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Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument

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INTRODUCTION

A. The Game

Like any other phenomenon that raises complex legal issues in the context of real-world choices, the mandatory drug-testing of college athletes can be compared to a game. Perhaps more accurately, it can be compared to a set of closely related games, each part of the broader "law game" which validates (and helps implement) certain claims to resources or power, and refuses to validate others. The various subordinate contests waged between colleges and athletes, legally trained proponents of contradictory "authoritative" precedents (including attorneys for the parties, judges, and legal scholars),

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and men and women in the public arena who either advocate drug-testing or oppose it all have ethical roots, since they are waged to determine whose values will prevail, and have as two related objects the promulgation of, and adherence to, behavioral norms. Like all games, these contests are also governed by a set of conventions or rules. At least to the extent that the players are seeking a specific "legal" outcome (e.g., an official and binding settlement of a dispute between an athlete and a college or a favorable decision by a court of law), those rules are unusually formal, those conventions, unusually explicit. Unlike many games, however, law games are also inherently "political," since they involve various interests competing to have their preferences and values adopted by the State, and since they depend on the threat (or actual use) of governmental power to insure "victory." Thus, every contest about collegiate drug-testing which involves lawyers or courts of law is fought against the backdrop of real-world possibilities, including injunctions, money judgments, the loss of scholarships, physical eviction from the field of play, expulsion from school, or—somewhat more remotely—criminal prosecution for violation of state or federal narcotics laws. In each instance, "the law" stands between the athlete and the school. What that law *is*, and—to the extent that the issue is distinguishable—how it is *interpreted,* will determine whether the law can be used by the athlete as a shield, or employed by the institution as a sword.

Of course, the possible availability of law as a shield is no guarantee of its efficacy. The existence of legal norms is not always going to mean that they are going to be followed. To the extent that the current contest about the drug-testing of college athletes is fought in the public arena, and reflects the rawest of political emotions—fear in the electorate, demands that legislators and administrators "do something" about drugs—legal rules limiting the authority of institutions to act are likely to come under considerable pressure, and, in some instances, at least, will be ignored. When legal rules are ambiguous—as seems often to be the case in the drug-testing controversy—it can safely be predicted that some institutions desiring to test will seize on those interpretations most favorable to their cause, and discount the risks of eventually being proven wrong.[1] Although they are governed by their own, largely separate, set of rules, law games are part of a broader policy process. As this Article will demonstrate, it is always a serious mistake to ignore the imperatives that drive that policy process. Not only can those imperatives lead to illegal behavior (or highly selective, non-authoritative interpretations of the law), but they can also contribute to the creation of new legislation and new judicial doctrine that change at least some of the rules of the on-going legal game.

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1. *See, e.g.,* Carey v. Piphus, 435 U.S. 247 (1978); Wood v. Strickland, 420 U.S. 308 (1975).

Nevertheless, my principal focus in this Article is on the various legal games that are played by those interested in testing athletes. Chief among the interested parties are the institutions which seek to test, and the athletes who stand to be tested. Because the legality of testing is at stake, these parties ordinarily do not participate in the game directly. Instead, they hire attorneys to counsel them, and, on occasion, to represent them in administrative proceedings, or in litigation. Legal games are thus lawyers' games—and judges' games. Judicial interpretation provides the essential content of a counselor's advice, and the basic frame of reference for a litigator's arguments. For this reason, the Article approaches drug-testing from three perspectives: that of the counselor giving advice to an institution intent on testing about "what it can safely get away with" ("Counselor's Rules"); that of the litigator seeking to defend the interests of an athlete who has been, or stands to be, tested ("The Litigator's Role"); and that of the judge who, upon hearing a case, issues an opinion which not only disposes of the issue for the contending parties, but also frames the applicable rule of law ("Judicial Choices"). By analyzing each of these legal games, I intend to show what the present state of drug-testing law is. Beyond this, however, I also intend to show the relationship of that law to the society—and the social values and political order—that such law serves.

B. On Liberty—and Privacy, and Social Order

The ethical dimension of every contest about drug-testing is an underlying conflict of values about "privacy," broadly construed. Persons generally opposed to testing, whether they are politicians, lawyers, or athletes, characteristically argue that the private use of drugs, if not knowable from its visible public manifestations,[2] should be immune from intrusive institutional acts aimed at its discovery and control—although some would argue that intrusion by the government is more dangerous than intrusion by a "private" institution. Implicit in this argument are beliefs about the presumptive "right" of individuals to be free from institutional intrusion which are similar to those expressed by John Stuart Mill:

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would

2. *E.g.*, arrest while purchasing cocaine from a dealer; overt possession of drug-paraphernalia; public utterances about use; behavior that is characteristic of use and that cannot be plausibly explained on other grounds.

> be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise.[3]

Those generally favoring testing, on the other hand, value privacy differently. While perhaps acknowledging that certain behavior (such as sexual intimacy between a husband and wife)[4] *should* ordinarily be free from governmental (and presumably, other institutional) oversight, they are less willing to extend a presumptive right of privacy to conduct, such as the use of drugs, which arguably endangers health, offends against community values, or is patently illegal—even if such conduct appears to pose demonstrable risk of *direct* harm only to the drug-user, and even if evidence of drug use can be obtained only through scientific analysis of urine or blood samples of the user obtained coercively by the state.[5] Emile Durkheim, writing about the legitimacy of laws prohibiting suicide, presents what well might be the strongest argument for state intervention where the personal abuse of drugs is concerned:

> A man who kills himself, the saying goes, does wrong only to himself and there is no occasion for the intervention of society; for so goes the ancient maxim *Volenti non fit injuria.* This is an error. Society is injured because the sentiment is offended on which its most respected moral maxims rest today. . . . From the moment that the human person is and must be considered something sacred, over which neither the individual nor the group has free disposal, any attack upon it must be forbidden. No matter that the guilty person and the victim are the same; the social evil springing from the act is not affected merely by the author being the one who suffers. If violent destruction of a human life revolts us as a sacrilege, in itself and generally, we cannot tolerate it under any circumstances. A collective sentiment which yielded so far would soon lose all its force.[6]

At its most extreme, this conflict of values pits those who would permit testing under almost no conceivable circumstance against those who would permit it routinely. In fact, however, most people who are interested in drug-testing probably occupy some middle position—due in part, I believe,

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3. J.S. MILL, ON LIBERTY, in CLASSICS OF WESTERN PHILOSOPHY 934, 939 (S.M. Cahn ed. 1977).

4. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (unwillingness of Supreme Court to extend this presumption of privacy to homosexual lovers).

5. Such coercion *could* be physical (*e.g.*, a doctor, assisted by the police, draws a blood sample from the arm of a struggling patient). In the context of almost any imaginable drug testing program, however, it is almost certain to be achieved by *threat* rather than by *violence* (*e.g.*, "Notice to an athlete: If you refuse to sign this form consenting to testing, or refuse to be tested, you will be dropped from the squad, lose your athletic eligibility, and will automatically not have your scholarship renewed when it expires at the end of this academic year.").

6. E. DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY (1952), *excerpted as The Legal Prohibition of Suicide, in* S. LUKES & A. SCULL, DURKHEIM AND THE LAW 144 (1983).

to the fact that ethical choices are always made within a social context, and that that social context includes a legal tradition which conditions us to relativize individual privacy claims and to balance them against the asserted interests of the state. Lending support to this legal tradition—which tends to focus on the specific facts of particular cases, rather than on broad expressions of ethical principle—are the inherently uncertain limits of the "liberal" (or even "libertarian") position exemplified by Mill, and the "conservative" (or even "authoritarian") position exemplified by Durkheim. In Mill's case, drawing the line between society's "self-protection," and its assertion of an illegitimate authority to interfere with "private life" is rendered difficult, perhaps impossible, by the many subterranean connections between an individual's actions and milieu. Snorting cocaine does not have the same readily apparent effect on others as shouting "Fire!" in a crowded theater. Yet who is to say that it *cannot,* under some circumstances, endanger others on the playing field, or in the stands? If college basketball players are "role models" for many of America's young people, and if their lives are customarily subjected to intense scrutiny by the press, who is to say that their "private" vices will not eventually surface as well-publicized behavior with considerable normative impact?[7]

On the other hand, Durkheim's argument has ethical and political implications that should, I think, cause us to treat it with equal skepticism. The obvious point is that smoking a joint a week before the college football season begins[8] is in no sense the moral equivalent of suicide—or even the

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7. All of the publicity devoted to celebrated instances of drug use that has any moral tinge to it, such as much of the press coverage devoted to the deaths of Len Bias and John Belushi, apparently has shared the assumption that such coverage, by playing up harsh facts, will discourage use. But is that assumption warranted? No serious attempt that I am aware of has addressed the possibility that when an adolescent discovers that a "role model" is a "user," he may be encouraged to emulate his idol's self-destructive behavior.

8. Marijuana is a substance that is included on the list of prohibited substances that most collegiate drug-testing programs are designed to discover. The chemical and spectroscopic methods used to reveal traces in the urine are sensitive enough to uncover evidence of occasional use weeks before the test is given. The problem is likely to arise because marijuana is fat-soluable.

EMIT tests are based on the principle that the use of particular substances will produce antibodies in the body of the user that can be chemically detected. According to one source:

> [O]ne of the strengths of immunoassay causes one of its weaknesses. The strength is that the more modern immunoassay techniques are extremely sensitive; they can detect very small, trace quantities of the drug. This strength gives rise to a weakness . . . that a suspect can have trace amounts of the drug metabolite in his urine even when he did not unlawfully ingest the drug. For instance, several studies suggest that a person may have trace quantities of the metabolite of marijuana . . . in his urine even if he has not smoked a marijuana cigarette.

P. GIANNELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE 956-57 (1986). According to one source, "THC [the active ingredient] . . . remains in fatty tissues of the body for a relatively long time. One dose can take weeks, maybe months, to eliminate completely. Thus a regular smoker may never be free of cannabinoid." H. JONES & P. LOVINGER, THE MARIJUANA QUESTION 5 (1985).

moral equivalent of "free-basing" cocaine. Although we may be able to argue that society, by its very nature, has a strong interest in thwarting any behavior that is immediately life-threatening, that argument hardly comprehends situations where the risk to an athlete (or to any third party) engendered by particular behavior is demonstrably slight. The typical response of conservative theorists to objections of this sort is that the "social bond" between the individual and society is much more comprehensive than a generalized concern for physical welfare, and that the state—assuming its government and its judicial system are reasonably representative of its resident population—is therefore entitled to stipulate and defend a broad range of normative interests when it forbids certain behavior, or declares it to be "illegal" or "criminal."[9] Yet at least to the extent that those who make this argument recognize that "individuality" and "moral choice" are values that *should be* protected against the claims of a totalitarian state,[10] they have also to acknowledge that interventions by the government and "the law" into the personal lives of the citizenry *must be limited according to some principle.* It is precisely that principle of limitation, however, that appears to be absent when universal, mandatory, and apparently indiscriminate drug-testing is required of athletes—or of members of virtually any other diverse social group.

Today, there is probably greater general acceptance in the United States of broadly intrusive governmental regulation of "private" conduct than there has been since at least the 1950's.[11] Nevertheless, there is little evidence that

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9. *See, e.g.*, E. DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL, (W. Hall trans. 1984) *excerpted as Crime and Punishment in* S. LUKES & A. SCULL, *supra* note 6, at 59-75. According to Durkheim:

> [punishment] does not serve, or serves only incidentally, to correct the guilty person or to scare off possible imitators. . . . Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour. . . . [Punishment] is a sign indicating that the sentiments of the collectivity have not changed, that the communion of minds sharing the same beliefs remains absolute. . . . [S]ince there cannot be a society in which individuals do not diverge to some extent from the common type, it is also inevitable that some assume a criminal character. *What confers upon them this character is not the intrinsic importance of the acts but the importance which the common consciousness ascribes to them.* . . . By reacting against *the slightest deviation* with an energy which it elsewhere employ[s] against those [that] are more weighty, it endues them with the same gravity and will brand them as criminal.

Id. at 73.

10. From the time of Aristotle to Burke to Durkheim, a common concern of conservative theorists of the state has been the over-reaching tyrant. Illustrative of this point of view is F.A. Hayek's assertion that even within the modern "liberal" political order, "we have been moving away from [the] ideal of individual liberty," and "that unlimited democracy is riding for a fall." 1 F. HAYEK, LAW, LEGISLATION, AND LIBERTY 3 (1973).

11. The tendency to recognize a significant state interest in regulating activities that traditionally have been regarded as "private," or as matters of "individual right," has not been restricted to drug-use issues, nor has it been confined to the rightwing of the political spectrum.

those who have taken an interest in drug-testing have committed themselves to absolute positions. Instead, it appears certain that many with serious doubts about the wisdom of testing in general would permit the limited intrusion implied by a urine test in particular cases if conducted "with appropriate safeguards," and for intelligible and convincing reasons. By the same token, some who are generally predisposed to favor testing demand that it be done "fairly" and "accurately," and sometimes express reservations about its use in particular circumstances.

The relativism of these positions reveals something about the uncertain value accorded to "privacy" today. It also reveals something about mediated ethical choices in a society that relativizes rights as a matter of course, and accords the government at least *some* presumptive right to regulate almost *any* behavior.

C. Mediated Choices: "Due Process" and "Equal Protection of Law"

In conventional legal terminology, the "right of privacy," to the extent that it has been recognized as existing at all,[12] has been characterized as a "substantive due process" right.[13] The cases are somewhat equivocal on the point, but generally hold that the sorts of substantive interests that can be singled out for protection under the fifth and fourteenth amendment due process clauses, either because they are specifically mentioned in the Bill of Rights, or because they are in some other sense regarded as being "fundamental," are either immune from any "prohibition or interference,"[14] or can be regulated or abridged only upon a showing of some "compelling" state interest.[15]

However, when any person within the United States has a recognized "liberty" or "property" interest adversely affected by governmental action, the "procedural due process" guarantees of the fifth amendment will come

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For example, a substantial attack on unrestricted "freedom of speech" has been launched by feminists and others who believe that the first amendment should not afford as protection to pornography because of the degraded image of women it conveys, and the consequent sexism it encourages. *See, e.g.*, MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986).

12. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

13. *See, e.g., Griswold*, 381 U.S. 479; Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Moore v. East Cleveland, 431 U.S. 494 (1977) (right of related family members to share living quarters). *But see* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (substantive due process protection not available for illegal homosexual acts).

14. *See* Lochner v. New York, 198 U.S. 45 (1905).

15. *Griswold*, 381 U.S. at 497; *Roe*, 410 U.S. at 55.

into play.[16] Such an interest, it is important to note, is protectable even though it may not be recognized as "fundamental." (For instance, an athlete subjected to mandatory drug-testing might stand to lose an athletic scholarship as the result of a "positive" urine assay revealing probable marijuana use. The scholarship probably would constitute a recognized property interest, at least during its current term.[17] But it would not have the special dignity of the "rights" recognized in substantive due process cases.) In such cases, the severe strictures on state conduct enunciated in cases such as *Lochner v. New York*[18] and *Griswold v. Connecticut*[19] will not apply. Instead, courts will employ the interest-balancing standard enunciated in *Mathews v. Eldridge*:

> '[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Cafeteria Workers v. McElroy*, 365 U.S. 471 (1961). . . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[20]

Consideration of these factors will not obviate the requirement that the government provide certain procedural protections, irrespective of the private and public interests involved, and the cost of accommodating them. Thus, "some sort of hearing" is probably always required when the government deprives someone of a protected interest—although that hearing need not (and cannot) always take place before the deprivation occurs.[21] As a minimum, due process also requires that a person who stands to be disadvantaged by the state because of something that he or she has done be notified of the relevant charges, and given some opportunity to produce countervailing evidence.[22] When an adverse decision is made, the governmental decision maker will be required to demonstrate that the conclusion reached was based

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16. U.S. CONST. amend. V. "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."; U.S. CONST. amend. XIV. "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

17. *See infra* text accompanying note 87.

18. 198 U.S. 45.

19. 381 U.S. 479.

20. 424 U.S. 319, 334-35 (1976).

21. *Compare* Goss v. Lopez, 419 U.S. 565 (1975), *with* Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* Parratt v. Taylor, 451 U.S. 527 (1981). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §12 (1982).

22. *Goldberg*, 397 U.S. 254; *Goss*, 419 U.S. 565; *see also* K. DAVIS, *supra* note 21, at §13:2.

on—or at least was not contradicted by—the evidence it had before it.[23] Finally, the procedures employed[24] and the penalties assessed[25] will have to be consistent with the decision maker's legal mandate, which can be established by statute[26] or by regulation.[27]

These minimal due process prerequisites are expanded when the government's action is directly regulated by the procedural requirements set forth elsewhere in the Bill of Rights, or is indirectly regulated through the "incorporation" of those requirements by the fourteenth amendment's due process clause. In a criminal proceeding, for example, the accused need not testify against himself,[28] and is entitled to a "speedy and public trial by an impartial jury."[29] And, subject to a number of exceptions (some of which will be analyzed below), every unit of government (or every "state actor") will be required to obtain a warrant before engaging in any "search" or "seizure" of the people's "persons, houses, papers, and effects."[30]

The restrictions on the arbitrary exercise of state power evidenced by these examples convey an attitude about the nature of "good" government that is every bit as ethical—and every bit as political—as the attitudes that are reflected when a state chooses to intervene in a particular area of human conduct, or chooses to avoid involvement because of a respect for "liberty" or "privacy." Arguably, the policy choices that are reflected in such restrictions are fundamental. (For example, we could argue that the concept of a *limited* and *accountable* state is central to any liberal or democratic theory of government, and that no limitation or accountability is possible without procedural due process.[31] Thus, we could argue that, in any practical

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23. Manley v. Georgia, 279 U.S. 1, 6-7 (1929); *Goldberg*, 397 U.S. at 270, *citing* Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

24. United States v. Florida E. Coast R.R. Co., 410 U.S. 224, 241-46 (1973).

25. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).

26. *See* Stark v. Wickard, 321 U.S. 288, 303-04 (1944); *see also Greene*, 360 U.S. 474; Kent v. Dulles, 357 U.S. 116 (1958) (agencies held to specific terms of delegation).

27. Federal Power Comm'n v. Texaco Inc., 377 U.S. 23, 39-41 (1964).

28. U.S. CONST., amend. V. "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

29. U.S. CONST., amend. VI.

30. U.S. CONST., amend. IV.

31. *See, e.g.*, Adamson v. California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring). Procedural due process has the purpose of establishing the framework required for the "protection of ultimate decency in a civilized society." *Id.* at 61.

Under the "due process" model of government, the "consent" of the governed (which is the necessary pre-condition for a constitutional democracy) becomes, in the final analysis, consent to be governed according to a set of pre-determined electoral and procedural rules, which, because they are the product of a "social contract," cannot be challenged as being unfair when they promote one substantive result rather than another. For a relatively "liberal" version of this argument, which imposes certain distributional constraints on what we can logically infer might have been consented to, see J. RAWLS, A THEORY OF JUSTICE 86-87 (1971).

> In order . . . to apply the notion of pure procedural justice to distributive shares it is necessary to set up and to administer impartially a just system of institutions.

sense, the right of privacy in fact depends on a *prior* elaboration of rules governing how that right can be claimed and must be evaluated.) Nevertheless, to the extent that procedural guarantees are variable, and depend on "balancing" the interests of the individual against those of the state, the courts will not presume that rights are absolute—or even that they are so "heavy" that they can be outweighed only by some fundamental interest of the state—such as survival[32]—which would be directly threatened if the asserted right were to be protected. Thus, balancing—as *Mathews v. Eldridge* clearly shows—ordinarily involves a cost-benefit analysis, and values are protected only to the extent that they pass through a utilitarian filter.

That filter assumes considerable importance when evaluating the legality of drug-testing. Questions of privacy, for reasons that will be explained below, are frequently presented in explicit "due process" terms. Even when they are presented in substantive fourth amendment terms, "balancing" often occurs. As a consequence, every player in the drug-testing game is involved, not only in asserting the general priority of one set of values over another, but also in characterizing them either in particular, situational, and utilitarian terms, or in fundamental, unchangeable terms. Two examples will illustrate this point. An athlete kicked off a team because he tests positive for marijuana will probably argue that his privacy is absolute, at least where Mill's central "harm to others" condition is absent. His school, however, will argue that whatever "expectation of privacy" he has, it is only protectable if "reasonable," and probably will try to convince a court that it is "unreasonable" for any participant in a big-time college football program to expect any privacy whatsoever. Similarly, a fencer asked to sign a "consent" form permitting testing on pain of losing her scholarship might argue that the consent is illusory, and that the legality of the school's "request" should be determined by looking at the request's effect on the underlying privacy (or fourth amendment) value. Her university, however, can be expected to counter by arguing that consent is a procedural matter, entirely separate from privacy, and thus amenable to validation under a wide-ranging balancing test.

Similar mediation—and very similar "balancing"—is also likely to occur when an athlete challenges a drug-testing program on the grounds that it

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> Only against the background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the requisite just procedure exists.

Id.

For a considerably more conservative elaboration of the model, in which the only rules for obtaining consent are derived from the operations of a totally competitive market, see J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

32. *See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 80-95 (1980). Ackerman argues that the only justification that the liberal state has for excluding aliens is the maintenance of "liberal conversation," which can be directly threatened by excessive population.

applies *only* to athletes, or applies to athletes in a special way. Thus, a good argument can be made under liberal theory that a legal system must treat everyone within the law's jurisdiction with equal respect. Yet even within a Rawlsian analytical framework, "equal respect" does not translate into identical treatment on every matter for every person subject to the law.[33] Within other, more overtly "realistic" or positivistic frameworks—including those customarily used by judges who do ordinarily employ explicitly philosophical arguments to decide cases or to justify the decisions they reach—questions of "equality" are likely to invite even more open-ended and context-determined answers.

"Equal protection" challenges to drug-testing programs, perhaps even more than "due process" challenges, are thus likely to be passed through a utilitarian filter before being decided. In only a few instances will the imposition of special burdens on athletes by a state institution (or another "state actor") lead to a strong (and perhaps irrebuttable) presumption that the classifications elaborated in a testing program, or employed in its selective application, are inherently "suspect." Testing on the basis of the race—and perhaps the nationality[34]—of the athlete will require the testing body to demonstrate that some "pressing public necessity" justifies its program,[35] and will also require that the program actually adopted or implemented promote a "permissible and substantial" public objective, and in fact be "necessary" to the accomplishment of that objective.[36] Testing that specially burdens any "fundamental" right recognized by the courts will be subjected to similar "strict scrutiny," and will require the demonstration of a similarly "compelling" governmental interest.[37] (An imaginable instance of a testing program that impermissibly burdens such "fundamental rights" would be one that required only out-of-state residents to submit to testing. Less likely would be programs imposed only on married student-athletes, or athletes professing a particular religion.) Programs that distinguish between men and

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33. Thus, when "primary social goods" are at stake, and when those goods are "basic liberties," Rawls argues that they cannot ordinarily be exchanged by the state for "economic and social benefits." J. RAWLS, *supra* note 31, at 149-51. *See also* B. ACKERMAN, *supra* note 32, at 243-51, 541-48. The athlete will of course argue that drug-testing constitutes a denial of the "basic liberty" (or "fundamental right") of "privacy." The institution will argue the reverse, thus seeking to justify its utilitarian arguments for testing.

34. NCAA rules aimed at foreign athletes have been subjected to demanding scrutiny. *See* Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973) (NCAA enjoined from declaring Canadian student-athletes ineligible to play intercollegiate hockey, since eligibility rules with respect to financial aid discriminated against foreign athletes and violated equal protection clause); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (NCAA "foreign student" rule subjected to "strict scrutiny" under equal protection clause, and invalidated); *see also* Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975) (American student not a member of "suspect class").

35. Korematsu v. United States, 323 U.S. 214 (1944).

36. *In re* Griffiths, 413 U.S. 717, 721-22 (1973).

37. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

women, either with respect to the obligation to submit to testing, or with respect to the consequences that will be mandated by "positive" results, will be subjected to a less-exacting, but still stringent, standard of review. Programs classifying by gender will be required to demonstrate that such classification "serve[s] important governmental objectives and [is] substantially related to the achievement of those objectives."[38] They will also have to demonstrate that gender is not "an inaccurate proxy for other, more germane bases of classification."[39]

In the great majority of cases involving college drug-testing, however, the only grounds for distinguishing those to be tested from those to be left alone will either be that the former are athletes (or athletes in a particular sport) and the latter are not, or that the former are athletes who have tested "positive" before whereas the latter have been "clean" in earlier testing. Similarly, different consequences imposed on those testing "positive" ordinarily will depend—at least as testing programs are designed to operate—solely on the results of previous tests. Thus, no special scrutiny is likely to be exercised by reviewing courts hearing "equal protection" claims. Instead, the great variety of practical reasons proposed by institutions for testing their athletes will all be given weight, and will, as the discussion below indicates, sometimes be deferred to quite uncritically.

D. Law, Politics, and the Choice of Values

The preference for privacy over social order, or its reverse—or the sort of mediated and generally quite pragmatic preference that emerges when choice is filtered through legal categories—necessarily has political implications. Overt choices about public policy are made whenever the government, through its political branches or through the judicial system, takes notice of the drug-testing issue, and either promulgates or abrogates a drug-testing program conducted by the state or one of its agencies or instrumentalities, or approves (or fails to disapprove) the continuance of a "private" testing program. Covert choices are made when the government *considers*—even if it does not adopt—any substantive or procedural limitation on "private" or "public" programs. By definition, these policy choices are political in the strictest sense of the word since they involve both a recognition that different segments of the population (those favoring testing, those disapproving of it, those somewhere in the middle) have different (and sometimes conflicting) interests, and that a governmental decision (even if to refrain from acting) inevitably favors one interest over others.

Nevertheless, when society's executive, legislative, and administrative institutions consider drug-testing, or take steps to implement it, ethical mo-

38. Craig v. Boren, 429 U.S. 190, 197 (1976).
39. *Id.* at 198.

tivations—which can be "utilitarian" or prudential, rather than strictly "moral"—and their political consequences, while not absolutely transparent, are generally quite overt.[40] It is frequently asserted by liberals (and libertarians) that it is inappropriate for the government "to legislate morality." Yet if the morality is popular enough, advocating it publicly and making it part of a legislative agenda are hardly "bad politics." Such advocacy is likely to remain politically advantageous even if the goal that is presented in moral terms is impossible of achievement, has a variety of hidden social and economic costs, and may in the not-so-distant future run into serious legal difficulties.

Perhaps the best example of risk free propaganda was afforded in 1986 by the "Ron and Nancy Show," a nationally-televised speech in which the President and his wife expressed their hope for a "drug-free America" and their "program" for achieving that goal. Given the national preoccupation with drugs, it was not only possible to express support for wide ranging drug-testing and for some combination of rehabilitation and punishment for those exposed by that testing,[41] but was probably also politically expedient to do so. Today, violators of drug laws are among the most visible offenders of public morality in America, and are probably the most universally reviled.[42] As Niccolo Machiavelli stated nearly five hundred years ago:

> it greatly profits a Prince . . . to follow striking methods . . . whenever the remarkable actions of anyone in civil life, whether for good or evil afford him occasion; and to choose such ways of rewarding and punishing as cannot fail to be much spoken of. But above all, he should strive by his actions to inspire a sense of his greatness and goodness.[43]

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40. Justifications for drug-testing programs are frequently offered in the alternative: "we're concerned about student health" *and* "we don't want people who are violating the law competing;" "we want to equalize competition" *and* "this drug use is giving college athletics a bad name." To the extent that law-and-order or reputational concerns can be identified as paramount (a methodologically difficult proposition to prove), yet are represented as secondary to concerns about health-and-safety or "performance enhancement," the ethical—or utilitarian—motives for action are of course disguised.

41. *See Address to the Nation,* 22 WEEKLY COMP. PRES. DOC. 1183-87 (1986). The President's "national crusade" included six "initiatives" or goals: "a drug-free workplace;" "drug-free schools;" "public protection and available treatment . . . for substance abusers and the chemically dependent;" "international cooperation [in dealing with] drug trafficking;" "strengthen[ing] law enforcement activities;" and greater "public awareness and prevention." *Id.* at 1183-87.

Punitive provisions, at least for federal employees required to undergo mandatory drug-testing, were announced in a related executive order. *See* Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). *See generally id.* sec. 5 Personnel Actions, at 32,891-92.

42. Indicative of the amount of attention paid to the topics of "drug addiction and abuse" and "drug traffic" and the concern they had aroused are the 21 columns of annotated citations to stories on these subjects that appeared in one major newspaper, the *New York Times,* in 1985. *See* N.Y. TIMES INDEX 387-94 (1985).

For a critical account of the amount and type of reporting, see Henry, *Reporting the Drug Problem: Have Journalists Overdosed on Print and TV Coverage?* 128 TIME 73 (1986).

43. N. MACHIAVELLI, THE PRINCE 158 (H. Thompson trans. 1954).

The realms of legislative and administrative action are no less political; yet in both, political choices are more clearly constrained by the legal and institutional frameworks in which members of Congress and administrators work. Whether the issue is the passage of new legislation having the object of catching and penalizing drug smugglers and drug vendors, the adoption of new administrative measures designed to identify drug users, or the implementation of existing legislative and regulatory rules, those officially involved with "doing something about the drug problem," whatever their personal views, will always have two concerns. One will be with the attitudes of the constituency which elects legislators, and which is served, at least theoretically, by every justice department official, school board member, prosecutor, and policeman on the beat. Those attitudes, it has already been noted, reflect broad ethical objections to drug use. Yet legislators—and to a much greater extent, administrators—must also be concerned with the attitudes and potentially adverse rulings of the judiciary, which is formally vested with a broad power of judicial review, and serves as an institutional *superego* to the *id* of public opinion.

Thus, if the "Ron and Nancy Show" plays well in Peoria—not only because the President and his First Lady are a Charming Couple, but also because the people of Peoria are worried sick about cocaine in their schoolyards—we can safely predict that the Republicans and the Democrats in Congress will engage in a game of political poker, with the purpose of convincing the electorate that *they* (and not the members of the other party) are truly concerned about the issue. Yet as the stakes grow larger, with billion dollar appropriations for stricter enforcement piled on top of long prison sentences, and provisions for inflicting the death penalty on dealers piled on top of plans to use the military to catch civilian offenders, we can also predict that some congressional voices will begin murmuring about the Constitution and the limits it puts on legislative power. Similarly, when the public expresses its dismay about the incidence of drug abuse among athletes, detailed in media reports, it is predictable that the National Collegiate Athletic Association (NCAA) and several hundred colleges and universities will announce drug-testing programs to demonstrate that *their* athletes are "clean." Events such as the well-publicized death of Len Bias will strengthen that resolve, and add medical grounds to a case that is rooted in moral and public-relations concerns. But it is also predictable that institutions, when designing those programs, will realize that the programs can give rise to legal problems, and will make at least some attempt to avoid litigation. If the schools are also playing public opinion poker, they face the risk of heavy losses, yet they start with a very limited stake.[44] They are also less sure of

44. *E.g.*, The University of Georgia Jan Kemp case, N.Y. Times, Jan. 14, 1986, §3, at 1, col. 1, or the exposed situation of the administrators at the University of Maryland as a result

the relative value of their cards, and are more in need of advice about minimizing risk. Thus, the schools will attempt to discover what they can do safely by consulting legal counsel, and will feel significant—although not necessarily dispositive—pressure to follow the legal advice they receive.

However, when the issue of testing is taken up by lawyers who base their recommendations on what courts have done in the past and what they believe courts will do in the future, the ethical foundations of choice ordinarily are buried under a massive superstructure of statutes, Constitutional provisions, and authoritative cases, all tied together by the characteristic rhetoric of the law, which uses a selective logic and a selective approach to history to justify any present or predicted decision as a necessary consequence of the past. Assumptions about the relative value and scope of privacy *vis à vis* the State's interest in regulating the moral conduct of its citizens do not entirely disappear; but when these assumptions surface, they cannot always be identified easily, since they are frequently draped in the language of reported cases, assuming a protective coloration which makes it difficult to distinguish them from the backdrop of precedent.

Attorneys giving advice about what "the law" *is,* and about what colleges, universities and athletic associations can "probably get away with" are therefore important participants in the overall drug-testing game, since their advice is frequently solicited and can influence the play of others. Yet the rules that a counselor plays by—which are extensively illustrated below in a sample interpretation of the current state of drug-testing law as it applies to intercollegiate athletics—are quite different from those of the politician fettered only by public opinion, the congresswoman playing high-stakes poker with only a mild fear that her bluff might be called,[45] or even the more cautious college administrator. Unlike all of the other players in the game, the moves the lawyers are allowed to make are exclusively interpretative. Maintaining for the moment the poker analogy, the lawyer acting as counselor is required to evaluate the strength of the client's hand in a game where the face cards are blurred, and where there are questions about the relative ranking of hands which cannot be answered without recourse to arcane and sometimes contradictory texts written in a dialect which is only partly comprehensible to the client.[46]

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of the Len Bias episode, N.Y. Times, June 10, 1986, §1, at 1, col. 1; N.Y. Times, Nov. 10, 1986, §3, at 8, col. 3.

45. The choice of gender here is not only a response to the demands of a non-sexist language; it also reflects the fact that the principal sponsor and floor manager of the Senate drug-control legislation in the 99th Congress was Sen. Paula Hawkins, a Republican from Florida in the middle of a tough re-election campaign. Whatever the long-term effect on her reputation of the proposed bill, it seemed a good bet that her sponsorship would not hurt her with the electorate in the pending election.

However, it apparently did not provide enough help. Sen. Hawkins was not re-elected.

