Drug Testing, Collective Suspicion, and a Fourth Amendment Out of Balance: A Reply to Professor Howard

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I. Introduction

In *Vernonia School District 47J v. Acton*,[1] the Supreme Court approved a public school district's right to compel the majority of its students, those who participated in its athletic programs, to urinate, essentially at the demand of a school authority figure, and then to turn over their bodily fluids to school officials to be tested for marijuana, cocaine, and LSD. The school asserted its right to engage in this testing as needed to protect student athletes from the dangerous consequences of drug abuse, notwithstanding the fact that it never tested students for the drug they were most likely to abuse—alcohol—nor for the drug most dangerous to high school athletes—steroids. Pursuant to this policy, the school tested hundreds of junior high school-age children whom it had no basis to suspect had used drugs at a school at which the school board had absolutely no evidence that any student had ever used drugs.

Despite the limited evidence in the record of any serious drug epidemic, either generally in the Vernonia schools or, in particular, in the elementary schools, the Supreme Court approved the suspicionless search of seventh-graders as "reasonable" by balancing the intrusion imposed by random drug testing against the legitimate governmental interests furthered by the tests. The Supreme Court then concluded that the privacy interests of the affected students were outweighed by the governmental interests proffered by the school board.

As a matter of constitutional interpretation, the case is troubling on at least two grounds. First, it is a demonstration of the failure of the Court's majority, which often invokes history when it supports its decisions in favor of the government, to consider the history, purposes, and values underlying the Fourth Amendment when it might produce an unfavorable outcome. A fair reading of that history and tradition supports the view that the requirement that a search proceed upon individualized suspicion is a core component of a "reasonable" search, and that dispensing with that requirement should only be permitted where there is persuasive evidence of significant dangers to public health and safety *and* a demonstrated inability to deal with the situation by the traditional means of targeting those whose conduct provides suspicion of wrongdoing. Had such a preference for individualized suspicion been taken seriously in this case, the school board could not have successfully defended its decisions, for its concerns about student deportment and student drug usage in the school environment could have been addressed by a program of suspicion-based testing.

Second, the case is yet another example of

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the poverty of analysis that accompanies the Court's current "balancing" test—the Supreme Court's test to determine the "reasonableness" of a search, which purports to measure the degree of intrusion caused by the government practice against the need of the government for the search procedure advanced. The Court's determination of the degree of intrusion against the individual invariably results in the Court's normative judgment that the degree of intrusion is insubstantial. In the course of denigrating the intrusions upon privacy, the Court rarely considers evidence provided by custom, law, or public opinion. At the same time, the Court's weighing of government interests tends to inflate the interests by discussing the general social problem being addressed by the search scheme, rather than the need for the particular search scheme proposed by the government.

Finally, the actions of the school district stand as a case study of parental and bureaucratic failure. Faced with a drug problem that appears less threatening than that faced in our community in Lawrence, Kansas, and in most high schools in the country, the parents in Vernonia, rather than teach and confront their own children, deputized the school district as parent for all, and imposed that designation on all children in the district. The school district's cowardice was equal if not greater. Faced by a small group of disruptive students, the school threw up its hands, declared itself unable to discipline those few who offended, and instead decided to intrude on the privacy and dignity of most adolescent students in the district.

II. Individualized Suspicion and the Fourth Amendment

Arguably the most important feature of the Court's analysis in this case is its view of the connection (or more precisely, the lack of connection) between whether a search is "reasonable" within the meaning of the Fourth Amendment, and whether it proceeds upon suspicion that the individual searched in fact possesses the evidence the government is seeking. As I shall discuss, in determining whether a search is reasonable, the Court has employed a "balancing" test, weighing the intrusion of the government practice against the government interest served by the program. In *Acton*, the Court claimed to utilize the test, and, after doing so, it concluded that the students' privacy interests were outweighed by the problem of illegal drugs. Then, critically, the Court moved almost directly to a conclusion that the school district could utilize a program that tested all students, rather than a program targeting those who evinced some symptoms of drug use.

