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# A CRITICAL LOOK AT THE SO-CALLED LOCKER ROOM MENTALITY AS A MEANS TO RATIONALIZE THE DRUG TESTING OF STUDENT ATHLETES

WALTER T. CHAMPION, JR.\*

## I. INTRODUCTION

In *Vernonia School District 47J v. Acton*,<sup>1</sup> the United States Supreme Court reversed a decision by the Ninth Circuit Court of Appeals and held that high school student athletes can be subject to random suspicionless drug tests. The Court reached this decision on the grounds that these students labor under a lessened expectation of privacy due to the "locker room mentality" and the bromide that athletes are role models and as such must be held to a higher standard than must other students.<sup>2</sup> Justice Scalia's majority opinion perpetuated the old rubric that the so-called "locker room mentality" lessens an athlete's expectation of privacy.<sup>3</sup> The majority reasoned that urinating as part of a drug test is merely an extension or variation of public showering, which is a component of a typical locker room environment.<sup>4</sup> This locker room environment, Justice Scalia reasoned, offers a low expectation of privacy. It appears that Justice Scalia's assertions, however, are both incorrect and outdated. This is especially true in light of evidence that students now avoid public showers because of such factors as height-

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1. 115 S. Ct. 2386 (1995), *rev'g* 23 F.3d 1514 (9th Cir. 1994).

2. *See id.* at 2392-93. The district court found that an increase in drug and alcohol abuse at Vernonia School District had been "largely fueled by the 'role model' effect of athletes' drug use." *Id.* at 2395-96. The Supreme Court noted that "[a]s elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community." *Id.* at 2388.

3. *See id.* at 2392-93.

4. *Id.* The Supreme Court asserted that there is a low degree of privacy in a traditional locker room environment. *See id.* The Court stated: "[s]chool sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." *Id.* at 2392. The Court went on to describe the Vernonia School District locker rooms as within this typical mold, having communal showers and no individual dressing rooms. *See id.* at 2393.

ened modesty, distorted self images, and a tradition of privacy at home.<sup>5</sup>

Justice Scalia's platitudes did not escape detection. Joined by Justices Souter and Stevens, Justice O'Connor launched a rousing attack on the majority's "business as usual" approach to the legitimacy of the drug testing of student-athletes.<sup>6</sup> The *Acton* majority's rationale can be summarized as follows: "An athlete's expectation of privacy is diminished by a pattern of testing that ordinarily accompanies athletic involvement (preseason physical), by the mechanisms of the test itself (urinating in a closed stall with the 'monitor' outside listening for the appropriate sounds) and the general condition of athletic involvement (for lack of a better term, the locker room mentality)."<sup>7</sup> This note analyzes the rationale of the locker room mentality perpetuated in *Vernonia School District 47J v. Acton*. Before analyzing the Supreme Court's decision in *Acton*, however, it is helpful to understand the Seventh Circuit Court of Appeals' decision in *Schaill v. Tippecanoe County School Corp.*,<sup>8</sup> which the *Acton* Court cited as support for its locker room mentality rationale.

## II. THE SHADOW OF THE *Schaill* DECISION

Before *Acton*, the standard for the drug testing of high school athletes was established by the Seventh Circuit Court of Appeals in *Schaill v. Tippecanoe County School Corp.*<sup>9</sup> In *Schaill*, as in *Acton*, the school's program was predicated on the consent of the individual athlete. In both cases, the plaintiff-athlete refused to sign a consent

5. See Dirk Johnson, *Students Still Sweat, They Just Don't Shower*, N.Y. TIMES, April 22, 1996, at A1. "In a striking measure of changed sensibilities in school and society, showering after physical education class, once an almost military ritual, has become virtually extinct. And the reasons seem as varied as insecurities about body image, heightened sexual awareness and a lack of time in a busy school schedule." *Id.*

6. *Acton*, 115 S. Ct. at 2397-2407.

7. Walter T. Champion, Jr., *The NCAA's Drug Testing Policies: Walking a Constitutional Tightrope*, 67 N.D. L. REV. 269, 270 (1991) (hereinafter Champion, *NCAA*). See also *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) (upholding random suspicionless drug testing in high school athletics). See generally Recent Case, *Search and Seizure - Suspicionless Drug Testing - Seventh Circuit Upholds Drug Testing of Student Athletes in the Public Schools*. *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), 103 HARV. L. REV. 591 (1989); Mary L. Scott, Comment, *Is Innocence Forever Gone? Drug Testing High School Athletes* *Schaill v. Tippecanoe County School Corp.*, 54 MO. L. REV. 425 (1989); Kathleen M. Dorr, Annotation, *Validity, Under Federal Constitution, of Regulations, Rules, or Statutes Allowing Drug Testing of Students*, 87 A.L.R. FED. 148 (1988).

8. 864 F.2d 1309 (7th Cir. 1988).