46. Here, a chess analogy might profitably be substituted for the poker analogy we have

Undoubtedly, the counselor in his choice of clients can reflect something of his own ethical, economic and political preferences—although it is clear that financial and career considerations will often lead attorneys to represent clients whose positions they do not personally favor. And given the inherent—*although not equal*—ambiguity of legal sources (including the central ambiguity of which sources actually "control" the issue at hand), there is no way of guaranteeing or demonstrating that the interpretation the counselor makes is not reflective of his or her own ethical or political biases. Thus, an ACLU attorney in California writing a memorandum on the extent of fourth amendment protections to tested athletes might unconsciously accord more weight to "liberal" decisions than would his counterpart representing a small state school in the rural South. Despite the possibility (and perhaps inevitability) of such bias, however, the counselor's task is confined, and his or her discretion limited, by a clear set of expectations which are probably general to all clients—including law review editors who are seeking a "good precis" of applicable law.[47] Those expectations include thoroughness in research, confinement of that research to "authoritative texts" (*viz.*, statutes and judicial or administrative opinions, with heavy emphasis put on the output of appellate courts), understanding of and adherence to a general method of drawing inferences from judicial opinions which is common to the profession (or at least to those members of the profession doing frequent counseling on controverted and difficult matters), conscious suppression of personal biases in the interest of "objectivity," and a willingness to "discuss both sides of the question" and present the "worst-case scenario." Expectations of this sort are integral to a lawyer's education, and are reinforced in subsequent practice by the concrete negative consequences of deviant behavior. The effect of these expectations is thus to impose a set of professional rules on a counselor which are antecedent to the legal rules which the counselor is expected to announce. These professional rules cannot insure complete disinterestedness, but they can insure that counselors will consciously distance themselves from their "personal" judgments about values and the appropriateness of governmental action. As a consequence, "coun-

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been using. Counselors are similar to the advisors who gather when a chess match is adjourned. They are not permitted to move the pieces, nor may they change the rules—although unlike real chess advisors, they cannot presume that their principals know the rules, and are obligated to explain them. But by analyzing the board, they can tell their principal what historical game (e.g., Karpov playing a Sicilian defense against Spassky in 1979) the present contest most resembles, what moves are likely to put the most pressure on the opponent, and what the outcome of the present contest is likely to be.

47. That desire, of course, is not the only thing that a law review editor might want. Nevertheless, despite the spread of "critical" approaches to the law—many of which are in no way connected to the Critical Legal Studies movement—descriptive accounts of what the law *is* remain understandably popular. There is, of course, an audience of practitioners which constitutes a significant portion of every review's clientele, and which wants a counselor's answers to its legal questions.

selor's rules" are likely to be narrowly drawn, and to present interpretations (and options) to clients with no apparent ethical or political content.

There are two apparent justifications for playing the drug-testing game by "counselor's rules." The first is entirely negative, and is explicable on "risk-avoidance" grounds. From the perspective of an educational institution or association which is considering imposing a drug-testing program, or is considering employing an existing one to deprive an athlete of some right, privilege, or opportunity (a place on the football team, for instance, or an athletic scholarship), "objective" legal answers to questions about the possible constitutional or statutory rights of athletes are useful. Such answers tell the testing institution how a judge—the ultimate arbiter in the imaginary game of cards I am describing—is likely to value the institution's hand. They say nothing about the utility, much less the necessity, of the testing program. Nor do they say anything about its moral wisdom. Instead, they give a reasonably reliable estimate of the economic or reputational costs of adopting or implementing it. The second justification is related to the first, but reflects a different conception of the counselor's social role. Thus a technical exegesis explaining *why it is legal to test* (or, as appears sometimes to be the case, *why it is illegal*) may be interpreted by the client as a *more-than-legal* affirmation (or disapproval) of her proposed action. More precisely, it may be interpreted as lending not only "legality" to a proposed course of conduct, but also "legitimacy." (Or conversely, it may suggest that such conduct is not only "illegal," but also "illegitimate.") Such confusion of description with evaluation can be decried as "unsophisticated;" yet it is not patently unreasonable, given the normative dimension of the law, which clearly has as one of its principal functions the elucidation of behavior that society, through its formal institutions, chooses either to permit or to limit—in both cases, with at least some appeal being made to the "common good" which the laws are said to promote.

Legal involvement in the drug-testing game frequently does not go beyond the recommendations of institutional counsel. College athletes are not apparently predisposed to levy legal challenges against drug-testing programs,[48] and such challenges, even if filed in court, do not necessarily lead to litigation.

Nevertheless, the existence of such programs—particularly when used to penalize athletes who have been found by testing to have used prohibited substances—is certain to prompt some of those at risk to seek their own legal counsel. In the initial stages of representation, that attorney is in all likelihood going to fulfill a role almost identical to that of the institution's counselor. Again, the counsel will identify the salient features of "the law,"

48. The first suit filed by an American college athlete objecting to mandatory testing was prepared by the ACLU, which had to wait nearly two years before it was able to find an athlete plaintiff willing to challenge the University of Colorado's program. Chron. Higher Educ., Oct. 29, 1986, at 37, col. 2; *see also* Chron. Higher Educ., Oct. 8, 1986, at 45.

and measure the specifics of the athlete's situation against them to determine if an arguably "winnable" case exists. If there appears to be a sufficient probability of success, the athlete may authorize counsel to initiate litigation.

Litigators, of course, can and do represent all parties, including institutions intent on imposing or implementing drug-testing programs. However, I will focus only on litigators defending athletes, since I believe that they play a distinctive role in the ongoing contest about ethical choice (and state power) that constitutes the "drug-testing game." That role, in both the pragmatic and the ideological sense, is dialectical. The institution, armed with a particular version of what the law will permit, takes specific action, requiring an athlete, for example, to submit a monitored urine sample for analysis, on pain of loss of athletic scholarship. The athlete's attorney attacks that action on procedural and substantive grounds. To support that attack, she introduces another, more limited version of what the law will permit. On both levels, she ordinarily will make provisional concessions: "*even if* the law *might,* under some circumstances, permit drug-testing, those circumstances are not present here." Yet those concessions serve as prologue to her own construction of the law: "before the University can establish a valid testing program, it must secure approval from a faculty oversight committee. This step was not taken; because the testing institution is a state university, it is required to provide all students with due process of law. Threatening to revoke a scholarship unless consent is given constitutes a denial of due process;" or perhaps, "taking a urine sample without genuinely voluntary and informed consent violates an athlete's right to privacy protected by the fourth and fourteenth amendments." Statements such as these are supported by references to favorable precedent and other authoritative sources whenever possible. Yet when existing law appears unfavorable, when it appears ambiguous, or even when it appears to be favorable but open to plausible attack, the litigator is forced to supplement her rhetoric with overt appeals to principle. Assertions about what the law *should be,* in other words, either contradict or reinforce what various interpretative traditions teach that the law *is.* Looking at the same cards that are laid out in front of the university's counsel, the litigator for the athlete well may be confronted with a reasonably strong hand. She will then be forced to tell the court—either in her brief or in her oral argument—why the given law (at least in some of its particulars) is defective. Relying on "liberal" perspectives about privacy (and about "due process," which is paired with privacy in every drug-testing case), and relying on non-legal sources (such as the arguments of John Stuart Mill), she will demand that courts go beyond precedent to justify the sort of intrusion that drug-testing actually entails.

Judges, then, are the last group of participants in the "drug-testing game." They are not empowered directly to make the last moves in the game, since whatever rules they establish will either be followed or ignored, and whatever sanctions they impose will be mediated by the enforcement agencies of

government. Yet institutionally, they are given the last word. Their say determines the value of the particular hands that the institution and the athlete each hold. In making that determination, they are bound at one level by what legislatures—or agencies with delegated legislative powers—have decided. Thus, under certain circumstances, a statute may permit certain tests or forbid such tests, or place limits on the distribution of the test results. Even here, however, judges have considerable—and generally non-reviewable[49]—leeway to decide if the circumstances that bring a legislative rule[50] into play in fact exist. Yet issues of privacy and due process also exist at a second, constitutional level where the judiciary, under established doctrines of judical review, is subject to no legislative oversight, and has nearly total freedom to interpret—and even negate—legislative and administrative rules.[51]

Virtually all litigation on drug-testing probably will call upon the courts to exercise statutory (or administrative) review. Whether the testing institution is a "private" or a "public" institution, athletes will search for some legislative or regulatory ground to challenge the program it decides to adopt, or to challenge the manner of its implementation. In describing how the drug-testing game is actually played out, I will pay some attention to statutes, such as the Buckley Amendment to the Education Act of 1972, and to internal regulations, such as those adopted by the District of Columbia Public Schools, which can and do impose some limitations on testing programs.

Yet the limitations imposed on colleges and universities—or on the NCAA—by statute or regulation are likely to be relatively slight. However, for those

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49. Of course, the judgment of an inferior court can be reversed by the subsequent action of an appellate panel. In this sense, only the highest appellate court having jurisdiction over the subject matter of the dispute is institutionally immune from further review. Even when such institutional immunity exists, subsequent legislative action *may* have the effect of overruling the judicial decision. *But see* Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (despite federal legislation modifying antitrust laws in response to earlier Supreme Court decision, Court manages to reach same result in subsequent case).

50. Rules governing the testing of athletes are frequently going to be promulgated by administrative bodies with rule-making authority, rather than by legislatures acting directly. The judicial role in interpreting the meaning and reach of such administrative rules is roughly equivalent to its role in determining the meaning and reach of legislation, although courts frequently accord special deference to the prior interpretations of the administrative body, which is generally credited with having a special "expertise" developed, in large part, by its interpretative experience in the area covered by the rules. *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); SEC v. Chenery Corp., 318 U.S. 80 (1943). *See generally* K. DAVIS, *supra* note 21, at §5.03, 298-306.

51. According to Alexander Hamilton, "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961). Such assertions of independence (as Hamilton recognized) are, of course, subject to political pressures, as President Franklin D. Roosevelt's "court packing" plan in 1937, the "impeach Justice Douglas" movement in the 1960's and 1970's, and the successful electoral attempt in 1986 to remove three justices of the California Supreme Court, including Chief Justice Rose Bird, all illustrate.

parties whose activities are regulated directly by its provisions, the federal Constitution, with its specific guarantees of "due process of law" and freedom from "unreasonable searches and seizures," and its implicit recognition of a "right to privacy," is much more likely to pose significant barriers to indiscriminate testing—and perhaps, to any testing at all. Thus, constitutional issues—including the threshhold question of whether certain testing (or test mandating) institutions, such as the NCAA, are amenable at all to constitutional constraint—will be dealt with more extensively.

I. Two Plans/Two Hands

Exercising an author's prerogative, I will not make the choice between describing a drug-testing plan which clearly involves "State action" or one which clearly involves only "private" institutional conduct. Nor will I choose between a program ostensibly concerned with health, safety, or competitive equality and another committed to barring athletes who use "street drugs" from competition. Instead, in order to develop the legal analysis more fully and to make distinctions useful to those approaching a variety of possible drug-testing programs, I will outline two rather different drug-testing plans here, and tie my later analysis to the pertinent features of each. That analysis will follow through with the game metaphor by evaluating *each* as a poker hand of varying strength.

The first plan I will describe is the one adopted by the National Collegiate Athletic Association (NCAA). The second is the one adopted by Indiana University. With minor variations (some of which will be considered in the text), these plans reasonably can be said to represent virtually every drug-testing plan being considered or being implemented at the college level today.

A. The NCAA Plan

At its annual meeting in January 1986, the NCAA, a "private voluntary association" of some 900 colleges and universities which regulates men's and women's intercollegiate athletics at those schools, conducts championships in all the sports it regulates, and sanctions some two dozen post-season football "bowl games," adopted a number of amendments to its Constitution, Bylaws, and Executive Regulations that had the effect of instituting a limited drug-testing program. Under the new NCAA program,

> [t]he student-athlete shall annually, prior to participation in intercollegiate competition during the academic year in question, sign a statement in a form prescribed by the NCAA Council in which the student-athlete . . . *consents to be tested for the use of drugs prohibited by NCAA legislation.* Failure to complete and sign the statement annually shall result in the

> student-athlete's ineligibility for participation in all intercollegiate competition.[52]

The Executive Committee of the NCAA, pursuant to the organization's amended bylaws[53] has authorized the testing of student-athletes "who compete in NCAA Championships and certified post-season football contests."[54] Eighty substances, and additional "related compounds," falling into seven broad categories, are listed as "banned drugs." The categories of banned drugs include: "psychomotor stimulants" (such as cocaine and amphetamines); "sympathomimetic amines" (such as ephedrine); "miscellaneous central nervous system stimulants" (such as caffeine); "anabolic steroids" (such as testosterone); "diuretics" (such as metolazone); "street drugs" (such as heroin and marijuana); and "substances banned for particular sports" (such as timolol, which reduces muscle tremors, and therefore might give an athlete competing in riflery a competitive edge).[55]

Athletes who test positive for any banned drug "in preparation for or participation in an NCAA championship or certified postseason football contest" ordinarily are subject to specific penalties:

> [Such a] student-athlete . . . shall not be eligible for postseason competition . . . . A student-athlete who tests "positive" in accordance with the testing methods authorized by the Executive Committee shall remain ineligible for postseason competition for a minimum of 90 days after the test date. If the student-athlete tests "positive" after being restored to eligibility, he or she shall be charged with the loss of one season of postseason eligibility in all sports and shall remain ineligible for postseason competition at least through the succeeding academic year.[56]

A first "positive" finding for marijuana, however, generates a warning, with more stringent sanctions imposed if subsequent testing reveals additional use.[57]

The NCAA's testing methods are modeled on those employed by the United States Olympic Committee. Testing teams consisting of university-associated physicians and trainers are dispatched to college campuses and to competition sites to collect urine samples from selected athletes.[58] A

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52. NCAA CONST. art. III, § 9(i), *quoted in* NCAA, *The NCAA Drug-Testing Program: 1986-87* 2 [hereinafter NCAA PAMPHLET] (pamphlet printed and distributed by the NCAA to its member institutions).

53. NCAA Bylaw 5-2-(c), *quoted in* NCAA PAMPHLET, *supra* note 52, at 2-3.

54. NCAA Exec. Reg. 1, §7(a), *quoted in* NCAA PAMPHLET, *supra* note 52, at 2.

55. NCAA Exec. Reg. 1, §7(b), *quoted in* NCAA PAMPHLET, *supra* note 52, at 3, 9-10.

56. NCAA Bylaw 5-2-(a),(b), *quoted in* NCAA PAMPHLET, *supra* note 52, at 2-3.

57. Telephone conversation with Frank Uryasz, Assistant Director of Research and Sports Sciences, NCAA, (Dec. 17, 1986); *see also* NCAA Exec. Reg. 1, §7(b), n.3 (list of "banned drugs" includes "marijuana—based on a repeat testing"), *quoted in* NCAA PAMPHLET, *supra* note 52, at 9.

58. *See* NCAA News, Dec. 23, 1986, at 1, col. 4; *id.* at 4, col. 3; Chron. Higher Educ., Oct. 1, 1986, at 39-40.

specified number of athletes with the most playing time in team sports are tested automatically, as are a specified number of additional players who are randomly selected. A specified number of randomly selected competitors are also tested in individual championships. The samples that are collected are divided into two sub-samples, each of which is labeled with an identification number. To establish chain-of-custody for any subsequent administrative or legal action, care is taken at every stage of processing to keep the identification number with the sub-samples, and to record their disposition. The first sub-sample is subjected to an assay. If it tests "positive" for a "banned drug," the second sub-sample for the athlete in question is subjected to gas chromatography or mass spectrometry, which are more expensive but considerably more accurate procedures. If the second procedure "confirms" the "positive" registered by the assay, the athlete's institution is notified that the athlete is in violation of NCAA rules and is subject to the "ineligibility" sanctions mandated by the drug-testing plan.

The college or university notified that a student-athlete is ineligible because of a "positive" test result may appeal to the NCAA Eligibility Committee. The Eligibility Committee has authority—but is not required—to restore eligibility "if the institution concludes that circumstances warrant restoration."[59] In the event that eligibility is not restored by the NCAA and the athlete's institution refuses to remove the athlete from the squad or takes other action inconsistent with the finding of ineligibility, the *institution*—but not, it is important to note, the athlete—becomes directly accountable to the NCAA for its actions, and faces the prospect of being sanctioned by the NCAA under pre-existing policies and regulations governing other rules infractions. Those policies and regulations, and the limited opportunity they provide for a hearing, the presentation of evidence, and administrative review, will be addressed below in discussions of the "State action" and "due process" issues raised by drug-testing.[60]

B. The Indiana University Plan

Complying with the mandate of the NCAA, and also responding to local pressures that the Athletic Department run a "clean" program, Indiana University adopted a mandatory drug-testing program at the beginning of the 1985-1986 academic year. In so doing, IU committed itself to a course

59. NCAA Bylaw 5-2-(b), *quoted in* NCAA PAMPHLET, *supra* note 52, at 3.

60. The NCAA Program also contains language subjecting the staff of "member institutions" to "disciplinary or corrective action" if they "have knowledge of the use . . . by a student-athlete of a substance on the list of banned drugs" and "fail to follow institutional procedures dealing with drug abuse." NCAA CONST. art. III, § 6(b), *quoted in* NCAA PAMPHLET, *supra* note 52, at 2. Although this provision also raises "State action" and "due process" questions, they are beyond the scope of this Article.

of action that has been adopted by over one hundred colleges and universities over the last three or four years.[61] Although the program was phased in, and initially applied only to athletes engaged in intercollegiate football, by its explicit terms it covers all student-athletes engaged in any intercollegiate sport. Like most such programs, it announces the University's "purpose" for testing, lists a variety of substances that will be tested for, prescribes a testing method, makes some provision for maintaining a "chain of custody" for specimen samples, makes some provision for insuring the confidentiality of those tested, discusses the frequency of proposed testing, establishes a series of graduated "disciplinary actions" that will result upon confirmation of a "first," "second," or "third positive," links discipline to "counselling," and makes provision for securing the "consent" of the student-athletes who are covered by the program. Except as noted below, all of the provisions of the Indiana University plan are quite typical of the provisions to be found in other collegiate programs.

1. Purpose

In a short prologue, the IU plan recites the belief of the athletic department

> that the use of drugs (excluding those drugs prescribed by a physician . . .) can be detrimental to the physical and mental well-being of its student athletes; can seriously interfere with the performance of individuals as students and as athletes; and can be extremely dangerous to the student-athlete and his/her teammates participating in athletic competition and practice.

These concerns give rise to seven stated "purposes" or "specific goals":

> A. To generally *educate* Indiana University *student-athletes* concerning the *problems of drug abuse*;
>
> B. To *educate* any *student-athlete* identified with a problem regarding the use of drugs as it may *affect the athlete* and his/her *team and teammates*;
>
> C. To provide a common mechanism for the *detection, sanction* and *treatment* of specific cases of drug abuse;
>
> D. To provide reasonable safeguards to *insure* that *every student-athlete* is *medically fit* to participate in athletic competition;
>
> E. To *prevent any drug use* by Indiana University student athletes;

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61. No reliable estimate has been made of the number of colleges at all levels of competition which have introduced drug-testing programs since 1985, when the issue became a matter of broad concern among college administrators. According to one estimate, as of October 1986, "about 130 major-college athletic departments now conduct tests." Chron. Higher Educ., Oct. 8, 1986, at 45, col. 2.

F. To *identify* any *student-athlete* who may be *using drugs* and to *identify the drug*, and

G. To *encourage* the *prompt treatment* of *drug dependency*.[62]

These purposes can be summarized as detection of drug use, prevention of such use through sanctions, treatment, and counseling, and education of users *and* non-users about the adverse personal and social effects of drugs (including their adverse effects on athletic teams). A stated reason for detection and prevention is concern about the "medical fitness" of student athletes. Nothing is said explicitly about the relationship between the testing program and concerns about illegal conduct, violations of customary social (i.e., "moral") norms, or the various adverse effects that publicity about student-athlete drug use could have on the University's athletic program. Nor is any reference made to the NCAA requirement that its member institutions participate with the NCAA in the testing of athletes preparatory to "NCAA championship[s] or certified postseason football contest[s],"[63] or that its staff members are subject to NCAA disciplinary action if they know of student-athlete use of banned substances and "fail to follow institutional procedures" for dealing with it.[64]

2. Prohibited Substances

The Indiana University list of prohibited substances is more generic than its NCAA equivalent (which lists many more specific substances within its several broad categories). The Indiana University list is also not as comprehensive, but does include one item—alcohol—which is not on the NCAA list, and is not generally tested for at other institutions. It is important to note that the list of prohibited substances varies from program to program; nevertheless, the IU list can be taken as reasonably representative. It provides for testing for the following substances: "Amphetamines, Barbiturates, Methaqualone (quaalude), Phencyclidine (PCP), Marijuana/THC, Cocaine, Benzediazepam (Librium), Anabolic Steroids, [and] Alcohol."[65]

3. Testing Method and Frequency; Chain of Custody

The Indiana University program provides for the collection of urine samples "under the supervision of a laboratory technician." "Student-athletes

62. INDIANA UNIV. DEP'T OF INTERCOLLEGIATE ATHLETICS, INDIANA UNIV. DEP'T OF INTERCOLLEGIATE ATHLETICS DRUG SCREENING PROGRAM AND POLICIES 1 (emphasis added) [hereinafter IU PROGRAM].

63. NCAA Bylaw 5-2-(a), *quoted in* NCAA PAMPHLET, *supra* note 52, at 2.

64. NCAA CONST. art. III, §6(b), *quoted in* NCAA PAMPHLET, *supra* note 52, at 2.

65. IU PROGRAM, *supra* note 62, at 2.

will be tested at the beginning of the school year, at the annual physical. Thereafter, tests will be administered on a random basis, and may, or may not be announced in advance."[66] Athletes who test "positive" will be subject to additional mandatory testing: "[they] will be required to . . . re-test until clear."[67]

After the sample has been taken, the IU plan stipulates that "[a]ppropriate precautions will be taken to assure and maintain the accuracy . . . of the test results including the maintenance of a documented chain of specimen custody to insure the proper identification and integrity of the sample throughout the collection and testing process."[68] After collection, the sample will be submitted to a laboratory to be analyzed "using the EMIT Drug Test or such other test as the University may deem appropriate, for the presence of screened drugs." No specific procedure for confirming a "positive" result is spelled out, although the portions of the Indiana University plan detailing how the University will respond to "positives" implies that *some method* of confirmation will be employed.[69]

This testing regime is quite typical of those announced or used by other institutions.[70] Its combination of scheduled initial tests, random follow-ups for the general student-athlete population, and targeted follow-ups for those who test "positive" is used by most colleges and universities. Some, however, provide only for *scheduled* testing,[71] and others limit the number of random tests an athlete might be subject to.[72] Many institutions spell out their "chain of custody" procedures in more detail. Initial reliance on the EMIT test is common, but some academic institutions, conforming their practices to those that are common in public employment settings, also specifically require that a "positive" obtained from the EMIT test be confirmed by subjecting another portion of the sample to testing by another method.

4. Disclosure and Confidentiality

All drug-testing programs are premised on the notion that *some use* will be made of the information obtained by those requiring the testing. Only

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66. *Id.*
67. *Id.* at 3.
68. *Id.* at 2.
69. Thus, language exists speaking of disciplinary measures "[i]f a positive result is confirmed." *Id.* at 3.
70. Under the Indiana program, additional testing, not governed by any existing written guidelines, is also done to determine if athletic administrators or coaches have been using prohibited substances. Since this additional testing is atypical, and does not implicate the same legal issues as the testing of student-athletes, it will not be analyzed in this Article.
71. *E.g.*, UNIVERSITY OF IOWA DEPARTMENTS OF INTERCOLLEGIATE ATHLETICS DRUG EDUCATION AND TESTING PROGRAM 2 (May 13, 1986) (only testing will be that imposed on athletes "who will (or appear likely to) compete in NCAA championships or post-season competition;" testing will be done "prior to" such competition).
72. *E.g.*, KANSAS STATE UNIVERSITY EDUCATION AND SCREENING PROGRAM FOR SUBSTANCE ABUSE 2 (annual maximum of four randomly scheduled tests).

"positive" results, however, are of major interest. Thus, an athletic department may "feel good" if urinalysis fails to reveal that any student-athletes are using prohibited substances, and may also want to use that information for public relations or recruiting purposes. Arguably, such information will also be of benefit in "educating" athletes about drug abuse—or, at least, about the potential effectiveness of drug abuse prevention programs. But the preventive goals of drug testing (as well as any punitive goals that are implied by "sanctions") can only be achieved if, through testing, university officials discover that students have been "using," discover something about what has been used, and take specific actions to change the users' behavior. Further—and this point, for reasons that will become immediately apparent, is not made explicitly in the IU plan or in any other plan I have seen—spreading the news that a particular athlete has tested "positive" and has been disciplined for drug use is, intuitively at least, likely to be the most effective way of influencing the behavior of other athletes.

The problem for the institution, however, is that quite apart from any "privacy rights" that a student-athlete might be able to legally invoke to avoid being tested at all, there are other "confidentiality" rights, created by statute or case law, that place definite restrictions on how much information the institution can release about its students, and that also place restrictions on the type of information that can be released, the circumstances under which such information can be released, and the parties to whom such information can be given. These limitations will be discussed more fully below. It can be stated here that the IU program reveals an awareness of lurking confidentiality problems, and attempts to deal with them in two ways: (1) by restricting information about test results; and (2) by seeking to obtain formal, written consent for certain disclosures.

The IU written policy with respect to the dissemination of test results is more cursory than that employed by many other institutions, but appears to be consistent with the general policy of the testing schools. It provides that the student-athlete be informed of "initial" and "confirmed" "positives," and that the athlete's parents, or legal guardians, or spouse be informed after a second or subsequent "positive," which is the point when sanctions will be imposed. The Administrator of the testing program will be informed immediately of test results; after any confirmed "positive," the head coach, the athletic director, and the team physician will also be informed.[73]

5. Consent

As is probably the case in every collegiate drug-testing program, the IU plan outlines specific procedures for documenting the student-athlete's "con-

73. IU PROGRAM, *supra* note 62, at 2-3.

sent" to two practices which, in the absence of an explicit waiver of rights, might be construed by the courts as illegal. Thus, IU asks its student-athletes and their parents or legal guardians—"requires" might be the better word—to sign a pre-printed form permitting the disclosure of test results to those persons specified by the testing plan, and also absolving from "legal responsibility or liability" the "Trustees of Indiana University, its officers, employees and agents" for any "release of . . . information and records as authorized by [that] form."[74] If such "consent" is valid—an issue that will be addressed below—potential "confidentiality" problems posed by privacy statutes (and perhaps by arguably related tort principles) probably will be overcome.

Similar written "consent" is also elicited for the testing which the student-athletes will be asked to undergo, and for the various steps the University will take if "positive" results are obtained. Thus, the IU Department of Intercollegiate Athletics gives its student-athletes a copy of its "Drug Screening Program and Policies" memorandum and requires them to sign an attached sheet that reads: "I have carefully read the foregoing policy and know the contents thereof, and I understand that by my signature, I agree to abide by the policy . . . ."[75] The University also requires them to sign (with their parents or legal guardians) an additional form prior to the academic year when they expect to participate in intercollegiate sports that states:

> For the academic year, [date], I hereby consent to have a sample of my urine collected and tested during my annual physical examination and at such other times as necessary or required, for the presence of certain drugs or substances in accordance with the provisions of the Indiana University Department of Intercollegiate Athletics Drug Screening Program.

The evident purpose of these required signatures is to defuse any legal challenge to the testing program itself by providing evidence that student participation is "voluntary." The question of voluntariness will be dealt with below in sections of the Article addressing the constitutional issues of fourth amendment expectations of privacy, and fourteenth amendment guarantees of "procedural due process."

6. Education and Counseling

Unlike some drug-testing programs, the IU plan, as announced, makes no specific provision for the education about drug abuse that is enunciated as one of the primary purposes of the program. Nevertheless, the Department

74. *Id.* (Consent Form Appendix).
75. *Id.* at 4.

of Intercollegiate Athletics, through its Student Athlete Assistance Program, has established a mandatory lecture program for athletes that covers a variety of medical, psychological, and nutritional topics, and which also brings speakers to campus to discuss various issues associated with drug use.[76] Individual coaches have also brought their own speakers in to discuss drug issues with the athletes on their squads.[77]

The IU program's stated goal of encouraging "prompt treatment of drug dependency" is amplified by a description of the procedures that will be followed when an athlete tests "positive." Different versions of the IU program employed by different coaches give an athlete evidencing drug use a differing number of chances to remain on the athletic squad—a practice that will be discussed more thoroughly below. However, for those athletes who are given a second or a third chance, a condition for remaining on the squad is attendance at "mandatory drug counselling sessions."[78] The IU plan states that these sessions will be provided through "the Student Athlete Assistance Program."[79] In fact, student-athletes who have been required to undergo counseling to date have been referred to the University's Office of Counseling and Psychological Services (CAPS), and have been referred through CAPS to other off-campus counseling services as the individual case demands.[80]

7. Sanctions; Disciplinary Procedures

As is the case in virtually all drug-testing programs, the IU plan in both of its versions specifies penalties which are designed to discourage drug use. The first version of the plan, which is formally applicable to all sports except intercollegiate football, states:

> All student athletes whose positive test result is confirmed will be subject to, but not limited to, the following disciplinary actions. These actions are required throughout the Athletic Department and are not intended to replace or affect the normal disciplinary measures of head coaches in their respective sports.
>
> A. FIRST POSITIVE. . . . The student-athlete will be required to attend mandatory drug counselling sessions . . . and re-test until clear . . . . Refusal to participate in the counseling program . . . will be treated and handled as a second positive.

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76. Interview with John Schroeder, (Dec. 12, 1986); interview with Elizabeth ("Buzz") Kurpius, (Dec. 15, 1986) (all freshmen athletes have session with Judge John Baker on legal aspects of drug use in Indiana; other sessions devoted to medical aspects of drug testing).

77. *Id.* (football program brought Carl Eller, a former NFL player with a well-publicized drug problem to speak to squad).

78. IU PROGRAM, *supra* note 62, at 3.

79. *Id.*

80. Interview with Elizabeth ("Buzz") Kurpius, (Dec. 15, 1986).

> B. SECOND POSITIVE. . . . [In addition to the disclosures mandated by the plan,] the student-athlete will be required to participate in continued and further counseling . . . and will be suspended from play until [the] counseling program is completed and [the athlete's] system is clear. REFUSAL TO PARTICIPATE IN THE COUNSELING PROGRAM, AS SET FORTH IN THIS PARAGRAPH [,] WILL BE TREATED AND HANDLED AS A THIRD POSITIVE.
>
> C. THIRD POSITIVE. . . . [In addition to the disclosures mandated by the plan, and after a hearing,] [t]he athletic director or his designee may apply whatever sanctions are deemed appropriate including suspension from participation in athletics for one calendar year and may recommend the revocation and nonrenewal of financial aid in accordance with the provision of the Big Ten Conference Rules and Regulations. Reinstatement of the student-athlete to participation may be made only after the student-athlete provides satisfactory proof of the successful completion of a certified drug rehabilitation program and proof that his/her system is tested clear of drugs.[81]

An alternative version of the plan, which has been adopted by the football squad, subjects an athlete who demonstrates a second "positive" to the same sanctions under the same conditions that an athlete who registers a third "positive" in another sport would receive.[82]

The only procedures specified in the plan that take "due process" into account (other than those governing the dissemination of test results to various university officials and relatives of the athlete) are those available to the athlete after a third "positive" under the general version of the plan, or after a second "positive" under the alternative football version. In both instances, "the student-athlete will be provided an opportunity to fully discuss the matter with the athletic director or his designee, and present evidence of any mitigating circumstances which he/she feels appropriate."[83] Under the general version of the plan, no provision for a hearing or the offer of mitigating evidence is made after a second "positive," although a confirmed second "positive" will lead to temporary—but perhaps fairly long-term—"suspension from play." This lacuna in the IU program appears to be somewhat unusual. When hearings are available, many institutions also provide a more formal and more extensive hearing procedure, which often includes a right to appeal an initial adverse athletic department decision to another university body.[84]

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81. IU PROGRAM, *supra* note 62, at 3.

82. *Id.* (alternative football version). It should be noted that the coach of at least one team is apparently willing to suspend *first* offenders from his squad, although no version of the stated policy provides for that result.

83. *Id.*

84. *See, e.g.*, TEMPLE UNIVERSITY, POLICY AND PROGRAM FOR DRUG EDUCATION AND THE PREVENTION OF DRUG ABUSE, INCLUDING THE TESTING AND REHABILITATION OF STUDENT-ATH-

The IU plan also makes no specific provision in either version of the plan for challenging the accuracy of test results, their relevancy to the University, or the underlying authority that the University implicitly claims to conduct mandatory, random testing. These omissions appear to be common to most drug-testing programs.

II. COUNSELOR'S RULES

A. The Maze

In describing the drug-testing game as a species of legal and political poker with indistinct cards and ambiguous and incomplete rules, I have attempted to highlight the central role that the lawyer, as interpreter, plays. To get a better sense of that role, it is necessary to flesh out the poker analogy a bit. Drug-testing poker characteristically comes in two versions. The basic version is "showdown," and involves only two parties: the athlete and the testing institution. In this version—and here the analogy with real-world poker breaks down a little—the "winner" can ordinarily be determined through the close examination of only one hand: that held by the institution.[85] Thus, the fundamental question is not whether the institution's program is the best one possible, but whether it passes minimal legal muster. From the counselor's perspective, determining whether it does is accomplished by uncovering all of the overt and hidden legal issues raised by the institution's program, mapping those issues so that their hierarchical relationship is clear, discovering the relevant legal standards that govern each issue, and applying those standards to determine whether the program, in any of its particulars, poses an unacceptable legal risk. Ordinarily only if the program appears deficient in some way will the counselor look to the strengths or weaknesses of the athlete's hand.

