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NOTE

IS RANDOM SUSPICIONLESS DRUG TESTING IN THE SCHOOLS REASONABLE? AN ANALYSIS OF *VERNONIA SCHOOL DISTRICT 47J V. ACTON*¹

INTRODUCTION

In the fall of 1991, twelve-year old James Acton, a seventh-grader at Washington Grade School in Vernonia, Oregon, tried out for and was chosen to be a member of the football team. At the first practice, he and other team members were given consent forms to be signed by the students and their parents permitting school officials to test the athletes' urine for the presence of illicit drugs.² Because James and his parents chose not to sign the form, James was suspended from interscholastic athletics for the season, despite the undisputed fact that he was not using drugs. Additionally, there was no reason to suspect he ever had used drugs.³ The Actons filed an action in federal court⁴ seeking declaratory and injunctive relief. They claimed that the drug testing policy, which required mandatory random urinalysis for participation in interscholastic athletics, violated James' constitutionally guaranteed right to be free from unreasonable government searches.⁵ The trial court upheld the policy, and the Actons appealed. The United States Court of Appeals for the Ninth Circuit reversed, finding that the policy was unconstitutional. The United States Supreme Court granted *certiorari*⁶ and overturned the decision of the court of appeals.⁷

Several cases decided prior to *Acton* have examined whether random drug testing of student athletes which is not based on suspicion that a particular individual has used drugs, and found such testing to be unconstitutional. The decisions have been mixed, with some courts

1. 115 S. Ct. 2386 (1995).

2. *Acton v. Vernonia Sch. Dist.*, 23 F.3d 1514, 1517 (9th Cir. 1994).

3. *Id.*

4. *Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354 (D. Or. 1992).

5. *Id.*

6. *Acton*, 23 F.3d at 1527.

7. *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386.

upholding random suspicionless drug testing⁸ and other courts finding that such testing is unconstitutional.⁹ Although the courts are in agreement that chemical analysis of urine constitutes a search,¹⁰ the debate centers around the circumstances under which the search can be considered reasonable — in essence, where the line should be drawn between reasonable and unreasonable searches.¹¹

This note will consider random suspicionless drug testing and the decisions reached in *Acton* by the District Court of Oregon, the Ninth Circuit Court of Appeals, and the United States Supreme Court. It will examine prior decisions on this issue where distinctions have been made between reasonable and unreasonable searches, and will consider the effects of the *Acton* decision on the future of drug testing and student athletic programs.

THE CASE

Vernonia, Oregon is a small, somewhat remote community of approximately 3,000 people where logging is the predominant industry. Because of its size and relative isolation, opportunities for entertainment are fairly limited, and local athletic competitions play a dominant role in the social fabric of the community.¹² Approximately 75%

8. See, e.g., *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1989) (finding that drug testing of student athletes was reasonable because the school had a legitimate interest in ensuring its athletes were drug-free, and the privacy interest of the students was diminished both by the communal nature of locker rooms and by the annual physical examinations which include urinalysis); *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994) (holding that a student's already diminished expectation of privacy was outweighed by the NCAA's legitimate interest in ensuring fair and vigorous competition and protecting the health and safety of student athletes); *O'Halloran v. Univ. of Wash.*, 679 F. Supp. 997 (W.D. Wash.1988), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988) (upholding the NCAA's random drug testing as a reasonable search because reducing drug use among athletes outweighs the invasion of the individual's right to privacy).

9. See, e.g., *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989) (holding that a program, which required drug testing of all students who participated in any extracurricular activity, was unconstitutional because of the large number of students who would be tested, the minimal evidence of a drug problem among students, and the magnitude of the privacy interest invaded); *University of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (holding that the university's random suspicionless urine testing program was invalid in the absence of voluntary consent).

10. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.").

11. See *United States v. Sharpe*, 470 U.S. 675, 682 (1985) ("The Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."). *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) ("What is reasonable . . . depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself").

12. *Acton*, 796 F. Supp. at 1356.

of elementary school students and 60-65% of high school students participate in district sponsored athletic programs.¹³

Vernonia School District runs two schools, Washington Grade School and Vernonia High School. Prior to 1985, teachers experienced few discipline problems and were not aware of much drug and alcohol use by students.¹⁴ Between 1985 and 1989 both teachers and members of the administration perceived an increase in discipline problems and an apparent simultaneous increase in student drug use. Athletic coaches noticed an increase in the number and severity of injuries which they attributed to drug use.¹⁵ The teachers began to feel concerned and helpless when students increasingly expressed interest in using drugs.¹⁶ When administrators investigated, they concluded that the advocates of this new trend were also the leading student athletes, and they began to fear that the very center of activity for both the school and the community was threatened.¹⁷

School officials attempted to deter drug use through educational programs, but concluded that they were achieving little, if any, positive result.¹⁸ Soon they perceived that disciplinary problems had reached "epidemic proportions,"¹⁹ and in 1988, they began to consider drug testing. Officials investigated similar programs used in other parts of the nation. They obtained legal counsel and held parent meetings. After submitting to the School Board a plan which had been unanimously approved at one of the parent meetings, and which both administrators and superintendent had also approved, school officials began to implement a drug testing program (the "Policy").²⁰

As a prerequisite for participation in interscholastic athletics, the Policy requires students (and their parents) to sign a form authorizing the District to conduct tests on urine specimens provided by the student athletes. Testing is done at the beginning of the season in which

13. *Id.*

14. *Acton*, 23 F.3d at 1516.

15. *Id.* At a wrestling match, an athlete was injured when he failed to execute a well-drilled basic safety maneuver. When the coach went to check on him the next day, the student's motel room (which he was sharing with three other students) smelled of marijuana. Respondent's Brief, 1995 WL 89313, at *7.

