# Judicial Activism Works the Constitution Out of Shape—*Acton* and Its Atrophic Effect on the Fourth Amendment Rights of Student Athletes.

## INTRODUCTION

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.[1]

The Fourth Amendment[2] to the United States Constitution is most commonly known for protecting people against unreasonable searches and seizures" by the government.[3] The Framer's strong opposition to any unjustified or arbitrary general searches was a driving force behind the promulgation of the Fourth Amendment.[4] Conversely, there is no historical support for the notion that the Fourth Amendment was intended to allow for mass, suspicionless searches even in instances in which such searches were believed to be fair and

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1. Nat'l Treas. Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987).

2. U.S. CONST. amend. IV. Adopted in 1791, the Fourth Amendment states in full:

> 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.

Id.

3. The basic purpose of the Fourth Amendment, recognized on countless occasions by the Supreme Court of the United States, is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." *See, e.g.,* Camara v. Municipal Court, 387 U.S. 523, 528 (1967). By way of the Fourteenth Amendment, the Fourth Amendment is applicable to the states and their officials, including public school boards of education. *See, e.g.,* New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985).

4. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995) [hereinafter Clancy]. "The drafting process of the Fourth Amendment reinforces the conclusion that suspicionless searches pursuant to general warrants were the initial and primary evils sought to be prevented." *Id.*; *see also*, William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, CLAREMONT GRAD SCH., (Ph.D. Dissertation) (1990) [hereinafter Cuddihy] (exhaustive analysis of the original meaning of the Fourth Amendment).

"evenhanded."[5] In fact, the Framers sought to preempt the abuses that were historically known to accompany such suspicionless, albeit evenhanded, searches by choosing language that unquestionably requires a threshold showing of "probable cause" before the issuance of a proper search warrant.[6] Indeed, it has been well settled in the law that, by unmistakable implication,[7] the Fourth Amendment requires individualized suspicion.[8] Until now, the Supreme Court had cautiously carved out a narrow exception to this most basic rule by allowing for its subjugation in the rare case in which a suspicion-based scheme had been proven to be "impracticable" and accompanied by disastrous consequences.[9] In fact, for most of our history, broad suspicionless searches have been categorically found to be per se unreasonable.[10]

In spite of this legal pedigree, in the recent case of Vernonia Sch. Dist. 47J v. Acton,[11] the United States Supreme Court chose to ignore original understanding and to part with long-standing precedent by validating Vernonia School District's (hereinafter "47J" or "District") policy of suspicionless drug testing of student athletes. In Acton, the Court appeared to be entirely unrestrained by precedent[12] when it "balanced-away" the Fourth Amendment protections of student athletes by clas-

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5. Cuddihy, supra note 4, at 1091. Indeed, many of these non-discriminatory blanket searches may have been regarded as more troublesome than the arbitrary singling-out of individuals under a general search power. *Id.* at 575.

6. *See, e.g.,* Clancy, supra note 4, at 489-90.

7. *See* Carroll v. United States, 267 U.S. 132, 150-51 (1925) (while the plain language of the Amendment does not mandate "individualized suspicion" as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that such suspicion was an inherent quality of reasonable searches and seizures).

8. Suspicion-based testing was not meant to be merely a less intrusive alternative to other types of testing; it is a fundamental requirement of any reasonable search "with a legal pedigree as old as the Fourth Amendment itself," and should not be casually disregarded to accommodate mere policy concerns. Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386, 2403 (1995) (O'Connor, J., dissenting).

9. Cases falling into this limited category are referred to as "special needs" exceptions. Skinner v. Railway Labor Execs. Assoc., 489 U.S. 602 (1989). *See also* Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89 (1992) (predicting the further erosion of Fourth Amendment protections based on the judicially created "special needs" exception).

10. *Acton*, at 2398 (O'Connor, J., dissenting).

11. 115 S.Ct. 2386 (1995).

12. Stuart J. Taylor, *Is Judicial Restraint Dead?*, 145 N.J.L.J. 841 (1996) (discussing the activist nature of the current Supreme Court of the United States). "The Court has liberals, moderates, and conservatives. But they are activists all, in the sense that each

sifying the District's suspicionless search as reasonable under the circumstances.

Acton arose out of the following circumstances. In the mid-to-late 1980's the faculty and administration of 47J[13] observed an increase in drug use which was perceived to be championed and glamorized by the District's athletes.[14] The faculty and administration feared that the celebrated acts of these alleged ringleaders would encourage emulated drug use by the entire student body.[15] Additionally, the District spuriously contended that drug use among 47J's athletes had and would continue to cause sport-related injuries.[16]

In the fall of 1989, after having made other modest attempts to control the perceived drug problem,[17] the District implemented the challenged Student Athlete Drug Policy (hereinafter "SADP" or "Policy").[18] Although the Policy was originally drafted to apply to nearly the entire student body,[19] SADP was curiously rewritten[20] to target only those who par-

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of them seems quite ready to find ways to strike down any democratically adopted law or practice that seriously offends his or her personal moral or political views." *Id.*

13. School District 47J consists of one high school and three grade schools in a rural logging community in Vernonia, Oregon. Acton v. Vernonia Sch. Dist. 47J., 796 F. Supp. 1354, 1356 (D.Ore. 1992). Total enrollment of students within 47J is approximately 690 students. Petitioner's Opening Brief at 4, Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386 (1995) (No. 94-590) [hereinafter U.S. Pet. Br.].

14. *Acton*, 796 F. Supp. at 1357. The district court found that athletes were the leaders of the alleged drug culture. *Id.* However, over the life of the drug testing program at 47J, only two students tested positive for any trace of drugs. Respondent's Brief at 8, Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386 (1995) (No. 94-590) [hereinafter U.S. Resp. Br.].

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

16. *Id.* Although expert testimony at trial confirmed the deleterious effects that drugs generally may have on athletic performance, the District could only offer the individual lay testimony of Vernonia's high school football and wrestling coach. *Id.* On this point, the coach could only speculate as to the cause of the scattered on field safety omissions and misexecutions that he witnessed. *Id.*

17. Upon initial discovery of the perceived increase in drug use, 47J offered special classes, speakers, and presentations in an effort to discourage student use, in addition to on site dog surveillance to deter the detectable possession of drugs in school. *Id.*

18. SADP was implemented after the District conducted an input-night at which those parents in attendance unanimously approved the Policy. *Id.* at 1358.

19. Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386, 2406 (1995). The original Policy controlled students involved in any extracurricular activity. *Id.*

20. U.S. Resp. Br., supra note 14, at 9. To "assure its legality" the original Policy, which was in effect from September of 1989 through August of 1990, was modified to its present form. *Id.* Justice O'Connor opined that the District's decision to designate student athletes in the Policy "appears to be driven more by a belief in what would pass

ticipated in interscholastic athletics.[21]

In its final version, the stated purpose of SADP was to prevent student athletes from using drugs, to protect their overall health and safety, and to provide assistance programs to abusing athletes.[22] Despite the fact that the perceived drug problem was only arguably identifiable at the high school level,[23] the Policy applied to all student athletes in the District, including seventh-grader James Acton.[24]

In the fall of 1991, young James Acton tried out for the Washington Grade School football team in Vernonia.[25] At the first practice, consent forms for random drug testing were distributed to all participating athletes.[26] James and his parents refused to sign the consent form, and as a result, James was suspended from the team by the District for the remainder of the 1991 season.[27]

After the suspension, James's parents filed suit on his behalf in the United States District Court for the District of Oregon.[28] The Actons sought a declaratory judgment and injunctive relief based upon their belief that the Policy contravened James' rights under the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Ore-

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constitutional muster . . . than by a belief in what was required to meet the District's principal disciplinary concern." *Acton*, 115 S.Ct. at 2406 (O'Connor, J., dissenting).

21. *Acton*, 115 S.Ct. at 2389. Other courts had already "squelched attempts to drug test all students, as opposed to a discrete segment of the student body." Rhett Traband, *The Acton Case: The Supreme Court's Gradual Sacrifice of Privacy Rights On The Altar Of The War On Drugs*, 100 DICK. L. REV. 1 (citing Brooks v. East Chambers Consolidated Indep. Sch. Dist., 730 F. Supp. 759, 766 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991), Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985), Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985)).

22. 115 S.Ct. at 2389. Counsel for respondent discussed the manifold problems of the expressed policy. U.S. Resp. Br., supra note 14, at 2-6.

23. *See id.* Evidence of reliable proof of the existence of any serious problem at the school is conspicuously absent from the lower court's opinion and findings of fact. *See id*; *see* 796 F. Supp. at 1359. The record is virtually void of any evidence that might support the need for such a policy at the grade school level. 115 S.Ct. at 2406 (O'Connor, J., dissenting). In fact, the record reflects that every identifiable event that served as the source of the District's alarm is traceable to behavior of students at the high school level only. *Id.* at 2403.

24. 796 F. Supp. at 1359.

25. *Id.*

26. *Id.*

27. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1517 (9th Cir. 1994).

28. 796 F. Supp. at 1356.

gon Constitution.[29] The district court denied their claim for relief, and the Actons appealed.[30] Reversing the court below, the United States Court of Appeals for the Ninth Circuit held that 47J's need to randomly search its students did not outweigh the privacy interests of the student athletes.[31]

The United States Supreme Court granted certiorari to determine whether random urinalysis drug testing of students who participate in the District's interscholastic athletic programs violated the Fourth and Fourteenth Amendments to the United States Constitution.[32] Finding in favor of 47J, the Court vacated the judgment of the Ninth Circuit and remanded the case to the Court of Appeals for further proceedings consistent with the Court's opinion.[33]

To support its decision to scrutinize the District's Policy in accordance with the demands of the Fourth Amendment, the Supreme Court began its discussion with seemingly innocuous citations to earlier cases in which similar state-compelled collections and analyses of urine had qualified as searches.[34] The Court then proclaimed that the ultimate test of the constitutionality of a governmental search is measured by the reasonableness of the search.[35] The constitutional reasonability of such a search is determined by balancing the intrusive nature of the search on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests sought to be achieved by the search.[36]

Paramount to the Court's validation of the Policy was its determination to categorize student athletes as a group that should have a "diminished expectation of privacy" rights as compared to the public at large, and more significantly, as compared to those classmates who choose not to participate in sports.[37] Relying on this pronouncement, the Court then casually characterized the nature of the intrusion upon student

29. *Id.* Article I, section 9, of the Oregon Constitution mirrors, nearly verbatim, the Fourth Amendment of the United States Constitution.

30. 23 F.3d at 1516.

31. *Id.* at 1525-27.

32. 115 S.Ct. at 2388.

33. *Id.* at 2397.

34. *Acton*, 115 S.Ct. at 2390 (citations omitted).

35. *Id.*

36. *Id.*

37. *Id.* at 2392-93.

athletes' privacy rights, namely the collection and analysis of athletes' urine, as "negligible" and the conditions under which the urine was collected as "nearly identical" to those found in a public restroom, thus, also negligible.[38] In addition, the Court regarded the compelled disclosure of confidential medical information to be of little significance.[39] Finally, the Court found that the stated governmental interest in deterring and treating drug use among student athletes and maintaining order in 47J was compelling enough to justify the intrusive Policy.[40]

By approving the intrusive Policy at the cost of individual privacy, the majority callously ignored the time honored judicial disavowal of suspicionless searches of individuals.[41] Traditionally, courts have refused to approve of searches which may infringe upon an individual's bodily privacy without "probable cause particularized with respect to that person."[42] Despite the Court's early characterization of suspicionless searches as "intolerable and unreasonable"[43] the Acton major-

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38. *Id.* at 2393.

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

40. *Id.* at 2396.

41. *See generally* Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89 (1992) (criticizing the special needs rationale as undervaluing individual privacy interests and overstating governmental interests); *see also* Delaware v. Prouse, 440 U.S. 648, 657 (1979) (holding that random, suspicionless searches of cars to check for licenses and registration did not outweigh an individual's legitimate privacy expectations under the Fourth Amendment).

42. Ybarra v. Illinois, 444 U.S. 85, 91 (1979). *Ybarra* arose after a bar patron was convicted for the unlawful possession of narcotics. The police had obtained a warrant, issued upon probable cause, to search the premises and its owner for illegal substances. *Id.* at 88. While conducting their search, the officers also conducted a bodily pat-down search of Ventura E. Ybarra despite the lack of any reasonable belief that he was involved in any criminal activity. *Id.* at 88-89. The unauthorized search of Ybarra resulted in the discovery of illegal drugs in his possession. *Id.* at 89. Ybarra was convicted for unlawful possession of a controlled substance. *Id.* The Appellate Court of Illinois for the Second District affirmed his conviction and the Illinois Supreme Court denied his petition for leave to appeal. *Id.* at 89-90. Reversing this decision, Justice Stewart succinctly wrote that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91 (citing Sibron v. New York, 392 U.S. 40, 62-63). In short, the Court found that the lawful presence of an individual at the wrong place and wrong time did not castrate that individual of his or her constitutional right to bodily privacy.