9. *Id.* at 1309.

form granting the school the authority to conduct mandatory urinalysis. In *Schaill*, the Seventh Circuit Court of Appeals addressed the issue of whether the suspicionless random drug testing of student athletes was constitutional. The answer seems to be that student athletes lose some of their constitutional rights in high school, and provided the testing procedures are not egregiously bizarre, the courts will allow urinalysis with consent.<sup>10</sup>

As a threshold matter, the Seventh Circuit Court of Appeals had to determine whether or not there was a Fourth Amendment search.<sup>11</sup> "[A] 'search' occurs when an expectation of privacy that society is prepared to consider is infringed."<sup>12</sup> The key question in drug testing, therefore, is whether an athlete has a right to privacy with regards to urinalysis. *Schaill* sets the tone for a discussion of the parameters of the right to privacy in the student-athlete context.

The *Schaill* court concluded that there was a high expectation of privacy with regards to urination, therefore, urinalysis did qualify as a Fourth Amendment search.<sup>13</sup> The court noted that urine is a very private thing.<sup>14</sup> "The fact that urine is voluntarily discharged from the body and treated as a waste product does not eliminate the expectation of privacy which an individual possesses in his or her urine."<sup>15</sup> Even though urine is excreted from the body, it is not knowingly exposed to the public; instead the manner in which an individual disposes of his or her urine is a highly private matter.<sup>16</sup> This demonstrates that urine is not intended to be inspected or examined by anyone.<sup>17</sup>

Having determined that the Tippecanoe random drug testing program was a Fourth Amendment search, the court next had to

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10. See generally WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW § 21.5, at 385 (1990) (hereinafter CHAMPION).

11. See *Schaill*, 864 F.2d at 1311.

12. *Id.* at 1311-12 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

13. *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1312 (7th Cir. 1988).

14. *Id.* at 1318. "In general, there is a substantial expectation of privacy in connection with the act of urination." *Id.*

15. *Id.* at 1312.

16. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)).

17. See *id.* The court also concluded that the voluntariness of students' submission to urinalysis did not effect the drug testing's status as a search. See *id.* at 1312-13. Although students were not tested without previously giving their consent, the fact that students were forced to waive their Fourth Amendment rights in order to play sports, qualified the drug testing as a search. See *id.*

determine whether or not the search was reasonable.<sup>18</sup> Since the drug testing was a suspicionless search (a search without any evidence of unlawful activity) the Tippecanoe County School Corporation faced a heavy burden of justifying the reasonableness of its program.<sup>19</sup> The court listed the factors relevant to determining the constitutionality of suspicionless random drug testing.<sup>20</sup> First, the Seventh Circuit Court of Appeals noted that an "individual's privacy rights vary with the context - whether the individual is at home, at work, in school or in jail, in a car or on a public sidewalk."<sup>21</sup> Not only can the physical circumstances affect an individual's reasonable expectations of privacy but, over time, an individual's expectations of privacy in a certain activity can be diminished by a past history of significant governmental regulation.<sup>22</sup> Second, in order for a governmental regulation to validly diminish one's privacy rights, the interest furthered by the particular privacy invasion it authorizes, "must be weighty, and generally of a nature that alternate, less intrusive means of detection would not sufficiently serve the government's ends."<sup>23</sup> In the drug testing of student-athletes realm, the government's search should be evaluated to determine whether the interest it furthers is weighty and whether there are alternative, less intrusive means of drug use detection that could be employed to meet the school's ends.<sup>24</sup> Furthermore, if alternative investigative techniques would not be as effective in deterring the unlawful conduct as the challenged practice, this factor may be considered.<sup>25</sup>

The Seventh Circuit Court of Appeals applied the reasonableness factors to the facts in *Schaill*. The court first examined the con-

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18. *Schaill*, 864 F.2d at 1313-14. The standard used for school searches is "reasonableness [ ] under all the circumstances." *Id.* at 1314 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (alteration in original)). The rationale for this reasonableness standard, as opposed to a search warrant or probable cause requirement, is that school teachers and administrators can not be expected to school themselves in the subtleties of the probable cause standard. *See id.*

19. *See id.* at 1315-16. Despite this heavy burden for suspicionless searches, there are several situations in which such searches are permitted. *See id.* The *Schaill* court listed several of these situations, including fixed checkpoints for automobile travelers. *Id.* at 1316.

20. *See id.* at 1317-18.

21. *Id.* at 1317.

22. *See id.*

23. *Schaill*, 864 F.2d at 1318.

24. *See id.*

25. *See* CHAMPION, *supra* note 10, § 21:4, at 383. The court also pointed to two other factors that determine the reasonableness of a suspicionless search: (1) the extent to which the examining officer's discretion is limited, and (2) whether the search is intended to discover criminal activity. *See Schaill*, 864 F.2d at 1318.

text of the search. In *Schaill*, the athlete entered a closed lavatory stall and the monitor stood outside listening for appropriate sounds.<sup>26</sup> The invasion of privacy in *Schaill* was less severe, therefore, than the invasion would have been if the monitor actually observed the act of urination.<sup>27</sup> The *Schaill* court, like the *Acton* court, also found great significance in the fact that the drug testing program was implemented solely with participants in an interscholastic athletic program.<sup>28</sup> The argument again is that student athletes possess a diminished expectation of privacy and, in particular, privacy with respect to urinating and urinalysis. This argument is based on the element of communal undress inherent in athletic participation, which suggests a reduced expectation of privacy.<sup>29</sup>