16. *Acton*, 796 F. Supp. at 1356. Students bragged about using drugs. One veteran teacher who had never experienced disciplinary problems before was ready to resign because of outbursts of misbehavior, profane language in class, rude and obscene statements toward other students, and a flagrant attitude towards discipline.

17. *Id.* at 1357.

18. *Id.*

19. *Id.*

20. *Id.* at 1358.

the athlete will compete, and repeated randomly throughout the season.²¹ The production of the specimen is fairly closely monitored.²²

When James Acton joined the football team in 1991, he willingly submitted to the prerequisite physical exam, which included producing a urine specimen. However, after he discussed the consent form for drug testing with his parents, they decided not to sign it, objecting to the Policy because it mandated urinalysis in the absence of any indication that James had ever used drugs or alcohol. They took their concerns to the principal and the superintendent, both of whom confirmed that James could not participate in district-sponsored sports without a signed consent form.²³ James' parents brought an action in Federal District Court claiming that the Policy violated their son's rights under the Fourth Amendment of the United States Constitution²⁴ and the Oregon Constitution.²⁵ The trial court upheld the Policy, and the Actons appealed.

Before discussing the substantive issues, the Ninth Circuit Court of Appeals addressed the issue of whether the case should be decided based on the United States Constitution or the Oregon Constitution. The court noted that it had previously held that when the state and federal constitutional provisions are similar or "coextensive," a claim can be decided based on the federal constitution which will also decide the state constitutional issue.²⁶ If they are not coextensive, and the state constitution gives greater protection, the case must be decided based on the state constitution. In *Acton*, the Oregon court held that the language of the two constitutions is nearly identical, and

21. *Acton*, 23 F.3d at 1516. Names are placed in a "pool" and each week approximately 10% of the student-athletes' names are drawn by a student supervised by two adults. *Acton*, 796 F. Supp. at 1358. Students can be asked to produce specimens before school, after school, between classes, or they can be pulled out of class.

22. *Acton*, 23 F.3d at 1517. Boys go to the boy's locker room and, while standing at a urinal, produce a specimen in a cup. A male monitor accompanies them and waits twelve to fifteen feet away. Although the monitor "do[es] not *always* watch," (emphasis added) they do listen "for the normal sounds of urination." Girls go to the office of the director of girls' athletics, and are allowed to produce a specimen in an enclosed stall. After the urine sample has been produced, the monitor checks it for temperature and indications of tampering, and then pours it into a vial which is sent to a lab for actual testing. *Id.*

23. *Acton*, 796 F. Supp. at 1359.

24. "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.

25. "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." OR. CONST. art I § 9.

26. *Acton*, 23 F.3d at 1518.

noted that the Oregon courts had previously ruled that any differences are inconsequential.²⁷

Relying on both Oregon and federal constitutional and case law, the appeals court found that the random suspicionless drug testing policy of the Vernonia School District was unconstitutional because it permitted an unreasonable search that violated privacy rights guaranteed by the Fourth Amendment of the United States Constitution and similar provisions of the Oregon Constitution.²⁸ In making this determination, the court applied a three-part analysis. It considered first whether there was a "search" in the constitutional sense; second, whether the executive official had the authority to perform the search;²⁹ and finally, whether the search was reasonable.³⁰ It concluded that urinalysis does constitute a search under the Oregon Constitution.³¹ Because the second part of the analysis was not challenged on appeal, the court adopted the district court's finding that the Policy was "properly authorized by a politically accountable body" since it was adopted by a vote of the School Board.³²

To determine whether the search was reasonable, the Ninth Circuit relied on a balancing test applied in *Delaware v. Prouse*.³³ The Court in *Prouse* stated that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests."³⁴

In balancing the Vernonia School District's legitimate interest in a drug-free student body against an individual's right to be free from unreasonable searches, the court of appeals found that the balance of interests weighed more heavily in favor of protecting constitutional rights. It held that suspicionless drug testing was invasive, and that while conditions in a locker room reduce expectations of privacy somewhat, this is still a "far cry from having an authority figure watch,

27. *Id.*

28. *Id.* at 1527.

29. *Id.*, at 1520. See also Robert E. Shepherd, Jr., *Juvenile Justice*, 5 CRIM. JUST. 27 (1990) for a discussion of the development of and concerns surrounding searches performed on juveniles in civil and criminal settings.

30. *Acton*, 23 F. Supp. at 1519.

31. *Id.*

32. *Id.* at 1521.

33. 440 U.S. 648 (1979).

34. *Id.* at 654. The Court in *Acton* wrote that four considerations, no one of which is determinative, could be distilled from *Prouse*: "(1) the importance of the government interests; (2) the degree of physical and psychological intrusion on the citizen's rights; (3) the amount of discretion the procedure vests in individual officials; and (4) the efficiency of the procedure - that is how well it contributes to the reaching of its purported goals and how necessary it is." *Acton*, 23 F.3d at 1522.

listen to, and gather the results of one's urination."³⁵ It emphasized the role of school boards in educating youth for citizenship, a role which was "reason for scrupulous protection of Constitutional freedoms of the individual."³⁶

While drug use among young people is tragic, the *Acton* court found no hazard extreme enough to warrant random suspicionless drug testing,³⁷ particularly since the goal of the Policy was not entirely clear to the court.³⁸ The court questioned whether the purpose was to avoid athletic injuries, in which case testing athletes was a reasonable way to proceed, or whether the true goal was to reduce drug use in the general student body, which meant that testing only the athletes was a "considerably more roundabout way of reaching that goal."³⁹ The court was not convinced that there was a causal relationship between the implementation of the Policy and the subsequent reduction in classroom misbehavior.⁴⁰ Therefore, it held the Policy to be invalid under the Fourth Amendment, and was certain that the Oregon courts would also find it invalid under its constitution.⁴¹

