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# Drug Testing College Athletes: NCAA Does Thy Cup Runneth Over

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# DRUG TESTING COLLEGE ATHLETES: NCAA DOES THY CUP RUNNETH OVER?

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## I. INTRODUCTION

The use of drug testing to deter drug use is not a new phenomenon. In the proper setting, drug testing is a necessary device to ensure public safety or to eradicate a drug problem. The expansion of drug testing to all facets of society, especially to activities that do not involve public safety, is a troubling development that has serious implications for privacy rights.<sup>1</sup>

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1. Humorist Art Buchwald satirized the fears surrounding the expansion of drug testing:

It all started when someone came up with the idea of testing horses for drugs.

Then somebody else said, "As long as we're doing it for horses, why don't we test football players?" It seemed like a good idea until baseball teams complained that if the authorities were screening football players, they should do the same for baseball players. The track stars said that they wanted to be in on it too, and before you knew it, they were testing basketball players, croquet teams, wrestlers, and bowlers.

A female volleyball team in Alaska went to the State Supreme Court complaining that men were being tested ten times as often as women. The court ruled that women were entitled to equal drug tests under the law.

Although the dope screening started in sports, it soon hit the civilian population.

Politicians urged that every schoolchild in America be tested. Corporations gave all employees little paper cups as they lined up for their paychecks.

Banks demanded drug checks on customers in exchange for mortgages. No one could use a credit card unless he had a favorable report from the lab.

The Army, Navy, Air Force, and the Marines declared mandatory testing for our boys in uniform. And the White House ordered everyone from the Secretary of State to the lowly Secretary of Agriculture to bring in samples before a cabinet meeting.

President Reagan declared that everybody in Nicaragua had to be tested by the Contras, who were already tested by the CIA.

There was some hell to pay when the White House leaked the story that all heads of state would have to take a drug test before they met with the President. Prime Minister Margaret Thatcher was particularly disturbed when they sent her a kit in the diplomatic pouch.

To show that there was nothing to it, President Reagan took the test. As everyone suspected, the President passed it with flying colors, and Nancy was shown giving him a kiss when the results were announced.

Drug screening became the most serious obstacle to foreign relations.

One of the big stumbling blocks to holding a summit concerned the question of whether or not Gorbachev would take a drug test. The Soviets insisted that Mr. Reagan had to take their word that Gorbachev was not on dope. The Ameri-

Despite drug testing's beneficent purposes, it is an invasion that has been challenged in many courts. When assessing the legality of drug-testing programs, courts must attempt to balance the invasive nature of drug testing against its benefits to society.

In 1986, the governing body of major college athletics, the National Collegiate Athletic Association (NCAA),<sup>2</sup> implemented a random drug-testing program.<sup>3</sup> The program imposed sanctions on athletes who tested positive on a urine test for drugs banned by the NCAA.<sup>4</sup>

cans held out for on-site inspection.

Not only the White House but other branches of government are now insisting on checks for drug use. Congressional candidates are filming commercials holding up the results of their tests on television and demanding their opponents do the same.

A suggestion to have the nine members of the Supreme Court take a test before deciding a case was greeted with stoney silence by the Court. That is because the Supreme Court will have to decide whether mandatory screening is constitutional or not. And if they take the test and fail, they could be held in contempt.

I don't wish to give the impression that everyone in Washington is being checked on a regular basis.

Many of us are just being subjected to random testing when we're in a public place.

I've been randomly tested only three times - once when I was drinking from a public water fountain outside Jesse Helms' office, once when I bought boxer shorts at Bloomingdale's, and once when I asked Attorney General Ed Meese at a press conference if he was having trouble understanding the Constitution of the United States.

ART BUCHWALD, *The Test*, in I THINK I DON'T REMEMBER 232-35 (1985) (reprinted with permission).

2. The NCAA is an unincorporated association of colleges and universities that is the governing body of intercollegiate athletics. GLENN M. WONG, *ESSENTIALS OF AMATEUR SPORTS LAW* 2 (1988). As such, the NCAA sanctions participation in intercollegiate athletics and sponsors championships in dozens of sports. *Id.* at 3. Among its myriad duties, the NCAA promulgates and enforces rules governing competition, participation and eligibility in its sports. *Id.*

3. NATIONAL COLLEGIATE ATHLETIC ASS'N, 1986-87 DRUG-TESTING PROGRAM (1986) [hereinafter NCAA 1986-87 PROGRAM]. The program became effective August 1, 1986. *Id.* at 5. For a further discussion of the 1986-87 program and the initial legal challenges to it, see Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505, 523-43, 545-51 (1988).

4. The suspension of two football players in 1987 illustrates some of the consequences in a positive drug test. George Mira and John O'Neill, two outstanding players for the University of Miami, tested positive for diuretics. Sally Jenkins, *Hurricanes' Mira, O'Neill Not Granted Injunction Sit Out Game*, WASH. POST, January 2, 1988, at D4. The NCAA's

Many of the NCAA's member universities have implemented drug-testing programs similar to the NCAA's program. Because most universities model their drug-testing programs after the NCAA's program, the university programs share many of the same programmatic and legal defects as the NCAA's program. In challenges to the drug-testing programs, courts have addressed whether drug testing impermissibly invades the athlete's privacy.<sup>5</sup> This Article will examine the evolution of the NCAA's drug-testing program. The Article will then review and analyze the most significant challenges to the NCAA and university drug-testing programs.<sup>6</sup> The Article will conclude with an analysis of the various tests, defenses and defects of drug-testing programs.

## II. THE NCAA'S DRUG-TESTING PROGRAM

The following Section will address the reasons behind drug testing college athletes, and will analyze relevant parts of the NCAA's drug-

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Executive Committee denied the players' appeals. *Id.* Judge Michael Salmon of Dade County Court in Florida then declined to grant an injunction, which would have allowed Mira and O'Neill to play in the 1988 Orange Bowl game, stating the injunction would be moot because University of Miami officials would have barred Mira and O'Neill's participation, regardless of the injunction. *Id.* The University's position stemmed from its fear of forfeiting both the title and revenues earned from the Orange Bowl if they used the two ineligible players. *Id.* The institution's penalty in connection with a positive test could have involved the forfeiture of any awards or revenues and the deletion of any records. See NATIONAL COLLEGIATE ATHLETIC ASS'N, 1992-93 DRUG TESTING/EDUCATION PROGRAMS 12, Bylaw 31.2.3.5 (Martin T. Benson ed., 1992) [hereinafter NCAA 1992-93 PROGRAM].

5. The issue confronting the NCAA and its member institutions was framed by Judge Joseph Bellipanni of the Colorado District Court in Boulder County:

The rights protected by the Fourth Amendment and [cognate state statutes] are essential to a free society. Drug abuse is a very significant problem which can and does devastate the lives of many members of this society . . . .

It is essential, however, that even sincere, legitimate concerns not be allowed to dull the vigilant defense of the values protected by the Constitution.

*Derdeyn v. University of Colorado*, No. 86-CV-2245-3, at 12 (Colo. Dist. Ct. Aug. 22, 1989) [hereinafter *Derdeyn I*].

6. The NCAA's recommendation that universities confer with "legal counsel at an early stage, particularly in regard to right to privacy statutes, which may vary from one state and locale to another" suggests that the NCAA was aware that its program would likely be challenged. NCAA 1986-87 PROGRAM, *supra* note 3, at 19.

testing program and significant changes to it.<sup>7</sup> There are several reasons used to justify drug testing college athletes: 1) to prevent the health problems associated with drug use; 2) to prevent young people from emulating college athletes by using drugs; and 3) to preserve athletic competition on an equal footing. Drug use by college athletes may cause significant health problems and threatens the integrity of athletic competition.<sup>8</sup> Drug use by athletes impairs fair athletic competition because performance may be enhanced by the use of some drugs.<sup>9</sup> The most widely abused performance-enhancing drugs are anabolic steroids. Anabolic steroids cause serious health problems for college athletes who use them outside of a medically supervised, therapeutic context.<sup>10</sup> Beyond the immediate adverse consequences to an athlete's health, drug use by college athletes at such a developmental age can have harmful repercussions throughout an athlete's life.<sup>11</sup>

There are also possible adverse consequences of drug use to others not directly associated with college athletics. Because college athletics are popular and profitable, they are often viewed as role models for peers and children.<sup>12</sup> As a result, publicized reports of drug use by

7. This Article will focus on the NCAA's program because most universities have the same or similar reasons for testing and have adopted the same or similar programs.

8. An athlete's health and safety may be imperiled by not only side effects from drug use, but also from use during athletic competition. At least one court has addressed the danger to athletes of drug use during competition. See *Hill v. NCAA*, 865 P.2d 633, 678 (Cal. 1994) (George, J., concurring & dissenting) [hereinafter *Hill III*].

9. See NCAA 1992-93 PROGRAM, *supra* note 4, at 9. The language accompanying the NCAA drug-testing legislation mentions the preservation of fair competition first and refers to it as an "ideal" to which the NCAA is dedicated. *Id.*

10. See Norma M. Reddig, Note, *Anabolic Steroids: The Price of Pumping Up*, 37 WAYNE L. REV. 1647, 1647-48 (1991) (claiming steroids are dangerous performance-enhancing drugs). Among the various side effects of steroid use are: liver damage, hepatitis, increased cancer risk, sterility, addiction, psychological imbalances and strokes. *Id.* at 1649-50.

11. If drug use is left undiscovered and unchecked at the collegiate level, it may be perpetuated throughout an athlete's life. For instance, National Football League (NFL) player Lyle Alzado died of cancer brought on by heavy steroid use that began in college. Maryann Hudson, *Lyle Alzado Is Dead at 43 of Cancer*, L.A. TIMES, May 15, 1992, at C1.

Many college athletes use performance-enhancing drugs to become professionals and must continue to use them in order to retain their jobs. This leads to a never ending cycle of steroid abuse.

12. See generally *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1320-21 (7th Cir. 1988) (finding drug use by high school athletes tended to influence others to use drugs). See also Stephen F. Brock & Kevin McKenna, *Drug Testing in Sports*, 92 DICK. L.

college athletes may contribute to drug use by young children who seek to emulate them.

The twin aims of the NCAA's program are to protect the health and safety of the student-athlete and to preserve fair competition.<sup>13</sup> To accomplish these goals, the NCAA established a list of banned drugs. The NCAA requires student-athletes to consent to be tested at post-season competitions for any of the banned drugs. The NCAA penalizes all student-athletes who test positive for a banned substance.<sup>14</sup> A positive drug test does not result in penalties to the athlete's team, unless the university either failed to declare the athlete ineligible after a positive test or the university knowingly allowed the athlete to compete after a positive drug test.<sup>15</sup> In either situation, the team would forfeit its championship finish and any revenue derived from winning or participating in the event.<sup>16</sup> The fear of team sanctions and loss of championship revenue are concerns that have motivated universities to implement their own drug-testing programs.

The NCAA banned the use of over three thousand substances.<sup>17</sup> The list of banned substances contained a "prescription exception" for the use of commonly used medications, such as asthma and bronchitis

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REV. 505 (1988).

13. *See Hill III*, 865 P.2d 633, 659 (Cal. 1994).

14. NCAA 1986-87 PROGRAM, *supra* note 3, at 2-5. Under the program, student-athletes who tested positive lost their eligibility to participate in intercollegiate athletics. In 1986, 32 players were banned from NCAA post-season competitions for positive drug tests. Douglas Lederman, *32 Football Players Failed NCAA Drug Tests Last Fall*, CHRON. HIGHER EDUC., Mar. 16, 1988, at A39. In 1987, it was revealed that 24 players were suspended from NCAA Division I football bowl games for failing NCAA drug tests. *Id.* In 1988, only four players were banned for failing drug tests. *Id.*

From January 1992 to June 1992, one-half of one percent of all tested NCAA athletes failed drug tests. *Very Few Athletes Fail Drug-Testing Program*, NCAA NEWS, Sept. 2, 1992, at 6. Of the 5,157 tested in Division I, 13 football players failed the urine test and another 20 failed to take the test. *Id.* Of the remaining student-athletes, only two Division I indoor track team competitors failed the tests. *Id.*

15. NCAA 1992-93 PROGRAM, *supra* note 9, at 12, Bylaw 31.2.3.5.

16. *Id.* For a further discussion of the penalties to a university for allowing an ineligible athlete to compete, *see supra* note 4.

17. The substances were divided into six classifications: stimulants, anabolic steroids, substances banned in rifle competitions, diuretics, street drugs, peptide hormones and analogues. NCAA 1986-87 PROGRAM, *supra* note 3, at 3, Exec. Reg. 1-7-(b).



medicines.<sup>18</sup> Later versions of the program expanded the exception, allowing athletes to declare their use of other medically necessary drugs. Athletes that signed the declaration could not be punished for using commonly available medication.<sup>19</sup> A student-athlete's first contact with the NCAA's program occurs before the competitive season begins. Student-athletes must sign consent forms agreeing to be tested for banned drugs before they can participate in intercollegiate athletics.<sup>20</sup> An athlete's failure to sign the consent form results in ineligibility to participate in all intercollegiate sports.<sup>21</sup>

With one exception, student-athletes were only tested at post-season competitions.<sup>22</sup> Originally, athletes were selected for testing based on: a random draw; the athlete's position of finish in the post-season competition; suspicion of drug use by NCAA officials; or by the amount of an athlete's playing time.<sup>23</sup> The NCAA eliminated all suspicion-based testing in 1990.<sup>24</sup> Athletes who were chosen for testing had to urinate in front of a monitor,<sup>25</sup> after which their urine was tested for the presence of any prohibited substances. If a banned substance was detected in the athlete's urine, the athlete lost eligibility to participate in intercollegiate athletics for varying periods of time, de-

18. *Id.* Exec. Reg. 1-7-(c).

19. NATIONAL COLLEGIATE ATHLETIC ASS'N, 1987-88 DRUG-TESTING PROGRAM 9, Exec. Reg. 1-7-(c) (1987) [hereinafter NCAA 1987-88 PROGRAM]. Under the 1987-88 program, the list of acceptable medicines, including those approved to combat asthma or exercise-induced bronchospasm, was expanded. *Id.* Also the use of sympathomimetic amines, a category including over-the-counter cold and diet medications, could be declared before urinalysis. *Id.* at 10. As a practical result, these measures lessened the draconian penalties that could have been imposed for the use of several common over-the-counter drugs.

The "prescription exception" in the 1992-93 program applies to drugs banned for rifle competitions and drugs classified as diuretics. NCAA 1992-93 PROGRAM, *supra* note 9, 9, at 12, Bylaw 31.2.3.2. The bylaw states that athletes who prove they have a medical need for the regular use of these banned substances will not be considered to have produced a positive test. *Id.*

20. NCAA 1986-87 PROGRAM, *supra* note 3, at 2 (amending NCAA CONST., art. 3, § 9-(i)).

21. *Id.*

22. *Id.* at 11, § 2.1.1. For a discussion of the one exception, year-round steroid testing, *see infra* 28-33 and accompanying text.

23. *Id.* at 13, §§ 4.2, 4.3.

24. NCAA 1992-93 PROGRAM, *supra* note 9, 9, at 17, §§ 4.2, 4.3.

25. *Id.* at 19, § 6.2.3.

pending on previous violations and the type of drug used.<sup>26</sup> A suspended athlete could regain eligibility by passing a drug test that could be conducted by the NCAA at any time during the athlete's period of ineligibility.<sup>27</sup>

The most significant addition to the NCAA's drug-testing program since its inception was the 1990 adoption of mandatory, year-round testing for steroids in Division I football.<sup>28</sup> The year-round program originally applied only to Division I football, but the NCAA now tests Division I, I-A, and I-AA football players.<sup>29</sup> In 1992, the NCAA also implemented year-round steroid testing in Division I Men and Women's track and field.<sup>30</sup> The mandatory program replaced a voluntary, off-season testing program in place since January, 1989.<sup>31</sup> The steroid testing program was designed to stop the use of steroids which were considered the most serious substance abuse problem because most of the positive drug tests were for steroids.<sup>32</sup> The program was also designed to detect the use of training drugs, which were usually

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26. NCAA 1986-87 PROGRAM, *supra* note 3, at 2-3 (amending NCAA Const. art. 5, § 2).

