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Drug Testing of Athletes and the United States Constitution: Crisis and Conflict

J. Otis Cochran*

I. Introduction

Historically, people engaged in physical activities of a sporting nature have included those obsessed with demonstrating exceptional physical superiority.[1] This obsession with physical prowess seems to have fueled the history of what we now call "doping." The term "doping" describes any artificial method of temporarily improving athletic performance, either during training or competition.[2] It has been suggested that the first recorded incidence of doping occurred in the Garden of Eden when Adam and Eve believed the forbidden fruit would give them God-like powers.[3] In any event, humans have long searched for a "gimmick" or "an easy way" or that "special something extra."[4] Although there are no shortcuts to an excellent performance, it is apparently human nature to keep searching for them.[5]

Although doping is not an exclusively American problem,[6] dop-

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1. During the Olympic Games, athletes of Ancient Greece ate sesame seeds that acted as a stimulant. The legendary Bersekers in Norwegian mythology used bufotenine, while the Andean Indians and Australian Aborigines chewed, respectively, coca leaves and the pituri plant for stimulating and anti-fatiguing effects. *See* M. WILLIAMS, DRUGS AND ATHLETIC PERFORMANCE 6 (1974).

2. *See* O. Boje, *Doping*, 8 Bull. Health Org. League of Nations (1939). After the Rome Olympics in 1960, doping was defined as the pharmacological potentiation of athletic power which aims to artificially increase the physiological efficiency of man or animal. *See* A. Venerando, *Doping: Pathology and Ways to Control It*, 3 MEDICINA DELLO SPORT 972 (1963).

3. T.Z. Csaky, *Doping*, 12 J. SPORTS MED. AND PHYS. FITNESS 117, 120 (1972).

4. *See Proper and Improper Use of Drugs by Athletes: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. 17 (1973) (statement of Dr. Donald L. Cooper).

5. *Id.*

6. Athletes in Latin America, West Africa and South America have used substances that range from harmless leaves to powerful poisons to enhance performance. *See* Boje, *A Study of Means Employed to Raise the Level of Performance in Sports*, 8 BULL. HEALTH ORG. LEAGUE OF NATIONS 445 (1969).

Historically, European athletes used drugs not only to improve their performances but also to weaken their opponents. For example, in the sport of boxing, strychnine tablets, mixtures of brandy and cocaine, were used to achieve this result. *See* Prokop, *The Struggle Against Doping and Its History*, 10 J. SPORTS MED. AND PHYS. FITNESS 45 (1970) [hereinafter Prokop].

ing among American athletes has received the most attention.[7] This national attention has uncovered a pervasive use of recreational drugs as well as traditional performance enhancers. While there is still grave concern about the physiological side effects of drugs taken to increase endurance and aggressiveness, there is at least equal concern about recreational drug use by athletes.[8] Whether drugs are taken to celebrate a victory, to mark the signing of a contract, or under any other circumstance, the recreational use of controlled substances[9] by athletes poses dangers similar to those posed by performance-enhancing drugs. These dangers range from impaired health to death.[10] Also of primary concern is the breakdown of ethics in athletic competition.[11]

The popularity of doping and recreational drug use by athletes has resulted in serious action by sports and governmental authorities to end abuse and to rehabilitate or punish abusers.[12] Various meth-

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More recently, it has been reported that drug use is known to be common among athletes in both the East and West and that drug abuse among Soviet sportsmen is widespread. *See generally About the Deaths of Those Soviet Athletes*, SPORTS ILLUSTRATED, Oct. 8, 1984, at 11. *See also How They're Keeping The Olympics Honest*, U.S. NEWS AND WORLD REPORT Aug. 6, 1984, at 5; *The Toughest Test For Athletes*, TIME, June 25, 1984, at 61.

7. *See* Todd, *The Steroid Predicament*, SPORTS ILLUSTRATED, Aug. 1, 1983, at 62; E. Magnuson, *Baseball's Drug Scandal*, TIME, Sept. 16, 1985, at 126; B. Brubaker, *Bittersweet*, SPORTS ILLUSTRATED, Feb. 4, 1985, at 58; *Biggs Begins Drug Rehab, Looks Toward Next Fight*, JET, Feb. 25, 1985, at 54; Looney, *A Test With Nothing But Tough Questions*, SPORTS ILLUSTRATED, Aug. 9, 1982, at 24; Goldsmith, *Laws Provide Framework For Procedure*, N.Y. Times, Feb. 9, 1986, § 5 at 2, col. 3; Glasser, *Right to Privacy is a Basic Principle*, N.Y. Times, Feb. 9, 1986, § 5, at 2, col. 1; F. Waterman, *Player Agreement's "Dead" After Publicity*, The Daily Beacon, Jan. 31, 1986, at 9, col. 1; E. Brody and L. Weisman, *Battle Lines Drawn Over Rozelle Plan*, USA Today, July 8, 1986, at C-1, col. 1.