However, the United States Supreme Court vacated the decision of the court of appeals, holding that the latter Court's decision "rested on a flawed premise"⁴² and remanded the case to the court of appeals for further proceedings. Justice Scalia, writing for the majority, stated 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 [S]o the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."⁴³ The Court held that students in general and student-athletes in particular have a lower expectation of privacy than members of the general population,⁴⁴ and that the drug testing program serves the important governmental interest of preventing drug use by students.⁴⁵

BACKGROUND

The Fourth Amendment of the United States Constitution, and its state counterparts, guard citizens from the imposition of unreasonable

35. *Acton*, 23 F.3d 1514, 1525 (9th Cir. 1994).

36. *Id.*

37. *Id.* at 1526.

38. *Id.* at 1522.

39. *Id.*

40. *Id.*

41. *Id.* at 1527.

42. *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2397 (1995).

43. *Id.* at 2396-97.

44. *Id.* at 2392-93.

45. *Id.* at 2395.

searches of their persons, houses, papers, and effects.⁴⁶ The Oregon Constitution, using similar wording, offers virtually the same protection.⁴⁷

In rendering its decision in *Acton*, the court of appeals relied on earlier Supreme Court cases which have examined the problem of random suspicionless drug testing in the light of the Fourth Amendment. In 1989, the Supreme Court decided two cases concurrently which challenged the constitutionality of drug testing programs.

In *Skinner v. Railway Labor Executives Ass'n*,⁴⁸ employees of the railroad association challenged a drug testing program that mandated urine and blood testing after major train accidents.⁴⁹ The program also authorized railroad officials to administer urine or breath tests to employees who violated specific safety regulations.⁵⁰ The testing is considered random and suspicionless because in the event of a major accident, all members of the crew are tested whether there is suspicion of a particular individual's responsibility for the accident.⁵¹

The Court determined that the "collection and subsequent analysis of the biological samples . . . constitute[d] searches of the person subject to the Fourth Amendment"⁵² despite the fact that such procedures did not entail any intrusion into the body.⁵³ The Court noted that a search of this nature intrudes on the expectations that people have of privacy in their elimination functions. Additionally, chemical analysis of urine can reveal medical information that individuals have come to regard as personal and private, such as whether a person is diabetic, epileptic, or pregnant.⁵⁴

However, the *Skinner* Court noted that the Fourth Amendment does not prohibit all searches and seizures, but only those that are considered unreasonable.⁵⁵ "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."⁵⁶ Determining whether a pro-

46. U.S. CONST. amend. IV.

47. OR. CONST. art. I § 9.

48. 489 U.S. 602 (1989).

49. *Id.* at 609. A "major train accident" was defined as one which involved either a fatality, a release of a hazardous material requiring evacuation, or damage to railroad property in excess of \$500,000.

50. *Id.* at 606.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 617.

55. *Id.* at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). See also William R. Brereton, *Using the Reasonable Suspicion Standard To Maintain a Proper Educational Environment To Educate Today's Youth* - *New Jersey v. T.L.O.*, 13 N. Ky. L. Rev. 253 (1986) for a history of the development of the "reasonableness" standard.

56. *Skinner*, 489 U.S. at 619.

cedure is permissible involves balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.⁵⁷

In *Skinner*, the government interest was in promoting safety, not just of employees and passengers, but of the public at large. Having ascertained that alcohol and drug abuse by railroad employees posed a serious threat to safety,⁵⁸ drug testing on railroad employees was implemented to protect the lives of employees and passengers, and to reduce the property damage that results from train accidents.⁵⁹

In the decision written by Justice Kennedy, the Court upheld the drug testing program. Balancing the government's interest against the individual's rights, the Court pointed out that this was an industry regulated pervasively to ensure safety, and one whose employees already have reduced expectations of privacy.⁶⁰ Further, the methods of collecting the specimens provided the individuals with some measure of privacy.⁶¹ The Court also determined that although a warrant and probable cause are usually required in the absence of individual suspicion of wrongdoing, a search still may be reasonable without a warrant and without individualized suspicion.⁶² For railroad employees who have been involved in a serious accident, a warrant would serve no purpose. Not only would requiring a warrant frustrate the objectives of the government's testing program, but it would provide the

57. *Id.*

58. *Id.* at 606.

59. *Id.* at 621.

60. *Id.* at 627. The Court wrote that the Secretary of Transportation is authorized by Congress to test railroad facilities, equipment, operations, and persons as he or she deems necessary to carry out the provisions of the Federal Railway Safety Act of 1970 (45 U.S.C. § 437(a)).

61. *Id.* at 626. Specimens were produced in a medical environment (similar to that of a doctor's office), and the collection was supervised, but not directly observed, by personnel unrelated to the railroad, rather than by an employee's supervisor.