27. NCAA 1992-93 PROGRAM, *supra* note 9, 9, at 22; *Drug-Testing Program Protocol Changes Listed*, NCAA NEWS, May 23, 1990, at 7. Ineligible athletes were also subject to a mandatory "exit test" during the last month of their period of ineligibility. *Id.*

28. *Year-Round Drug-Testing Plan Aimed at Stopping Steroid Use*, NCAA NEWS, May 23, 1990, at 1 [hereinafter *Year-Round Drug Testing*]. Section 1.3.1.1 of the NCAA's program provides that "[b]eginning August 1, 1990, and continuing through the conclusion of the 1991-92 academic year, non-championship and non-bowl testing will be limited to anabolic steroids, diuretics and other urine manipulators." NATIONAL COLLEGIATE ATHLETIC ASS'N, 1990-91 DRUG TESTING/EDUCATION PROGRAMS 11, § 1.3.1.1 (Laura E. Bollig ed., 1990) [hereinafter NCAA 1990-91 PROGRAM].

29. *Year-Round Drug Testing*, *supra* note 28, at 1. The NCAA has stated that the further expansion of steroid testing may be warranted, as football players in Division II and III championships have tested positive for steroids. *Id.* at 6. In the NCAA, athletic programs compete in a variety of divisions, depending on their competitiveness and size. *See* 1991-92 NATIONAL COLLEGIATE ATHLETIC ASS'N MANUAL 339-63, Bylaw 20. There are five divisions: Division I; Division I-A; Division I-AA; Division II; and Division III. *Id.* at 339. Generally the largest universities, public and private, compete on the Division I or I-A level, while the Division I-AA, II and III schools are smaller and less athletically oriented.

30. *Year-Round Testing Begins for Track and Field*, NCAA NEWS, July 22, 1992, at 6. Selection is conducted on a random basis. *Id.*

31. *Year-Round Drug Testing*, *supra* note 28, at 1.

32. For example, in 1989, seven of twelve positive tests under the NCAA's postseason testing program involved football players who used anabolic steroids. *Id.*

detected at postseason championship because steroids are generally taken in the offseason during training for the upcoming season.<sup>33</sup>

Steroid testing differs from standard drug testing in that steroids are detected by inferring that the presence of abnormal hormonal levels in the urine is caused by steroid use. Originally, an athlete with a testosterone to epitestosterone (T/E) ratio of 6:1 was considered to have tested positive for steroids; subsequently, the test was amended to account for naturally unusual T/E ratios.<sup>34</sup> The new standard called for additional testing when a student had a T/E ratio between 6:1 and 8.99:1.<sup>35</sup> Unfortunately, the steroids tests are imprecise and can be easily beaten, therefore, their accuracy and efficiency have been questioned.<sup>36</sup>

While university drug-testing programs are far from uniform, most are modelled after the NCAA's program. The university programs generally share the NCAA's interests in protecting the health and safety of athletes and preserving fair competition. Universities also have the added interest in ensuring the eligibility of their athletes for post-season competition. Many university-sponsored drug-testing programs follow the NCAA's program in its entirety, including the use of the NCAA's drug test, procedures and list of banned drugs.<sup>37</sup>

The cases that are discussed below illustrate various nuances of university drug-testing programs. Some university programs include: provisions for tests based on reasonable suspicion; release of test results to a variety of individuals without confidentiality guarantees; aural, instead of visual monitoring; and different sanctions for positive

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33. *Id.*

34. NCAA 1992-93 PROGRAM, *supra* note 9, 9, at 14, Bylaw 31.2.3.1(g).

35. *Id.* A subsequent test revealing a ratio of 6:1 or lower counted as a negative test, while a ratio of 9:1 or greater counted as a positive test and subjected the student to full sanctions. *Id.*

36. Regardless of the ratio, experts suggest that the test can be fooled. Maryann Hudson, *Steroid Research Coming up Short*, L.A. TIMES, June 11, 1992, at C1. One expert on steroid use, Dr. Mouro DiPasquale, claimed that the injection or ingestion of epitestosterone would fool the test. *Id.* In fact, DiPasquale asserted that a drop of epitestosterone on the tongue was sufficient to deceive the test. *Id.* There are also commercial, over-the-counter substances which are alleged to mask the presence of steroids in urine. *See id.*

37. *See, e.g.*, VILLANOVA UNIVERSITY DRUG TESTING PROGRAM (1989).

drug tests. The outcome of challenges to drug-testing programs vary depending on the components of the program and the law applied.

### III. THE LEGAL CHALLENGES TO NCAA- AND UNIVERSITY-SPONSORED DRUG-TESTING PROGRAMS

Drug-testing programs have been challenged in two ways: under a state privacy law; or, when the drug testing program is conducted by state actors under the Fourth Amendment or its state constitution equivalent. In order to assess the legality of drug-testing programs, it is useful to develop the legal background to the challenges and to examine and compare the four major challenges to the drug testing of college athletes. From that background, several principles that govern the legality of drug-testing programs can be elucidated.

At the collegiate level, courts have reached a variety of results. In *Hill v. NCAA*,<sup>38</sup> the Supreme Court of California upheld the NCAA's drug testing program. In *University of Colorado v. Derdeyn*,<sup>39</sup> the Supreme Court of Colorado invalidated the University of Colorado's (CU) drug-testing program. In the State of Washington, *O'Halloran v. University of Washington*<sup>40</sup> involved the drug-testing programs of both the University of Washington (UW) and the NCAA, and ultimately resulted in a settlement restricting UW from conducting its program. In *Bally v. Northeastern University*,<sup>41</sup> the Supreme Judicial Court of Massachusetts validated Northeastern University's (NU) drug-testing program based on Massachusetts' privacy and civil rights laws.

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38. 865 P.2d 633 (Cal. 1994).

39. 863 P.2d 929 (Colo. 1993), *cert. denied*, 114 S. Ct. 1646 (1994) [hereinafter *Derdeyn III*].

40. 856 F.2d 1375 (9th Cir. 1988) [hereinafter *O'Halloran IV*], *rev'g on other grounds*, 679 F. Supp. 997 (W.D. Wash. 1988) [hereinafter *O'Halloran III*], *rev'g*, No. 87-2-08775-1 (Wash. Super. Ct. July 23, 1987) (transcript of oral opinion) [hereinafter *O'Halloran I*]. The litigation also includes one significant procedural holding: *O'Halloran v. University of Washington*, 672 F. Supp. 1380 (W.D. Wash. 1987) [hereinafter *O'Halloran II*] (denying University's injunction and plaintiff's motion to remand).

41. 532 N.E.2d 49 (Mass. 1989), *rev'g*, No. 87-1178 (Mass. Super. Ct. Nov. 1987) (Memorandum of Decision and Order) [hereinafter *Bally Memorandum*].

Courts have taken a different approach when analyzing the drug testing of high school student-athletes. In *Schaill v. Tippecanoe County School Corp.*,<sup>42</sup> the Seventh Circuit deferred to the judgment of the high school district and upheld the random drug testing of high school student-athletes.<sup>43</sup>

### A. Legal Background to the Drug Testing Litigation

In *Skinner v. Railway Labor Executives Association*,<sup>44</sup> the Supreme Court held that the monitoring, collection, and testing of urine is a search<sup>45</sup> that must comply with the Fourth Amendment.<sup>46</sup> Under regulations promulgated by the Federal Railroad Administration, workers were compelled to take drug and alcohol tests after major accidents or when a supervisor had reasonable suspicion of drug and alcohol use.<sup>47</sup> The Supreme Court upheld the drug testing of federal railroad workers.<sup>48</sup> The Court held that the tests were reasonable searches under the Fourth Amendment because the government established a compelling need to drug test the employees—to protect the safety of railway passengers from impaired employees.<sup>49</sup> In *National Treasury Em-*

42. 864 F.2d 1309 (7th Cir. 1988).

43. *Id.* at 1318.

44. 489 U.S. 602 (1989).

45. *Id.* at 617 (“[b]ecause 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”). The Supreme Court stated, “[t]here are few activities in our society more personal or private than the passing of urine . . . . It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.” *Id.* (quoting *Nat’l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

46. U.S. CONST. amend. IV. The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures.” *Id.* The Fourth Amendment requires searches be conducted only after securing a properly issued search warrant that was supported by probable cause. *Id.* The Fourth Amendment only applies to state actors.

47. 489 U.S. at 611. There is inconsistent language in *Skinner* as to whether the tests required monitoring. At one point the Court stated that, “the process of collecting the sample . . . may in some cases involve visual or aural monitoring of the act of urination.” *Id.* at 617. Yet the Court later stated “[t]he regulations do not require that samples be furnished under the direct observation of a monitor.” *Id.* at 626.

48. *Id.* at 634.

49. *Id.* at 620. The government’s case was bolstered by evidence in the record of

*ployees Union v. Von Raab*,<sup>50</sup> a companion case to *Skinner*, the Court upheld a portion of the United States Customs Office's program, allowing the random testing of drug interdiction agents and firearm-carrying employees.<sup>51</sup> The Court reasoned that the agency established a compelling interest in protecting society from drug-impaired agents.<sup>52</sup>

The *Skinner* Court concluded that drug tests not conducted in a law enforcement context fit within the "special needs" exception to the Fourth Amendment,<sup>53</sup> thus the tests could be conducted without a search warrant<sup>54</sup> or probable cause.<sup>55</sup> Consequently, the test for determining the constitutionality of a drug-testing program conducted by a state actor has two prongs. First, the court must determine if the drug test is reasonable based on the interests behind the testing, and second, the court must ask if the test is reasonably tailored to fulfill the objectives of the program. However, Fourth Amendment challenges to drug-testing programs require the plaintiff to first prove that the sponsor of the program is a state actor.<sup>56</sup> A plaintiff who argues that the

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substantial drug use by railroad employees and by evidence of nearly forty train accidents that were caused by impaired or intoxicated employees. *Id.* at 607.

50. 489 U.S. 656 (1989).

51. *Id.* at 664-65.

52. *Id.*

53. The "special needs" exception allows searches that are backed by a substantial government interest to take place without the formalities of the Fourth Amendment's warrant clause.

54. *Skinner*, 489 U.S. at 621-25. The Court gave three reasons why the railroad employees' drug tests fit into the "special needs" exception. First, the results of the drug tests were not designed to be used in criminal prosecutions. *Id.* at 621 n.5. Second, the tests were narrowly defined and were not administered at the discretion of government officials. *Id.* at 621-24. Third, the drug tests would not catch drug users if the agency was required to obtain a warrant before testing its employees. *Id.* at 623.

55. *Id.* at 624-25. Although warrantless searches were generally thought to require a minimum of probable cause as the basis for the search, the *Skinner* Court held some searches could be conducted without any suspicion. *Id.* at 624. The Court stated that they had "made it clear, [ ], that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560, (1976)). Justifying the random searches in *Skinner*, the Court held that "[i]n limited circumstances . . . a search may be reasonable despite the absence of such [individualized] suspicion." *Id.* at 624.

56. *See id.* at 614-15 (stating that the Fourth Amendment does not apply to searches conducted by private party).

NCAA's program violates the Fourth Amendment must, therefore, first establish that the NCAA is a state actor.<sup>57</sup>

In *Barbay v. NCAA*,<sup>58</sup> one of the first challenges to the NCAA's program and its ineligibility sanctions failed because the court held that the NCAA was not a state actor. After Roland Barbay, a football player for Louisiana State University (LSU), was suspended for failing a drug test, he sought an injunction against the NCAA to allow him to participate in the 1987 Sugar Bowl.<sup>59</sup> The basis of the claim was Section 1983 of the Civil Rights Act.<sup>60</sup> The court dismissed Barbay's claim, holding that the NCAA was not a state actor, as required by Section 1983.<sup>61</sup> In ruling against Barbay, the court found that the regulation of college athletics was not a traditional state function,<sup>62</sup> nor was the NCAA directed by state actors.<sup>63</sup>

In the seminal case of *NCAA v. Tarkanian*,<sup>64</sup> the Supreme Court held the NCAA was not a state actor.<sup>65</sup> University of Nevada-Las Vegas (UNLV) Men's basketball coach, Jerry Tarkanian, claimed that the NCAA breached due process of law when it ordered him suspended for recruiting violations.<sup>66</sup> Since the NCAA was not a state actor,

57. See Kevin M. McKenna, *A Proposition with a Powerful Punch: The Legality and Constitutionality of NCAA Proposition 48*, 26 DUQ. L. REV. 43, 53-59 (1988) (discussing three theories for finding state action by NCAA). State action is also an essential element of any challenge to a university-sponsored program.

58. No. 86-5697, 1987 U.S. Dist. LEXIS 393, at \*1 (E.D. La. Jan. 20, 1987). For a further discussion of this case, see Brock & McKenna, *supra* note 12, at 557-59.

59. *Barbay*, 1987 U.S. Dist. LEXIS at \*1-6.

60. 42 U.S.C. § 1983 (1988).

61. *Barbay*, 1987 U.S. Dist. LEXIS 393, at \*10-14. In order to find the NCAA was a state actor, Barbay had to prove that: 1) the NCAA was operating in an area traditionally associated with the state; or 2) a state actor was essentially directing the NCAA's actions. *Id.* at \*12 (citing *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021-22 (4th Cir. 1984)).

62. *Id.* at \*12-13.

63. *Id.* Although LSU, a stipulated state actor, participated in the NCAA's rule-making process, that alone did not prove it controlled the implementation of the NCAA's drug testing program. *Id.* at \*12-14.

64. 488 U.S. 179 (1988). For an in-depth discussion of state action and the NCAA, see Kevin M. McKenna, *The Tarkanian Decision: The State of College Athletics Is Everything but State Action*, 40 DEPAUL L. REV. 459 (1991).

65. *Tarkanian*, 488 U.S. at 182 n.5.

66. *Id.* at 187. After an NCAA report uncovered violations of NCAA recruiting rules by UNLV, the NCAA placed UNLV on probation and requested it to show cause why the

Tarkanian was not entitled to the protections of Fourth or Fourteenth Amendment due process.<sup>67</sup>

The Supreme Court rejected Tarkanian's argument that the NCAA's actions were "under color of law" because they resulted from a delegation of power by its members, who were state actors, such as UNLV.<sup>68</sup> The Court reasoned that the NCAA "is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcements of NCAA's recruitment standards."<sup>69</sup>

While *Tarkanian* addressed the NCAA's role in enforcing sanctions for recruiting violations, its holding that the NCAA is not a state actor also applies to litigation concerning the NCAA's drug-testing program because the factors for determining state action do not depend on the Amendment that is used.<sup>70</sup> As such, *Tarkanian* forecloses Fourth

NCAA should not impose additional sanctions on UNLV if it did not penalize or suspend Tarkanian. *Id.* at 186. The suspension was recommended by the NCAA as a way for UNLV to avoid sanctions, but the NCAA had no direct power to force UNLV's compliance. *Id.* at 197-98.

The Court rejected Tarkanian's assertion that "UNLV had no practical alternative" but to comply with the NCAA. *Id.* at 198. The Court found that UNLV had several viable, albeit "unpalatable," alternatives to membership in the NCAA. *Id.* at 198 n.19. *But see id.* at 201 (White, J., dissenting) (arguing NCAA acted jointly with UNLV to suspend Tarkanian); *Hill v. NCAA*, 273 Cal. Rptr. 402, 405 (Cal. Ct. App. 1990) ("[t]here is no viable alternative to membership in the NCAA for a university with a major intercollegiate sports program").

67. *Id.* at 191-92. The Court reiterated that the Fourth Amendment only applied to state actors, stating, "[a]s a general matter the protections . . . do not extend to 'private conduct abridging individual rights.'" *Id.* at 191 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). The finding that the NCAA was not a state actor foreclosed relief under Section 1983 of the Civil Rights Act, which provides recourse to those deprived of constitutional rights by state actors. *See* 42 U.S.C. § 1983 (1988).

68. *Id.* at 195-96. NCAA legislation is proposed and approved by its members. *Id.* at 193. The Court stated that if all the NCAA's members were state actors, then it could find that the NCAA was acting under "color of law," but, as such, some participation by state actors did not transform the NCAA into a state actor. *Id.* at 194-95.

69. *Id.* at 196; *see Barbay v. NCAA*, No. 86-5697, 1987 U.S. Dist. LEXIS, at \*11-15 (E.D. La. Jan. 20 1987). *But see Tarkanian*, 488 U.S. at 202 (White, J., dissenting). Justice White disagreed with the five member majority, finding the NCAA directed UNLV's suspension of Coach Tarkanian, and therefore, was "jointly engaged" with UNLV which was a state actor. *Id.*

70. *But see* John M. Evans, *The NCAA Drug Program: Out of Bounds but Still in*



Amendment challenges to the NCAA's drug-testing program. Consequently, plaintiffs challenging the NCAA's program must rely on state laws.

