holding that a warrant must be obtained from a neutral and detached magistrate in order to conduct a search of a premises); *see also* United States v. Watson, 423 U.S. 411, 424 (holding that there is no requirement that the police obtain an arrest warrant in order to make a lawful arrest).

[66]*See* New York v. Belton, 453 U.S. 454, 469 (1981) (holding that automobiles are special settings which allow a warrantless search of the entire passenger compartment, including any closed containers, in that car upon a valid arrest). In *Belton,* the Court validated a search conducted by a police officer who, upon stopping a car containing

relationship with the state, (such as probationers, customs agents and schoolchildren), can be subjected to searches and other governmental actions that would not be constitutional if applied to the general public.[67] Consequently, the Court decided that "special needs" do exist in the public school setting,[68] specifically because warrants are impracticable in the public school setting.[69]

The majority framed the ultimate issue as whether the seizing of bodily excretions of minors while under the supervision of the state was reasonable. In addressing this issue, Justice Scalia noted that not all privacy interests are protected; rather, only those that society deems "reasonable" are secured.[70] Justice Scalia explained that the context of the search determines the legitimacy of the privacy interest.[71] The Justice observed that not just the manner of a search, but also the setting, whether the search occurs in an

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Belton and four others, noticed the smell of burning marijuana. *Id.* The police officer ordered the occupants out and searched the passenger compartment and found cocaine in a zippered pocket of a jacket in the back seat of the car. *Id.* *See also* Chimel v. California, 395 U.S. 752 (1969) (holding that following the valid arrest of a suspected coin robber, the police could search the area of immediate control around the defendant at time of arrest in order to find weapons or evidence that could be destroyed, but could not constitutionally search the defendants entire three bedroom home); *Watson*, 423 U.S. at 423-25 (holding that an arrest based on probable cause does not require the issuance of a pre-arrest warrant, even though it may be practicable to obtain one).

[67]*Acton*, 115 S. Ct. at 2391 (citing Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (holding that although a probationer's home restrains Fourth Amendment safeguards, the nature of the supervisory relationship between a probationer and the State justifies "a degree of impingement upon a probationer's privacy that would not be constitutional if applied to the public at large")).

[68]*See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that a warrantless search of a student's handbag for contraband was justified, despite the fact that no probable cause existed, due to the need for teachers and administrators to maintain order in the classrooms and hallways). Notably in *T.L.O.*, the Court found that the warrant requirement "unduly interferes with the maintenance of the swift and informal disciplinary procedures" needed to maintain order. *Id.* at 340.

[69]In *T.L.O.*, 469 U.S. at 333, the Court upheld a warrantless search of a student by a vice principal even though it was not based on probable cause. Rather, the Court justified the search on a lesser showing of reasonable suspicion of wrongdoing. *Id.* at 342. There, the Court was satisfied that no precedent existed which required an individualized suspicion to conduct a random search and seizure. *Id.*

[70]*Acton,* 115 S. Ct. at 2391.

[71]*Id.*

individual's home, car or in a public park, affects the outcome of the constitutionality of the search.[72] Nonetheless, the Court concluded that the taking of bodily excretions from student-athletes in a public school is reasonable.[73]

Justice Scalia emphasized that the search targeted children, for whom the state acts *in loco parentis* while they attend school.[74] The Justice noted that school actors are subjected to constitutional constraints,[75] and that "while children assuredly do not 'shed their constitutional rights at the schoolhouse gate'[76] the nature of these rights is what is appropriate for children in school."[77] The majority also addressed the fact that these constitutional rights may be curtailed in order to advance pedagogy through order and discipline.[78]

Relying on public health and safety concerns, the Court found the

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[72]*Id.* (citing Griffin v. Wisconsin, 483. U.S. 868, 873 (1987) (holding that "the supervisory nature of the relationship between the State and a probationer justifies a degree of impingement upon a probationer's privacy that would not be constitutional if applied to the public at large")).