The *Schaill* court also pointed to the past history of government regulation in public schools and specifically within athletic programs. The *Schaill* court noted that physical examinations are integral to almost all athletic programs.<sup>30</sup> In fact, the athletes and cheerleaders in *Schaill* had long been required to produce a urine sample as part of a mandatory medical examination.<sup>31</sup> Although these medical test samples were not produced under monitored circumstances, were only tested for the presence of sugar and were given to the athlete's physician of choice rather than to a school official, the fact remained that samples were required, suggesting that legitimate expectations of privacy in the student athlete were diminished.<sup>32</sup> In other words, urine samples were already no big deal. The *Schaill* court held that it was implausible that competitive athletes could have general expectations of privacy with respect to urine tests.<sup>33</sup>

In *Schaill*, the Seventh Circuit Court of Appeals found that the urinalysis was a reasonable search under the Fourth Amendment based on the school's interest in maintaining a drug-free athletic program.<sup>34</sup> Factors the court considered in reaching this decision include the fact that the athlete's consent was a prerequisite to drug testing and that other athletes could be harmed in a drug-infested

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26. *Schaill*, 864 F.2d at 1318. The monitor was also supposed to check the temperature of the urine sample to assure its genuineness. *See id.* at 1311.

27. *Id.* at 1318.

28. *Id.*

29. *See id.*

30. *Id.*

31. *Schaill*, 864 F.2d at 1318.

32. *See id.*

33. *See id.*

34. *Id.* at 1324.

sports program.<sup>35</sup> Additionally, the court noted that a person loses some constitutional rights while in a public high school.<sup>36</sup> The question left for the Supreme Court was whether the warrantless, suspicionless search allowed in *Schaill* was consistent with the Fourth Amendment standard of reasonableness.<sup>37</sup>

### A. The Supreme Court Follows *Schaill*

As in *Schaill*, the *Acton* plaintiffs challenged the constitutionality of suspicionless random drug testing of high school athletes.<sup>38</sup> In *Acton*, at the circuit court level, the Ninth Circuit Court of Appeals veered from *Schaill*, and it looked like some semblance of privacy would return to our beleaguered athletes.<sup>39</sup> The Supreme Court, however, dropped a bomb by vacating and remanding *Acton* on June 26, 1995.<sup>40</sup> The Supreme Court chose the route (and the rationale) articulated by the Seventh Circuit in *Schaill* (and to some extent, the California Supreme Court in *Hill v. NCAA*<sup>41</sup>) as opposed to the one suggested by the Ninth Circuit Court of Appeals in *Acton*.

*Schaill* provided the basic legal structure for the Supreme Court's opinion in *Acton*. Accordingly, as of June 26, 1995, suspicionless (no probable cause), random drug testing of high school

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35. See *CHAMPION*, *supra* note 10, § 21.5, at 385.

36. See *Schaill*, 864 F.2d at 1324.

37. See *CHAMPION*, *supra* note 10, § 21.5, at 385.

38. *Acton*, 115 S. Ct. at 2388. In *Acton*, Vernonia School District 47J, after increased drug problems within its public schools, enacted a policy requiring student athletes to consent to random suspicionless drug testing. *Id.* at 2388-89. James Acton, at the time a seventh-grader, refused to sign the required consent form. See *id.* at 2390. The Actons, alleging that the suspicionless random drug testing violated the Fourth and Fourteenth Amendments, filed suit in the District Court for the District of Oregon. See *id.*

39. *Acton v. Vernonia Sch. Dist. 47J*, 23 F.3d 1514, 1527 (9th Cir. 1994), *rev'd*, 115 S. Ct. 2386 (1995). The Ninth Circuit averred that the Seventh Circuit "unduly minimized the privacy interests of students." *Id.* "[W]e simply do not agree with the Seventh Circuit." *Id.* The Ninth Circuit noted that the Seventh Circuit balanced the privacy interests of the student against the substantial interests of the school. See *id.* n.3. The Ninth Circuit believed, in contrast, that the government interest would have to be compelling and would have to outweigh the privacy interest of the student before such a policy could be constitutional. *Id.* at 1526.

40. *Acton*, 115 S. Ct. at 2397. "The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9 of the Oregon Constitution." *Id.* Because the Court concluded that the former holding was in error, "the latter holding rested on a flawed premise." *Id.* The Court thus remanded the Ninth Circuit decision with respect to the Oregon Constitution. *Id.*

41. 865 P.2d 633 (Cal. 1994) (intercollegiate athletic association's drug testing policy which involved monitoring of urination and testing of urine samples did not violate California's constitutional right to privacy).

student-athletes is deemed to be constitutional.<sup>42</sup> The decision was reached by a 6-3 majority, written by Justice Scalia, with the aforementioned rousing dissent by Justice O'Connor, joined by Justices Stevens and Souter. Justice O'Connor was livid: noting that "[b]y the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search."<sup>43</sup>

In short, the Court held that the tests utilized in the Vernonia School District did not violate the student's constitutional right to be free from unreasonable searches.<sup>44</sup> This is partially because James Acton, as a result of "the locker room mentality," possessed a lessened expectation of privacy.<sup>45</sup> The Court noted that school sports, which require a level of communal undress, are not for the bashful.<sup>46</sup> In addition, the Court stated that student athletes were subject to increased regulations such as physical examinations, insurance coverage requirements and minimum grade point averages.<sup>47</sup> This mentality suggests that in choosing to go out for the team, Acton voluntarily subjected himself to a degree of regulation greater than that which was imposed upon the general student body.<sup>48</sup> As the school district had an immediate, legitimate concern (the "role model" argument) in preventing drug abuse, and as the privacy invasion was negligible because the expectation of privacy was already diminished, the Court concluded that the school district's program was reasonable and it should not be compelled to develop the "least intrusive" search.<sup>49</sup>

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

43. *Id.*

44. *See id.* at 2396. "Taking into account all the factors we have considered above the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search we conclude that Vernonia's Policy is reasonable and hence constitutional." *Id.*

45. *See id.* at 2393.