43. *Carroll*, 267 U.S. 132 (individualized suspicion to search a person is an absolute requirement). Such a perspective is secured by history. *See Acton*, 115 S.Ct. at 2398 (O'Connor, J., dissenting)(citations omitted). Notwithstanding, the *Carroll* Court noted that for the sake of protecting national security, the suspicionless stop of travelers seeking to enter the United States at international borders would be justified for identification purposes. 267 U.S. at 154. However, the Court made it clear that "those lawfully

ity balked at constitutional history and justified an advisory opinion on presumed policy grounds. The Court's abuse of precedent warrants a corrective revisit to the cases from which the majority's legal malformation was begotten.

### Public School Standard for Search and Seizure

In New Jersey v. T.L.O.,[44] the Supreme Court declared that the Fourth Amendment's prohibition on unreasonable searches and seizures by the government also applied to those searches conducted by public school officials, the legality of which depends simply upon the reasonableness of the search under the circumstances.[45] By announcing an amorphous balancing test, the Court in T.L.O. rendered, perhaps unwittingly, a decision that would literally pave the way for the constitutional disrobing of public school children.[46]

T.L.O. arose when a principal seized and emptied the purse of a 14-year-old girl who was caught smoking in the bathroom.[47] As the search of the contents continued and additional paraphernalia was discovered, the principal's suspicion grew.[48] Ultimately, the complete search revealed a small amount of marijuana, the possession of which resulted in the girl's adjudication and subsequent classification as a juvenile delinquent.[49]

Asserting that the principal's search of her purse constituted a Fourth Amendment violation, T.L.O. moved to suppress the evidence found in her purse and her subsequent

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within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.* *But see* Michigan Dept. Of State Police v Sitz, 496 U.S. 444 (1990) (brief detention and visual examination of all travelers for signs of intoxication at sobriety checkpoint did not violate the Fourth Amendment).

44. 469 U.S. 325 (1985).

45. *Id.* at 341.

46. The Court perfunctorily pared-down school children's constitutional safeguards by deciding to adopt a relaxed test for simple reasonableness so as to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause. . . ." *Id.* at 343.

47. *Id.* at 328.

48. *Id.* at 328-29.

49. *T.L.O.*, 469 U.S. at 329-30. The State of New Jersey brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. *Id.*

confession.[50] The Juvenile Court denied T.L.O.'s motion to suppress and found the girl to be delinquent.[51] On appeal, the Appellate Division affirmed the lower court's ruling regarding the Fourth Amendment.[52] The Supreme Court of New Jersey reversed and ordered the suppression of the evidence.[53] The Supreme Court of the United States granted certiorari,[54] and ultimately decided to rule on whether and how the Fourth Amendment restricted the activities of public school authorities.[55]

As a preliminary matter, the Court found the conduct of public school authorities to be within the dominion of the Fourth Amendment.[56] In spite of this determination, the Court reasoned that school authorities should be provided with greater latitude, namely less judicial scrutiny under Fourth Amendment analysis, to enforce policies that aim to uphold order in school.[57] Consequently, the Court saw fit to relax the ordinarily strict requirement of probable cause under the Fourth Amendment,[58] in favor of a less burdensome reasonable suspicion standard.[59]

In order to test the reasonableness of the warrantless school search, the Court imported a modified, two-fold inquiry from the often contentious "stop and frisk" case of Terry v. Ohio.[60] Accordingly, the search must first be "'justified at its inception.'"[61] Second, the actual search must be "'reasonably

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50. *Id.* at 329.
51. *Id.* at 329-30.
52. *Id.* at 330.
53. *Id.*
54. Originally, the Court granted certiorari to answer the limited question of what the appropriate remedy for unlawful school searches should be in a juvenile court proceeding. *T.L.O.*, 469 U.S. at 332.
55. *Id.* The Court ordered reargument in order to resolve the struggle among state and federal courts on how to apply the Fourth Amendment in public schools. *Id.* at 333 (footnote 2).
56. *Id.* at 333.
57. *Id.* at 341.
58. Although the Court recognized that the Fourth Amendment almost always requires probable cause, Justice White noted that such a requirement is not "irreducible." *T.L.O.*, 469 U.S. at 340.
59. *Id.* at 341.
60. *See id.* (citing Terry V. Ohio, 392 U.S. 1, 20 (1968)).
61. *Id.* at 341-42. According to the *T.L.O.* Court, a search will be "justified at its inception" after reasonable grounds for suspecting that a student is violating the law or some other school policy are found to exist, *i.e.*, particularized suspicion of a violation. *Id.*

related in scope'" to the initial decision to search.[62] Applying this test, the Court held that the principal's search, at every stage, was "reasonable, under all the circumstances."[63] In the wake of the Acton decision, it has become apparent that the T.L.O. Court's warning that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal" has gone unheeded.[64]

## "Special Needs" Exceptions to Suspicion-Based Searches: "Cases Fraught with Danger"

In Skinner v. Railway Labor Execs. Assoc.,[65] the Court recognized a narrow class of cases which present "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[66] In Skinner, the Court upheld the suspicionless drug and alcohol testing of train operators in cases where spot tests were to be conducted immediately after a major railroad accident.[67]

In response to the documented suspicion[68] that substance abuse by railroad employees posed a serious threat[69] to safety on the rails, the Federal Railroad Administration ("FRA")

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62. *Id.* (quoting *Terry*, 392 U.S. at 20.). The *T.L.O.* Court cautioned that "[s]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342 (footnote omitted).

63. *T.L.O.*, 469 U.S. at 347-48.

64. *Id.* at 342 (footnote 8) (citing Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

65. 489 U.S. 602 (1989).

66. *Id.* at 620 (citing Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)).

67. *Id.*

68. The concern of the FRA was based upon independent studies and review of accident investigation reports. *Skinner*, 489 U.S. at 607. A 1979 study revealed that "an estimated one out of every eight railroad workers drank at least once while on duty. . . ." *Id.* at footnote 1 (quoting 48 Fed.Reg. 30724 (1983)). "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." *Id.* Moreover, 23% of the operating personnel were found to be "problem drinkers." *Id.* The review of accident investigation reports revealed that from 1972 to 1983, drug or alcohol abuse caused or contributed to the cause of at least 21 significant train accidents on the national railways. *Id.* These accidents resulted in 25 deaths, 61 non-fatal injuries, and an estimated property damage of $19 million. Another 17 fatalities to employees working on or around the rail rolling stock were also attributed to substance abuse. *Id.*

