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REFORMING THE NCAA DRUG-TESTING PROGRAM TO WITHSTAND STATE CONSTITUTIONAL SCRUTINY: AN ANALYSIS AND PROPOSAL

Thomas P. Simon*

Three weeks before the University of Southern California (USC) football team faced Michigan State in the 1988 Rose Bowl, the National Collegiate Athletic Association¹ (NCAA) tested the USC players in accordance with the drug-testing program it had enacted in 1986.² The players knew when NCAA testing would occur and all of them passed, but USC head coach Larry Smith was curious to see if the testing was accurate.³ About three days before the game he ordered a second test, this time unannounced, and several players tested positive for banned substances even though none had failed the NCAA's earlier test.⁴

This incident arising from the 1988 Rose Bowl was one of many reports that student-athletes were using drugs⁵ and avoiding detection under the NCAA's original program, which randomly tested only those "student-athletes who compete in NCAA championships and certified postseason football contests."⁶ The incidence of student-athletes who tested positive under that program had never exceeded one percent during its

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1. The NCAA "regulates men's and women's intercollegiate athletics at [member] schools, conducts championships in all the sports it regulates, and sanctions some two-dozen post-season football 'bowl games.'" Scanlan, *Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument*, 62 IND. L.J. 863, 882 (1987). The NCAA consists of approximately one thousand colleges and universities, of which approximately one half are public institutions. See *Arlosoroff v. NCAA*, 746 F.2d 1019, 1020 (4th Cir. 1984) (describing the NCAA). It also "promulgates rules to insure minimum standards for scholarship, sportsmanship and amateurism." *Id.*

2. See B. SCHEMBECHLER & M. ALBOM, BO 248 (1989). For a brief description of the events leading to the 1986 adoption of the drug-testing program, see Hill v. NCAA, 223 Cal. App. 3d 1642, 1657-58, 273 Cal. Rptr. 402, 411, *appeal granted*, 801 P.2d 1070, 276 Cal. Rptr. 319 (1990).

3. See B. SCHEMBECHLER & M. ALBOM, *supra* note 2, at 248.

4. *Id.*

5. See *infra* note 133 (listing reports).

6. NATIONAL COLLEGIATE ATHLETIC ASS'N, NCAA DRUG TESTING/EDUCATION PROGRAMS 1989-90, at 6 (1989).

first three years of implementation,⁷ but NCAA Executive Director Richard Schultz stated that the low percentage “sounds exciting, sounds great, like we’ve done a terrific job. But unfortunately, I think we only catch the dumb [users].”⁸

To deter the use of steroids by “smart” users who avoid detection because they know when testing will occur, NCAA members voted overwhelmingly in January 1990 to expand the program to include random, year-round testing of players in major college-football programs for anabolic-steroid use.⁹ Malcolm McInnis, chairman of the drug-testing and drug-education subcommittee of the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports, stated:

As individuals become more sophisticated in methods to avoid detection, telling them a year in advance that they’re going to be tested before a bowl game is not a deterrent at all. But if they know that they can be tested at any time of year—particularly during training—that can be a very effective deterrent.¹⁰

Shortly after year-round testing went into effect, the California Court of Appeal held that the NCAA’s original drug-testing program violated a student-athlete’s right of privacy as protected by the California Constitution.¹¹ This Note examines the impact of that decision and attempts to design a program that will withstand state constitutional scrutiny.

7. In the academic year 1986-87, the NCAA declared ineligible 34 of the 3,360 athletes it tested (1.0 %). Krupa, *Fighting a Losing Battle: The NCAA’s Drug Testing Plan is Floundering*, SPORTS INC., Oct. 3, 1988, at 36. In 1987-88, 31 of the 3,304 athletes tested (0.9 %) were declared ineligible. *Id.* At NCAA championships and before postseason bowl games in the fall of the 1988-89 academic year, only 11 of the 1,618 athletes tested (0.8 %) were declared ineligible. *Fall Drug Tests Show 0.8 Rate for Positives*, NCAA NEWS, May 24, 1989, at 1, col. 5.

8. *Schultz Advocates Random Drug Tests for Athletes*, NCAA NEWS, Oct. 9, 1989, at 4, col. 3.

9. See Rhoden, *N.C.A.A. Stiffens Drug Penalties and Expands Testing in Football*, N.Y. Times, Jan. 11, 1990, at A1, col. 1.

10. *Committee Proposes Year-Round Testing for Steroids*, NCAA NEWS, July 5, 1989, at 1, col. 3. As Executive Director Richard Schultz stated:

There is so much sophistication, so many gurus out there that are trying to stay one step ahead of the testing techniques, that if a person wants to take anabolic steroids today, they [sic] can cycle those if they know they are going to be tested and probably pass that test.

Schultz Advocates Random Drug Tests for Athletes, *supra* note 8, at 4, col. 3.

11. *Hill v. NCAA*, 223 Cal. App. 3d 1642, 273 Cal. Rptr. 402, *appeal granted*, 801 P.2d 1070, 276 Cal. Rptr. 319 (1990).

Part I describes the current NCAA drug-testing program. Part II looks at the fourth amendment argument against drug testing of student-athletes. Part III assesses the viability of a federal constitutional attack on NCAA testing, while Part IV discusses a state constitutional challenge. Finally, Part V proposes reform of the current NCAA drug-testing program to achieve its goals within the bounds of federal and state constitutional rights of privacy.

I. THE NCAA DRUG-TESTING PROGRAM

A. *The Original Program*

In December 1986, All-American linebacker Brian Bosworth of the University of Oklahoma tested positive for an anabolic steroid called Deca Durabolin.¹² Barred by the NCAA from playing in the Sooners' January 1, 1987, Orange Bowl game against Arkansas,¹³ Bosworth, the most publicized victim of NCAA drug testing, added to his publicity by showing up at the Orange Bowl sporting a t-shirt that read "NCAA: NATIONAL COMMUNISTS AGAINST ATHLETES."¹⁴

Brian Bosworth was tested and penalized in accordance with the NCAA's original drug-testing program, which tested only student-athletes who competed in NCAA championships and postseason football bowl games.¹⁵ The NCAA implemented its program "[s]o that no one participant might have an artificially induced advantage, so that no one participant might be pressured to use chemical substances in order to remain competitive, and to safeguard the health and safety of participants."¹⁶

Each year student-athletes must sign a statement consenting to be tested for prohibited substances;¹⁷ those who do not

12. See Neff, *Bosworth Faces the Music*, SPORTS ILLUSTRATED, Jan. 5, 1987, at 20-21.

13. *Id.* By January 1987, 32 NCAA football players had been declared ineligible for their teams' postseason bowl games after testing positive for banned substances. See Brock & McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505, 533 (1988).