The other version of the drug-testing game resembles stud poker (all or most cards face-up on the table), and involves at least three players: the

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LETES 4 (July, 1985):

> Pre-Sanction Appeal Procedure. 1. A pre-sanction appeal procedure will be available to any student athlete found to have a prohibited substance in his or her urine sample; 2. An appeal will be heard by a five-member Appeal Panel, consisting of the Chair of the University Disciplinary Committee (UDC), the faculty representative to the National Collegiate Athletic Association . . ., the two student members of the athletic council, and a physician appointed by the President; 3. The Chair of the Appeal Panel will be appointed by the President.

85. Blackjack perhaps provides a better analogy. A player betting against the dealer receives all of his cards first. He wins outright if his hand totals exactly 21 points, or the first five cards he receives do not exceed 21 points. He loses if his hand exceeds 21 points. Only when he chooses to "stand pat" with fewer than five cards and fewer than 21 points does it become necessary to compute the value of the dealer's hand and compare it to that of the player he is betting against.

institution, the athlete, and one or more athletic associations or athletic conferences (or both) pressuring the institution to test athletes or to subject them to test-related sanctions. In this version, the counselor is under immediate pressure to estimate the strength of all the hands in the game, even though there are a few cards he may not be able to see and can only estimate the value of. The process of estimation is more complicated because it forces the institution to analyze the situation explicitly fom several points of view, and because the situation being analyzed requires the consideration of factors not found in the ordinary drug-testing situation, such as the legal standards governing the conduct of "private" voluntary associations, and the nature and legal force of the "contract" governing the relationship between the institution and such associations. Yet the analytical method employed by the counselor is identical to that employed in the less complex situation.

B. Constitutional Issues

1. State Action

Only the federal government, individual states, the various "arms" of state government, and subordinate political units (including counties, cities, and local school boards) are required by the federal Constitution to provide "equal protection" and "due process of law."[86] (State constitutions all contain provisions that are either identical to, or essentially equivalent to, the federal "due process" and "equal protection" clauses. Some have been construed by state courts to reach private conduct that is immune from constitutional scrutiny under the federal "state action" doctrine.[87]) Under federal law, certain ostensibly "private bodies" that are deemed by the courts to be "state actors" are held to the same constitutional obligations, but others that are not deemed to be agents of a state, or to be involved in a "symbiotic relationship" with a state, or to be performing some essentially "governmental" function are not. Indiana University, like most publicly supported educational institutions, is clearly an official "arm" of state government. As such, it must conform its dealings with athletes to the requirements of the federal Constitution. However, the NCAA, like other "private" athletic associations that regulate intercollegiate and interscholastic athletic competition, stands on a very different footing from Indiana University. The NCAA receives all of its funding from the contributions of its

86. "[T]he Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to the acts of the states and not to acts of private persons or entities." Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982) (*citing* Civil Rights Cases, 109 U.S. 3, 11 (1883), *and* Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

87. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

membership and the sponsorship of various championship events, and makes no *direct* financial demands on any state or on the federal government. Its constitution, its by-laws, and the various other rules it has adopted that govern the conduct of its members are all the result of agreement by those members, and do not derive from any legislative enactment. Its executive director and its governing board are also appointed (or elected) by the membership, rather than by the state. Yet a substantial percentage of its members consists of public institutions, and those institutions probably play the predominant part in setting NCAA policy. Thus, the NCAA is clearly not a government agency, as state colleges and universities are. Yet a counselor advising it about any potential problems with its drug-testing program will have to ask the threshold questions: "Is the NCAA a 'state actor' under federal law?" and, "Under state law, is the NCAA required to provide 'due process' or 'equal protection' to athletes adversely affected by its drug-testing program?"

a. Is the NCAA a "State Actor" Under Federal Law?

Until 1984, precedent existed in almost every federal circuit indicating that the NCAA was a "state actor." Several recent decisions, however, appear to be more compatible with recent Supreme Court holdings on "state action" than these dated precedents. It seems probable that the Supreme Court will eventually conclude that the NCAA, at least where disciplinary regulations are concerned, is not a "state actor." A counselor, even in jurisdictions where "state action" has been found in the past, will probably be safe in advising the Association that whatever other problems there might be with its current testing program, that program is probably immune from direct constitutional attack.

Although the NCAA is technically a "private association," the mode of judicial analysis until recently almost guaranteed that the NCAA would *not* be considered a purely private party by the courts when its role in a mandatory drug-testing program was challenged. The issue of the NCAA's role as a "state actor" was litigated dozens of times from the early 1970's until 1984,[88] when *Arlosoroff v. NCAA*[89] was decided. In only one—*McDonald v. NCAA*[90]—did a federal court hold squarely that the NCAA was *not* a "state actor." At least 100 other cases, establishing controlling precedent in nearly every federal circuit,[91] ruled the other way. Thus, the weight of the

88. A representative sampling of these cases is discussed in Buss, *Due Process in Enforcement of Amateur Sports Rules*, in LAW & AMATEUR SPORTS 1, 14-19 (R. Waicukauski ed. 1982).

89. 746 F.2d 1019 (4th Cir. 1984).

90. 370 F. Supp. 625 (C.D. Cal. 1974).

91. For partial listings, see Buss, *supra* note 88, and Parish v. NCAA, 506 F.2d 1078 (5th Cir. 1975).

decided cases until very recently gave overwhelming support to the view that "equal protection" or "due process" claims lodged against the NCAA would require it to give a full constitutional justification for its actions. However, no Supreme Court case ever directly confronted the "state action" issue as it involves the NCAA or any other similar multi-state umbrella association. Nor were any of the cases decided in the lower federal courts firmly grounded in the recent "state action" doctrine of the high court. Thus, almost none carefully evaluated the ties between the NCAA and specific governmental entities,[92] and most relied heavily on a theory of "state action" that the Supreme Court has all but abandoned over the last decade.

The questionable theory has usually been labeled the "public function" or "government function" test. Essentially, it looks to the involvement of a private party in an activity which traditionally has been exercised by a state and recognized by the legislature and the courts as the prerogative of that state. Hence, in *Marsh v. Alabama,*[93] a restriction imposed by a company town, forbidding a Jehovah's Witness to distribute literature without permission on pain of criminal prosecution was ruled unconstitutional. The Supreme Court found that except for private ownership, the company town "ha[d] all the characteristics of any other American town,"[94] was "built and operated primarily to benefit the public,"[95] and thus performed an "essentially . . . public function."[96] Constitutional limits on the right of an "ordinary" town to curtail freedom of speech and of religion were thus imposed on a privately owned and operated municipal entity because the latter's "function" was essentially identical to the former's. Later cases used the "public function" theory to determine that a shopping center was functionally equivalent to a municipal business district, where free speech would be constitutionally protected,[97] and that a "private" political organization which in fact chose a political party's candidates for public office was subject to the same constitutional constraints on racial discrimination as the political party itself.[98] In a dictum in another case, Justice Douglas suggested that a private parcel of land opened up to the public by its owner for use as a park was also subject to constitutional limits on the restriction of its use because "the predominant character and purpose of this park are municipal."[99]

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92. For a number of years, in NCAA cases, courts relied heavily on the precedent of earlier decisions. Virtually no analysis of underlying Supreme Court theory appeared in any case decided between 1978 and 1984 holding that the NCAA was a "state actor."

93. 326 U.S. 501 (1946).

94. *Id.* at 502.

95. *Id.* at 506.

96. *Id.*

97. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

98. Terry v. Adams, 345 U.S. 461 (1953).

99. Evans v. Newton, 382 U.S. 296, 302 (1966).

Had this line of cases continued to develop, it might have given adequate support to the contention that the NCAA, because it regulates intercollegiate athletics, is fulfilling a traditional governmental role and should be governed by constitutional standards. Such reasoning was specifically adopted by the Fifth Circuit in *Parish v. NCAA*,[100] and has been assumed *sub silentio* in dozens of other cases. *But it is not compatible with the recent "public function" jurisprudence of the Supreme Court.* Thus, instead of continuing to expand upon the analogical relationship between certain private entities and the government, and to attach legal obligations as a result of such analogies, the Court has restricted "public function" analysis to a few narrow areas. In 1974, in a case involving a service cut-off by a heavily-regulated power company, the Court asserted:

> We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. . . . If we were dealing with the exercise by [the company] of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while [state law] imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State.[101]

The Supreme Court reached a similar result in 1978, in a case involving an ultimatum by a storage company demanding payment and threatening to sell goods in its possession pursuant to a provision in state law permitting self-help. It rejected the owner's claim that the storage company was a "state actor" because it sought to perform a traditional governmental action. According to the Court, "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"[102] It found the requisite degree of *exclusivity* in the private primary cases, and in the situation which occurs when a private corporation "perform[s] all the necessary municipal functions [of a town]."[103] But despite a series of precedents finding "state action" in a variety of other statutorily authorized creditor self-help contexts, the Court found that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function."[104] And it reserved judgment on the constitutional implication of a city or state delegating to private parties such functions as public "education, fire and police protection, and tax collection,"[105] which it concluded "have been administered with a greater degree of exclusivity by states and municipalities than has the function of so-called 'dispute resolution.'"[106]

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100. 506 F.2d 1028.
101. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (citations omitted).
102. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1956).
103. *Id.* at 159.
104. *Id.* at 161.
105. *Id.* at 163.
106. *Id.*

Underlying its desire to limit the public function doctrine, the Court also expressly overruled its earlier holding that a "shopping center is the functional equivalent of a municipality"[107] in 1976, and in 1978, in dicta, rejected its previous view that a privately owned park could be identified with "an exclusively public function."[108]

Finally, in 1982, in *Rendell-Baker v. Kohn,*[109] a case involving a first amendment claim brought by teachers at a nominally "private" school for "problem children" and others with "special" educational needs, the Supreme Court affirmed a determination by the First Circuit rejecting the district court contention "that although education was not a *uniquely* public function, it is a *primarily* public function," and therefore covered by the "state action" doctrine. It did so even though in the community where the action arose, special education was provided *exclusively* by the "private" defendant.[110] The defendant, not incidentally, was state regulated, and received over ninety percent of its funding from public sources.[111] Explaining its affirmance, the Court stated:

> our holdings have made clear that the relevant question is not simply whether the private group is performing a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State". . . . There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools. . . . That a private entity performs a function which serves the public does not make its acts state action.[112]

While none of these cases addresses the specific issue of athletic regulation, taken together they demonstrate that the "public function" argument will probably be accepted only when: (1) state control over a particular type of enterprise has been longstanding and exclusive; (2) the delegation of authority to govern that type of enterprise to private parties threatens to deprive other

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107. Hudgens v. NLRB, 424 U.S. 507 (1976) (distinguishing Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

108. *Flagg Bros.,* 436 U.S. at 161.

109. 457 U.S. 830.

110. *Id.* at 836.

111. *Id.* at 832-33, 837.

When students are referred to the school by Brookline or Boston under Chapter 766 of the Massachusetts Acts of 1972, the School Committees in those cities pay for the students' education. . . . In recent years public funds have accounted for at least 90%, and in one year, 99%, of respondent school's operating budget. There were approximately 50 students at the school in those years and none paid tuition. *Id.* at 832.

112. 457 U.S. at 842 (citations omitted).

citizens of necessities or generally recognized rights; and (3) adequate, non-constitutional remedies at law for such citizens do not exist. Under such an analysis, the delegation of virtually all responsibility for the operation of public elementary and secondary schools from statutorily-mandated school boards to a private educational association *might* support a finding that the rules of the private association constitute "state action." But given that the NCAA is responsible only for intercollegiate athletics, that the educational interest of a student in attending college may well be less compelling than the right to receive a public secondary education,[113] that the interest of an athlete in competition has generally been regarded by the courts as less significant than the athlete's interest in substantive course-work,[114] that state schools which belong to the NCAA retain the right in most instances to exercise concurrent control over athletic contests and athletic eligibility,[115] and that the tradition of delegating rule-making authority to the NCAA is a longstanding one,[116] it is almost certain that the Supreme Court, if asked to decide the issue, would not find athletic regulation to be an "essential" *or* an "exclusive public function."

If an organization is not regarded as a "state actor" under the "public" or "governmental function" test, it can still be deemed to be a "state actor" because of the "encouragement" or the "participation" of the government in its specific activities. Thus, to take the simplest case, if a local school board, enjoined by the courts from racially segregating its schools, was to lease its buildings at a nominal fee to an ostensibly private corporation, which then organized a private school restricted exclusively to white students, the private school in such a case would certainly be deemed the equivalent of the state if sued by the parents of black applicants for admission.[117]

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113. *See* Buss, *supra* note 88, at 23-25, for an exposition of the opposite view, namely, that the due process rights found by the Supreme Court in Goss v. Lopez, 419 U.S. 565 (1975), are directly relevant to intercollegiate athletics. This position ignores the emphasis in *Goss* on the compulsory education laws at issue in *Goss,* which the Court concluded established a "property interest" in education. Such an interest has generally not been found in athletic participation, and absent a scholarship which is being terminated, or a state provision guaranteeing tertiary education, appears not to apply to colleges at all.

114. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 1.11 (1979) ("The 'Right' to Participate").

115. Member institutions of the NCAA commit themselves to "apply[ing] and enforce[ing] [NCAA] legislation." NCAA CONST. art. II, § 2(b). Yet the NCAA Constitution also provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference, if any, of which it is a member." *Id.* at art. III, § 2.

116. Eligibility rules for athletes were first drafted for athletes by the NCAA in 1906, the year of its creation. Compliance by institutions, however, was voluntary. In 1939, member institutions were obliged for the first time to comply with explicit "Standards for the Conduct of Intercollegiate Athletics" as a condition of NCAA membership. F. MENKE, ENCYCLOPEDIA OF SPORTS 311 (rev. 2d ed. 1960).

117. *Cf.* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), *cert. denied,* 371 U.S. 911 (1962).

Ordinarily, however, the relationship between the private entity and the government is more tenuous. Addressing situations involving more limited "participation" or encouragement, the Supreme Court has established the following benchmarks:

(1) "Private conduct abridging individual rights does not do violence to the Equal Protection Clause [and the Due Process Clause] unless to *some significant extent* the State in any of its manifestations has been found to be involved in it."[118]

(2) It is not sufficient grounds for finding "state action" if all that can be shown is that "the private entity receives any sort of benefit or service at all from the State, or is subject to state regulation in any degree whatsoever."[119]

(3) Instead, if "state action" is to be based on a *general* relationship, the degree of contact between the private entity and the state must approach the sort of "symbiotic relationship" found by the Court in *Burton v. Wilmington Parking Authority.*[120]

(4) Alternatively, direct state support or "encouragement" of a particular initiative may convert that initiative into "state action," even though the private entity responsible for it is not "symbiotically" related to the state.[121] Dicta in *Moose Lodge No. 107 v. Irvis*[122] indicates that in such a case, the Court will look for a relationship between the private entity and the State which is analogous to that of a partnership or a joint venture.[123] Clearly, as the Court has indicated in *Jackson v. Metropolitan Edison Co.*,[124] "a sufficiently close nexus between the State and the challenged action" of the nominally private party will *not* be found if the "initiative" for that action comes from the private party, and the State's *only* involvement is a grant of permission to proceed in a manner generally authorized by law.[125]

(5) Finally, any determination of the "state action" question must depend on a careful evaluative process: "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[126]

Nearly all of the decisions that have identified State "support" or "encouragement" as the basis for determining that the NCAA is a "state actor"

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118. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (emphasis added).
119. Moose Lodge No. 117 v. Irvis, 407 U.S. 163, 173 (1972).
120. *See Jackson,* 419 U.S. at 357 (*citing Burton,* 365 U.S. 715).
121. *Id.* at 357; *see also* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).
122. 407 U.S. 163.
123. *Id.* at 177.
124. 419 U.S. 345.
125. *Id.* at 354-57. *But see Shelley,* 334 U.S. 1. *See also Flagg Bros.,* 436 U.S. at 164-66 (1978). ("This Court has, however, never held that a state's mere acquiescence in a private action converts that action into that of the State.").
126. *Burton,* 365 U.S. at 722.

have done so without "sifting facts and weighing circumstances" to any significant degree. Fairly typical of the prevailing approach is the Fifth Circuit's assertion in *Parish v. NCAA* that:

> [we] see no reason to enumerate again the contacts and degree of participation of the various states, through their colleges and universities, with the NCAA. Suffice it to say that state-supported educational institutions and their members and officers play a substantial, although admittedly not pervasive, role in the NCAA's program.[127]

Other cases which have addressed the question of encouragement or support more directly have focused on the fact that approximately fifty percent of the NCAA member-institutions are "public" rather than "private;"[128] that representatives of those institutions sit on various NCAA policy-making boards; that NCAA regulations have the effect of determining the rights and responsibilities of employees and student-athletes at public colleges;[129] and that the grant of rule-making authority by these public institutions to the NCAA makes the NCAA their agent in fact, if not always in name.[130]

Even when the revenue generated by NCAA-regulated sports and received by its member schools is loosely analogized to the *rent* which the Supreme Court took into account in *Burton v. Wilmington Parking Authority,*[131] public-private ties such as these appear to fall considerably short of the sort of "symbiotic relationship" described in that case. That conclusion is buttressed by the increasingly restrictive approach to "state action" which the Court has taken since *Burton* was decided. In *Rendell-Baker v. Kohn,* for instance, virtually *total* financial support of the "private" school by the state was held to be insufficient to establish "state action:" "the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as in *Burton* existed here."[132] And in *Jackson v. Metropolitan Edison Co.,*[133] and *Blum v. Yaretsky,*[134] the Court rejected the argument that extensive state regulation of a private enterprise automatically converts that enterprise into something reachable by the fourteenth amendment, stating: "[t]he complaining party must also show that 'there is a sufficiently close nexus between the State *and the challenged action of the regulated entity*

127. *Parish,* 506 F.2d at 1032.

128. Buckton v. NCAA, 366 F. Supp. 1152, 1156-57 (D. Mass. 1973).

129. *Parish,* 506 F.2d at 1032; *see also* University of Nev. v. Tarkanian, 594 P.2d 1159 (Nev. 1979).

130. *Parish,* 506 F.2d. at 1033: "It would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by bonding together to form or support a "private" organization to which they have relinquished some portion of their governmental power."

131. 365 U.S. at 720.

132. *Rendell-Baker,* 457 U.S. at 843.

133. 419 U.S. at 350.

134. 457 U.S. 991, 1004 (1982).

so that the *action* of the latter may be fairly treated as that of the State itself.'"[135]

In the later case, in fact, the Court arguably placed new barriers on finding "state action" by asserting:

> [t]he purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.
>
> . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.[136]

In the light of this precedent, the sorts of contacts between the NCAA and the various states enumerated in *Parish* appear to fall well short of those required to establish the "symbiosis" necessary for "state action." But even if contacts such as these could be regarded as "significant" enough, it is clear that their significance derives, not from the NCAA's link to any *particular state,* but from its broader, *collective relationship with all fifty states and with the federal government,* each of which supplies the NCAA with public-institution members. Thus, as the Fifth Circuit noted in the *Parish* case, it is ordinarily not possible to characterize the NCAA's conduct as a reflection of control by "any one state or governmental body."[137] This fact distinguishes the NCAA cases from others which have found various state high school athletic associations to be "state actors."[138] It also makes it difficult to demonstrate that particular actions by the NCAA, including the promulgation of drug-testing rules can be attributed properly to the "encouragement" or "support" of *any* governmental body, rather than to the general will of the NCAA's mixed membership.

Thus, despite the overwhelming weight of early precedent, as a result of recent Supreme Court action, the "encouragement" or "support" argument appears to be nearly as weak as the "public function" argument. A series of recent cases decided in the lower federal courts, beginning in 1984 with *Arlosoroff v. NCAA,*[139] have therefore concluded that as a matter of federal constitutional law, the NCAA (at least in its promulgation of various eli-

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135. *Jackson,* 419 U.S. at 351 (quoting *Blum,* 457 U.S. at 1004) (emphasis added).

136. *Blum,* 457 U.S. at 1004-05.

137. *Parish,* 506 F.2d at 1033.

138. *See* Gilpin v. Kansas State High School Activities Ass'n, 377 F.2d 3552 (8th Cir. 1977); Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).

However, in a recent case decided in the Seventh Circuit, Judge Posner intimated that the issue was still open, and that a court might be willing to hear arguments again about the existence of "state action" in cases involving rules promulgated by state high school athletic associations. Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1032 (7th Cir. 1982).

139. 746 F.2d 1019.

gibility and disciplinary rules) is *not* a "state actor."[140] Nothing in the current jurisprudence of the Supreme Court suggests that this result is incorrect.

b. Is the NCAA Bound to Provide "Due Process" or "Equal Protection" as a Matter of State Constitutional Law?

A determination that the NCAA (or, for that matter, a "private" college or university following NCAA rules) is not a "state actor" for federal purposes still leaves open the possibility that an athlete might prevail against the NCAA (or institution following NCAA rules) in an action alleging a deprivation of a right guaranteed by the relevant *state constitution.* To address this question adequately, the counselor representing the NCAA or the institution would have to familiarize himself with *state* doctrines of "state action" in the *particular jurisdiction* where the complained of testing occurred, or where some other asserted test-related deprivation of rights occurred.[141]

Such a survey is beyond the scope of this Article. However, it is appropriate to note that the U.S. Supreme Court has permitted states to impose constitutional restrictions on "private" conduct more restrictive than those imposed by the federal Constitution, and that as a result, the law in at least one state could give the NCAA (or a "private" institution following its rules) trouble. Thus, the Supreme Court of California determined in 1979 that state constitutional claims could be asserted against a privately-owned shopping center,[142] even though similar claims asserted under the federal Constitution would founder because of a lack of "state action."[143] The United States Supreme Court affirmed. Writing for the Court, Justice Rehnquist observed:

> [o]ur reasoning in *Lloyd* [finding no "state action" under the Fourteenth Amendment in a similar shopping center case]. . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its

140. *See* Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Johnson v. Educational Testing Serv., 754 F.2d 20 (1st Cir. 1985) (dictum); Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985); *see also* Ponce v. Basketball Fed., 760 F.2d 375 (1st Cir. 1985).

141. Since an athlete deprived of eligibility as the result of a "positive" NCAA-administered test would suffer the consequences of that deprivation at her home institution, she could probably invoke the state constitutional law prevailing in the state where that institution is located. *See* Levant v. NCAA, No. 619209 (Super. Ct., Santa Clara Cty., Cal., Mar. 10, 1987). However, if the actual testing takes place in another locale (e.g., a football "bowl" or NCAA championship site), she might also be able to invoke whatever state constitutional protections are available in that locale.

142. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd,* 447 U.S. 74 (1980).

143. *See Lloyd Corp.,* 407 U.S. at 569; *Hudgens,* 424 U.S. 507 (overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)).

sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.[144]

c. What Consequences Follow if the NCAA Is Not A "State Actor," or Is Not Required to Observe State Constitutional Rules?

A finding that the NCAA is not a "state actor" for the purposes of federal law, and is not obliged by state constitutional law to afford athletes "due process" or "equal protection," will immunize the NCAA from suits claiming that *its actions* in promulgating, implementing, or enforcing its drug-testing program were unconstitutional. But such a finding will not necessarily immunize those institutions that cooperate with the NCAA by requiring that their athletes submit to NCAA testing or by subjecting athletes that refuse to be tested to suspension from athletic participation or other sanctions. Nor will it necessarily immunize those same institutions from federal or state lawsuits if the institution suspends or otherwise disciplines an athlete because she tests "positive" on a test administered or required by the NCAA. Instead, a separate inquiry, conducted along the lines indicated in the previous two sections of this Article, will have to be made to determine if the institution cooperating with the NCAA is either a "state actor" under federal law, or, under state constitutional law, is required to afford athletes "due process" and "equal protection."

If the answer to either question is "yes," then the NCAA program, although not reviewable *directly,* will become in effect unenforceable, since any institution cooperating with the NCAA in its enforcement will be in violation of state or federal law.

Thus, any success the NCAA has almost certainly will not prevent all constitutional review of its drug-testing plan, although it well may preclude holding the NCAA liable for that plan. The argument made in *Parish* to the effect that states should not be permitted to avoid legal responsibility for their acts by delegating them to a private association is likely to be heard sympathetically by the courts.[145] Even if it is determined that the NCAA is not a "state actor," it is clear that public colleges and universities which are NCCA members are state actors.[146] In addition, at least some nominally "private" members of the NCAA are likely to be held accountable under state, if not federal, constitutional standards. Any action that these institutions take in the furtherance of NCAA drug-testing rules is likely to involve

144. *Pruneyard Shopping Center,* 447 U.S. at 81.

145. *Parish,* 506 F.2d at 1032-33.

146. The application of the fourteenth amendment to institutions of public education at every level has been clear since the 1930's, when the Supreme Court began ruling on racial discrimination in state universities and professional schools. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

them, either as sole defendants, or as joint defendants with the NCAA, in lawsuits brought by athletes. In the event that the schools' actions pass constitutional muster, the NCAA's plan will continue to be dispositive in drug-use situations. If, however, a court should determine that the sanctions which any college or university imposes is violative of "due process" or some other constitutional rights, it has the clear power to enjoin the institution from imposing that sanction, *even if failure to do so is a clear violation of the agreement between the institution and the NCAA.* Thus, case law supports the contention that a state university has a "superior legal duty" to observe the requirements of the constitution whenever they come into conflict with contractual obligations to the NCAA, even though such observance could jeopardize the university's good standing in the Association.[147]

2. "Due Process"—In General

An athlete required to submit to a drug-testing program by any "state actor" may object to the testing, or to the uses to which the testing is put, by alleging generally that the procedures used, or the penalties exacted, or both, deprive the athlete of various procedural or substantive rights guaranteed by the United States Constitution. With the exception of claims alleging a denial of "equal protection of the laws" (which are treated separately below), all such objections—including those involving such issues as "privacy," "unlawful search and seizure," and "compelled self-incrimination"—will depend on demonstrating that the guarantees provided by the "due process" clause of the fourteenth amendment have not been afforded. In its simplest application, the "due process" clause is invoked in its own name, and monitors the "fundamental fairness"[148] of institutional proceedings and procedures to which athletes contesting drug-testing must submit. For example, objections to the sort of hearing an athlete might be afforded to rebut a "positive" test result—or to the failure to afford the athlete any hearing at all—as well as objections to certain "consent" forms that are required by the typical testing program depend exclusively for their resolution on judicial interpretation and application of the "due process" clause itself. In all such cases, the plaintiff will be required to demonstrate the deprivation of "life, liberty, or property" that triggers "due process" inquiry *before* challenging the governmental conduct which has contributed to that deprivation.

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147. *See* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977), *rev'g* 422 F. Supp. 1158 (D. Minn. 1976). *Cf. Tarkanian,* 594 P.2d at 1164. *See also* Kentucky High School Athletic Ass'n v. Hopkins City Board of Educ., 552 S.W.2d 685, 690 (Ky. App. 1977) (school cannot be disciplined by athletic association for complying with court order).

148. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 161 (19xx) (Frankfurter, J., concurring).

Yet "due process" also has another dimension that does not require this preliminary showing. That dimension becomes apparent when an athlete challenges a drug-testing program on constitutional grounds that are not contemplated directly by the "due process" clause. Because the Bill of Rights places direct limitations only on the activities of the *federal* government, the process of making virtually all of its terms applicable to states (and "state actors") depends on the judicial "incorporation" of its various guarantees into the meaning of "due process of law," as that term is employed in the fourteenth amendment.[149] Some of those guarantees, such as the fifth amendment right of a criminal defendant not to testify against himself in a criminal proceeding, are essentially "procedural," while others, such as the first amendment right to free speech, are essentially "substantive." In addition to these enumerated rights, other substantive guarantees have been read into the Bill of Rights by the courts, including the "right to privacy" enunciated in *Griswold v. Connecticut,*[150] and *Roe v. Wade.*[151] All of these procedural and substantive rights, both enumerated and implied, establish interests that the government is constitutionally forbidden to deprive *any* "person" resident in the United States of, except under narrow and well-defined circumstances. In other words, they largely define—and clearly fall within—the sort of "liberty" interest that the fourteenth amendment's "due process" clause protects. As a consequence, an athlete claiming, for example, that a drug-testing program has deprived her of "due process" by subjecting her to a warrantless, non-consensual, and "unreasonable" search, in violation of the express terms of the fourth amendment, need not demonstrate the existence of any "liberty" or "property" interest independent of the one established and protected by the fourth amendment itself.

The counselor seeking to advise a university or athletic association about the legality of its drug-testing plans, if aware of this distinction between the two types of "due process," will probably first want to address the legal implications of constitutional guarantees which operate in and of themselves, and are in no way dependent on incidental factors, such as the athlete's scholarship status or potential to become a professional star.

a. The Fifth Amendment Protection Against Self-Incrimination

The third clause of the fifth amendment provides that "[n]o person shall be compelled in any criminal case to be a witness against himself."[152] The fifth amendment protection against compulsory self-incrimination has been

149. J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 315 (1986).
150. 381 U.S. 479 (1965).
151. 410 U.S. 113 (1973).
152. U.S. CONST. amend. V., cl. 3.

incorporated into the "due process" clause of the fourteenth amendment,[153] and thus applies against all "state actors," including all public colleges and universities, and the NCAA in some jurisdictions. If the NCAA and other athletic associations are deemed to be "state actors," their fifth amendment concerns are virtually identical to those of public educational institutions. All must be careful not to compel student-athletes to "testify against themselves" in some manner which will subject them to probable "criminal" proceedings.

As interpreted by the Supreme Court, the protection afforded by this clause is available in civil proceedings if the testimony which the government seeks to compel would incriminate a party in a later criminal proceeding.[154] Similar considerations have led the Court to forbid compelled self-incrimination during grand jury proceedings,[155] congressional investigatory hearings,[156] and juvenile delinquency proceedings denominated "civil."[157] However, as long as the testing institution does not require a *written* or *verbal* statement from athletes detailing their drug use, similar protection is not likely *ever* to be available to an athlete whose drug use is revealed by a mandatory testing program, even if the evidence obtained by that program later becomes available to law-enforcement authorities.

i. The "Testimonial" Threshold

The fifth amendment affords no protection to individuals who are compelled to produce non-testimonial evidence, although, as later parts of this study will show, such compulsion may be violative of other constitutional or statutory rights. In the landmark case of *Schmerber v. California,*[158] the Supreme Court was called upon to evaluate the constitutionality of a blood test which a driver involved in a traffic accident was forced by police to undergo, despite his express refusal to grant consent. The Court, following the lead of an earlier case,[159] first concluded that forcibly extracting a blood sample did not fall within the scope of general violations of "due process" occasioned by official behavior "that shocks the conscience" and "afford[s] brutality the cloak of law."[160] It then examined the reach of the privilege against self-incrimination, and asserted: "We hold that the privilege protects

153. *Id.*
154. Grosso v. United States, 390 U.S. 62 (1968); Boyd v. United States, 116 U.S. 616 (1886).
155. *See Boyd,* 116 U.S. 616; United States v. Dionisio, 410 U.S. 1 (1914).
156. Lefkowitz v. Turley, 414 U.S. 70 (1973).
157. *In re* Gault, 387 U.S. 1 (1967).
158. 384 U.S. 757 (1966).
159. Breithaupt v. Abram, 352 U.S. 432 (1957).
160. Rochin v. California, 432 U.S. 165 (1952) (forcible use of stomach pump to obtain evidence violated "due process" clause of fifth and fourteenth amendments).

an accused only from being compelled to testify against himself, or otherwise provide the state with *evidence of a testimonial nature. . . .*"[161] Interpreting the italicized phrase, the Court added:

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. On the other hand, both federal and state courts have held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[162]

The holding in *Schmerber* has been followed consistently to permit the use of "breathalyzers" to determine the alcohol content of drivers' blood,[163] and the testing of urine to determine if military personnel have taken prohibited substances.[164] Any drug-testing programs, such as the ones being analyzed here, which rely *exclusively* on urinalysis, or even blood-testing should not encounter constitutional problems with compulsory self-incrimination.

ii. The "Criminal Case" Threshold

It is conceivable that a drug-testing plan could include, either as an alternative to chemical analysis of blood or urine, or as a supplement, a required statement by athletes that they have not used certain prohibited substances within a specified period of time. In such a case, the plan will cross the testimonial threshold. Nevertheless, unless the testimonial evidence obtained is likely to be used in a future criminal proceeding, the privilege against compelled self-incrimination will not apply. Unlike the "due process" clauses of the fifth and fourteenth amendments, and the entire fourth amendment, the "self-incrimination" clause is available only to shield a current or potential *criminal* defendant from undue pressures. The mere possibility that a compelled disclosure could lead to criminal prosecution is not sufficient to invoke the clause. Thus, a four justice plurality of the United States Supreme Court in *California v. Beyers*[165] stated:

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161. 384 U.S. at 761 (emphasis added).

162. *Id.* at 763-64 (the court indicated that lie detector tests, because used to "elicit responses which are essentially testimonial," would be covered by the privilege) (citation omitted).

163. *See* State v. Quaid, 172 N.J. Super. 533, 412 A.2d 1087 (1980); Welch v. District Court of Vt., 461 F. Supp. 592 (D. Vt. 1978).

164. Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

165. 402 U.S. 424 (1971).

> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the contents of products, on the wages, hours, and working conditions of employees. . . .
>
> In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law requires compels a person to supply. . . . But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here. . . .
>
> In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with "substantial hazards of self-incrimination."[166]

It should be noted, however, that certain aspects of the *Beyers* case predisposed the plurality to find no "substantial hazards of self-incrimination." First, the statute asked a driver involved in a traffic accident only for "[d]isclosure of name and address," which the Court concluded, was "an essentially neutral act."[167] Second, the focus of the inquiry—the identity of a motorist—was distinguished from the focus of other inquiries where unconstitutional compulsory self-incrimination had been found. Thus, the Court distinguished the California statute at issue in the case from statutes requiring members of Communist organizations and gamblers to register with a governmental agency, noting that the latter statutes compelled disclosure only from a "highly selective group inherently suspect of criminal activities," and involved governmental inquiry into "area[s] permeated with criminal statutes," and not into "essentially noncriminal and regulatory area[s] of inquiry."[168] Another possible factor in the decision was the fact that the compelled disclosure was required by statute, and that statute fulfilled a strong regulatory purpose.

Thus, if testimonial disclosure of drug use is required under a drug-testing plan, it is likely that a student challenging the plan will argue:

(1) that strong public policy reasons for compelling testimony do not exist;

(2) that the inquiry being made is squarely within an "area permeated by criminal statutes;"

(3) that one purpose of the testing plan—particularly if it seeks to uncover use of "street" as well as "performance enhancing" drugs—is to identify a group of actual or potential violators of those criminal statutes; and consequently,

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166. *Id.* at 427-29.
167. *Id.* at 432.
168. *Id.* at 430.

(4) that a "substantial hazard of self-incrimination" exists.

The likelihood that such an argument will succeed depends on a separate consideration of each argument, and on judicial balancing of the "public interest" associated with such compulsion of testimony against the likelihood of criminal proceedings. If those eliciting the testimony are acting on behalf of the police, or in close cooperation with them for the purpose of initiating a criminal proceeding, a clear problem of possible compelled self-incrimination arises. Otherwise, it appears far less likely that the fifth amendment will provide a remedy for the tested athlete. The reasons given by the NCAA and Indiana University in testing athletes for drug use are treated elsewhere in this Article.[169] Clearly, that interest is especially significant when drug use poses a clear health or safety hazard, or when it appears to enhance performance to such an extent that it interferes with fair competition.

Yet it is by no means certain that such an interest outweighs the genuine possibility—which may, however, fall short of a "substantial hazard of self-incrimination"—that test results will be released to law enforcement authorities investigating violations of laws limiting the possession or use of drugs. Given this possibility, which is analyzed below,[170] any competent counsel would probably advise the athletic association or college it represented not to compel any testimony, verbal or written, concerning an athlete's drug use.

b. The Constitutional Right to "Privacy"

In addition to alleging that mandatory drug-testing violates fifth amendment rights, an athlete is likely to argue that such testing violates a constitutional "right of privacy." The classic formulation of this right is contained in Justice Douglas's majority opinion in *Griswold,*[171] which stated:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion). The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in

169. *See infra* text accompanying notes 884-86.
170. *See infra* text accompanying notes 282-342.
171. 381 U.S. 479.

> the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> The Fourth and Fifth Amendments were described in *Boyd v. United States,* 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio*, 367 U.S. 643, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).[172]

Despite the open-ended language employed by Justice Douglas, the Supreme Court has been extremely reluctant to construe the "right to be left alone" broadly. *Griswold* involved a Connecticut statute which made it a criminal offense for anyone, including married couples, to *use* contraceptive devices. The majority of the Court accepted the view that the marital relationship either lay "within a zone of privacy created by several fundamental constitutional guarantees,"[173] or involved "basic values 'implicit in the concept of ordered liberty,'"[174] which would be violated by prosecutorial prying into "marital intimacy." Other cases where a constitutional privacy right has been found have involved unreasonable restrictions on the right to marry;[175] on the distribution and sale of contraceptives to adults and children under sixteen; on the right of a woman to receive an abortion during the early months of pregnancy;[176] or on the right of individuals related by blood or marriage to define their own family unit for the purpose of finding housing.[177] In the housing case, the Supreme Court indicated that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by [due process],"[178] and suggested that any regulation unduly burdening family life would require a close examination of the governmental interests which the government claimed to be advancing through its regulations.

To this list could perhaps be added cases involving parental choices on the education of children.[179] Yet the general principle appears clear: although the Supreme Court frequently uses the term "privacy," it only affords individuals sweeping protection from governmental intrusion in very limited contexts, seldom invoking privacy *per se* as a constitutional principle. For

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172. *Id.* at 484-85.
173. *Id.* at 485.
174. *Id.* at 500.
175. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).
176. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); *Roe,* 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).
177. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
178. *Id.* at 499.
179. *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

example, while the courts will frequently speak of a "reasonable expectation of privacy" in search and seizure cases[180] the criminal cases employing that term all "involve affirmative, unannounced, narrowly-focused intrusions into individual privacy during the course of criminal investigations,"[181] and all evaluate such intrusions according to the *specific* language of the fourth amendment.

As the next section of this study shows, significant problems deriving from the text of the fourth amendment can arise from a non-consensual "search" for drug use undertaken *via* mandatory drug-testing. Yet it appears highly unlikely that such problems will arise under any analysis which seeks to identify a general privacy right, deriving (as was the case in *Griswold*) from the "penumbra" of various provisions in the Bill of Rights, and which seeks to immunize an athlete from a drug-testing program on the basis of that right.

This appears to be true despite the decision in *Merriken v. Cressman,*[182] a 1973 federal district court case which invalidated a procedure employed by a high school to generate a profile of potential drug abusers. Although the court employed a "penumbral" analysis, its apparent reason for doing so was the requirement of the defendant school district that its students submit a detailed questionnaire that intruded into areas of familial life where a special privacy interest is now recognized. Other factors which permit distinguishing the *Merriken* survey from current drug-testing programs include the youth of the children questioned, the school district's failure to elicit valid consent from the students involved in the profile program, and its failure to demonstrate that the profiles generated were in any sense valid indicators of drug abuse.

Yet it must be noted that the Court in *Merriken* was also concerned about the "stigma" that labeling a student as a "drug abuser" might entail, and believed that the lack of confidentiality in the program was a definite problem.[183]

However, a much stronger case exists which should alleviate any lingering concern that a mandatory drug-testing program will impinge upon a student athlete's "penumbral" privacy rights. That case is *Whalen v. Roe,*[184] decided by the Supreme Court in 1977. In *Whalen,* physicians and patients affected by provisions of the New York Controlled Substances Act of 1972 challenged its constitutionality. The Act set forth a schedule of dangerous prescription drugs, required copies of such prescriptions to be put on computer file and

180. *See* United States v. Santana, 427 U.S. 38, 42 (1976).
181. Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977).
182. 364 F. Supp. 913 (E.D. Pa. 1973).
183. *Id.* at 920-21.
184. 429 U.S. 589.

saved for five years, and put stringent limits—backed by criminal penalties—on the disclosure of file contents. Under the Act:

> Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.[185]

According to the *Whalen* Court:

> There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly. And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.[186]

Thus, the *Whalen* Court assumed that the New York law *adequately* protected confidentiality, although it acknowledged the remote possibility that such confidentiality could be breached, and it recognized that a *specific statutory provision excepted judicial proceedings for alleged violations from the confidentiality provisions.* Premising its decision at least in part on these assumptions, it concluded:

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not . . . meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community does not automatically amount to an impermissible invasion of privacy.[187]

It must be emphasized that *Whalen* dealt with the storage and possible distribution of drug possession information, rather than with a procedure designed to determine if particular individuals had in fact used those drugs. Clearly, additional issues, such as valid consent under the fourth amendment, are raised at the point where an institution attempts to elicit a blood or urine sample from an athlete.

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185. *Id.* at 608.
186. *Id.* at 601-02.
187. *Id.* at 602.

c. The "Right to Privacy" Under State Constitutional Law

A university or athletic association attorney needs to concern himself not only with "privacy" claims arising under the U.S. Constitution, but also with those claims that might arise under the explicit or implicit terms of the several state constitutions.[188] California law is likely to prove particularly troublesome to counsel for three reasons: a large number of colleges and universities are located in California; the state is the site of many athletic competitions, including the Rose Bowl game, which pits champion football squads from the Big Ten and Pac Ten football conferences against each other every January 1; and the state also has a specific constitutional provision guaranteeing "privacy" which probably is the most liberal in the country. For these reasons, this brief discussion of constitutional privacy under state law is confined to California law.

"Privacy" was made an explicit constitutional right in California in 1972. The state Constitution now provides: "All 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*.[189] A detailed exegesis of the right that has been recognized by the California provision, which "reaches beyond the interests protected by the common law right of privacy, and may be protected from infringement by either the state or by any individual,"[190] is beyond the scope of this Article.[191] However, the aware-

188. At least eleven states, including Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Mississippi, Montana, South Carolina, and Washington "have explicit privacy guarantees in their state constitutions." M. Crosby, *Rights of Privacy*, P. BAMBERGER, RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 234, 331 (1985).

Capsule descriptions of representative privacy case law are contained in the Crosby article. For a more general account of state constitutional law, see B. MCGRAW, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (1985).

189. CAL. CONST. art. I (1974) (emphasis added).

190. Cutter v. Brownbridge, 183 Cal. App. 3d 836, 842, 228 Cal. Rptr. 545, 549 (1986).

191. Among the important issues that an attorney contemplating defending a drug-testing program in California would have to examine, two stand out:

1.) the sorts of privacy claims that the state will in fact recognize. The California constitutional provision was adopted principally to avoid four "mischiefs":

> (1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing record.

White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975).

None of these categories are self-defining; but the first (which probably provides the strongest basis for attacking most drug-testing programs) is particularly vague. Clearly, not all governmental or private intrusions are a violation of the California Constitution. Two recent cases illustrate this fact. In one, a Californian challenged the requirement of the public school system

ness that Simone Levant, a college athlete attending Stanford University, successfully used the privacy clause of the California Constitution in a suit against the NCAA challenging its mandatory drug-testing program will inevitably be of concern to the testing institution.[192] In the *Levant* case, the trial court judge, while acknowledging that the use of drugs did create understandable concerns for the NCAA, laid heavy emphasis on the indiscriminate nature of the testing and on the ability of the institution conducting it to learn an almost unlimited amount about the subject's lifestyle, "including deeply personal matters such as the use of birth control medication."[193]

At a minimum, similar results in other jurisdictions could prevent athletic associations and colleges from continuing to test for a wide variety of

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she worked for that she provide an annual chest x-ray. The court rejected her contention that she had a protectable privacy claim. Garrett v. Los Angeles City Unified School Dist., 116 Cal. App. 3d 472, 172 Cal. Rptr. 170 (1981). In the other, the court rejected a claim by a petitioner who sought to avoid submitting a photograph with his driver's license application. The court found "no reasonable expectation of privacy in that which is already public." Robinson v. Superior Ct. of Sacremento County, 105 Cal. App. 3d 249, 164 Cal. Rptr. 389 (1980).

On the other hand, a successful suit has been brought against an employer by employees resisting the requirement that they submit to polygraph tests as a condition of continuing employment. Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986). And a number of lawsuits brought under the California Constitution by employees challenging mandatory urinalysis are apparently still wending their way through the California courts. *See* K. Bishop, *Drug Testing Comes to Work: Employees' Assertion of Privacy Rights is Giving Employers Legal Hangovers,* 6 CAL. LAW, Apr. 1986, at 29-32.

2) The appropriate standard of review is problematical. When a protectable privacy interest is found, it is not clear whether the California courts will subject the intrusion to "strict scrutiny," or will merely "balance" the interests of the intruder-regulator against the interests of the individual asserting the claim. Recent case law suggests that there is growing support for "balancing," particularly when "privacy" is divorced from other assertions of right. *See Cutter,* 183 Cal. App. 3d at 842, 228 Cal. Rptr. at 550 n.7. Nevertheless, because the courts in California have emphasized the "fundamental" and "inalienable" nature of the privacy right, they have generally taken a strong position. Indicative is the following statement of California law:

> The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and, Ninth Amendments to the U.S. Constitution. *This right should be abridged only when there is a compelling public need. . . .*

City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130, 610 P.2d 436, 439, 164 Cal. Rptr. 539, 542 (1980). *See also White,* 13 Cal. 3d at 774-75, 533 P.2d at 233-34, 120 Cal. Rptr. at 105-06.

As is argued elsewhere in this Article with reference to federal constitutional law, the standard of review employed can be decisive in determining whether the testing agency has an interest sufficient to justify its testing program.

192. *Levant,* No. 619209 (Super. Ct., Santa Clara Cty., Cal., Mar. 10, 1987).

Levant did not sue Stanford University, which has not instituted its own drug-testing program. However, the California privacy clause has been interpreted to reach the conduct of private universities. *See* Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976).

193. Trial transcript at 3-4, *Levant,* No. 619209 (Super. Ct. Santa Clara Cty., Cal., Mar. 10, 1987).

substances without "individualized suspicion" that those substances had been used by the particular athlete, and without a showing of more significant institutional need to conduct testing than has generally been shown thus far.

d. Protection Against "Unreasonable Searches and Seizures" Under the Fourth Amendment

The fourth amendment's general requirements that governmental searches be "reasonable," and be undertaken only after a valid warrant has been obtained, presents the counselor for an institution seeking to test athletes with significant legal difficulties.

First, it is clear that testing the athlete's urine (or blood) for the presence of proscribed substances can "constitute" a search within the meaning of the fourth amendment. Searches can occur even when the use to which the evidence found will be put is "administrative" or "regulatory," rather than for the purpose of proving criminal conduct.

Second, the literal requirement of the fourth amendment that individuals be required to submit to searches only if a warrant has issued upon a showing of probable cause has clearly not been met in either of the testing programs being considered.

Third, the right of the athlete to be "secure in his person . . . and effects" is not dependent upon any claimed right to athletic participation.

Fourth and finally, although the law recognizes that the athlete may waive fourth amendment rights by freely consenting to a search, there are constitutional limits on what a governmental institution can do to "compel" consent.

Plunging into the legal maze, the counselor will therefore look for judicial doctrines that alleviate the apparent stringency of the amendment itself, permitting the sort of general, warrantless, and mandatory testing program that colleges and athletic associations have begun to adopt.

i. The Scope of the Amendment

The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and provides further that "no Warrants shall issue, but upon probable cause . . . particularly describing the place to be searched and the persons or things to be seized."[194]

Nothing in the language of the amendment ties its protection explicitly to criminal proceedings. Instead, as the Supreme Court noted more than 70 years ago, the amendment's protection "reaches all alike, whether accused

194. U.S. CONST. amend. IV.

of crime or not."[195] Specifically, it protects private property, business property, and natural persons from "unreasonable" searches and seizures. Thus, the Court stated in *Camara v. Municipal Court*[196] that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[197] In *See v. City of Seattle,* the Court extended this holding to include "private commercial property."[198] Various examinations of individuals conducted by law enforcement personnel, including "stop-and-frisk" pat-downs,[199] forcible detention for the purpose of undergoing fingerprinting,[200] and magnetometer tests at courthouses and airports for the purpose of detecting concealed weapons have all been characterized as searches.[201] Finally, and most importantly, the Supreme Court has recognized that the protection of the fourth amendment extends to searches conducted for disciplinary purposes by school officials in the nation's high schools[202] and colleges.[203]

Speaking generally, wherever and whenever the government, without consent, enters a zone where an individual has "justifiable expectations of privacy"[204] for the purpose of finding evidence to be used in criminal *or administrative* proceedings,[205] including "administrative inspection programs,"[206] the fourth amendment applies. Because the interest the amendment protects is "privacy," its applicability is not limited to searches or seizures directed at specific substances. Instead, as the words "persons" and "effects" indicate, the amendment's protection is broad. Considerable debate has been occasioned by Supreme Court cases that have narrowly defined the circumstances under which an expectation of privacy will be regarded as "justifiable."[207] Yet the great majority of the courts that have recently considered the question have held that persons subject to mandatory urinalysis fall within the scope of the amendment's protection, given the personal nature of urination and the intrusiveness of testing procedures, which often require observation to insure that the sample given is actually that of

195. Weeks v. United States, 232 U.S. 383, 392 (1914).
196. 387 U.S. 523 (1967).
197. *Id.* at 526-27.
198. 387 U.S. 541, 543 (1967).
199. Terry v. Ohio, 392 U.S. 1, 19 (1968).
200. *See* Davis v. Mississippi, 394 U.S. 721 (1969).
201. *See* United States v. Bell, 464 F.2d 667 (2d Cir. 1972).
202. New Jersey v. T.L.O., 469 U.S. 325 (1985).
203. Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).
204. United States v. Biswell, 406 U.S. 311, 316 (1972).
205. *See Camara,* 387 U.S. 523.
206. *Id.* at 525.
207. *See, e.g.,* Zurcher v. Stanford Daily News, 436 U.S. 547 (1978) (how broad should the right be to subject third parties to searches and seizures?); see also the long line of automobile search cases, including South Dakota v. Opperman, 428 U.S. 364 (1976), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

the person being tested.[208] (Similar logic has been employed to hold that the compelled testing of blood will invoke the protection of the fourth amendment.)[209] Therefore in most jurisdictions, at least, if testing takes place, in order for it to pass constitutional muster, it must be conducted pursuant to a valid warrant (and thus have been found "reasonable" by the magistrate issuing the warrant); or, if no warrant has been issued, it must not be "unreasonable" *and* fit within a recognized exception to the warrant rule, or must be consented to "voluntarily" by the target.

ii. The *Wyman v. James* Exception: "No Search"

Despite the broad scope of the fourth amendment, there is *some* possibility that the drug-testing procedures at issue here will not be considered "searches" by the courts. If so, the fourth amendment ceases to be a problem for the institutions involved, since the existence of a "search" is a necessary predicate to the protections the amendment affords.

The "no search" argument can be made most strongly—although not, I believe, convincingly—if an athlete is disciplined after *refusing to be tested.* Its principal underpinning is found in the Supreme Court's 1971 decision, *Wyman v. James,*[210] which involved a refusal by Mrs. Wyman, an AFDC recipient, to submit to the compulsory "home visit" required by welfare law. Loss of AFDC benefits immediately ensued, and Mrs. Wyman brought suit challenging the constitutionality of the law on fourth amendment grounds.

The *Wyman* Court distinguished *Camara* and *See,* which involved successful appeals of fines levied against individuals who had refused, respectively, to permit warrantless searches of a dwelling and a place of business by a housing code and a fire code inspector. In neither instance had the inspecting official actually entered the premises; yet in both cases, the Supreme Court held that the fourth amendment imposed limitations on the government's right to inspect without a warrant or prior consent. The Court

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208. Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984) ("In a way in which having blood extracted could never be, being forced under threat of punishment to urinate into a bottle held by another is purely and simply degrading. Thus, this type of search is entitled to at least the level of scrutiny given blood tests. . . .") *But see* Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. 1985) ("The intrusion of a urinalysis test requires a normal bodily function for this purpose. This is not an extreme body invasion."); McDonnell v. Hunter, 746 F.2d 785 (8th Cir. 1987) ("Urinalysis is a search and seizure, [but] properly administered is not as intrusive as a strip search or a blood test.").

Other cases holding that urinalysis constitutes a search include Allen v. City of Marietta, 601 F. Supp. 432 (N.D. Ga. 1985); Patchogue-Medford Congress of Teachers v. Board of Educ. 119 A.D.2d 35, 505 N.Y.S.2d 888 (N.Y. App. Div. 1986); Jones v. McKenzie, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986). For one of the few contrary results, see Everrett v. Napper, 32 F. Supp. 1481, 1484 (N.D. Ga. 1986).

209. *See Schmerber,* 384 U.S. at 767-68.

210. 400 U.S. 309 (1971).

in *Wyman* characterized these cases in the following manner: "Each concerned a true search for violations. . . . The community welfare aspects, of course, were highly important, but each case arose in a criminal context where a genuine search was denied and prosecution followed."[211] The Court distinguished the situation of Mrs. James by noting:

> Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. . . . The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits.[212]

Under the Court's rationale, the fourth amendment never became applicable because Mrs. James managed to keep the inspectors out of her home. Thus, despite the loss of AFDC benefits, no search had been *compelled* by the government: "the visitation in itself [was] not forced or compelled, and the beneficiary's denial of permission [was] not a criminal act."[213] Absent physical or criminal compulsion, the Court implicitly suggested, that the fourth amendment will apply *only* if the investigation itself takes place. But in *Wyman,* "[t]here [was] no entry of the home and there [was] no search."[214] The Court in *Wyman* was unequivocal in holding that there was "no search," although it suggested that had the "home visit" in fact occurred, a search would have occurred.[215]

If *Wyman* is good law, we can conclude that the fourth amendment will not apply when drug-testing programs are challenged by athletes *who refuse to be tested.* For even if the programs condition continuing athletic eligibility or scholarship renewal on submission to testing, it is clear that such measures fall far short of cutting a welfare mother and her children off from their principal source of income.

However, the counselor evaluating the precedential effect of *Wyman* will have to take seriously the forceful dissent in the case, which exposes what appear to be genuine inconsistencies between its holding and the more generally expansive holdings of cases like *Camara* and *See.* Although *Wyman* is occasionally cited (particularly in the lower federal courts), it appears to be a case without significant progeny. The general tendency to expand the concept of "administrative search" has continued since 1971, and has clearly and unequivocally reached the nation's schools. In 1985, in *New Jersey v. T.L.O.,*[216] a case involving the non-consensual search of a high school stu-

211. *Id.* at 325.
212. *Id.*
213. *Id.* at 317.
214. *Id.* at 318.
215. The existence of a search does not mean that a court will necessarily deem it unreasonable. The *Wyman* court indicated that *had* a search occurred, it would have been regarded as "reasonable." *See infra* notes 220-81 and accompanying text.
216. 469 U.S. 325.

dent's purse by the school's principal, the Supreme Court held unequivocally that the "[Fourth] Amendment's prohibitions on unreasonable searches and seizures applies to searches conducted by public school officials."[217] Quoting *Camara* and *Marshall v. Barlow's Inc.*,[218] it implicitly rejected the distinction between criminally-related and other searches that appears to lie at the heart of *Wyman*'s "no search" holding:

> The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. . . . Because the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'[219]

Thus, it would not be safe to assume that because an athlete had refused to be tested, no "search" (in the constitutional sense) had occurred.

It would be even less safe, given the broad scope of the protection afforded by the amendment already noted, to assume that an athlete who *has* submitted to testing has not in fact been "searched." Yet despite the common characterization of urinalysis as the sort of intrusion that brings the amendment into play, it is at least possible to imagine circumstances under which drug-testing could be conducted that support that argument. For instance, most college athletes currently are required to submit to routine physical exams for reasons unrelated to drug use, and are sometimes required to submit urine samples obtained in the privacy of a doctor's office. Under such circumstances, the process itself is not particularly intrusive, and the requirement that the athlete cooperate (assuming that the results of the physical are kept confidential) arguably does not infringe on any "justifiable expectation of privacy." It is conceivable that a drug-testing program conducted in this manner would raise no substantial fourth amendment questions—although it is clear, as is indicated below, that such a program would still be required to survive *direct* "due process" and "equal protection" scrutiny.

iii. The "Reasonableness" Exception

In certain situations which clearly involve a search, the courts will nevertheless find that the fourth amendment has not been violated *because* it protects individuals *only* from "*unreasonable* searches and seizures." "Rea-

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217. *Id.*
218. 436 U.S. 307, 312 (1978).
219. *T.L.O.*, 469 U.S. at 332.

sonableness," as it has been analyzed by the Supreme Court, involves two related issues, which are frequently conjoined in a single case. The first issue goes to the justification that the institution may have for conducting the search at all; the second, which implicates the "warrant" language of the amendment itself, goes to determining whether such justifications (assuming they are present in a particular case) permit waiving the general warrant requirement.

An extensive jurisprudence has evolved establishing the parameters of "reasonable" searches. It is always possible that new doctrines will evolve to bring mandatory drug-testing of the sort at issue here within the range of that jurisprudence. However, it is impossible to predict with any certainty whether courts called upon today to evaluate the warrantless, non-consensual urinalysis (or blood testing) of college athletes in the manner established by the NCAA and Indiana University programs would, if they regarded the urinalysis as a "search," find such a search either "reasonable," or immune from the fourth amendment's warrant requirement.

Analytically, the starting point for a counselor's inquiry is the conclusion reached by the Supreme Court in *Camara*[220] and *See*[221] that "administrative searches" are, in fact, subject to the warrant requirements of the fourth amendment.[222] In characterizing these searches as "administrative," the Court noted that the degree of "probable cause" required by the fourth amendment to obtain a warrant need not be as extensive as those obtained in, for example, police searches undertaken in the course of a criminal investigation.[223] The decisions in *Camara* and *See* suggest that what is "reasonable" depends heavily on a context that includes the purpose of the search, the circumstances under which it will be conducted, and the use to which the search results will be put. *Wyman v. James*[224] is again favorable to institutions that choose to test. In that case, the Supreme Court held that even had the requirement that a welfare recipient submit to "home visits" or lose her benefits been construed as a "search" within the meaning of the fourth amendment, such a search, within the "specific context" of that case, would still have been deemed reasonable.[225] Its implicit conclusion was that in the context of the administration of a welfare program, there was no need for the state or city to have *any particularized* reason to initiate the limited search of any residence required by the mandatory "home visits." It reached that conclusion by noting eleven factors which persuaded it generally that the intrusion into Mrs. James's personal security was minimal, and thus not

220. 387 U.S. 523.
221. 87 U.S. 541.
222. *Camara,* 387 U.S. at 534; *See,* 387 U.S. at 545-46.
223. *See,* 387 U.S. at 545.
224. 400 U.S. 309.
225. *Id.* at 319.

"unreasonable." Included in the list were several considerations that could be urged on behalf of some, but not all, drug-testing plans. Thus, the fact that the search was not to be undertaken by "police or uniformed authorit[ies],"[226] was not made pursuant to "a criminal investigation [and] does not equate with a criminal investigation,"[227] was undertaken pursuant to a program that "affords 'a personal, rehabilitative orientation,' "[228] the fact that the *Wyman* program emphasized privacy,[229] and that the information it sought could not readily be obtained except through the search,[230] were all cited by the Supreme Court as important indicators that a compulsory home visit was not "unreasonable."

On the other hand, several factors considered important by the *Wyman* Court are not likely to be accorded much weight in the collegiate drug-testing context. First, in *Wyman*, "[t]he focus is on the *child* and further, it is on the child who is *dependent*."[231] Second, there is no evidence that educational institutions policing the drug use of college age athletes are fulfilling the same sort of "public trust" the Court deemed welfare agencies to be fulfilling when they sought information as to unauthorized receipt of funds.[232] (However, those administering drug tests could assert another sort of "public trust," though, perhaps involving the broad responsibilities of colleges to society, or the more particular responsibilities of athletic administrators to athletes and fans, which some courts might find convincing.) Third, the inferences from statutes and state regulations drawn by the court in *Wyman* in support of its argument that the search had a "rehabilitative" purpose,[233] and its emphasis on the differences between "home visits" and criminal investigations, are not clearly supported when drug-testing programs, like those at issue here, seek information about "street drugs." Of course, the argument can be made that upon discovery of their use, the "educational" or "rehabilitative" components of such programs will kick in. Yet it seems clear that inquiry into such use is linked to strong social disapprobation and a desire to "punish" those who use "illegal" drugs, and that testing will make that punishment much more likely. Thus, the evidence that testing produces often will establish the necessary factual predicate for criminal prosecution. Finally, according to the *Wyman* court, "[t]he means employed by the New York [welfare] agency are important. Mrs. James received written notice several days in advance of the intended home visit.

226. *Id.* at 322.
227. *Id.* at 323.
228. *Id.* at 319-20.
229. *Id.* at 321.
230. *Id.* at 322.
231. *Id.* at 318.
232. *Id.* at 318-19.
233. *Id.* 319-20.

The date was specified."[234] While similar notice is at least generally given by the NCAA for its pre-Bowl and pre-championship testing, randomness and unannounced testing are clearly contemplated by many collegiate drug-testing plans, including the one adopted by Indiana University.

Thus, despite the fact that *Wyman* posited the reasonableness of some *general,* non-consensual, warrantless searches, its findings do not control in the collegiate drug-testing context, although the case is clearly an important one from the perspective of the proponents of testing.

Like *Wyman, Camara* and *See* permitted *general* (or "area") searches, since the purpose of the inspection programs being challenged could not be served by requiring that inspectors show *in advance* that code violations had probably occurred, and since "*the inspections are neither personal in nature* nor aimed at the discovery of evidence of a crime."[235] Generally, though, when a search is "personal in nature" (as urinalysis for the determination of drug use clearly is), courts will demand a showing of some "individualized suspicion" of misconduct before determinining that it is "reasonable" to initiate a search in an administrative or regulatory context.[236] Thus, the *Wyman* exception to this requirement is unusually favorable to the government. Although other exceptions exist, they ordinarily involve *institutions* with special "security" needs (such as prisons[237] and the U.S. military forces[238]), and *situations* which seem to demand general searches because of justifiable concerns about possible actions which could endanger lives (such as the situations that obtain when air passengers[239] and visitors to "sensitive" government facilities[240] are subjected to compulsory magnetometer or "profile" screening, or power plant employees are tested for recent drug use).[241] "Individualized suspicion," which is less demanding than "probable cause," has been part of search-and-seizure law since 1968, when the Supreme Court decided in *Terry v. Ohio*[242] that police officers have the authority to stop and frisk those they "[have] reason to believe . . . [are] armed and dangerous . . . *regardless of whether* . . . [*they have*] *probable cause to arrest*

234. *Id.* at 320-21.

235. *Camara,* 387 U.S. at 530-31.

236. *See Martinez-Fuerte,* 428 U.S. at 560-61 ("[S]ome quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure [although] the fourth amendment imposes no irreducible requirement of such suspicion.").

237. *See* Bell v. Wolfish, 441 U.S. 520, 546-47 (1979) (prisons are dangerous places where heightened security concerns prevail). McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) ("[We] hold that urinalysis may be performed uniformly or by systematic random selection of those employees who have regular contact on a day-by-day basis in medium or maximum security prisons.").

238. Williams v. Secretary of Navy, 787 F.2d 552 (Fed. Cir. 1986).

239. United States v. Pulido-Baquerizo, 800 F.2d. 899 (9th Cir. 1986); United States v. Lopez-Pages, 767 F.2d. 776 (11th Cir. 1985).

240. McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978).

241. Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

242. 392 U.S. 1.

the individual for a crime."[243] Recently, the Supreme Court, in determining that the fourth amendment did not bar high school officials from conducting certain searches for drugs carried on the person, stated, "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting . . . that the student has violated or is violating . . . the law or the rules of the school."[244] Explaining this holding, the Court, in a gnomic footnote, stated:

> Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where 'other safeguards' are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field. . . .' " Because the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules, we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.[245]

The possibility thus exists that a court, looking at the NCAA and I.U. programs and laying particular emphasis on their randomness and the "confidentiality" of the test results they generate, would conclude that they impinge only on "minimal" privacy interests and invite no undue exercise of administrative discretion. Thus, if it also concluded that the purpose of such testing fulfilled an important governmental objective (such as the discouragement of the use of dangerous drugs by athletes) *and* concluded that that objective could not be met except by mandatory testing, it might then conclude that such testing was "reasonable."

Conclusions similar to these were apparently reached by the Third Circuit, which recently affirmed a district court decision upholding the legality of regulations promulgated by the New Jersey Racing Commission requiring jockeys and other race track personnel to undergo periodic, mandatory urinalysis and breathalyzer tests to determine if they were using alcohol or other prohibited substances.[246] In that case, the court explicitly rejected the petitioners' contention that "individualized suspicion" was required before testing could be mandated.[247] Focusing on the "intensely regulated" industry of horse racing in New Jersey, the court identified a strong public interest in "the protection of the wagering public, and the protection of the state's fisc by virtue of the wagering public's confidence in the integrity of the industry."[248] The court apparently assumed (but never explicitly stated) that

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243. *Id.* at 20-27 (emphasis added).
244. *T.L.O.*, 469 U.S. at 336.
245. 469 U.S. at 336 n.8 (citations omitted).
246. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986).
247. *Id.* at 1143.
248. *Id.* at 1142.

these protective goals could only be achieved by a general, mandatory testing program.

Although a number of other cases have permitted mandatory urinalysis, the requisite "individualized suspicion" has generally been present. (Thus, for example, the testing of bus drivers involved in accidents has been held to be constitutional.)[249] Absent some factor giving rise to that suspicion, however, the recent cases—which have generally arisen in an employment context—have almost all prohibited—or implied that they would have prohibited—mandatory testing. Representative of this tendency have been cases involving policemen and firemen,[250] special security personnel,[251] civilian employees of the federal government holding "critical" positions in the Department of Defense and the U.S. Customs Service,[252] teachers,[253] and school bus attendants.[254] Thus, it is probably only a slight overstatement of the law to conclude, as one district court did recently, that:

> a judicial trend is finally beginning to emerge, and with each new decision on the subject of periodic drug testing it becomes more apparent that the testing of civilians by urinalysis, absent some form of individualized suspicion, is in almost all cases offensive to the mandates of the fourth amendment.[255]

The counselor attempting to digest the law on "reasonable" searches would thus confront the difficulty that while there are cases at least inferentially supporting the mandatory general testing of athletes, "individualized suspicion" of drug use might well be necessary before such a program could be initiated. Under the NCAA and I.U. plans, such suspicion may well be reasonable for those who have admitted to prior drug use, or have tested "positive" on an earlier valid test. But no such suspicion reasonably can be said to attach to whole athletic teams, or to everyone associated with the athletic department or program of a college or university.