69. Solicited comments and reports by interested industry participants supported the FRA's conclusions. *Skinner*, 489 U.S. at 607-08. Some of the accidents resulted in the release of hazardous materials. *Id.* at 608. In one case in Louisiana, the hazardous

promulgated regulations[70] that required blood and urine tests of railroad employees who were involved in a "major train accident."[71] Significantly, the unmonitored testing was to be conducted by independent medical professionals at an outside medical facility.[72] Any refusal by an employee to provide a blood or urine sample resulted in a nine month suspension with the opportunity for a hearing to contest the suspension.[73]

Seeking an injunction against the FRA regulations, the Railway Labor Executives' Association brought suit in the United States District Court for the Northern District of California.[74] The District Court granted Secretary of Transportation Skinner's motion for summary judgment on the ground that the promotion of national railroad safety for the general public outweighed the bodily privacy interest of the railroad employees.[75] A divided Ninth Circuit Court of Appeals reversed concluding that particularized suspicion was an essential element to a reasonable search under the Fourth Amendment.[76] The Supreme Court granted certiorari to consider whether the regulations violated the Fourth Amendment.[77]

As a prelude to the Court's decision to reverse the Ninth Circuit, the Court first acknowledged that because "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment."[78] Notwithstanding the existence of this expectation of

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pollution that resulted from the accident led to the evacuation of an entire local community. *Id.*

70. 489 U.S. at 606. The Federal Railroad Safety Act of 1970 authorized the Secretary of Transportation to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." 45 U.S.C. § 431(a) (1970) (repealed 1994).

71. A "major train accident" was defined as any accident that involved "(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." *Skinner*, 489 U.S. at 609 (citing 49 C.F.R. § 219.201(a)(1) (1989)).

72. *Skinner*, 489 U.S. at 609-10. After the samples had been obtained, they were shipped to the FRA laboratory for analysis. *Id.* at 610.

73. *Id.* at 610-11.

74. *Id.* at 612.

75. *Id.*

76. *Id.* at 612-13. The court stated that such a requirement would impose "no insuperable burden on the government" and would confine the discovery of the tests to the current impairment. *Id.* at 613.

77. Skinner v. Railway Labor Executives' Assoc., 486 U.S. 1042 (1988).

78. *Skinner*, 489 U.S. at 617 (footnote and citations omitted). The Court's acknowl-

privacy under the Fourth Amendment, the Court was compelled by the extraordinarily hazardous circumstances to make a rare exception.[79] More specifically, the Court sought to protect society from future, large-scale disasters, the likes of which had already been demonstrated to have been the direct result of substance abuse by railroad operators.[80] In making this rare exception the Court took strides to qualify its holding by writing, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[81]

On the same day that the Court decided Skinner, the Court handed down their decision in Nat'l Treasury Employees Union v. Von Raab.[82] Similarly motivated, this time by grave concerns for national security, the majority validated a policy of suspicionless drug-testing of employees who sought promotions to positions that involved interdiction of illegal drugs or required them to carry firearms on border patrol.[83]

Asserting a violation of the Fourth Amendment, the National Treasury Employees Union filed suit in opposition to the United States Customs Service's ("Custom Service") suspicionless drug-testing program.[84] The District Court found a violation and enjoined the program. In vacating the injunction, a divided Fifth Circuit Court of Appeals found the searches to be reasonable in light of their minimally intrusive nature, their nondiscretionary implementation, and the compelling governmental interest of detecting drug use within this

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edgment of this privacy interest was in accord with the unanimous conclusions of the Federal Courts of Appeal. *Id.* at 617.

79. *Id.* at 620. The Ninth Circuit noted that although "[a]n idle locomotive, sitting in the roundhouse, is harmless[,] [i]t becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." Railway Labor Executives' Assoc. v. Skinner, 839 F.2d 575, 593 (1988).

80. *Skinner*, 489 U.S. at 620.

81. *Id.* at 624. The Court believed that an employee who had decided to participate in "an industry that [was] regulated pervasively to ensure safety" should not have been surprised by the administration of precautionary measures that had the effect of diminishing certain privacy interests. *Id.* at 626.

82. 489 U.S. 656 (1989).

83. *Id.*

84. *Id.* at 663.

unique class of employees.[85] The Supreme Court granted certiorari to determine whether the requirement of a urinalysis test from those employees of the United States government who sought such sensitive positions violated the Fourth Amendment.[86]

Applying the same logic used in Skinner, the Von Raab Court recognized that a narrow class of "special governmental needs, beyond the normal need for law enforcement" may justify an intrusion on the Fourth Amendment in the extreme case in which it is "impractical to require a warrant or some level of individualized suspicion. . . ."[87] It is particularly revealing that only after the Court observed that the Custom Service functions as our "[n]ation's first line of defense against one of the greatest problems affecting the health and welfare of our population," was the Court willing to sacrifice an employee's privacy interest.[88] The Court summarized its holding as follows: "In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable."[89] Indeed, inasmuch as common sense suggests that it would be unwise to invite the fox to guard the

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85. National Treasury Employees Union v. Von Raab, 816 F.2d 170 (1987).

86. *Von Raab*, 489 U.S. at 659.

87. 489 U.S. 656, 665-66 (1989). Only in certain limited circumstances has the government's special need to discover latent or hidden threats been compelling enough to justify a subordination of the normal requirements of the Fourth Amendment. *Cf. Camara*, 387 U.S. at 535-36 (noting that the typical probable cause standard may be unhelpful in situations where the government acts in advance to prevent the development of hazardous conditions); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (dropping requirement of individualized suspicion while conducting routine border stops of vehicles on major highways at Mexican border to search the vehicles for illegal aliens because of its impracticability). The *VonRaab* Court later added that the detection of drug impairment of customs officials may be an especially difficult task since the acts of these employees cannot be scrutinized on a daily basis as compared to the routinely observable conduct of employees who work in more traditional environments. 489 U.S. at 674.

88. *Von Raab*, 489 U.S. at 668. Because of the absolute need for national self-protection, travelers may be halted at the entrance to our country. *Id.* at 669 (citing *Carroll*, 267 U.S at 154).

89. *Id.* at 674. Furthermore, the Court was entirely unwilling to subject the public to the potentially fatal use of deadly force by a government employee whose judgment might be impaired by drugs or alcohol. *Id.* at 671.

hen house, the druguser should not be enlisted to intercept drugs at the border.

Interestingly, Justice Scalia, the author of the majority opinion in Acton, wrote a separate dissenting opinion in Von Raab.[90] Justice Scalia refused to join the majority in Von Raab because "neither frequency of [drug] use nor connection of harm [was] demonstrated or even likely."[91] What is even more intriguing is that Justice Scalia himself stressed the fact that until Skinner and VonRaab, the Court had, in its entire history, only upheld a suspicionless bodily search with respect to dangerous prison inmates.[92] That Justice Scalia could react with such disdain to the Court's decision in Von Raab and then author the Acton opinion is particularly ironic. Indeed, his earlier willingness to exalt the Fourth Amendment by severely restricting suspicionless searches is at serious odds with his expansive, ennobled opinion in Acton.