62. *Id.* at 624. Searches and seizures are generally divided into two types. Those which are performed in conjunction with criminal cases fall under the procedures developed from the Warrant Clause of the Fourteenth Amendment. Such searches usually require a judicial warrant issued upon probable cause or a finding of an exception to the warrant requirements. See *Skinner*, 489 U.S. at 619; see also *Payton v. New York*, 445 U.S. 573, 586 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Exceptions are allowed when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619. Searches which are not performed in conjunction with criminal cases are considered to be administrative searches. See *Acton*, 23 F.3d at 1521; see also *O'Connor v. Ortega*, 480 U.S. 709 (1986) (requiring an employer to obtain a warrant to enter an employee's office or desk for a work-related purpose is unreasonable, and the appropriate standard for administrative searches is not probable cause in its traditional meaning); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that traditional "probable cause" is not required in automobile searches near the border because they are undertaken for primarily administrative purposes rather than prosecutorial purposes); *New York v. Burger*, 482 U.S. 691 (1987) (upholding New York's statute authorizing warrantless inspections of closely regulated businesses as within the exception to the warrant requirement for administrative searches).

individual with little, if any, additional protection.⁶³ The Court found that the Railway Association's procedures constituted a reasonable search.⁶⁴

In *National Treasury Employees Union v. Von Raab*,⁶⁵ a decision announced the same day as *Skinner*, the Court considered a challenge to a policy requiring drug testing of customs officials who were seeking transfers or promotion to certain positions. Utilizing the same balancing test as in *Skinner*, the Court held that the Customs Service was justified in warrantless, suspicionless, random testing of those employees who were directly involved in drug interdiction, or whose jobs required them to carry firearms.⁶⁶ According to the Court, employees who accept promotions to those positions should be tested because they must make instantaneous life or death decisions, and because it would be dangerous for an employee who has an addiction to be handling the illicit drugs that the Customs Service seizes.⁶⁷ However, drug testing of employees who merely handle classified materials may not be reasonable, and the Court remanded that part of the prior decision for further examination.⁶⁸ In determining that a warrant was unnecessary, the Court found that "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions . . . especially where the government seeks to prevent the development of hazardous conditions"⁶⁹ The Court concluded that the government's need to conduct the searches outweighed the privacy interests of the employees.⁷⁰

Lower federal courts have approved drug testing on employees when serious safety concerns were at issue or when national security was at risk.⁷¹ These courts also used the balancing test to determine whether the government's interest was substantial and therefore reasonable under the circumstances. Drug testing usually has been upheld when there is already a diminished expectation of privacy.⁷² On

63. *Skinner*, 489 U.S. at 623.

64. *Id.* at 633.

65. 489 U.S. 656 (1989).

66. *Id.* at 672.

67. *Id.* at 660-61.

68. *Id.* at 665.

69. *Id.* at 668.

70. *Id.* at 672.

71. See *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991); *IBEW, Local 1245 v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir. 1992).

72. See *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991) (upholding drug testing for employees required to pass a top security clearances and judged to have a reduced expectation of privacy); *IBEW, Local 1245 v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir. 1992) (upholding drug testing of gas pipeline workers); but see *Harmon v. Thornburg*, 878 F.2d 484 (D.C. Cir. 1989) (upholding testing of attorneys who deal with top secret information, but not those who deal mainly with grand juries and the prosecution of criminals).

the other hand, drug testing has not been allowed where there was merely a general interest in the integrity of the workforce.⁷³

Prior to *Acton*, the Supreme Court had not considered the specific issue of drug testing of student athletes, but some lower federal and some state courts had done so. In *Odenheim v. Carlstadt-East Rutherford Regional School District*,⁷⁴ the school administration attempted to justify testing the entire student body for drugs as part of a required annual physical exam.⁷⁵ Administrators claimed that drug use is an illness and, therefore, beyond the parameters of the laws regulating searches and seizures.⁷⁶ The court held that to support such an idea would suggest that medical testing is without limits,⁷⁷ and it concluded that the drug testing policy was unconstitutional.⁷⁸ In *Brooks v. East Chambers Consolidated Independent School District*, a student brought a class action suit challenging a school's drug testing policy which mandated the testing of all students who wished to participate in any extracurricular activity.⁷⁹ Brent Brooks, a high school senior in a school district with no ascertainable sign of a drug problem, was barred from participation in a Future Farmers of America competition after he refused to provide a urine sample for testing.⁸⁰ Brooks was successful in getting a temporary restraining order against the school, and in the subsequent trial, the court held that the intrusion on personal privacy which the school children were forced to undergo was not justified by the goal of preventing substance abuse.⁸¹

At least one court has struck random suspicionless drug testing of student athletes at the college level. In *University of Colorado v. Derdeyn*, the Colorado Supreme Court upheld the court of appeals'

73. See *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (prohibiting drug testing of correctional employees who do not carry firearms or have regular access to prisoners). See also *O'Keefe v. Passaic Valley Water Comm'n*, 602 A.2d 760 (1992) (rejecting urine testing for water meter readers or applicants for those jobs absent an individualized suspicion of drug use); *Romaguerra v. Gegenheimer*, 798 F. Supp. 1249 (E.D. La.1992) (permitting random drug testing only of employees who operate motor vehicles and have direct and unsupervised access to drugs); *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990) (striking the state's pre-employment drug screening program upon a finding that a generalized interest in the integrity of the workforce does not justify violation of Fourth Amendment rights of employees).

74. 510 A.2d 709 (N.J. Super. Ct. 1985).

75. The Introduction to the Board's policy stated in part:

These complete physical examinations will help to identify any drug and alcohol use by the pupils. The detection of drug and/or alcohol use will enable the Board of Education to enter the pupil into an appropriate rehabilitation program designed to help the student recognize the danger and to remedy any problem that exists.

Id. at 710.

76. *Id.* at 711.

77. *Id.* at 713.

78. *Id.*

79. 730 F. Supp. 759 (S.D. Tex. 1989).

80. *Id.* at 760.