[73]*Id.* at 2393. The Court recognized that collecting urine samples does intrude upon "an excretory function traditionally shielded great privacy." *Id.* (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626 (1989)). The *Acton* Court, however, emphasized that the monitors who collected the urine samples either waited outside the bathroom stalls, for the girls, or in the case of the boys, stood 15 feet behind the boys who were at the urinals with their backs turned. *Id.* The Court noted that the specimen's were thus "obtained in conditions nearly identical to those typically encountered in public restrooms." *Id.*

[74]*Id.* at 2391. The Court recognized that parents, by entrusting their children to the state, are delegating to the schools their parental authority, and that the schools must exert this authority to ensure that the students are educated and safeguarded. *Id.*

[75]*Id.*

[76]*Id.* at 2392 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)). In *Tinker*, the Court held unconstitutional a regulation promulgated by public school principals that barred students from wearing black arm bands to school as a symbol of political protest of the Vietnam War. *Tinker*, 393 U.S. at 506. The Court rejected the principal's argument that the arm bands could potentially cause a safety concern within the school if fights or actual violence arose due to some students wearing them. *Id.* at 508. However, the court held that mere apprehension of disturbance was not enough to overcome the students right to freedom of expression. *Id.*

[77]Vernonia School District 47J. v. Acton, 115 S. Ct. 2386, 2392 (1995).

[78]*Id.*

school's drug testing policy constitutional. Specifically, the Court reasoned that the search at issue benefitted the students' health, as did mandatory vaccinations and medical tests, which are also "searches."[79] Justice Scalia observed that procedures such as vaccinations illustrate the decreased expectation of privacy in schools.[80]

The Court then demonstrated that student-athletes, particularly those in Vernonia schools, have a lesser expectation of privacy than non-student-athletes.[81] The majority noted that student-athletes, in preparing for competitions, would have to undress in front of other students.[82] Moreover, the Court observed that the showers and locker rooms in Vernonia, as in most high schools, are communal.[83] In addition, the majority stressed that by voluntarily signing up for a team, an athlete subjected himself or herself to a lessened degree of privacy by having to maintain a minimum grade point average and to comply with the rules of conduct during training hours.[84]

Next, the Court addressed the intrusiveness of the test in light of the Court's drug testing jurisprudence.[85] Justice Scalia noted that the testing procedures allowed the male students to have their backs turned, while female students were allowed to remain in closed stalls.[86] The Court also indicated that the test implemented by the school board was limited to certain

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[79]*Id.* at 2395. "That the nature of the concern is important — indeed, perhaps compelling — can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the concern in *Von Raab*." *Id.*

[80]*Id.* at 2392.

[81]*Id.*

[82]*Id.* at 2393.

[83]*Id.*

[84]*Id.*

[85]*Id.* In *Skinner v. Railway Labor Executives Assn.*, the Court maintained that a person has a reasonable expectation of privacy in his bodily functions, but that the governmental interest in railroad safety outweighed this limited intrusion. 489 U.S. 602, 626 (1989). The *Skinner* Court stated that "[w]hile we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process." *Id.*

[86]Vernonia School District 47J. v. Acton, 115 S. Ct. 2386, 2393 (1995).

drugs, thereby protecting a student's privacy.[87] Additionally, Justice Scalia observed that the results were revealed only to the student and a limited number of school personnel.[88] Finally, the majority was satisfied that the drug test was designed not to punish, but to prevent injury and to provide athletes with treatment and counseling where necessary.[89] Accordingly, the Court concluded that Vernonia's student-athlete drug testing plan passed constitutional muster.[90]

B. Minority Opinion Sought Individualized Suspicion to Conduct Drug Testing of Student-Athletes

In a dissenting opinion, Justice O'Connor[91] posited that under a traditional Fourth Amendment analysis, the requirement of an individualized suspicion should not be waived merely because there are some legitimate reasons to enact a drug testing policy.[92] Justice O'Connor reasoned that during the nation's constitutional history, large-scale and suspicionless searches have generally been considered *per se* unreasonable pursuant to the spirit of the Fourth Amendment.[93] In particular, Justice O'Connor disagreed with the imposition of a blanket search of all athletes.[94] The Justice emphasized that drug testing of individual student-athletes whose behavior triggers a reasonable suspicion in teachers and coaches would be an effective means of addressing the problem.[95] Justice O'Connor's dissent distinguished the suspicionless drug testing preferred in *Skinner* on two grounds. First, the Justice noted that testing train operators on the site of a

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[87]*Id.* at 2389, 2393. The test was limited to marijuana, cocaine and amphetamines. *Id.*

[88]*Id.*

[89]*Id.* at 2396.

[90]*Id.*

[91]Justice O'Connor was joined by Justices Souter and Stevens. *Id.* at 2407.

[92]*Id.* at 2407 (O'Connor, J., dissenting).

[93]*Id.* at 2397 (O'Connor, J., dissenting).

[94]*Id.* at 2406 (O'Connor, J., dissenting).