### A Judicially Perverse Marriage of Precedent

Writing for a 6-3 majority in Acton, Justice Scalia approved the "reasonableness" of a suspicionless search for drug use among public school athletes through, arguably coerced,[93] random urinalysis testing. The Court began its legal analysis by stating broadly that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"[94] Such a determination will normally be made by balancing the intrusion on the individual's Fourth Amendment rights against the promotion of the legitimate governmental interest.[95]

Next, Justice Scalia fused the Court's earlier school search

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

91. *Id.* at 681.

92. *Id.* at 680 (citing Bell v. Wolfish, 441 U.S. 520, 558-60, (1979)).

93. At oral argument in front of the Supreme Court of the United States, the involuntary nature of the District's consent form was put into question by one of the Justices. Vernonia Sch. Dist. 47J v. Acton, No. 94-590, 1995 U.S.Oral.Arg. WL 353412, at *10-12 (U.S. June 26, 1995). Responding to the Justice's conclusion that "[t]he consent form in this case was—well, would have been coerced," Richard H. Seamon on behalf of the United States, as amicus curiae, supporting the District, conceded that "[t]here is at least a plausible argument to the extent that you're denying a student a benefit the consent is coerced[.]" *Id.* at 27. Although the coercive nature of the consent form was not the subject of discussion in the Court's final decision, it should be noted that while valid consent may be a basis for a lawful search, coercive tactics may render a search per se unreasonable. *See id.*

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

95. *Id.* According to Justice Scalia, this type of review will apply in cases in which

holding in T.L.O. with the Court's limited line of "special needs" cases.[96] By integrating extractions from each of these contextually distinct holdings, the Justice introduced an amalgamated creation which extended each of these exceptional cases well beyond their solitary scope. As already mentioned, the Court in T.L.O did not mean to drop the requirement of individualized suspicion. The Court simply relaxed the manner in which a student, who had already been suspected of acting unlawfully or in violation of a school rule, may have her belongings searched. As for the "special needs" cases, the individualized suspicion requirement was only subordinated because of its complete impracticability and because of the potentially calamitous effects that had been proven to be likely in the absence of any affirmative control.

In Acton, the Court first examined the nature of the intruded upon privacy interest.[97] After documenting instances in which the Courts have recognized the authority of a state to exercise a greater degree of supervision and control over children than adults while the state is acting in its role of schoolmaster,[98] the Court went on to further restrict the already diminished privacy expectations of students, specifically in those instances in which the student participates in athletics.[99]

The Justice suggested that submission to physical examinations, vaccinations, and other medical procedures at school is proof that students have a diminished expectation of privacy.[100] Bootstrapping on this argument, the Justice added that since "[s]chool sports are not for the bashful[,]" student athletes should expect even fewer privacy rights.[101] By Justice Scalia's standards, the mere fact that children share a locker

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no clear practice for determining constitutionality existed at the time the constitutional provision was enacted. *Id.*

96. *Id.* at 2391.

97. *Id.*

98. *Acton*, 115 S.Ct. at 2392. The Court cited Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) for the proposition that "school authorities ac[t] in loco parentis[.]" And, although the Court assured that children do not "'shed their constitutional rights . . . at the schoolhouse gate,'" *Id.* at 2393 (citing Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 506 (1969)), the Court was quick to qualify this guarantee by adding that "the nature of those rights is what is appropriate for children in school." *Id.* (citing generally Goss v. Lopez, 419 U.S. 565, 581-82 (1975)).

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

100. *Id.* (citing *T.L.O.*, 469 U.S. at 348).

101. *Id.* at 2393.

room or "'go out for the team'" is grounds to force them to unabashedly urinate on command, and as a consequence, divulge otherwise personal medical information to strange officials.

The Court then turned its attention to the character of the intrusion.[102] Focusing on the manner in which the sample is monitored as it is produced, the Court believed that any invasion upon privacy was merely "negligible."[103] Similarly, the Court opined that the information disclosed concerning the state of the student athlete's body and the materials that may have been ingested were kept sufficiently confidential.[104] However, unlike the testing programs in Skinner and Von Raab which did not require the advanced disclosure of any medical information, the District's Policy required every student athlete to identify, in advance, any medication currently being taken.[105] Significantly, a failure to abide by this mandatory predisclosure requirement brought with it the risk of punishment in the case of a falsely positive test.[106]

Without any logical or legal support, Justice Scalia made short shrift of the well established requirement that the impracticability of a suspicion based governmental policy must be demonstrated before an alternative, suspicionless search policy may be considered.[107] While it is widely understood that once the government has demonstrated the impracticability of any suspicion based search, the government is then no longer obligated to implement the least intrusive suspicionless alternative; it is also true that the government is not automatically relieved of its initial duty to show "impracticability[,]" as suggested by Justice Scalia.[108] Indeed, it was the very existence of the "impracticability" of suspicion based searches in crises be-

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102. *Id.*

103. *Acton*, 115 S.Ct. at 2393. Despite the Court's recognition that the collection of samples for urinalysis intruded upon "'an excretory function traditionally shielded by great privacy[,]'" *Id.* (quoting *Skinner*, 489 U.S. at 626), the majority found the conditions to be "nearly identical to those found in public restrooms," and thus, completely unobtrusive. *Id.* Under the District's Policy, boys were forced to produce samples at a urinal along the wall while being observed from behind. *Id.* The girls were ordered to produce samples in an enclosed stall while a monitor stood at the door listening. *Id.*

104. *Acton*, 115 S.Ct. at 2393. The tests were screened for drugs and were disclosed to a limited group of school personnel. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2396.

108. *Id.*

yond normal law enforcement that gave rise to the Court's decision to carve out the narrow "special needs" exception in the first place.[109] Therefore, it is simply disingenuos to argue that the "impracticability" of testing during these crises has never been an absolute prerequisite to the application of the "special needs" exception.[110] Impracticability has always been the sine qua non to the use of the exception.

As if to soften the blow, Justice Scalia momentarily backpedaled to remind that the approval of the District's Policy only affects the narrowly defined class of student athletes.[111] And, Justice Scalia contended that the targeting of these athletes was justified because of the potential for immediate physical harm to the impaired athlete or to other participants.[112] Incredibly, the Justice seems to equate the magnitude of a single injury on the playing field with that of a major train accident or a breach of national security.[113]

Although Justice Scalia proudly highlighted the fact that the Policy only applied to the narrow class of abusing student athletes, the Justice did not hesitate to remark that "the most significant element in this case . . . is that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[114] It is of little doubt that these final remarks foreshadow the future strained application and extension of case law into other arenas.[115] Indeed, it would not be at all surprising if Justice Scalia's concluding thoughts appeared as the introductory remarks of a future case that endorses the mass, suspicionless drug testing of all public school students.