8. Although mind-altering drugs have been used since ancient times, their use was generally restricted to religious and medicinal purposes. It is unclear exactly when recreational use began. There is, however, some evidence that drugs were used socially before the birth of Christ, but authorities report that widespread recreational use did not occur until much later. In fact, widespread use of opium and cocaine did not occur until the mid-nineteenth century. E.R. BLOOMQUIST, MARIJUANA: THE SECOND TRIP 24 (1971); J. KENNEDY, COCA EXOTICA 15 (1985); L. GRINSPOON & J. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL REVOLUTION 19 (1976).

9. "Controlled substances" refers to any narcotic drug designated by federal or state controlled substances acts. *See* BLACK'S LAW DICTIONARY 298 (5th ed. 1979).

10. One of the earliest fatalities resulting from doping was reported in 1886. During a race between Paris and Bordeaux, an excessive dose of trimethyl caused an English cyclist's death. *See* Prokop, *supra* note 6, at 45. On June 19, 1986, Len Bias, a twenty-two year old basketball star who was the second selection overall in the 1986 National Basketball Association's draft, died from a lethal dose of cocaine. R. Johnson, *All-America Basketball Star, Celtic Choice, Dies Suddenly*, N.Y. Times, June 20, 1986, at 1, col. 1; *Bias Killed by Cocaine, Examiner Says*, The Knoxville Journal, June 25, 1986, at 1, col. 1.

Eight days after Bias' death, Don Rogers, a twenty-three year old football player with the Cleveland Browns, died of cardiac arrest induced by cocaine poisoning. D. Moore, *Autopsy Shows Deaths of Rogers, Bias Similar*, USA Today, July 1, 1986, at C-3, col. 1.

11. *See How They're Keeping the Olympics Honest*, U.S. NEWS AND WORLD REPORT, Aug. 6, 1984, at 25.

12. *See Rozelle's Drug Program*, The Knoxville News-Sentinel, July 14, 1986, at A-6,

ods have been deployed in the effort to deter drug abusers. The most common method for identifying athletes who abuse drugs is drug testing.[13]

While strict measures must be taken to guard against drug abuse by athletes, it is questionable whether drug testing is an appropriate means to achieve that result. In fact, drug testing raises significant legal issues, including an apparent conflict with fundamental constitutional rights. For example, does drug testing constitute an unreasonable search or seizure?[14] Do athletes have an absolute expectation of privacy that precludes drug testing?[15] Are there due process and equal protection implications in drug testing?[16] Does drug testing violate the fifth amendment right against self-incrimination?[17] What policy considerations are involved in drug testing? In addition to exploring the constitutional problems posed by drug testing, this Article will examine the drug testing procedures used in professional and amateur settings, and will discuss the dangers of an unbridled adoption of drug testing as a method for combating drug

col. 1; Forbes, *Browns' Model Renews Call For Random, Mandatory Drug Testing*, USA Today, June 30, 1986, at C-7; Note, *Drugs, Athletes And The NCAA: A Proposed Rule For Mandatory Drug Testing In College Athletics*, 18 J. MAR. L. REV. 205 (1984) [hereinafter *Drugs, Athletes and the NCAA*].

Copies of the drug testing programs of the National Collegiate Athletic Association, the National Basketball Association, the United States Olympic Committee, the National Football League, and the Baltimore Orioles can be found in the *Dickinson Law Review* office.

13. The two most popular forms of drug testing are chromatography and immunoassay. Chromatography is used to screen urine samples and is best described as follows:

Chromatography, an adsorption analysis, separates the chemical constituents of a sample by their differential movements through a two-phase system. Comparing the peaks that correspond to emergence of the compounds to a known standard allows presumptive identification of a compound. In gas liquid chromatography (GLC), the moving phase is the gaseous state of a sample, and the stationary phase is the liquid state. In thin-layer chromatography (TLC), the sample is incorporated into a solvent that acts as the moving phase. The moving phase rises by capillary action on a plate covered by a thin layer of cellulose or another inert material. *See* Rovere, Haupt & Yates, *Drug Testing in a University Athletic Program: Protocol and Implementation*, THE PHYSICIAN AND SPORT MEDICINE 69, 71 April, 1986.

Immunoassay is a drug testing technique in which the reaction of an antiserum to a particular compound is tested against a sample. If the compound in question is in the sample, then the amount of free antiserum will be diminished in proportion to the quantity of the compound present. The antiserum is labeled with either radioisotopes or enzymes, and the amount of free antiserum remaining is measured either with a radio immunoassay technique or with enzyme-multiplied immunoassay technique. *Id.*

See also copies of the various drug testing programs (available in the offices of the *Dickinson Law Review*). Recently, the federal government filed an amicus brief in support of a Boston Police Department's drug-testing program that is being challenged by a police union on the grounds that it violates the fourth amendment's ban on unreasonable search and seizure. The Justice Department is monitoring similar suits in other states. *See Federal Government Defends Drug Tests To Court*, Ogden Standard Examiner, Sept. 21, 1986, at 1, col. 1.