46. *See id.* The locker rooms in the Vernonia School District were typical: "no individual dressing rooms are provided; shower heads are lined up along the wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors." *Id.*

47. *Acton*, 115 S. Ct. at 2393. The Court compared student athletes to adults in closely regulated industries. *See id.* "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.* (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989)).

48. *See id.* This rationale can probably most readily be described as an "it comes with the territory" approach.

49. *See id.* at 2395-96.

The majority opinion generated a fire storm of popular interest.<sup>50</sup> Justice O'Connor's dissent most eloquently expressed the problems inherent in the *Acton* majority:

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they do anyway: stay close to the record in each case that appears before them, and make their

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50. See CHAMPION, *supra* note 10, § 21.7 (Supp. 1996); Linda Greenhouse, *High Court Upholds Drug Tests For Some Public School Athletes*, N.Y. TIMES, June 27, 1995, at A1; Tamar Lewin, *Despite Ruling, Wide Drug Testing of Students is not Foreseen*, N.Y. TIMES, June 28, 1995, at B7; Marcia Chambers, *Courts Put Safety First in Drug Tests*, N.Y. TIMES, July 3, 1995, at 35. See also *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514, 1527 (9th Cir. 1994), *rev'd*, 115 S. Ct. 2386 (1995). The Ninth Circuit concluded that:

We understand the importance of having drug-free children, and the sorrow our society is reaping from the fact that the drugs which have invaded it have found their way into our children's hands. We also understand the deep concerns of parents, teachers, administrators, and school boards. We have no doubt that the District and those associated with it have proceeded in all good faith.

However, we also understand the concern of our forebears and the importance of the protections given by the constitutional provisions which prohibit unreasonable searches and seizures. We are all too aware of the dangers to our liberties that those provisions are designed to protect against and of the constant pressures upon them, despite centuries of living with and under their protections.

We have found that we must live with a certain amount of discomfort, even danger, if we are to maintain constitutional protections. If they are to continue to exist and flourish, we and our children must understand them, profit from them, and believe in them. They are, after all, just words, ideas, beliefs, and principles. But if we are vigilant there is a great deal of power in the word "just."

Given the Fourth Amendment, given our traditions, given our law, we are constrained to hold that the Policy is invalid under the Fourth Amendment. That being so, Oregon would find it invalid under Article I, Section 9, of its Constitution.

*Id.* On remand, the majority of the Ninth Circuit panel averred that the Oregon Supreme Court would not offer any greater protection under the provisions of the Oregon Constitution. See *Acton v. Vernonia Sch. Dist.* 47J, 66 F.3d 217, 218 (9th Cir. 1995). Therefore, the panel decided to affirm the judgment of the district court. See *id.* There was, however, a vigorous dissent (Reinhardt, J.) which preferred to certify the question to the Oregon Supreme Court. See *id.* at 219-20. Judge Reinhardt disagreed strongly with the majority's bold statement that the Oregon Constitution would afford no greater protection than Justice Scalia's *Acton* majority. See *id.* at 218-20.

judgments based on that alone. Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student-athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.<sup>51</sup>

Notwithstanding, the majority ignored the logic of Justice O'Connor and continued with a return to a family value approach.

Justice Scalia first raised the old standard that athletes are special and different because they are role models. "As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community."<sup>52</sup> The Court concluded that the "role-model" effect of athletes' drug use fueled the serious drug use problem within the Vernonia School District.<sup>53</sup> Justice Scalia then mulls another bromide, that "drug use increases the risk of sports-related injury."<sup>54</sup>

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51. *Acton*, 115 S. Ct. at 2407. See also *Moule v. Paradise Valley Unified Sch. Dist. No. 69*, 863 F. Supp. 1098 (D. Ariz. 1994), *rev'd*, 66 F.3d 335 (9th Cir. 1997). The *Moule* case, although interesting, contains little real significance after the Supreme Court's decision in *Acton*. *Moule* was decided on September 9, 1994, and religiously adhered to the Ninth Circuit Court of Appeals version of *Acton*, which was decided on May 5, 1994. Of course, the Supreme Court's rendition of *Acton*, which vacated and remanded the decision of the Ninth Circuit Court of Appeals, was decided on June 26, 1995. In *Moule*, a case also involving a random drug testing program for student-athletes, the District Court for the District of Arizona followed the Ninth Circuit in *Acton* and found that the school district's drug testing policy violated the Fourth Amendment. *Moule*, 863 F. Supp. at 1103. Interestingly, the court also opined that the consent forms signed by both father and son under the district's "no testing, no playing" requirement, were not truly voluntary. *Id.* The Moules were coerced, for constitutional purposes, by the fact that young Moule would have been barred from participation without the signed consent form. See also *Derdeyn v. University of Colo.*, 832 P.2d 1031, 1035 (Colo. Ct. App. 1991), *aff'd*, 863 P.2d 929 (Colo. 1993) (holding athlete's consent not voluntary).