## BIG-BROTHER-*ACTON*

While preventing drug use is indeed a laudable goal, "[w]e have found that we must live with a certain amount of discomfort, even danger, if we are to maintain constitutional protec-

109. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).
110. *See, e.g., Von Raab*, 489 U.S. at 665-66.
111. *Acton*, 115 S.Ct. at 2395.
112. *Id.* The Justice characterized the risk as "particularly high." *Id.*
113. *See id.*
114. *Acton*, 115 S.Ct. at 2396.
115. It is quite possible that Justice Scalia's open-ended conclusion prompted Justice Ginsburg to write a separate, albeit brief, concurrence which expressly acknowledged the limited scope of the Court's decision. *See id.* at 2397 (Ginsburg, J., concurring).

tions."[116] And, while paternalistic action may in certain circumstances serve to advance societal interests, "Big Brother" dominance incites rebellion and resentment—an Orwellian negative utopia.[117] As discussed at length by Justice O'Connor in her thoughtful dissent, suspicionless blanket searches, regardless of their evenhanded nature, have been deemed to be per se unreasonable and historically inimical to the basic protections assured by the Fourth Amendment.[118] In this regard, it is instructive that even in the most expansive school search ruling of our time, the Court tolerated the search of a student's bag only after she had been individually suspected of a violation.[119]

Notwithstanding the purposefully limited scope of the holding in T.L.O., the Acton majority unfortunately saw fit to utilize this earlier decision as a blunt tool with which to bash a student's constitutional right to be free from suspicionless, invasive bodily searches. Consequently, millions of law abiding student athletes across our country may now be shamed by highly intrusive bodily searches.[120]

Although the majority chose not to regard the process by which adolescent and adult students are forced to produce urine on command while being observed from the rear as an invasion of privacy, most ordinary people would disagree with its propriety. Similarly, judged by a legal standard, many scholars believe that the majority in Acton nonchalantly understated the privacy interest at stake while zealously overstating the governmental interest.[121] Justice Scalia offered, at best, a shallow justification for balancing away student ath-

116. The Ninth Circuit emphasized the importance of preserving our constitutional protections. *Acton*, 23 F.3d at 1527.

117. "In George Orwell's famous novel, 1984, he describes a 'negative utopia' in which the citizenry have lost all privacy. The government—'Big Brother'—watches everyone through 'telescreens' mounted on the walls. The screens are everywhere, including the water closet: 'There was no place where you could be more certain that the telescreens were watched continuously.'" U.S. Resp. Br. at 30 n.20 (quoting Eric Blair a.k.a. George Orwell, 1984 89 (New American Library 1981)).

118. *Acton*, 115 S.Ct. at 2398-402 (O'Connor, J., dissenting).

119. *T.L.O.* 469 U.S. at 328.

120. *See Acton*, 115 S.Ct. at 2397 (O'Connor, J., dissenting).

121. *See, e.g.*, Donald Crowley, *Student Athletes and Drug Testing*, 6 MARQ. SPORTS L.J. 95 (1995) (concluding that the widespread application of suspicionless drug testing policies sacrifices social values) [hereinafter Crowley]. For an investigative look at the realities of drug use by America's youth, *see* Eugene C. Bjorklun, Commentary, *Drug Testing High School Athletes and the Fourth Amendment*, 83 ED. LAW REP. 913 (1993).

letes' privacy rights. Simply put, the Justice believed that since sports are not for the "bashful[,]" athletes should not expect much privacy.[122] However, even aggressive athletes are aware of and sensitive to the universal right to be left alone while going to the bathroom. Few, if any, self respecting citizens react favorably to a command to urinate like a dog that is walked only once a day. In sad contrast to the dog's master, who politely looks away while the dog performs his expected duty, the District monitors watch the young boys from behind as they are urged to produce a urine sample.

The Policy at issue in Acton grandly overstated any governmental interest by mischaracterizing the District's interest as one beyond normal governmental control, and as a result erroneously qualified the case as a "special needs" exception. As discussed, grave and imminent threats of otherwise uncontrollable disasters gave rise to the judicially-created, narrow exception to the absolute right to be free from suspicionless searches and seizures of the body. Shockingly, the Court analyzed the local school Policy of the small logging community of Vernonia, Oregon as if it belonged in this class. Clearly, and in stark contrast to those rare "special needs" exceptions, the Policy in Acton was not instituted to guard against subversive national security breaches, nor was it designed to preemptively protect the public at large from proven disaster on the Nation's railroads.

Apparently, one of the bedrock principles upon which our country was formed, namely that all are presumed to be innocent until proven guilty, is little more than an outdated, romantic notion to the present majority.[123] Today, we have sent a message to our schoolchildren that they are guilty until they prove their innocence. Burdening America's young athletes with such a presumption of guilt is, at the very least, a poor mechanism by which to maintain order or bring about positive change.[124]

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122. Acton, 115 S.Ct. at 2392-93.

123. *See* Rhett Traband, *The Acton Case: The Supreme Court's Gradual Sacrifice of Privacy Rights On The Altar Of The War On Drugs*, 100 DICK. L. REV. 1, 27 (1995) [hereinafter Traband]. "[I]n the post-Acton world, everyone is guilty, and one must prove one's innocence." *Id.*

124. "'Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpin-

## POTENTIAL POST *ACTON* ABUSES

Not only does the Acton decision misapply precedent, skew history, and eviscerate the fundamental privacy rights of student athletes, the expansive ruling forecasts further governmental intrusion.[125] That the Court could marry T.L.O. with Skinner and Von Raab to beget Acton strongly suggests that the Court may be similarly inclined to twist precedent as a way to justify future, predetermined policy-based decisions.[126] Certainly, at least at the public school level, the door has swung open for the future abuse of magisterial discretion. Just how the Court's amorphous balancing test will be applied in the future will depend largely upon the makeup of a constantly shifting majority.[127]

Prior to the Court's decision in Acton, the constitutionality of random drug testing of college athletes had already been at issue.[128] Perhaps sensing that a Supreme Court decision at the college level which preceded a high school decision would have been unpopularly premature, the Court has refused to grant certiorari to such cases.[129] Or perhaps, by hearing Acton

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ning our constitutional freedoms.'" U.S. Resp. Br. at 18 (citing Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (dissent from denial of certiorari).