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249. Division 241, Amalgamated Transit Union v. Suscy, 405 F. Supp. 750 (N.D. Ill. 1975), *aff'd,* 538 F.2d 1264 (7th Cir. 1975), *cert. denied,* 429 U.S. 1029 (1976); Sanders v. Washington Metropolitan Area Transit Auth., No. 84-3072, slip op. (D.D.C. Jan. 9, 1985).

250. *See e.g.,* Penny v. Kennedy, 648 F. Supp. 815 (E.D. Tenn. 1986) (both cases prohibit testing); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); *see also Turner,* 500 A.2d 1005 (D.C. 1985) (finding requisite suspicion and permitting testing).

251. Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (testing prohibited).

252. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (testing was prohibited in both cases); National Treasury Employees Union v. Raab, 649 F. Supp. 380 (E.D. La. 1986).

253. *Patchogue-Medford Congress of Teachers,* 119 A.D.2d 35, 505 N.Y.S.2d 888.

254. *Jones,* 628 F. Supp. at 1508-09 ("reasonable suspicion" required before bus *attendants* can be tested; may not be required for drivers).

255. *American Fed'n of Gov't Employees,* 651 F. Supp. 726 (S.D. Ga. 1986) (court discounted *Shoemaker v. Handel,* 795 F.2d 1136, characterizing it—incorrectly—as the *only* decision not requiring individualized suspicion of civilians subjected to testing).

However, even if general testing were to be regarded as "reasonable," the warrant problem would still demand resolution. For even in cases such as *Camara* and *See,* which permitted "area searches" without "probable cause" (and indeed, without "individualized suspicion"), warrants were still required before those searches could be conducted. The range of exceptions to the general warrant requirement of the fourth amendment remains uncertain. Clearly, an exception will be found if the governmental intrusion is part of the ordinary oversight of a "pervasively regulated industry."[256] Intercollegiate athletics, which traditionally have been subject to few *governmental* controls, do not clearly fit within the definition of such an "industry," although a case perhaps could be made that they should.[257] Nor do two other common exceptions to the warrant rule appear to be applicable to college athletes, namely, one which permits warrantless searches because certain individuals have very limited "reasonable expectations of privacy," and another, which permits warrrantless searches because of a special risk that the public faces.

In the "special risk" situation, "exigent circumstances" must be demonstrated. Thus, case law supports the proposition that searches may be conducted without a warrant in cases of "hot pursuit" of known or suspected criminals,[258] or when severe danger to the public may ensue because the person to be searched may be carrying explosives or weapons.[259] However, not every activity that may pose significant threats to the public-at-large *if discovered* will permit warrantless searches. Thus, in a 1979 case involving "traffic and vehicle regulations" that would have permitted a state to randomly stop traffic to check for drivers' licenses and registration, the Supreme Court stated, "we are aware of the danger to life and property posed by vehicular traffic,"[260] and acknowledged that, "the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor

256. *See, e.g.,* Donovan v. Dewey, 452 U.S. 594, 602-05 (1981) (coal mines); *Biswell,* 406 U.S. at 316-17 (gun selling); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (liquor industry); *Shoemaker,* 795 F.2d at 1142-43 (horse racing industry).

257. Most of the "regulation" of intercollegiate athletics is carried out by the NCAA, which, as the analysis above shows, will probably *not* be regarded as a "state actor." "Private regulation," however "pervasive"—and NCAA rules do govern much of a student athlete's life—probably cannot assume constitutional significance in interpreting the reach of the fourth amendment's requirements. Yet the significance of state *adoption* of private rules may well be to make those rules indistinguishable from those promulgated by the state itself.

For the view that intercollegiate athletics, as presently conducted by NCAA member schools, are at least a "business," see NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

258. *See* United States v. Rabinowitz, 339 U.S. 56, 64-66 (1950).

259. Thus, the following cases permit warrantless searches when there is "reasonable suspicion" that an individual possesses dangerous weapons: U.S. v. Hairston, 439 F. Supp. 515 (N.D. Ill. 1977); Stewart v. State, 681 S.W.2d 774 (Tex. Crim. App. 1984); State v. Rogers, 585 S.W.2d 498 (Mo. App. 1979).

260. Delaware v. Prouse, 440 U.S. 648, 658 (1979).

vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed."[261]

Nevertheless, the Court refused to permit the random stops, stating:

> The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that answer must be answered in the negative. Given the alternative mechanisms available, both in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.[262]

In other words, even safety concerns—which are perhaps the primary stated justification for mandatory drug-testing—must be measured against the "intrusiveness" of the device used to satisfy them, and must be promoted by methods that minimize intrusion while maximizing the desired effect. However, in the absence of significant danger, there appears to be no basis for the warrantless intrusion at all. Thus, the testing institution, to take advantage of the "special risk" exception, must first be able to demonstrate that the drugs for which it is testing do in fact pose real risks to the athletes that use them (or to other athletes coming in contact with those athletes), and *then* must be able to show that such testing is exceptionally non-intrusive and productive. Substantial risks may in fact be provable for some substances commonly used, such as anabolic steroids.[263] However, for other substances on the prohibited lists, such as marijuana, there appears to be no firm medical evidence that the risks are substantial.[264] There can be no genuine question that the testing protocol, with its initial use of an EMIT test, and its gas chromotagography follow-up, is likely to be quite "productive" in identifying drug users. That productivity, however, is likely to identify some who have not used drugs recently, have not used them during practice,

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261. *Id.*

262. *Id.* at 659.

263. Strong evidence exists that their use contributes to heart disease and liver cancer. *See M.D.'s Warned of Steroids, Liver Cancer Link,* Amer. Med. News, Mar. 15, 1985, at 17, col. 1; Hecht, *Anabolic Steroids: Pumping Trouble,* 18 FDA Consumer, Sept., 1984, at 12, col. 4; Franklin, *Steroids Heft Heart Risks in Iron Pumpers,* Science News, Jul. 21, 1984, at 38, col. 1.

264. As Dusek and Girdano note, "[r]esearch concerning the effects of marijuana has been controversial since the early 1960's." D. DUSEK & D. GIRDANO, DRUGS: A FACTUAL ACCOUNT 90 (4th ed. 1987). Their chapter on the subject suggests that the "possible effect" of significant use on the psychological development of "child and adolescent users" is a matter of "grave concern," but in listing various physiological effects associated with use, identifies all as transient, relatively mild, or inconclusively proved. *Id.* at 93-94. A much harder line is taken by H. JONES & P. LOVINGER, *supra* note 8, who devotes whole chapters to marijuana's alleged effects on "The Lungs and the Respiratory System," "Sex, Reproduction, and Offspring," "The Heart and the Circulatory System," "Immunity and Resistance," and "Cells and Chromosomes."

competition, the academic year, or the athletic season, and pose no present danger to themselves or others.[265] And, as has already been noted, some, but by no means all, courts consider urinalysis exceptionally intrusive.[266]

In the absence of risk or other exigent circumstances, the Court has sometimes found that an individual's reasonable expectation of privacy is so low in particular situations that official intrusion into the "zone of privacy" raises only limited constitutional questions. Prisoners[267] and individuals riding in cars stopped by the police because of patent traffic violations[268] have thus been found to have very limited privacy rights. Under a similar theory, some courts have held that children in elementary schools and high schools have a limited expectation of privacy in a school setting.[269]

Relying in part on early high school cases, a district court in Alabama in 1968, asked to rule on a non-consensual search for marijuana in a college student's dormitory room, asserted:

> The college does not stand, strictly speaking, *in loco parentis* to its students, nor is their relationship purely contractual in the traditional sense. The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student. A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a "waiver" of that right as a condition precedent to admission. The college, on the other hand, has an "affirmative obligation" to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student "waives" his right to Fourth Amendment protection or on whether he has "contracted" it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. In other words, if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of student.[270]

That conclusion is not supported generally in more recent cases. In another dormitory-search-for-drugs case, decided in 1975, another federal district

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265. This conclusion follows from the scientific evidence that marijuana by-products may remain in the body for weeks or months after use. *See supra* note 8.

266. *See supra* note 208.

267. *See, e.g.,* Hudson v. Palmer, 468 U.S. 517 (1984).

268. *See, e.g.,* Colorado v. Bannister, 449 U.S. 1 (1980); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Robinson, 533 F.2d 578 (D.C. Cir. 1976).

269. On the privacy right of elementary school students, see, e.g. Bilbrey v. Brown, 481 F. Supp. 26 (D.C. Or. 1979). *But see T.L.O.,* 469 U.S. at 331 (fourth amendment protects school children against "unreasonable searches and seizures" by "public school officials").

270. Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 729 (M.D. Ala. 1968).

court confronted a situation in which a college, in its housing contract and its student handbook, announced a broad policy permitting the search of student rooms whenever, "[c]ollege officials have reasonable cause to believe that students are continuing to violate federal, state or local laws or college regulations."[271] After pursuing a search without consent, the college found marijuana, and two roommates Smith and Smyth, the petitioners, were suspended from college for one term. The Court, in granting injunctive relief, reached the following conclusions, all of which are relevant to the situation at issue here. First, citing *Tinker v. Des Moines School District*[272] and *Goss v. Lopez*,[273] it noted that "[s]tudents have constitutional rights."[274] Second, it noted that such rights include those guaranteed by the fourth amendment, and indicated that in determining what constitutes "a reasonable expectation of freedom from governmental intrusion,"[275] the maturity of college students is an issue:

> Smith was an adult at the time of the search in question, and thus was in general entitled to the same rights of privacy as any other adult in our society. [College] students are in a different position from most elementary and secondary school students who are minor and are presumptively subject to a greater degree of supervision.[276]

Third, when searches are followed by harsh disciplinary measures directed at those incriminated by the search, then the fact that it is a college which imposes the discipline, rather than a law enforcement agency, will not necessarily immunize the search:

> While the court will not characterize the charge, conviction, and one-term suspension of Smith as a formal "criminal proceeding," the College proceedings certainly performed all the functions of a criminal action. The object of a college disciplinary proceding relating to the possession of marijuana, like a criminal proceeding, is to penalize for the commission of an offense against the law. To the extent suspension can be said to teach the student that he should not violate the rules, any criminal sanction accomplishes the same educational objective.[277]

Finally, the special nature of any investigation into the possession of illegal drugs or the use of such drugs, in the case of many of the testing programs currently being promulgated or considered, raises special fourth amendment concerns. As the *Smyth* court meticulously illustrated with specific references

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271. Smyth v. Lubbers, 398 F. Supp. 777, 782 (W.D. Mich. 1975).
272. 398 U.S. 503 (1969).
273. 419 U.S. 565.
274. *Smyth,* 398 F. Supp. at 785.
275. *Id.* (quoting Mancusi v. DeForte, 392 U.S. 364, 368 (1968)).
276. *Id.* at 787.
277. *Id.* (citation omitted).

to Michigan law and Supreme Court cases involving the scope of grand jury investigations[278] and the admissibility of evidence,[279]

> the College's resort to its own internal proceedings will not insulate either the College from the intrusion of civil authorities into its affairs or Smith from the formal institution of criminal proceedings against him. The matter is entirely outside the control of the College, and the search and seizure in question puts Smith in severe jeopardy.[280]

All of these factors undercut the notion that college students, as a class—or college athletes—have limited expectations of privacy or are unprotected by the Constitution. College athletes are generally of draft and voting age. Their ordinary behavior does not raise the same necessity for constant supervision cited by the Supreme Court in *New Jersey v. T.L.O.*, which based its approval of warrantless searches on the special problems of those supervising adolescent and pre-adolescent children:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. . . . Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires a close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. . . . The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the swift and informal disciplinary procedures needed in schools.[281]

The risk of criminal prosecution is also greater for college athletes subjected to testing than it is for most grade- and high-school students subjected to "informal" disciplinary procedures. The jeopardy of those whose urine tests positive under the NCAA and IU plans is probably more limited than it would be if the testing focused primarily or exclusively on presence in the urine sample of illegal substances. Yet "street drugs" are tested for under both plans, and it appears impossible to totally exclude civil officials from access to test results, which for the reasons already noted, will sometimes have the effect of subjecting athletes testing positive to criminal penalties.

For all of these reasons, even if a university or athletic association believes that it might be "reasonable" to require athletes to submit to mandatory urinalysis, it cannot safely presume that it can safely do so without first obtaining either the athlete's "valid consent," or some sort of administrative warrant. No provision, however, is made in either the NCAA or IU plan

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278. *See* United States v. Calandra, 414 U.S. 338 (1974).

279. *See* Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).

280. *Smyth*, 398 F. Supp. at 787.

281. 469 U.S at 334-35.

for obtaining such a warrant. Thus, a counselor will be forced to take a hard look at "consent" before putting his *imprimatur* on the testing programs being considered here.

iv. "Consent" and the Doctrine of "Unconstitutional Conditions"

A foreseeable consequence of any drug-testing program is that an athlete who submits to testing, is found to have used some prohibited substance, and is disciplined will claim either that he (or she) never consented to the test at all, that the consent that was given was "involuntary" and in some way "coerced," or that such consent was not "informed," since the full consequences of submitting to testing were not understood or appreciated at the time consent was given. Alternatively, an athlete subject to such a program may refuse to be tested at all, and may fight any attempt to sanction his (or her) refusal on the grounds that the automatic denial of a benefit (the opportunity to compete) entailed by that refusal was unconstitutionally coercive. The counselor designing a testing program that resembles those adopted by the NCAA or Indiana University well might conclude that its "consent" provisions do not violate the fourth amendment. But that conclusion will be, at best, tentative, and will reflect a real concern about the potentially adverse effect of the doctrine of "unconstitutional conditions."

The point of departure is *Schneckloth v. Bustamonte,*[282] decided by the Supreme Court in 1973. In *Schneckloth,* a car was stopped by the police because its lights were not working properly. An officer asked one of the occupants "if he could search the car."[283] Upon receiving an affirmative reply, and help in opening the trunk and glove compartment, the inspecting officer found stolen property, and that evidence was used to convict Bustamonte, another of the car's occupants. Bustamonte appealed his conviction on the grounds that the consent which had been given was not in fact "voluntary" because none of the occupants of the car knew that they had the right to refuse permission for the search. The Ninth Circuit reversed Bustamonte's conviction, but was in turn reversed by the Supreme Court. In its opinion, the Court noted that:

> [t]he requirement of a "knowing" and "intelligent" waiver was articulated in a case involving the validity of a defendant's decision to forgo a right constitutionally guaranteed to protect a fair trial and the reliability of the truth determining process. . . . There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing," and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to

282. 412 U.S. 218 (1973).
283. *Id.* at 220.

> be extended to the constitutional guarantee against unreasonable searches and seizures.[284]

Despite its conclusion that consent to a search need not be "knowing" and "intelligent" to meet the requirements of the fourth amendment, the Court in *Schneckloth* also asserted that "consent searches [must] be free from any aspect of official coercion."[285] Determining what sort of pressure constitutes unconstitutional "coercion" requires an "analy[sis] of all the circumstances of an individual consent."[286] The *Schneckloth* Court indicated that certain "*police* tactics" are "inherently coercive."[287] Included are such practices as obtaining consent by physical violence[288] and through false assertions that the investigating officer has a warrant.[289] Other sorts of illicit pressure can be exerted through "subtly coercive *police* questions,"[293] and *may be* present if failure to give consent results in the automatic loss of some "fundamental" right.[291] Clearly, however, significant non-violent "persuasion" by the police is permitted.[292]

The coercion implicit in the drug-testing programs being analyzed here inheres in the presumptive "positive" findings—and loss of eligibility—that result automatically if the athlete refuses to be tested. Without a doubt, the prospect of these consequences puts considerable pressure on athletes to submit to testing. Yet as we will see below, even if an institution responds to a refusal in a Draconian manner, denying the athlete all remaining eligibility, and refusing to renew his or her athletic scholarship, that denial will *not* be regarded by the courts as the deprivation of a "fundamental right" or indeed, as the deprivation of any interest afforded constitutional protection under the general rubric of "due process."

Yet it is clear that the affected athlete will be required to choose between two other sorts of deprivation: the deprivation of whatever "privacy" rights the fourth amendment affords, *or* the deprivation of the opportunity to compete (and perhaps, to obtain scholarship renewal). This choice well may lead the athlete to invoke the doctrine of "unconstitutional conditions." The

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284. *Id.* at 236-41 (citing Johnson v. Zerbst, 304 U.S. 458 (1938), United States v. Wade, 388 U.S. 218 (1967), and Miranda v. Arizona, 384 U.S. 486 (1966)).

285. *Schnekcloth,* 412 U.S. at 229.

286. *Id.* at 233.

287. *Id.* at 247 (emphasis added).

288. Brown v. Mississippi, 297 U.S. 278 (1936).

289. Bumper v. North Carolina, 391 U.S. 543 (1968).

290. *Schneckloth,* 412 U.S. at 229 (emphasis added).

291. The airline security-search cases suggest that the "right to travel" can sometimes be abridged if a passenger refuses to be screened. Yet *Smyth,* 398 F. Supp. 777, discussed in some detail above, indicates that college students cannot be deprived of the opportunity to attend college because they will not sign consent forms permitting free access to their dormitory rooms to search for drugs.

292. *See, e.g.,* United States v. Mendenhall, 446 U.S. 544 (1980).

doctrine has roots that extend back into the nineteenth century,[293] and has been a well-established part of constitutional law since 1925, when the Supreme Court, in a case restricting the power of states to place special burdens on non-resident corporations, stated:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all. It is inconceivable that the guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[294]

Subsequent case law has made it clear that the doctrine applies even when the *only* consequence of refusing to relinquish a constitutional *right* is the loss of some *privilege* that would otherwise have been available.[295] (Indeed, as several commentators have noted, the doctrine had its historical roots as a response to the argument that the government was entitled to burden or condition grants that it had no antecedent obligations to make, i.e., "privileges,"[296] and is constitutionally redundant if applied—as courts sometimes have done—"to strike down attempts to condition one constitutional 'right' on the waiver of another constitutional 'right.' "[297]) Thus, a state or ("state actor") will not be able to defeat the doctrine by characterizing its treatment of the student-athlete as the deprivation of a mere "privilege," or by relying on the distinction announced in *Regents of State Colleges v. Roth*,[298] distinguishing between constitutionally-protected "entitlements" and mere "claims," which it determined were unprotected for the purposes of a procedural due process action.

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293. *See* Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1002 (1986); *see also* VanAlstyne, *The Demise of the Right-Privilege Distinction in American Law*, 81 HARV. L. REV. 1439 (1968).

294. Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1925).

295. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 518 (1958) ("The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

296. Westen, *supra* note 293, at 985 ("[T]he doctrine of unconstitutional conditions was originally formulated in response to the problem of conditioned privileges, not the problem of conditioned rights." (citing McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 890 (1980))).

297. *Id.* at 985 ("[W]hile there is no doctrinal substitute in the area of conditioned privileges for the doctrine of unconstitutional conditions, there is a doctrinal alternative in the area of conditioned rights: the doctrine that the state may not force a person to surrender one constitutional right in return for exercising another constitutional right." (citing Simmons v. United States, 390 U.S. 377, 394 (1968))).

298. 408 U.S. 564 (1972).

Nor will the testing institution be able to defeat the doctrine by arguing that it does not apply to violations of the fourth amendment, does not reach the specific issue of mandatory drug-testing, or does not pertain to the regulation of student conduct. As the doctrine customarily has been expressed, it reaches a broad range of constitutionally-protected rights,[299] including the right to be free from "unreasonable" and warrantless searches.[300] At least six recent cases have applied it against federal or state agencies or local units of government which required their *employees* to submit to mandatory urinalysis or face administrative action that threatened their jobs.[301] Although "[a]lmost any state activity can be characterized as a benefit"[302] for the purposes of the doctrine of "unconstitutional conditions," that doctrine has seldom been used in the last decade to afford most of them constitutional protection.[303] Therefore, it is possible that these recent drug-testing cases are something of a historical aberration, reflecting the extensive and especially favorable treatment government employment traditionally has been accorded under the doctrine.[304] Nevertheless, it is clear that there are

299. Westen, *supra* note 293, at 985.

300. *See, e.g.,* Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 112 n.4 (3d Cir. 1987); *Raab,* 649 F. Supp. at 388; Blackburn v. Snow, 771 F.2d 556, 568-69 (1st Cir. 1985).

301. *Weinberger,* 651 F. Supp. at 736 ("It is clear that the Government cannot require the relinquishment of an employee's fourth amendment right as a condition of employment. Thus, if the seizure of the plaintiffs' urine, and the search thereof for evidence is found to be unreasonable, then consent to such a search and seizure cannot be required."); *Raab,* 649 F. Supp. at 387-88 ("The court rejects defendant's contention that Customs workers who are compelled to submit to urinalysis as a precondition to advancement into so-called 'covered positions' have voluntarily waived their constitutional rights. . . . The Court holds that it is unconstitutional for the government to condition public employment on 'consent to an unreasonable search.' "); *Bauman,* 475 So. 2d at 1324-25 ("[T]he city argues [that] by signing the 'Notice,' consent was given to [perform the urinalysis, by the policemen and firefighters]. This argument is without substance for it is abundantly clear that such signatures were procured under threat of disciplinary action. Consent cannot be inferred from an act so manifestly coerced."); *Capua,* 643 F. Supp. at 1517. *Cf.* McDonnell v. Hunter, 612 F. Supp. at 1131 (district court held that "consent form" signed by prison guards did "not constitute a blanket waiver of Fourth Amendment rights" since "[p]ublic employees cannot be bound by unreasonable conditions of employment;" "Advance consent to future *unreasonable* searches is not a reasonable condition of employment." Court of Appeals held that urinalysis for prison guards was reasonable, did not reach question of consent.) (Emphasis added).

302. Note, *Committee to Defend Reproductive Rights v. Myers: Abortion Funding Restrictions as an Unconstitutional Condition,* 70 CALIF. L. REV. 978, 986 (1982) (citing cases applying the doctrine to denials of, or restrictions on, tax exemptions, employment, government contracts, use of state property, and grants of probation).

303. *See* Van Alstyne, *supra* note 293. Note, *Recent Developments: New Life for the Doctrine of Unconstitutional Conditions,* 58 WASH. L. REV. 679, 684-87 (1983) (Since the 1960's, the erosion of the "right"-"privilege" distinction, and the development of the "equal protection" doctrine has led to considerably less judicial reliance on the doctrine of "unconstitutional conditions.").

304. For cases *limiting* the right of government to condition the constitutional rights of employees, see, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Board of Educ., 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593 (1972); Elrod v. Burns,

non-employment contexts involving fourth amendment rights where the doctrine applies,[305] and that college students have sometimes been its beneficiaries. Thus, in *Smyth v. Lubbers,*[306] one of the legal justifications that a state university gave for searching students' rooms for marijuana without first obtaining a warrant[307] and later suspending those students from school was the provision in its dormitory contract that:

> [t]he undersigned, in consideration for the room and board provided by Grand Valley State College, do(es) hereby agree as follows: . . . (2) To abide by the terms and conditions of residence . . . as stated in the current housing handbook, which terms and conditions are specifically made a part thereof [sic]. (3) That residency in Grand Valley State College's residence halls, and this contract, are subject to all rules and regulations of Grandview State College.[308]

The relevant handbook provision stated:

> ROOM ENTRY PROCEDURES. In the interest of maintaining an environment in the College residence halls which provides for the health, safety, and welfare of all residents, it is occasionally necessary for the College to exercise its right of room entry. The situations requiring room entry are as follows: . . .
>
> 2. Student residence halls may be entered by residence hall staff members if any of the following situations exist: . . .
>
> c. College officials have reason to believe that students are continuing to violate federal, state, or local laws or College regulations. . . .[309]

The *Smyth* court stated:

> the College is contending that by signing the contract, Smith waived objections, or consented, to any search conducted in accordance with the College regulation, even if the search otherwise did not comply with the Fourth Amendment. . . . This problem really belongs to the law of unconstitutional conditions. The state cannot condition attendance at

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427 U.S. 347 (1976); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Cons. School Dist., 439 U.S. 410 (1979); Branti v. Finkel, 445 U.S. 507 (1980). *But see* Arnett v. Kennedy, 416 U.S. 134, 151-54 (1974) (Rehnquist, J., concurring) ("appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of the service.' But the very section of the statute which granted him that [right] expressly provided also for the procedure by which 'cause' was to be determined. . . . [We conclude] that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet.").

305. *See, e.g., Blackburn,* 771 F.2d 556 (strip search of prison visitor).

306. 398 F. Supp. 777.

307. It appears some "individualized suspicion" of wrongdoing existed, although the decision does not make that fact clear. *Id.* at 782-83.

308. *Id.* at 782.

309. *Id.*

> Grand Valley State College on a waiver of constitutional rights.[310]

The doctrine of "unconstitutional conditions" thus construed undoubtedly poses a significant problem to any state college that seeks to impose or implement a drug-testing program that depends on "consent" to circumvent fourth amendment problems, but obtains that "consent" by making it a precondition of athletic participation. Given such scope, the doctrine seems to compel the institution's counsel to conclude that the athlete's "consent" to be tested is legally meaningless. For as Peter Westen—perhaps the doctrine's harshest critic—has noted, it has "considerable . . . rhetorical force"[311] prompting

> courts and commentators alike [to] . . . believe, as the doctrine states, that it is *always—or at least presumptively*—unconstitutional to condition a privilege on a person's not doing or receiving something he is constitutionally entitled to do or receive in other settings.[312]

For several reasons, however, counsel well might conclude that the law as it presently stands does not require quite such an automatically negative outcome.

First, there is clearly a distinction between "automatic" and "presumptive" unconstitutionality. In certain areas—most notably those affecting rights of speech and the free exercise of religion protected by the first amendment—the usual judicial response has either been to declare those rights so absolute that no condition could, as a matter of principle, be tolerated,[313] or to find such conditions tolerable only if they serve some "compelling state interest" and are carefully tailored to promote that interest using the least restrictive of any available alternatives.[314] In the latter instance, unconstitutionality is "presumptive" rather than absolute; however, the presumption is so strong that it will survive almost any representation of overriding state interest.[315] Given the rather general arguments for health, safety, institutional reputation, and preservation of public morality that have been used to support the mandatory general testing of college athletes, it is certain that such testing could not survive the "strict scrutiny" that the "compelling state interest" standard demands.

However, if we assume that courts will always "presume" unconstitutionality (which, as we will see, may be an unwarranted conclusion), we need not assume that presumption will always be a strong one. When the

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310. *Id.* at 788 (citing Robinson v. Board of Regents of E. Ky. Univ., 475 F.2d 707 (6th Cir. 1973)).

311. Westen, *supra* note 293, at 1008.

312. *Id.* at 996 (emphasis added).

313. *See, e.g., Keyishian,* 385 U.S. 589.

314. Westen, *supra* note 293, at 988-99.

315. *But see Pickering,* 391 U.S. 563 (right of teachers to create disruption by publicly criticizing superiors is not unlimited).

courts have considered conditions on constitutional protections other than those afforded by the first amendment, they have not always employed "strict scrutiny." Instead, their approach has sometimes been to "balance" in an apparently even-handed manner the benefits which would accrue to the state from conditioning the right against the detriments that the person subject to the condition would suffer. Westen has argued that such an approach is the appropriate one when the "right" at issue is not regarded by the courts (or perhaps, by legal philosophers) as a settled and absolute "entitlement,"[316] but instead is treated as a "constitutionally protected interest."[317] He has suggested that the sort of "privacy" interests implicated by the fourth amendment fit within the latter category. Thus, he differentiates them from first amendment interests, which are always granted "categorical weight," so that the only issue is whether, in "look[ing] solely to the state-interest side of the balance," the "state's interest in conditioning the privilege on the waiver . . . is 'compelling.' "[318] In fourth amendment cases, Westen's argument goes, "privacy" interests are inherently situational, and are granted conditional rather than categorical weight.[319] Therefore, "ad hoc" balancing not only *has* sometimes been used, but the courts have acted *"correctly"* when they have chosen to employ this method, rather than announcing categorically that the doctrine of "unconstitutional conditions" applies in some absolute sense.[320]

Westen illustrates "ad hoc" balancing with a urinalysis hypothetical. In that hypothetical, a state conditions parole from prison (in traditional terms, a "privilege" rather than a "right") for "prisoners convicted of violent crimes committed under the influence of drug abuse" on their promise to abstain from using certain drugs *and* to "submit to a weekly urinalysis to

316. Westen, *supra* note 293, at 997-98.(" 'Rights' in the sense of 'entitlements' are 'absolute'—absolute because A's interests in doing or receiving Y in setting Z have already been assessed and found to override the particular interests the state may have in preventing him from doing or receiving Y in setting Z.").

317. Westen, *supra* note 293, at 1002-03. *See especially* 1003 ("When we say that rights are not 'absolute' because they can be 'outweighed' or 'overridden,' or that rights 'persist' even when competing interests do not justify their exercise, or that rights have to be 'weighed' or 'balanced' against competing interests, we refer to claims that always carry some weight even though the weight they carry may be less than an entitlement. In short, when we speak of rights in these cases, we mean not constitutional entitlements, but constitutionally supported interests.").

318. *Id.* at 988-89.

319. In support of this argument, Westen cites a number of cases, including Tennessee v. Garner, 105 S. Ct. 1694, 1699 (1985) ("To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' "), and *Camara,* 387 U.S. at 536-37 ("[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."). Westen, *supra* note 293, at 990 n.23.

320. *Id.* at 989, 993.

determine whether they are under the influence of drugs."[321] His analysis suggests that to determine the constitutionality of the mandatory testing, a court first should weigh the interests of the state in maintaining a parole system *and* in conditioning parole on testing; then should weigh the prisoners' interest in being paroled *and* in having their privacy respected; and should make its ultimate determination on the basis of which set of interests is the heavier.

Not surprisingly, perhaps, given the record of those to be released, the cost of maintaining prisons, and Westen's conclusion that, "compulsory urinalysis is less intrusive on [prisoner] A's privacy than unannounced searches of his person or his papers because [in the hypothetical] the analysis is scheduled at his convenience and conducted painlessly and without risk to or a touching of his person,"[322] he concludes that such a non-consensual search would not (or should not) be constitutionally barred. Would such a conclusion follow, though, if the urinalysis at issue was the sort contemplated by Indiana University or the NCAA? Clearly, in the collegiate setting, the level of intrusiveness would be approximately the same, or only slightly greater; thus, the basic "privacy" interest of athletes and prisoners would be similar. No obvious way appears to exist of comparing the interest in maintaining a drug-free athletic environment with the desire of prison officials to keep their costs down. However, the parole board's interest in using targeted testing to insure that those convicted of drug-related crimes are not "using" again is much stronger than either IU's or the NCAA's interest in insuring that athletes generally do not use any of a broad list of prohibited substances. (Note, however, that the differential may vary, depending on what substance is being tested for, and what the health risks or adverse effects on competition associated with that substance are.) On the other hand, the prisoner clearly has a much greater interest in the root "liberty" interest of physical freedom than any athlete—including one with dreams of a professional career—has in being able to compete.

Comparing the prisoner's situation with the situation of the college athlete is therefore a guessing game—as is any comparison that a counselor makes between the facts in front of him and the facts-in-books that underpin a legal rule arguably "governing" the matter he is concerned about. Thus, it is clear that courts have, in fact, permitted states to condition the parole of prisoners on periodic, mandatory testing.[323] Intuitively, it seems that the state has a better argument for conditioning parole on consent to testing than public universities or athletic associations have for conditioning athletic competition on such testing. But even if their argument is *less* compelling, it still might be compelling enough.

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321. *Id.* at 990.
322. *Id.* at 992-93.
323. *Cf.* Owens v. Kelley, 681 F.2d 362 (11th Cir. 1982).

To arrive at a provisional answer, the counselor must look to straws in the wind. Several command his immediate attention. One is the always helpful (from an institutional counselor's point of view) decision in *Wyman v. James*.[324] In *Wyman,* the Supreme Court concluded, in its first (and apparently dispositive) holding, that fourth amendment considerations would have arisen only *after* an actual "home visitation." Since Mrs. James had not permitted welfare workers to enter her apartment (or "consented" to their entry), no constitutional issue arose.[325] As Justice Douglas noted in his dissent, the necessary and first implication of this line of argument is to read the doctrine of "unconstitutional conditions" out of fourth amendment jurisprudence:

> [w]hatever the semantics, the central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution. But for the assertion of her Constitutional right [to deny access to her home], Barbara James in this case would have received the welfare benefit.[326]

Such a result is not, of course, consistent with the other authorities on the doctrine that have been brought to the counselor's attention. Since they are numerous, he has to discount the *Wyman* decision.

But he need not ignore it. For buried in the case are two other principles which are probably closer to the mainstream of current constitutional law. The first of these principles is that "interest balancing" has become the norm for constitutional interpretation involving asserted "rights" against the state, and that such "ad hoc" balancing tends to look to comparative utilities, rather than "primary" or (quasi-) "absolute rights" that must be regarded as unconditional, or conditional only if a "compelling state interest" is shown. Although not all recent cases conform to that norm, even some involving first amendment claims in the realm of public employment do.[327] Recent fourth amendment cases have, *as a general matter,* not only employed a balancing test, but have applied it in a manner that gives unprecedented weight to the asserted governmental interest. For example, in two cases involving the application of the "exclusionary rule" for evidence illegally obtained, the Supreme Court has refused to use the rule to bar that evidence in federal tax proceedings[328] and in deportation proceedings.[329] In

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324. 400 U.S. 309.

325. *Id.* 317-18.

326. *Id.* at 327-28 (footnote omitted).

327. *See, e.g.,* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259-64. (Justice Powell, concurring, noted that the Court employed a simple balancing test rather than "strict scrutiny:" "Before today it had been well-established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. The Court, for the first time in a First Amendment case, simply reverses this principle." *Id.* (citations omitted)).