In rejecting the argument that the school board should only test upon suspicion, rather than test all students, the Court in essence declared that it made no difference for Fourth Amendment reasonableness which of the options the district chose. Justice Scalia instead argued that the Court had repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.[2] With virtually no further analysis, he dismissed any obligation on the part of the board to demonstrate an inability to control drug use by student athletes by testing on suspicion, notwithstanding the opinion of the court below that "teachers and administrators could detect behavior and physical problems that rather clearly appeared to be drug related."[3]

Justice Scalia's view that the difference between random searches and searches upon suspicion is merely a policy choice delegated to

the legislature is fundamentally unfaithful to the Fourth Amendment. As Justice O'Connor's dissenting opinion, and other recent research convincingly demonstrates, the history of the Fourth Amendment suggests that a desire to require searches upon suspicion was one of the core reasons for enactment of the Amendment. For most of our history, suspicionless searches have been considered unreasonable under the Fourth Amendment. And, in recent years, when exceptions have been allowed, they have been permitted only when it has been clear that a search regime utilizing suspicion-based searches would be ineffectual. While the specific question of school searches could obviously not have been in the minds of the Framers at the time of the enactment of the Fourth Amendment, since public schools as we know them did not exist, the history of the Amendment demonstrates the centrality, even when warrants are not required, of individualized suspicion.

The single practice of greatest concern to the Framers of the Amendment was the general search — searches which proceeded by so-called general warrants or writs of assistance. Some of the general warrants were directed against specific individuals and were opposed because they allowed broad searches of these individuals without cause. Other general warrants were even broader. They permitted searches of entire areas in a "door to door" fashion.[4] For example, writs of assistance permitted customs officials to search wherever they chose.

Distaste about these practices was widespread, and the Fourth Amendment was written in large part to limit them. The remedy chosen by the framers to limit the abuse was the requirement that they occur only upon suspicion—probable cause—and that they specifically identify and limit the scope of the search.

While the command of probable cause was included in the section of the Amendment dealing with the requirements for a search pursuant to a warrant, there is little doubt that the framers believe that suspicion was a general requirement for searches, whether carried out by a warrant or not.[5] Thus, when the same Congress that proposed the Fourth Amendment authorized customs searches, specific warrants were required for searches on land; for searches on sea, where warrants could not have been obtained, and were therefore not required, the statute nonetheless limited officers in searching to those ships "'in which [a collector] shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed.'"[6]

The requirement that searches be permitted only upon suspicion was sufficiently well-established that when the Supreme Court, early in the century, considered the propriety of allowing searches of automobiles without a warrant, the Court assumed that, whatever the necessity of a warrant, it would be intolerable to allow searches, even if evenhanded, of all cars without suspicion. The Court stated, "it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."[7]

Justice Scalia's rejection of the historical preference for searches upon suspicion was cavalier: his response to the historical evidence presented in Justice O'Connor's dissenting opinion and reflected in other recent studies[8] was essentially to ignore it. At the outset of his opinion, he stated that where there was no "clear practice" either approving or disapproving the

type of search, the question of whether a particular search is unreasonable is measured by the Court's test balancing the individual's Fourth Amendment interest against the government's interest. Justice Scalia then noted in a footnote that public schools did not begin in this country until the nineteenth century, and that drug testing was an even more recent phenomenon.[9] His footnote said no more, therefore indicating his belief that the irrelevance of history to shed any light on the issue was self-evident. Those familiar with Justice Scalia's writing on the First Amendment's Establishment Clause will no doubt find his dismissal of history for the Fourth Amendment baffling. Justice Scalia has had no difficulty in arguing the importance of history in determining its applicability to activities carried out in public school and by public school students, despite the fact that public schools antedate the First, as well as the Fourth, Amendment.[10]

Justice Scalia's refusal to confront history might have been appropriate if current caselaw had compelled a conclusion that it was essentially irrelevant, for Fourth Amendment purposes, whether individualized suspicion was required for a search. And it is correct that recent decisions of the Supreme Court, when dealing with so-called administrative searches, or searches upon "special needs," have allowed the government to search or seize individuals without probable cause. But even if we take the Supreme Court's recent decisions as the baseline for measuring the scope of the Fourth Amendment's suspicion requirement, those cases have, with rare exceptions, approved suspicionless searches or seizures only when the search or seizure involved was unintrusive or the threat to public safety was substantial, and, in addition, when the goals of the administrative scheme could not be accomplished by searches upon suspicion.