125. The Court has expressed a "willingness to afford the state increasingly broad powers at the expense of both doctrinal coherence and governmental responsibility." Comment, *Drug Testing—Student Athletes*, 109 HARV. L. REV. 220 (1995).

126. *See Acton*, 115 S.Ct. at 2397-98 (O'Connor J., dissenting). "[I]t is not open to judges or government officials to decide on policy grounds . . ." that which most of our constitutional history makes clear. *Id.* at 2398.

127. The Supreme Court has just granted *certiorari* to rule on the constitutionality of a Georgia law that requires candidates for a wide array of state offices to undergo drug testing as a prerequisite to appearing on an election ballot. Linda Greenhouse, *Justices Agree to Hear Challenge to Georgia Law Requiring Drug Tests for Candidates*, N.Y. TIMES, Oct. 2, 1996, at A14.

128. *Compare* Hill v. Nat'l Collegiate Athletic Assoc., 865 P.2d 633 (Cal. 1994) (holding that NCAA's drug testing program did not violate student athlete's privacy rights) *with* University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993)(holding that in the absence of uncoereced consent, the state university's drug testing policy violated the Fourth Amendment). For extensive analysis of the viability of *Acton* at the college level, *see* Crowley, supra note 121. For a discussion on state constitutional privacy rights and the castrating effect of the *Hill* holding on these rights, *see* Stephen M. Kennedy, Note, *Emasculating A State's Constitutional Right To Privacy: The California Supreme Court's Decision In* Hill v. NCAA, 68 TEMP. L. REV. 1497 (1995). For a brief analysis of the court's holding in *Derdeyn*, *see* Shannon B. Blair, Case Comment, *Constitutional Law—Testing the Fourth Amendment: Random, Suspicionless Urinalysis Drug-Testing of Student-Athletes Is Unconstitutional Search*—University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993), 28 SUFFOLK L. REV. 217 (1994).

129. *See, e.g.*, University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993).

first, the Court has purposefully created an additional judicial foothold upon which the Court may rely to rule on a similar drug testing policy at the college level. Assuming arguendo, that the NCAA will again be found to be a state actor, the application of Acton to college athletics may not be such a stretch.[130] In fact, considering the Court's imaginative use of precedent and its recent proactive tendencies, such a decision would be likely to become imminent. This is particularly so because of the escalating concern over the perceived drug problem in America, especially among the Nation's youth.[131]

If the concern over drug abuse is indeed genuine, and if the problem is reaching epidemic proportions on a national scale, why shouldn't college athletes also be within the Court's ultimate control? After all, these young adults are those very same students whose problems as younger students in high school may have gone undetected. Should their collegiate status make such a difference? A strict application of Acton suggests that it may not. Indeed, it is clear that the adult high school students, regardless of age, voting or draft status, were also subject to the same rigors of the District's Policy that controlled the younger, presumably more impressionable, student body in Acton.[132]

As the government's role in schools continues to approach an affirmative duty,[133] should the government's responsibility to those college athletes whose problems were missed as high school athletes grow concomitantly and proportionately? Per-

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130. For a discussion on the NCAA as a state actor, *see* Crowley.

131. *See* Traband, supra note 117, at 1. "Random drug testing is currently viewed as a key element of the 'war on drugs' because of its reputed investigative results and deterrent effect." *Id.* However, contrary to the perception that drug use is rampant, especially among college athletes, drug testing by the NCAA has revealed virtually no drug use among its member athletes. *Id.* at 20 (citing National Collegiate Athletic Ass'n, 1986-87 Drug Testing Program (1986)). From January 1992 to June 1992, only one-half of one percent of all tested NCAA athletes failed drug tests. *Id.* (citing NCAA NEWS, Sept. 2, 1992, at 6). It is inconclusive as to whether this result means that the policy works or whether no real drug problem exists.

132. Although the Court described the state's power with respect to schoolchildren as "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults[,]" the Court overlooked the fact that a small portion of senior high school students are emancipated adults. *Id.* at 2392 (citation omitted).

133. For a discussion examining the implications of expanding the state's role in schools, *see* Comment, *Drug Testing—Student Athletes*, 109 HARV. L. REV. 220, 227-28 (1995). "[B]y extending the state's control over students, it edges toward a result whereby the state exercises so much control as to give rise to a constitutional duty to protect those students." *Id.*

haps the exponential reasoning that enabled the Court to make the quantum leap from T.L.O. to Acton will be similarly used to take the next step from Acton to a college drug testing case.

## POST *ACTON* PARADOX

That the decision in Acton has already had a resounding effect on schools around the country is undeniable. The decision has sparked nationwide community debates[134] regarding the implementation of random drug testing in schools.[135] Ironically, although Acton would not have received a judicial imprimatur had the District's Policy been applied to the entire student body, local communities now seem to feel that it is simply unfair to test only student athletes.[136] It seems as though the Court has created what might be referred to as a slippery-slope paradox—a policy that is uniquely justifiable by the Court on legal grounds because the policy is limited to targeting only athletes, is plainly unfair in the eyes of the public for that very same reason. As the groundswell grows, the next judicial solution may be to craft an opinion that validates the testing of all students.

Although the viability of Acton has yet to be tested in state courts where students may find greater protection under state constitutions,[137] the "qualified" ruling in Acton has not only been favorably received by many school officials, but it has also been liberally interpreted. Already, Acton has been further ex-

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134. While some support the initiative, others believe that "this kind of program assumes the worst about the student athletes. Instead of creating the atmosphere of camaraderie and team spirit, it creates an atmosphere of suspicion and mistrust." Pamela Martineau, *Dixon High Athletes Start Mandatory Tests For Drugs*, THE SACRAMENTO BEE, Aug. 16, 1996, at A1.

135. Terry Hutchens, *Greenwood Will Begin Random Drug Testing of Student-Athletes*, THE INDIANAPOLIS STAR, Sept. 26, 1996, at E8 [hereinafter Hutchens]. "The mere mention of drug testing by one's school or employer stirs a bevy of emotions. Few are crazy about it, some accept it, and many grumble, often claiming it's a violation of their constitutional rights." *Id.*

136. Many student athletes feel that such disparate treatment and singling-out of athletes is unfair. *See* Daniel de Vise, *Oceanside schools' drug-testing plans draw mixed reaction*, SAN DIEGO UNION-TRIBUNE, July 20, 1996, at B3:7 [hereinafter de Vise]. Such policies "tweak the community's notions of privacy, dignity and fairness." *Id.*; *see also Drug Tests In Dixon*, THE SACRAMENTO BEE, June 3, 1996, at B6.