14. *See infra* notes 33-74 and accompanying text.

15. *See infra* notes 97-116 and accompanying text.

16. *See infra* notes 152-185 and accompanying text.

17. *See infra* notes 75-96 and accompanying text.

use among athletes. Finally, this Article will propose viable alternatives to across-the-board drug testing and will suggest that most legal arguments surrounding the drug testing issue are policy-based and symptomatic of larger societal problems.

II. Illegal Drug Use in Sports: The Crisis

To understand the legal implications of drug testing, it is first necessary to understand the drug abuse problems of athletes. The extent of such drug use is difficult to quantify.[18] While it is a general perception that drug abuse is pervasive, experts widely disagree on whether or not drug abuse by athletes has increased dramatically in recent years.[19] Regardless of the statistics, increased media attention on both sports and individual athletes clearly heightened public awareness of drug abuse problems among athletes.[20]

In the past thirty years, changes in the nature of the American media have brought the problem of drug use by athletes under even closer public scrutiny. Not only has the media allotted increased broadcast time and resources to athletics, but it has also improved its means of gathering and disseminating information.[21] As a result, the media is increasingly intruding into the lives of all public figures, including athletes. The press has the capability to transform relatively unknown athletes into public figures. This increased media attention, coupled with more extensive coverage of athletes, has resulted in an unwritten code of athletic conduct.[22] This code does not tolerate performance-enhancing or recreational drug use by athletes.

Although the public disapproves of drug use by athletes, it still exists. According to one report, at least forty-two professional athletes sought treatment for alcoholism or drug dependency between

18. *Drugs, Athletes, and the NCAA, supra* note 12, at 207.

19. *Id.* at n. 11. See *The Scenario Leading Up To Rozelle's Plan*, the Atlanta Constitution, July 8, 1986, at D-3, col. 1, for an excellent chronology of drug-related events in the world of sports in 1986. According to one report, at the NFL camp in New Orleans in February, 1986, sixteen percent of the nation's top seniors tested positive when given a drug test. In a two year study concluded in 1985, more than fifty-five percent of Michigan State University's athletes tested positive, with seventeen percent showing cocaine use. *See* W. Robinson, Remarks at the Entertainment Law Seminar at the University of Tennessee (April 4, 1985) (on file at the University of Tennessee Law Library).

20. *See Gooden and Society*, N.Y. Times, April 8, 1987, § 1 at 27, col. 1; *Gooden's Fall From Grace*, N.Y. Times, April 3, 1987, § 2 at 1, col. 2.

21. *See* Hyams, *Drug Use In Sports Is Forcing Athletes To Play By New Rules*, Knoxville News Sentinel, April 6, 1986, at C-3, col. 1. *See also supra* notes 6-7 and accompanying text.

22. Athletes, the new American heroes, are expected to conduct themselves responsibly and ethically. *See Gooden and Society*, N.Y. Times, April 8, 1987, § 1 at 27, col. 1.

January 1977 and July 1986,[23] and no less than twenty-three professional athletes were convicted of drug- or alcohol-related crimes during the same period.[24] Statements by the FBI's national coordinator for gambling and sports bribery investigations are even more alarming: he believes there is a strong possibility that a number of athletes might fix games or shave points because of their heavy use of cocaine.[25] Athletes have admitted publicly that the use of performance-enhancing drugs is widespread. Buck Williams, a player with the New Jersey Nets, estimated that twenty to thirty percent of the National Basketball Association players use such drugs.[26]

The initial response of the management and owners of athletic league franchises, as well as of amateur athletic associations and educational institutions, was to make counseling and drug rehabilitation services available to athletes on a voluntary basis. The counseling and drug rehabilitation programs represented attempts to internalize the problem and keep it from the press. Nevertheless, the problem could not be hidden.[27]

As the media began to inform the public that the use of drugs by athletes was widespread; the leagues, sports associations and colleges started to take more drastic measures to deal with the problem. They imposed sanctions, fines and even suspensions on those athletes whose drug use was reported by the press. But even these measures could not solve the problem. When public attention and media coverage brought reports that improper drug use by athletes had reached a crisis in American sports, the quest for a better solution began. The public demanded reassurance that its sports personalities were not using sports to support self-destructive addiction. As public pressure mounted; leagues, sports associations and colleges introduced drug testing as a possible solution to the athlete drug problem. Although perhaps attractive at first glance, drug-testing has far-reaching ramifications that must be critically examined.[28]

23. *Drug Addiction: The Costs to Sports Keep Growing*, N.Y. Times, July 25, 1986, § 3 at 6, col. 5.