[95]*Id.*

train wreck is unworkable due to the chaos at the scene of a train accident.[96] Second, Justice O'Connor further observed that allowing a conductor to operate a train while under the influence of a narcotic could cause far more serious injuries to others than would an athlete competing while using drugs.[97]

Justice O'Connor was not persuaded by the *Skinner* Court's argument that individualized drug testing, which was not attempted by the school district, would be inherently unworkable.[98] The dissent argued that had the school district tested only those students who gave some reasonable suspicion of drug use, the search would be less intrusive.[99] Furthermore, the Justice opined that the student's behavior would bear a causal connection to those who were tested.[100] Justice O'Connor emphasized that students behaving properly in class and at practice would not cause suspicion and never be tested.[101] The dissent claimed that such a policy would comport with the traditional preference against general searches.[102]

Lastly, the dissent posited that the testing of student-athletes is a pretext for testing the entire student body.[103] Because sixty-five percent of the students in the school district participated in school athletics, Justice O'Connor asserted that it was "quite obvious that the true driving force behind the district's adoption of its drug testing program was the need to combat the rise in drug related disorder and disruption in its classrooms and

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[96]*Id.* at 2401 (O'Connor, J., dissenting).

[97]*Id.*

[98]*Id.* *See* Skinner v. Railway Labor Executive's Ass'n., 489 U.S. 602, 631 (1989). The *Skinner* rationale gave weight to the fact that testing after a train wreck has occurred is problematic because the scene is chaotic, and most efforts are initially done to save lives, not look for employees to submit to drug testing. *Id.* However, Justice O'Connor stressed that the district never attempted to institute individualized testing. Vernonia School District 47J v. Acton, 115 S. Ct. 2386, 2401 (1995) (O'Connor, J., dissenting).

[99]*Acton*, 115 S. Ct. at 2402 (O'Connor, J. dissenting).

[100]*Id.*

[101]*Id.*

[102]*Id.* at 2405 (O'Connor, J., dissenting).

[103]*Id.*

around campus."[104] However, the dissent did not contend that classroom disruptions caused by students using drugs is an uncompelling reason for drug testing.[105] Instead, Justice O'Connor suggested that since the bulk of the trial court evidence was introduced to show classroom disruptions, rather than the number of student-athletes using drugs and their injuries, that the safety issue was merely a pretext for a desire to control classroom behavior in the students.[106]

IV. TREND TOWARD HARSHER PUNISHMENT FOR ILLEGAL DRUG USE

The Court's decision reflects the recent attitude held by many Americans that tougher methods must be implemented to combat the "war on drugs." Thus, longer prison terms have been mandated and the funding of drug interdiction has increased dramatically. However, some citizens may find the drug testing of student-athletes troublesome. *Acton* is the first case in which the Court has upheld a search in a public school without a showing of individualized suspicion.[107] However, as previously noted, this is not the first time that the Supreme Court has ratified a random drug testing program.[108]

The true test of the constitutionality of the *Acton* search, the searches in *Skinner* and *Von Raab*, and all other searches, depends upon the reasonableness of the search. As properly noted by the majority, reasonableness depends upon the setting.[109] It is unreasonable for a student walking in the hallways of a public high school to think that she may go where she pleases and act in any manner she feels. The nature of the school environment requires that teachers and administrators possess the ability to control students and maintain order, even though this power inherently may stifle a student's creativity and freedom. For instance, a student may have to display a hall pass and tell a teacher where she is going or be reprimanded

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[104]*Id.* at 2406 (O'Connor, J., dissenting).

[105]*Id.*

[106]*Id.*

[107]*Cf.* New Jersey v. T.L.O., 469 U.S. 325 (1984).

[108]*See supra* notes 11 and 12.

[109]Vernonia School District 47J. v. Acton, 115 S. Ct. 2386, 2390 (1995).

for being disruptive in class. Although students do not "check their constitutional rights at the schoolhouse gate,"[110] the nature of the school setting demands that students forfeit some of the constitutional freedoms that they enjoy outside the school grounds.[111] That there are rules and regulations posted in the hallways of every school is reflective of students' forfeiture of some freedom and their accompanying lesser expectation of privacy.

