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DRUG TESTING OF STUDENT ATHLETES: SOME CONTRACT AND TORT IMPLICATIONS

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I. INTRODUCTION

The death of Len Bias[1] brought home to many of us the stark reality and grim truth of both the danger and the insidious nature of illegal drug use. For many, Bias' death symbolized modern athletics, with its pressures and pitfalls. For others still, stereotypical images of the inner city student-athlete, more often than not, African-American, were more firmly entrenched by this tragedy.

Whatever the reaction to Bias' death, it is clear that it heightened efforts across American campuses to intervene in the life of the student-athlete. Fueled by the perception that drug use is a particular problem for the student-athlete,[2] drug testing through urinalysis has become the order of the day.[3]

Universities and colleges defend drug testing as necessary to deter the type of situation that led to the death of Bias. Academic institutions are also quick to point out that the student-athlete readily consents to such testing as a *quid pro quo* for the privilege of participating in athletics and for the significant financial advantage of a scholarship.

The establishment of drug testing as part of the life of the student-athlete has not been without controversy. Particular concern has been raised where government involvement occurs in the context of state university administered drug testing programs[4] or where the quasi-governmental nature of intercollegiate regulation imposes such testing requirements.[5] Much of this concern centers on the fourth amendment

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1. Len Bias died on June 19, 1986. His death and that of Cleveland Brown's defensive back Don Rogers, on June 27, 1986 sparked strong public reaction. See Reilly, *When the Cheers Turned to Tears*, SPORTS ILLUSTRATED, July 14, 1986, at 28.

2. The public perception of drug use among athletes stems from initial inquiries by The National Collegiate Athletic Association ("NCAA") concerning the use of performance enhancing drugs in the 1970's. *See* Comment, *Drugs, Athletes, and the NCAA: A Proposed Rule for Mandatory Drug Testing in College Athletics*, 18 J. MARSHALL L. REV. 205 (1984). Only in more recent years has attention turned to "recreational" drug use, i.e. marijuana and cocaine. However, a 1985 study by the University of Michigan indicates that marijuana use among student-athletes ranged from 25% to 35% as opposed to 42% among all students. Cocaine use was estimated to be the same (17%) for student-athletes and non-athlete students. W. ANDERSON AND D. MCKEAG, SUBSTANCE ABUSE HABITS OF COLLEGE STUDENT ATHLETES, INSTITUTE OF SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN (1985).

3. *See* Pernell, *Random Drug Testing of Student Athletes By State Universities in the Wake of Von Raab and Skinner*, 1 J. NAT'L SPORTS L. INST. 201 (1990).

4. *Id.*

5. In the fall of 1986 the NCAA enacted a comprehensive drug testing program that requires all student-athletes participating in NCAA championship play to submit to a

implications of drug testing as a search and seizure. Thus, private colleges have not faced the same level of constitutional scrutiny.[6]

Discussion in the past centered on the concept of consent.[7] Consent is an issue often raised as the answer to fourth amendment constitutional challenges.[8] Consent can, however, be of significance in another context as well.[9]

Consent plays a significant role in contract and tort law. It is in this context that very little has been discussed relative to drug testing of student-athletes. Yet momentary reflection suggests that consent in this classic context has a significant role to play in the brave new world of urinalysis on demand.

Consider for a moment the typical student-athlete entering college. In almost all cases the student is asked in his or her senior year of high school to make significant choices concerning not only what college to attend, but also to agree to the terms and conditions imposed by the institution. These conditions are most often a prerequisite for obtaining grants-in-aid or other forms of financial support. Decisions concerning these choices and acquiescence to these conditions are most often sought from individuals who are no more than eighteen years old.

Consent to the university requirement of drug testing is most often required of the entering freshman prior to his or her first day on campus. Universities are particularly apt to require such testing in the high visibility, revenue producing, intercollegiate sports.[10]

Public attention regarding athlete drug use has centered on football and basketball. The Black student-athlete, disproportionate to his or her presence in society, accounts for a significant percentage of the ros-

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screening for use of prohibited drugs. The NCAA plan calls for the testing of athletes from member institutions "who compete in NCAA Championships and certified post-season football contests." NCAA Exec. Reg. 1, § 7(a). Eighty substances are included in the testing protocol including psychomotor stimulants (cocaine and amphetamines), sympathomimetic amines, miscellaneous central nervous system stimulants, anabolic steroids, diuretics, street drugs, including heroin and marijuana, and substances banned for particular sports. Whether or not constitutional issues are applicable to the NCAA program is beyond the scope of this article. However, it should be noted that the NCAA was determined not to be a state actor under the fourteenth amendment in NCAA v. Tarkanian, 109 S.Ct. 454 (1988). In *Tarkanian*, the Court found that no state action existed as to the NCAA, even though a state university carried out its disciplinary policy against the plaintiff.

6. *See* Bally v. Northeastern Univ., 403 Mass. 713, 532 N.E.2d 49 (1989).

7. *See* Scanlan, *Playing the Drug Testing Game: College Athletes, Regulatory Institutions, and the Structure of Constitutional Argument*, 62 IND. L. J. 863, 930-42 (1986-87).

8. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

9. RESTATEMENT (SECOND) OF TORTS § 892A (1977) states:

(1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.

10. The University of Illinois, Indiana University, University of Michigan, Northwestern University, Ohio State University, Purdue University, and the University of Wisconsin all have some form of drug testing. Some schools including Ohio State test all athletes. All of the indicated schools test athletes in at least the revenue generating sports of basketball and football. *See Drug-testing a Hot Topic Among Big 10 Coaches*, Chi. Tribune, Aug. 4, 1986, at 6.

ter in these activities. This student is often poor, and perhaps poorly prepared to resist the temptation to agree to almost anything for the opportunity to "make it" in intercollegiate athletics.

If the issue of consent, beyond the constitutional consideration, is a significant one then it would make some sense to explore the implication of asking young high school students, often poorly equipped to make intelligent or voluntary choices, to give such consent.

It is the intent of this article briefly to note some issues that may arise concerning the enforceability of this consent as a matter of contract law, and to consider the extent to which consent will shield the university from tortious liability. To do this it will be necessary first to explore the contractual nature of the relationship between the student-athlete and the university and then to discuss the consequences of enforcement of such a relationship. The tort law analysis of consent will examine the public policy implications of allowing consent to serve as a barrier to liability for the intrusive nature of drug testing. Finally the article explores ways of eliminating "questionable" consent and of allowing for the administration of drug testing in an environment in which free, intelligent choice exists.

II. THE STUDENT-ATHLETE AND THE UNIVERSITY — THE CONTRACTUAL LINK

The legal relationship between the student-athlete and the university is, to some extent, a smaller part of the larger question of the relationship between the university and students in general. Traditionally the courts were reluctant to interfere with academic relationships.[11] Social changes during the past forty years have caused the legal system to pay closer attention to issues pertaining to the business and administrative function of the university. These changes, particularly in the areas of civil rights and consumer protection, have brought about increased concern regarding student rights, and in particular, the student's status.[12]

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11. In Epperson v. Arkansas, 393 U.S. 97, 104 (1968), the Court states:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems . . . .

This doctrine of academic abstention, by which courts have deferred to educators and administrators, as applied in the university context is discussed in depth in Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. C. & U. L. 141 (1981-1982).

12. Sweat v. Painter, 339 U.S. 629 (1950) represented a major undermining of Plessy v. Ferguson, 163 U.S. 537 (1896). In unanimously finding that an all black law school was unequal in facilities, curriculum, reputation and professional opportunity, to the then all white University of Texas, *Sweat* served as the forerunner of Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954). Civil rights concerns also served as a basis for judicial scrutiny of university operation in McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) and the earlier cases of Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337 (1938) and Sipuel v. Board of Regents of the Univ. of Oklahoma, 332 U.S. 631 (1948).

Dixon v. Alabama State Bd. of Ed., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930

The theories initially relied on for judicial intervention grew, in large part, from the involvement of the state in education. Thus, early cases focused on due process as it applied to state-run or state-sponsored schools.[13] However, attempts to apply the same due process principles to private institutions have met with little success.[14]

In response to the difficulties in applying across the board due process analysis, courts have offered various other theories for determining the rights and duties between the student and the university.[15]

Contract theory is the most popular method used to support student claims against colleges. In *Perett v. State of Montana*,[16] the court described the theory by reference to a *Notre Dame Lawyer* note[17] which stated in part:

> This contract is conceived of as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school's disciplinary regulations, in return for which the school agrees to allow the

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(1961) is often thought to be the first modern case recognizing a judicial willingness to intercede in the relationship between a student and the educational system. In *Dixon*, the court noted that in regard to expulsion, the student must be given the rudimentary trappings of due process. For a more complete discussion of the growth of judicial intervention see Nordin, *supra* note 11, at 142.

13. The issue of whether the activities of a state school are state action for purposes of constitutional analysis was resolved by the Supreme Court's analysis in New Jersey v. T.L.O., 469 U.S. 325 (1985). In *T.L.O.*, the Court found that a search conducted by a state high school principal was state action for purposes of the fourth amendment. Further, the Court recognized the application of due process to the state campus in Goss v. Lopez, 419 U.S. 565 (1975) (requiring due process in suspension and expulsion proceedings) and Ingraham v. Wright, 430 U.S. 651 (1977) (applying due process to the administration of corporeal punishment).

14. In Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967) the court held that, "[i]t is clear . . . that the principle . . . that a Government college or university may not expel its students without notice of charges and an opportunity to be heard, is not applicable to Howard University, for it is not a public institution nor does it partake of any governmental character." *Id.* at 612. *See also* Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1977).

15. Professor Nordin indicates that theories of *loco parentis* and fiduciary relationships, among others, have been used to describe the relationship between the student and the university. Nordin, *supra* note 11, n.5.

The *loco parentis* theory suggests that the university serves in the place of the parent and can exercise the control that a parent could when dealing with their child. *See* Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913). Such a theory has obvious drawbacks in a modern higher education context where the age of majority is achieved at eighteen, and where even minors are recognized as persons for purposes of individual rights. Wisconsin v. Yoder, 406 U.S. 205 (1972).

The "fiduciary" theory is illustrated by the language in People *ex rel.* Tinkoff v. Northwestern University, 333 Ill. App. 224, 77 N.E.2d 345 (1947) in which the petitioner sought mandamus to require his admission to the university. The petitioner contended that the university was a private corporation "entrusted" with a public interest as evidenced by its charter granted by the legislature. This argument was rejected as was the petition for mandamus.

16. 464 F. Supp. 784, 786 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (1981). In *Peretti* students of an aviation technology course brought suit regarding the termination, due to budget cuts, of their course. The court held that an implied contract existed between the parties that could be enforced as a protected right under the fourteenth amendment to the United States Constitution.

17. Note, *Expulsion of College and Professional Students — Rights and Remedies*, 38 NOTRE DAME LAW. 174 (1963).

> student to pursue his course of studies and be granted a diploma upon successful completion thereof.[18]

Although such contracts are seldom in writing, the court accepted the notion that the existence of the contracts is implied, and that the terms can be found in the university bulletins and through the custom and usages within academia.[19]

Similarly, in *Lowenthal v. Vanderbilt University*,[20] the court found that the doctrine of academic abstention was inapplicable where the allegation is one of breach of contract.[21]

The contract theory as a basis for judicial intervention, while used often, has not escaped criticism. The contract theory has been criticized as inappropriate because the student-university relationship does not reflect "a true bargaining and promise orientation"[22] associated within the classic theory of contract. It is apparent that the application of contract theory reflects in many instances a disguised attempt to apply principles of due process to both public and private settings.[23]

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18. *Id.* at 183.

19. *See also* Krasnow v. Virginia Polytechnic Inst., 414 F. Supp. 55 (W.D. Va. 1976); Papish v. Board of Curators of Univ. of Missouri, 331 F. Supp. 1321 (W.D. Mo. 1971), *aff'd*, 464 F.2d 136 (8th Cir. 1972); Andersen v. Regents of the Univ. of California, 99 Cal. Rptr. 531 (1972); Balogun v. Cornell Univ., 70 Misc. 2d 474, 333 N.Y.S.2d 838 (N.Y. Sup. Ct. 1971).

20. No. A-8525 (Tenn. Ch. Ct. Davidson County Aug. 15, 1977). Discussed in detail in Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 108-09 (1985).

21. The case arose from the student/plaintiff allegation that the failure of the university to provide an announced innovative program within the Graduate School of Management, breached a contract to provide competent educational services. Once again, the court found that contract terms may be implied from the school's bulletin, doctoral studies guidelines, and other official statements.

22. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701, 730 (1985). Professor Dodd argues that "the lack of a true business, bargained-for relationship between student and educational institution is a major reason why contractually based analysis is not fully appropriate. . . ." *Id.* at 704. As evidence of this, the article points out that the traditional rules of offer and acceptance do not fit the university setting. Student expectations of performance, in Professor Dodd's view, do not normally rise to the traditional strength necessary to constitute contractual promise. *Id.* at 724.

Despite her criticism, Professor Dodd does note that the modern law characterizes the relationship between student and university as primarily contractual. *Id.* at 702.

23. The early cases of contract law application to the student-university relationship, often involved matters of discipline which today would be resolved, in the public institutional setting, as a matter of due process. *See* Goss v. Lopez, 419 U.S. 565 (1975). Due process on the campus is not, however, unlimited. Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978) (restricted to non-academic decisions); *see* Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 265-67 (1972) (inapplicability to the private campus).