Thus, the series of cases that have permitted suspicionless stops of individuals to determine compliance with auto registration,[11] immigration regulations,[12] or to check for sobriety[13] involve particular conditions, such as compliance with auto registration, that are not observable, so that checking upon suspicion would render the program ineffective. Moreover, the stops approved in those cases are far less invasive of individual privacy than the search required in *Acton*. Indeed, the temporary stopping of an automobile at a checkpoint is probably the smallest and least intrusive action comprising a "seizure" under the Amendment.

Another line of administrative search cases has permitted searches of "closely regulated" businesses for safety-related information.[14] However, the requirement that a pawn-shop owner produce gun records or that a mine owner submit to safety inspections is obviously done on a greater showing of public need than that in *Acton*. Moreover, the intrusion is one that requires disclosure of public and business information, rather than the intensely private type of information that is required in a search of excretory functions.

The cases that have permitted intrusions similar in nature to drug testing, or permitted drug testing itself, have done so in situations where a threat to public safety, not just the safety of the individual screened, was implicated. Thus, in *Skinner v. Railway Labor Executives' Ass'n*,[15] the Court approved testing of railway workers involved in accidents by noting that even one drug-impaired train operator could lead to "disastrous consequences" such as a train wreck. Perhaps even more directly, in *Treasury Employees v. Von Rabb*,[16] the Court approved

the testing of employees of the customs service working at the border or possessing firearms, because such officials, in effect, were on the "front lines" of the war on drugs. The Court recognized that such individuals might, by using drugs, become susceptible to bribery or corruption, with the possible consequence of failing to stop huge quantities of drugs from shipment to this country. At the same time, the Court failed to uphold a requirement that every customs employee who handled classified documents be required to be tested, or that all customs officials be tested.

Moreover, even in these cases, involving employees who had pursued jobs in safety-sensitive industries, the government pursued a testing scheme far less invasive than the one imposed upon most junior high school and high school children in Vernonia. In *Skinner*, the testing was accomplished by medical personnel, in a medical environment; in *Von Rabb*, the employees were given advance notice, not visually monitored, and not required to disclose medication.

Finally, and perhaps most importantly, most of the cases in which suspicionless testing was approved involved situations where the Court found that an alternative restricted to testing upon suspicion could not satisfy the concerns that prompted the administrative search scheme. For example, in *Camara v. Municipal Court*,[17] the Court refused to require individualized suspicion precedent to inspections of homes for safety code violations because such inspections simply could not effectively be done only upon suspicion—conditions such as faulty wiring are simply not observable, and the choices left to the government (and Court) were therefore to permit inspections without individualized suspicion, or to wait until safety code violations had caused the harms against which the codes were designed to protect.

To put it mildly, in this case, the school board never demonstrated that a suspicion-based regime would be impracticable. But that failure was not fatal. The majority never found the need to examine with care whether the school board could have tested those students found to have offended the prohibition against drugs, because the Court found that the school need not establish that such a regime would be impracticable before it went to a system of blanket testing.

III. The Use of the Balancing Test

Even if the Court were correct in ignoring history and the preference for suspicion-based testing in favor of an ad hoc "balancing" of interests between the privacy of the individual and the need of the government, its use of the "balancing" test would be cause for concern. As it has in so many of its recent cases, the Court significantly understated the intrusion represented by the practice of drug testing, and it overstated the need of the Vernonia school district to test most of its students.