14. For an interesting description of these events, see B. BOSWORTH WITH R. REILLY, *THE BOZ: CONFESSIONS OF A MODERN ANTI-HERO* 191-205 (Charter ed. 1989).

15. See *supra* note 6 and accompanying text.

16. NATIONAL COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 6.

17. *Id.* at 6, 8-9 (NCAA bylaw 14.1.3.1).

are ineligible.¹⁸ The NCAA states that its list of prohibited substances "consists of substances generally purported to be performance enhancing and/or potentially harmful to the health and safety of the student-athlete."¹⁹ The list includes stimulants (e.g., amphetamines), anabolic steroids, diuretics, and street drugs (e.g., marijuana).²⁰ The program permits use without penalty of a limited number of prescription and over-the-counter medicines included in the list, but only if the athlete can establish "a documented medical history demonstrating the need for regular use of such a drug."²¹

The NCAA implements its program by sending testing teams to college campuses and competition sites to collect urine samples from selected athletes.²² Athletes may be selected for testing based on position of finish in the competition, playing time, playing position, suspicion, or NCAA-approved random selection.²³ The NCAA treats those who refuse to provide urine, fail to appear when scheduled for testing, or alter the validity of their specimen as if they had tested positive for a banned substance.²⁴

Testing officials visually monitor the furnishing of specimens and divide them into two subsamples, each of which is labeled with an identification number to establish a chain of custody for subsequent administrative or legal action.²⁵ The first subsample is subjected to an assay.²⁶ If it tests positive for a banned substance, the second subsample is tested by gas chromatography/mass spectrometry,²⁷ a more accurate but considerably more expensive procedure.²⁸ If that test confirms the positive result, the NCAA informs the athlete's institution that the athlete is in violation of NCAA rules and is subject to the drug-testing plan's ineligibility sanctions.²⁹

18. *Id.* at 12 (protocol 3.1).

19. *Id.* at 6.

20. *Id.* at 10 (NCAA bylaw 31.2.3.1).

21. *Id.* at 7 (NCAA bylaw 31.2.3.2).

22. See Scanlan, *supra* note 1, at 883.

23. See NATIONAL COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 12 (protocols 4.2 and 4.3).

24. *Id.* at 12 (protocol 3.3).

25. See Scanlan, *supra* note 1, at 884.

26. *Id.* For a description of the immunoassay technique, see Miike & Hewitt, *Accuracy and Reliability of Urine Drug Tests*, 36 U. KAN. L. REV. 641, 644-46 (1988).

27. See Scanlan, *supra* note 1, at 884.

28. For details on gas chromatography and mass spectrometry, see Miike & Hewitt, *supra* note 26, at 646-47.

29. See Scanlan, *supra* note 1, at 884.

The original program provided two levels of penalties: a first positive test resulted in the student-athlete's loss of eligibility for postseason competition for a minimum of ninety days,³⁰ and a subsequent positive test resulted in loss of postseason eligibility in all sports for one season and ineligibility for postseason competition at least through the succeeding academic year.³¹ The institution may appeal the penalty if it concludes that circumstances warrant restoring the student-athlete's eligibility.³²

B. The 1990 Reforms

At the NCAA's 84th annual convention in January 1990, NCAA members voted overwhelmingly to require random, year-round drug testing of Division I football players for anabolic steroids and diuretics.³³ Year-round testing supplements the NCAA's original drug-testing program, which tested only those student-athletes who participated in NCAA championships or in certified football bowl games.³⁴

The NCAA tests three dozen football players from each of the 192 colleges and universities with Division I-A and I-AA football teams.³⁵ Testing occurs at least once and usually twice a year, and its estimated cost is \$1.6 million.³⁶ Selected at random, the players receive between twenty-four and forty-eight hours' notice that testing will occur.³⁷

The NCAA will limit the new program during the first two years of its implementation to testing Division I football players.³⁸ On its face, though, the bylaw passed at the 84th convention does not limit year-round testing to football,³⁹ and

30. *See id.*

31. *See* NATIONAL COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 6 (NCAA bylaw 18.4.1.5.1).

32. *Id.* at 6 (NCAA bylaw 18.4.1.5).

33. *See* Rhoden, *supra* note 9, at A1, col. 1. Year-round testing replaced regulations implemented in 1989 that permitted the NCAA to test football players for anabolic steroids on a voluntary basis. *See* NATIONAL COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 15-16.

34. *See supra* note 6 and accompanying text.

35. *See* Rhoden, *supra* note 9, at B13, col. 1.

36. *Id.*

37. *Id.*

38. *Id.*

39. *See* NATIONAL COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 6 (NCAA bylaw

an NCAA official stated that year-round testing will be expanded to other sports if it proves effective.⁴⁰ For the time being, student-athletes in sports other than Division I football are tested only before they participate in NCAA championships.⁴¹

NCAA members also voted at the 84th convention to impose stiffer penalties on all violators of the NCAA's drug policies.⁴² The tougher penalties affect student-athletes who test positive for a banned substance under either the original program or the year-round testing program.⁴³ A first positive test results in the loss of one year of eligibility.⁴⁴ A second positive test for street drugs brings the loss of another year's eligibility, while a second positive test for a performance-enhancing drug, *e.g.*, an anabolic steroid, results in a lifetime ban from NCAA athletics.⁴⁵ If a member institution knowingly allows an ineligible athlete to participate in a competition, the school must forfeit any awards or net receipts it may have earned, and the team's and athlete's performances are stricken from NCAA records.⁴⁶

II. THE FOURTH AMENDMENT AND URINALYSIS TESTING OF STUDENT-ATHLETES

The most serious challenge to drug testing of student-athletes arises from the right of privacy protected by the fourth amendment and its state constitutional equivalents.⁴⁷

18.4.1.5.2).