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

53. See *id.* at 2395-96. "It seems to us self-evident that a drug problem largely fueled by the 'role-model' effect of athletes' drug use . . . is effectively addressed by making sure that athletes do not use drugs." *Id.* The Vernonia School District first expressed its concern for the "role-model" effect in the district court. See *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *rev'd*, 115 S. Ct. 2386 (1995). The district court concluded that "the school's leading athletes might have a significant poisoning impact, upon the broader student population, including the young and more impressionable elementary school students who would eventually seek to emulate their elders." *Id.*

54. *Acton*, 115 S. Ct. at 2389. The Court pointed to testimony in the district court confirming the "delirious effects of drugs on motivation, memory, judgement, reaction, coordination, and performance." *Id.* But see *Derdeyn v. University of Colo.*, 863 P.2d 929, 933 (Colo. 1993) (holding drug use did not increase risk of sports-related injuries).

A non-probable cause search can be constitutional if there are special needs that make the requirement of probable cause impractical.<sup>55</sup> One wonders what special needs are present in *Acton* where the quarry is a junior high school would be athlete that resides with his parents. Usually, the special needs is the risk of danger: e.g., a fleeing felon, a sweating stick of dynamite, etc. *Acton* opens the door for millions of school children to be subjected to intrusive bodily searches without even a scintilla of probable cause. "Principles of law once bent, do not snap back easily."<sup>56</sup>

Again, one wonders why more rational minds could not have prevailed. Why not a less broad-based approach that would decline to sweep innocent junior high school students into a drag net? For example, a test based on the probable cause of observed rapid eye movement. Why not choose a less intrusive available alternative which would also serve the stated purpose of monitoring and curtailment of illegal drug use by students? "Options such as education or impairment testing would be as effective as drug testing and not nearly as intrusive. Effective education which would teach athletes to handle stress and explain the underlying reasons for drug abuse" is certainly more appropriate than blanket testing which merely teaches the athlete to "say no" to drug usage when there's the possibility of being apprehended.<sup>57</sup>

The process in *Acton* is overly broad and unnecessarily intrusive. A better approach was demonstrated in the California Court of Appeals in *Hill v. NCAA*,<sup>58</sup> which also dealt with random, suspicionless urinalysis used at whim by a governing body, in this case the NCAA. Much was made in the Appeals Court version of *Hill* about the overly intrusive quality of the NCAA drug testing policy and the fact that forced urination on command was extremely em-

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55. *Acton*, 115 S. Ct. at 2391 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). In *Griffin*, the Court held that a search sans probable cause can be constitutional if "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin*, 483 U.S. at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)). In *T.L.O.*, there was no probable cause but there was an individualized suspicion of wrongdoing, unlike the situation here. *T.L.O.*, 469 U.S. at 345-47.

56. *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting).

57. *Champion, NCAA*, *supra* note 7, at 278-79. See also *Hill v. NCAA*, 273 Cal. Rptr. 402, 421 (1990), *rev'd*, 865 P.2d 633 (1994). The California Court of Appeals in *Hill* averred that drug education is "certainly a viable alternative to drug testing" which had not been adequately attempted by the NCAA. *Id.* Drug testing could not continue while less intrusive alternatives had not yet been adequately attempted. See *id.* at 422.

58. 273 Cal. Rptr. 402 (1990), *rev'd*, 865 P.2d 633 (Cal. 1994).

barrassing and humiliating.<sup>59</sup> The California Court of Appeals in *Hill* also mentioned that there were less intrusive methods available, namely, education and testing based on a reasonable suspicion.<sup>60</sup> The *Hill* testing program, like *Acton*, tested the pattern of drug use that occurred sometime before the big game, as opposed to the impairment of the athlete directly prior to the event.<sup>61</sup> If the goal is to reduce the possibility of injury due to impairment (and both the California Supreme Court version of *Hill* and the United States Supreme Court rendition of *Acton* claim that it is), then one must assume that the fairest type of test would be one that tests the athlete's impairment at the time of the game based on a reasonable suspicion of drug use.<sup>62</sup>

The urine testing policies used by both the NCAA in *Hill* and the Vernonia School District in *Acton* are inherently intrusive and inconclusive.<sup>63</sup> Both pose "the spectre of Big Brother peering over your shoulder (literally)."<sup>64</sup> Another option might be vocal impairment testing which tests the level of impairment at a specific moment in time based on an analysis of the subject's voicing patterns.<sup>65</sup> Vocal impairment testing, or some other test that evaluates the current level of impairment and is based on reasonable suspicion, makes much more sense than the expensive, overly intrusive, embarrassing hit-or-miss witch hunts perpetrated by the NCAA and the Vernonia School District.<sup>66</sup>

### B. Justice Scalia's Nostalgic Journey

Justice Scalia begins his discussion with the truism that the nature of the State's power over schoolchildren is custodial and tutelary which permits a degree of supervision and control that would

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59. *See id.* at 406. *See also* Champion, NCAA, *supra* note 7, at 279.