137. Peter J. Sampson, *District to Check Athletes for Drugs a Few Random Tests Planned Each Week*, THE RECORD, NORTHERN NEW JERSEY, June 22, 1996, at A1. Indeed, in New Jersey and in other states, "the door is still open for a legal challenge. . . ." *Id.*

tended to include the suspicionless drug testing of non-athletic groups. In fact, many policies now include the suspicionless testing of any student involved in "extracurricular activities,"[138] including, for example, members of the "debate team."[139] Still other school districts propose testing any student who participates in a leadership role.[140] Others target students who merely drive to school.[141] As a result of Acton, random drug testing policies of entire student bodies have now become imminent and are presently under serious consideration.[142] And, even in those districts where testing is still limited to athletes, many school officials expect the programs to become school-wide.[143]

Moreover, proactive policies have been adopted by school districts without any demonstration of an identifiable drug problem of the kind that was alleged to have existed and served as the justification for the Policy in Acton.[144] In addition, at least one policy has been adopted that goes beyond testing for illegal drugs to include testing for the mere pres-

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138. Haya El Nasser, *More schools test kids for drugs*, USA TODAY, Sept. 5, 1996, at 1A [hereinafter Nasser] (Texas school will test students involved in "every activity, from the French Club to the National Honor Society[,]" thereby subjecting approximately 70% of the student body to mandatory drug testing).

139. Gary Rummler, *Most Other Districts Don't See A Need West Allis To Consider Student Drug Testing*, THE MILWAUKEE JOURNAL SENTINEL, Aug. 3, 1996, at 1 (considering mandatory testing for all students involved in "after-school activities").

140. Jon Glass, *Random School Drug Tests Eyed A Board Member Would Like To Include Class Officers And All Other Students Who Represent The School System In Public*, THE VIRGINIAN-PILOT AND THE LEDGER STAR, Jan. 24, 1996, at B1.

141. USA TODAY, Feb. 19, 1996, at 8A.

142. Barbara O'Brien, *Trustee Asks Zero Tolerance On Drug Use*, BUFFALO NEWS, Mar. 19, 1996, at B4.

143. Hutchens, supra note 135, at E8; *See also* Reinbrecht, *School Panel Opposes Idea For Drug Testing*, READING EAGLE, July 6, 1996, at B2 (high school principal wants to test the entire student body but remains uncertain about the legality of such a test).

144. Carmen J. Lee, *Student Athletes Face Drug Tests Belle Vernon Area's 1st To Check High Schoolers*, PITTSBURGH POST-GAZETTE, July 26, 1996, at A1. Despite the determination by school officials that Pittsburgh's Belle Vernon High School does not have a major drug problem, the board has still decided to enact a mandatory drug testing policy of all athletes and cheerleaders. *Id.*; *see also* John Gaines, *Coach Leads Bid To Tackle Drug Threat*, THE SAN DIEGO UNION-TRIBUNE, May 27, 1996, at B1 (supporting drug testing of athletes although no problem traceable to athletes exists); *see also* Stacy Finz, *Oceanside Student Athletes Face Random Drug Tests*, THE SAN DIEGO UNION-TRIBUNE, at B1 (instituting policy of drug testing athletes without any evidence of a significant problem among players); *but see Drug Testing Proposal Dies*, THE COURIER JOURNAL, July 27, 1996, at 1B (refusing to approve of policy singling out student-athletes).

ence of nicotine.[145]

Moreover, the prohibitive cost of applying a random drug testing program at the public school level is economically "impracticable" and fiscally irresponsible.[146] Indeed, many school districts cannot find funds to purchase books much less to sponsor a taxing drug screening program.[147] Adding insult to injury, one school has proposed financing the cost of its intrusive policy by charging the mandated athletes $15.00 each as an additional price for being tested.[148]

## CONCLUSION

If nothing else, the Court has added to its judicially active arsenal by unequivocally determining that all student athletes have fewer Fourth Amendment privacy rights than other ordinary students. Furthermore, the Court has endorsed the position that, in school settings, the control of drug use based upon individualized suspicion is, without explanation, impracticable. Moreover, the Court has stated that the governmental interest need not be compelling; it must simply be sufficiently important.[149]

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145. Dave Long, *High School Athletics: Ohio District OKs Drug Testing * Olentangy Becomes The First District In Ohio To Have A Comprehensive Drug Test*, DAYTON DAILY NEWS, June 28, 1996, at 4D [hereinafter Long].

146. David Hensel, *No Drug Testing Today And, Probably Not Tomorrow. Palm Beach County School Board Lacks The Funds To Test Athletes For Drugs*, SUN-SENTINEL FT LAUDERDALE, Feb. 21, 1996, at 21. A committee for the Hillsborough County public schools in Florida determined that it would cost $567,000 to implement a drug testing program, exclusive of any funds for post discovery treatment. B.C. Manion, *Drug Testing Unlikely for Athletes*, THE TAMPA TRIBUNE, Jan. 5, 1996, at 1; Nasser, supra note 138, at 1A. One school district in Columbus, Ohio expects to spend almost $50,000 per year on the testing alone—the cost of one full-time teacher earning an average salary. *Id.* Additional costs of approximately $100,000 per year are anticipated for post discovery treatment programs. *Id.* John Heeney, the assistant to the director of the National Federation of State High School Associations, reports that fewer than 5% of the country's schools have adopted drug testing programs "because most schools simply can't afford it." USA TODAY, Aug. 8, 1996, at 3C. Per test costs range from $20-$30 for marijuana, cocaine, and other illicit drugs while the testing cost for other screened substances, such as steroids, are over $100 per test. De Vise, supra note 136, at B1: 1, 2, 3, 4, 5; B3: 7. Historically, most of the area schools in the Miami Valley of Ohio have had difficulty passing operating levies to finance a drug testing program on any level. Long, supra note 145, at 4D. Other schools have already been forced to stop random drug testing programs because of the expensive costs. Jennifer Erdmann, *School's Athletes May Face Drug Tests*, THE ORANGE COUNTY REGISTER, May 30, 1996, at B2.

147. Long, supra note 145, at 4D.

148. *McAlester Eyes Drug Test*, TULSA WORLD, July 12, 1996, at B2.

149. *Acton*, 115 S.Ct. at 2394-95.

It is of little doubt that Acton has stripped student athletes of their Fourth Amendment Constitutional rights upon entry at the schoolhouse gate. Unfortunately today, the redressing of these constitutional rights can only occur after the final bell has sounded, the schoolhouse doors have been securely closed, and our nation's schoolchildren have begun their naked retreat home.

*Christian Edward Samay*