Since there is no uniformity among the courts, it is essential to identify the factors that influence courts in deciding challenges to drug testing. There are three factors that affect the constitutionality of the drug-testing program being challenged: 1) the protections of the various state laws;<sup>71</sup> 2) the sufficiency of the case record establishing a need for drug testing; and 3) the testing program's procedures and methodology.<sup>72</sup>

*B. Hill v. NCAA: The NCAA's Drug-Testing Program Is Constitutional (In California)*

In *Hill*, Stanford University student-athletes challenged the NCAA's drug-testing program. In 1987, the California Superior Court issued a permanent injunction against the NCAA,<sup>73</sup> barring it from testing all Stanford athletes.<sup>74</sup> In 1990, the California Court of Appeals upheld the trial court's permanent injunction.<sup>75</sup> In 1994, a majority of the Supreme Court of California reversed the Court of Appeals and dissolved the permanent injunction restraining the NCAA from drug testing.<sup>76</sup>

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*Play*, 19 J.L. & EDUC. 161, 168 (1990) (distinguishing *Tarkanian* from potential drug testing cases).

71. Compare *University of Colorado v. Derdeyn*, 863 P.2d 929, 946 (Colo. 1993) (finding Colorado's right to privacy protected more rights than federal constitution) with *Bally v. Northeastern Univ.*, 532 N.E.2d 49, 52-53 (Mass. 1989) (holding Massachusetts' privacy statute was narrow).

72. See *Hill v. NCAA*, 273 Cal. Rptr. 402, 414-16 (Ct. App. 1990) [hereinafter *Hill II*], *rev'd*, 865 P.2d 633 (Cal. 1994).

73. *Hill v. NCAA*, No. 619209, at 36 (Cal. Super. Ct. Nov. 19, 1987) [hereinafter *Hill I*]. *Hill* was a continuation of *LeVant v. NCAA*, No. 619209 (Cal. Super. Ct. 1987), which was brought by Stanford diver Simone LeVant in early 1987. *Hill II*, 273 Cal. Rptr. at 406 n.4. The court granted a preliminary injunction in March 1987, on LeVant's behalf, but it was terminated by stipulation upon LeVant's graduation. *Id.* Jennifer Hill and J. Barry McKeever were added as plaintiffs in order to perpetuate the case. *Id.*

74. *Hill I*, No. 619209, at 36; *Hill II*, 273 Cal. Rptr. at 407.

75. *Id.* at 404-05.

76. *Hill III*, 865 P.2d 633, 699 (Cal. 1994).

### 1. The Lower Courts Hold That the NCAA's Program Is Unconstitutional

The Stanford athletes sued to prevent the enforcement of the NCAA's drug-testing program.<sup>77</sup> The plaintiffs claimed that the drug tests invaded their privacy which was guaranteed by Article 1, Section 1 of the California Constitution.<sup>78</sup> Stanford University intervened, joining the lawsuit to protect itself from NCAA sanctions because it would have been penalized for failing to administer the signing of the NCAA's consent forms.<sup>79</sup>

The trial court issued a permanent injunction against the NCAA because it concluded that the NCAA had neither established a compelling need to drug test college athletes nor proved that its program was narrowly tailored to meet its goals.<sup>80</sup> According to the trial court, the NCAA failed to establish a compelling need because it could not prove that: 1) any of the drugs on its list enhanced athletic performance;<sup>81</sup> 2) there was widespread use of any of the banned drugs by college students; and 3) the NCAA program was designed to discover or deter

77. *Id.* at 637.

78. *Id.* The California Constitution's right to privacy clause states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy." CAL. CONST. art. 1, § 1.

79. *Hill II*, 273 Cal. Rptr. at 406. For a further discussion of penalties on universities for allowing ineligible athletes to compete, see *supra* note 4.

80. *Hill I*, No. 619209, at 2. The California Superior Court stated that while it would be appropriate to test those employees that affected the public's safety, it was not appropriate to test college athletes. *Id.* at 3; see *Evans, supra* note 70, at 164 ("[i]f those [NCAA] objectives are legitimate, the facts must show widespread use of drugs among student athletes, significant health and safety problems, and a program designed to deter the use of performance-enhancing substances"). Showing disdain for drug testing, the court termed the humiliation and embarrassment accompanying the act of urinating under the unwavering gaze of one "whose entire attention is focused on the athletes [sic] normally private act of urination," an "offense against decency." *Hill I*, No. 619209, at 6.

81. *Hill I*, No. 619209, at 8. In fact, the NCAA agreed that none of the banned drugs enhanced performance. Instead it argued that athletes did not believe this fact and continued to use the drugs. *Id.* at 4. This argument succeeded before the Supreme Court of California. *Hill III*, 865 P.2d at 660.

use of the banned substances.<sup>82</sup> The trial court concluded that the NCAA's list of banned drugs was overbroad because it covered harmless substances and its vague term "related compounds" unduly broadened the list of substances.<sup>83</sup>

The California Court of Appeals affirmed the decision by holding that the trial court had not abused its discretion in issuing the injunction.<sup>84</sup> The court agreed with the trial court's finding that the NCAA had not demonstrated a "compelling need" to drug test Stanford athletes and it agreed with the finding that the NCAA's tests were an unreasonable invasion of the plaintiffs' privacy.<sup>85</sup> The appeals court

82. *Hill I*, No. 619209, at 8.

83. *Id.* at 33-35. The California Superior Court faulted the NCAA for including common stimulants on its list of banned substances, stating:

With the exception of caffeine . . . there was no showing whatever in this case of the relevance of this drug list to anything. The most obvious example is 'strychnine' which so far as the Court knows is primarily used to poison rats . . . .

All of the testimony concerning diuretics was speculative. Not one witness offered any evidence based on reasonable medical probability, the standard, for banning it.

*Id.* at 33-34.

The court also identified numerous methodological problems with the NCAA's tests, finding that the tests revealed false positives, disclosed a lack of quantitative results as to the amount of the drug and the time it was taken, and depended on probabilities, not certainties. *Id.* at 16-24.

84. *Hill II*, 273 Cal. Rptr. at 423. The *Hill I* court concluded that the NCAA's program violated the Fourth Amendment. *Hill I*, No. 619209, at 2. Due to the intervening decision in *Tarkanian v. NCAA*, 488 U.S. 179 (1988), the Fourth Amendment ruling was not before the appeals court. The Fourth Amendment verdict would have been overturned because the NCAA was not a state actor. For a discussion of *Tarkanian*, see *supra* notes 64-70 and accompanying text.

85. *Hill II*, 273 Cal. Rptr. at 422. The appeals court framed the NCAA's burden of proof on appeal, stating:

[T]he NCAA must demonstrate that: (1) the testing program relates to the purposes of the NCAA regulations which confer the benefit (participation in intercollegiate competition); (2) the utility of imposing the program manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no less offensive alternatives.

*Id.* at 410. This is a compelling interest test.

As to the "availability of less intrusive alternatives," the *Hill II* court concluded that drug education was both viable and under-utilized by the NCAA. *Id.* at 421. The court also stated that the use of suspicion-based testing should have been explored by the NCAA. *Id.*

determined that the tests invaded the plaintiffs' privacy by: 1) subjecting them to the embarrassing act of monitored urination; 2) interfering with the confidentiality of their medical records; 3) interfering with medical treatment; and 4) imposing surveillance on their activities.<sup>86</sup> The court found that these privacy interests were substantial and could only be outweighed by a compelling interest, which the NCAA had not established.

## 2. The Supreme Court of California Reverses

In 1994, the Supreme Court of California reversed the California Court of Appeals.<sup>87</sup> The court held that the NCAA's legitimate interests in drug testing college athletes outweighed the tests' invasion on the athletes' diminished expectation of privacy.<sup>88</sup> It is settled law that drug testing is an invasion of privacy;<sup>89</sup> the question addressed in *Hill* was whether it was too substantial an invasion to be permissible under California's Constitution. The court first analyzed whether the California Constitution's right of privacy extended to invasions by private actors.<sup>90</sup> The court then analyzed the nature of the right to privacy, engaging in a lengthy historical analysis before concluding that there are several types of privacy and several different standards that can be used to analyze an alleged privacy invasion.<sup>91</sup> The court next set forth elements necessary to establish an invasion of privacy cause of action.<sup>92</sup> The court concluded by applying the standards and elements of an invasion of privacy cause of action to the NCAA's drug-testing program.<sup>93</sup>

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In light of increased funding by the NCAA for drug education, the court might reach a different finding on the availability of less intrusive alternatives.

86. *Id.* at 416.

87. *Hill III*, 865 P.2d 633 (Cal. 1994).

88. *Id.* at 658-60.

89. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617 n.4 (1989).

For a further discussion of urinalysis as a search, *see supra* note 45 and accompanying text.

90. *Hill III*, 865 P.2d at 641-44.

91. *Id.* at 644-54.

92. *Id.* at 654-55.

93. *Id.* at 657-67.

Each court in the *Hill* litigation agreed that the protections of the California Constitution's right to privacy clause extends to the actions of private, nongovernmental actors.<sup>94</sup> The Supreme Court of California determined that the legislative history of the Privacy Initiative (Initiative),<sup>95</sup> the Ballot Arguments, supported the conclusion that the Initiative governed private actors as well as governmental entities.<sup>96</sup> The court found that the Initiative was designed to protect the public from the "overbroad collection and retention of unnecessary personal information by government and business interests."<sup>97</sup>

The court next determined that the proper standard to use in *Hill* was an intermediate standard: the invasion of privacy could be justified by a showing of legitimate interests. The lower courts in *Hill* applied a test that required the NCAA to demonstrate a compelling interest for testing the Stanford athletes and to prove there were no available alternative procedures that were less invasive than the NCAA's program. It was first necessary for the *Hill III* court to determine what type of right privacy is: fundamental or legitimate. Although there was language in the Initiative stating that privacy was a "fundamental and compelling interest" and in the Ballot Arguments that an invasion could only be justified by establishing a "compelling public need," the court held that the Initiative created a right of privacy that can be outweighed by a showing of legitimate interests. To support its conclusion, the court examined the history of the right to privacy and found that it created a right that was narrower than other fundamental rights.<sup>98</sup> The court then stated that there are two types of privacy

94. *Hill III*, 865 P.2d at 644; *Hill II*, 273 Cal. Rptr. at 408. The California Court of Appeals stated: "[p]rivacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." *Id.* (quoting *Porten v. University of San Francisco*, 134 Cal. Rptr. 839, 842 (Ct. App. 1976)). Thus, the protections of the California Constitution apply to organizations, like the NCAA, which are immune under the Fourth Amendment.

95. The Privacy Initiative was the legislative campaign to add the privacy clause to the California Constitution. *Hill III*, 865 P.2d at 641.

96. *Id.* All of the Justices on the court agreed on this point. *Id.* at 669 (Kennard, J., concurring & dissenting); *Id.* at 672 (George, J., concurring & dissenting); *Id.* at 679 (Mosk, J., dissenting).

97. *Id.* at 642 (quoting *White v. Davis*, 533 P.2d 222, 240 (Cal. 1975)). The court labelled this invasion of privacy an invasion of "informational privacy." *Id.* at 650.

98. *Id.* at 646-50. The court found that the common law created a right of privacy

rights: the right to protect private information and the right to autonomy.<sup>99</sup> According to the court, another factor mitigating against imposing a compelling interest standard on the NCAA was that the NCAA as a private actor should not be held to the same standard as governmental actors.<sup>100</sup> Before applying the legitimate interests standard to the *Hill* case, the court first set forth the elements of an invasion of privacy cause of action.

The court stated there are three elements to an invasion of privacy cause of action brought under the California Constitution: (1) the plaintiff must establish that the invasion is of "a legally protected privacy interest";<sup>101</sup> (2) the plaintiff must prove a "reasonable expectation of privacy," the reasonableness of which is determined by analyzing the circumstances; and (3) the plaintiff must establish that the invasion of privacy is serious.<sup>102</sup> The court stated that any such invasion can be overcome by a showing of a compelling or legitimate interest.<sup>103</sup> However, a plaintiff may then attempt to establish the existence of feasible alternatives to overcome any legitimate interest defense.<sup>104</sup>

The court then applied its new test to the NCAA's drug-testing program. The court found that the plaintiffs satisfied the first element: the NCAA invaded both autonomy privacy, by monitoring urination, and informational privacy by disclosing confidential information.<sup>105</sup> Analyzing the second element, the court concluded that the Stanford athletes' expectation of privacy was diminished because: athletes are closely regulated; athletes are frequently examined; athletes disrobe in

that was limited in its scope. *Id.* at 648. The court also looked to conventional wisdom regarding the nature of the federal constitutional right and correctly recognized that the federal right of privacy is less than fundamental. *Id.* at 651.

99. *Id.* at 654. The court stated that California case law did not establish a compelling interest test for all invasions of privacy as was asserted by the plaintiffs. *Id.*

100. *Id.* at 641. Dissenting Justice Mosk sharply criticized this assertion. *Id.* at 701 (Mosk, J., dissenting).

101. The court used the first prong to differentiate between informational privacy and autonomy privacy.

102. *Id.* at 657.

103. *Id.*

104. *Id.* The lower courts applied a least intrusive alternative standard.

105. *Id.* at 657-58.

public;<sup>106</sup> and athletes expect the testing by virtue of the consent forms.<sup>107</sup> Concluding that the Stanford athletes had a diminished expectation of privacy, the court then determined that the NCAA's interests were legitimate and outweighed the tests' invasive nature. The court's finding that the NCAA's interests in "protecting the health and safety of student-athletes" and promoting fair competition were legitimate conflicted with the trial and appellate courts' findings. Although the lower courts were using a compelling interest standard, some of the uncontroverted findings mitigate against finding that the NCAA had a legitimate interest to drug test. For instance, both lower courts determined that none of the NCAA's banned substances actually enhanced athletic performance and thus drug use did not threaten fair competition.<sup>108</sup> The Supreme Court of California agreed that there was scant evidence of enhancement, but then stated that athletes believed that drugs enhanced performance, and therefore, used drugs.<sup>109</sup> Thus, the court found that the NCAA could justify preventing drug use.

The court also found that the NCAA's interest in protecting the athletes' health and safety was significant and supported by evidence adduced at trial.<sup>110</sup> Where the lower courts found there was no evidence that drug use by athletes placed them in increased danger during competition,<sup>111</sup> the Supreme Court of California disagreed.<sup>112</sup> Both

106. *Id.* at 658 n.13 (citing *Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988)). In dissent, Justice Mosk questioned how changing in a locker room diminishes the invasiveness of monitored urination. *Id.* at 692 (Mosk, J., dissenting).

107. *Id.* at 658. In footnote 12, the majority analogizes monitored urination to urination in a male restroom where there are no partitions between urinals. *Id.* at 658 n.12 (quoting *Dimeo v. Griffin*, 943 F.2d 679, 682 (7th Cir. 1990)). There is a fundamental difference between urinating in a public restroom and compulsory monitored urination: men have a choice to use an enclosed stall or wait until the restroom is empty. Student-athletes have no choice.

108. *Hill II*, 273 Cal. Rptr. at 418-20; *Hill I*, No. 619209, slip op. at 8. At best, the evidence proffered by the NCAA established that only amphetamines could affect performance. *Hill II*, 273 Cal. Rptr. at 419. In fact, the appeals court asserted that some of the banned substances actually hindered athletic performance. *Id.*

109. *Hill III*, 865 P.2d at 660 ("whatever the provable incidence of drug use, perception may be more potent than reality"). The court found that the NCAA has an interest in upholding its reputation. *Id.* at 661. Thus the NCAA could take steps to ensure that the competition was perceived as fair and drug free. *Id.*

110. *Id.*

111. *Hill II*, 273 Cal. Rptr. at 418; *Hill I*, No. 619209, at 10.

lower courts stated that there was only minimal evidence adduced at trial that athletes used drugs more than other college students during the athletic season other than anabolic steroids and a few street drugs.<sup>113</sup> The Supreme Court of California found this evidence was irrelevant because college athletes “have set themselves apart . . . they have different and diminished expectations of privacy.”<sup>114</sup> The lower courts both concluded that the NCAA’s tests were overbroad and flawed.<sup>115</sup> As to this finding, the Supreme Court of California held that the Initiative did not permit an in-depth review of the programs of private actors, therefore, the overbreadth argument was erroneous.<sup>116</sup>

The court concluded its analysis by finding that there were no feasible alternatives to monitoring, therefore, the Stanford athletes could not overcome the NCAA’s legitimate interests.<sup>117</sup> The court did not address the appeals court’s finding that the injunction was not a violation of the Interstate Commerce Clause because the injunction only incidentally affected interstate commerce.<sup>118</sup> Because the NCAA could not impose testing on Stanford athletes, many schools felt Stanford

112. *Hill III*, 865 P.2d at 662.

113. *Hill II*, 273 Cal. Rptr. at 413; *Hill I*, No. 619209, at 10.