40. See Rhoden, *supra* note 9, at A1, col. 1.

41. *Id.* at A1, col. 2.

42. *Id.* at A1, col. 1.

43. *Id.*

44. *Id.* at A1, col. 2.

45. *Id.*

46. *Id.* at B13, col. 1.

47. See, *e.g.*, Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 DICK. L. REV. 571, 576-82 (1988); Lock & Jennings, *The Constitutionality of Mandatory Student-Athlete Drug Testing Programs: The Bounds of Privacy*, 38 U. FLA. L. REV. 581, 588-608 (1986); Rose & Girard, *Drug Testing in Professional and College Sports*, 36 U. KAN. L. REV. 787, 814-17 (1988); Scanlan, *supra* note 1, at 915-42; Comment, *The NCAA Declares War: Student-Athletes Battle the Mandatory Drug Test*, 16 CAP. U.L. REV. 673, 694-96 (1987) (authored by Robert J. Meredith); Note, *Does the National Collegiate Athletic Association's Drug Testing Program Test Positive if it is Subjected to Constitutional Scrutiny?*, 37 DRAKE L. REV. 83, 90-98 (1987) (authored by Joseph V. Fonti); Note, *The National Collegiate Athletic*

The fourth amendment⁴⁸ generally requires a governmental search to be based on "probable cause."⁴⁹ The United States Supreme Court has held that drug testing by means of urinalysis is a search.⁵⁰ The recent trend, however, is towards the conclusion that probable cause is unnecessary if a search meets the more general standard of reasonableness under all of the circumstances.⁵¹

According to the Supreme Court's pronouncement in *New Jersey v. T.L.O.*,⁵² "[t]he determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"⁵³ The Court described that balancing process: "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."⁵⁴

Association, Random Drug-Testing, and the Applicability of the Administrative Search Exception, 17 HOFSTRA L. REV. 641, 647-88 (1989) (authored by Craig H. Thaler); Note, *Is Innocence Forever Gone? Drug Testing High School Athletes*, 54 MO. L. REV. 425, 430-34 (1989) (authored by Mary L. Scott); Note, *An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S. CAL. L. REV. 815, 819-24, 836-50 (1987) (authored by Sally Lynn Meloch). On drug testing students generally, see Note, *School Drug Tests: A Fourth Amendment Perspective*, 1987 U. ILL. L. REV. 275 (1987) (authored by Kathryn A. Buckner).

48. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

49. The Supreme Court frequently grapples with the definition of "probable cause." See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("Ordinarily, a search . . . must be based upon 'probable cause' to believe that a violation of the law has occurred."); *Illinois v. Gates*, 462 U.S. 213, 230-39 (1983); see also Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS* 173-98 (7th ed. 1990) (discussing cases); Comment, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking for an American Standard*, 21 GA. L. REV. 467, 471 (1986) (authored by Robert M. Keenan III); Note, *School Drug Tests: A Fourth Amendment Perspective*, *supra* note 47, at 281-86.

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

51. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1051 (1983); *United States v. Place*, 462 U.S. 696, 703 (1983); see also Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984) (authored by Ronald F. Wright); Comment, *supra* note 49, at 471.

52. 469 U.S. 325 (1985).

53. *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)).

54. *Id.*; see also *United States v. Place*, 462 U.S. 696, 703 (1983) (stating that the level of suspicion required before the government may conduct a search involves

In the context of urinalysis drug testing, courts generally recognize two basic infringements on privacy: (1) the fundamental deprivation of individual dignity and privacy that results from performing a private bodily function in the presence of a test administrator,⁵⁵ and (2) the invasion of the reasonable expectation of privacy regarding the information contained in one's bodily fluids.⁵⁶ Against those invasions of privacy, courts will weigh the program's efficacy at achieving its goals, which in the context of student-athlete testing typically include protecting the health and safety of the student-athletes and maintaining fair competition.⁵⁷

Currently, sixty percent of NCAA Division I institutions test their student-athletes for drug use.⁵⁸ The programs at the University of Colorado and the University of Washington have been challenged under the fourth amendment and state constitutional equivalents. In *Derdeyn v. University of*

"balanc[ing] 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").

55. See, e.g., *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617 (1989) ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment."); *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1312 (7th Cir. 1988) ("There can be little doubt that a person engaging in the act of urination possesses a reasonable expectation of privacy as to that act, and as to the urine which is excreted."); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175-76 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656 (1989) ("There are few activities in our society more personal or private than the passing of urine."); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) ("Urine . . . is normally discharged and disposed of under circumstances that merit protection from arbitrary interference.").

56. See, e.g., *Schaill*, 864 F.2d at 1312 ("The fact that urine is voluntarily discharged from the body and treated as a waste product does not eliminate the expectation of privacy which an individual possesses in his or her urine."); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 735-36 (S.D. Ga. 1986).

57. For a description of the purposes of the NCAA's drug-testing program, see NATIONAL COLLEGIATE ATHLETIC ASS'N, *supra* note 6, at 6 and text accompanying note 16.

58. See *Antidrug Programs Level Off for Now*, NCAA NEWS, Aug. 2, 1989, at 6, col. 1. One hundred fifty-two Division I schools responded to the survey, which was conducted by the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports. *Id.* The percentage is considerably lower at NCAA Division II and Division III institutions. *Id.* For descriptions of various programs implemented by Division I schools, see *Rose & Girard, supra* note 47, at 812-14 (Universities of Washington, Colorado, and Kansas); *Rovere, Haupt & Yates, Drug Testing in a University Athletic Program: Protocol and Implementation*, PHYSICIAN & SPORTSMEDICINE, Apr. 1986, at 69 (Wake Forest University); *Scanlan, supra* note 1, at 884-92 (Indiana University); and *Comment, The NCAA Declares War, supra* note 47, at 694-96 (Ohio State University).