81. *Id.* at 766.

decision that mandatory testing of student athletes was not constitutional.⁸² Although it acknowledged the seriousness of drug abuse, the court determined that "the University's interest in securing a drug-free athletic program does not constitute a compelling state interest which rises to the level required by *Skinner* and *Von Raab*."⁸³

Suspicionless drug testing has been upheld, however, in other cases involving student athletes. In *Schaill v. Tippecanoe County School Corporation*, the court balanced the students' expectations of privacy against the school's compelling interest in preventing drug-related injuries.⁸⁴ In upholding the constitutionality of the school's drug testing program, the court pointed to factors such as mandatory physical exams, the element of communal undress in locker rooms, and the high visibility and pervasiveness of drug testing among professional, collegiate, and Olympic Game athletes.⁸⁵

Federal courts have also considered whether students should be granted fewer rights under the constitution than other citizens. In *New Jersey v. T.L.O.*,⁸⁶ the Supreme Court found that "school children have legitimate expectations of privacy" that need to be balanced against "the school's equally legitimate need to maintain an environment in which learning can take place."⁸⁷ The Court held that the restrictions prohibiting warrantless searches should be eased somewhat to accommodate the nature of the school setting, and that cases need to be decided based on the "reasonableness" test, examining all the relevant circumstances.⁸⁸ In *T.L.O.*, the search and seizure was found to be constitutional, but it was neither random nor suspicionless.⁸⁹ The Supreme Court has held that "students do not shed their constitutional rights . . . at the schoolhouse gate"⁹⁰ But in applying the balancing and reasonableness tests, courts have frequently upheld searches that have taken place on school grounds.⁹¹

82. *Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (en banc), *aff'g* 832 P.2d 1031 (Colo. Ct. App. 1991).

83. *Id.* at 1034-35.

84. 864 F.2d 1309 (7th Cir. 1988).

85. *Id.* at 1318-19.

86. 469 U.S. 325 (1985).

87. *Id.*

88. *Id.* at 341-42.

89. *Id.* at 326. T.L.O. was caught smoking in the girl's restroom at school. A search of the student's purse revealed a pack of cigarettes and a pack of rolling papers which the vice principal associated with marijuana cigarettes. The Court held that this justified a further search, whereupon more evidence of drug-related activity was discovered. Each search was held to be justified by "reasonable grounds" that school rules and/or the law had been broken.

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

91. See, e.g., *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 480 (5th Cir. 1982) ("Teachers and school officials must have broad supervisory and disciplinary powers"); *Doe v. Renfrou*, 475 F. Supp. 1012 (N.D. Ind. 1979) (upholding a search of high school students by drug detecting dogs); *In re Isiah B.*, 500 N.W. 2d 637 (Wis. 1993) (upholding a random search of

While the issue of urine testing in *Acton* was a case of first impression for the Oregon Courts, the constitutionality of other types of searches had been tested. For example, in *State v. Tourtillott*,⁹² the court upheld the practice of stopping individuals at fixed game checkpoints to check for hunting licenses, citing the reasonableness test developed in *Delaware v. Prouse*.⁹³

ANALYSIS

When viewed in the light of earlier decisions, the holding of the Ninth Circuit — to disallow urine testing on school children participating in sports programs — makes sense. The appeals court in *Acton* followed the lead of the Supreme Court and drew a line, labeling this search as unreasonable.⁹⁴ When national security is at risk,⁹⁵ when lives could be endangered by an employee who is disoriented due to drugs or alcohol,⁹⁶ or when a person is responsible for seizing illegal drugs smuggled into this country,⁹⁷ testing body fluids is justified. In other cases, searches are justified when there is probable cause or at least reasonable suspicion.⁹⁸ However, random testing of school children where there is a lack of clear and convincing evidence of a drug problem⁹⁹ is not reasonable.

In *Brooks v. East Chambers Consol. Indep. Sch. Dist.*,¹⁰⁰ the school district tried to justify testing anyone who participated in any extra-curricular activity, despite the fact that a drug-sniffing dog uncovered so little evidence of drugs on campus that the practice was discontinued for lack of justification.¹⁰¹ In *Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist.*, the school system tried to impose an annual urine test for drugs on the entire student body in a policy the court called "an attempt to control student discipline under the guise of a medical procedure, thereby circumventing strict due process require-

school lockers where there had been incidents of violence, and officials had been warned that additional violence would take place. A gun and cocaine were discovered in Isiah B's locker.

92. 618 P.2d 423 (Or. 1980), *cert. denied*, 451 U.S. 972 (1981).

93. *Id.* at 427. *But see*, *Nelson v. Lane County*, 743 P.2d 692 (Or. 1987) (holding that stopping drivers at a roadblock violated the Oregon Constitution).

94. The Court in *Acton* relied on the Supreme Court's decisions in *Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Acton*, 23 F.3d at 1520-26.

95. *See* *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991).

96. *See* *Skinner*, 469 U.S. at 602; *Rushton v. Nebraska Public Power Dist.* 844 F.2d 562 (8th Cir. 1988).

97. *Von Raab*, 489 U.S. at 656.

98. U.S. CONST. amend. IV.

99. In the first three weeks of testing, 110 student underwent urinalysis. Only two tested positive, and they were high school, not grade school students. Respondents' Brief, 1995 WL 89313 at 20-21, *Acton* (No. 94-590).

100. 730 F. Supp. 759 (S. D. Tex.).