Typical of contract approach to disciplinary issues is Goldstein v. New York University, wherein the court states:

> But obviously, and of necessity, there is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof. The power of suspension or expulsion of students is an attribute of government of educational institutions. It was ample in this case.

76 A.D. 80, 83, 78 N.Y.S. 739, 740-41 (1902).

Whatever uncertainty may be raised by the student-university relationship in general, it is certain that the relationship between the university and the student-athlete is indeed contractual.

A student-athlete certifies his intent to attend a NCAA member institution by executing a National Letter of Intent ("Letter").[24] The Letter obligates the student to attend only the indicated institution. Any enrollment in another institution within one year of the execution of the Letter results in intercollegiate ineligibility for two years, unless the initial institution formally releases the student.[25] The bargained for exchange is the offering of financial aid.

The National Letter of Intent serves as the athlete's acceptance of the university's offer. By signing, the athlete accepts the specific terms that are in the Letter, as well as those that are part of the previous course of dealings between the college and the student-athlete.

In *Taylor v. Wake Forest University*,[26] in what is considered to be the leading case on the issue,[27] the court held that the relationship between a student-athlete and the university was contractual. In *Taylor*, the plaintiff received a football scholarship contingent on his compliance with the rules of the Atlantic Coast Conference, the NCAA and Wake Forest University. Both the university and the athletic associations required that Taylor attend practice sessions in order to maintain his eligibility.

Because of poor grades Taylor quit the football team after his freshman year. As a result, Taylor's scholarship was cancelled. The failure of Taylor to participate in football was the reason given for termination.

In an action brought to recover the cost of Taylor's subsequent education,[28] the court found that the relationship between the university and the student-athlete was contractual, and that "in consideration of the scholarship award, [Taylor] agreed to maintain his athletic eligibility, and this meant both physically and scholastically."[29] Because Taylor breached this contract by failing to attend practice, the court held that the university was not liable for its promise to provide a scholarship. The court found that the terms of the contract were drawn not only from the grant-in-aid application filed by the plaintiffs[30] but also from oral

24. The National Letter of Intent program was devised by the NCAA to deter "school jumping." *See* Sturrup v. Mahan, 290 N.E.2d 64, 68 (Ind. 1972). The Letter indicates the adverse consequences that may befall the student who attempts to attend, within the prohibited period any school other than the one named in the Letter.

25. NCAA Bylaw 1-2-(a)-(2)-(vi) (1988).

26. 16 N.C. App. 117, 191 S.E.2d 379 (1972), *cert. denied*, 192 S.E.2d 197 (1972).

27. *See* G. SCHUBERT, R. SMITH AND J. TRENTADUE, SPORTS LAW 40 (1986).

28. Interestingly, the plaintiff sought recovery apparently for "wrongful termination" of the athletic scholarship. As such the action would appear to sound in tort as well as contract. *See* Woods and Mills, *Tortious Interference with an Athletic Scholarship: A University's Remedy for the Unscrupulous Sports Agent*, 40 ALA. L. REV. 141 (1988).

29. 16 N.C. App. at 120-22, 191 S.E.2d at 382.

30. The application entitled, "Atlantic Coast Conference Application For A Football Grant-In-Aid Or A Scholarship" stated in part: "This Grant if awarded, will be for 4 years provided I conduct myself in accordance with the rules of the Conference, the NCAA, and the Institution. I agree to maintain eligibility for intercollegiate athletics under both Conference and Institutional rules." *Id.* at 380.

agreements entered into between the plaintiffs and Wake Forest.[31]

In *Begley v. Corporation of Mercer University*,[32] the court again found that a contract existed between the plaintiff Begley, a basketball player, and the university. Begley received a grant-in-aid in exchange for his participation in the basketball program. The university withdrew its scholarship award after discovering a miscalculation of Begley's high school average. In finding that the university was entitled to rescind its promise to provide a scholarship, the court read into the terms of the contract the NCAA requirement that grant-in-aid awards may only be made to students with entering averages higher than that of the plaintiff.[33]

Taylor and *Begley* both support the contention that the relationship between the university and the student-athlete is contractual since athletic services are offered in exchange for a scholarship. Such a contract can be implied and will be interpreted in light of the expectations and promises of the parties.[34]

The recognition of the contractual relationship between the student-athlete and the university, both as a matter of express and implied contract, is more easily achieved than the recognition of the same relationship between the university and the student body generally. As stated in the *Columbia Law Review*

> The terms and conditions by which a student athlete goes to college are markedly different from those that govern the general student body. First, non-athlete students are under no specific written contract to follow the rules and regulations of the university. Student athletes, on the other hand, are under written obligation, the terms of which are specified in both the National Letter of Intent, which compels attendance at the designated institution, and the financial aid statement, which stipu-

31. Weistart and Lowell raise the issue of whether the recognition of a contract based on a financial aid award violates the concept of amateurism and in addition note: "If an award is granted in exchange for participation, the arrangement could be viewed as a vocational arrangement — that is, as compensation for personal services. And if the award is compensation for services, then the athlete might also be an 'employee' of the institution for workmen's compensation purposes." J. WEISTART AND C. LOWELL, THE LAW OF SPORTS 11 (1979).

For further discussion of the concept of the student-athlete as an employee see, University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 432 (Colo. 1953) (injured football player was an employee for purposes of workmen's compensation); Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169 (1963) (football player killed in a plane accident while returning from a game held to be an employee for family compensation purposes).

32. 367 F. Supp. 908 (E.D. Tenn. 1973).

33. *Id.*

34. The rationale of *Taylor* and *Begley* has been followed in practically all cases that have since litigated the rights and responsibilities between student-athletes and the university. *See* Gulf South Conference v. Boyd, 369 So.2d 553 (Ala. 1979). The court stated:

> It should be noted that the relationship between a college athlete who accepts an athletic scholarship and the college which awards such an athletic scholarship is contractual in nature. The college athlete agrees to participate in a sport at the college, and the college in return agrees to give assistance to the athlete. The athlete also agrees to be bound by the rules and regulations adopted by the college concerning the financial assistance.

Id. at 558.

> lates the specific terms and conditions of the scholarship. These documents impose rules and regulations upon the student athlete in excess of those ordinarily implicit in the relationship between the university and the non-athlete student.[35]

If the special relationship between a college and a student-athlete is contractual in nature, of what significance is a required consent to drug testing in the overall contractual relationship?

A. *Consent to Drug Testing as a Contractual Term*

Terms of a contract may be implied as well as specifically stated. Terms may be implied from the surrounding circumstances, the standard terms and the history of the course of dealings between the parties.[36] In the student-college relationship it is traditional for the terms of the contract to be derived not only from expressed agreements between the parties but from other documents expressing intent — such as the college catalog.[37] The contractual relationship between the student-athlete and the university builds upon this general approach by including all documents, agreements and rules that evidence the responsibilities of each party to the other.[38]

The typical consent to drug testing required by university athletic programs is the type of agreement or term that is implicitly part of the contract between the student-athlete and the university.[39] The language of such consent is exemplified by the forms used by Ohio State University[40] and the University of Illinois.[41]

The Ohio State form emphasizes that the student's consent to drug

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35. Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 104 (1985) (footnotes omitted).