114. *Hill III*, 865 P.2d at 662. The court stated that although drug use was not rampant, if unchecked, drug use could increase and substantially harm competition and athletes’ health. *Id.* The court thus enunciated a preventive theory behind testing, although the evidence did not appear to establish an underlying need for testing.

115. *Hill II*, 273 Cal. Rptr. at 412, 414-15; *Hill I*, No. 619209, at 33-35. As the appeals court explained, the list of banned drugs was 58 pages long, and the use of common beverages such as coffee and tea had to be declared before testing. *Hill II*, 273 Cal. Rptr. at 412. The appeals court also agreed with the trial court’s finding that the NCAA’s tests were flawed in their procedure. *Id.* at 414-15. Besides identifying problems with chain of custody and laboratory handling, the court stated that a positive test for steroids was based on estimated probabilities unsupported by independent confirmation. *Id.* The court also singled out the testing for metabolites as inadequate, finding that, “[e]ven poppy seed can cause a positive for opiates under the NCAA drug testing program.” *Id.* at 415.

116. *Hill III*, 865 P.2d at 663.

117. *Id.* at 664. The court implied that there were feasible alternatives, but the plaintiffs had not proved this. *Id.* at 665. However, the court would not remand.

118. *Hill II*, 273 Cal. Rptr. at 422-23. The NCAA claimed that banning it from testing Stanford athletes at post-season competitions would limit its ability to sponsor post-season championships. *Id.* at 422. The NCAA feared that other schools would protest or boycott championships based on Stanford’s perceived competitive edge.



athletes received special treatment and enjoyed a competitive advantage. However, the court never reached this finding.

*Hill* produced three other opinions: Justice Kennard concurred in the analysis, but dissented in the result; Justice George concurred in part and dissented in part; and Justice Mosk dissented. Justice Kennard agreed with the majority's premise that private actors are held to a lesser standard than governmental actors and that the NCAA had those legitimate interests.<sup>119</sup> Justice Kennard believed, however, that the majority should have remanded the case to give the Stanford athletes an opportunity to litigate under the new legal standard announced by the court.<sup>120</sup>

Justice George, unlike Justice Kennard, dissented with regard to the majority's analysis, but concurred in the result.<sup>121</sup> Justice George relied on precedent to support the conclusion that the proper standard was the compelling interest standard.<sup>122</sup> According to Justice George, the majority misread *White v. Davis*<sup>123</sup> and ignored the plain language of the Initiative and the Ballot Arguments. Justice George also dissented from the majority's application of a lesser standard to private entities, such as the NCAA.<sup>124</sup> Believing that the factors of advance notice and consent reduced the invasiveness of the tests and that the NCAA had compelling interests to drug test, Justice George found that the NCAA's tests were constitutional.<sup>125</sup>

119. *Hill III*, 865 P.2d at 670 (Kennard, J., concurring & dissenting). Justice Kennard stated that the plaintiff's expectation of privacy cannot be determined by custom or practice within the industry. *Id.* at 671 (Kennard, J., concurring & dissenting).

120. *Id.* at 671-72 (Kennard J., concurring & dissenting).

121. *Id.* at 672 (George, J., concurring in result).

122. Justice George stated the Initiative was clear in establishing the fundamental nature of the right of privacy. *Id.* at 673-74 (George, J., concurring in result).

123. 13 Cal. 3d 757 (1975).

124. *Hill III*, 865 P.2d at 673 (George, J., concurring in result). Justice George reasoned that the effect of an invasion of privacy by a private actor was the same as an invasion of privacy by a governmental organization. *Id.*

125. *Id.* at 678-79 (George, J., concurring in result). Justice George agreed that the athletes had a diminished expectation of privacy and the NCAA had an interest in preventing unfair competition and protecting competitors during competition. Justice George stated that the NCAA did not need to have evidence of drug use before it began testing. Justice George analogized drug testing to the search by boxing officials of a boxers' gloves or trunks. *Id.* The example of a search during boxing is flawed because searches were only

Justice Mosk sharply dissented, finding that the proper standard was a compelling interest standard. Mosk quoted the Ballot Arguments, which declared that, "the right of privacy is the right to be left alone. It is a fundamental and compelling interest."<sup>126</sup> Justice Mosk, like Justice George, did not see any basis for applying a lesser standard to private actors.<sup>127</sup> Justice Mosk then applied the trial court's findings to rebut the majority's analysis.<sup>128</sup> Specifically, Justice Mosk stated that the trial court's finding that there was no evidence of drug use by athletes clearly established there was no need for the NCAA's program.<sup>129</sup> Justice Mosk also stated that there were feasible alternatives to monitoring.

### 3. Discussion of the Supreme Court of California's Opinions

The Supreme Court of California decision is not persuasive. First, it appeared to impose a legal standard with no basis in precedent or in the legislative history of the Initiative. The court made factual findings "de novo" that were contrary to the findings of the lower courts, without substantial evidential support.

In *Hill II*, the California Court of Appeals held that compelling interest was the standard used to analyze invasion of privacy causes of action. The Supreme Court of California erroneously attempted to distinguish the cases that applied the compelling interest standard. Although none of these cases arose in the same precise factual context as *Hill*, each case held a compelling interest standard applicable in the invasion of privacy context.

In *White v. Davis*,<sup>130</sup> a university professor challenged police surveillance and information gathering techniques.<sup>131</sup> The plaintiff sought

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implemented to combat a pre-existing problem, unlike the NCAA's drug tests.

126. *Id.* at 680 (Mosk, J., dissenting). Quoting heavily from the ballot arguments, Justice Mosk concluded that the right of privacy is, indeed, fundamental. *Id.* at 682 (Mosk, J., dissenting).

127. *Id.* at 687 (Mosk, J., dissenting).

128. *Id.*

129. *Id.*

130. 13 Cal. 3d 757 (1975) (en banc).

131. *Id.* at 761-62.

relief, alleging a violation of both free speech *and* California's right of privacy.<sup>132</sup> The Supreme Court of California held that the police tactics were an invasion of privacy that could only be justified by a compelling governmental interest.<sup>133</sup> The *Hill III* court distinguished *White* on several grounds: first, the privacy language in *White* was dicta; and second, the compelling interest standard used in *White* was imposed on a government actor.<sup>134</sup> However, the privacy claim in *White* is an alternative ground for relief, not dicta as the *Hill III* court claimed. Also, the *White* court never distinguished between government and private actors; in fact, it quoted language from the Ballot Arguments that implicated both government and private organizations.<sup>135</sup>

Based on its interpretation of *White*, the court stated that "[s]ome of our decisions following *White* use "compelling interest" language; others appear to rely on balancing tests." Yet the cases the court relied on cited *White* with approval and generally adhered to a compelling interest standard.<sup>136</sup> The California Court of Appeals had consistently applied *White*'s compelling interest test to a variety of cases involving different types of privacy invasions.<sup>137</sup> The *Hill III* court, while not

132. *Id.* at 760.

133. *Id.* at 775. The court interpreted the Ballot Arguments as clearly establishing that: "the amendment does not purport to prohibit all incursion into individual privacy but rather that *any such intervention must be justified by a compelling interest.*" *Id.* (emphasis added).

134. *Id.* at 774-75.

135. *White*, 13 Cal. 3d at 775. The court quoted the Ballot Arguments: "The right of privacy . . . protects [citizens] from government and business interests." *Id.* at 774.

136. *Hill III*, 865 P.2d at 653 n.11. For instance in *People v. Stritzinger*, the Supreme Court of California stated that the right of privacy yields only to a "compelling state interest." 668 P.2d 738 (Cal. 1983). The *Stritzinger* court appears to use a balancing test as the *Hill* court suggested, but its statement "[d]efendant [does not] argue [ ] that the state's interest in protecting children is less than compelling" suggests that the "balancing test" was to be between compelling interests and privacy rights. *Id.* at 741-43. In *Loder v. Municipal Court for the San Diego Judicial District of San Diego County*, the Supreme Court again appears to adopt a balancing test, but quotes *White* and states that the defendants asserted a compelling interest. 17 Cal. 3d 859, 864 (1976) (quoting *White*, 13 Cal. 3d. at 775).

*Doyle v. State Bar of California* cites *White* with approval, then states that a privacy interest can "be outweighed by the public interest." 184 Cal. Rptr. 720, 724 (1982). However, the *Doyle* court does not elaborate as to which standard is the correct standard. Interestingly, the majority cites *Doyle* to support its position and Justice Mosk cites *Doyle* to support his position. *Hill III*, 865 P.2d at 653 n.11; *Id.* at 683 n.27 (Mosk, J., dissenting).

137. *See American G.I. Forum v. Miller*, 267 Cal. Rptr. 371, 373 (Ct. App. 1990)

bound by the appeals court cases, is disingenuous in attempting to distinguish cases without squarely addressing these decisions on their face appearing to set forth a blanket compelling interest test, including *White*.<sup>138</sup>

Moreover, the Initiative clearly states, as the majority acknowledges, that the right of privacy is “fundamental.”<sup>139</sup> The statement in the Ballot Arguments that the right of privacy cannot be abridged unless there is a “compelling public need” is equally unambiguous. While the use of the Ballot Arguments is imperfect, as the majority stated in footnote 5, it is the only legislative history available. The majority’s criticism of the use of the Ballot Arguments conflicts with its decision in *White* where the Supreme Court stated that the Ballot Arguments were the Initiative’s only legislative history and that the use of the Ballot Arguments was necessary to determine the legislative intent behind the Initiative. The *Hill III* court is, therefore, being disingenuous when indicating that the use of the Ballot Arguments is not helpful because it used them in *White* for its finding that private actors must comply with the privacy clause.

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(“intervention into privacy must be justified by a compelling interest”); *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629 (Ct. App. 1990) (“[w]e see no reason to depart from existing precedent applying the compelling interest test in cases arising under” California’s privacy clause); *Alarcon v. Murphy*, 248 Cal. Rptr. 26, 29 (Ct. App. 1988) (stating that any invasion of privacy “must be justified by a compelling interest”). *Alarcon* arose in the context of the disclosure of a suspect’s arrest. *Id.* at 28. *See People v. Williams*, 180 Cal. Rptr. 734, 737 (Ct. App. 1982). In *Williams*, the court differentiated between the search and seizure standard of reasonableness and the standard for invasions of privacy which is a “compelling interest” standard. The plaintiff in *Williams* was surreptitiously taped in the back of a police car and alleged an invasion of his privacy. The court found the plaintiff had no reasonable expectation of privacy while under arrest in the back of a police car. *Id.* at 738. *See also Santa Barbara v. Adamson*, 164 Cal. Rptr. 539, 543 (1980). The Supreme Court of California quoted *White* and required Santa Barbara to show it had a compelling interest in passing an ordinance requiring residents in the same home to be related. *Id.* at 541-42.

138. The California Court of Appeals believed that *White* established a compelling interest standard in all privacy cases. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629 (Ct. App. 1990) (“[w]e see no reason to depart from existing precedent applying the compelling interest test in cases arising under” California’s privacy clause). *Accord In re Noah M.*, 260 Cal. Rptr. 309, 313 (Ct. App. 1989) (citing *White* with approval).

139. *Hill III*, 865 P.2d at 644.

Although the federal right of privacy is likely governed by a reasonableness standard and is not a fundamental right, it has no bearing on *Hill III* because the California right of privacy is stronger than the federal right. In *Committee to Defend Reproductive Rights v. Myers*,<sup>140</sup> the Supreme Court of California reasoned that the California right of privacy is not identical to any federal constitutional right of privacy.<sup>141</sup> In fact, the *Myers* court stated that the California right of privacy is broader than any federal right of privacy.<sup>142</sup> Therefore, in light of the cases decided by the California Court of Appeals, the Initiative's equivocal legislative history, and the strength of the California right of privacy, the proper standard should be a compelling interest standard. The *Hill III* court should have announced that it was formulating a new standard and remanded the case to the trial court. Further, the Supreme Court did not justify its essential *de novo* review of the trial court's findings, some of which appear to be at least partially factual in nature.<sup>143</sup>

*Hill III* has significant repercussions for the NCAA and for California plaintiffs who sue for invasion of privacy. The NCAA can now drug test student athletes in every state. This eliminates a perceived advantage that Stanford athletes had as a result of the lower courts'

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140. 172 Cal. Rptr. 866 (1981).

141. *Myers*, 172 Cal. Rptr. at 871.

142. *Id.* (quoting *Santa Barbara v. Adamson*, 164 Cal. Rptr. 539, 543 n.3 (1980)).

143. Questions of ultimate fact — *i.e.* mixed questions of fact and law, may, under certain circumstances, appropriately be decided under a *de novo* appellate standard. See Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 464, 489-493 (1984). However, "pure" questions of fact are generally reviewed under a clearly erroneous appellate standard, as are "ultimate fact" questions in some circumstances. *Cf. id.* at 489-492. As discussed in Part III.C. below, in *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993), a majority of the Colorado Supreme Court, in contrast to the California Supreme Court, largely deferred to the trial court's findings concerning the invasiveness of the University of Colorado's drug-testing program, and the reasonableness of the invasion.

The issue of the appropriate standard of appellate deference to trial court conclusions concerning the invasiveness, unreasonableness and permissibility of drug testing programs is discussed further *infra* in Part IV.A.5, concerning lessons from drug testing litigation.

injunction.<sup>144</sup> Commentators hailed the decision as a significant restriction on the right of privacy in California.

### C. *Derdeyn: Colorado Rejects Random Drug Testing*

In *University of Colorado v. Derdeyn*,<sup>145</sup> the Supreme Court of Colorado addressed two issues that were briefly addressed by the *Hill III* majority: whether athletes have a diminished expectation of privacy and the voluntariness of the consent to be drug tested. The second issue was the core of the dispute in Colorado.

In 1993, the Supreme Court of Colorado, in *Derdeyn*, held that the University of Colorado's (CU's) drug-testing program was an unreasonable search under the Fourth Amendment.<sup>146</sup> Because the court treated the issue as a question of fact, the trial court's findings were accorded great weight. Therefore, the trial court's opinion must first be analyzed in order to understand the Supreme Court of Colorado's holding.

#### 1. Background

In 1986, CU student-athletes brought a class action challenging CU's drug-testing program.<sup>147</sup> The plaintiffs alleged that CU's program was an unconstitutional search under both the Fourth Amendment and the Colorado Constitution's right to privacy clause.

Although CU modified its program several times during the course of the litigation, every aspect of the program was before the Supreme Court of Colorado because CU reserved the right to return to its original program.<sup>148</sup> CU's program had some of the same features as the NCAA's program: all student-athletes were required to sign a consent form agreeing to be tested before they could participate in athletics; a positive drug test resulted in varying levels of punishment depending

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144. Erin McCormick, *Court Approves NCAA's Drug Tests*, S.F. EXAMINER, Jan. 29, 1994, at A1.

145. 863 P.2d 929 (Colo. 1993) [hereinafter *Derdeyn III*].

146. *Id.*

147. *Id.* at 932.

148. *Id.*

on the number of previous positive tests; and student-athletes were tested for proscribed drugs.<sup>149</sup> During one incarnation of CU's program, visual monitoring was required.<sup>150</sup>

There were several differences, however, between CU's program and the NCAA's program. The CU consent form released the test results to a number of CU officials without a guarantee of confidentiality.<sup>151</sup> Although student-athletes were originally selected at random, in the program's third incarnation student-athletes were selected using objective criteria that were supposed to detect drug use. Under this program, CU student-athletes could only be tested if they failed a Rapid Eye Examination (REE) or if university officials had a reasonable suspicion of drug use.<sup>152</sup>

In August, 1989, the Colorado District Court in Boulder County ruled that CU's drug-testing program violated both the Fourth Amendment<sup>153</sup> and the Colorado Constitution.<sup>154</sup> The court found that CU

149. *Id.* at 930-33. Presumably CU's list mirrored the NCAA's list. However, in the modification of the program, CU added alcohol and over-the-counter drugs to its list.

150. *Id.* at 932.

151. *Id.* at 930-33. In CU's final program, it provided a limited guarantee of confidentiality. *Id.* at 932. Among the officials who received a student-athlete's test results were coaches, trainers and work supervisors. *Id.* at 930-33. Parents were also notified of test results. *Id.*

152. Both the Rapid Eye Exam and the suspicion-based test were harshly criticized by the courts. The Rapid Eye Exam was characterized as being devoid of any helpful characteristics that aided in the detection of drug use. Among the factors that were used to provide a reasonable suspicion of drug use were: "tardiness, absenteeism, poor head habits, emotional swings, unexplained performance changes, and/or excessive aggressiveness." *Id.* at 932.