60. *Hill*, 273 Cal. Rptr. at 421. The California Court of Appeals also noted that drug education might be more effective at destroying drug myths and deterring general drug use than would be testing for certain specified drugs. *See id.* at 422.

61. *Id.* at 414. *See also* Champion, NCAA, *supra* note 7, at 279.

62. *See* Champion, NCAA, *supra* note 7, at 279-80.

63. *See id.* at 280. *See also* David J. Greenblatt, M.D., *Urine Drug Testing: What Does It Test?*, 23 NEW ENG. L. REV. 651 (1988-89).

64. Champion, NCAA, *supra* note 7, at 280.

65. *See id.* (citing Hayre, *Speaking on Drugs*, 32 Security Management 98 (Apr. 1988)). Dr. Hayre's program monitors on-the-job fitness by having the subject speak into an ordinary telephone; the voice pattern is then analyzed via computer and a current impairment measure is reported within seconds. *See id.*

66. *See* Champion, NCAA, *supra* note 7, at 280.

be unacceptable with free adults.<sup>67</sup> But, before the custodial and tutelary power kicks in, there must first be a problem,<sup>68</sup> which was not the case in *Acton*. Although the expectations are lesser for public schoolchildren, the intrusion must still be reasonable. Various physical examinations and vaccinations are probably reasonable, however, these examinations certainly do not include public urination. Also, these tests (vision, hearing and scoliosis) do not carry with them an approbation factor, as does the *Acton* drug testing (e.g., wearing glasses is not as onerous as being labeled, perhaps erroneously, as a "druggie"). Nor are the run-of-the-mill tests as intrusive as the random, suspicionless drug testing of minor, student-athletes.

The *Acton* majority continues: "Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards."<sup>69</sup> "Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors."<sup>70</sup> The Scalia majority noted the *Schaill* maxim that there is "an element of 'communal undress' inherent in athletic participation."<sup>71</sup> But, there is a world of difference between the modicum of communal undress that the *Schaill* court erroneously believed is inherent in athletics and the undress that is inherent in drug testing. The *Acton* Court stresses that by "choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."<sup>72</sup>

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67. See *Acton*, 115 S. Ct. at 2392 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985)).

68. See *T.L.O.*, 469 U.S. at 328 (school officials searched student's purse after student suspected of smoking on school grounds and school officials uncovered cigarettes and marijuana).

69. *Acton*, 115 S. Ct. at 2392. There appears, however, that there is far less allegiance to this so-called locker room mentality today. For example, the following is a colloquy with my 29 year-old wife. Q: "Did you feel comfortable showering after gym in high school?" A: "Heck no." Q: "Well, the Supreme Court says that drug testing is OK since students are use to, and at ease with, locker room nudity." A: "It must have been written by an old man."

70. *Id.* at 2393.

71. *Id.* (quoting *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)).

72. *Id.*

Justice Scalia's touchingly nostalgic view of suiting up, showering and changing clothes recalls the era of nickel cokes and free lunches; nostalgic sure, but undeniably paternalistic. Apparently if the NEW YORK TIMES is any indication or if the perceived notion of many professional sports educators means anything, there is a trend among American high school students to not accept showering with classmates after gym or athletics.<sup>73</sup> "In a striking measure of changed sensibilities in school and society, showering after physical education class, once an almost military ritual, has become virtually extinct. And the reasons seem as varied as insecurities about body image, heightened sexual awareness and a lack of time in a busy school schedule."<sup>74</sup> "Students across the United States have aban-

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73. See Johnson, *supra* note 5, at A1. Johnson noted:

A generation ago, when most schools mandated showers, a teacher would typically monitor students and handout towels, making sure that proper hygiene was observed. In schools with pools, students were sometimes required to swim naked, and teachers would conduct inspections for cleanliness that schools today would not dare allow, whether because of greater respect for children or greater fear of lawsuits . . . . Some people believe that children today simply grow up accustomed to more privacy. Years ago, when bigger families lived in smaller houses with fewer bathrooms and bedrooms, it was the rare child who could maintain a sense of modesty.

*Id.* Johnson also noted that the American Civil Liberties Union (ACLU) threatened to file a federal lawsuit against a mandatory shower policy in Hollidaysburg, Pennsylvania. See *id.* The ACLU attorney, David Millstein, represented a shy, overweight girl who felt humiliated in the showers. See *id.* The school district ultimately dropped their policy. See *id.*

74. *Id.* C.J. Glawe, a 16 year-old sophomore reports that "[y]ou just cake on the deodorant . . . and hope you're not going to smell too bad." *Id.* Johnson further states:

Modesty among young people today seems, in some ways, out of step in a culture that sells and celebrates the uncovered body in advertisements, on television and in movies. But some health and physical education experts contend that many students withdraw precisely because of the overload of erotic images — so many perfectly toned bodies cannot help but leave ordinary mortals feeling a bit inadequate . . . . Women have long been bombarded with the images of perfect female bodies. But in recent years, images of scantily clad muscular men have become much more widespread . . . . It also seems that a heightened awareness of sexuality, including the more open discussions in high schools today about homosexuality, has left many students fretting.