328. United States v. Janis, 428 U.S. 433 (1976).

329. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

the first case, *United States v. Janis,* the Court reached a conclusion that had the effect of overruling the "silver platter," which had formerly mandated the automatic exclusion of such evidence.[330] In the second, *INS v. Lopez-Mendoza,* the Court used a "cost-benefit test" to overturn a well-established rule permitting aliens to suppress illegally-obtained evidence:[331]

> Imprecise as the exercise might be, the Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. . . . In these circumstances we are persuaded that the *Janis* balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS.[332]

Particularly notable in *Lopez-Mendoza* was the failure of the Court to give serious consideration to *either* of the interests of the petitioner that were clearly implicated in the case, namely his broad interest in "privacy" *per se,* which at some level the fourth amendment exists to protect, and his specific interest in avoiding the harsh consequences of deportation.[333]

To the extent that these cases are representative of a deeper judicial current—as I believe they are—it thus appears that "balancing" (particularly where fourth amendment rights are concerned) is an infinitely malleable concept, capable within the "unconstitutional conditions" context of subordinating any underlying "privacy" claim of college athletes to the various state governmental interests that are promoted by drug-testing. Or, as Yale Kamisar has written:

> [h]ow does one "balance" the interests in furthering an important governmental objective "against a constitutional statement that the government may not employ a certain means for the attainment of any of its objectives"? Inasmuch as "privacy" (or "individual liberty") and "efficiency" . . . are *different kinds of interests,* how can they be compared quantitatively unless the judge has "some standard independent of both to which they can be referred"? If the standard is not to be the fourth amendment—which embodies the judgment that securing all citizens "in their persons, houses, papers, and effects against unreasonable searches

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330. 428 U.S. at 461 (Stewart, J., dissenting).

331. 468 U.S. at 1058 ("Prior to [one of the Board of Immigration Appeals decisions in 1979 giving rise to *Lopez-Mendoza*], neither the Board nor any court had held that the exclusionary rule did not apply in civil deportation proceedings. . . . The simple fact is that prior to 1979 the exclusionary rule was available in civil deportation proceedings. . . .") (White, J., dissenting).

332. *Id.* at 1041-50.

333. The *Lopez-Mendoza* Court did focus on another significant interest, that of providing those who are targets of unconstitutional conduct some sort of remedy. But the remedy proposed—suing for declaratory relief—appears to be highly speculative, given the fact that the aliens who would have standing to bring such an action are, by definition, in the midst of deportation proceedings that well might remove them from the jurisdiction of the American courts. *See Id.* at 1045.

> and seizures" *outweighs* society's interests in apprehending [offenders]—then what is it to be?[334]

Yet even if "balancing" has limits that might promote the maintenance of the doctrine in *some settings* to proscribe *some coerced searches,* it is by no means clear that the school or college setting is the one that most courts would choose. Thus, one of the characteristics of the doctrine of "unconstitutional conditions" is that it is conclusory: every time it appears in a majority opinion, the result is foreordained. But it has already been noted that the doctrine has in fact found its way into relatively few majority opinions in the last decade. In some areas (such as constitutional objections to "breathalyzer" tests coerced by "implied consent" laws) where it would appear to afford a natural benefit to petitioners, it has not appeared at all.[335] In the specific area of student rights, *Smyth v. Lubbers* appears to be the only half-way recent instance. If the general invisibility of the doctrine is a large bundle of straw which can help us determine which way the judicial wind is blowing, various judicial pronouncements about the interests of educational institutions in regulating the conduct of their students are individual blades. Among those blades are Justice Rehnquist's concurring opinion in *Healy v. James,*[336] and then his dissenting opinion, joined by Justices Burger and Blackmun, in *Papish v. University of Missouri Curators.*[337] The Court in *Healy upheld* the first amendment right of students to form a political organization on campus which would be accorded the same degree of official recognition as other similar organizations advocating more conservative political viewpoints. Thus, its holding placed limits on the right of a state college to interfere with the constitutionally-protected rights of its student body. Yet Justice Rehnquist found in the majority opinion an implicit acknowledgment that college administrators have special disciplinary powers:

> I find the implication clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. The Court's quotations from *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506 (1969), to the effect that first amendment rights must always be applied "in light of the special characteristics of the . . . environment," and from *Esteban v. Central Missouri State College,* 415 F.2d 1077, 1089 (8th Cir. 1969), to the effect that a college "may expect that its students adhere to generally accepted standards of conduct," emphasize this fact. . . . The

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334. Kamisar, *Does (Did) (Should) the "Exclusionary Rule" Rest on a "Principled Basis" Rather Than on an "Empirical Proposition?,"* 16 CREIGHTON L. REV 565, 646-47 (1983) (footnote omitted).

335. *See, e.g.,* South Dakota v. Neville, 459 U.S. 553, 562 (1983) (no direct state compulsion involved, since petitioner had the initial choice of taking the test, or refusing the test and being made subject to the statutory presumption).

336. 408 U.S. 169 (1972).

337. 410 U.S. 667 (1973).

> government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government on all citizens.[338]

In *Papish,* another first amendment case involving a university's expulsion of a graduate student for the unauthorized distribution of literature containing a number of well-known four-, seven-, eight-, and thirteen-letter vulgarities, Rehnquist made a similar point:

> It simply does not follow that . . . because petitioner could not be criminally prosecuted by the Missouri state courts for the conduct in question, she may not therefore be expelled from the University of Missouri for the same conduct. A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible . . . is quite unacceptable to me and I would suspect would have been equally unacceptable to the Framers of the [Bill of Rights].[339]

Of course, neither of these opinions has the force of controlling law. Yet when read in conjunction with the Supreme Court's opinions in *New Jersey v. T.L.O.,*[340] (which relaxed the fourth amendment "probable cause" requirement in a *high school* setting because of the necessity of promoting institutional discipline) and in *Board of Curators of University of Missouri v. Horowitz,*[341] (which relaxed the fifth amendment's "procedural due process" requirement in a collegiate setting when the grounds for expulsion were *academic* rather than *disciplinary*), they at least suggest to the sensitive counselor that the present Court is not likely to conclude quickly that *no* limitations can be imposed by "state actors" on the constitutionally-protected privacy interests of college athletes.

The second principle buried in *Wyman* relates closely to the emerging judicial preference for "balancing," rather than definitive findings of *per se* unconstitutionality. It is suggested by the Court's perception that the particular deprivation Mrs. James faced was somehow less meaningful—and therefore had less legal significance—than other deprivations the state could have imposed pursuant to a "search." Thus, just as Justice Rehnquist *would have permitted* a state institution to *expel* a student for reasons that he would not permit if the penalty were criminal prosecution, so the *Wyman* Court *did permit* the State of New York to cut off welfare benefits because, among other things,

> The [home] visit is not one by police or uniformed authority. . . . It does not deal with crime or with the actual or suspected perpetrators of

338. *Healey,* 408 U.S. at 201-03 (Rehnquist, J., concurring).
339. *Papish,* 410 U.S. at 676-77 (Rehnquist, J., dissenting).
340. 469 U.S. 325.
341. 435 U.S. 78 (1978).

> crime. The caseworker is not a sleuth but rather, we trust, is a friend to one in need.
>
> The home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding.[342]

The comparative devaluation of Mrs. James' fears is inconsistent with the absolute prohibition implicit in the doctrine of "unconstitutional conditions." It does more, however, than to undercut the idea of "absolute" privacy rights. By tying the constitutional claim to the nature of some deprivation that is independent of (and additional to) the deprivation of privacy *per se,* the *Wyman* Court also forces us to look at the consequences of the denial of privacy. How serious, we are forced to ask, are the negative consequences going to be if an athlete is required to submit to urinalysis, tests positive for drugs, and loses her athletic eligibility and any realistic prospect of scholarship renewal? Surely, it would seem, those consequences (given the confidentiality requirements of the NCAA and IU testing programs) are going to be less damaging to most college athletes than was the loss of the welfare benefits which Mrs. James experienced, given her reliance on those benefits to support herself and her children. That perception will almost certainly be strengthened when, in turning to another set of "due process" issues—those arising *directly* under the fifth and fourteenth amendments—we discover how little value the courts have generally accorded athletic participation and the expectations or hopes it engenders.

3. Claims Brought "Directly" Under the Fourteenth Amendment "Due Process Clause"

For the purposes of the "due process" clause of the fourteenth amendment, certain "liberty" interests—such as the right afforded by the fourth amendment to be free from "unreasonable searches and seizures"—are constitutional "givens," since they are specifically protected by the Bill of Rights, and the "incorporation" doctrine makes them applicable against the states or institutions that are regarded as "state actors". All of the claims the counselor has confronted to this point are predicated on the existence of such "liberty" interests, which derive explicitly or implicitly from the constitutional text.[343] However, other interests that are arguably implicated when college athletes are tested, or are subjected to discipline after being tested, find no textual support in the Constitution.

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342. *Wyman,* 400 U.S. at 322-23.

343. Unlike the right to be free from "unreasonable" warrantless searches, or from the necessity of testifying against oneself in a criminal proceeding, the "right to privacy" is not textually committed, but has been derived from a more general reading of the Bill of Rights and the system of "ordered liberty" it expresses. *See Griswold,* 381 U.S. 479.

Such is likely to be the case when an athlete claims, not that she has been subjected to an illegal search, but that she has been denied an appropriate hearing, or has been penalized on the grounds of evidence produced by unreliable (or at least, insufficiently reliable) testing methods. The basic constitutional challenge to the inadequate hearing or the unreliable testing method used inevitably will be that the *procedures* the testing institution used were unconstitutional, since they were "fundamentally unfair," and therefore (in a general sense), were violative of "due process." "Unfairness" may, in fact, be fairly easy to prove by demonstrating that the hearing the athlete was given was conclusory, that the athlete was not permitted to submit countervailing evidence, or that the testing method employed was statistically suspect. However, the "due process" clause proscribes only those acts of governmental "unfairness" that effect a deprivation "of life, liberty, or property." Therefore, the *threshold* task for the athlete complaining about the hearing she received or other alleged deficiencies in the testing procedure will be to convince a court that the ordeal she was forced to undergo resulted in the deprivation of *something* of constitutional significance. In other words, she will be required to show that lost athletic eligibility, lost playing time, or the athletic scholarship which the institution may have refused to renew constitutes a cognizable "liberty" or "property" interest.

Institutional counsel will find considerable case law to support their argument that none of these things *does* have, except in very unusual circumstances, constitutional significance. Therefore they will not be required to devote much attention to constitutional objections to the actual procedures used by drug-testing institutions.

a. Absent Scholarship Revocation, No "Liberty" or "Property" Interests Are Implicated by the Punitive Provisions of the Drug-Testing Plans

Under the NCAA plan, an athlete who, prior to a football bowl game or NCAA championship meet, registers a second "positive" for marijuana, or a first "positive" for any other prohibited substance, will be banned automatically from that bowl game or meet. Under the IU plan and similar plans adopted by other colleges, athletes competing in any sport who are identified through urinalysis as repeat offenders will face the loss of some or all of their remaining athletic eligibility. In addition, they may face the non-renewal—or perhaps even the revocation—of their athletic scholarships.

"Liberty" and "property," as used in "due process" jurisprudence, are fairly comprehensive terms. "Liberty" includes the right to enter into future contracts.[344] Damage to an individual's reputation can deprive him or her

344. *See Roth,* 408 U.S. 564.

of liberty if the effect of the injury is to deny the possibility of securing a livelihood in a particular line of work. "Property" includes rights under contracts, and those expectations of future economic benefit which are not mere hopes, but actual "entitlements."[345] Suspending a star athlete from a college team could jeopardize his prospects for securing a professional contract. Those prospects might be further damaged if word got out that he was a drug user. A few courts, including a federal court in Minnesota, have concluded that athletes with a good chance of competing professionally have a constitutionally-protected interest in participating on a college team.[346] Yet the great majority have found that the economic benefits of being allowed to participate in intercollegiate sports lie entirely in the future, are highly speculative, and fall far short of being entitlements.[347] In most jurisdictions, the courts would find no constitutional right of participation violated by an NCAA or institutionally-sponsored drug-testing plan.

Only the revocation of a scholarship *during its term* is likely to be regarded as raising genuine constitutional issues. In such a case, the requisite "property" interest may well be found in the "contract" between the college and the university that arises when the college offers an athlete an athletic scholarship with an ascertainable and immediately realizable monetary value in return for that athlete's athletic participation.[348] However, if the university takes a "positive" test result into account, and announces it will not *renew* an existing athletic scholarship, such non-renewal will probably not be regarded as the deprivation of a "property" interest, since NCAA regulations limit the terms of members' commitments to student-athletes to one year, and treat each subsequent year of aid as, in effect, a new grant.[349] For this reason, the expectation of receiving a *renewal* is always a speculative one, and the award for a future year is in no sense a "vested interest."

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345. *Id. See also, Perry,* 408 U.S. 593.

346. *See* Hall v. University of Minn., 530 F. Supp. 104 (D. Minn. 1982); *see also* Duffley v. Interscholastic Athletic Ass'n, 446 A.2d 462 (N.H. 1982) (finding "right of participation" under *state* constitution).

347. *See* Colorado Seminary (University of Denver) v. NCAA, 570 F.2d 320 (10th Cir. 1978); *see also* Albach v. Odle, 531 F.2d 983 (10th Cir. 1976).

348. *Cf.* Taylor v. Wake Forest Univ., 16 N.C. App. 117, 191 S.E.2d 379 (1972) (student, rather than university, violated contractual obligations imposed by terms of athletic scholarship); Begley v. Corporation of Mercer Univ., 367 F. Supp. 908 (E.D. Tenn. 1973) (failure of student to meet grade requirements in scholarship agreement excused university from obligation to award that scholarship, since those requirements were material terms of that agreement). For a criticism of the equation of athletic scholarships with contracts, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 1.06 (1979).

349. NCAA CONST. art. 3, § 4(d) ("Where a student-athlete's ability is taken into account in any degree in awarding unearned financial aid, such aid shall not be awarded in excess of one academic year.").

b. Minimal "Hearing" and "Test Accuracy" Rights

Even if a scholarship is revoked, however, it may still be possible to demonstrate that the athlete was provided with all the process which was due. That minimal amount of "due process" will require that the testing institution afford the athlete the opportunity to be heard, and to challenge the accuracy of the test results. Although "some kind of hearing" is a minimal requirement of procedural "due process," the law does not appear to require that such a hearing be particularly formal or extensive. Almost certainly, little more will be required under the fourteenth amendment than was required in the high school discipline case of *Goss v. Lopez.*[350] In *Goss,* the issue was what minimal hearing rights students facing short-term suspension from school were entitled to. The Supreme Court required "that there be at least an informal give-and-take between student and disciplinarian,"[351] that the student "be given an opportunity to explain his version of the facts at this discussion,"[352] and that "the student first be told what he is accused of doing and what the basis of the accusation is."[353] It did *not* require that additional protections, such as the presence of counsel, the right to produce witnesses for the "defence," or the right to cross-examine antagonistic witnesses, be afforded. However, given the arguably harsher consequences of losing an athletic scholarship, it is not inconceivable that such additional process would be constitutionally required in the instant situation. Thus, the testing institution might have to interpret its testing guidelines expansively to insure that athletes are afforded an adequate hearing before being disciplined.

The problem, of course, is that while a hearing might be expected to produce evidence of mitigating circumstances, ordinarily it will not directly refute the finding of the test procedure itself. Thus, a student might testify that he had never used marijuana, but is unlikely to be able to prove it. In such a case, the institution will be required to weigh a denial against a laboratory result concluding precisely the opposite.

Can such a "scientifically" obtained result be successfully challenged? Two technical avenues will exist in some cases. Thus, if the procedures the institution employs to establish chain-of-custody of the urine sample are not followed strictly, the results of the urinalysis are likely to be thrown out.[354] And if the original result is not "confirmed" according to some procedure

350. 419 U.S. 565.
351. *Id.* at 584.
352. *Id.* at 582.
353. *Id.*
354. *See generally* P. GIANNELLI & E. IMWINKELRIED, *supra* note 8, at § 7-1.

mandated by the testing plan, the results will also be voided.[355] Constitutional challenges are likely to prove more difficult, since 100% reliability of test results clearly is not an absolute requirement of procedural "due process." Instead, the constitutional requirement is that the procedure used be "fair" in its "specific factual context[]."[356] Thus, even a 95% accuracy level *may be* sufficient since, as one court evaluating a drug-testing program observed, "the 95% statistical figure, in the field of science and medicine, is recognized to mean *almost complete certainty*"[357] The better rule, however, appears to be the one promulgated by a Massachusetts trial court,[358] and apparently adopted in another recent U.S. district court decision, *Storms v. Coughlin*.[359] In the Massachusetts case, the court specifically examined the EMIT test, which is not only used as part of the NCAA and IU programs, but apparently is "the urine test commonly used to detect employee drug use,"[360] and certainly seems to be employed widely in a variety of drug-testing contexts. The court said: "No evidence having been introduced that warrants my finding that EMIT has been generally accepted by toxicologists and/or pharmacologists as producing reliable positive results in the absence of independent *confirmation*, I find that it does not produce such a result absent such confirmation."[361] This conclusion is supported by the view of "[l]eading analytical toxicologists . . . that positive . . . EMIT findings be confirmed by other procedures" because "the error rate [for that test] can go up to 25 percent."[362]

However, given the confirmation procedure stipulated by the NCAA, and actually employed under the Indiana program, there is no reason to believe that the testing of college athletes, if done "by the book," will not meet minimal "due process" requirements.

4. The Obligation to Provide "Equal Protection"

The fourteenth amendment states that "[no state] . . . shall deny to any person within its jurisdiction the equal protection of the laws."[363] Identical or similar language is contained in most state constitutions. A student-athlete

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355. Cornish v. Coughlin, 505 N.Y.S.2d 255 (N.Y. App. Div. 1986); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).

356. Hannah v. Larche, 363 U.S. 420, 442 (1960), (*quoted in* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-13 (1978).

357. Jensen v. Lick, 589 F. Supp. 35, 38 (D.N.D. 1984) (emphasis in original).

358. Kane v. Fair, Civ. No. 136229, slip op. (Super. Ct. Mass. Aug. 5, 1983) (*cited in Storms*, 600 F. Supp. at 1221).

359. 600 F. Supp. 1214.

360. Note, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?* 19 LOY. L.A.L. REV. 1451, 1455 (1986).

361. *Kane*, Civ. No. 136229, slip op. at 4 (*quoted in Storms*, 600 F. Supp. at 1221).

362. P. GIANNELLI & IMWINKELRIED, *supra* note 8, at § 23-2(3).

363. U.S. CONST. amend. XIV, § 1, cl. 4.

subjected to drug-testing seeking to successfully assert an "equal protection" claim need not demonstrate the existence of the sort of "liberty" or "property" interest in athletic participation that would be required if asserting a violation of "due process,"[364] although the existence of such an interest (provided it is regarded as "fundamental" by a reviewing court) will affect the standard of review employed, and thus may have a significant effect on the outcome of the student's legal action. Thus, it is possible for anyone who believes that she has been adversely affected by *any* classification embodied in a policy, rule, or statute promulgated by a "state actor" to challenge that classification on constitutional grounds. A demonstration of adverse effect, however, will not be sufficient. Instead, a showing will have to be made, either directly or inferentially, that the consequences of the regulation (or the consequences of enforcing it in a particular way)[365] were intended by those enacting (or enforcing) it to fall with particular severity on those belonging to the petitioner's class.[366] If the requisite intent is demonstrated, a court will review the classification (or its enforcement) to determine whether the "state" is justified in "discriminating" against the members of the class affected by the regulation, rule, practice, or statute being contested.

However, the standard of review employed in fourteenth amendment cases is going to be quite deferential to the state or "state actor" in most circumstances. Except in those instances when a classification infringes upon a "fundamental right" or disadvantages members of minorities who have been granted special protection under the law,[367] it will be upheld upon a simple showing that it rationally promotes some valid public purpose.[368] The "due process" analysis of mandatory drug-testing that the counselor has already made suggests that while a "fundamental" privacy right may be infringed if an athlete is required to submit to testing without giving "valid

364. Unlike the due process clause of the fourteenth amendment, the "equal protection clause" refers to no specific interests which are affected by the legal process, but only to the legal process itself, and to its possible deficiency. Thus, it is possible to have a denial of "equal protection" even when no specific "liberty" or "property" interests are implicated. *See, e.g., Buckton,* 366 F. Supp. 1152. Because athletic participation has not been regarded as a "fundamental right" under the fourteenth amendment, however, the level of scrutiny which courts impose on the classification of athletes is likely to be so deferential that the athlete protesting it will stand virtually no chance of success. *See* Missouri State High School Activities Ass'n v. Barnhorst, 682 F.2d 147 (8th Cir. 1982).

365. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

366. Washington v. Davis, 426 U.S. 229 (1976).

367. Carolene Products v. United States, 304 U.S. 134 (1938) (special protection for "discrete and insular minorities"); *Loving,* 388 U.S. 1 and Korematsu v. United States, 323 U.S. 214 (1944) ("strict scrutiny" in race discrimination cases); Craig v. Boren, 429 U.S. 190 (1976) and Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) ("heightened scrutiny" in gender discrimination cases).

368. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

consent," when such consent is deemed to be present, nothing fundamental is at stake, even if the athlete stands to lose a scholarship or eligibility if found to be a drug-user.[369] A *prospective* denial of a scholarship or eligibility to an athlete who refuses to be tested (or who refuses to consent to being tested), under the theory expressed by the Supreme Court in *Wyman v. James,*[370] also will not constitute an infringement of a "fundamental interest." While it is true that athletes are in some sense a "minority" of any student body, it is clear that they have not been given, nor are ever likely to be given, special constitutional protection as a class. Thus, when an athlete who has "consented" to be tested seeks to challenge the testing and any penalties imposed because of adverse (i.e., "positive") results, or when an athlete who has not been tested seeks to challenge any penalty imposed for refusing to be tested, the result in both cases will almost always be a search for "mere rationality" by the reviewing court. Only in exceptional circumstances will "stricter" scrutiny be employed. One occasion for such "heightened" (or, in some instances, "strict") scrutiny would arise if a testing program singled out athletes for testing on the basis of race, sex, or nationality; subject to the "intent" requirement, another would arise if the testing program, although facially neutral, *in its implementation,* tended to discriminate against members of a particular race, sex, or nationality. Neither the I.U., nor the NCAA program—in common with all the other collegiate testing programs I am familiar with—discriminates overtly on the basis of these factors. Whether any program, in its actual administration, has been, or might be, used to discriminate against members of a specially protected group is a fact-specific question which, to my knowlege, has not yet arisen. Should it arise, the athletes asserting the existence of discrimination in a facially-neutral program would bear a heavy burden of proof.

Assuming "state action" and the absence of factors that would lead to any special scrutiny, how will an "equal protection" suit fare under counselor's rules? Two types of challenges are likely to be raised, one applicable to every mandatory testing program, the other applicable only to those programs adopted by educational institutions. The first type of challenge will focus on the particular drugs being tested for, and will argue that the list is either "underinclusive," or contains items that the testing agency has no business looking for. Even the NCAA doesn't test for *everything:* alcohol, for instance, is not on its list. Alcohol *is* included on the IU list; but its other generic categories arguably do not prohibit everything prohibited by the NCAA. And, of course, neither list prohibits the use of substances such as saccharine or cyclamates, although both have been identified officially with a heightened cancer risk. What if a steroid user objects that the program

369. *See supra* text accompanying notes 344-49.
370. *Wyman,* 400 U.S. 309.

which identifies and penalizes him is constitutionally defective because it does not identify or punish those who drink or use artificial sweeteners? Fourteenth amendment doctrine is clear: when courts are looking for "mere" or "minimal rationality," the fact that a classification does not cover everyone who is in some sense similarly situated will not invalidate that classification, provided that some plausible reason can be offered for "drawing the line" at the point the classifying agency chooses. Or, as the Supreme Court noted in 1976:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. . . . Legislatures may implement their program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.[371]

The challenge, in other words, will fail.

However, a second objection to the list of prohibited substances focuses on "overinclusiveness" rather than "underinclusiveness." In its strongest form, it objects to the imposition of a penalty upon an athlete found to have used a *particular substance* on the ground that the testing institution has insufficient justification to test *for that substance.* Underlying this objection is a premise that the "legitimate interests" an institution must have to support a classification are not unlimited, and are to some extent controlled by the social role or "purpose" of the institution. Testing for some substances arguably might promote that social role or purpose; testing for others would be, in essence, *ultra vires.* Two significant problems attend this line of argument. First, the formal doctrine of *ultra vires* has largely fallen into disuse, although it clearly has more vitality at the state than at the federal level. Second, to the extent that "legitimate interests" (or "legitimate state interests") have been analyzed in "equal protection" cases, the focus has been almost exclusively on practices that under contemporary fourteenth amendment law promote *inherently* impermissible (or at least, "suspect") objectives, such as racial[372] or gender[373] segregation for their own sakes. Nevertheless, there is support for the proposition that athletic associations (at least when acting as the *alter ego* to a State Board of Education) have only *limited* authority to supervise or regulate the activites of student-athletes, particularly if the activities being supervised or regulated occur "out of season" or after the conclusion of the school year, and cannot be tied *directly* enough to the operation of the schools.[374] Further inferential support

371. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).
372. *See Loving,* 388 U.S. 1.
373. *See Mississippi Univ. for Women,* 458 U.S. 718; Orr v. Orr, 440 U.S. 268 (1979).
374. Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 563-64 (Iowa 1972).

for the proposition that the authority to test is limited is contained in cases that, in the course of testing the constitutionality of regulations, have looked specifically at the tasks ordinarily performed by the regulating agency, and the relationship of the contested classification to the performance of those tasks.[375]

However, even if the general authority of an athletic association or a school to regulate is limited, a challenge to the testing of any substance on the NCAA or IU list *other than* one of the banned "street drugs" is not likely to succeed. Thus, for most of the items on both lists of proscribed substances, a rational explanation of how their inclusion will promote the University's or the NCAA's valid purposes will be readily available. For instance, most of the substances listed by the NCAA are tested for because of a documented belief that their use will affect either an athlete's performance, his health, or both, or are likely to give the athlete using it a special competitive edge.[376] Health and safety concerns deriving from the heavy toll of football injuries that occurred when intercollegiate athletics went largely unregulated were the principal reasons why the NCAA was created,[377] and the organization has long promoted the ideal (if not the fact) of rough equality of competition through its promulgation of dozens of generally applicable rules unrelated to drug-testing.[378] The stated purposes of the IU plan have already been discussed.[379] As that discussion should indicate, concerns about harmful physical effects were the principal reason why most of the proscribed substances on the IU list were banned.[380]

Yet the NCAA and many of the state universities which have adopted their own drug-testing plans—including Indiana University—have also chosen

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375. *See* employment cases, *supra* note 301; *cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (purpose of civil service rule, when testing for "fit" between that rule and the government's objective, to be inferred from "normal responsibilities" of Civil Service Commission).

376. NCAA PAMPHLET, *supra* note 52, at 1 ("This list is comprised of drugs generally purported to be performance enhancing and/or potentially harmful to the health and safety of the student-athlete.").

377. J. FALLA, THE NCAA: THE VOICE OF COLLEGE SPORTS 13-15 (1981) (1905 college football season marked by 18 deaths and 149 serious injuries; President Theodore Roosevelt summoned football leaders to White House to discuss "two choices facing the college game—reform or abolition." NCAA formed as a "fledgling organization (whose members faced) the common problem of finding a way to save football from falling off the precipice of violence toward which it has been careening.").

378. For instances of "pro-competitive" rules unrelated to drug-testing, see *id.* at 143-48 ("Academic Standards"); *id.* at 148-56 ("Recruiting and Financial Aid Regulations"); *id.* at 229-34 ("Competitive and Legislative Reorganization").

379. *See supra* text accompanying notes 61-73.

380. It is less clear what the justification for testing for intoxicants or depressants might be. However, if it can be plausibly argued that their use significantly affects an athlete's performance or that significant health hazards are associated with their use in an athletic contest, the requisite "rational basis" for a drug-testing program which identifies the users of such substances will probably be met.

to test for various illegal substances, including such "street drugs" as heroin, cocaine, and marijuana. Arguably, some of those "street drugs" also have stimulative effects, or pose health risks, that could account for their banning. Cocaine, for instance, is banned by the NCAA as a "psychomotor stimulant" *and* as a "street drug."[381] The potential constitutional problem lies in the fact that "street drugs" comprise a *separate* category that includes other substances (such as marijuana) that are not classified as stimulants, and are not labeled in any other way as health hazards or "performance enhancers." What purpose does this extra category serve? An argument could be made that it is a catch-all classification for drugs that might adversely affect an athlete's performance, pose long-term health risks, or pose risks to other competitors; it would probably be difficult to find a football or basketball coach in America who does not believe that marijuana is a debilitating or dangerous drug, and does not have anecdotes to back that conclusion up. Yet it is difficult to avoid the conclusion that the prohibition of "street drugs" as a category—and marijuana as a particular substance within that category—is attributable primarily to moral concerns, to a general sense of those responsible for governing college athletics that those athletes they are responsible for should not be permitted to "break the law," particularly if such law-breaking is likely to become public knowledge and create institutional embarrassment.

Counselors will find it difficult to argue that the protection of college-age students from immoral influences, in the absence of any "reasonable suspicion" of illegality, is within the powers of a public university or an intercollegiate athletic association or conference. Clearly, a general desire to maintain the right "moral" tone does *not* permit such an institution to ride roughshod over the constitutional rights of any student, athlete or not.[382] The prudent counselor, therefore, will probably advise his institutional client to remove any overt references to moral concerns or law-enforcement goals from drug-testing plans, and may also suggest that "street drugs" be dropped as a separate category. He may feel he stands on firmer ground, though, if one of the purposes of the plan is defined as a desire to avoid institutional embarrassment. Thus, it well may be true that a college dependent upon a state legislature for its funding has a rational—although hardly compelling—interest in taking prophylactic efforts to avoid damaging publicity.[383]

The potentially diverse effects of adverse publicity might also provide a college with a rational justification for treating athletes as a sub-class within the student body on the theory that the school will be hurt more by revelations

381. NCAA PAMPHLET, *supra* note 52, at 9-10 ("NCAA Banned Drug List 1986").

382. *Smyth*, 398 F. Supp. 777.

383. Assuming *arguendo* that the NCAA *is* a "state actor," it is by no means clear that it would have the same reputational interest at stake in the absence of a testing plan as would its member institutions.

that its All-American basketball player is using cocaine than by similar revelations about the typical undergraduate. Like arguments keyed to special concerns about the health or safety of athletes, this argument is predicated upon the belief that athletes are differently situated from the rest of the student body, and therefore can be subjected reasonably to different standards. Clearly, the NCAA can only concern itself with athletes. But when colleges and universities decide to test only athletes in an environment which includes many non-athletes, these schools must provide some explanation why athletes should be singled out as a special class. As long as an institution can show that athletes are more likely to use a particular substance, or face special health hazards because they use it, or can obtain a performance-enhancing effect from using it—or are likely to cause special institutional problems, such as serious embarrassment and a threat of reduced state funding (or even alumni contributions)—then singling them out for special treatment may be legally defensible.

In sum, the counselor, examining mandatory drug-testing from the perspective of the federal "equal protection" clause (or one of its state equivalents), ought to feel some special concern about the legality of his client testing for "street drugs," particularly marijuana. But as a general proposition, his concerns about "equal protection" problems need not be nearly as great as his concerns about "due process." For if mandatory testing constitutes the sort of intrusion into areas or "expectations" of privacy protected by the Constitution, and if it is conducted coercively and without valid consent, then concerns about "due process," broadly defined, will put a heavy—and perhaps insuperable—burden on the NCAA and the colleges to justify their testing programs. Aside from their interest in privacy and in being treated in a manner consistent with "fundamental fairness," however, athletes are unlikely to be regarded by the courts as possessing anything "fundamental" which testing interferes with, and which as a result, calls "heightened" or "strict scrutiny" into play. Instead, since the courts have quite consistently refused to recognize that college athletes have a "liberty" or a "property" interest in athletic participation, or even in scholarship renewal,[384] a "mere rationality" test is likely to be applied whenever "equal protection" is invoked. And in the present social and political climate, it seems "rational,"—if not necessarily wise—to search for signs that athletes have been using virtually any substance on the NCAA or IU list. It seems hardly less "rational" to require them to submit to urinalysis in order that this search can be carried out.

5. Prudential Considerations: The Risk of Damaging Lawsuits

We have assumed that in a world of unlimited time, money, and legal resources, college and athletic association counsel would undertake the pains-

384. *See supra* text accompanying notes 344-49.

taking constitutional analysis described in the preceeding pages. In the world where choices about drug-testing programs are actually made, it is unlikely that any actor would have quite so much information or analytical guidance available. Nevertheless, the assumption that institutions will expend considerable resources seeking guidance makes sense if we can demonstrate that they have good reason to believe that by violating the constitutional rights of athletes, they risk lawsuits that are not only likely to be "losers" from the institutional point-of-view, but are also likely to prove costly. Thus, it is at least arguable that a university will consider or even adopt a drug-testing program that it believes rests on shaky constitutional foundations if it also believes that the risk of having that program overturned in court will be outweighed by such benefits as happier coaches and alumni, better athletic performance, and generally favorable publicity because the institution is "doing something about drugs." If, however, the likely consequences of losing include a significant drain on the university (or state) treasury, then the balance will shift strongly against testing.

Thus, another issue counsel must consider is potential institutional liability for damages to the athlete. To the extent that this issue is presented because the athlete has chosen to sue a state or "state actor," or one of its agents, in *federal* court, it raises a final set of *constitutional* questions that must be addressed.