A. The Nature of the Intrusion

The Court acknowledged that drug testing involves "'an excretory function traditionally shielded by great privacy.'"[18] That, I believe, is an understatement. The activity that the State purports to monitor is one which, after all, is not only an activity which we do not engage in out in public, but one that is against the law to perform in public.[19] Indeed, drug testing by urinalysis is sufficiently intrusive that at least eighteen states and many municipalities have enacted laws to regulate the use of the practice, including its use by private companies.[20] While this activity is

clearly intrusive for adults, it is also intrusive for middle school and high school students. Adolescents have little enough use for adult monitoring of their conversations and activities. In *Acton*, the Court permitted a drug testing scheme that allowed the school district essentially to mandate that students perform excretory functions while under the gaze of an authority figure.

The manner in which the tests were performed, more intrusive than those permitted in *Skinner* and *Von Rabb*, maximize the sense of invasion. Each week the school draws names of students to be tested. The student is escorted to a locker room and instructed to urinate. If the student is unable to do so, he may leave, but will be required to return later in the day. This intrusion is compounded by the requirement that students disclose prescription medication to school officials before taking the test. By so requiring, the school arrogates to itself the right to learn information that individuals often hold secret and that is unrelated to whether the student is using illegal drugs. This disclosure, for example, would provide information to the school on those of its students taking birth control pills.

In addition to playing down the intrusive nature of the search undertaken here, the Court advanced two reasons why the individuals tested were entitled to limited privacy over their excretory functions. While acknowledging that junior high school and high school students possessed an interest in bodily integrity, the Court stated that student privacy rights were diminished by the fact that they were high school students, and that student expectation of privacy was further diminished by the fact that the particular students tested were student athletes. I believe that neither of these factors provides significant support for the Court's approval of blanket testing.

As to the first of those two considerations, it is of course true that students in high school have "watered down" constitutional protections for some purposes. The requirements of school education and discipline permit regulations of speech that would not be permissible if imposed upon adults.[21] And students can also expect, as a result of the school's custodial responsibilities, that the school may possess broad search powers in certain areas.[22] For example, because the schools control their lockers, it may be reasonable to subject the lockers to routine inspections. But the fact that students have reduced expectations of privacy in some areas does not necessarily mean they lose privacy in all respects. That student lockers are open to search does not mean students should expect that they have their bodies searched, or that school officials may search their homes to find out what they are doing when they are not in school. Similarly, there is nothing about student submission to compulsory school attendance or obtaining vaccines (which are not searches at all) that should permit a conclusion that students forfeit an interest to be free from observation by authority figures while urinating or from chemical inspection of their bodily fluids.

The second prong of the Court's analysis, its conclusion that student athletes had an even more diminished expectation of privacy than other students enjoy, in part because of the "communal undress" that athletes experience in locker rooms, is even less persuasive. First, the argument proves too much, for the prospect of "communal undress" is faced by virtually all students, not just athletes. Mandatory participation in physical education programs and the use of locker rooms is a part of the life of

virtually all high school students. More important, it is genuinely hard to see why the fact that students will lose *some aspect* of privacy because of that communal undress means that students have a lesser expectation of privacy concerning a different and more substantial intrusion. There is simply no logical reason why the fact that students will encounter fellow students of the same sex in various states of undress constitutes a waiver of their privacy to be free from being required to urinate in front of an authority figure, or to be required to turn over that urine for chemical analysis. Many of us use locker rooms in gymnasiums and health clubs. I doubt that any of us believes that use to be relevant to our expectation of privacy were the club owner to assert a right to monitor our urination and engage in urinalysis.