153. *Derdeyn I*, No. 86-CV-22453-3, at 13 (Colo. Dist. Ct. Aug. 22, 1989). CU was a stipulated state actor, thus the courts applied the Fourth Amendment via the Fourteenth Amendment to analyze the constitutionality of CU's drug-testing program. *See Derdeyn III*, 863 P.2d at 930 n.1; *Derdeyn II*, 832 P.2d 1031, 1033 (Colo. Ct. App. 1991).

154. The claims brought under the Colorado Constitution were resolved by the court's Fourth Amendment holding. *Derdeyn I*, No. 86-CV-22453-3, at 12. The court stated that the privacy clause of the Colorado Constitution guaranteed more extensive protections of privacy than the Fourth Amendment. *Id.* at 8. Therefore, a finding of unconstitutionality under the Fourth Amendment would equate to unconstitutionality under the Colorado Constitution. *Id.* The right to privacy clause in the Colorado Constitution reads:

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the

did not establish a compelling need for its program, therefore, it was an unreasonable search under the Fourth Amendment.<sup>155</sup> The court held that CU's interests in preserving its image and ensuring the integrity of athletics were not sufficiently important to validate the urinalysis under the Fourth Amendment.<sup>156</sup> The drug tests merely protected the sanctity of athletics; they did not affect the public's general welfare.<sup>157</sup> The trial court also found that CU's objective of protecting the athletes' safety was not a compelling interest because there was no evidence of drug use by CU's student-athletes.<sup>158</sup>

The court held that the inefficiency of the REE test rendered drug testing based on a REE failure an unreasonable search.<sup>159</sup> The court also found that CU failed to carry its burden of proof in establishing that the consent forms were voluntarily signed by student-athletes.<sup>160</sup> Such a showing would overcome an unreasonableness finding.<sup>161</sup> The

person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

COLO. CONST. art. II, § 7.

155. *Derdeyn I*, No. 86-CV-22453-3, at 7 n.2. The trial court stated that the Supreme Court's holdings in *Skinner* and *Von Raab* required that CU show a compelling interest to support its program. *Id.*

156. *Id.* at 4, 6-7.

157. *Id.* at 6. The trial court reasoned:

[I]t is only athletic games we are concerned with here. There are no issues of "public safety" or "national security." There is no evidence of special substantial drug abuse which distinguishes this population from any other in our society. The integrity of athletic contests cannot be purchased at the cost of privacy interests protected by the Fourth Amendment. There is simply no compelling interest suggested by the University . . . .

*Id.* Extrapolating this reasoning, the court concluded that if student-athletes could be randomly tested, then so too could other segments of society. *Id.*

158. *Id.* at 4.

159. *Id.* at 7. The court criticized the efficacy of the REE, stating "[a]s a factual matter the REE is totally ineffective. It is an intrusion without purpose. It does not reveal what it is intended to reveal. It is wholly unable to indicate with any measure of validity whether a person has been using any of the proscribed drugs." *Id.* CU did not challenge the court's finding on the efficacy of the REE search at the appellate level. See *Derdeyn II*, 832 P.2d at 1033.

160. *Derdeyn I*, No. 86-CV-22453-3, at 11.

161. It is settled law that a search which is not otherwise constitutional is permitted if the subject voluntarily consents to be searched. *Schneckloth v. Busamonte*, 412 U.S. 218, 219 (1973).



trial court relied on the “unconstitutional conditions” doctrine, which states that consent conditioned on receiving a benefit or a right is presumed to be involuntary.<sup>162</sup> The court stated:

Though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest . . . . For if the government could deny a benefit to a person because of his [exercise of] constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly.<sup>163</sup>

Thus, the court concluded that CU coerced athletes to sign the consent forms because participation in intercollegiate athletics, the governmental benefit at stake, was conditioned on signing the consent form.<sup>164</sup>

In 1991, the Colorado Court of Appeals affirmed the trial court’s holding, but reversed the injunction to the extent that it prohibited drug-testing that was based on reasonable suspicion.<sup>165</sup> The Colorado Court of Appeals determined that the trial court’s finding that CU had not satisfied its burden of proving that the consent form was voluntarily signed was not clearly erroneous.<sup>166</sup> The appeals court concluded that CU’s student-athletes were coerced into signing the consent forms because a failure to sign would cause the student-athletes to lose valuable economic benefits, such as athletic scholarships.<sup>167</sup>

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162. *Derdeyn I*, No. 86-CV-2243-3, at 11.

163. *Id.* at 11 (quoting *Perry v. Sinderman* [sic], 408 U.S. 583, 597 (1972)).

164. *Id.*

165. *Derdeyn II*, 832 P.2d at 1035-36. The appeals court reversed the portion of the injunction that prohibited all searches not based on probable cause. *Id.* at 1035. The court stated that reasonable suspicion sufficed under circumstances where there is a significant need for drug testing. *Id.* The court stated that CU failed to prove that its tests were based on reasonable suspicion or that it had a “compelling need based on actual student drug related problems” to justify drug testing. The court found that under different circumstances CU could prove a “compelling need” or prove that testing was based on reasonable suspicion, therefore, the permanent injunction was not warranted. *Id.*

166. *Id.*

167. *Id.*

In 1993, a 4-3 majority of the Supreme Court of Colorado affirmed the Colorado Court of Appeals.<sup>168</sup> The court held that CU's program constituted an unreasonable search under both the Fourth Amendment and the Colorado Constitution, and the trial court correctly found that the consent for testing was not voluntarily given.<sup>169</sup>

The court explained that the reasonableness of CU's program was not a question of fact, but resembled a question of fact.<sup>170</sup> The court thus gave substantial weight to the trial court's findings.<sup>171</sup> The court then balanced the student-athlete's privacy interests and CU's interests in testing its student-athletes. CU argued that the student-athletes had a diminished expectation of privacy, therefore, CU's program was not intrusive.<sup>172</sup> The court rejected the argument that student-athletes are subjected to regular medical examinations, which diminishes their expectations of privacy, because CU's drug tests were not done in a regular medical environment.<sup>173</sup> The court rejected CU's argument that student-athletes were extensively regulated and, therefore, expected drug testing because there was no evidence that the student-athletes were, in fact, extensively regulated.<sup>174</sup> CU argued that because usual monitoring was not performed, the program was less intrusive. However, the court determined that CU could have returned to visual monitoring at any time it chose, thus CU's argument was irrelevant. The court also rejected the argument that the loss of participation in inter-

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168. *Derdeyn III*, 863 P.2d at 930.

169. *Id.*

170. *Id.* at 938. In dissent, Justice Erickson stated that the reasonableness issue is a question of law that must be reviewed *de novo*. *Id.* at 959 (Erickson, J., dissenting). Although the majority accorded the trial court substantial weight, it engaged in searching analysis and did not wholly adopt the trial court's findings.

171. *Id.* at 938.

172. *Cf.* *Hill v. NCAA*, 865 P.2d 633, 658 (Cal. 1994) (finding NCAA athletes had "diminished expectation of privacy" because they were extensively regulated).

173. *Derdeyn III*, 863 P.2d at 940. The *Skinner* Court stated that tests conducted in a medical environment are less intrusive than other drug tests. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 626-27 (1989). Testimony by CU student-athletes established that the urine samples were not taken in a medical environment. *Derdeyn III*, 863 P.2d at 940. The court found that CU's drug-testing program negatively affected student-athletes' relationships with CU's athletic trainers. *Id.* at 941 n.25. CU student-athletes stated that they no longer trusted the trainers because the trainers were seen as prosecutorial agents. *Id.*

174. *Id.* at 941.

collegiate athletics was not a severe penalty because the court found that such a loss of eligibility was significant, although less severe than a loss of employment or liberty.<sup>175</sup>

The court then found that the interests asserted by CU to justify drug testing its student-athletes were not significant interests. CU's interests were: (1) preparing its athletes for drug testing in NCAA championship events; (2) promoting the integrity of its athletic program; (3) preventing drug use by other students who look to athletes as role models; (4) ensuring fair competition; and (5) protecting the health and safety of intercollegiate athletics.<sup>176</sup> The court stated that CU must justify testing by showing that public safety or national security was threatened, as was suggested by *Skinner*.<sup>177</sup> The court characterized the interests of preserving the integrity of CU's athletic program and of fair athletic competition as "not very significant for Fourth Amendment purposes."<sup>178</sup>

The Supreme Court of Colorado also found that the trial court had not erred when it held that CU had not established that its student-athletes had voluntarily consented to the drug testing. The court determined that voluntariness of consent was a question of fact that could not be reviewed *de novo* unless the factual findings were clearly erroneous.<sup>179</sup> CU argued that the trial court had not made a factual finding on the issue of voluntariness, but had instead applied the legal doctrine of "unconstitutional conditions" and determined that the consent was involuntary. The court concluded that the trial court used the "unconstitutional conditions" doctrine only as an alternative ground. Thus, the trial court's decision based on factual findings must be ac-

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175. *Id.* at 942. The court stated that the loss of eligibility was significant because it deprived some student-athletes of the opportunity for a professional sports career, it deprived many of the experience necessary to become a coach, and deprived student-athletes of their scholarships. *Id.*

176. *Id.* at 943.

177. *Id.* at 945. The court stated that the role model interest might be a significant interest, but CU did not introduce evidence that CU's athletes were role models. *Id.* at 945 n.30.

178. *Id.* at 945.

179. *Id.* at 946-47 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)).

cepted unless the findings were clearly erroneous.<sup>180</sup> Finally, the court also rejected the argument that the factual finding that consent was involuntarily obtained had to be determined on an individual basis because the case was a class action.<sup>181</sup>

Two Justices dissented in *Derdeyn III*. Chief Justice Rovira dissented, stating that the trial court's holding on the issue of voluntary consent was based solely and erroneously on the "unconstitutional conditions" doctrine.<sup>182</sup> Chief Justice Rovira relied on the fact that the trial court heard no evidence from prospective student-athletes on the voluntariness issue; thus, the trial court had to state that as a matter of law no CU student-athlete could ever voluntarily consent to be drug tested.<sup>183</sup> Chief Justice Rovira then analyzed whether the doctrine was properly applied to CU's student-athletes and decided it was not.<sup>184</sup> Chief Justice Rovira's dissent ignored the fact that CU had the burden to prove voluntariness, therefore, any inferences must be resolved in favor of the student athletes.

Justice Erickson also dissented, finding that the drug testing was reasonable and agreeing with Chief Justice Rovira that the trial court erred on the issue of voluntary consent. Justice Erickson stated that suspicionless drug testing is valid in certain contexts, especially when the privacy interests at stake are *de minimis*. Justice Erickson concluded that not only were CU's interests in conducting its drug-testing program valid,<sup>185</sup> but that student-athletes had a diminished expectation of privacy.<sup>186</sup> Justice Erickson concurred with Chief Justice Rovira's

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180. *Id.* at 947.

181. *Id.* at 949.

182. *Id.* at 951 (Rovira, C.J., dissenting).

183. *Id.* Such a ruling would be reviewed *de novo* argued Chief Justice Rovira.

184. *Id.* at 952-56 (Rovira, C.J., dissenting).

185. *Id.* at 960 (Erickson, J., dissenting). Justice Erickson argued that protecting the health and safety of athletes was a valid interest, but he did not address the fact that CU never adduced evidence of drug use at CU. Justice Erickson also relied on the role model theory as justification, but relied on a case involving high school students. *See Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988).

186. *Derdeyn III*, 863 P.2d at 961. Justice Erickson cited three reasons why CU's student-athletes had a diminished expectation of privacy: (1) student athletes are subject to regular and routine physical examinations; (2) student athletes voluntarily submit to extensive regulation of their personal behavior; and (3) a communal locker room atmosphere is com-

dissent with regards to the voluntariness of consent. The two dissenters rejected the use of the “unconstitutional conditions” doctrine to establish that consent to be drug tested when conditioned on participation in intercollegiate athletics is never voluntary. Both dissenters found that the governmental benefit of participation in intercollegiate athletics was too insignificant to trigger the application of the doctrine.

## 2. Discussion

The Colorado Supreme Court majority in *Derdeyn III* deferred substantially to the trial court’s findings on the interests that were implicated by CU’s drug-testing program. CU made several crucial errors in the conduct of its drug-testing program and the subsequent litigation that invalidated its program. CU’s determined stance to reserve the right to return to the original program crippled its efforts during the litigation because the most invasive aspects of the past program were before the court. Two aspects of its various programs — visual monitoring and lack of confidentiality for the test results — greatly intruded on the athletes’ privacy. CU also failed to build a record at trial that would justify its program. Without evidence of a need to drug test its student-athletes, CU could not justify its program. CU’s other mistake was to use the REE test, which is a flawed indicator of drug use, to justify its reasonable suspicion tests.

The major flaw in the *Derdeyn III* court’s analysis is its finding that the “unconstitutional conditions” doctrine can be asserted when the governmental benefit is participation in intercollegiate athletics. The doctrine was developed in the context of welfare, which the Supreme Court has long recognized as an important governmental benefit. Although the doctrine has been extended to benefits considered less important than welfare, none are comparable to participation in competi-

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monplace in intercollegiate athletics. *Id.* Justice Erickson stated that the three reasons did not extend beyond student-athletes because no other identifiable group shared the three components. Justice Erickson also relied on two cases that are inapposite for his communal locker room argument. *Schail* dealt with high school athletes and the Seventh Circuit did not find that athletes had a diminished expectation of privacy; and *O’Halloran*, which was overturned.

tive amateur athletics. Thus the court may have extended the doctrine beyond its boundaries.

Although decided in a state court, *Derdeyn III* relies on the Fourth Amendment and could thus be used as persuasive support in other courts. However, CU's program is largely anomalous because few drug testing programs include as many invasive components as CU's program. It is important to note, in addition, that the NCAA was not a party to the litigation in *Derdeyn*. The NCAA can continue to test CU athletes who qualify for post-season competition. The permanent injunction only prohibits CU from utilizing random drug testing.

#### *D. O'Halloran: The Three-Headed Procedural Monster*

The *O'Halloran* litigation involved a challenge to the University of Washington's (UW's) drug-testing program and encompassed four opinions in three courts, a final disposition on a procedural matter and a settlement accompanied by a dismissal. At times the NCAA was a defendant, but the case ultimately centered only on UW's program. Although UW's drug-testing program was upheld in *O'Halloran III*, that opinion is not controlling because it was reversed on procedural grounds. The litigation illustrates differing approaches to drug-testing, as the federal district court's holding in *O'Halloran III* was a sharp repudiation of the state court's decision in *O'Halloran I*. The two decisions differed in their views of the consent form's coercive nature and of the reasonableness of the drug-testing program.

##### 1. The O'Halloran Decisions

In 1987, Elizabeth O'Halloran, a cross-country runner for UW, sued to enjoin UW's drug-testing program.<sup>187</sup> The UW program was modelled after the NCAA's program and had three important features. First, the UW program had a secure chain of custody.<sup>188</sup> Second,

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187. *O'Halloran v. University of Washington*, 856 F.2d 1375, 1377 (9th Cir. 1988) [hereinafter *O'Halloran IV*].

188. *O'Halloran v. University of Washington*, No. 87-2-08775-1, at 4 (Wash. Ct. App. 1987) [hereinafter *O'Halloran I*]. The lower courts in *Hill* were troubled by the NCAA's chain of custody procedures. *Hill II*, 273 Cal. Rptr. at 414.

there was no problem with disclosing confidential information, such as test results, to a number of people.<sup>189</sup> Finally, UW monitored its athletes while they urinated.<sup>190</sup>

In *O'Halloran I*, the Washington Superior Court granted a preliminary injunction prohibiting the enforcement of the random testing portion of UW's program.<sup>191</sup> The program was held to violate both the Fourth Amendment and the Washington Constitution.<sup>192</sup> The court relied on three factors to invalidate UW's program: 1) monitoring was an invasion of privacy;<sup>193</sup> 2) UW introduced no evidence of drug use at UW to support the need for its program;<sup>194</sup> and 3) UW had not established that the consent to be tested was given voluntarily.<sup>195</sup> The NCAA was not a party in *O'Halloran I*, but the oral ruling, on its face, purported to apply to the NCAA's program.<sup>196</sup>

After the trial court's invalidation of both the UW's and the NCAA's programs, the students, UW and the NCAA began a three-sided procedural dance.<sup>197</sup> In *O'Halloran II*,<sup>198</sup> the United States

189. *O'Halloran I*, No. 87-2-08775-1, at 6.

190. *Id.* at 4-5.

191. *Id.* at 20. For a detailed discussion of the oral opinion, see Brock & McKenna, *supra* note 12, at 548-51.