*Colorado*⁵⁹ and *O'Halloran v. University of Washington*,⁶⁰ state trial courts held that those programs did not advance their stated goals sufficiently to justify the intrusions caused by testing.⁶¹ In a third determination, the Oregon Attorney General also concluded that the intrusiveness of a drug-testing program would outweigh the University's interests in testing when the Oregon Department of Higher Education requested that he address the constitutionality of a proposed program at the University of Oregon.⁶²

"State action" must be present, however, before one can invoke the fourth amendment's protection.⁶³ That requirement was met in the decisions discussed above because state universities are governmental entities,⁶⁴ but it poses an obstacle to a federal constitutional challenge to NCAA drug-testing because the NCAA, as an unincorporated voluntary association, is not an obvious state actor.

III. FEDERAL CONSTITUTIONAL CHALLENGES TO NCAA DRUG TESTING

Brian Bosworth was not the only All-American football player barred from postseason play during the first year of NCAA testing. The NCAA likewise suspended All-American defensive end Rolando Barbay of Louisiana State University (LSU) after he had tested positive for an anabolic steroid,⁶⁵

59. No. 86CV2245 (Colo. Dist. Ct., Boulder County, Aug. 22, 1989).

60. No. 87-2-08775-1 (Wash. Super. Ct., King County, July 23, 1987).

61. See *Derdeyn*, slip op. at 6-7; *O'Halloran*, transcript of oral op. at 10-11. In *O'Halloran*, the trial court subsequently ordered the NCAA to be joined as a third-party defendant. See *Order Compelling Joinder, O'Halloran v. University of Washington*, No. 87-2-08775-1 (Wash. Super. Ct., King County, July 24, 1987). Plaintiff's claim against the University of Washington was dismissed after reaching a compromise with the university. See *O'Halloran v. University of Washington*, 679 F. Supp. 997, 998 (W.D. Wash. 1988) (stating the procedural history of the case). Plaintiff persisted with her case against the NCAA after the NCAA removed the case to federal court. *Id.*

62. See *Op. Or. Att'y Gen. No. 8191* (Nov. 16, 1987).

63. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); see generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 497-525 (2d ed. 1983) (discussing "state action").

64. See, e.g., *Powe v. Miles*, 407 F.2d 73, 82-83 (2d Cir. 1968); *Morale v. Grigel*, 422 F. Supp. 988, 996 (D.N.H. 1976); *Smyth v. Lubbers*, 398 F. Supp. 777, 783-84 (W.D. Mich. 1975).

65. See *Neff*, *supra* note 12, at 21.

but Barbay did not make headlines by showing up at LSU's 1987 Sugar Bowl contest in a controversial t-shirt. Instead, he protested the NCAA's action by filing a lawsuit in the federal district court in New Orleans, claiming that his property right in his reputation would be damaged if he were suspended from the Sugar Bowl.⁶⁶ Barbay's federal constitutional claim against the NCAA failed, however, when the court dismissed his case for lack of state action.⁶⁷

The following year, a Florida trial court in Dade County refused to grant an injunction sought by two University of Miami football players whom the NCAA had suspended from the Orange Bowl game after the players tested positive for diuretics.⁶⁸ Again, the court held that there was "no government question involved in the case."⁶⁹

Another challenge under the United States Constitution came in *O'Halloran v. University of Washington*.⁷⁰ In that case, plaintiff contended that the NCAA's drug-testing program was flawed constitutionally because it interfered significantly with the student-athletes' rights of privacy protected by the fourth amendment.⁷¹ The court granted summary judgment to the defendant because plaintiff did not demonstrate that the NCAA's drug-testing program was enforced by persons acting under color of state law.⁷²

Each of these federal constitutional challenges to the NCAA drug-testing program failed because the plaintiff could not demonstrate that the NCAA was a state actor. Before 1982, courts typically held that the NCAA was a state actor.⁷³ These early cases rested on the notion that indirect involvement of state government could convert what otherwise would be considered private conduct into state action. Courts

66. *Barbay v. NCAA*, No. 86-5697, 1987 U.S. Dist LEXIS 393, 1987 WL 5619 (E.D. La. Jan. 20, 1987).

67. *Id.*

68. *See Mira, O'Neill Sidelined After Appeal is Rejected*, *Newsday*, Jan. 2, 1988, at 28.

69. *Id.*

70. 679 F. Supp. 997 (W.D. Wash.), *rev'd on procedural grounds*, 856 F.2d 1375 (9th Cir. 1988).

71. *O'Halloran*, 679 F. Supp. at 1000.

72. *Id.* at 1002.

73. *See, e.g., Regents of the Univ. of Minnesota v. NCAA*, 560 F.2d 352, 364 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); *Howard Univ. v. NCAA*, 510 F.2d 213, 216-20 (D.C. Cir. 1975); *Parish v. NCAA*, 506 F.2d 1028, 1031-33 (5th Cir. 1975); *Associated Students, Inc. of California State Univ. v. NCAA*, 493 F.2d 1251, 1254-55 (9th Cir. 1974).

justified their decisions on grounds that the NCAA performs a public function by regulating intercollegiate athletics,⁷⁴ that there was substantial interdependence between the NCAA and the state institutions that comprise about one-half of its membership,⁷⁵ and that the state institutional members played a "substantial, although admittedly not pervasive, role" in NCAA funding and decision making.⁷⁶

In 1982, the Supreme Court narrowed the test for determining what conduct by a private party will constitute state action.⁷⁷ Since then, federal courts of appeals addressing the issue have held that the NCAA is not a state actor.⁷⁸ In *Arlosoroff v. NCAA*,⁷⁹ for example, promulgating a new NCAA eligibility bylaw⁸⁰ that precluded the top singles player on the Duke tennis team from further competition in intercollegiate tennis did not constitute state action. The NCAA's regulation of intercollegiate athletics, which the court acknowledged may be of some public service, did not justify a finding of state action because that function was not traditionally reserved to the state.⁸¹ Moreover, the fact that approximately one half of the NCAA's members were public institutions that provided more than one half of its revenues did not alter its basic character as a voluntary association of public and private institutions.⁸² The court stated:

It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action

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

75. See, e.g., *Howard Univ.*, 510 F.2d at 219.

76. *Parish*, 506 F.2d at 1032; see also *Howard Univ.*, 510 F.2d at 219-20.

77. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-39 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982).