*Id.* As support, Johnson cites Dr. David Bernhardt, a specialist in pediatrics and sports medicine at the University of Wisconsin, Madison. See *id.* Dr. Bernhardt avers that mandatory showers will not "do any favors for your self-esteem . . . [a]nd when you don't feel good about yourself, you tend to pull back, close off." *Id.* See also *Melnynchenko v. 84 Lumber Co.*, 676 N.E.2d 45 (Mass. 1997). *Melnynchenko* seems to hold that intense "locker room" chatter can be actionable in sexual harassment cases, and although not on point, it is a definite pronouncement from a state Supreme Court that does not diminish the pernicious effect that "locker room" brutality can have on a person. See *id.* at 46. And although it calls for more than occasional locker room chatter that surfaces in the workplace; this opinion

doned school showers, and their attitudes seem to be much the same whether they live in inner-city high-rises, on suburban cul-de-sacs or in far-flung little towns in cornfield country."<sup>75</sup>

After concluding that students have a limited expectation of privacy that is even further diminished by their choosing to play sports, Justice Scalia compared the young plaintiff to "adults who choose to participate in a 'closely regulated industry'."<sup>76</sup> Justice Scalia relied on *Skinner v. Railway Labor Executives' Ass'n*<sup>77</sup> and *United States v. Biswell*<sup>78</sup> to buttress his comparison of employment in closely regulated industries and participation in school sports.<sup>79</sup> The industries in the cases he cites, however, deal with either great potential danger or the safety of common carrier passengers; both instances have little or nothing to do with the plight of a would be seventh-grade football player.

The *Acton* majority next turned to the character of the intrusion alleged.<sup>80</sup> The Court recognized that collecting the samples for urinalysis intruded upon "an excretory function traditionally shielded by great privacy."<sup>81</sup> The Court noted, however, that the

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demands a pervasive pattern of humiliating, offensive, unwelcome behavior that creates a hostile work environment. For same-sex sexual harassment, you do have to go beyond "boys being boys." After *Melnichenko*, locker room mentality harassment can now be actionable even though the victims are not the typical victims of sexual harassment, that is, women and gay men.

75. Johnson, *supra* note 5, at A1. Judy Young, the executive director of the National Association for Sport and Physical Education, believes it is just a new cultural thing but notes that avoiding showers is not all that new. *See id.* Even middle aged people remember having made excuses to avoid showering at school. *See id.*

76. *See Acton*, 115 S. Ct. at 2393.

77. 489 U.S. 602, 627 (1989).

78. 406 U.S. 311, 316 (1972).

79. *See Acton*, 115 S. Ct. at 2393. The *Acton* majority makes the jump from the safety and security sensitive rationale of *Skinner* and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Respondents brief in *Acton* argued: "Junior high school athletics is not 'safety' or 'security-sensitive,' as those terms are used in *Skinner* and *Van Raab*. The typical sports injury in Vernonia is a pulled muscle or torn ligament, and the District has never even had an injury that it can relate to drugs." Brief for Respondent, *Acton v. Vernonia Sch. Dist.* 47J, 115 S. Ct. 2386 (1995) (No. 94-590), 1995 WL 89313, at \*17. The question is how and why did they make this jump? Another question is, did the school district prove drug infestation generally and more specifically, drug infestation in the athletic program, or did they merely reflect paranoia and rumor-mongering? Teachers claimed both infestation generally and specifically, and supported their claims, at least in the minds of the teachers, "by unconfirmed, second-hand reports of off-campus drug use, almost all of it hearsay or hearsay within hearsay." *Id.* at \*3. Interestingly, the school did not test for alcohol use, which arguably was much more of a confirmed concern than rumors of drug usage. *See id.* at \*9.

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

81. *Id.* (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989)).

degree of intrusion depended upon the manner in which the production of the urine sample was monitored.<sup>82</sup> Under the policy in *Acton*,

male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.<sup>83</sup>

The so-called diminished expectation reflects a different quantum of expectation. The comparison to public restrooms is disingenuous, in a restroom you do not have to urinate on command with a known but non-casual observer watching your every move.

In *Acton*, the Respondents argued that the Vernonia School District's policy was in fact more intrusive than at first glance because it required students, "if they are to avoid sanctions for a falsely positive test, to identify in advance prescription medications they are taking."<sup>84</sup> Justice Scalia once again shielded his analysis by pointing to *Skinner v. Railway Labor Executives' Ass'n*, wherein the Court reached the conclusion that requiring the advance disclosure of medications was not a significant invasion of the right of privacy.<sup>85</sup> A better approach was taken by the California Court of Appeals in *Hill v. NCAA*.<sup>86</sup> In *Hill*, the court recognized that "the right to keep one's medical history private is protected" by the California Constitution.<sup>87</sup> As the *Hill* court correctly concluded, "an athlete's right to privacy should only be abridged when there is a compelling public interest."<sup>88</sup>

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82. *See id.*

83. *Id.*

84. *Id.* at 2394.

85. *See Acton*, 115 S. Ct. at 2394.

86. 273 Cal. Rptr. 402, 417 (1990), *rev'd*, 865 P.2d 633 (Cal. 1994).