The Court also opined that by choosing to go out for the team, students subject themselves to a degree of regulation "even higher" than that imposed upon students generally. But the actual degree of regulation imposed upon the great number of students who went out for sporting activities in Vernonia was not significantly greater than that required of students generally. Students must take a physical, keep up grades, and have insurance or sign a waiver.[23] These minimal rules, which may parallel those required for any number of activities at the school, should not represent the kind of extensive government regulation that would diminish an individual's expectation of privacy. And the fact that students may choose not to participate in sports should also not be sufficient to reduce a student's expectation of privacy. In fact, for students who wish to participate in any kinds of organized athletic activities, the school programs are the only show in town. Moreover, the notion that testing is permissible because students voluntarily join athletic programs would permit the school district to test essentially all of its students, for virtually all students enroll in some activity that is voluntary. The "voluntary choice" rationale would therefore allow drug testing for students as a condition to entering choir, driver training, student council, shop, or any other of the range of activities engaged in by high school students that the school might be able to articulate as involving "role models" or activities where student safety was a concern.[24]

The overall effect of Justice Scalia's effort to minimize the intrusiveness of a compelled urinalysis is a not-so-subtle denial of reality. Both anecdotal and empirical evidence suggest that at least for those of us who do not routinely submit to drug testing, a request to do so is threatening. Students who have been required, as a part of their NCAA athletic competition, to submit to such testing have let me know, in no uncertain terms, of their distaste for the process. A group of University of Kansas law students who faced the possibility of being required to submit to testing as a condition of participating in one of our clinical programs was, almost without exception, outraged by the notion that they should have to submit to testing. They opined, and I would have no reason to disagree, that imposition of such a requirement for our clinical course would result in a substantially reduced enrollment for the course. This anecdotal evidence is in accord with the one empirical study of which I am aware, which showed that a requirement to submit to drug testing was viewed as a greater intrusion on privacy that a search of an auto, search of a garage, or even arrest and detention of an individual for forty-eight hours—activities, of course, that would require probable cause.[25]

B. Justification for the Intrusion

If Justice Scalia consistently denigrated the privacy interest implicated by the drug testing in *Acton*, he exaggerated, sometimes extravagantly, the danger faced by the Vernonia School District, and the justifications for the search program.

The Court began by observing that "[d]eterring 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" (the basis for the Court's decision in *Von Rabb*) or "deterring drug use by engineers and trainmen" (the basis for the decision in *Skinner*).[26] But the conclusion that the State's interest in Vernonia is as great as in the Court's other drug testing cases is questionable, to put it mildly.

First, it is simply not the case that we equate the risk that *individuals* (even young people) may use drugs with the risk that those responsible for the safety of hundreds of individuals may use drugs. The public interest in deterring drug use by engineers and trainmen cited in *Skinner* was the concern that even a single intoxicated individual in so safety-sensitive a position might endanger hundreds of others. Similarly, the law enforcement/customs employees in *Von Rabb* were in a position to endanger hundreds were they to have participated in drug smuggling. Those risks are simply of a different order than the risk that a high school student may smoke marijuana. Where pressing questions of public safety are concerned, societal and administrative interests ought to be of a greater order than where the concern is that a particular individual might misuse drugs.

Moreover, Justice Scalia's description of the interests involved conflates the school's interest in dealing with drugs with society's interest. The two may not be identical. Our school systems obviously have an interest in assuring that students are not using illegal or dangerous drugs on school premises. They also have a clear interest in assuring that students are not intoxicated or affected by drugs while at school. On the other hand, we have not yet made school administrators surrogate parents for all student behavior at all times. While our society and criminal law have expressed the view that it is dangerous for young people to use drugs at any time, the school's interest in combating drug use is appropriately narrower than society's.

A less exaggerated statement of the administration's interest might be its desire to reduce drug use in school, with the student-athletes targeted because they were role-models, and to protect student athletes from harm caused by drug usage. Here, the school's and the Court's characterization of the problems posed by student drug usage exaggerates—almost extravagantly—the extent of drug use at Vernonia. The view of the school district that it was facing an epidemic, that a large portion of the student body were in rebellion, and that there was an "immediate crisis" that was so pressing as to be more important than the governmental need to test individuals responsible for common carrier accidents, is based upon more fear than evidence. In fact, the depiction of student drug usage in Vernonia shows a student body that was less prone to drug use than students at most high schools in the country.