78. See *McCormack v. NCAA*, 845 F.2d 1338, 1346 (5th Cir. 1988); *Karmanos v. Baker*, 816 F.2d 258, 260-61 (6th Cir. 1987); *Graham v. NCAA*, 804 F.2d 953, 957-58 (6th Cir. 1986); *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021-22 (4th Cir. 1984).

79. 746 F.2d 1019 (4th Cir. 1984).

80. The bylaw provided that "any participation in organized competition in a sport during each twelve month period after the student's 20th birthday and prior to matriculation with a member institution should count as one year of varsity competition in that sport." *Arlosoroff*, 746 F.2d at 1020 (quoting NCAA bylaw 5.1.d.3). The NCAA had ruled that plaintiff's freshman year was his final year of eligibility because he had spent three years in organized tennis after his discharge from the Israeli army and before his matriculation at Duke. *Id.*

81. *Id.* at 1021.

82. *Id.*

complained of, and the function is not one traditionally reserved to the state, there is no state action.⁸³

In *Arlosoroff*, there was no suggestion that the state institutions had joined together as a bloc to adopt the challenged bylaw over the objection of the private institutions.⁸⁴

The Supreme Court directly addressed whether the NCAA is a state actor in *NCAA v. Tarkanian*.⁸⁵ In 1976, the NCAA imposed a two-year suspension from televised and postseason play on the University of Nevada, Las Vegas (UNLV) basketball team after it found thirty-eight violations of NCAA rules, ten of which involved Jerry Tarkanian, UNLV's well-known basketball coach.⁸⁶ In addition, the NCAA essentially ordered UNLV to remove Tarkanian from its intercollegiate athletic program during the probation period or face further sanctions.⁸⁷ When UNLV reluctantly complied, Tarkanian sued the NCAA alleging deprivation of liberty and property without due process.⁸⁸

To implicate the due process clause, Tarkanian argued that the NCAA was a state actor because UNLV, unquestionably a state actor, had delegated its own function to the NCAA when it complied with NCAA rules and recommendations.⁸⁹ Writing for the majority, Justice Stevens disagreed, concluding that "[n]either UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation" was sufficient to transform promulgating those standards into state action.⁹⁰ Without the requisite state action to invoke the Constitution's protection, the Court held that the NCAA had not violated due process when it investigated UNLV and recommended disciplinary action against Tarkanian.⁹¹

Commentators have noted that *Tarkanian's* most significant implication may be in the area of NCAA drug testing.⁹²

83. *Id.* at 1022.

84. *Id.*

85. 488 U.S. 179 (1988); see generally Note, *The NCAA and State Action: The Supreme Court Dunks Jerry Tarkanian*, 40 SYRACUSE L. REV. 1123 (1989) (authored by Ronald E. Friese).

86. Most of the violations concerned illegal recruiting practices, but the most serious charge was that Tarkanian attempted to frustrate the NCAA's investigation by getting people to "change their story." See *Tarkanian*, 488 U.S. at 186 n.9.

87. See *id.* at 186.

88. *Id.* at 187.

89. *Id.* at 191-92.

90. *Id.* at 195.

91. *Id.* at 199.

92. See Hochberg, *The True Meaning of "Tarkanian,"* SPORTS INC., Jan. 9, 1989,

With the recent Supreme Court decision and a line of federal appellate cases holding that adopting NCAA rules does not constitute state action, the NCAA can be confident that its current drug-testing program is shielded from attack under the United States Constitution.

IV. A STATE CONSTITUTIONAL CHALLENGE TO NCAA DRUG TESTING

Although insulated from attack under the federal Constitution, the NCAA drug-testing program remains susceptible to challenge on state constitutional right-of-privacy grounds. The California Constitution's protection of privacy rights,⁹³ for example, appears to be broader than the federal Constitution's,⁹⁴ and its guarantee of privacy is enforceable against the NCAA because the federal prerequisite of state action is not required.⁹⁵ Several other states also read their state constitutions' guarantee of privacy more expansively than the federal Constitution's fourth amendment.⁹⁶

In *LeVant v. NCAA*,⁹⁷ the captain of the Stanford University women's diving team challenged the NCAA's drug-testing program under the privacy provision of the California Constitution. The trial court issued a preliminary injunction permitting plaintiff to compete without penalty even though she had refused to sign the consent form required by the

at 44; Note, *supra* note 85, at 1138-40.

93. The California Constitution 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*." CAL. CONST. art. I, § 1 (1849, amended 1972) (emphasis added).

94. See *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 131 n.3, 610 P.2d 436, 440 n.3, 164 Cal. Rptr. 539, 543 n.3 (1980) ("[T]he federal right of privacy . . . appears to be narrower than what the voters approved . . . when they added 'privacy' to the California Constitution."); see generally Note, *The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy?*, 23 U.S.F. L. REV. 253, 255-65 (1989) (authored by Deborah Holmes McBride).

95. See *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1041-43, 264 Cal. Rptr. 194, 198-200 (1989); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976).

96. See, e.g., *People v. Beavers*, 393 Mich. 554, 564-68, 227 N.W.2d 511, 514-16, *cert. denied*, 423 U.S. 878 (1975) (discussing article I, § 11 of the Michigan Constitution); *State v. Myrick*, 102 Wash. 2d 506, 510, 688 P.2d 151, 153 (1984) (discussing article I, § 7 of the Washington Constitution).

97. No. 619209 (Cal. Super. Ct., Santa Clara County, Mar. 13, 1987).

NCAA.⁹⁸ The case became moot, however, when plaintiff, a senior, failed to qualify for NCAA championships.⁹⁹

To force the court to reach the issues raised in *LeVant*, a co-captain of the Stanford women's soccer team and a starting linebacker on the football team substituted as plaintiffs.¹⁰⁰ In *Hill v. NCAA*,¹⁰¹ a different state trial court held that the NCAA drug-testing program violated the California Constitution and permanently enjoined the NCAA from enforcing its program against Stanford student-athletes.¹⁰²

The California Court of Appeal addressed the issue on the NCAA's appeal.¹⁰³ That court determined that the NCAA must show a "compelling interest" in testing before it could invade the student-athletes' fundamental privacy rights.¹⁰⁴ To do that, the NCAA would have to "demonstrate that: (1) the testing program relates to the purposes of the NCAA regulations which confer the benefit (participation in intercollegiate competition); (2) the utility of imposing the program manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no less offensive alternatives."¹⁰⁵ The court of appeal affirmed the trial court's decision that the program violated the right of privacy based on its finding that the NCAA failed to demonstrate all three of those requirements.