In *Tinker,* the Court acknowledged that students retain some freedom of thought and expression and can wage a silent political protest in the educational setting.[112] Recall that the *Tinker* Court reversed the school board's prohibition against students wearing black arm bands in order to wage a silent political protest against the Vietnam War.[113] In contrast, there is nothing political about children using narcotics. Surely, *Tinker* would not have been decided the same way if the children were storming out of class to burn flags or even to barricade themselves in the gymnasium for a protest.[114] In *Tinker* a symbol of what was in students' hearts and minds was held sacred; yet, in *Acton* what was in their bloodstreams is not.[115]

The constitutionality of a search by the government is determined by measuring the search's reasonableness by balancing the privacy interest against the government's interest.[116] Further, reasonableness depends on the context. Some searches are conducted pursuant to a search warrant, which must be issued by a neutral and detached magistrate and based on probable cause.[117] Similarly, searches that occur incident to a valid arrest must be based on probable cause.[118]

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[110]*See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969); *see also supra* note 63 and accompanying text.

[111]*See supra* notes 4 and 5 and accompanying text.

[112]393 U.S. 503.

[113]*Id.*

[114]*See supra* note 76. If actual violence had accompanied the students' protests, it is likely that *Tinker* would have been decided differently.

[115]*Id.*

[116]*See supra* note 3.

[117]*Id.*

[118]*Id.*

While people may have a heightened expectation of privacy in their bodily excretions, reasonableness is determined by the setting and the means by which the search is conducted; the Court must balance the intrusion against the asserted government interest. In the *Acton* case, the actual search or production of urine was conducted in the most dignified manner possible.[119] The teacher either remained outside the stall or stood with his back turned to the student.[120] Hence, the intrusion on the student was mitigated. This intrusion is balanced against the compelling governmental interest, namely the safety of the students. Perhaps, the safety issue in this suspicionless search is not as strong as the safety of hundreds of train passengers, but the enhanced potential for harm to athletes using drugs while participating in athletics, as well as the increased propensity that children have toward becoming addicted to drugs, are compelling reasons for the search.[121]

There are several other practical reasons for upholding student-athlete drug testing policies. The state is only subjecting student-athletes to the testing policy, and not the entire student body. The risk of harm the school band drummer can inflict upon himself or others is less than that attendant in football or basketball games where a player will make intense, sometimes violent, contact with other participants.

V. CONCLUSION

It is of paramount importance that the primary consequence of a violation of the Vernonia School District Drug Policy is not to impose punishment on athletes, but to get violators the necessary substance abuse counseling they deserve. For years, coaches and teachers have been castigated for turning a blind eye to the behavioral and drug problems of their athletes. They should be commended for trying to get children the help when needed. The state, under its *parens patriae* power, is acting as a benevolent parent seeking to aid its troubled child, not to rebuke him. This argument is bolstered by the fact that drug use has reached epidemic

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[119]Vernonia School District 47J. v. Acton, 115 S. Ct. 2386, 2389 (1995).

[120]*Id.*

[121]Carey Goldberg, *Survey Reports More Drug Use by Teenagers*, NEW YORK TIMES, Aug. 21, 1996, at A4. "Admitting that they had not pushed hard enough for drug-abuse prevention programs, federal officials disclosed on August 20, 1996 that marijuana smoking among American teenagers had jumped 141% from 1992 to 1995 and that overall teenage drug use more than doubled." *Id.*

proportions.[122] Also, it is well settled that most alcoholics and drug addicts start using drugs in their teen years.[123] These individuals' futures are at stake; the teachers and coaches are doing the students a favor, not punishing them.

Lastly, the glamour of athletics is one of the few things in this world that is a greater attraction to our young than the often glorified drug culture. The consequence of not being able to play ball may be stronger than the need to get high for some. With properly managed drug testing programs, like the one implemented by the Vernonia School District, society may have an effective tool to deter and reduce drug consumption in student-athletes.

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[122]*Id.*

[123]*Pot Entices Youth*, THE CINCINNATI POST, Feb. 20, 1996, at 2A. "Study conducted by the Partnership for a Drug free America says teens now see fewer risks in smoking marijuana. Every year since 1990 there has been an increase in marijuana use by American teenagers. Presently, 38% of American teens have experimented with marijuana. 44% stated that pot helped them relax and forty-one percent said it helped them forget about their problems." *Id.*; *see also* Jane Daugherty, *Boomers Come Face to Face with Kids Drug Abuse*, THE DETROIT NEWS, Feb. 27, 1996, at D1 ("Marijuana use in thirteen-year-olds was virtually zero in the early 1960's, but now one in every six American thirteen-year-olds has smoked marijuana. This is an especially disturbing statistic, given that marijuana now has far greater levels of toxicology then it had twenty years ago."). *Id.*