Typically, these questions will arise when the athlete files a claim for damages in U.S. District Court under 42 U.S.C. § 1983, alleging that her civil rights have been violated because of some punitive action taken against her by the defendant, pursuant to the terms of the "unconstitutional" drug-testing program.

Liability under 42 U.S.C. § 1983 for violation of a student athlete's civil rights is relevant to the NCAA only if it is determined that the NCAA is a state actor. In such a case, a finding that mandatory drug-testing has resulted in the denial of "due process" could result in a money judgment for which the NCAA would be liable. Most state universities will be immune from the requirement that they pay statutory damages by virtue of the protection afforded by the eleventh amendment. However, their officers, at least to the extent that their actions are undertaken in a "personal" rather than an "official" capacity, can be held liable. Municipal colleges and universities ordinarily will not possess the same immunity, but will benefit from a "good faith" doctrine which ordinarily will have the effect of minimizing the amount of an adverse judgment.

The special obligation of "state actors" to provide "equal protection" and "due process" carries with it a special potential for liability arising out of the violation of the rights guaranteed by those constitutional provisions. Thus, if it were determined, for example, that a student had been subjected to an illegal search, or had been deprived of her athletic scholarship because of the application of a rule which denied her "equal protection," she might

well seek money damages from her university, and from those of its employees responsible for requiring or administering the test. Section 1983 of title 42 of the United States Code has been construed to permit damage suits against state actors, including educational institutions and their employees, under certain circumstances, and subject to certain conditions.

The limitation and conditions associated with a section 1983 Civil Rights action are important to any institution which may be a state actor and is involved in drug-testing. The fourteenth amendment places limits on the authority of "states" to deny "due process." Yet the eleventh amendment, subject to a number of important exceptions, immunizes states from suit in federal court.[385] Section 1983 partly resolves the conflict by permitting suits in federal court against "persons" who, it is claimed, have denied federally-protected rights "under color of state law." Under this formulation, when the issue is the enforceability of a regulation or state law which may be unconstitutional, a plaintiff will ordinarily have no difficulty securing a review of that regulation or statute by suing the state or local governmental officials charged with its enforcement. Thus, in seeking injunctive or declaratory relief against a state university, plaintiffs will ordinarily sue the members of the board of regents and individually-named defendants in the university and athletic department administration.[386] In some instances, it will also be possible to name the institution itself as a defendant. Thus, if the courts determine that a particular "state actor" is sufficiently independent of direct state control, and is not an "arm of the state" or the state's *alter ego*, the eleventh amendment will confer no immunity.[387] Ordinarily, athletic associations (if they are deemed "state actors") will fall into this category, as will some municipal and community colleges.

If, however, a plaintiff sues for money damages, the importance of immunity under the eleventh amendment becomes clearer. The general rule is that states, those agencies which are regarded as "arms of the state," *and* employees of the state and of such agencies, if they are acting in the course of their official duties, are immunized against any judgment requiring payment directly or indirectly out of the state treasury.[388] This immunity will not protect all "state actors." Yet state agents who can be sued to secure injunctive relief are thus in many instances not subject to suit under section 1983 for money damages. Only by suing them in their *individual*, rather than their official capacity, *and* by showing that their actions exceeded the

385. U.S. CONST. amend XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . . ."

386. *See Ex Parte* Young, 209 U.S. 123 (1908); Milliken v. Bradley, 433 U.S. 267 (1977).

387. For application of the principle to educational institutions, see CIVIL ACTIONS AGAINST STATE GOVERNMENT § 4.31 (1982).

388. *See id.* at §§ 4.26, 4.35.

authority the state granted them, will a plaintiff stand any chance of collecting from such defendants.

If the threshold of eleventh amendment immunity is crossed, then even an unintentional denial of "due process," based on a misunderstanding of the applicable law, can result in liability, provided that a court determines that the official responsible, "reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . ."[389] On the other hand, absent a showing that the deprivation of "due process" has resulted in actual, quantifiable damage to the plaintiff, the recovery permitted from the defendant will be only nominal.[390]

Here, the general unwillingness of the courts to construe future financial aid or the expectation of a remunerative professional career as cognizable "property" interests may have the additional effect of denying their deprivation the status of "actual" damage. Reputational harm standing alone will not constitute the sort of "actual harm" needed to trigger a damage claim.[391] Nevertheless, to the extent that the testing institution insures the confidentiality of test results, it will also make it difficult for the athlete to claim that such reputational harm has in fact occurred. Thus, should there be "actual," calculable damage of another sort (perhaps because a *current* scholarship has been revoked), it may be difficult for an athlete dismissed from a squad without publicity and without any institutional statement of reasons to demonstrate that she has suffered additional, consequential damage to her reputation as a result of her ineligibility.

In summary: the NCAA or similar athletic associations, if deemed "state actors," would probably have good reason to fear a suit for damages, although the "good faith" exception and the athlete's difficulty in showing actual or significant "consequential" damages would probably limit recovery. Most state universities would appear to have even less to fear. Assuming that university employees carried out the drug-testing plan in accordance with the university's official testing policy, they would almost certainly be deemed to be acting in their official capacity, and would be immune from personal suits for damages. Thus, in the great majority of cases, the prospect of violating a student's rights through a drug-testing program of doubtful (but, it is important to note, still judicially indeterminate) constitutionality probably would not cause the institution to abandon or cease testing.

C. Non-Constitutional Issues

In addition to the potential problems posed for the NCAA and for public educational institutions by the Constitution, difficulties can arise as a result

389. Wood v. Strickland, 420 U.S. 308, 322 (1975).
390. Carey v. Piphus, 435 U.S. 247 (1978).
391. *See* Paul v. Davis, 424 U.S. 693, 706 (1976).

of the application of common law doctrines of contract law and tort liability, and of state and federal statutes designed to protect the privacy of students. Additional difficulties also may arise if civil rights actions are brought against athletic associations or colleges under state, rather than federal, law. In general, these difficulties are more likely to affect colleges and universities than the NCAA. Thus, the NCAA, unlike its member schools, is not bound by the provisions of the Buckley Amendment and similar state "educational privacy" statutes. Consequently, it risks no cut-off of aid for unauthorized disclosure of test results. Even private colleges risk such a cut-off, however, if they publish test results without the affected athlete's consent. But the NCAA, like its members, can be potentially liable for defamation if information about an athlete is released, and that information proves incorrect. Such potential liability is likely to be negligible if the drug-testing program is carefully designed to detect errors, is scrupulously administered, and takes due regard of the athlete's privacy concerns.

1. The Violation of Contract Terms

Contract is generally regarded as the basis of a legal relationship between students at private educational institutions and the institutions themselves. The obligations of school and athletes stated in the college catalog, and in other college publications will usually take priority. However, where those terms are vague or incomplete, courts will usually permit colleges to assert broad regulatory powers, so long as those powers are generally related to the institution's stated policies. As a consequence, it is unlikely that any private institution with a pre-existing drug policy would be prevented from unilaterally imposing a testing program. Nevertheless, when disciplinary rules have been imposed without prior notice, or have been applied unevenly and arbitrarily, the targets of such regulations have sometimes been afforded relief by the courts. That relief can include restoration of an academic scholarship which has been revoked. Thus, although it is unlikely that a private school will be forced to abandon its drug-testing program under a contract theory, it should be prepared to publicize the provisions of that program in materials distributed to athletes before the beginning of the school year, and should take care to administer the program evenhandedly and in accordance with clear procedural rules.

2. The Violation of Federal and State Privacy Statutes

Colleges and universities frequently will incur a special obligation to maintain the confidentiality of "student records" coming into their possession. That obligation ordinarily will derive from three sources: the so-called "Buck-

ley Amendment"[392] of 1972, providing for "family educational and privacy rights" with respect to "education records"; analogous state statutes, such as Article 5 of the California Education Code, which provides for "Privacy of Pupil Records"; and more general privacy statutes or common law doctrines, which may in some instances give the victims of false but non-defamatory publications an independent right of action.

The "Buckley Amendment" is applicable only to institutions receiving federal aid;[393] whether those institutions are "public" or "private" is of no significance. The liability it imposes is limited to the cutting off of federal funding, "to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents."[394]

The rule of nondisclosure contains a number of specific exceptions. Thus, students who have reached the age of eighteen can give their own consent, and educational institutions can make limted nonconsensual use of records for such purposes as effecting a student's transfer to another school, evaluating financial aid requests, meeting the requirements of accrediting agencies, meeting state and federal financial account requirements, and fulfilling the requirements of a "judicial order, or . . . a lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency."[395] In addition, "subject to regulations of the Secretary [of Education], [a school may release information] in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[396]

However, a special provision in the statute, by restricting the definition of "education records," effectively prohibits the release to anyone of information which in most states would fall within the "physician-patient" privilege. Specifically covered are:

> records on a student who is eighteen years of age or older, or is attending an institution of post-secondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or are assisting in that capacity, and which are made, maintained, and used *only* in connection with the provision of treatment to the student, and *are not available to anyone other than persons providing such treatment. . . .*"[397]

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392. Codified at 20 U.S.C. § 1232(g) (1972).
393. *Id.* at § 1232(g)(a)(3).
394. *Id.* at § 1232(g)(b)(1).
395. *Id.* at § 1232(g)(b)(2)(B).
396. *Id.* at § 1232(g)(b)(1)(I).
397. *Id.* at § 1232(a)(4)(B)(iv)(emphasis added).

It should be noted that drug-testing results would not appear to fall within this definition if they are intended to be used for any purpose other than "treatment of the student," *or* are released to anyone other than the student himself, or a physician or similar professional of *his* choice.

Since many private colleges receive some federal aid, and since the "Buckley Amendment" is not "program specific," that is, it threatens the receipt of federal funding in areas other than the specific program where a violation of privacy may have occurred, the Amendment's privacy requirements are likely to affect most drug-testing institutions. Additional problems will arise for some, however, because of the *concurrent* applicability of state statutes imposing similar restrictions on the release of "education" or "student records." Many states now have such statutes. Most appear to reach only public educational institutions within the state, and the majority probably affect only elementary and secondary schools. However, it is clear that in some states, statutes and regulations will also have the effect of requiring that state colleges and universities guarantee "educational privacy." Clearly, a search of the applicable law in each jurisdiction will be necessary.

It should be emphasized that the protection afforded educational records has nothing to do with the truthfulness of those records. They are private whether or not they are accurate, and their unauthorized release cannot be justified by contending that they are "true." On the other hand, in the absence of statutory or regulatory protection of such records, the release of "true" information about a student, including a student-athlete suspended as a result of positive drug-testing results, should not give rise to any valid constitutional tort claim for "invasion of privacy."

3. Defamation Arising Out of Publication of Incorrect Information

Publication may require making information available to an audience wider than the athlete and university officials having free access to the student-athlete's records.

Even an incorrect test result leading to suspension will not support a defamation action if the results of the test in question are never published, and the testing agency never states or implies that the suspension in question was a response to its tests.

Public institutions may be protected by tort claims acts, which in virtually every state have replaced the common law doctrine of "sovereign immunity." These acts may bar defamation actions altogether; may impose a standard of misconduct higher than mere negligence; may impose dollar limits on the amount receivable; and will impose strict requirements with respect to how and when defamation actions are filed. If the only damage an athlete alleges in a civil rights suit under 42 U.S.C. § 1983 is loss of reputation, the

availability of a defamation suit in state court as an alternative may preclude bringing the civil rights suit altogether.[398]

The legal standards for imposing liability vary depending upon whether the plaintiff-athlete is a public figure. If the plaintiff is a public figure, the governing standard is "actual malice," that is, knowledge that the published information was false, or "reckless disregard of whether it was false or not."[399] The standard for imposing liability when the plaintiff is not a public figure is something more than "liability without fault."[400] There will be no "recovery of presumed or punitive damages . . . [without] a showing of knowledge of falsity or reckless disregard for the truth."[401]

Public figures are persons "of such persuasive power and influence that they are deemed public figures for all purposes" *or* persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Simple notoriety, as demonstrated by public interest in a scandalous news story, is not sufficient to make one a public figure.[402] It should be noted that a football coach at a major university who was accused of "throwing" a game was treated as a public figure.[403]

A key element in determining whether a public figure plaintiff is entitled to any damages, or whether a non-public figure plaintiff is entitled to punitive damages is the degree of fault which is assigned to the publisher of the false story.

Determining the existence of "actual malice" or a "reckless disregard for the truth" ordinarily involves a factual inquiry into the techniques of interviewing, investigation, and record-keeping employed. It also depends upon the discovery of evidence of intent to highlight, cover up, ignore, or misrepresent facts which were available to the publisher or would have been available had care been taken.

In the context of drug-testing, where the "facts" are the results of chemical or spectroscopic analysis, and where the publisher of those results is the institution commissioning or conducting that analysis, "malice" and "recklessness" will in part be determined by the court's finding as to the reliability of testing procedures used, the care employed in running particular tests, and the "reasonableness" of relying on the testing procedures chosen. When a test is reliable to a high degree of certainty, is administered so as to minimize the likelihood of obtaining "false positive" results, and is inter-

398. *Paul,* 424 U.S. 693.
399. New York Times v. Sullivan, 376 U.S. 254, 280 (1964).
400. Gertz v. Robert Welch Inc., 418 U.S. 323, 347 (1974).
401. *Id.* at 349.
402. Times, Inc. v. Firestone, 424 U.S. 448 (1976). *See also* Wolston v. Readers' Digest Ass'n, Inc., 443 U.S. 157 (1979).
403. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

preted by experts using clement, formal procedures, accurately publicizing test results will probably not be regarded as negligence and certainly will not be regarded as either "malicious" or "reckless." However, if a test cannot state with virtually total certainty that a particular individual has used specific drugs, yet the test results are published in a manner which states or strongly implies that a particular athlete is a drug-user, that athlete will stand a good chance of proving negligence and may be able to show "reckless" conduct as well.

4. Sovereign Immunity and State "Civil Rights" Claims

The problems posed by the eleventh amendment do not apply if the athlete sues the testing institution under either federal or state civil rights statutes in the state where the alleged unconstitutional testing occurred. Thus, for example, it might be possible for an Indiana athlete to sue the NCAA or Indiana University in the Indiana courts. In such a case, the basis of the claim will be the existence of a so-called "constitutional tort." As far as Indiana University or its officials are concerned, however, whether that tort will be actionable or not, and if so, what recovery will be allowed, will depend on the relevant tort claims act in Indiana. Clearly, Indiana University is protected by the provisions of the Indiana Tort Claims Act.[404]

However, the NCAA, or any similar athletic association, is in a somewhat more difficult position. If it is not a "state actor," then 42 U.S.C. § 1983 does not apply. But other state civil rights statutes, which do not require "state action," might. In such a case, the limited sovereign immunity granted public entities would offer no protection at all. Yet even if an athletic association *is* regarded as a "state actor" for some purposes, it does not necessarily follow that it will be regarded as a public entity for the purpose of any state tort claims act. In other words, by acting as the *alter ego* of the state, it is at least possible that the NCAA could take on all of the state's potential liabilities, without assuming any of the state's constitutional or statutory protections.

III. THE LITIGATOR'S ROLE

The litigator representing an athlete must perform several basic tasks. First, he must analyze the relevant law, probing for weak spots in the legal theories that the institution might use to justify its testing program. Second, to the extent that the litigator detects a weakness that does not appear to be absolute, but instead is contingent on the existence of certain facts, he

404. IND. CODE § 34-4-16.5-2 (1974) (a "State college or university" is defined as a "political subdivision" of the State for the purposes of the act).

must develop those facts as best he can, and construct a plausible argument that those facts are determinative in his client's case. If, after examining the law and the facts of the particular case, he determines either that there appears to be no controlling precedent at all (i.e., that there is a doctrinal "gap" in the law), or that the testing institution has strong precedent on its side, he must advise his client of that fact. Should the athlete wish to continue her lawsuit, the attorney will then be required to "fill the gap," or to challenge some or all of that precedent on grounds of "policy" or "principle."

When a testing program is attacked, all of its legally questionable features must be brought to the fore. Failure to raise a relevant issue in the early stages of legal proceedings will probably bar the athlete from raising that issue later on. Thus, the litigator will inevitably duplicate much of the analytical work of institutional counsel. The same basic legal issues will be "mapped" to determine whether the testing is amenable to constitutional, statutory, or common law challenge. Unlike institutional counsel, the athlete's lawyer will not necessarily be aware of the theory that the college, university, or athletic association may have developed to justify its testing program. On the other hand, the athlete's lawyer will not be concerned initially with why the institution believes it can test; instead, his first goal will be to construct alternative theories of unlawful conduct and potential liability, and then identify fundamental flaws in the testing program which will establish a strong—and perhaps irrebuttable—inference that the program, as designed or implemented, is either patently unconstitutional, or otherwise illegal. Thus, it is important to remember that the athlete, as the moving party, has the initial opportunity to frame the legal issues. The institution will be required to meet those issues before presenting its own theory as to why testing is justified.

A. "First Level" Arguments

Assuming that the athlete's lawyer has reached similar conclusions about the relevant law as institutional counsel, the litigator's initial—or "first level"—argument will not focus heavily on issues such as compelled self-incrimination or a broad right of personal privacy unrelated to the specific protections of the fourth amendment. Nor, except in the rare instance when unauthorized disclosure of test results has occurred, will he focus on statutory or common law "confidentiality" issues. Existing precedent suggests that under ordinary circumstances, all of these issues will be "losers" for the athlete. The litigator's initial arguments will be devoted to issues that either make a *prima facie* "winning" case for the athlete or might be regarded by a court as doing so.

As earlier sections of this Article have suggested, the strongest of these arguments—at least when public colleges and universities are involved, and

the action is brought under a claim of right derived from the U.S. Constitution—turn on the fourth amendment's prohibition against "unreasonable searches and seizures." Assuming for the moment that "state action" exists, and that the athlete is contesting the institutional use of a "positive" test result, the litigator's "first level" argument almost certainly will be framed this way:

1.) the institution is *obliged* to refrain from "unreasonable," warrantless searches;

2.) urinalysis constitutes a "search" within the meaning of the fourth amendment;

3.) in the absence of "valid consent," the institution will be permitted to conduct a warrantless search *only* if

a.) the intrusion is justified by a judicially-created "exigency" exception to the fourth amendment; *or*

b.) the institution has "probable cause" to believe that some crime or violation of rules has occurred; *or*

c.) within the specific context of an "administrative search," the institution has *at least* some "individualized suspicion" of a rule violation;

4.) in the instant case, no "valid consent" was obtained, because the "waiver forms" signed by the athlete were coerced by a threat to deny eligibility and future scholarship aid, and such coercion constitutes an "unconstitutional condition";

5.) no general "exigency" exception exists that permits general, warrantless searches of college students;

6.) neither "probable cause" nor "individualized suspicion" has been demonstrated by the institution conducting the testing; and

7.) therefore, because the urinalysis actually conducted was unconstitutional, the institution should be enjoined from continuing it, and the athlete's eligibility and future scholarship opportunities should be reinstated.

The same basic argument, truncated somewhat, will probably be made if the institution penalizes an athlete for refusing to be tested. In such a case, by relying on the decisions in *Camara v. Municipal Court,*[405] and *See v. Seattle,*[406] and treating the decision in *Wyman v. James,*[407] as an anomaly, the athlete's lawyer will argue that fourth amendment rights attach at the moment the search is coerced by threatened deprivation of benefits. Consequently, the doctrine of "unconstitutional conditions" will apply even though no urinalysis has in fact taken place.

No comparable argument for the *prima facie* unconstitutionality of drug-testing by the NCAA can be made after *Rendell-Baker v. Kohn,*[408] *Blum v.*

405. 387 U.S. 523 (1967).
406. 387 U.S. 541 (1967).
407. 400 U.S. 309 (1971).
408. 457 U.S. 830 (1982).

Yaretsky,[409] and *Arlosoroff v. NCAA*,[410] since these cases, as I have argued above, compel the conclusion that the NCAA, despite dozens of older cases to the contrary, will ordinarily *not* be regarded as a "state actor" for purposes of federal constitutional law. Given the results in those cases, it is unclear whether there are *any* circumstances under which the quantum of cooperation between the association and its public institution members would be sufficient to bring "state action" doctrine into play. But it is certain that the sort of collective influence exercised when various public institutions participate in the sort of membership vote which resulted in the adoption of the current NCAA drug-testing program does *not* constitute the sort of "nexus" or "symbiotic relationship" that case law now demands.

However, two other avenues of argument are open to the litigator who chooses to attack NCAA rules. Thus, as was suggested above, a claim under *state* constitutional law may not require "state action." Further, various state constitutional provisions may afford substantive rights to individuals—such as a broad right to "privacy"—that extend beyond those guaranteed by the U.S. Constitution. In such a case, it might be possible to demonstrate—as Stanford University athlete Simone Levant recently did—that the NCAA testing program violated state-protected rights.

Alternatively, the litigator might look to the nature of the relationship between the NCAA, its member institutions, and the student-athletes whose conduct is governed by NCAA rules. Under the NCAA Constitution, only "[c]olleges, universities, and other institutions of learning, athletic conferences or associations[,] and other groups related to intercollegiate athletics . . . are eligible for membership."[411] The principal "condition and obligation" of membership is that all such members," administer their athletic programs in accordance with the constitution, the bylaws, and other legislation of the association."[412] This obligation is subject to the general "principle of institutional control and responsibility": "The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference, if any, of which it is a member."[413] Specifically included within the responsibility of particular member institutions are decisions to exclude from "intercollegiate athletic competition" individual athletes who do not meet NCAA eligibility criteria.[414] Failure of such members to exclude ineligible athletes from competition is grounds for the NCAA to impose sanctions on the member institutions

409. 457 U.S. 991 (1982).
410. 746 F.2d 1019 (4th Cir. 1984).
411. NCAA CONST. art. IV, § 1.
412. *Id.* at § 2(a).
413. *Id.* at art. II, § 2.
414. *Id.* at art. III, § 9 ("An institution shall not permit a student-athlete to represent it in intercollegiate athletic competition unless the student-athlete meets the following requirements of eligibility. . . .").

themselves.[415] Thus, although the NCAA Constitution and bylaws list numerous requirements that an athlete must meet in order to be "eligible" to compete in intercollegiate athletics or in "NCAA championships," and also list a variety of circumstances (including testing "positive" on an NCAA-administered drug test) which will result in "ineligibility," direct responsibility for barring an athlete from actual competition lies with the institutions themselves.[416] This fact is a necessary corollary of the NCAA's status as a voluntary association, deriving its powers from the mutual consensual obligations which its members have assumed to abide by the association's rules. Institutions, because they are members of the NCAA and have agreed to administer intercollegiate athletics in accordance with its rules, are obligated to apply those rules when athletes fail to meet NCAA eligibility criteria.[417] Athletes, because they are not (and cannot be) members of the NCAA, have no *direct* obligations to the NCAA, and cannot be *directly* regulated by the NCAA absent individual contractual undertakings with the association itself. Instead, their obligations stem from their decisions to enroll at particular educational institutions and abide by the rules those *institutions* promulgate. NCAA control over the conduct of student-athletes is thus *indirect,* since it is exercised through the actions of NCAA member institutions, and is enforced through NCAA sanctions on those members who permit ineligible athletes to participate in violation of NCAA rules.[418]

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415. *See id.* at art. IV, § 2(c) ("The members of this Association agree . . . [t]o establish and maintain high standards of personal honor, eligibility, and fair play"); *id.* at § 6(b) ("The membership of any active or allied member failing to maintain the academic or athletic standards required for membership or failing to meet the conditions and obligations of membership may be terminated or suspended or the member otherwise disciplined by a vote of two-thirds of the delegates present and voting at an annual Convention . . ."); *see also* NCAA Bylaw 9-5 ("Discipline of Members"); 1986-87 NCAA MANUAL 206-21 (1986) ("Official Procedure Governing the NCAA Enforcement [hereinafter "Enforcement"]).

416. *See* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 355 (8th Cir. 1977), *cert. dismissed,* 434 U.S. 978 (1977) ("The Association does not itself declare student-athletes ineligible, but its rules require member institutions to take such action in specified circumstances.").

417. Tarkanian v. NCAA, 95 Nev. 389, 396, 594 P.2d 1159, 1164 ("[T]he NCAA may claim a contractual right to bind the university to enforce the NCAA's decisions by sanctions it deems appropriate.").

418. *See* "Enforcement," *supra* note 415, at 9-(a): "When the (Committee on Infractions) or NCAA Council finds that there has been a violation of the constitution or bylaws affecting the eligibility of the individual student-athlete or student-athletes, the institution involved . . . shall be notified of the violation, ... it being understood that if the *institution* fails to take appropriate action, the involved institution shall be cited to show cause under the Association's regular enforcement procedures why it should not be disciplined for failure to do so." (emphasis added); *see also id.* at 10 ("If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or the Association, or both, and said injunction is subsequently voluntarily vacated, stayed, reversed or finally determined by the courts that injunctive relief is not or was not justified, the Council may take [disciplinary] actions *against such institutions* in the interest of restitution or fairness to competing institutions. . . ." (emphasis added)).

The significance of this structure of mediated control is that when NCAA drug-testing rules are applied against athletes, they are in a strict legal sense—if not always in fact—applied by the institutions those athletes attend. Thus, if that institution is a "state actor," its enforcement of the NCAA drug-testing program will be subject to exactly the same constitutional scrutiny as the enforcement of its own, home-grown testing program would be. Athletes attending public colleges who are subjected to testing mandated by the NCAA will thus be able to challenge that testing by suing their home institutions under either of the fourth amendment theories described in this section of the Article.

B. "Second Level" Arguments

The purpose of the litigator's "first level" arguments is to establish as conclusively as possible *that as a matter of law* the drug-testing of college athletes is forbidden. Yet if the basis of those arguments is an asserted fourth amendment protection from the sort of search the institution is promoting, they are unlikely to be accepted as unconditional by any court. Instead, to a greater or lesser degree, they will depend on a showing that under the facts of the particular case, the testing institution's program is violative of the asserted right. A similar showing will always be required if the athlete's claim is based exclusively on the "due process" clause of the fourteenth amendment. Assuming that he can show that the requisite "liberty" or "property" interest exists, the athlete's attorney will still be required to demonstrate that, on balance, his client will be hurt more by the institution's testing procedures than the institution will be benefited by retaining them. Only if "first level" arguments are based on an asserted right of "privacy" under a state constitution will there be *some* chance that a judge might treat testing as *absolutely* impermissible. Even then, it is more likely that the circumstances of the intrusion will be taken into account.

Almost inevitably, then, the litigator will feel bound to supplement arguments that testing is *prima facie* unconstitutional with more limited, "second level" arguments which attempt to demonstrate that, even within the context of the "balancing" framework sometimes favored by the courts, the interests of the athlete outweigh the interests of the testing institution. He will do so even though he probably realizes that "second level" arguments of this sort are in some sense concessive, since they always undercut his more absolute first position.[419]

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419. Thus, the characteristic form of the two arguments when combined is: "Testing is always wrong for reason X; but even if X does not always apply, it applies now, given circumstances Y, which currently obtain."

1. Fourth Amendment "Privacy" and Fourteenth Amendment "Due Process" Claims: The General Argument

Contextual arguments are always necessary when the constitutional issue at stake is protection under the fourth amendment. For as has already been demonstrated, whether the particular question being litigated is the existence of a "search," the permissibility of dispensing with the warrant requirement, the level of "individualized suspicion" necessary before an institution can begin searching without a warrant, or the degree of coercion that will be permitted before consent is invalidated, virtually every relevant issue arising under the fourth amendment appears to turn ultimately on what the court believes to be "reasonable under all the circumstances."

Thus, the adage frequently recited by the Supreme Court that "the fourth amendment bars only *'unreasonable'* searches and seizures"[420] has the *potential* of validating a great many intrusive practices in the world of college athletics, including mandatory drug-testing. A significant part of the litigator's job is to limit that potential by demonstrating as specifically as possible why such testing imposes significant costs on the athlete while yielding few concrete benefits to the institution. To support this assertion, he will place heavy emphasis on the presumptive existence of the right to be left alone, the intrusiveness of the testing, and its likely harsh consequences. He will also argue that such testing is unnecessary, and will contribute little or nothing to the welfare of the athletic team, the athletic association, or the school mandating urinalysis.

Because "context" is, by definition, specific to a particular lawsuit, we can only hypothesize about the "facts" he is likely to emphasize, and the way he is likely to weave them into his argument. It is possible, however, to offer a few representative examples of his probable approach.

Consider, for example, our female athlete who has been required to submit to testing, and has tested "positive" for marijuana. Assume that the testing occurred immediately after she completed running a marathon, and that the testing was conducted in a locker room under the supervision of a female trainer and female laboratory technician. Assume also that because she was dehydrated after the race, it took her more than two hours to produce the necessary urine sample. Her attorney would probably first look at the decisions discussing "intrusiveness,"[421] and make the best use he could out of

420. *See, e.g.,* Bell v. Wolfish, 441 U.S. 520, 558 (1979); Carroll v. United States, 267 U.S. 132, 147 (1925).

421. *See* Caruso v. Ward, 506 N.Y.S.2d 789, 793 (N.Y. Sup. Ct. 1986) (Identifying "the degree of intrusiveness" as "the first factor in the reasonableness test," noting that "[a] person's perception as to the scope or degree of any governmental intrusion is ordinarily dependent upon what his legitimate expectation of privacy is in the area intruded upon," and concluding "a person has a reasonable expectation of privacy in his bodily fluids.").

them, given their contradictory results.[422] He would thus focus on those factors discussed by judges who believed that testing was particularly intrusive, because, among other things, "the subject . . . would be required to perform before another person what is an otherwise very private bodily function which necessarily involves exposing one's private parts, an experience which even if courteously supervised can be humiliating and degrading,"[423] and if required to submit to testing, the subject would be forced to reveal a great deal of otherwise personal information:

> One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that . . . urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs.[424]

Having isolated the qualities of urinalysis that appear to make it most suspect in the eyes of the law, i.e., its potential for inflicting humiliation and the virtually limitless information it provides about the person being tested, the athlete's attorney would then highlight those aspects of our hypothetical case that suggest that his client was in fact humiliated, and that the testing actually employed in fact revealed a great deal about her. Thus, he would probably lay particular stress on the semi-public location of the testing, its timing and duration after an exhausting race, the fact that it was supervised, the difficulties of producing the urine sample and its attendant embarrassments, and the fact that whatever the institution's intentions, insuring the confidentiality of test results would be virtually impossible.[425] In all likelihood, he would also emphasize that *in this case,* the subject of the testing was a woman, who under customary social norms, had a greater expectation of privacy with respect to urination than would a male peti-

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422. *See supra* notes 171-87 and accompanying text.

423. *Caruso,* 506 N.Y.S.2d at 793, (citing Tucker v. Dickey, 613 F. Supp. 1124, 1130 (D.C. Wis. 1985)).

424. McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa). It should be noted, however, that the Eighth Circuit later validated the mandatory urinalysis of prison guards at issue in the case, holding that although privacy interests were implicated, "[u]rinalysis properly administered is not as intrusive as a strip search or a blood test." McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987).

425. The prospect for extensive publicity was revealed in the aftermath of the December, 1986 testing conducted by the NCAA prior to the holiday season bowl games. Many of the athletes who tested "positive"—including University of Oklahoma linebacker Brian Bosworth—were exposed to instant and wide-spread negative publicity. *See, e.g., Suspension of 21 Football Players from Bowl Games for Taking Steroids Renews Debate over Purpose of Drug Tests and Appropriate Penalties,* Chron. Higher Educ., Jan. 7. 1987, at 34, col. 2; *NCAA Suspends 5 Who Failed Drug Test,* Chron. Higher Educ., Dec. 17, 1986, at 31, col. 1. More recently, the results of drug-testing conducted during the March, 1987 NCAA Basketball Tourney have received similar publicity, although no one apparently failed the randomly administered test.

tioner.[426] Additionally, the attorney would point to the wide range of substances whose use is *explicitly* discoverable under the NCAA and prototype Indiana plans, and would make two additional observations: first, other substances *not* specifically being searched for by the testing institution, yet capable of causing embarrassment, could easily be revealed (e.g., by-products of birth control pills and blood sugar levels associated with diabetes); and second, even with regard to substances on the list, the evidence of use is not likely to be 100% conclusive, or is not likely to be able to prove conclusively that the use that probably did occur occurred recently or often.[427]

The second observation moves the litigator's argument beyond the "privacy" component of fourth amendment jurisprudence, suggesting that the athlete has an additional interest which ought to be taken into account, namely, an interest in not being penalized on the basis of evidence that is questionable or is of questionable relevance to the testing institution. Clearly, this contention lies at the heart of the litigator's procedural "due process" argument, which is formally—but not analytically—independent of his fourth amendment argument. Thus, if the litigator wants to confront testing procedures head on, he will first have to prove the existence of some affected "liberty" or "property" interest, and then convince the court that, under the "balancing" test set forth in *Mathews v. Eldridge*,[428] that interest, when weighed against the competing interests of the testing institution, *requires* greater procedural protection than that institution is in fact providing. Assuming for the moment that the athlete possesses an interest of constitutional magnitude, the court would be required to compare it with "[t]he Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[429]

Presumably, if the athlete's interest were considered great, and the government's minimal, then the court would be more likely to take seriously "the risk of an erroneous deprivation of [the athlete's] interest through the [testing and hearing] procedures used,"[430] and would also be more likely to

426. Thus, it is virtually universal for men to use urinals in public, which are far less "private" than the closed toilet stalls that are almost always made available for women. If proponents of testing argue that the difference in these arrangements reflects differences in physiology, and not a recognition of—or greater respect for—female privacy expectations, they supply their opponents with a strong counter-argument. For it is precisely these physiological differences that make the production of a nicely-bottled urine sample by a woman a more difficult and messier affair—and hence, make such production arguably much more humiliating.