The record in this case revealed the following evidence: During the 1980s the number of disciplinary complaints against students at the Vernonia High School apparently increased significantly. The basis for most of

these complaints was apparently rude behavior by students. In addition to these instances, school administrators were particularly concerned about two "rowdy groups" of students that would engage in heat-butting and other adolescent activity.[27]

These instances of misbehavior coincided with what administrators believed was an increase in drug use and glorification of drug use in school. As evidence of glorification of drug use, one teacher reported that during the 1980s, some eight or nine students had written compositions in which drug use was dealt with approvingly. The instances of drug use reported to the Court involved one teacher's observation of students smoking a cigarette across from the school that she believed to be marijuana, apparent student admissions to the football coach that some had been using amphetamines, and reports of parents that students had used marijuana during a football road trip.

As for drug usage by student athletes, in addition to the hearsay account of amphetamine usage, the school board presented the testimony of the wrestling coach that one student had inexplicably failed to perform a wrestling move he had previously performed well, and that he injured himself as a result. The next day, the coach went to the room that the boy was sharing with several others and concluded that someone in the room was smoking marijuana.

While the school board, and the district court, apparently concluded from this evidence that drug use was epidemic, the court of appeals was clearly more rational in its assessment of what the evidence showed: "there was some drug usage in the schools, that student discipline had declined, that athletes were involved, and that there was reason to believe that one athlete had suffered an injury because of drug usage and others may have."[28]

If the evidence generated at Vernonia is sufficient to establish a governmental need for suspicionless drug testing, there will be few high schools where administrators will be unable to demonstrate a justification for testing. Indeed, it is hard to imagine an urban or suburban high school where the account of student drug use would be as sparse and, frankly, benign, as reported by Vernonia. Apparently, Vernonia has been spared students who experiment with LSD, cocaine, pain killers, and tranquilizers, to name just a few of the drugs used by students in the high schools my children have attended and are absent from the account of the problem in Vernonia.

But even if Vernonia's evidence were sufficient to establish a pressing problem in the high school, the district never made an effort to explain why it was necessary to apply the policy to James Acton, an elementary school student. The record in this case is devoid of *any* evidence that *any* junior high school age student used drugs at *any* time. The Court thus declared as constitutional a policy requiring the mandatory testing of thousands of pre-high school children, under conditions more degrading than those permitted in *Skinner* and *Von Rabb*, in a situation where general public safety was not endangered, based upon an "epidemic" that the school board had never demonstrated had spread even in small part to the junior high school.

C. Acton and Parental Responsibility

Take it from one who has raised three teens, adolescents have a nose for hypocrisy and little stomach for bureaucracies acting on fear. Both of those problems mark the Vernonia testing program. Those students who participate in sports know they are singled out by the

school. They may question whether a testing program that includes marijuana, while leaving out alcohol and steroids, is really being instituted for their safety or is more a reflection of their parents' fears. They may wonder why the school has invested so much energy to screen them all, rather than attempting to deal with those who cause trouble. Ultimately, this program may help a few students, but those students would be helped far more by parental involvement.[29] For more students, the testing will be a distasteful invasion of their privacy, and a message that the school system presumes them guilty.

Notes

* This essay is a somewhat expanded version of a presentation given earlier this year at a forum for the Kansas Journal of Law and Public Policy. In that forum, I replied to Professor Howard, who defended the Court's opinion. As with his oral presentation, Professor Howard's written comments contain a summary of the facts and the Court's opinion. My comments assume that the reader has read Professor Howard's paper.