36. J. CALAMARI AND J. PERILLO, CONTRACTS 56 (3d ed. 1987); A. CORBIN, CORBIN ON CONTRACTS 525 (1952).

37. Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C.U.L. 201, 206 (1985) states: "Beginning in the 1890's, courts have held that the relationship between a college and its students is fundamentally a contractual one and that the school's catalog is the main document setting forth the terms of the legal contract."(footnotes omitted).

38. Thus in *Taylor*, 16 N.C. App. at 117, 191 S.E.2d at 379 (1972) the contract terms were derived from the rules of the Atlantic Coast Conference and the NCAA as well as the grant-in-aid application signed by the plaintiff. In *Begley*, 367 F. Supp. at 908 (E.D. Tenn. 1973) Begley's failure to obtain the requisite high school grade point average implicitly breached the rules of the NCAA and Mercer University which were read as part of the contract. In Gulf South Conference v. Boyd, 369 So.2d 553 (Ala. 1979) the court enforced the athletic association by-laws regarding the transfer of students as part of the contract between the student and the university.(The court held that the university could not declare the student ineligible because of a transfer from one conference school to another.). *See also* Barile v. University of Virginia, 2 Ohio App.3d 233, 441 N.E.2d 608 (Ohio Ct. App. 1981) (finding that the Interconference Letter of Intent evidenced and was part of the contract between the university and the student-athlete).

Of particular significance to this article is Bally v. Northeastern Univ., 403 Mass. 713, 532 N.E.2d 49 (1989). Student-athlete Bally refused to sign the consent to drug test and was not allowed to participate in the track program. The university prevailed on its claim of breach of contract because of the student's refusal to sign the Northeastern University and NCAA consent forms.

39. *See Bally*, 403 Mass. 713, 532 N.E.2d 49.

40. *See* Appendix A.

41. *See* Appendix B.

testing is "in consideration for the opportunity to participate in intercollegiate athletics at The Ohio State University."[42] The Illinois program, while not using the classic consideration term for contractual intent, speaks of consent as the bargained for exchange required for athletic competition.[43]

Required consent as the *quid pro quo* for the receipt of a benefit — particularly where the delivery of a personal service is involved — is traditionally found to be an implicit term of contract. Thus in *Larsen v. Motor Supply Company*,[44] the court enforced as a term in a contract for at-will employment, the employer's standardized consent form for a psychological stress evaluation test.

However, if we accept drug testing consent requirements as implied contractual terms, whether and to what extent such terms will be judicially enforced, must be determined. Such a determination involves an evaluation of contractual rules pertaining to the intent of the parties as well as those rules concerning the enforceability of the terms. In this regard it is necessary to examine the application of traditional rules of contract avoidance including duress, undue influence and unconscionability.

1. Drug Testing Consent and the Doctrine of Duress

The concept of duress speaks to the free will of a party entering into a contractual agreement.[45] The modern rule is "that any wrongful act or threat which overcomes the free will of a party constitutes duress."[46] The determination of free will, for contract purposes, is made by looking to the particular person and determining if that person's will has been overcome.[47] In the context of the student-athlete it must be determined if the university, through a wrongful act or threat, has overcome the will of the student-athlete at the time of requiring consent.[48]

Duress also turns on whether the coercive party is unjustly enriched. In this context the issue of whether intercollegiate athletics exploit the athlete for the economic gain of the university is particularly germane.[49]

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42. *See* Appendix A.

43. The Illinois form states:

> I also understand that my participation in intercollegiate athletics is conditioned upon my full and good faith participation and cooperation in all aspects of the program including testing, education, counselling and rehabilitation. *See* Appendix B.

44. 117 Ariz. 507, 573 P.2d 907 (1977).

45. Kaplan v. Kaplan, 25 Ill. 2d 181, 185 N.E.2d 706, 709 (1962).

46. J. CALAMARI AND J. PERILLO, CONTRACTS 337 (3d ed. 1987).

47. *See* Silsbee v. Webber, 171 Mass. 378, 50 N.E. 555 (1898).

48. The age and sophistication of the student-athlete has an important role to play in determining the strength of his or her will. In 1980, 72.6% of entering freshmen were 18 years old. Only 6% were 20 or over. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701, 715 (1985).

49. There seems to be little question that the economic benefit of athletics to the university far exceeds any economic gain of the unpaid student-athlete. *See* McKenzie and Sullivan, *Does the NCAA Exploit College Athletes? An Economic and Legal Reinterpretation*, 32 ANTITRUST BULL. 373 (1987); Yasser, *Are Scholarship Athletes At Big-Time Programs Really Univer-*

But most importantly, duress requires that the act or threat be wrongful.[50] Regarding requiring drug testing consent, two issues are raised concerning the "wrongfulness" of the university's activity or threat.

First, by requiring the student-athlete to consent to drug testing under pain of loss of scholarship or non-participation, the university forces the student to waive significant constitutional and common law rights to privacy.[51] Such a forced waiver, at least in terms of the state university, may well be wrongful because of the doctrine of unconstitutional conditions.[52]

Second, the modern trend in determining duress emphasizes the exercise of a legal right "in oppressive or abusive ways"[53] as Calamari and Perillo state in describing an employee who may legally be fired without cause:

> [A] threat to fire him unless he agrees to sell his shares of stock in the employing corporation back to the employer constitutes an abuse of the employer's rights and the employee who succumbs to the threat may recover his shares if the trier of fact finds that the employee had been coerced by threat.[54]

Like the employee above, the student-athlete, although not entitled to a scholarship or to intercollegiate competition, may be the victim of duress if his or her consent to drug testing is obtained by threat of loss of those privileges.

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sity Employees?—You Bet They Are !, 9 BLACK L.J. 65 (1984); Note, *Compensation for Collegiate Athletes: A Run for More Than The Roses*, 22 SAN DIEGO L. REV. 701 (1985).

50. The Restatement of Contracts addresses what may constitute wrongful threats for purposes of duress. *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1979) (regarding when duress by physical compulsion prevents formation of a contract), RESTATEMENT (SECOND) OF CONTRACTS § 176 (1) (1979) (regarding when a threat is improper) and in particular, for purposes of this article, RESTATEMENT (SECOND) OF CONTRACTS § 176 (2) (1979) which provides:

> A threat is improper if the resulting exchange is not on fair terms, and
>
> (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
>
> (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
>
> (c) what is threatened is otherwise a use of power for intellegitimate ends.

51. *See* Pernell, *supra* note 3. As to the common law right to privacy and drug testing at the private university. *See* Bally v. Northeastern University, 403 Mass. 713, 532 N.E.2d 49 (1989).