427. According to one account, "9 delta THC [the principal active ingredient in marijuana] localizes in body fat . . . and disappears slowly." D. DUSEK & D. GIRDANO, *supra* note 264, at 92 (citing W. Arono & J. Cassidy, *Effect of smoking marijuana and of a high-nicotine cigarette on angina pectoris,* CLINICAL PHARMACOLOGY AND THERAPEUTICS, 17(5): 549-54 (1975)).

428. 424 U.S. 319, 335 (1976).

429. *Id.*

430. *Id.* (revised to reflect the drug-testing context).

recognize "the probable value . . . of additional or substitute procedural safeguards. . . ."[431] On the other hand, if the government's interest were considered great and the athlete's minimal, then despite a recognition that the procedures used were "less than perfect," the court would be more likely to say that they were "good enough."

The practical burden on the athlete's attorney arguing denial of procedural "due process" would therefore be three-fold. First, he would have to demonstrate that the testing or hearing procedures employed, considered separately or together, in fact invited significant and unacceptable error. This argument appears to be strongest when some reasonable and readily available alternative exists that will guarantee a superior level of accuracy. If, for example, an institution treated "positive" EMIT results as dispositive without confirmation *via* a second analysis of the sample using another laboratory method, improvement would clearly be possible. In such a case, the institution might still question the necessity of engaging in a second, expensive procedure. Clearly, if the cost of confirmation was astronomical, and the marginal increase in accuracy it afforded was statistically slight, a court might conclude that the confirmation was not in fact "reasonable" or "readily available."

Thus, it is incumbent on the litigator to demonstrate that in the world where testing actually occurs, there are certain implicit standards of accuracy that are generally accepted by testing institutions, and certain generally accepted methods of insuring through confirmation that such accuracy is in fact achieved. If, for example, he can show that *most* institutions administering EMIT tests *require* confirmation through a second chemical assay, or through gas chromatography or mass spectroscopy, the burden will probably shift to the institutional defendant to explain why it should not be required to do likewise. If, however, the institution in fact conducted its testing under guidelines compatible with the NCAA or IU plans, both of which in fact employ the extremely reliable technology of gas chromatography to confirm initial "positives,"[432] then the litigator would have to argue, using the best statistical evidence available, that a latent danger of a "false positive" still existed, and that the court should treat that danger as significant enough so as to bar testing altogether.

Similar arguments could, of course, be made if the issue being litigated were the sort of notice, hearing, or procedural record afforded the athlete, rather than the sort of testing method being employed. Thus, if the question is, "what is reasonable under all the circumstances?," those circumstances

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431. *Id.*

432. *See* P. GIANNELLI & E. IMWINKELREID, *supra* note 8, at 232 (gas chromatography highly effective as a means of separating components in a sample and isolating small amounts for analysis; less reliable as a qualitative device, since more than one substance can reveal same test pattern; if used in conjunction with mass spectroscopy, virtually infallible).

will necessarily include the sorts of hearings provided by other, similarly situated institutions when they look into alleged drug violations by students or other disciplinary breaches. Certainly, the litigator will want to familiarize himself with the practices of other testing institutions, and all of the relevant case law he can find that suggests that such institutions are *required* to do such things as create a reviewable record,[433] or give adequate notice to the athlete, before testing is imposed, of what the controlling rules of conduct are.[434] It is worth noting, however, that *Goss v. Lopez*[435] not only establishes *minimal* hearing and notice requirements in an academic setting where student "liberty" or "property" interests are at stake, but also comes close to establishing the *maximum* content of procedural protection.[436]

Let us return, then, to the testing procedures themselves. There, we quickly discover that there is no magic formula that tells a court how much of a risk of inaccuracy is too much. If urinalysis is wrong thirty times out of a hundred, is that "too much?" Probably. If urinalysis is wrong two times out of ten thousand, is that "too much?" Probably not. But how is a court to decide where to draw the line? The "balancing" approach suggests that the only possible approach is to look at the respective interests of the athlete and the testing institution, and to intuit the appropriate answer after taking "all the circumstances" into account. Such an approach does not add up to a mathematical formula. Instead, it gives the court considerable leeway to be convinced by the arguments of opposing counsel—and a considerable opportunity to be guided by the preconceptions of its members. The litigator may not be able to overcome those preconceptions. Thus, if a judge believes that the interests of a state institution in maintaining "discipline" are, as a general matter, more significant than those of an athlete seeking to compete, she has plenty of opportunity to discount the hardships a disqualified athlete may face, and to inflate the dangers that unchecked drug use may pose to a school or an athletic program. Nevertheless, the second and third parts of the litigator's practical burden are to demonstrate as factually and graphically as possible how important to the athlete competition is, and how relatively unimportant detecting drug use is.

Within the context of the "due process" argument, meeting the second part of the burden requires an emphasis on deprivations of "right" other than those arguably protected by the fourth amendment. Thus, for example, the litigator will attempt to convince the court that the athlete facing dis-

433. *See, e.g.*, Duffley v. New Hampshire Interscholastic Athletic Ass'n, 446 A.2d 462 (N.H. 1982).

434. *Cf.* Wright v. Arkansas Activities Ass'n, 501 F.2d 25 (8th Cir. 1974) (Coach could not be fired for violating athletic association rule since the rule, as published, did not give adequate notice of the severity of the penalty for scheduling early practice.).

435. 419 U.S. 565 (1975).

436. *See* Ingraham v. Wright, 430 U.S. 651, 681-82 (1977); *cf. id.* at 692-700 (White, J., dissenting).

qualification faces a variety of other things as well: a possible revocation or non-renewal of scholarship; a lost opportunity to compete for a spot on the U.S. Olympic Track Squad; a loss of commercial endorsements that the athlete, as a successful marathoner, probably would have earned had she been able to compete in the Olympics; and, perhaps, because of reputational damage, a diminished opportunity to find gainful employment outside of sports. (It must be emphasized, however, that all of these arguments, with the exception of those involving possible revocation of an *existing* scholarship, are likely to fall on deaf ears. Even if reinforced with statistical evidence about probable loss of earnings, the courts have, with rare exceptions,[437] been unwilling to treat economic claims as anything more than "speculative."[438] Thus, the same sort of analysis that has supported the view that athletic competition is not a "liberty" or "property" interest *at all* would also support a finding that if such a protectable interest in fact existed, it would not be a particularly important one.)

In meeting the third part of his "due process" burden, however, the litigator will necessarily attempt to refute at least some of the *same* assertions of governmental interest that he will also have to address within the context of the fourth amendment. Thus, part of the governmental interest in adopting a drug-testing program with particular testing and hearing procedures is to regulate student conduct while incurring minimal "fiscal and administrative burdens."[439] Under the *Matthews v. Eldridge* "balancing test," these are valid considerations. Procedural "due process," in other words, can be conditioned at least on the resources of the testing institution, and the demands that are put on them. If the college or athletic association is financially strapped, working with a minimal staff, and intent on dealing with a large number of athletes, it theoretically might be able to offer fewer or less substantial protections than if it were well-to-do, overstaffed, and concerned about the status of relatively few athletes.

As *Eldridge* makes clear, however, the *primary* determinant of the institution's interest is the institutional "function involved" in the testing program.[440] "Function" here means something like "institutional purpose" or "institutional goal." So defined, it has essentially identical significance for the litigator whether he is arguing his client's case directly under the "due process" clause of the fourteenth amendment or according to a fourth amendment theory. For in both instances, the athlete's attorney will be compelled to argue that the goal in fact is not valid or important, or is not well-served by the testing program actually adopted. Each of these arguments

437. Hall v. University of Minn., 350 F. Supp. 104 (D. Minn. 1982); *Duffley,* 446 A.2d 462.

438. Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976).

439. *Eldridge,* 424 U.S. at 335.

440. *Id.*

is to some extent fact-dependent. For example, the argument that finding evidence of marijuana is not a "valid concern" of a state university will be enhanced if the attorney can show that tests given incoming freshmen athletes are so discriminating that they will reveal casual marijuana use which occurred long before the athlete ever set foot on the university's campus. Similarly, the argument that marijuana testing is not an "important concern" will depend on the factual evidence that suggests either that marijuana is a particularly toxic substance likely to affect both an athlete's health *and* his behavior on the playing field, or suggests that, on the contrary, it is approximately as dangerous to the athlete as tobacco, is unlikely to precipitate incidents involving other athletes, and, at least if smoked in moderation well in advance of competition, is also unlikely to affect the athlete's performance. Assuming that an institution might have good reason to be concerned if its athletes are using marijuana—or cocaine, or steroids, or any other prohibited substance—the attorney for an athlete still might argue that mandatory testing should be deemed illegal because it is not truly consensual, is clearly intrusive, and is likely to produce very little information that could not be obtained in some other, less constitutionally-suspect way. Here, the factual determinants of the legal argument are likely to be the physical or behavioral signs of drug abuse which, athlete's counsel will probably argue, should be visible to a competent coaching or training staff, and should be sufficient to permit appropriate remedial or punitive action.

2. "Unconstitutional Conditions:" The Litigator's Response

As has already been suggested, it is clearly in the litigator's interest to present the doctrine of "unconstitutional conditions" *via* a "first level" argument. Indeed, to the extent that the doctrine has been given force by the courts, it has almost always been characterized as an absolute rule. Yet the litigator also has to be aware that the rule is not always applied in situations where it would seem analytically appropriate, and that when it is not applied, the reason appears to be the often-unstated judicial belief that a "balancing" of the interests of the state and of the individual is preferable to a *per se* prohibition which would prevent the state from *ever* curtailing a "privilege" whenever that curtailment would abridge a constitutional "right."[441]

441. By not attacking the doctrine of "unconstitutional conditions" head-on, judges who are apparently uncomfortable with it are sometimes moved to engage in amazing feats of judicial prestidigitation. In Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986), for example, two drivers were lawfully stopped and asked to submit to breathalyzer tests. They refused to be tested, and were penalized under the provisions of the Alaska "implied consent" statute. The Ninth Circuit acknowledged that "the administration of a breath test is a search within the meaning of the Fourth Amendment and therefore subject to the requirements

Therefore, to stand a better chance of claiming the benefits of the supposedly "absolute" doctrine, the athlete's attorney is probably in fact going to be forced to make a concurrent "second level" argument. His claim, however, will be based on facts identical to the one described in the preceding paragraphs. Thus, he will probably argue that given the strength of his client's interest in the "privilege" of athletic competition (e.g., the possibility of competing in the Olympic games, obtaining endorsements, etc.), and the inconsequentiality of the institution's interest, the court should be particularly mindful of her fourth amendment rights, and should not countenance any institutional attempt to force her to relinquish them.

3. Arguing "Privacy" under State Law

Even if an attorney encounters state constitutional law that creates a broad and seemingly absolute "right to privacy," questions will always exist as to what activities fall within that right. In California, for instance, until February, 1987, no court had been asked to consider whether the mandatory drug-testing *of athletes* violated the provisions of the state constitution, although state courts had previously decided that mandatory drug-testing in an *employment* context might, under certain circumstances, violate privacy rights guaranteed by the California Constitution.[442] As was noted above, to determine if governmental (or covered non-governmental) action infringes upon privacy rights in California, a court must first determine if the interest in question is one in which an individual has "a . . . personal and objectively reasonable expectation of privacy,"[443] and then, if such a privacy interest exists, the Court must determine if the state has the requisite "compelling public need" to abridge the privacy right.[444] *Both* parts of this analytical process are contextual. Thus, neither the existence of a "personal expectation" of privacy with respect to urinalysis nor the "objective reasonableness"

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of that amendment." *Id.* at 1449. It also acknowledged that "the government may not impose conditions which require the relinquishment of constitutional rights." *Id.* at 1450. Yet it rejected the petitioners' argument that because the implied consent statute conditioned use of the Alaska highways on submission to a breathalyzer test, an "unconstitutional condition" had in fact been imposed. Instead, it asserted: "[n]o rights were relinquished here, however, because there is no Fourth Amendment right to refuse a breathalyzer examination." *Id.*

That conclusion begs the question. The whole point of the fourth amendment is to prevent "unreasonable searches and seizures," and the entire rationale for the doctrine of "unconstitutional conditions" in the fourth amendment context is to prevent the end-run around the "reasonableness" requirement which would result if a coerced waiver of fourth amendment rights were permitted. Here, the state attempted to coerce such a waiver. Therefore, the court was logically obligated to address the "reasonableness" of the search *that would have been conducted* had the petitioners submitted to breathalyzer tests.

442. *See* Bishop, *supra* note 191, at 29-32.

443. People *ex rel.* Franchise Tax Bd. v. Superior Ct., 164 Cal. App. 3d 526, 540-41, 210 Cal. Rptr. 695, 703-04 (1985).

444. White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234 (1975).

of that expectation can be determined without examining the circumstances of the testing. And it is clear that "compelling public need," if it can be shown at all, will depend on a concrete illustration of the dangers posed by drugs and facts to support assertions that testing is an effective way to forestall these dangers, and is in fact the only practical way of doing so.

It seems inevitable, therefore, that suits brought under state "privacy" provisions will address the same factual issues as suits brought under the fourth amendment, although the weight those facts assume will vary, depending on the nature of the action. Thus, in her recent successful suit, Simone Levant made good use of the open-endedness of testing, convincing the court that the procedures used by the NCAA had the potential to reveal a wide range of things about her personal life (such as her birth control practices), that either were none of the NCAA's business, or not of such nature that the NCAA had any compelling need to know them.

C. *"Third Level" Arguments*

Sometimes, the athlete's attorney will confront a legal environment in which arguments helpful to his case will not exist because of "gaps" in the law. As an example, we can imagine a litigator trying to base his client's claim on the proposition, apparently untested on the college level in any state, that a university's testing of its athletes is *ultra vires*.

I will characterize an attempt to convince a court that it should adopt a *new* theory for deciding a case as a "third level" argument. However, since I believe (for reasons that will become clearer in the concluding section of this Article) that such theories are unlikely to play a major part in drug-testing litigation, I will offer only a brief description of their characteristic elements.

These elements, ordered in the way that I believe they would be generally presented, include:

1.) the presentation of a theory of law that, by definition, has never been used within the jurisdiction to address the sort of claims at issue in a drug-testing case, and therefore, has never been used to support the sort of conclusion desired by the athlete's attorney or by institutional counsel;

2.) a logical demonstration that this *new* theory of law is not contradicted by, or inherently inconsistent with, other theories of law that have been applied in the jurisdiction. For example, prior "due process" cases in the jurisdiction, in the course of addressing *procedural* aspects of a testing program, may have assumed, *sub silentio,* that as a matter of substantive law, it was within the authority of a state university to test. In fact, earlier decisions may have identified interests of institutions conducting testing that the courts have treated as "weighty" or "substantial." The identification of such "weighty interests" in the "due process" setting would necessarily undercut the *ultra vires* argument;

3.) a *positive* assertion that the new theory *is consistent* with other authoritative theories within the jurisdiction, and serves similar policy purposes. For example, if the *ultra vires* doctrine has been employed in commercial litigation to prevent corporations from undertaking certain sorts of business ventures inconsistent with their charters, the athlete's attorney well might argue that colleges are governed by similar charters; that these charters, while admittedly broad, have as their common central feature the promotion of "education," but not the promotion of a particular state-sponsored "morality" or of the long-term "safety" of the student body; and that since the primary justifications traditionally offered for testing are in fact moral or health-related, colleges lack the requisite authority to test. This *formal* analogy between the *ultra vires* doctrine in a business and educational-athletic setting probably can be reinforced with a *policy* analogy. Thus, the litigator well may claim that the doctrine in its ordinary setting uses state power to serve the important purpose of protecting shareholders from impetuous actions of the corporation's directors that were never envisioned when the corporation was formed, and that it is at least as important for the state to use its power to protect student-athletes from ill-conceived, faddish testing programs; and

4.) an application of the new theory to the particular case. Thus, to demonstrate that a college's testing program was in fact *ultra vires*, the athlete's attorney would probably look to sources as diverse as the state educational code, the college's student handbook, and any statements made by those responsible for instituting the program, suggesting in the last instance that their *reasons* for establishing it contemplated an exercise of power extending beyond that authorized by legislation or any contract that could be implied between the institution and its student body. In other words, facts sufficient to bring the university's conduct within the ambit of the favorable rule would be adduced.

D. "Fourth Level" Arguments

It is probably always easier to imagine legal theories that are contradicted directly by existing precedent than it is to imagine the existence of "gaps" and original ways of filling them. Certainly, this seems to be true when we consider mandatory drug-testing. As this Article indicates, there are numerous well-established ways of confronting the testing issue. Some clearly are not advantageous to athlete's counsel. For example, the litigator might want to argue that his client has a "property" right in competing, or that the NCAA should be treated as a "state actor." As earlier sections of this Article have noted, both of these arguments fly in the face of powerful recent precedent.

How can the litigator deal with such precedent? Clearly, his task is not easy. Three principal methods suggest themselves. The first is to argue that

the negative rulings are old, and do not reflect contemporary reality. Unfortunately for the athlete, however, the principal case that suggests that the NCAA should not be regarded as a "state actor" dates only from 1984,[445] and the policy that case conveys seems entirely consistent with the views of much of the federal judiciary, including the majority of the present Supreme Court.[446] The conclusion that college athletes do not have a "liberty" or "property" interest in their athletic participation seems to be similarly situated in the mainstream of current American law.

Nevertheless, the litigator can still make a second, more limited argument based on "policy." With respect to the NCAA and precedent indicating there is no "state action," for example, he can focus, as some commentators recently did,[447] on the scope of the power delegated by state institutions to the NCAA. His argument will probably have two aspects:

a.) a claim that the sort of delegation that public colleges engage in when they commit the regulation of intercollegiate athletics to the NCAA is essentially different from, and involves more control than, the sorts of close public-private arrangements that have recently been construed by the courts as not manifesting a sufficient "nexus" to justify the application of constitutional standards to the "private" entity. Thus, in arguing that "the alleged infringement of federal rights 'was fairly attributable to the State,'"[448] the litigator could assert that, "[t]he organization receives from its member institutions delegated powers of a breadth and scope unknown to one small urban school [the "private party" in *Rendell-Baker v. Kohn*[449]] or physician's committee [the "private party" in *Blum v. Yaretsky*[450]], important though their work may be."[451] To emphasize the "scope" of these delegated powers, emphasis would probably be laid on the *completeness* of NCAA regulations, and on the *total surrender* of institutional right to act contrary to those regulations.[452]

b.) A claim that in the absence of a finding of "state action," the breadth of these delegated powers will make it very difficult—and perhaps impossible—to contest effectively the actions taken by the state school she attends:

> [w]ithout a restraint, the potential for evasion of difficult but important constitutional duties would otherwise be too appealing. The matter of

445. *Arlosoroff*, 746 F.2d 1019.

446. See, *e.g.*, the decisions on which *Arlosoroff* is explicitly based—*Rendell-Baker*, 457 U.S. 830, and *Blum*, 457 U.S. 991.

447. *See* Martin, *The NCAA and Its Student-Athletes: Is there Still State Action?*, 21 NEW ENG. L. REV. 49 (1986); J. WEISTART & C. LOWELL, *supra* note 114, § 1.14, at 8 (Supp. 1985).

448. Martin, *supra* note 447, at 71.

449. 457 U.S. 830.

450. 457 U.S. 991.

451. Martin, *supra* note 447, at 71.

452. *See, e.g.*, Regents of Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1976); University of Nev. v. Tarkanian, 594 P.2d 1159 (Nev. 1979).

> drug testing among college athletes provides a useful example. If the state undertakes to test its students itself, it should be made to comply with whatever constitutional controls are applicable. Avoidance of these duties should not be as simple as appointing the NCAA as the testing and enforcing entity.[453]

Turning this assertion into an effective legal argument will demand some factual showing that it is easier and more likely to be effective to sue the NCAA than to sue those state institutions which cooperate with the NCAA in implementing its rules.[454]

Similar "policy" arguments can be made with respect to the existence of a constitutionally-protected "liberty" or "property" interest. Thus, despite the strong historical trend against finding such an interest in athletic participation or even in future professional employment,[455] it is still possible to assert, as one federal judge did, that for a particular college athlete enrolled in a particularly undemanding curriculum at an institution engaged in "big-time" college athletics, "the underlying reason for the plaintiff's desire to be enrolled at the defendant University is the enhancement of his chances to become a professional basketball player."[456] And out of this conclusion, it is possible to aduce a "protectable" interest in a future professional career by taking evidence that the athlete has the talent to play professional ball,[457] and arguing that "the private interest at stake, . . . although ostensibly academic, is the plaintiff's ability to obtain a "no cut" contract with the National Basketball Association. . . . The plaintiff would suffer a substantial loss if his career objectives were impaired."[458]

To a considerable degree, these "policy" arguments are arguments based on "fact," since they derive their potential persuasive force from their ability to convince a judge that the *situation* before him is significantly different from that covered by prevailing doctrine, and that the *generality* of that doctrine must therefore be cut back to accommodate the *particulars of the instant situation* in a reasonable way. Yet part of the problem with unfavorable precedents is that they are sometimes very much "on point." Thus, the litigator's final argument when he seeks to avoid unfavorable precedents by securing an overt change in doctrine is to assert that those precedents are fundamentally flawed, that they are *basically* unfair, that *as a matter of principle*, they should be revoked or altered. Virtually always, he will make this final argument in conjunction with the one preceding. Thus, his

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453. J. WEISTART & C. LOWELL, *supra* note 114, § 1.14, at 8 (Supp. 1985).

454. For reasons indicated in the "state action" segment of this Article, this argument does not appear to be very convincing. *See supra* notes 86-149 and accompanying text.

455. W. Buss, *Due Process in Enforcement of Amateur Sports Rules,* in LAW AND AMATEUR SPORTS 1, 12-14 (R. Waicukauski ed. 1982).

456. *Hall,* 530 F. Supp. at 106.

457. *Id.* at 106.

458. *Id.* at 109.

strategy will resemble that pursued by the Supreme Court in *Brown v. Board of Education*[459] and its successors: demonstrate that the existing doctrine (in *Brown*, "separate but equal") does not "work," given the *facts* before the court; and argue that the *practical* flaws are accompanied by some philosophically-definable "injustice."

Justice Douglas exemplified the argument from principle in his *Wyman* dissent. Rejecting the majority's thesis that the warrantless search of Mrs. James' home was "'reasonable' merely because she is dependent on government largesse,"[460] Douglas argued that the fourth amendment was unconditional in its application:

> [t]he bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassments of modern life,[461]

and

> constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or the affluence of the beneficiary. It is the precincts of the *home* that the fourth amendment protects; and their privacy is as important to the lowly as the mighty.[462]

CONCLUSION: JUDICIAL CHOICES

The IU and NCAA drug-testing programs confront the courts with a fundamental choice: will they permit wide-scale, random intrusions into the lives of hundreds of thousands of athletes, expecting to discover that a small percentage are using illegal drugs? Or will they forbid testing on the ground that although some athletes will be hurt by drug use, and strongly-held social conventions will continue to be flouted, the danger to liberal ideals posed by indiscriminate testing is more important than the health and safety risks—and the risks to institutional reputation—that scattered drug use poses?

The first section of this Article suggested that this choice does not—indeed, can not—present itself in "philosophically pure" terms. Instead, it inevitably arises within a particular institutional and political context. Pressures for testing thus reflect the interests and pragmatic needs of colleges, athletic associations, and politicians, as well as the concrete fears of those who encounter drug abuse personally or through the media. Pressures against testing are less well-organized, and perhaps more generally "ideological" in nature. Thus, it is clear that some athletes will object to testing as an "invasion of privacy." But as the shortage of lawsuits to date suggests, the

459. 347 U.S. 483 (1954).
460. *Wyman*, 400 U.S. at 331.
461. *Id.* at 335 (Douglas, J., dissenting).
462. *Id.* at 332-33.

great majority are probably willing to "go along with the program."

Barriers to "the program" have emerged slowly; yet to the extent that they have emerged at all, they have been attributable to the concerns of those responsible for instituting testing that to do so would be "wrong"—and in all likelihood, illegal. In other words, judges deciding cases about "privacy" under state law and about the fourth amendment under the U.S. Constitution, have provided the principal counterweight to official hysteria about the danger that drugs pose to our society. Nowhere has this been clearer than in the judicial response to President Reagan's proposal to institute widespread testing of various classes of federal employees. Virtually all of the reported cases to date have summarily rejected the call for random testing without "individualized suspicion."[463]

The second section of this Article chronicled an idealized effort of an institution's attorney to work his way through the maze of largely-negative precedents in order to find a "winning hand," that is, a justification for a testing program that would be compatible with the requirements of existing law. In his search, he discovered that it is considerably easier to find law favorable to his cause when defending the NCAA than when defending the programs of public colleges and universities. A strong set of recent holdings, denying that the NCAA is a "state actor," suggested that federal constitutional norms do not directly govern the activities of "private" athletic associations, although they do govern the activities of public institutions that cooperate with such institutions in implementing their drug-testing programs. On the other hand, even the NCAA appears to be bound by state constitutional norms protecting the "right to privacy." As the recent trial court decision in *Levant v. NCAA*[464] indicates, in California at least, those norms are probably more protective of individual rights than are similar norms generated by the federal Constitution, and certainly reach parties not covered under the "due process" or "equal protection" clauses of the fourteenth amendment.

Counsel's arguments for a testing authority in public colleges are more strained, since it is clear that such institutions, as "state actors," are obligated to abstain from warrantless and "unreasonable" searches. The concept of what is "reasonable" has been given considerable substance in hundreds of cases, many of which are more or less directly applicable to the drug-testing situation. Under certain extreme circumstances, such as those that might obtain in prisons[465] or military installations,[466] it is reasonable to test without a warrant and without any "individualized suspicion." Within the context

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463. *See supra* note 301 and accompanying text.

464. *See supra* note 141.

465. *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (urinalysis permissible as a means of keeping drugs out of prison).

466. *See, e.g.*, Williams v. Secretary of the Navy, 787 F.2d 552 (Fed. Cir. 1986).

of school searches, however, such individualized suspicion (or even "probable cause"[467]) appears to be a general requirement.[468] Only with some ingenuity can an argument be made that these fourth amendment cases do not prevent testing. One line of attack depends on the decision in *Wyman v. James,*[469] and argues on the basis of that case that "no search" in fact takes place when the purpose of the governmental intrusion is "remedial" rather than "punitive." For the reasons indicated above,[470] given the actual testing programs that Indiana University, the NCAA, and most other educational institutions use, such a characterization of testing appears to be profoundly misleading. Another line of attack, also based on *Wyman*, argues that at least in those situations involving a student who refuses to be tested, "no search" takes place because no urine sample has in fact been taken. The weakness of this argument is that it flies in the face of the "doctrine of unconstitutional conditions."[471] A final line of attack available to the litigator, less specific in its focus but perhaps more promising, is based on the general idea that fourth amendment protections, like virtually everything else comprehended by the "due process" clause, *should not* be regarded as "absolutes," but must be derived on a case-by-case basis, in which the interests of the state are weighed (or "balanced"[472]) against the hardships imposed by the search.[473] This approach in effect demands that the hard lines of precedent in a variety of fourth amendment areas be relaxed to accommodate the perceived dangers of drug use among athletes.

To the extent that the "balancing" approach is already well-established in the law, it serves as an example of what the third section of the Article refers to as a "second-level argument." Such arguments frame doctrine in the light of contingencies, relativizing assertions of generalized individual rights to accommodate the particular claims of the state. Since those claims are substantial in the drug-testing arena, part of the conflict between the litigator representing an athlete and institutional counsel is a battle of characterization, in which the former tries to frame every issue in terms of an already-recognized "absolute" right, and the latter seeks to exploit the inevitable differences between issues decided "absolutely" in the past, and variations of those issues that demand a more "balanced" approach in the present. Due to the nature of rights discourse (in other words, those representing athletes tend to be "absolutists," given to presenting "first level," universal arguments in favor of "privacy" and "liberty," while their op-

467. Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).
468. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).
469. 400 U.S. 309 (1971).
470. *See supra* text accompanying notes 210-19.
471. *See supra* text accompanying notes 282-342.
472. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
473. *See* United States v. Leon, 468 U.S. 897 (1984); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

ponents are almost always pragmatists) "new" issues tend to be framed in these antithetical terms when they first arise, assimilated on the one hand to existing doctrines favoring the athlete's unlimited right to choose, and on the other, to existing arguments proclaiming the state's interest in overriding "rights" with claims of "public necessity." Only occasionally does this pattern of argumentation vary significantly. Thus, in a few instances, established doctrine (such as the current law addressing the question of whether an athlete has a "liberty" or "property" interest in present or future athletic competition[474]) is clearly antithetical to the interests of the athlete. In such cases, the athlete's attorney is likely to argue first on pragmatic terms that the existing rule of law is too harsh, and is being applied too rigidly, and *then* is likely to argue that the proposed alternative rule of law is more consistent with underlying principles of "privacy."

In the end, the decisions that courts reach about drug-testing will reveal where they stand on the privacy issue. Exactly *where* they end up standing, however, cannot be determined in the abstract, according to some timeless formula. Nearly seventy years ago, Munroe Smith wrote:

> [i]n their effort to give the social sense of justice articulate expression in rules and principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will be eventually reformulated.[475]

Even the doctrines of a rights-based jurisprudence are not resistant to such change. Thus, as concepts of justice change from time to time, and as the relative values assigned to "liberty" and to "freedom" in the popular consciousness and the political order shift, we can expect shifts in the willingness of the judiciary to take claims of "personal autonomy" or "privacy" seriously. Those shifts may scarcely be visible, masked by the inevitable judicial tendency to cloak new doctrine in the trappings of the old, to label new and protean rules of law as minor exceptions to established precedent. But as Benjamin Cardozo once said: "The glacier still moves."[476]

The recent movement of the glacier where the fourth and fourteenth amendment is concerned has certainly been toward more "balancing," and away from the unusually absolutistic conceptions of "right" which flourished

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474. *See supra* notes 148-51 and accompanying text.

475. M. SMITH, JURISPRUDENCE 21 (1909) (*quoted in* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921)).

476. B. CARDOZO, *supra* note 475, at 28.

during the era of the Warren Court, and have gradually been eroded over the last sixteen years. The drug-testing of athletes, although earth-shattering to some of those involved, and of general symbolic significance to a society interested in protecting individual privacy, is a relatively marginal issue. Thus, if the courts continue, as they did in *Lopez-Mendoza* and *Leon* to "balance" the personal interests of aliens and criminals in avoiding warrantless searches against the efficiency interests of the government in conducting them, it is only a matter of time before the courts, by relaxing the definition of "search," or by expanding the definition of what is "reasonable," permit colleges to conduct warrantless and random searches of their student-athletes.

Nevertheless, it is important to note that *currently existing* doctrine makes such a result difficult to justify. The strategy of the institutional counsel described above is first to understand and then to attempt to circumvent existing patterns of precedent. Similarly, all of the litigator's arguments have as their starting point a perception of the *present state* of the law, although the way that state is described sometimes entails a demand for change.

Almost exactly two centuries ago, Alexander Hamilton located the essential conservatism of the judiciary in its ultimate dependence on the "political branches" of government, noting that "it is in continual jeopardy of being overpowered, awed, or influenced, by its coordinate branches,"[477] and so would be unlikely to risk the relative freedom conferred by "separation of powers" by substituting its unhindered "will" for the historical directives of the constitution.[478] More recently, Judith Shklar, following in the footsteps of Max Weber, has located it in "internal professional ideology,"[479] which has "wedded" lawyers and judges to conceptions of "formal justice" and "to all the interests that relied on permanence and predictability in social procedures."[480] Ronald Dworkin and Stanley Fish have located it in still another source: the common, historically-derived language that judges inevitably use when they define present obligations and limits in the light of the past.[481] Finally, in a recent, rather surprising article, Duncan Kennedy has located it in the formal and psychological constraints on argument that an existing set of legal doctrines inevitably impose on even the most radical of judges:

> [Part] of the normative power of the [existing] field [of decision] comes from the fact that all these judges (and others) have left us more than just a record of their fact situations and outcomes. They wrote opinions

477. THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961).
478. *Id.* at 465-66.
479. J. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 16 (1986).
480. *Id.* at 15.
481. *See* Dworkin, *Law as Interpretation,* 60 TEX. L. REV. 527, 542-43 (1982); Fish, *Working on the Chain Gang: Interpretation in Law and Literature,* 60 TEX. L. REV. 551, 553-58 (1982).

> full of overtly normative explanations of outcomes obtainable by reference to rules and policies. . . . The second order normative power of the field comes from the fact that I identify with these ought-speakers. I respect them. I honor them. When they speak, I listen. I even tremble if I think I am going against their collective wisdom. They are members of the same community working on the same problems. They are *old.* They are *many.* They are steeped in a tradition of serious ethical inquiry whose power I have felt on countless occasions, a tradition that seems to me a partially valid great accomplishment of the often cruddy civilization of which I am a tiny part.[482]

Whatever the source of this conservative professional vision, though, it elevates existing doctrine about "privacy," the fourth amendment, and related constitutional concepts into icons that can be gradually reshaped, but not shattered without peril to the one who does the shattering. In terms of the maze, then, judges can re-shape it by cutting through overgrown walls as they trace new dimensions to old doctrines like "state action" and "unconstitutional conditions." But in terms of the game, they are forced to slog through the mass of existing precedents, constructing reasonably plausible rules as they go.

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482. Kennedy, *Freedom and Constraint on Adjudication: A Critical Phenomenology,* 36 J. LEGAL EDUC. 518, 549-50 (1986).