101. *Id.* at 761.

ments.”¹⁰² In both cases, the courts correctly held that this level of infringement on students’ rights to privacy was too excessive even when balanced against the administrations’ legitimate interests in a drug-free student body and their equally legitimate interest in promoting school discipline. Being forced to urinate on demand while a school monitor listens “for the normal sounds of urination”¹⁰³ is a serious intrusion on an activity most people consider intensely private. “Most people describe [the passing of urine] by euphemisms if they talk about it at all [I]ndeed its performance in public is generally prohibited by law as well as social custom.”¹⁰⁴ The *Acton* court of appeals was not convinced that student-athletes have lower expectations of privacy than other students. “Training rules and grade point average requirements are not the sort of extensive government regulation that [have] been found to diminish the expectation of privacy of workers in high risk industries or high security areas of the government.”¹⁰⁵

While the Seventh Circuit upheld the drug testing program in *Schaill v. Tippecanoe County Sch. Corp.*,¹⁰⁶ there was strong evidence of a pervasive drug problem in the school.¹⁰⁷ Nevertheless, the court of appeals in *Acton* felt that the Seventh Circuit had “unduly minimized the privacy interests of the students” and bluntly stated that “we simply do not agree with the Seventh Circuit.”¹⁰⁸

The appeals court in *Acton* came to the same conclusion as the courts in *Brooks* and *Odenheim*. While deploring drug use among young people, and acknowledging that school officials acted in good faith, the court nonetheless emphasized the grave importance of demonstrating to students that constitutionally granted rights should be protected vigilantly. Otherwise, children will come to believe, at an early age, that the constitution is merely a collection of meaningless words.¹⁰⁹ School boards can perform their important tasks within the bounds of the Fourth Amendment. “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹¹⁰

102. 510 A.2d 709, 713 (N.J. Super. Ct. 1985).

103. *Acton*, 23 F.3d at 1517 (9th Cir. 1994).

104. *Skinner*, 489 U.S. at 617 (1989).

105. *Acton*, 23 F.3d at 1525.

106. 864 F.2d 1309 (7th Cir. 1988).

107. *Id.* at 1310. When the problem was first discovered, sixteen students were tested — five of the tests were positive.

108. *Acton*, 23 F.3d at 1527.

109. *Id.*

110. *Id.* at 1525.

The Supreme Court applied the same balancing test to the *Acton* facts as had the Ninth Circuit Court of Appeals; yet it reached an entirely different conclusion.¹¹¹ The Supreme Court weighed the students' privacy interests against the government's interest in a drug-free population and concluded that the urine testing imposed on school children by the Vernonia School District constituted a reasonable search.

Justice Scalia wrote that the subjects of this search were children who had been committed to "the temporary custody of the State as schoolmaster."¹¹² Consequently, the government may exercise a greater degree of supervision and control over them than would be possible if the subjects were adults.¹¹³ According to the Court, children have a lesser expectation of privacy than members of the general population because they are required to submit to physical examinations and vaccinations.¹¹⁴ Furthermore, student athletes have an even lesser expectation of privacy than students who are not athletes due to communal undress in locker rooms, pre-season physicals, and rules which regulate their conduct.¹¹⁵ The Court labeled the privacy interest compromised by the urine testing "negligible"¹¹⁶ and "relative[ly] unobtrusive . . ."¹¹⁷ while calling the state's interest in deterring drug use by school children "important" and "perhaps compelling."¹¹⁸

Justice Scalia elaborated on the "compelling state interest" standard.

It is a mistake . . . to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.¹¹⁹

In this case, the majority considered such factors as the government's special responsibility of care and direction for school children and a duty to protect them from drug-infested schools.¹²⁰

111. *Acton*, 115 S. Ct. 2386 (1995).

112. *Id.* at 2391.

113. *Id.* at 2392.

114. *Id.*

115. *Id.* at 2393.

116. *Id.*

117. *Id.* at 2396.

118. *Id.* at 2395.

119. *Id.*

120. *Id.*

Whether the Vernonia schools were drug-infested, however, was one of the primary issues contested by the parties. The parties' briefs indicate a strong difference of opinion concerning the seriousness and scope of the drug situation in the Vernonia schools. The Actons perceived it to be a relatively small problem,¹²¹ while the School District concluded that drug abuse of epidemic proportions had invaded the Vernonia schools.¹²² During oral arguments, the Justices repeatedly questioned the parties about the extent of the drug problem, and speculated that perhaps this was more a situation of young people bragging, rather than relating accounts of incidents which actually had occurred.¹²³ The Supreme Court apparently found the argument of the Petitioners to be more persuasive, calling the situation "an immediate crisis of greater proportion than existed in *Skinner* . . . [a]nd of much greater proportion than existed in *Von Raab*" ¹²⁴

The Court also found the program imposed by the Policy to be sufficiently tailored to meet the District's need to control drug use. "It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."¹²⁵

The Court explained that the Fourth Amendment does not require a governmental body to use the least intrusive means to an end, even if such a means is available. Although the Actons argued that drug testing based on a suspicion of individualized drug use would provide a less intrusive means of controlling drug use among students,¹²⁶ the Court considered such a plan to be impracticable, and speculated that parents who had no objection to a program of random suspicionless drug testing might object to accusatory drug testing "which transforms the process into a badge of shame."¹²⁷ According to the Court, this latter type of drug testing creates the risk that teachers would impose arbitrary testing upon "troublesome but not drug-likely students."¹²⁸

121. Respondents' Brief, 1995 WL 89313 at *2, *Acton* (No. 94-590) ("It is very important to carefully describe Vernonia's drug 'problem' because the District persistently overstates it In fact, there is little evidence of Vernonia's students using drugs, and no evidence of any athlete in Vernonia ever competing while on drugs, let alone causing or sustaining injury.").

122. Brief of Petitioner Vernonia School District 47J, 1995 WL 13176 at *6, *Acton* (No. 94-590) ("[T]he leading student athletes were actively involved with the school-wide drug problem Drug and alcohol use pervaded the District's athletic programs."). See also Reply Brief of Petitioner Vernonia School District 47J, 1995 WL 120204 at *2 ("More direct evidence of a drug problem exists here than in *Skinner*. . . .").