192. *Id.* Washington's state constitution explicitly guarantees the right to privacy. WASH. CONST. art. I, § 7. The section provides that, "[n]o person shall be disturbed in his private affairs, or his home invaded without authority of law." *Id.* For a comparison to the right to privacy in the California Constitution, see *supra* note 78.

193. *O'Halloran I*, No. 87-2-08775-1, at 9-10.

194. *Id.* at 10-11.

195. *Id.* at 17.

196. *Id.* at 20-21. The court concluded:

It is clear that the NCAA's requirement of all athletes consenting in writing to random post season drug testing as a condition of the University's right to participate in post season championships and bowl events suffers from even more constitutional deficiencies than does the University of Washington's proposed program, which is more structured and much more limited.

*Id.*

197. The state court advised *O'Halloran* to join the NCAA as a defendant and it advised UW to seek an injunction preventing the NCAA from sanctioning it for failing to comply with the NCAA's program. *O'Halloran IV*, 856 F.2d at 1377.

198. *O'Halloran v. University of Washington*, 672 F. Supp. 1380 (W.D. Wash. 1987) [hereinafter *O'Halloran II*]. The NCAA removed the case to federal court after it was joined as a third-party defendant by UW. *Id.* at 1381.

District Court for the Western District of Washington denied UW's motion for a preliminary injunction against the NCAA, holding that the need for an injunction was not established because the NCAA had not been heard on the constitutionality of its program.<sup>199</sup> In a separate part of the opinion, the court denied O'Halloran's motion to remand the case to Washington state court, stating the court had federal subject-matter jurisdiction.<sup>200</sup>

In *O'Halloran III*,<sup>201</sup> with the NCAA's program at issue, the district court finally addressed O'Halloran's claim that the NCAA's drug-testing program was unconstitutional. The court rejected the state court's analysis in *O'Halloran I* and denied O'Halloran's motion for an injunction against the NCAA.<sup>202</sup> The court held that the NCAA was not a state actor as required by Section 1983 of the Civil Rights Act and the Fourth Amendment. Therefore, O'Halloran could not maintain her suit against the NCAA.<sup>203</sup> The court, nevertheless, proceeded to analyze the NCAA's program under the Fourth Amendment.<sup>204</sup> In dicta, the court applied a balancing test and determined that the NCAA's important interests in drug testing student-athletes outweighed O'Halloran's singular and unimportant interest in competing on the intercollegiate level.<sup>205</sup>

The court applied the test developed in *New Jersey v. T.L.O.*<sup>206</sup> to determine the reasonableness of the NCAA's program under the Fourth Amendment.<sup>207</sup> The *T.L.O.* test has two prongs: 1) whether the

199. *Id.*

200. *Id.* The court found there was both a federal question and diversity of citizenship between UW and the NCAA. *Id.* at 1382. According to the court, the case involved the Fourth Amendment because UW would have to prove that the NCAA's program was unconstitutional. *Id.* at 1383.

201. *O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1988) [hereinafter *O'Halloran III*]. The court dismissed the third-party complaint against the NCAA and ordered the plaintiffs to join the NCAA as a defendant. *Id.* at 998. Meanwhile, UW dropped its random testing plan and was dismissed as a defendant. *Id.*

202. *Id.* at 999-1000.

203. *Id.* at 1000.

204. *Id.* at 1001-05.

205. *Id.* at 999-1000.

206. 469 U.S. 325 (1985).

207. *Id.* at 341. In *T.L.O.*, the Supreme Court held that a high school official's search



search was justified at its inception; and 2) whether the search as conducted was reasonably related to the circumstances that justified the initial interference.<sup>208</sup> In *O'Halloran III* the district court concluded that the NCAA had sufficient reasons to justify its drug testing<sup>209</sup> and that the testing was sufficiently limited so as to justify the minor intrusions on O'Halloran's privacy.<sup>210</sup>

The court rejected O'Halloran's arguments that the NCAA's consent form was coercive and that the conduct and scope of the tests were overly invasive. The court found that the NCAA's consent form was not coercive because the only consequence of refusing to sign was the denial of intercollegiate eligibility, not the denial of participation in all athletics.<sup>211</sup> The court also found that the tests' intrusive aspects, such as monitored urination and disclosure of irrelevant, private information, were not sufficiently invasive to outweigh the NCAA's "compelling" interests.<sup>212</sup> The court implicitly relied on the diminished ex-

of a student's purse without probable cause was permissible under the Fourth Amendment. *Id.* at 341-42. The Court found that schoolchildren had a lesser privacy interest, therefore, the search did not require either a warrant or probable cause. *Id.* at 340.

208. *Id.* at 341. The *T.L.O.* Court stated that it was not deciding "whether individualized suspicion is an essential element of the reasonableness standard," noting that "although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'" *Id.* at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)). The Court noted that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal" and when the testing officials have limited discretion. *Id.* at 342.

209. *O'Halloran III*, 679 F. Supp. at 1004. The court stated that the NCAA had ample evidence of drug use, but the court relied only on media accounts of athletes' drug use and on the testimony of a single expert. *Id.* By comparison, the *O'Halloran I* court had noted that there was an "absence of evidence of a significant drug problem among athletes in general, or athletes at the University of Washington." *O'Halloran I*, No. 87-2-08775-1, at 12.

210. *O'Halloran II*, 679 F. Supp. at 1005. The court resolved this issue by deferring to the findings of the NCAA's experts on the reasonableness of the test's procedures. *Id.* at 1005-06.

211. *Id.* at 1000, 1005. The court stated that the denial of the right to participate in intercollegiate athletics resulting from a refusal to consent was not a constitutionally protected right. *Id.* at 1005. Unlike the Colorado Supreme Court in *Derdeyn III*, the *O'Halloran III* court did not read the "unconstitutional conditions" doctrine to include rights not found in the Constitution.

212. *O'Halloran III*, 679 F. Supp. at 1005-06. The court found that as an athlete,

pectation of privacy argument in the context of athletics to uphold the NCAA's program.<sup>213</sup>

*O'Halloran III's* impact, however, has been negated by two subsequent events. In *O'Halloran IV*, the Ninth Circuit reversed *O'Halloran III* on procedural grounds and remanded the case to the state courts.<sup>214</sup> The Ninth Circuit held that O'Halloran's amended complaint which added the NCAA as a defendant did not create federal jurisdiction because the complaint was filed pursuant to the district court's order.<sup>215</sup> Finally, the *O'Halloran IV* court concluded, contrary to the lower court's assertion, that UW's claim against the NCAA was a state law breach of contract claim.<sup>216</sup>

The *O'Halloran* litigation ended in June, 1989, when O'Halloran and UW settled and agreed to dismiss O'Halloran's suit.<sup>217</sup> Their agreement set forth a non-exhaustive list of four grounds on which future challenges to UW's program could be predicated and allowed O'Halloran to proceed in her suit against the NCAA.<sup>218</sup>

O'Halloran was accustomed to communal undressing, thus the monitoring of her urination was neither uncommon nor overly invasive. *Id.* at 1005. The court also reasoned that reporting safeguards would protect O'Halloran from improper disclosures of test results. *Id.*

213. The *O'Halloran III* court concluded that "the larger interests of the health of the student-athlete . . . greatly outweighs [sic] the relatively small compromise of an individual's privacy interest, which is diminished in the context of collegiate athletics." *Id.* at 1007.

214. *O'Halloran IV*, 856 F.2d at 1381. The court held that the denial of the motion to remand was a reversible error. *Id.*

215. *Id.* at 1379-80. The Ninth Circuit held that, "when a court orders the plaintiff to amend its complaint, doing so does not moot the question [as argued by the NCAA] whether removal to the federal court was proper." *Id.* at 1380. The court added that the NCAA did not have diversity jurisdiction, because it was an unincorporated association. *Id.* at 1381. In addition, the court held that O'Halloran specifically reserved her right to appeal the denial of her motion to remand. *Id.* at 1379.

216. *Id.* at 1380-81. The court recharacterized the action, stating UW joined the NCAA as a third-party defendant to protect itself from sanctions for a future breach of contract with the NCAA. *Id.* The court disagreed with the *O'Halloran II* court's reasoning, stating UW would not have to allege that the NCAA's program violated the Fourth Amendment, in order to gain an injunction against the NCAA. *Id.*

217. *O'Halloran v. University of Washington*, No. 87-2-08775-1, at 1 (Wash. Super. Ct. June 26, 1989) (Stipulation and Order of Dismissal). Pursuant to the settlement agreement, UW eliminated its random drug testing, leaving tests based on reasonable suspicion of drug use in place. *O'Halloran and University of Washington Partial Settlement Agreement*, at 1-2 (1989).

218. *O'Halloran and University of Washington Partial Settlement Agreement*, at 1-2

## 2. Making Sense of the Disorder(s)

Due to the settlement and the numerous actions, motions, dismissals and appeals, *O'Halloran* established no rule of law. In fact, because the Ninth Circuit reversed *O'Halloran III* on jurisdictional grounds, the *O'Halloran III* ruling that the NCAA's tests were valid was never addressed by the appeals court. Thus, the reasoning on the merits in the *O'Halloran* decision is significant only for its effect on UW's drug-testing program and for the persuasive impact of the *O'Halloran III* reasoning. However, the persuasive impact of the *O'Halloran III* opinion is found solely in its dicta.

In analyzing the tests' reasonableness, the *O'Halloran III* court relied on three dubious propositions. First, the court stated that the "element of communal undress" in athletics diminished the invasiveness of monitored urination.<sup>219</sup> Second, the court found that anecdotal evidence of drug use in the past by some members of a class, proved that drug testing will "turn up evidence of . . . drug use" by members of the class.<sup>220</sup> Third, the court determined that the NCAA narrowly tailored its test to achieve its objective of deterrence.

The *O'Halloran III* court used the same logic as the *Hill III* court that the element of communal undressing and showering in athletics reduced the invasiveness of monitored urination.<sup>221</sup> There is one fallacy with this argument: it equates voluntary undressing in the presence of teammates with compulsory, monitored urination conducted for the purposes of investigation and possible subsequent sanctions. As the *Skinner* Court stated, the act of urination is private;<sup>222</sup> monitored urination with use of the results in this manner is not rendered less invasive because an athlete has, in the past, undressed in front of teammates.

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(1989).

219. *O'Halloran III*, 679 F. Supp. at 1005.

220. *Id.* at 1004.

221. *See Hill III*, 865 P.2d at 657.

222. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617 (1989) (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

The need for the UW and the NCAA's drug-testing programs was meagerly supported by anecdotal evidence of past incidents of drug use by athletes. The *O'Halloran* court erred in relying on that evidence for three reasons. First, reliance on anecdotal evidence of drug use as a legal finding that drug use exists at UW is questionable. Second, the court did not address the specificity of evidence necessary to justify drug testing at UW; there was no evidence of a drug problem at UW. Third, anecdotal evidence of past drug use by some athletes does not logically lead to the conclusion that other athletes use drugs.

The *O'Halloran III* court also inadequately addressed whether the NCAA's drug-testing program was overbroad and thus not tailored to satisfy its objectives.<sup>223</sup> The court deferred solely to the judgment of the NCAA's experts on the reasonableness of the tests.<sup>224</sup> The dicta in *O'Halloran III* is important because it demonstrates that: 1) some courts may be unwilling to expand the "unconstitutional conditions" doctrine to the context of college athletics; 2) courts can find that the privacy interests of college athletes are minimal, even in the context of monitored urination; and 3) the NCAA's interests may be found to be compelling.

#### *E. Bally v. Northeastern: An Indirect Victory for the NCAA*

*Bally v. Northeastern University*<sup>225</sup> involved a challenge to Northeastern University's (NU's) drug-testing program. In *Bally*, the Massachusetts Supreme Judicial Court upheld NU's drug-testing program because the student-athlete could not prove that NU coerced his consent to be drug tested.

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223. See *Hill II*, 273 Cal. Rptr. at 418.

224. *O'Halloran III*, 679 F. Supp. at 1005. The court incorrectly asserted that the NCAA tests would not disclose any irrelevant private information. *Id.* This flat assertion is contradicted by the bulk of medical testimony. See *Derdeyn II*, 832 P.2d at 1033 ("[i]t is not disputed . . . that chemical analysis of urine, like that of blood can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic").

225. 532 N.E.2d 49 (Mass. 1989).

## 1. Facts, Holding, and Reasoning

In 1987, David Bally, a distance runner for NU, sued under Massachusetts' Civil Rights Act<sup>226</sup> and Right of Privacy Act<sup>227</sup> to enjoin NU's drug-testing program. NU's program featured monitored urination, consent forms, a list of banned substances that mirrored the NCAA's list, random testing and a limited distribution of test results.<sup>228</sup> However, *Bally* would center on the issue of the consent form. Deciding the case on stipulated facts, the Massachusetts Superior Court granted summary judgment in Bally's favor. In 1987, the Massachusetts Superior Court held that NU's program violated the Massachusetts Civil Rights Act because 1) the consent provision was a coercive deprivation of Bally's right to privacy; 2) the drug testing was overbroad in that it disclosed private information which was irrelevant to the program's purposes; and 3) there was no need for NU's program because there was no evidence of drug use by NU student-ath-

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226. The Massachusetts Civil Rights Act required Bally to prove that his constitutional rights guaranteed by state or federal law were interfered with and that the interference was accomplished by the use of "threats, intimidation or coercion." See MASS. GEN. L. ch. 12, § 11H-I (1988). The Massachusetts Constitution secures the right to privacy in Article 14. Thus, NU's alleged interference was with Bally's privacy rights under the explicit right to privacy in Massachusetts and also by implication under the Fourth Amendment's protection against unreasonable searches and seizures. *Bally*, 532 N.E.2d at 52; see MASS. CONST. art. 14, § 1; U.S. CONST. amend. IV. The Massachusetts Civil Rights Act, like Section 1983 of the Federal Civil Rights Act, requires state action. The Massachusetts Civil Rights Act, however, differs from the Federal Civil Rights Act by adding the requirement that the deprivation of rights be caused by the "use of threats, intimidation or coercion." Compare Mass. Gen. L., ch. 12, § 11H-I (1988) with 42 U.S.C. § 1983 (1988).

227. The Massachusetts Right of Privacy Act provides that, "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." MASS. GEN. L. ch. 214, § 1B (1986).

228. *Bally Memorandum*, No. 87-1178, at 1 (Mass. Super. Ct. Nov. 1987) [hereinafter *Bally Memorandum*]. NU's program prohibited the use of any of the NCAA's banned substances. *Bally*, 532 N.E.2d at 50-51. It further provided for: a compulsory annual drug test; permissive, random testing throughout the year; and mandatory testing of all athletes who were to compete in NCAA post season competitions. *Id.* In fact, NU only tested those athletes who participated in post season NCAA championships. *Id.* When Bally refused to sign either the NCAA's or NU's consent form, he was declared athletically ineligible. *Id.* at 51. As a result, Bally brought suit to enjoin the enforcement of NU's program. *Id.*

letes.<sup>229</sup> The trial court stated that NU could not condition Bally's athletic eligibility on a waiver of his constitutional rights.<sup>230</sup> The court also found that NU violated Bally's right to privacy because the drug tests disclosed non-pertinent and confidential information.<sup>231</sup> Like the *Hill I* court, the *Bally* trial court found that the lack of evidence of drug use at NU established that there was no need for the invasive tests.<sup>232</sup>

The Massachusetts Supreme Judicial Court reversed, holding that Bally failed to prove a violation of either the civil rights or the privacy acts.<sup>233</sup> According to the court, Bally did not establish that NU violated his civil rights for two reasons. First, the court found that there was no evidence of NU's use of "threats, intimidation or coercion."<sup>234</sup> As to the coercion the trial court found to exist in the signing of consent forms, the Supreme Judicial Court held that Bally, by virtue of his refusal to sign the form,<sup>235</sup> was merely excluded from

229. *Bally Memorandum*, at 16-17, 21-22.

230. *Id.* at 16-17. The court agreed that Bally had no right to participate in athletics, but found that the consent provision was still coercive for the statute's purposes. *Id.* at 17. The court implicitly relied on the "unconstitutional conditions" doctrine.

231. *Id.* at 21. This finding was based on Bally's rights of the type the authors term "confidentiality type 1," which includes the right to freedom from disclosure of personal information irrelevant to a program's articulated goals. Drug tests necessarily reveal information unrelated to a search for drugs such as pregnancy, illnesses, or the type and use of birth control medication. *Id.*

232. *Id.* at 24. The *Bally* trial court found that there were less intrusive alternatives than random testing. *Id.* The court stated that the search was unreasonable, "particularly where the less intrusive means of coach training, athlete education and observation may be employed toward protecting NU's interests." *Id.* The parties stipulated that "chronic or substantial abuse of certain drugs by athletes may be detectable" by means less intrusive than drug testing. *Id.* at 13-14.