52. The doctrine of unconstitutional conditions has its roots in the 1925 decision of Frost Trucking Co. v. Railway Comm'n., 271 U.S. 583 (1925):

> 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 conceivable that the guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94.

53. J. CALAMARI AND J. PERILLO, CONTRACTS 340 (3d ed. 1987).

54. *Id.* at 340.

If duress exists, the remedy for the student is to void the contract.[55] In this instance only the contract provision for consent to drug testing need be voided. In addition, the student may invoke the equitable jurisdiction of the court to reform the contract or to grant such other equitable relief as may be required.[56]

2. Drug Testing Consent and the Doctrine of Undue Influence

Undue influence as an equitable concept was developed as a means of setting aside a contractual agreement imposed by a dominant party upon a subservient one.[57] Unlike duress it requires no proof of a wrongful act or a threat. Instead, what must be shown is that one party used its superior psychological position to induce the subservient party to consent to an agreement that the latter would not have otherwise consented to.[58]

Calamari and Perillo speak of four elements that make a *prima facie* case of undue influence:[59] (1) susceptibility of the party influenced; (2) evidence of the opportunity to exercise influence; (3) evidence of a disposition to exercise undue influence; and (4) evidence of the unnatural nature of the transaction. Applied to the requiring of drug testing consent, undue influence appears to have validity.

The mental status of the influenced party plays a significant role in determining susceptibility. The young high school athlete presents a mentally vulnerable subject. It is hard to imagine a more impressionable person than an eighteen year-old high school student-athlete without prior experience asserting individual rights. It is ironic that the very universities which have questioned the academic preparation of the high school athlete,[60] now expect the same student to demonstrate the mental maturity necessary to bargain and consent on an issue as complex as drug testing.

The opportunity to exercise undue influence normally connotes a confidential relationship.[61] It is unclear whether the confidentiality often alleged to exist in a university drug testing program qualifies as the type of relationship conducive to undue influence. Even if it does not, the relationship between a school and a student may still meet the requirement of undue influence.

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55. *Id.* at 349.
56. *Id.* at 349-50.
57. J. CALAMARI AND J. PERILLO, CONTRACTS 351 (3d ed. 1987).
58. *Id.* at 352.
59. *Id.* at 352-53. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979).
60. At the NCAA annual convention in 1981 amendments purporting to "restore academic credibility to the postsecondary career of the student athlete" were adopted. Widener, *Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity*, 24 ARIZ. L. REV. 467 (1982). These amendments followed in the wake of documentation of the educational shortcomings of many college athletes. *See* Axthelm, *The Shame of College Sports*, NEWSWEEK, September 22, 1980, at 50, and Sanoff, *Big-Time College Sports: Behind Scandals*, U.S. NEWS & WORLD REP., April 5, 1982, at 60.
61. *See* Note, *Use of Non-confidential Relationship Undue Influence in Contract Recision*, 49 NOTRE DAME L. REV. 631, 632-33 (1974).

In *Odorizzi v. Bloomfield School District*,[62] the coerced resignation of a school teacher for unproven homosexual activity was found to be the product of undue influence. The teacher was weakened by forty hours without sleep. The court stated: "The difference between legitimate persuasion and excessive pressure, like the difference between seduction and rape, rests to a considerable extent in the manner in which the parties go about their business."[63]

If the teacher can succumb to the coercion then so can the student. Like the teacher in *Odorizzi*, the student is often faced with the demand that consent be given at once and without question. Like the teacher, the student lacks an advisor and may not have the opportunity to consult anyone other than a parent who may know even less than the student about dealing with the forces of higher education.

Third, the fact that the university almost always takes the initiative in both contacting the student and in requesting consent is significant evidence of a disposition to exercise undue influence.[64] Finally, the unnatural nature of the transaction is evidenced by the uniqueness of drug testing. The current public attention regarding drug use and the intimate nature of the testing procedure, make consent to urinalysis a strange transaction indeed.

As with duress, the remedy for undue influence in drug testing consent lies in equity. The student that successfully establishes this claim may void that provision of the contract or demand that the scholarship portion be specifically performed.

3. Consent to Drug Test and Unconscionability

Perhaps the contract doctrine most suitable to drug testing consent analysis is unconscionability. Unconscionability is a concept that, although defying precise definition,[65] prevents the enforcement of contracts or contract clauses that are grossly one-sided. In *Weaver v. American Oil Company*,[66] one of the leading cases on the doctrine, the court held that if the substantial burden of the contract or clause is on a party in a weaker bargaining position, the superior party must demonstrate "a real and voluntary meeting of the minds and not merely an objective meeting."[67]

Superior bargaining power, while alone not sufficient to make a contract unconscionable, will result in the provision being struck if there

62. 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966).

63. *Id.* at 134, 54 Cal. Rptr. at 542.

64. CALAMARI AND PERILLO, *supra* note 55, at 353.

65. Calamari and Perillo state: " 'Unconscionable' is a word that defies lawyer-like definition. It is a term borrowed from moral philosophy and ethics. As close to a definition as we are likely to get is 'that which affronts the sense of decency.' " *Id.* at 406 (quoting Gimble Bros., Inc. v. Swift, 62 Misc. 2d 156, 307 N.Y.S.2d 952 (N.Y. Civ. Ct. 1970)).

66. 257 Ind. 458, 276 N.E.2d 144 (Ind. 1971).

67. *Id.* at 464, 276 N.E.2d at 148.

is a lack of meaningful choice.[68] The typical student-athlete often presents the classic example of a weak bargaining position with no meaningful choice. The student-athlete is totally dependent on the university for financial aid. As a result of the Letter of Intent,[69] the student may not market his or her skills to other institutions without severe penalties. The mandatory nature of drug testing consent and the widespread existence of programs throughout the major institutions, leaves the student with no realistic choice but to sign.

Closely aligned with substantive unconscionability is the modern interpretation of contracts of adhesion.[70] Although the concept of adhesion developed primarily as a response to the general common law "duty to read,"[71] modern courts have found that such contracts may be unconscionable, even if technically "read." In *Weaver v. American Oil Co.*, after finding the contract to be one of adhesion the court stated:

> When a party can show . . . the contract . . . to be . . . an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party,. . . the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy.[72]

The student-university contractual relationship has been compared to a contract of adhesion by several commentators.[73] Courts also have viewed the relationship between the college and the student in adhesion terms.[74] As Professor Dodd notes, the nature of the written materials setting forth the contract terms lend themselves to classic adhesion analysis:

> [T]he various written materials that constitute the contract between student and university, a school's catalogues, circulars

68. *See* Campbell Soup v. Wentz, 172 F.2d 80 (3rd Cir. 1948); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

69. *See supra* notes 24-25 and accompanying text.