1. 115 S. Ct. 2386 (1995).
2. *Id.* at 2396.
3. Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1522 (9th Cir. 1993). Justice Scalia did argue that testing upon suspicion might be impracticable because parents might not approve a regime of suspicion-based testing or that the school board might fear the possibility of legal action based upon a regime that tested only those students who demonstrated some evidence of impairment. 115 S. Ct. at 2396. It is clear, however, that his speculations were not critical to the ultimate conclusion that it was not the school's obligation to demonstrate that only a random testing method could accomplish its goals.
4. Justice O'Connor's dissenting opinion identifies two classes of warrants that went "beyond" general search, in which the searcher entered and inspected suspicious places, by requiring the searching of entire categories of places whether suspected or not, but by authorizing searches of entire geographic areas in a district, not just specific houses. 115 S. Ct. at 2398 (O'Connor, J., dissenting).
5. The decision to address the requirement of probable cause in the warrant clause was entirely logical, because the primary evil against which the drafters were reacting was the use of general warrants. Moreover, most searches were carried out by warrant, and those few that were not generally required individualized suspicion. While the probable cause requirement was thus specifically attached to the warrant clause, the historical record makes clear that individualized suspicion was also thought to be necessary for a warrantless search to be "reasonable." The Fourth Amendment was a device to regulate the abuses of searches. It would be an absurdity to assume that the framers intended to permit those abuses, so long as they were carried out without a warrant.
6. 115 S. Ct. at 2399 (O'Connor, J., dissenting) (citing the Collection Act of July 31, 1789 §24, 1 Stat. 43). *See also* Cuddihy, the Fourth Amendment: Origins and Original Meaning (1990) (Ph.D. Dissertation at Claremont Graduate School). Cuddihy is extensively cited by Justice O'Connor in her dissenting opinion.
7. Carroll v. United States, 267 U.S. 132, 153-54 (1925).
8. Justice O'Connor cites a recent Ph.D. dissertation as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." 115 S. Ct. at 2397-98 (*citing* Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990), a Ph.D. Dissertation at Claremont Graduate School). Another extensive work reaching the same conclusion is Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 Mem. St. U.L. Rev. 483 (1994).
9. 115 S. Ct. at 2390 n.1.
10. *See* Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).
11. Delaware v. Prouse, 440 U.S. 648 (1979).
12. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

13. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
14. *See* New York v. Burger, 482 U.S. 691 (1987).
15. 489 U.S. 602 (1989).
16. 489 U.S. 656 (1989).
17. 387 U.S. 523, 537 (1967).
18. 115 S. Ct. at 2393 (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626 (1989)).
19. For women, the public restrooms are configured so that the act of excretion may be accomplished without any observation. While men have less privacy while using public rest rooms, the general ethic when using these rooms is not to look directly at each other.
20. Kevin B. Zeese, DRUG TESTING LEGAL MANUAL § 1.05[3], at 38-39 (rel. #13, May 1995).
21. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).
22. *See* New Jersey v. T.L.O., 469 U.S. 325, 339-41 (1985).
23. Respondent's Brief at 34, Acton (No. 94-590) (citing the Record at 61, 62).
24. In fact, the program originally approved by the school district mandated testing of any individuals involved in extra-curricular activities, including band, drama, and student government. Respondent's Brief at 8 n.9, Acton (No. 94-590) (citing Joint Appendix at 29, 30).
25. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at Understanding Recognized and Permitted by Society*, 42 Duke L.J. 727, 738 (1988).
26. 115 S. Ct. at 2395.
27. *See* Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1515 (9th Cir. 1993). One group of perhaps four to ten students called itself the "Big Elks" and would engage in antics such as "head butting" in school. Another group, called itself the "drug cartel" and engaged in equally strange behavior. There was no evidence of drug use by members of these groups, in school or out. Respondent's Brief at 2-3, Acton (No. 94-590) (citing Joint Appendix at 41, 52, and 60).
28. 23 F.3d at 1519.
29. Of course, any parent in Vernonia could have had his or her child tested for illegal drugs as part of the school-mandated physicals. The effect of Vernonia's program was not to compel students whose parents wanted their children tested to submit to such tests. The parents already possessed that power. Instead, the result was to compel parents who did not wish their children tested to submit their children to the test or forfeit their right to participate in athletic programs.