233. *Bally*, 532 N.E.2d at 50.

234. *Id.* at 52.

235. As the *O'Halloran* litigation demonstrates, signing the NCAA's or the university's consent forms before seeking injunctive relief may be the only realistic way for a student-athlete to maintain eligibility while challenging the programs. Unlike the plaintiffs in *Hill*, *O'Halloran* and *Bally*, Derdeyn signed CU's consent form before challenging its program. The status of both *O'Halloran* and *Bally*—ineligible because they refused to sign the NCAA consent form—illustrates the prejudice a student-athlete may suffer by refusing to sign the NCAA's consent form. Thus, signatures on consent forms should be viewed as reservations of eligibility pending resolution of legal challenges, rather than as waivers of a legal right to challenge the constitutionality of the programs.

participation in intercollegiate sports.<sup>236</sup> Second, the court stressed that the Massachusetts Civil Rights Act was narrowly drawn and did not address the type of violation alleged by Bally.<sup>237</sup> The court distinguished other civil rights cases finding that NU's program was uniformly applied, therefore, it was not "comparable with the direct assault" directed towards "a particular individual or class of persons."<sup>238</sup>

The Massachusetts Supreme Judicial Court overturned the summary judgment on the privacy claim, interpreting the privacy statute to require a showing of public disclosure of private or confidential information.<sup>239</sup> The court found that NU had not disclosed any private information.<sup>240</sup> In its ruling, the court distinguished several Massachusetts cases that concerned drug testing in the employment context.<sup>241</sup>

The Massachusetts Supreme Judicial Court decided *Bally* in conjunction with *Horsemen's Benevolent and Protective Association v. State Racing Commission*.<sup>242</sup> In *Horsemen's*, the court held that the drug testing of jockeys by the state's horse racing commission violated the explicit right of privacy found in the Massachusetts Constitu-

236. *Id.* at 53.

237. *Id.* at 52-53. The court asserted that the Act was only intended to address the problems created by racial discrimination and was not intended to create a "vast constitutional tort." *Id.* at 52 (quoting *Bell v. Mazza*, 474 N.E.2d 1111, 1115 (Mass. 1985)).

238. *Id.* at 52-53.

239. *Id.* at 53.

240. *Id.* The court did not address whether disclosure of results of a positive drug test to relevant university officials could constitute public disclosure under the privacy statute.

241. *Bally*, 532 N.E.2d at 53-54. The *Bally* court distinguished *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908 (Mass. 1982), where the Supreme Judicial Court held that within the context of private employment an employee could not "be discharged for refusing to answer unreasonably intrusive inquiries of a personal nature." *Id.* (quoting *Cort*, 431 N.E.2d at 912 n.9 (Mass. 1982)).

The court also distinguished *Bratt v. International Business Machs. Corp.*, 467 N.E.2d 126 (Mass. 1984), again finding that the disclosure of highly personal information was limited to the context of private employment and disclosures by employers. *Id.* (citing *Bratt*, 467 N.E.2d at 133-34). The *Bally* court stated that disclosure of private information in an intra-corporate memo was an invasion of privacy, but only when applied to the context of private employment. *Id.* The court did not view the *Bally* case as stemming from a contract; therefore, it did not address whether an athlete who was bound by a scholarship contract could raise the disclosure issue.

242. 532 N.E.2d 644 (Mass. 1989).

tion.<sup>243</sup> Since the commission was a state actor, the court applied the protections of the Massachusetts Constitution to the commission's drug-testing program.<sup>244</sup>

The *Horsemen's* court analysis was comprised of two relevant parts. First, the court disagreed with the premise that extensive regulation of an industry justified invasive searches.<sup>245</sup> Second, the court found that the preservation of fair competition was not a compelling interest,<sup>246</sup> and there was no evidence of a health threat to justify the need for the program.<sup>247</sup> The primary difference between *Bally* and *Horsemen's* was that the *Horsemen's* court applied the greater privacy rights guaranteed by the Massachusetts Constitution because the racing commission was a state actor.<sup>248</sup>

## 2. Discussion

The Massachusetts Supreme Judicial Court's analysis in *Bally* is deficient in two areas: 1) it failed to address *Bally's* argument that the

243. *Id.* at 646.

244. *Id.* Because there was no state action in *Bally*, the plaintiff could not invoke the protections of privacy guaranteed in the Massachusetts Constitution. *Id.* at 646 n.1.

245. *Horsemen's*, 532 N.E.2d at 650-51. The court criticized the reasoning that a diminished expectation of privacy is concomitant with employment in a heavily regulated industry, stating that there was a host of industries that would *a priori* be subject to drug testing. *Id.* at 650 n.3. The *Horsemen's* court firmly "reject[ed] the argument that random drug testing in an industry can be justified solely by, or hinges on, the extent to which that industry is heavily regulated." *Id.* at 650. *But see* *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d. Cir. 1986) (stating jockeys were employed in heavily regulated industry which diminished their privacy).

246. The court reasoned that random testing was only designed to prevent "catastrophic losses," therefore, the commission's stated purpose of "prevent[ing] improperly won or lost horse races" failed to justify its program. *Horsemen's*, 532 N.E.2d at 651-52. *But see* *Shoemaker*, 795 F.2d at 1142. The *Shoemaker* court held that the preservation of fair competition was a compelling interest. 795 F.2d at 1142. Ironically, the purpose behind the New Jersey testing program was the same as the Massachusetts program-preserving the integrity of horse racing. *Compare* *Shoemaker*, 795 F.2d at 1138 *with* *Horsemen's*, 532 N.E.2d at 646.

247. Although there was circumstantial evidence of drug abuse at Suffolk's Downs race track, the court asserted that this evidence was not sufficient to justify the drug testing. *Horsemen's*, 532 N.E.2d at 646.

248. *See* *Horsemen's*, 532 N.E.2d at 646, n.1, 648 (citing Mass. Declaration of Rights, Art. 14).



consent forms were coercive; and 2) it did not address the test's disclosure of private information. The court dismissed the argument that the student-athletes' signing of NU's consent form was coerced, and therefore, it found that Bally could not prove a violation of the Act. The court interpreted coercion as requiring a threat of physical harm; thus, Bally's contention that the consent was a form of economic coercion was viewed as inapposite.<sup>249</sup> The court thus rejected participation in intercollegiate athletics as sufficient to implicate the "unconstitutional conditions" doctrine. This holding directly conflicts with the holding of the Colorado Supreme Court in *Derdeyn III*.

Interpreting the Massachusetts Right of Privacy Act to cover only the public disclosure of private facts, the *Bally* court then mischaracterized Bally's claim, stating that his complaint addressed the prospective disclosure of the test results. Bally was actually attacking the overbreadth of the testing. Thus, the court did not explain why in *Horsemen's* it found that the drug testing was overbroad because it disclosed non-pertinent facts,<sup>250</sup> but in *Bally* it concluded that such disclosures did not rise to the level of a disclosure of confidential information under the privacy statute. Whereas the *Hill III* court held that the California Constitution's privacy clause covered the actions of private actors,<sup>251</sup> the Massachusetts Supreme Judicial Court would not similarly extend the Massachusetts Constitution.<sup>252</sup>

The *Bally* court reversed the judgment against NU because Bally could not establish that he was coerced into signing the consent form.<sup>253</sup> Thus, the Massachusetts Supreme Judicial Court placed the burden of proof on Bally, whereas the Colorado Supreme Court in *Derdeyn III* placed the burden of proof on the university to prove voluntariness. The fundamental difference in these cases is a disagree-

249. *Bally*, 532 N.E.2d at 53-54.

250. *Horsemen's*, 532 N.E.2d at 649.

251. *Hill III*, 865 P.2d at 643-44.

252. See *Horsemen's*, 532 N.E.2d at 646 n.1. If the Massachusetts Constitution covered NU's program, the court would have been compelled to apply *Horsemen's* to invalidate NU's program. *Horsemen's* and *Bally* shared three similarities: 1) there was not sufficient evidence of drug use in either program to justify the drug tests; 2) both programs featured monitoring; and 3) both programs invariably disclosed irrelevant, private information.

253. *Bally*, 532 N.E.2d at 50.

ment over the extent of the “unconstitutional conditions” doctrine and the importance of participation in intercollegiate athletics.

*Bally* is significant for its treatment of an intercollegiate drug testing program under restrictive state privacy statutes. Again, the NCAA was not impacted by the *Bally* litigation.

#### *F. Recent Developments: Continuing Litigation*

The NCAA has not enjoyed a respite from challenges to its testing program. However, recent challenges have been individual appeals of sanctions for positive drug tests. Program wide challenges have been averted by settlements with the challenging athletes. In October 1991, Steve Premock, a football player for the University of Montana, obtained an injunction against the NCAA allowing him to resume playing football after he tested positive for steroids.<sup>254</sup> Citing flaws in the NCAA’s methodology and its chain of custody, Montana District Court Judge Douglas Harkin rejected the NCAA’s appeal and granted Premock an injunction to resume playing.<sup>255</sup> In December, 1991, the NCAA settled with Premock thereby averting further litigation.<sup>256</sup>

In 1992, Monty Grow, a football player for the University of Florida, initiated a suit against the NCAA to regain a lost year of eligibility after he was suspended for failing a test for steroids.<sup>257</sup> Grow eventually regained his lost year of eligibility, thereby avoiding litigation with the NCAA and the University of Florida.<sup>258</sup> Grow claimed there were problems in the NCAA’s testing procedure that constituted a violation of his right to due process.<sup>259</sup> Grow’s attorney attributed settlement to the NCAA’s fear of litigation that would have challenged the constitutionality of the NCAA’s program under Florida’s privacy

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254. *Judge Hits NCAA Drug Testing*, CHICAGO TRIB., Oct. 13, 1991, at C3.

255. *Id.* Judge Harkin stated the “NCAA has a long way to go before this court can accept the results of their drug-testing program.” *Id.*

256. *NCAA to Pay Athlete in Drug-Case Settlement*, USA TODAY, Dec. 13, 1991, at C11.

257. Peter Kerasotis, *FBC-Gators*, FLA. TODAY, Oct. 7, 1992 (Gannett News Serv.).

258. John Romano, *Grow Gets Second Senior Year*, ST. PETERSBURG TIMES, Aug. 13, 1993, at C1.

259. *Id.*

laws.<sup>260</sup> Grow's suit was part of a trend, as it was based in part on a Florida statute that requires the NCAA to adhere to due process in cases involving Florida's state universities.<sup>261</sup> A similar statute in Louisiana allowed a Louisiana State University football player to enjoin the NCAA and play out his senior season.<sup>262</sup>

### G. *Schaill: An Example of Challenges to the Drug Testing of High School Students*

Courts have shown less resistance to drug testing student-athletes who are minors. In contrast to the litigation involving universities' programs, courts apply a lesser burden on high schools to justify the drug testing of their student-athletes. In *Schaill v. Tippecanoe County School Corp.*,<sup>263</sup> Darcy Schaill, a high school swimmer, sued to enjoin her high school's unmonitored, random drug-testing program.<sup>264</sup> The Seventh Circuit held that the testing was reasonable because high school athletes have reduced privacy expectations and the school system had a compelling interest to support its program.

Since the drug tests were unmonitored and the court found that the athletes had a diminished expectation of privacy, the court held that the tests were not as invasive as drug tests in other contexts.<sup>265</sup> The court

260. Celeste E. Whittaker, *Inside Colleges*, ATLANTA J. & CONST., July 25, 1993, at E2.

261. *Id.*; see FLA. STAT. § 240.5338-5349 (1991). A similar statute in Nevada was held by the United States District Court for Nevada to violate the Commerce Clause of the United States Constitution. See *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993). The statute in *Miller* purported to apply due process to all proceedings of the NCAA involving Nevada's state universities. *Id.* at 637.

A similar argument was raised by the NCAA in *Hill*, but was rejected by the *Hill II* court. 273 Cal. Rptr. at 422-23. The NCAA argued that the *Hill* ruling destroyed the uniformity of the NCAA's program and, therefore, imposed an undue burden on interstate commerce. The court found the trial court's injunction was only an incidental burden on commerce. *Id.* at 423.

262. Kerasotis, *supra* note 255.

263. 864 F.2d 1309 (7th Cir. 1988).

264. *Id.* at 1310.

265. *Id.* at 1318. The court focused on the oft-cited proposition that the element of communal undress reduces an athlete's privacy rights. *Id.* According to the court, the fact that athletes are generally subject to a pre-participation medical examination also reduced athletes' privacy rights. *Id.* The court stated:

found that the high school athletes' participation in interscholastic athletics subjected the students to extensive regulation of off-school behavior, which contributed to its finding that the program was reasonable.<sup>266</sup> The *Schail* court concluded that extensive evidence of drug use at one high school, and of drug-related athletic injuries, in addition to national surveys of drug use by high school students, supported the school system's interest in testing its athletes.<sup>267</sup>

*Schail* illustrates the importance of introducing evidence of drug use into the record in order to justify the need for drug testing. Because the athletes were young and in need of greater protection from drugs, the court accepted largely circumstantial evidence of drug use in the schools as establishing the school's interest in testing its student-athletes. The *Schail* court acknowledged, however, that the inquiry into high school drug-testing programs was less stringent than the inquiry into university level drug-testing programs because the former involved young students.<sup>268</sup>

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The combination of these factors makes it quite implausible that students competing for positions on an interscholastic athletic team would have strong expectations of privacy with respect to urine tests. We can, of course, appreciate that monitored collection and subsequent testing of urine samples may be distasteful (although plaintiffs' subjective evidence on this point was not powerful), but such procedures can hardly come as a great shock or surprise under present-day circumstances. For this reason, we believe that sports are quite distinguishable from almost any other activity. Random testing of athletes does not necessarily imply random testing of band members or the chess team.

*Id.* at 1319 (footnote omitted). The court's reasoning is troubling when it is applied to young students. Young athletes are generally more sensitive to invasions of their privacy, especially a more than casual observation of the highly personal act of urination. As the court suggested, the plaintiff did not prove this assertion, but it is almost uncontroversial that high school athletes are more sensitive to their privacy during urination than most college athletes.

266. *Id.* at 1322. In another inquiry the court concluded that drug testing was the only effective method of satisfying the school's goal of deterring drug use. *Id.* at 1321.

267. *Id.* at 1310-11, 1320-21. The *Schail* court stated that there was substantial testimony at trial concerning the drug problem in the schools. The school also presented circumstantial testimony as to injuries suffered during athletic contests by drug-impaired athletes. *Id.* at 1320-21.

268. High school athletes may have greater protection following the holding in *Acton v. Vermona Sch. Dist.* 47J, 23 F.3d 1514 (9th Cir. 1994). The Ninth Circuit overturned a lower court holding that found a high school's drug-testing program was constitutional. Analyzed under the Fourth Amendment, the court found there was no compelling interest to conduct

#### IV. LESSONS OF THE DRUG-TESTING LITIGATION

##### A. Addressing the Case Law

##### 1. State Action

The state action requirement forecloses many Fourth Amendment challenges. The Supreme Court's holding in *Tarkanian* conclusively established that the NCAA will not be considered a state actor for Fourth Amendment purposes.<sup>269</sup> Challenges predicated on a Fourth Amendment unreasonable search argument thus cannot be brought against the NCAA. Similarly, many private universities are not state actors, and their drug-testing programs may only be challenged under privacy laws that apply to non-state actors, such as in California.<sup>270</sup>

##### 2. Diminished Expectation of Privacy

One defense that is often asserted by universities or the NCAA is that the student-athlete enjoys a diminished expectation of privacy, therefore, the search is reasonable despite its invasive aspects. The reasons used to support this theory include: student-athletes are extensively regulated and qualify under the warrantless search exception; student-athletes often dress in a communal locker room atmosphere, therefore, visual monitoring of urination is common and unintrusive; and student-athletes often take medical examinations, so they are used to drug-testing. The *Hill III* court's finding that the athletes had a diminished expectation of privacy, although consistent from court to court, is controverted by the finding of the Colorado Supreme Court in

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testing. *Id.* at 1520, 1527. The court found that the athletes's expectation of privacy was not diminished by virtue of their participation in athletics or their use of locker rooms. *Id.* at 1525. The court stated "[normal] locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination." *Id.*

269. For a further discussion of the state action issue, see *supra* notes 57, 65-69 and accompanying text.

270. One commentator suggested that challenges to drug-testing programs in Florida, New York and Montana are especially "ripe." Ted O'Neal, Comment, *The Constitutionality of NCAA Drug Testing: A Fine Specimen for Examination*, 46 S.M.U. L. REV. 513, 552 (1992). This may explain the settlements in the Grow and Premock situations.