70. The term contract of adhesion refers to standardized, pre-printed contracts, merely providing blanks to be filled in or signed by the non-drafting party. *See* Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

71. The traditional duty to read rule indicates that a party who signs an agreement is deemed by their actions to have read and understood the document. *See* Ricketts v. Pennsylvania R.R. Co., 153 F.2d 757 (2nd Cir. 1946). In contracts of adhesion, courts have found the duty to read to be inapplicable where the "clause was in fine print and contained no title heading . . . ." Weaver v. American Oil Co., 257 Ind. 458, 461, 276 N.E.2d 144, 147 (Ind. 1971).

72. 257 Ind. at 464, 276 N.E.2d at 148. *See also* Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

73. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 714 (1985); Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966); Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C.U.L. 191 (1980-81).

74. *See* Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984). "[T]he contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power. . . ." *See also* K.D. v. Educational Testing Serv., 87 Misc. 2d 657, 386 N.Y.S.2d 747, 751-52 (N.Y. Sup. Ct. 1976).

> and bulletins, are not drafted to be contracts. The information so disseminated is written most often by school administrators, not lawyers, and one wonders if the drafters themselves, much less student readers, perceive that the documents are contractual materials. At least the typical consumer who must sign a contract of adhesion, although she may not comprehend nor truly agree to the terms it contains, is presumably aware that the proffered document is a legal instrument creating certain duties on the part of both parties.[75]

The plight of the student-athlete is even greater. Included in the various materials such as catalogs and bulletins are rules and regulations of the respective university specifically aimed at athletes *and* rules and requirements of the various athletic associations. Very seldom are the forms associated with these materials, including the drug testing consent form, explained to the student as legal documents containing binding contractual terms.

Dodd also points out that the public policy concern over oppression is enhanced by the youth of the subservient party.[76] Although most students are past the age of majority upon entering college, they still lack the life experience necessary to make intelligent contractual decisions.[77]

B. *Avoiding Contractual Problems in Obtaining Drug Testing Consent*

The foregoing discussion suggests that the current practices relating to obtaining consent for drug testing create potentially serious contractual problems. The private school can no longer breathe a sigh of relief because it has avoided the constitutional problems faced by its sister state university.[78]

However, the contractual problems raised are not necessarily insurmountable. There are several courses of action that a college concerned with the rejection of its drug testing consent program can pursue.

First, recognition of the source of contractual difficulty is essential. The concept of oppression is the central concern of duress, undue influence and unconscionability. Removing oppression from the drug testing consent process is thus the primary goal of any attempt to prevent a voidable contract.

Oppression in drug testing is characterized as the invasion of a student's substantial rights by denying him the opportunity to choose between options. Severe penalties for non-consent, and the absence of a reliable source of information and advice for the student called upon to make the choice, also results in oppression.

Second, choice and relief from severe penalty and advice are both factors that can be addressed by concerted university action. Choice, sufficient to remove oppression, may be accomplished by making drug

75. Dodd, *supra* note 73, at 714-15.
76. Dodd, *supra* note 73, at 715.
77. *Cf.* Ryan v. Hofstra Univ., 67 Misc. 2d 651, 324 N.Y.S.2d 964 (N.Y. Sup. Ct. 1971).
78. *See* Bally v. Northeastern Univ., 403 Mass. 713, 532 N.E.2d 49 (1989).

testing truly voluntary. Proponents of mandatory drug testing might claim that a truly voluntary program would not work as a deterrence for those involved with drug use. However, a student-athlete involved with one of the "major" sports lives under constant scrutiny. His or her conduct is monitored by other students, faculty and the media. The student-athlete, recognizing the importance of image may be highly motivated to demonstrate a "clean bill of health" without being required to provide urine on demand.

Universities might also consider the possibility of not making scholarships contingent on consenting to drug testing. In addition to providing an opportunity for choosing to submit to testing, such an approach has the added advantage of not coupling the relinquishment of the right not to be tested with the contractual consideration, scholarship. An alternative "penalty" might be to link drug testing solely with intercollegiate competition. It has long been recognized that the student-athlete has no vested right to compete and such is not the basis of the contract.[79]

Finally, the use of an independent advisor would meet the concern expressed in *Odorizzi*,[80] providing a shield against undue influence, and would also allow the student to make an informed choice. The concept of an advisor does not necessarily mean a lawyer.[81] However, the complexity of the issue may well require not only an adult, but also a person with a fair amount of sophistication.

While the above might be a good starting point for evaluating drug testing, it in no way guarantees that such programs will be risk free for the university. In addition to the uncertainty as to whether contract law hurdles may be overcome, there are some questions of tort liability that have not received much consideration.

III. Some Common Law Tort Implications of Drug Testing

Consent has significance in tort as well as contract.[82] Valid consent can protect the university from tort liability.[83]

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79. *See* National Collegiate Athletic Ass'n v. Gillard, 352 So.2d 1072 (Miss. 1977); Colorado Seminary v. National Collegiate Athletic Ass'n, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978).

80. *See supra* notes 61-62 and accompanying text.

81. The onerous nature of the student-school contract was, of course, greatly lessened in previous eras when the contract frequently was between the parent and the school. A person who is a parent would be an older person and presumably more aware than a student would be of the nature of the contractual relationship with the school.

Dodd, *supra* note 73, at 717.

82. Restatement (Second) of Torts § 892 (1977) provides:

(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.

(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

83. Restatement (Second) of Torts § 892A (1977) states:

(1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or harm resulting from it.

Drug testing exposes the university to liability that far exceeds mere negligence.[84] While constitutional liability is problematic,[85] the sensitive nature of the information gathered and the privacy interest of the test subject create a significant potential for liability in many jurisdictions if confidentiality is not strictly maintained.[86]

The effect of a signed consent for drug testing on potential liability for invasion of privacy under the common law is an area of inquiry that has to date been neglected. In light of the widespread use of drug tests, the potential for liability in this area should be considered.

A. *The Common Law Right to Privacy and Drug Testing*

Of the existing causes of action in tort, common law claims of invasion of privacy present the greatest likelihood of liability for the university.[87] Privacy, or the right to be let alone, is the student-athlete's interest that is most jeopardized by mandatory drug testing.[88]

The right to privacy, as a common law cause of action, is a concept which includes four distinct claims.[89] Of these four, the two that are particularly relevant to drug testing are: (1) unreasonable intrusion

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(2) To be effective, consent must be
(a) by one who has the capacity to consent or by a person empowered to consent for him, and
(b) to the particular conduct, or to substantially the same conduct.
(3) Conditional consent or consent restricted as to time, area or in other respects is effective only within the limits of the condition or restriction.
(4) If the actor exceeds the consent, it is not effective for the excess.
(5) Upon termination of consent its effectiveness is terminated, except as it may have become irrevocable by contract or otherwise, or except as its terms may include, expressly or by implication, a privilege to continue to act.