87. *Id.* Also, since the right to protective choice is a fundamental right that falls within the other rights of privacy, the requirement that female athletes declare their use of birth control pills would also invade this right. *See id.* (citing *Conservatorship of Valerie N.*, 707 P.2d 760 (Cal. 1985)). *See also* Champion, *NCAA*, *supra* note 7, at 276.

88. Champion, *NCAA*, *supra* note 7, at 276.

The *Acton* majority next turned to the nature and immediacy of the governmental concern at issue. Justice Scalia concluded:

[t]hat the nature of the concern is important — indeed, perhaps compelling — can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab*, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner*. School years are the time when the physical, psychological, and addictive effects of drugs are most severe.<sup>89</sup>

Certainly, controlling the use of drugs in public schools is extremely important. If it truly is so essential, then why not test everyone? Why not test all seventh-graders? Justice Scalia shouldn't use sports, as a back door to test seventh-graders, who could not be accessed through the front door.

Justice Scalia concludes with yet another bold, but totally unproved or even unprovable assertion. "Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."<sup>90</sup> Again, this is totally unproved and is not supported by any credible evidence or documentation. His assertions are based, so it seems, on misty memories and flimsy hearsay.

### C. Justice O'Connor Says "No"

Justice O'Connor opines that exceptions to the probable cause requirement should only be for exceptional reasons and that "[b]lanket searches, because they can involve 'thousands or millions' of searches, 'pos[e] a greater threat to liberty' than do suspicion-based ones, which 'affect one person at a time'."<sup>91</sup> Justice O'Connor also noted the Court's departure from precedent, stating that "[f]or most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed ex-

89. *Acton*, 115 S. Ct. at 2395 (citations omitted).

90. *Id.*

91. *Id.* at 2397 (O'Connor, J., dissenting) (quoting *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting)) (second and third alterations in original).

ceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual.”<sup>92</sup> Justice O’Connor, in good conscience, could not see that a suspicion-based approach would have proven ineffective under the facts in *Acton*. Justice Scalia himself had stated in *National Treasury Employees Union v. Von Raab* that “[u]ntil today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment.”<sup>93</sup> Justice O’Connor was surprised by the apparent contradiction.<sup>94</sup>

Justice O’Connor also demonstrated that she understands the context of the public school environment and noted that it would be easy to establish probable cause in the confined, myopic boundaries of the public school classroom. “In most schools, the entire pool of potential search targets — students — is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms.”<sup>95</sup> In an environment such as this, eliciting probable cause would be easy, if it existed. This, thus, makes searches in the absence of probable cause unacceptably unreasonable.

Justice O’Connor next attacked the majority’s reliance on *New Jersey v. T.L.O.* and similar cases.<sup>96</sup> She noted that the cases relied on by the majority stand for the proposition that schools have substantial leeway in carrying out their traditional mission of responding to students’ particular wrongdoings. “By contrast, intrusive, blanket searches of school children, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise.”<sup>97</sup> Such was the case of the *Acton*’s father, James *Acton*.

Justice O’Connor then gently proceeded to the underlying difference between medical exams and drug tests: the former has no onus, it is not pejorative, while the drug test contains at least some punitive elements. “It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect

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92. *Id.* at 2398 (O’Connor, J., dissenting) (emphasis added).

93. 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

94. *See Acton*, 115 S. Ct. at 2401 (O’Connor, J., dissenting).

95. *Id.* at 2403.

96. *See id.*

97. *Id.*

wrongdoing on the part of the student, and so are wholly nonaccusatory and have no consequences that can be regarded as punitive."<sup>98</sup> Justice O'Connor rightly believed that drug testing is different because "the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably — and quite reasonably — understood as punishment."<sup>99</sup> Justice O'Connor therefore concluded that the *Acton* policy "sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment."<sup>100</sup>

### III. CONCLUSION

The drug testing of student athletes has been a tempest-in-a-teapot for at least the last ten years. *Schail v. Tippecanoe County School Corp.* established the parameters for a diminished expectation of privacy, the "locker room mentality" argument. It is a beautifully simplistic argument; and one that defies documentation. It is a perfect non-argument; something in the same genre as "don't walk under ladders." The California Court of Appeals in *Hill v. NCAA* and the Ninth Circuit Court of Appeals rendition of *Acton* both veered towards a more rational way of solving the problem. However, the California Supreme Court in *Hill*, and of course, Justice Scalia in *Acton*, again revisited the Bermuda Triangle of arguments — don't worry about their privacy, they don't expect much because of THE LOCKER ROOM!!!!

Justice O'Connor makes a noble attempt at bringing a reality-based approach to this conundrum. The role model and locker room arguments are inherently weak. She realizes this and understands that this is really an egregious intrusion into the legitimate privacy rights of an already unprotected group. Analyzing urine is an intrusive bodily search, and the majority has now accepted suspicionless blanket searches of a closed-set community. Unfortunately, however, *Acton's* assault on privacy was based on hearsay, innuendo, gossip and paranoia. The so-called drug revolution is insufficient, at least in the sub-set of high school athletics, to allow such an invidious intrusion without a modicum of some legitimate probable cause.

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98. *Id.*

99. *Acton*, 115 S. Ct. at 2405 (O'Connor, J., dissenting).

100. *Id.* at 2407.