The NCAA implied that the first prong of that test would be satisfied if the evidence at trial supported the NCAA's contention that its program promotes the health of student-athletes and the integrity of competition by deterring the use of banned substances.¹⁰⁶ The court observed, however, that "[a]ll of the evidence taken together demonstrated that there was no drug involvement in any sport except football, and that the problem related only to steroid use and involved a small minority of the football players."¹⁰⁷ This suggests that the original NCAA program was overbroad to the extent that it

98. See *id.* (Order Granting Preliminary Injunction at 2).

99. See *Incident or Precedent?*, SPORTS ILLUSTRATED, Mar. 23, 1987, at 18.

100. See Note, *supra* note 94, at 270.

101. No. 619209 (Cal. Super. Ct., Santa Clara County, Aug. 10, 1988), *aff'd*, 223 Cal. App. 3d 1642, 273 Cal. Rptr. 402, *appeal granted*, 801 P.2d 1070, 276 Cal. Rptr. 319 (1990).

102. See *Hill*, transcript of oral op. at 25-27.

103. See *Hill v. NCAA*, 223 Cal. App. 3d 1642, 273 Cal. Rptr. 402, *appeal granted*, 801 P.2d 1070, 276 Cal. Rptr. 319 (1990).

104. *Id.* at 1656, 273 Cal. Rptr. at 410.

105. *Id.* at 1656-57, 273 Cal. Rptr. at 410.

106. See *id.* at 1657-58, 273 Cal. Rptr. at 411.

107. *Id.* at 1662, 273 Cal. Rptr. at 414.

reached sports other than football and substances other than steroids. Moreover, there was "no scientific evidence that drug testing is an effective deterrent to drug use."¹⁰⁸

Moving to the second prong of its analysis, the court determined that the utility of the program did not manifestly outweigh its impairment of the student-athletes' constitutional right of privacy.¹⁰⁹ The court recognized that the program caused several intrusions into privacy, including the invasion caused by monitored urine collection¹¹⁰ and the interference with the student-athletes' rights to medical confidentiality,¹¹¹ to control their own medical treatment,¹¹² and to be left alone.¹¹³

In the court's view, these intrusions outweighed the NCAA's less-than-compelling interests in testing, which included protecting the health and safety of student-athletes and maintaining fair and equitable competition. The health and safety goal was not compelling because evidence at trial showed that drug use by student-athletes was no greater than that of other students.¹¹⁴ Moreover, the court concluded that the program actually might harm the health of student-athletes because it might deter the use of over-the-counter and prescription medications, many of which contain banned substances.¹¹⁵ The court also noted that the program does not provide counselling or rehabilitation, and "[i]dentifying someone who has a drug problem does not help the health of that person unless he receives appropriate treatment."¹¹⁶ As for the fair and equitable competition goal, the court found that the goal was not compelling because "the evidence did not establish that any of the drugs on the banned list would actually enhance the performance of an athlete in the NCAA sports."¹¹⁷

The court then found that the NCAA had not satisfied the third prong because it had failed to show that there were no less intrusive means available to further its health and fair-

108. *Id.* at 1672, 273 Cal. Rptr. at 420.

109. *Id.* at 1665-73, 273 Cal. Rptr. at 416-21.

110. *Id.* at 1666, 273 Cal. Rptr. at 416-17.

111. *Id.* at 1666-67, 273 Cal. Rptr. at 417.

112. *Id.* at 1667, 273 Cal. Rptr. at 417.

113. *Id.*

114. *Id.* at 1668, 273 Cal. Rptr. at 418.

115. *Id.*

116. *Id.* at 1669, 273 Cal. Rptr. at 418.

117. *Id.*

competition goals.¹¹⁸ The court focused on the NCAA's failure to try drug education adequately, or to consider testing based on reasonable suspicion as an alternative to random testing.¹¹⁹ Additionally, the court of appeal relied on the trial court's finding that the NCAA's drug-testing program was overbroad because it included substances that do not enhance performance and for which there is no evidence of use in college athletics.¹²⁰ Finally, the court noted that the program's appeal process was inadequate.¹²¹

The court's holding that the NCAA drug-testing program violates the California Constitution is especially important because California is home to a large number of colleges and universities and is the site of many NCAA athletic competitions, including the Rose Bowl game.¹²² One example of the consequences of the decision could be that Big Ten football players will be tested before playing in the Rose Bowl although Pac-10 players will not be tested.¹²³ The NCAA concedes that it "cannot be expected to maintain a nationwide system of interstate competition in which only some athletes are subject to drug testing and possible disqualification while others are not, any more than it could allow only some schools to pay their athletes or exempt them from attending classes."¹²⁴ Frank Uryasz, NCAA Director of Sports Sciences, has stated: "I think there is a problem anytime there's testing in 49 of the states and not the 50th. There's certainly going to be some inequity there. We can't operate that way."¹²⁵

V. A PROPOSAL TO REFORM THE NCAA DRUG-TESTING PROGRAM

The NCAA must eliminate the original portion of its current drug-testing program because a situation in which that portion of testing is unenforceable in one state but

118. *Id.* at 1673-74, 273 Cal. Rptr. at 421.

119. *Id.*

120. *Id.* at 1674, 273 Cal. Rptr. at 422.

121. *Id.* at 1674-75, 273 Cal. Rptr. at 422.