84. It is beyond the scope of this article to discuss in detail the always existing potential for liability that may occur as a result of physical injury or mistaken findings that are the product of negligent administration of the testing procedure.

85. National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989); Skinner v. Railway Labor Executives' Ass'n, 109 S.Ct. 1402 (1989) (allowed the drug testing of employees of the government, or who were subject to government regulation, thus opening the door to constitutional drug testing).

86. The common law now recognizes that physical intrusion into the solitude or private affairs of another is actionable as an invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652B (1977). Liability also exists for the public disclosure of private facts. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962). Invasion of privacy claims such as these, and as discussed *infra* notes 85-91 and accompanying text, should not be confused with constitutional invasion of privacy claims arising under federal or state constitutions. *See* Note, *The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy?*, 23 U.S.F. L. REV. 253 (1989).

87. Liability for negligence based causes of action are of course a real possibility, particularly if erroneous test results are generated. *See* Molien v. Kaiser Foundation Hosps., 27 Cal.3d 916, 616 P.2d 813 (1980) (defendant hospital was liable for negligent inflection of emotional distress as a result of erroneous interpretation of venereal disease test).

88. *See*, Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890):
[M]an, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

89. RESTATEMENT (SECOND) OF TORTS § 652A (1977) states:
(1) one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

upon the seclusion of another, and (2) unreasonable publicity given to the other's private life.

Intrusion upon seclusion requires proof that the defendant intentionally intrudes upon the private affairs of others in a way that would be highly offensive to a reasonable person.[90]

In *Bednarik v. Bednarik*,[91] the right to privacy principle was applied to invalidate an illegal compulsory blood test. *Bednarik* involved an action where the petitioner sought a court ordered blood test of both parties and a minor child. In denying the request the court found that "to subject a person against his will to a blood test is . . . clearly an invasion of his personal privacy."[92]

O'Brien v. Papa Gino's of America, Inc.[93] also upheld the application of this theory of invasion of privacy to a testing situation. Interestingly, for purposes of this article, the plaintiff brought suit for invasion of privacy after his employer forced the plaintiff, under threat of being fired, to take a polygraph examination relating to alleged drug use.

Applied to the drug testing of student-athletes, there can be little doubt that urinalysis, the preferred method of testing, involves an intrusion into a classic area of seclusion. Nor can there be any question that reasonable people would find the observation of urination and collection of one's urine by another, for non-medical purposes, to be highly offensive as the court stated in *National Treasury Employees Union* v. *Von Raab*:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without observation; indeed, its performance in public is generally prohibited by law as well as social custom.[94]

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(2) The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another, as stated in sec. 652B; or

(b) appropriation of the other's name or likeness, as stated in sec. 652C; or

(c) unreasonable publicity given to the other's private life, as stated in § 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in sec. 652E.

90. RESTATEMENT (SECOND) OF TORTS § 652B (1976) states: One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

In Housh v. Peth, 135 N.E.2d 440, 450 (Ohio Ct. App. 1955) the court defined the cause of action as one where there is "wrongful intrusion into one's private activities in such manner as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

91. 18 N.J. Misc. 633, 16 A.2d 80 (1940).

92. *Id.* at 90. Although the taking of a blood sample is clearly at invasion of a privacy interest, today modern civil discovery would allow for court ordered physical examinations including such test. *See* FED. R. CIV. P. 35(a).

93. 780 F.2d 1067 (1st. Cir. 1986).

94. 816 F.2d 170, 175 (5th Cir. 1987). Quoted with approval by the United States Supreme Court in Skinner v. Railway Labor Executives Ass'n, 109 S.Ct. 1402, 1413 (1989).

Urinalysis, as an invasion of the seclusion of another, was specifically addressed in *Jennings v. Minco Technology Labs, Inc.*.[95] In *Jennings*, the plaintiff brought suit against her employer seeking injunctive relief to prevent required drug testing by urinalysis. Although the court found that the cause of action for invasion of privacy was barred by the plaintiff's consent,[96] the court characterized the plaintiff's common law right to right to privacy, "to be free of any unwarranted intrusion into her private affairs,"[97] as undeniable.

A person's right to privacy can also be violated when his private life is exposed to unreasonable publicity. To constitute an invasion, the disclosure must involve private facts that are highly offensive and objectionable to the public.[98]

A headline such as "star quarterback not to play in big game after team takes drug test" could fall within the meaning of the restatement as to publicity given to private life. Most university programs indicate that drug testing results are for use by team personnel or by the player's family only.[99] However, the imposition of team or school sanctions may be as revealing to the press as direct access to the information. The fishbowl existence of the "major" college athlete results in little privacy for the athlete. At the same time there are few things that can be more damaging to the professional career of an athlete than to be associated with drugs. Witness the fate of the Canadian runner Ben Johnson.[100]

The Massachusetts Supreme Court considered the issue of public disclosure of private facts regarding the drug testing of student-athletes in *Bally v. Northeastern University*.[101] Although the plaintiff's cause of action arose under a Massachusetts statute, as opposed to common law, the court construed a claim to exist only if there is a public dissemination of information. The plaintiff failed to present any evidence that information regarding his participation in drug testing was exposed to the public.

The university again escaped liability in *Bilney v. Evening Star Newspaper*.[102] In *Bilney* six basketball team members brought suit as result of a story that appeared concerning their academic standing. Like drug testing information, actual academic performance is considered confidential. The plaintiffs' cause of action against the newspaper failed because the information was divulged by an unnamed source at the university and not the newspaper.

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95. 765 S.W.2d 497 (Tex. Ct. App. 1989).

96. *See infra* notes 103-112 and accompanying text.

97. *Jennings*, 765 S.W.2d at 500.

98. RESTATEMENT (SECOND) OF TORTS § 652D (1976) provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

99. *See* Appendix A and B.

100. *See Ben Johnson World's Fastest Scapegoat*, N.Y. Times, Oct. 20, 1988, at A27.

101. 403 Mass. 713, 532 N.E.2d 49 (1989).

102. 43 Md. App. 560, 406 A.2d 652 (Md. Ct. Spec. App. 1979).

It is likely that the issues confronted by the courts in *Bally* and *Bilney* will arise again without the impediments encountered by the plaintiffs in those cases. When they do, the court will have to determine what significance, if any to give to signed consent.

B. *Signed Consent and Tort Liability*

As noted earlier, consent, if valid, will bar recovery in tort.[103] Whether the consent to drug testing discussed above will be viewed as effective in tort, depends on the considerations of several factors.

Consent, for the purpose of excusing tort liability, is defined as a willingness for conduct to occur that is manifested by action or inaction.[104] Consent embodies the concept of *volenti non fit injuria*,[105] and as such falls within the realm of assumption of risk.

To be effective, consent must not be the product of duress.[106] The tort concept of duress would appear to be broader than the contract definition.[107] Consent was found to be a bar to a right to privacy claim in *Jennings v. Minco Technology Labs*,[108] regarding an employment required drug testing program. However, Jennings apparently did not claim that her consent was the result of duress or that it was in any way involuntary.