123. 1995 WL 353412 (U.S. Oral Arg.) at *3-4, 115 S. Ct. 2386 (1995).

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

125. *Id.* at 2396.

126. Respondent's Brief, 1995 WL 89313 at *45-46.

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

128. *Id.*

While not minimizing the seriousness of the drug problem nationwide, Justice O'Connor, in her dissenting opinion, pointed out the irony of the majority decision.¹²⁹ The School District justified its Policy on evidence of misbehavior among identifiable students, and of suspected drug use by student athletes who had been identified.¹³⁰ The Policy was proposed because the administration suspected there was a correlation between the discipline problems in the classrooms and reports of students glamorizing drug use.¹³¹ Justice O'Connor noted that the individualized suspicion requirement has "a legal pedigree as old as the Fourth Amendment itself."¹³² "[I]n the area of intrusive personal searches, the only recognized exception [to a requirement of a warrant and probable cause] is for situations in which a suspicion-based scheme would be likely ineffectual."¹³³ Here, a suspicion-based program might have been more effective.

Justice O'Connor pointed out that traditionally, the primary requirement for reasonableness has been individualized suspicion.¹³⁴ "[W]hat the framers of the Fourth Amendment most strongly opposed . . . were general searches . . ."¹³⁵ For most of this country's history, "mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment [E]xceptions [have been allowed] only where it has been clear that a suspicion-based regime would be ineffectual [T]hat is not the case here."¹³⁶ The potential subjects of the search within the Vernonia schools could be and in fact were readily identified by classroom teachers and coaches.

Justice O'Connor's dissenting opinion is supported by the Court's decision in *New Jersey v. T.L.O.*¹³⁷ finding reasonable suspicion to justify a search of a student's purse for cigarettes after the student was caught smoking. Justice O'Connor pointed out that the Court should not abandon the requirement of individualized suspicion, which is

129. *Id.* at 2397. (O'Connor, J., dissenting. Justices Stevens and Souter joined in Justice O'Connor's dissent. "[T]he police cannot . . . subject to drug testing every person entering or leaving a certain drug-infested neighborhood in order to find evidence of crime . . . even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods." *Id.* at 2400).

130. *Acton*, 23 F.3d 1514, at 1516 ("[O]ne teacher had often seen students smoking marijuana during the school day at a coffee shop across the street from the high school.").

131. *Id.* ("An English teacher received several essays describing and glorying in scenes of student drug and alcohol use.").

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

133. *Id.*

134. *Id.* at 2401. "[S]ome quantum of individualized suspicion is usually required under the Fourth Amendment." *Skinner v. Railway Executives Ass'n*, 489 U.S. at 624 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)).

135. *Id.* at 2398.

136. *Id.*

137. 469 U.S. 325 (1985).

usually required for an intrusive personal search. A suspicion-based scheme is not likely to lead to testing students whose misbehavior is induced by something other than drug use because the required level of suspicion in a school setting is "objectively reasonable suspicion."¹³⁸ "Moreover, any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential."¹³⁹ A suspicion-based drug testing scheme would be a minor addition to the adversarial disciplinary methods schools have traditionally used.¹⁴⁰

The Court in *T.L.O.*¹⁴¹ held that determining whether searching school children is reasonable involves a two-fold inquiry:

[F]irst, one must consider "whether the . . . action was justified at its inception;" second, one must determine whether the search as actually conducted was "reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such 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.¹⁴²

Had this test been applied to *Acton*, it is likely that random suspicionless testing would have been disallowed. Instead, a program could have been designed which required only those students who violated school disciplinary rules and who were suspected of drug abuse to be tested for illicit drug use. Such a policy would have eliminated, or at least seriously reduced, the testing of *Vernonia* students who were not causing the disciplinary problems.

Justice O'Connor pointed out that suspicion-based searches pose a lesser threat to liberty than do mass suspicionless ones which can involve thousands or millions of searches.¹⁴³ In *Carroll v. United States*,¹⁴⁴ decided during the days of Prohibition, the Court refused to admit evidence from random searches of automobiles made by agents looking for alcohol, calling such searches "intolerable and unreasonable."¹⁴⁵ The Court reasoned that most of the people stopped and sub-

138. *Acton*, 115 S. Ct. at 2402.

139. *Id.*

140. *Id.*

141. 469 U.S. at 341-42 (citations omitted).

142. *Id.*

143. *Acton*, 115 S. Ct. at 2397 (citing *Illinois v. Krull*, 480 U.S. 340 (1987)).

144. 267 U.S. 132 (1925).

145. *Id.* at 153-54.

jected to such searches would have been using the public roads for lawful purposes.¹⁴⁶ The Court has also held that pat-downs for weapons of all patrons in a bar where there was probable cause to suspect drug trafficking was not a reasonable search.¹⁴⁷ Nor can the police subject every person entering or leaving a drug-ridden neighborhood to a search in order to find evidence of a crime.¹⁴⁸ It is likely that a suspicion-based drug testing program would have solved Vernonia's problem, while at the same time preserving the right of James Acton and his fellow student athletes to be free from unreasonable searches.