122. Scanlan, *supra* note 1, at 913.

123. See Krupa, *supra* note 7, at 37.

124. Hill, 223 Cal. App. 3d at 1675, 273 Cal. Rptr. at 422.

125. Krupa, *supra* note 7, at 37.

enforceable in other states threatens the fair competition that the program was designed to ensure.¹²⁶ If the NCAA chooses not to eliminate testing altogether, it must redesign its program to withstand attack under all state constitutions. The NCAA may have taken a step toward designing a program that conforms with state constitutions when, in 1990, it implemented unannounced, year-round testing of Division I college football players for anabolic steroids.¹²⁷ This part of the Note considers the constitutionality of that program under the test set forth by the California Court of Appeal in *Hill v. NCAA*.¹²⁸

A. *The Efficacy of Year-Round Testing*

The NCAA first would have to show that Division I football players use anabolic steroids. The court in *Hill* noted that “[t]he trial court found it undisputed that athletes do not use drugs any more than college students generally or others of their age group,”¹²⁹ but a court would be hard-pressed to make a similar finding about the use of anabolic steroids. The California Court of Appeal acknowledged that evidence of at least some anabolic steroid use in football exists.¹³⁰ Existing statistics almost certainly underreport the extent of steroid use because football players knew when NCAA testing would occur under the original program and cycled their steroid use to avoid testing positive.¹³¹

126. See *supra* text accompanying notes 124-25 (discussing the possibility of different testing in different states); *Hill*, 223 Cal. App. 3d at 1657-58, 273 Cal. Rptr. at 411 (mentioning the NCAA’s concern for fair competition).

127. See *supra* text accompanying note 9.

128. See *supra* text accompanying notes 101-21.

129. *Hill v. NCAA*, 223 Cal. App. 3d 1642, 1660, 273 Cal. Rptr. 402, 413, *appeal granted*, 801 P.2d 1070, 276 Cal. Rptr. 319 (1990).

130. See *Hill*, 223 Cal. App. 3d at 1661-62, 273 Cal. Rptr. at 413-14.

131. NCAA Assistant Director Frank Uryasz concurs:

I don’t think you can rely on percent positive to reflect usage. The reason we’re testing is to deter use of anabolic steroids and other substances. The figures reflect that we’re deterring the use of oil-based and injectables [which stay in the system longer]. I don’t think they tell us anything about water-based [which leave the system relatively quickly].

Myslenski, *Pumping Drugs*, Chicago Tribune, Jan. 22, 1989, § 10 (Magazine), at 16, col. 2.

The NCAA should be able to demonstrate the use of steroids by college football players because this knowledge is now fairly widespread. A 1989 survey found that the number of college athletes using anabolic steroids is increasing.¹³² Newspapers frequently report allegations of steroid use by NCAA football players.¹³³ If the proposed program were implemented and subsequently challenged, the NCAA should present witnesses such as Steve Huffman, a former University of Notre Dame football player who alleged that steroids were used widely by those in the Fighting Irish football program.¹³⁴

The NCAA also would have to show that unannounced, year-round testing for anabolic steroids would deter their use effectively. The *Hill* court stated that "NCAA testing, which is preannounced and takes place only at championships, would only deter drug use among a very small number of people and only for the immediate period of the drug testing."¹³⁵ Athletes avoided detection under the original NCAA program because they knew when testing would occur,¹³⁶ but the unannounced nature of testing under the proposed program would prevent athletes from preparing methods to avoid detection.

132. See Goldberg, *Study Reveals Steroid Use Up, Cocaine Down*, Washington Times, Oct. 17, 1989, at D2, col. 2. Of nearly 2,300 athletes surveyed by Michigan State University researchers, five percent (mainly football players) reported using anabolic steroids. *Id.*

133. See, e.g., *Michigan St. Officials to Look into Alleged Steroid Use*, Chicago Tribune, Mar. 22, 1990, at C2 (Chicagoland North ed.) (reporting that after a two-month study with more than 100 players, parents, police officers, and physicians, the Detroit News stated that steroid use was widespread in recent years among Michigan State University football players); Jauss, *NU Getting Tougher on Drug Testing*, Chicago Tribune, Feb. 11, 1990, at C10, col. 1 (reporting that two former Northwestern University football players stated that linemen on the 1986 and 1987 Northwestern football teams used steroids, and that one estimated that "from 80 to 90 percent of offensive and defensive linemen tried steroids at least once"); Berkowitz & Sell, *Former Terrapins Say They Knew of Steroid Use*, Washington Post, May 3, 1989, at C1, col. 6 (reporting that two former University of Maryland football players said they were aware some of their teammates were using steroids, and that one estimated that "20 to 25 percent" of them used steroids during the 1985-86 school year).

134. See Huffman & Telander, *I Deserve My Turn*, SPORTS ILLUSTRATED, Aug. 27, 1990, at 26. Huffman states that almost half the lettermen at Notre Dame used steroids at some time, and describes scenes of dozens of steroid bottles and hypodermic needles littering dormitory rooms. *Id.* at 30.

135. *Hill*, 223 Cal. App. 3d at 1672, 273 Cal. Rptr. at 420.

136. See *supra* notes 1-4 and accompanying text.

The *Hill* court also observed that “[s]teroids are a drug primarily used during training. If water-based steroids are used, they cannot be detected in urine after a few weeks. Testing for steroids at the time of postseason competition is not likely to detect or deter such steroid use during training.”¹³⁷ By testing year-round, the proposed program would test athletes during off-season training periods when they are most likely to use steroids. In fact, some suggest that year-round, out-of-competition testing may be the only way to deter the use of steroids.¹³⁸

B. Utility Versus Impairment

The NCAA also would have to show that the utility of the proposed program would outweigh its intrusiveness.¹³⁹ A court applying the *Hill* test likely would find that the proposed program is not nearly as intrusive as the NCAA’s original program. Because testing would be completely unannounced under the proposed program, the NCAA could eliminate its current requirement that the taking of samples be monitored visually because athletes would not have the opportunity to prepare a false sample.¹⁴⁰ The proposed program also would interfere significantly less with the student-athletes’ right to control their own medical treatment by banning only the use of anabolic steroids. Eventually, the NCAA may be able to reduce the intrusiveness of testing even further by replacing urinalysis with hair testing. The technology is currently available to perform radio-immunoassay tests of hair samples for illegal drug use, but the Food and Drug Administration has stated that the tests are “unproven” and “unreliable” at this time.¹⁴¹

137. *Hill*, 223 Cal. App. 3d at 1672, 273 Cal. Rptr. at 420.

138. See, e.g., Cowert, *Random Testing During Training May Be Only Way to Combat Drugs in Sports*, 260 J. AM. MED. ASS’N 3556 (1988).