*Derdeyn III*.<sup>271</sup> In *Skinner*,<sup>272</sup> the Supreme Court reasoned that employees in a “pervasively regulated industry,” such as the railroad workers, have a diminished expectation of privacy. Agreeing with the *Skinner* Court, the *Hill III* court concluded that NCAA athletes have a similarly diminished expectation of privacy because athletes are extensively regulated.<sup>273</sup> The Supreme Court of Colorado found that the arguments for finding that athletes had a diminished expectation of privacy were not supported by testimony at trial.<sup>274</sup> Given sufficient evidence that student-athletes are more extensively regulated than other students, courts will most likely find that student-athletes have a diminished expectation of privacy, which significantly increases the drug-testing organization’s chances for victory.

The finding that athletes have a diminished expectation of privacy suffers from several logical defects. First, arguing that monitored drug tests are less invasive because athletes undress in a communal locker room ignores a difference between the two activities. Undressing in a locker room is permissive, while monitored urination is compulsory. Moreover, comparison of the two does not take into account that the purpose of the latter is the organized and systematic collection and use of private information by the sponsoring institution. One can hardly argue that an element of communal undress justifies *this* aspect of monitored urination.<sup>275</sup> However it could be argued that male athletes using a communal urinal may experience a possible lessened expectation of privacy.

Finally, the argument that the closely regulated nature of athletics justifies the diminished expectation finding can be destroyed by the

271. However, the finding in Colorado may be attributed more to an evidentiary failure by the University of Colorado than to a holding that all student-athletes do not have a diminished expectation of privacy.

272. *Skinner*, 489 U.S. at 627.

273. *Hill III*, 863 P.2d at 657; *Hill II*, 273 Cal. Rptr. at 409-10.

274. *Derdeyn III*, 863 P.2d at 945. See also *Horsemen’s*, 532 N.E.2d at 650-51.

275. For example, the element of communal undress in locker rooms does not justify an institution’s photographing of students in their undressed state, then circulation of the photographs to selected university officials, with possible sanctions against the students based on the photographs. Similarly, more than an element of locker room communal undress is required to justify systematic institutional collection and use of comparable chemical information, with potential sanctions against students.

process of *reductio ad absurdum*. This argument supports the drug testing of all students who are closely regulated, such as teaching assistants, band members and laboratory assistants. All of these students are closely regulated, and many have a far greater impact on public safety than athletes. Thus the diminished expectation finding is erroneous and should be reconsidered.

### 3. Compelling and Legitimate Interests

Another aspect of the drug-testing litigation is the interests asserted by drug-testers to justify drug testing college athletes. The interests generally asserted are protection of the health and safety of college athletes and preservation of fair athletic competition. Courts have accorded these interests different weights.

The *Derdeyn III* court stated that CU's purposes were insignificant because they involved athletics and did not impinge on matters of national concern or public safety.<sup>276</sup> The *Bally* court, however, found that an athlete's participation in intercollegiate athletics was a weak interest in light of NU's purpose of protecting the health of its student-athletes.<sup>277</sup> In *Hill III*, the NCAA's interests were found to be legitimate and extended as far as protecting the NCAA's reputation for sponsoring fair athletic events. With a properly substantiated record, a university or the NCAA could most likely establish that it had a legitimate need to drug test student-athletes.

There is seeming consensus that the drug-testing organization only needs to assert legitimate interests. The Colorado Supreme Court in *Derdeyn III* stated that the Fourth Amendment only requires a showing of a legitimate interest. The California Supreme Court in *Hill III* also found that the appropriate standard was a legitimate interests standard.

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276. *Derdeyn III*, 863 P.2d at 945.

277. *Bally*, 532 N.E.2d at 53.

#### 4. Voluntary Consent

Most drug-testing programs require the athlete to consent to be drug tested; if this consent was voluntarily given, the drug test can be as invasive as necessary.<sup>278</sup> However, most courts have held that the sponsor of the drug testing bears the burden of proving that the consent form was voluntarily signed. The issue of voluntary consent revolves around judicial acceptance of the “unconstitutional conditions” doctrine.

A majority of the Justices of the Supreme Court of Colorado accepted the theory that denial of participation in intercollegiate athletics was an unconstitutional condition that removed the voluntariness of the athlete’s consent. Both dissenters in *Derdeyn III* found that the governmental benefit of participation in intercollegiate athletics was too insignificant to constitute an “unconstitutional condition.” The Massachusetts Supreme Judicial Court also implicitly rejected the application of the doctrine to the context of intercollegiate athletics. The doctrine is on weak legal ground because participation in intercollegiate athletics is probably not sufficient to trigger the doctrine, *Derdeyn* notwithstanding.

#### 5. Questions of Law Versus Questions of Fact

Courts should explicitly address the issue of whether a drug testing program is unreasonably or impermissibly invasive is a question of fact, of law, or of ultimate fact, *i.e.* a mixed question of fact and law.<sup>279</sup> First, this is important in determining whether trial court conclusions should be reviewed under a *de novo* or clearly erroneous standard.

Appellate courts to date simply have not been consistent in their treatment of lower court conclusions concerning the invasiveness and reasonableness of NCAA and university sponsored drug testing programs. For example, in *Derdeyn*, the Colorado Supreme Court majori-

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278. This argument was not raised in *Hill*.

279. For a discussion of appellate review standards for ultimate facts, *see* Schwarzer, *supra* note 143.



ty largely deferred to trial court findings, while in *Hill* the California Supreme Court displayed little if any deference. Indeed, justices on the same court have disagreed on the proper appellate standard.<sup>280</sup>

This issue is also significant concerning the type, amount, and quality of proof required on the question of whether a program is unreasonably or impermissively invasive. Evidentiary proof is unquestionably appropriate on issues of fact, issues of ultimate fact, and to establish the absence of material factual dispute, *e.g.* a genuine issue of material fact. However, little if any evidentiary "proof" is logically necessary on a question of pure law.

Resolution of this issue would also likely help clarify the level of deference one trial court should afford another, as it will clarify the issues being addressed and the proofs directed to each issue. For example, in *O'Halloran*, a federal court purported to largely ignore earlier state court conclusions on these questions, deferring instead to "expert findings" concerning the reasonableness of the NCAA's testing procedures.<sup>281</sup>

The invasiveness of a particular program is not purely a question of law. Rather, it depends on facts specific to the particular program — for example whether it is voluntary or mandatory, the asserted interests or needs justifying the program, the breadth of the substances tested for, the testing procedures used, the information collected, the individuals to whom such information will be circulated, the purposes for which the information will be used, and the sanctions employed. Likewise, the invasiveness of a specific program, or the needs or interests to be served by a specific program, are appropriate areas for factual proofs.

However, neither is the permissibility or reasonableness of a particular program purely a fact question.<sup>282</sup> Rather, in that it involves

280. *See, e.g., Derdeyn, supra* notes 164-186; 863 P.2d at 938, 959 (majority concluding reasonableness issue under Colorado constitution resembled one of fact, dissenting justice opining issue was one of law to be reviewed *de novo*).

281. *See supra* notes 208-209 and accompanying text.

282. For example, the Fourth Amendment prohibits unreasonable searches and seizures, but the question of whether a particular search or seizure was "unreasonable" is not purely a question of fact. *See, e.g., T.L.O., supra*, notes 206-208 and accompanying text. Likewise,

both factual and legal components, the issue of whether a particular program is impermissibly or unreasonably invasive is one of ultimate fact.

Accordingly, practitioners should be prepared to present whatever admissible evidence they believe is available to support their claims on these subjects. They should be prepared to take a stance as to whether a particular issue is one of fact, of law, or of ultimate fact. On appeal, where the issue has not been resolved by a state Supreme Court decision, they should be prepared also to argue whether the controlling standard of review with respect to a particular issue is *de novo* or a deferential standard such as a clearly erroneous one.

However, courts should also clarify for practitioners their analysis on these questions. This requires that courts and practitioners distinguish between three different types of "ultimate fact" issues. First, the trial court's resolution of disputed "historical" facts and credibility issues should be reviewed under a clearly erroneous or comparably deferential standard.<sup>283</sup> Similarly, "where the trial court decides ultimate facts which would go to the jury, and does so on motion because witness credibility and demeanor are not implicated, a strong case for deference exists."<sup>284</sup> However, where the historical facts are undisputed, and the only question presented is whether the facts satisfy the constitutional, statutory, or other legal standard, a *de novo* appellate review standard may be appropriate.<sup>285</sup> A particular case may present a combination of issues which fall into different of these three basic categories. Thus, courts and practitioners must be clear in addressing which of these situations is present in a particular case.

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the question of whether a particular program is unreasonable or impermissible under state privacy standards is not purely a question of fact. *See, e.g., Derdeyn, supra* notes 167-185 and accompanying text; 863 P.2d at 938, 959 (majority concluding issue of reasonableness under Colorado Constitution resembled one of fact, dissenting justice opining issue was one of law to be reviewed *de novo*).

283. *Cf. Schwarzer, supra* note 143 at 489-93.

284. *Id.* at 492.

285. Schwarzer states: "Where the decision is of ultimate facts of the kind appropriate for decision by a court as questions of law, the case for deference is weaker. Nevertheless, the appellate court may take into account the trial judge's long exposure, careful study and greater familiarity with what may be a lengthy and complex documentary record." *Id.*

### B. *If the NCAA Was a State Actor*

Many university drug-testing programs follow or are based on the NCAA's program. Thus the question arises: If the NCAA was considered a state actor would its drug-testing program survive a Fourth Amendment challenge? The NCAA's program would have to survive the two prongs of *Skinner*: reasonableness and reasonably tailored. The NCAA could assert several defenses that will be addressed in Subsection 3.

#### 1. The Reasonableness of the NCAA's Program

While a finding on this ground will vary from court to court, certain tendencies can be identified. First, visual monitoring is generally recognized as the most invasive aspect of the NCAA's program. Second, the NCAA's interests are legitimate, but may not be compelling. Although the *Hill III* and *Derdeyn* courts suggested that Colorado University only needed to show a "legitimate" interest, the *Derdeyn III* court found that Colorado University's interests were not legitimate. Thus, the NCAA must build a record sufficient to survive a legitimate interest inquiry. Third, NCAA athletes may have a diminished expectation of privacy, but a finding depends on an adequate record that can draw parallels to the extensively regulated industry in *Skinner*. It is likely that, given an adequate record, the NCAA's program would be found to be reasonable.

#### 2. The Overbreadth of the NCAA's Present Program

The NCAA must prove that its program satisfies the second prong of the *Skinner* test: that testing is reasonably related in scope to achieving the asserted goals of deterrence or disclosure of drug use. There are two reasons why the NCAA's present program is not narrowly tailored to meet its objectives. First, the NCAA's list of banned substances is over-inclusive. The NCAA has little justification to support testing for substances such as strychnine. Second, the NCAA's program inherently discloses irrelevant and private information. It is

uncontroverted that irrelevant information is revealed by the tests and thus is disclosed to testing officials.<sup>286</sup>

To defend its program in future litigation, the NCAA must tailor its testing to the furtherance of legitimate interests. Due to the overbreadth of its list of banned drugs, some of the NCAA's tests have no legitimate purpose.<sup>287</sup> Thus, the NCAA should reduce its list of banned drugs to those substances most frequently used by athletes and which relate to the NCAA's interests in ensuring equitable competition and protecting the health of its athletes. The NCAA should also strive to improve the methodology of its tests so that it can avoid cases such as *Reynolds v. IAAF*<sup>288</sup> or potential challenges such as the Monty Grow case.

### 3. Building a Record to Support Testing Programs

As noted above, the NCAA's drug testing program should be narrowed to more directly further the goals of preserving fair competition and protecting the health and safety of college athletes. Thus monitored, random testing without demonstrated relation to these purposes is likely to be invalidated. Accordingly, the resolution of a challenge to a drug-testing program is likely to turn on the state of the record as to: 1) whether the drugs that are the focus of the program have been linked to unfair competition; and 2) whether the assertions of protecting the health and safety of student-athletes are substantiated by specific evidence of a drug use problem among the target population.

Courts such as the *O'Halloran III* court<sup>289</sup> have been willing to recognize that the preservation of fair competition is at least a legiti-

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286. *Derdeyn II*, 832 P.2d at 1033.

287. *See Hill I*, No. 619209, at 33-35.

288. 841 F. Supp. 1444 (S.D. Ohio 1992). After testing positive for steroids, Butch Reynolds, a world record-holding sprinter, was granted a permanent injunction allowing him to compete in the U.S. Olympic Trials against the wishes of the International Amateur Athletic Federation (IAAF). *Id.* at 1447. Reynolds was successful in introducing sufficient evidence to create a substantial doubt as to the validity of the IAAF's chain of custody. *Id.* Reynolds identified various problems in the handling of his urine sample that the court found contributed to the possibility in that the test's result was erroneous. *Id.*

289. *See O'Halloran III*, 679 F. Supp. at 1005.

mate interest. The follow-up question, however — whether the substances targeted by the drug tests are proved to unfairly affect athletic competition — must also be addressed. As stated by the *Hill* trial court, it has not been proved that drugs necessarily enhance athletic performance.<sup>290</sup> Accordingly, if the NCAA is serious in its articulated goals of ensuring fair competition, its testing program should be limited to substances that are demonstrated to be performance-enhancing.

Testing for over three thousand banned substances is also not justifiable on the grounds that an analysis of the percentage of athletes testing positive for certain substances indicates that the problem seems primarily limited to steroid use.<sup>291</sup> For instance, in the first half of 1992 athletes tested positive only for steroids or steroids-related substances, except for one positive test for excessive caffeine.<sup>292</sup> Thus, the NCAA should only test for those substances that are either prevalently used by college athletes; or are demonstrated to be performance enhancing or to constitute a significant health threat.

#### 4. The Conflicting Roles of the University

An ancillary question raised by the drug testing litigation is, what is the proper role of the university? Athletes who fail NCAA drug tests must convince not only the NCAA and possibly the courts to allow them to participate, they must also convince their own schools. Because the team penalties for allowing an ineligible athlete to participate are severe,<sup>293</sup> universities are unlikely to risk NCAA sanctions to allow one athlete to participate.

A university has conflicting obligations to the NCAA and to its students. These obligations create a three-way struggle between the student, the NCAA and the university. Of course, in challenges to university-mandated programs, the university is an adverse party to the

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290. *Hill I*, No. 619209, at 8. For a further discussion of the court's conclusion that none of the NCAA's banned substances aid performance, see *supra* note 81 and accompanying text.

291. See *Year-Round Steroid Testing*, *supra* note 28, at 1.

292. *Very Few Athletes Fail Drug Testing Program*, NCAA NEWS, Sept. 2, 1992, at 6.

293. For a further discussion of team penalties, see *supra* note 4.

student. Similarly, before the court has addressed the validity of the NCAA's program, it is reasonable for the university to align itself with the NCAA. The university's alignment with the NCAA is arguably motivated by fear of NCAA sanctions. As such, it is difficult for a university to align itself based on the merits of a case.

Once there has been a judicial declaration that the NCAA's program is invalid, the university's interests diverge from the NCAA's interest in uniform application of its program and uniform regulation of college sports. The university must then weigh compliance with a court order against potential NCAA sanctions. To protect themselves universities must seek injunctions to prohibit the NCAA from enforcing its sanctions.<sup>294</sup>

### *C. Conclusions: Defensible Programs and the Correct Standard*

Universities are taking a risk when they rely on the consent provision to demonstrate that the student-athlete has voluntarily waived any privacy rights. Several courts have indicated that these consent provisions can be viewed as coercive, depending on the court's view of the significance of athletic participation. Consent is perceived by the athlete as a necessary step for obtaining scholarships or pursuing a professional athletic or coaching career after college. It is also the university's burden to prove that consent was given voluntarily, which is not easy task. Thus, the consent form is not necessarily dispositive and should not be relied upon by the NCAA or the university's counsel.

Because the visual monitoring of urination has been deemed particularly invasive, alternatives to it should be considered. As one court suggested, there are alternatives to monitoring, such as dyes in the toilet and checks on the sample temperature, which ensure the athlete has given a proper sample.<sup>295</sup> Removing this invasive aspect of the test increases the probability that the test will be upheld.

Likewise, where there is adequate preparation by the university or the NCAA's counsel, where there is evidence supporting the need for

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294. See *O'Halloran III*, 672 F. Supp. at 1380.

295. *Schaill*, 864 F.2d at 1321-22.

drug testing, and the chemical lists, testing procedures, circulation of information, and sanctions are narrowly tailored to address that need, the tests are more likely to be upheld.