There is a close relationship between consent and assumption of risk. This close relationship raises a significant issue of whether public policy concerns, sufficient to void express assumption of risk agreements, will also nullify similar express consent provisions.

In *Tunkl v. Regents of University of California*,[109] the court confronted a signed release that sought to shield the defendant medical center from all liability arising from the negligence or wrongful acts of its employees. The court found that such provisions were against public policy if (1) the subject of the agreement involved a business generally suitable for public regulation, (2) the party seeking exculpation is involved in providing a service of great importance to the public, (3) the party seeking exculpation possesses a decisive advantage in bargaining position, and (4) the person seeking this service places himself under the control of the party

103. RESTATEMENT (SECOND) OF TORTS § 892A (1977).

104. RESTATEMENT (SECOND) OF TORTS § 892 (1977) states:

(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.

(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

105. To one who is willing no harm is done.

106. RESTATEMENT (SECOND) OF TORTS § 892B (3) (1977).

107. Unlike the contract definition discussed above, tort duress applies to any conduct of the actor which constrains another's will and makes the giving of consent involuntary. Comment j. to RESTATEMENT (SECOND) OF TORTS § 892B (1977) states:

Duress is constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so. Persuasion amounting to a form of constraint can take various forms and many of them, commonly encountered in daily life, are without legal effect and are not normally characterized as duress.

108. 765 S.W.2d 497 (Tex. Ct. App. 1989).

109. 60 Cal. 2d 92, 383 P.2d 441 (1963).

seeking exculpation.[110]

The transition from exculpatory clause to consent was made in *Beeck v. Tucson General Hospital*,[111] where a surgical consent signed by the plaintiff, prior to surgery, which stated that all doctors providing services were independent contractors was held invalid under the *Tunkl* principle.[112]

If a similar transition between exculpatory clause and signed consent is made regarding university required consent to drug test, then *Tunkl* may pose significant problems regarding the enforcement of that consent in a right to privacy action.

The applicability of *Tunkl* is limited to the type of business that is generally suitable for public regulation. The defendant in *Tunkl* was a university and, like all universities was subject to considerable regulation. The importance of the university to the athlete and the public in general, as a source of education is great. The decisive advantage of the bargaining position of the university vis-a-vis the student has already been discussed, and indeed forms the heart of the problem. For good or for ill, the student surely places his or herself in the hands of the university for their academic and athletic future.

It is by no means certain that signed consent will protect universities from invasion of privacy liability. Nor is it certain, that the university will be adequately protected by its current consent policy. What is certain, is that more thought and planning regarding potential liability beyond search and seizures claims must be considered.

IV. CONCLUSION

As the smoke settles from the initial furor over drug testing and its constitutionality, universities must now consider the impact of the more traditional legal theories of contracts and torts. The recognition of the relative lack of bargaining power of the student-athlete, regarding the significant intrusion of privacy that drug testing creates, leads to serious problems of oppression and coercion.

The common law doctrines of duress, undue influence and unconscionability are ripe for application in the contract milieu of university-student transactions. Planning and awareness of these factors may lead to a more equitable balancing of the relationship.

The significant interests of privacy must not be assumed to have no life beyond the constitutional inquiry. The common law protection of privacy may provide greater protection for the student than might be found to exist by constitutional edict. The university must be vigilant in guarding the confidentiality of the student and at the same time work to assure a greater role for free choice.

110. *Id.* at 447.
111. 18 Ariz. App. 165, 500 P.2d 1153 (1972).
112. *Id.* at 167, 500 P.2d at 1155.

APPENDIX A
CONSENT TO TESTING OF URINE SAMPLES AND AUTHORIZATION FOR RELEASE OF INFORMATION

To: Team Physicians
The Ohio State University
Columbus, Ohio 43210

I hereby acknowledge that I received a copy of The Ohio State University Intercollegiate Athletics Drug Education Program. I further acknowledge that I have read said program, and that I understand the provisions of the program.

In consideration for the opportunity to participate in intercollegiate athletics at The Ohio State University, I am entering into this the terms of this consent and authorization.

I do hereby give my consent to have a sample of my urine collected during the school year of 1986-87, and testing for the presence of certain drugs or substances in accordance with the provisions of The Ohio State University Intercollegiate Athletics Drug Testing Program. I also consent to have a sample of my urine collected and tested at such other times as analysis testing is required under the program during the academic year. I further authorize you to act as my physician for the limited purpose of conducting analysis testing under the program and agree that you may make a confidential release of the results of the testing to the head athletic trainer at The Ohio State University; my parent(s) or legal guardian; the head coach of any intercollegiate sport of which I am a member; and the athletic director of The Ohio State University. To the extent set forth in this document, I waive any privilege I might have in connection with such information.

I understand any urine samples will be sent to the Clinical Laboratory at The Ohio State University Hospital, for actual testing.

In consideration for the opportunity to participate in intercollegiate athletics at The Ohio State University, I also release from legal responsibility or liability The Ohio State University, its Board of Trustees, its officers, employees, representatives, and agents for the release of such information and records as authorized by this form.

_____ _____

Signature Date

_____

Name (Please Print)

APPENDIX B

UNIVERSITY OF ILLINOIS SUBSTANCE ABUSE PROGRAM ADOPTED BY THE A.A. BOARD OF DIRECTORS AT A SPECIAL MEETING — MAY 23, 1985

CONSENT TO PARTICIPATE IN THE INTERCOLLEGIATE ATHLETIC SUBSTANCE ABUSE PROGRAM AND LIMITED WAIVER OF CONFIDENTIALITY

I,_____, a student at the University of Illinois, Urbana Campus, as a condition to participating in the Intercollegiate Athletic Program conducted under the auspices of the Athletic Association, do hereby consent to participate in the Substance Abuse Program. I acknowledge that I have received, read and understand the policy statement concerning this program, which includes provisions for testing through non-invasive procedures for the presence of substances, education and counselling with regard to substance abuse, and disciplinary sanctions which might be imposed as a result of this program if it is determined that I have violated the provisions and intent of the policy.

Further, I understand that as part of the program, the results of this testing may be disclosed to the coaching staff, the support staff and to my parent(s) or legal guardian(s) as provided for in the program statement. I also understand that my participation in intercollegiate athletics is conditioned upon my full and good faith participation and cooperation in all aspects of the program including testing, education, counselling and rehabilitation.

I further expressly waive any rights under applicable state or federal laws, or University policy, including but not limited to The Family Education and Privacy Act (20 USC 1232g), the physician-patient privilege, to the confidentiality of the information and documents resulting from my participation in this program, to the extent that disclosures are made as pursuant to the program statement. It is understood that the information will not be available to any other person without first obtaining my consent.

Signed this_____day of _____, 19__.

_____ _____

Witness Student