Furthermore, the Vernonia Policy fails the 'scope' test of *T.L.O.* because the search is not reasonably related in scope to the circumstances which justified the invasion of the privacy interest. The Policy originated due to an increase in conduct problems believed to be caused by substance abuse. A program which tests only those students who are disciplinary problems almost certainly would be smaller in scope than the random testing of athletes. Under Vernonia's Policy, non-athletes who are drug-users and discipline problems may never be tested, while completely innocent students who have never used illegal substances may be forced to produce urine samples repeatedly. Finally, the Policy fails the scope test in that it does not provide for the detection of alcohol,¹⁴⁹ which is the substance most likely to be abused by students.¹⁵⁰

CONCLUSION

In our country, one of our most fundamental beliefs is that people who allegedly have committed crimes should be considered innocent until proved guilty. Random, suspicionless, warrantless drug testing of school children is misguided. It is on the wrong side of the line that separates reasonable searches from unreasonable ones. It starts with the assumption that someone — in this case a child — has committed a wrong. The child is presumed guilty until he or she agrees to demonstrate his or her innocence over and over by submitting to invasive urinalysis repeatedly throughout a sports season. If the student

146. *Id.*

147. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

148. See 3 W. LAFAVE, *SEARCH AND SEIZURE* § 9.5(b), pp. 551-53 (2d ed. 1987).

149. United States Supreme Court Official Transcript, 1995 WL 353412, at *18-20, Acton (No. 94-590).

150. "A *USA Today* survey of almost 800 high school coaches asked what they considered the greatest threat to athletes on their teams. Eighty-eight percent indicated that alcohol was the greatest threat, 6% crack/cocaine, 3% marijuana, and 1% steroids." Andrew T. Pittman, *Drug Testing of High School Athletes After Vernonia*, 104 ED. LAW REP. 15 (1995).

refuses to provide continuous proof of innocence, he or she is punished by being disqualified from participation in athletic programs.¹⁵¹

It is significant that school officials justify these searches on the basis of promoting student safety. But, ironically there is no indication that the adults involved in running and managing the sports programs in the Veronia School District — coaches, referees, and bus drivers — had volunteered or were willing to be tested for drug abuse for the sake of student safety. All of those adults play a significant role in the safety of students in general, and athletes in particular. An impaired bus driver could easily be a greater risk to students' lives than an impaired athlete.

The majority based its decision partially on the subjective assumption that students have a reduced expectation of privacy because they submit to an annual physical. This is an assumption with which most students would disagree. It further raises the question of whether any adult who gets an annual physical is impliedly agreeing to allow the government to search his or her urine randomly for indications of illegal drug use.

Americans think they place a high value on the right to privacy, but the Constitution's chief bulwark against government snooping is being steadily dismantled, with enthusiastic support from the public. [The] Supreme Court decision upholding drug testing for adolescent athletes in public schools is the latest diminution of personal sovereignty in the name of greater safety.¹⁵²

It remains to be seen whether the imposition of drug testing on student athletes will be an effective weapon in the nation's war on drugs. The drug education coordinator for the National Federation of High School Associations (NFHSA) does not think so, if for no other reason than the cost.¹⁵³ In 1994, the National Collegiate Athletic Association (NCAA) spent \$2.1 million on drug testing.¹⁵⁴ While the NCAA has approximately 1,000 member schools, the NFHSA has 18,000 member schools.¹⁵⁵ There are approximately 18 million children in public school in grades seven through twelve.¹⁵⁶ The cost of implementing drug testing programs for so many student athletes will likely

151. Respondent's Brief, 1995 WL 89313 at *36. "Community life in Vernonia revolves around school activities with sports events playing a center role. To be denied the right to participate in school sports is, in effect, to be excluded in part from the community. That cannot be viewed as anything but punishment." *Id.* at *63.

152. Stephen Chapman, *Students Find Themselves Going Back to the Future of "1984,"* PORTLAND OREGONIAN, July 1, 1995, at D9.

153. Brad McCray, *Ruling Probably Will Have Little Effect,* PORTLAND OREGONIAN, July 5, 1995, at C7.

154. *Id.*

155. *Id.*

156. *Acton*, 115 S. Ct. at 2397 (citing U.S. Dept. of Education, National Center for Education Statistics 58 (1994) (Table 43)).

prevent it from becoming standard practice. Several delegates to a recent meeting of the NFHSA concurred, believing that mandatory drug testing of high school athletes is not the best tool, and that educational programming may still provide the best prevention.¹⁵⁷

Although Justice Scalia now considers a search of a student's urine a "negligible"¹⁵⁸ intrusion on privacy, in his dissent in *Von Raab* written only five years ago, he objected to urine testing of U.S. Customs agents, calling it a "type of search particularly destructive of privacy and offensive to personal dignity."¹⁵⁹ Most adolescents — much more insecure about their bodies and bodily functions than adults¹⁶⁰ — would probably relate more closely to his earlier philosophy than his current characterizing of this kind of intrusion as negligible. Suspicionless drug testing should not be the weapon of choice for controlling drug use in our schools. In the absence of a safety or security risk of the magnitude of a train wreck or a prison control problem, there should be some evidence or at least some suspicion of individualized wrongdoing. A student should not be tested routinely or randomly, but only when there is reason to believe that he or she is impaired. Schools need to find other ways, more compatible with educational institutions, to prevent drug abuse.

As Justice Marshall, dissenting in *Skinner*, said,

The issue . . . is not whether declaring a war on illegal drug use is good public policy Rather, the issue here is whether the government's deployment in that war of a particularly Draconian weapon — the compulsory collection and chemical testing of . . . blood and urine — comports with the Fourth Amendment [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.¹⁶¹

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157. McCray, *supra* note 153.

158. 115 S. Ct. at 2393.

159. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting). Justice Scalia also stated, "In my view, the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681.

160. According to a female student athlete, "You kind of got flippant about it [urine testing] after a while because it was so embarrassing and everybody had to do it so we made jokes about it so that, you know, it wouldn't be as bad." University of Colo. v. Derdeyn, 863 P.2d 929, 931 (1993).

161. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

* Dedicated to the memory of my parents, who taught me, among other things, not to split infinitives and dangle participles. Requiescant in pacem.

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