139. See *Hill*, 223 Cal. App. 3d at 1665-73, 273 Cal. Rptr. at 416-21.

140. Even the NCAA’s requirement that the taking of urine samples be visually monitored does not completely eliminate the possibility of a false sample. Seven Michigan State University football players reportedly fooled NCAA drug testers on the eve of the 1988 Rose Bowl game by using someone else’s urine carried in a plastic bag taped inside their armpits and attached to a tube that came out between their legs. See *Michigan St. Officials to Look Into Alleged Steroid Use*, *supra* note 133.

141. See *Hair Sample Testing*, 5 Individual Empl. Rights (BNA) No. 17, at 4 (Sept.

Moving to the NCAA's alleged "compelling needs" for testing, the court in *Hill* found that the NCAA's original program did not achieve its goal of protecting the student-athletes' health and safety and may actually have harmed their health because the program banned the use of many substances contained in over-the-counter and prescription medications.¹⁴² That objection does not apply to the new program because it bans only the use of anabolic steroids, which have well-documented health risks.¹⁴³ Hypertension, cancer, sterility, liver trouble, and kidney and skin disorders are among the side effects that have been tied to their use.¹⁴⁴

The *Hill* court also found that the original program did not further its fairness-of-competition goal because the NCAA had not established the performance-enhancing effects of any of the banned substances.¹⁴⁵ The court of appeal relied on the trial court's finding that "the possible performance enhancement of steroids (increase in lean body mass and muscle strength) was a scientific controversy which would not be resolved in the foreseeable future."¹⁴⁶

Medical opinion, however, is tilting toward the conclusion that anabolic steroids have performance-enhancing effects,¹⁴⁷ and the NCAA should be able to demonstrate those effects in the near future if it cannot do so already. In 1984, Herbert Haupt and G.D. Rovere performed a thorough and comprehensive review of the literature on the effect of anabolic steroids on athletic performance.¹⁴⁸ After reviewing twenty-five well-documented studies, they concluded that consistent improvements in strength will result from anabolic-steroid use when

25, 1990).

142. See *Hill*, 223 Cal. App. 3d at 1668, 273 Cal. Rptr. at 418.

143. See B. GOLDMAN, DEATH IN THE LOCKER ROOM: STEROIDS AND SPORTS (1984); J. HARRIS, DRUGGED ATHLETES: CRISIS IN AMERICAN SPORTS (1987); J. MOHUM, DRUGS, STEROIDS AND SPORTS (1988); W. TAYLOR, ANABOLIC STEROIDS AND THE ATHLETE (1982); J. WRIGHT, ANABOLIC STEROIDS AND SPORTS (1982); Crawshaw, *The Young Athlete: Recognizing Anabolic Steroid Use*, PATIENT CARE, Aug. 1985, at 28; Fuller & LaFountain, *Performance-Enhancing Drugs in Sport: A Different Form of Drug Abuse*, 22 ADOLESCENCE 969 (1987); Haupt & Rovere, *Anabolic Steroids: A Review of the Literature*, 12 AM. J. SPORTS MED. 469 (1984); Wilson & Griffin, *The Use and Misuse of Androgens*, 29 METABOLISM 1278 (1980).

144. See Neff, *supra* note 12, at 21.

145. *Hill*, 223 Cal. App. 3d at 1669-73, 273 Cal. Rptr. at 418-21.

146. *Id.* at 1669, 273 Cal. Rptr. at 419.

147. See Altman, *New "Breakfast of Champions": A Recipe for Victory or Disaster?*, N.Y. Times, Nov. 20, 1988, at A1, col. 4.

148. Haupt & Rovere, *supra* note 143.

it is accompanied by high-intensity weight training and a high-protein, high-calorie diet.¹⁴⁹ Haupt and Rovere also found that steroids give the athlete a feeling of well-being and diminished fatigue.¹⁵⁰

The *Hill* court pointed to testimony that "no one had scientifically demonstrated that any possible improvements in strength would translate into enhanced performance for football players."¹⁵¹ Scientific evidence of that proposition hardly seems necessary; I believe that any football coach would testify that an increase in strength and muscle bulk would prove a competitive advantage in football.

C. The Availability of Less-Offensive Alternatives

The third prong of the *Hill* test could prove to be the biggest obstacle to the proposed program. The California Court of Appeal observed:

The NCAA has not adequately considered and used testing based on reasonable suspicion as an alternative to random testing or testing based on playing time

For example, anabolic steroids . . . produce very specific characteristics when taken. It is undisputed that persons using anabolic steroids experience rapid weight gain, a garlicky odor, hair loss, an increase in aggressiveness, et cetera. This means that trainers and coaches (who are extremely attentive to their players) can, by closely observing their athletes, form a reasonable suspicion of steroid use.¹⁵²

Along similar lines, Notre Dame football coach Lou Holtz has stated: "If you're observant, you often can recognize an individual using steroids. You may see a sudden gain. When you see someone come out of nowhere to bench press 550 pounds, you have to wonder."¹⁵³

149. *Id.* at 474.

150. *Id.* at 475.

151. *Hill*, 223 Cal. App. 3d at 1670, 273 Cal. Rptr. at 419.

152. *Id.* at 1674, 273 Cal. Rptr. at 421.

153. L. HOLTZ, *THE FIGHTING SPIRIT: A CHAMPIONSHIP SEASON AT NOTRE DAME* 161 (1989).

NCAA officials, however, are not in a position to make those observations, and it might be unrealistic to rely on coaches and trainers to report steroid use by their own players.¹⁵⁴ Nevertheless, this should not present an insurmountable obstacle. A court should require the NCAA to limit its program to reasonable-suspicion testing of athletes who show characteristic signs of anabolic-steroid use.

VI. CONCLUSION

The NCAA's current drug-testing program is extremely vulnerable to challenge under state constitutional rights of privacy enforceable against private entities. Because the NCAA's goal of fair competition makes it essential that its drug-testing program meet the requirements of all state constitutions, it must eliminate its original program of testing student-athletes who participate in football bowl games and NCAA championships for a wide range of banned substances. If the NCAA decides to continue testing, a limited program of unannounced, year-round testing of football players for anabolic steroids might be the only type of program that would withstand state constitutional scrutiny.

154. See Note, *supra* note 94, at 288 (discussing the role of coaches).