24. *Id.*

25. *Drugs Called Bribe Lure*, N.Y. Times, June 16, 1986, § 2 at 17, col. 1.

26. D. Begel, *The Difficulty of Treating the Drug Abusing Athlete*, N.Y. Times, February 13, 1986, § 5 at 2, col. 1.

27. *Id.*

28. Although this Article focuses primarily upon drug testing of athletes, the author recognizes that similar constitutional issues are raised by public sector drug testing. Notably, in March 1986, the President's Commission on Organized Crime recommended mandatory drug testing of all federal employees. The commission's findings have touched off an explosive debate over the constitutionality of widespread drug testing. *See Mandatory Drug Testing In The Workplace*, 72 A.B.A. J., Aug. 1986, at ____. *See also* Chineson, *Mandatory Drug Testing: An Invasion of Privacy?*, TRIAL, Sept. 1986, at 91.

As one response to the deaths of Len Bias and Don Rogers,[29] coaches, players and owners called for increased drug testing. Art Model, owner of the Cleveland Browns, claimed that random tests are the only way to deal with drug use because the players cannot prepare for the tests by interrupting their drug use a few days prior to the tests.[30] Kevin McHale of the Boston Celtics believes that testing will help players and should be endorsed because "we should not protect drug users from being caught."[31] Dr. Forrest Tennant, drug advisor for the National Football League, said he could not understand why anyone would refuse random urinalysis: "[W]e're talking about a person's health, about addiction, the loss of lives, and injuring a player on the field. From a medical standpoint it's hard for me to understand any challenge to getting drugs out of the NFL."[32]

While many policy arguments have been mounted in support of and in opposition to drug testing, many legal questions have surfaced as well. Implementation of a comprehensive drug testing program for athletes may abrogate certain rights that are enjoyed by all persons under the United States Constitution, such as the fourth amendment right to be free from unreasonable searches and seizures; the fifth amendment protection against deprivation of life, liberty or property without due process of law, the privilege against self-incrimination; the right of privacy, a right derived from the guarantees of the Bill of Rights; and the fourteenth amendment guarantee of equal protection under the law.

III. Professional Sports: Mandatory Drug Testing

A. Is Mandatory Drug Testing An Unconstitutional Search and Seizure?

The fourth amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[33] The fourteenth amendment makes the constitutional prohibition against unreasonable searches and seizures applicable to the states.[34]

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29. *See supra* note 10.
30. G. Forbes, *Browns' Model Renews Call For Random, Mandatory Drug Testing*, USA Today, June 30, 1986, at C-7, col. 1.
31. *McHale: Set Tough Drug Policy*, Knoxville News Sentinel, June 26, 1986, at D-6, col. 1.
32. *Drug Doc: Testing a Benefit*, USA Today, July 8, 1986, at C-2, col. 1.
33. U.S. CONST. amend. IV.
34. Mapp v. Ohio, 367 U.S. 643 (1961); Sibron v. New York, 392 U.S. 40, 44 (1968).

The drafters of the Bill of Rights originally intended to alleviate the evil of "general warrants," which were used to carry out indiscriminate searches.[35] Mandatory drug testing by urinalysis is clearly a search within the meaning of the fourth amendment.[36] Case law indicates that collection of biological waste is a seizure in the "sense that something has been taken from the suspect."[37] The crucial question is whether drug testing by urinalysis is an "unreasonable search or seizure" under the fourth amendment.

The test of reasonableness under the fourth amendment is incapable of precise definition or mechanical application.[38] It requires a balancing of the need for the particular search against the invasion of personal rights.[39] Few courts have addressed the issue of drug testing and athletes within the context of a fourth amendment analysis. However, several courts recently have applied this balancing test to determine whether drug-testing procedures used by employers infringe on the constitutional rights of their employees to be free from unreasonable searches or seizures.[40]

Nearly all the cases involve public employees who objected to the random procedure used by a municipality to test them for drugs.[41] With few exceptions, courts have struck down procedures that called for random, universal drug testing of all employees. However, drug testing procedures such as urinalysis have been allowed by the courts when conducted as part of a regularly scheduled medical examination. Drug testing procedures have also been sustained where there is reasonable suspicion based upon a showing of specific objective facts that an employee is under the influence of a controlled substance.

35. J.G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 3.1 at 292 (2d Ed. 1985) [hereinafter COOK]; New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

36. In Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985), the court specifically addressed the issue of "whether the urinalysis test administered . . . was a search or seizure within the meaning of this amendment." *Id.* at 488. The court determined that urine tests were analogous to breathalyzer tests, which repeatedly have been deemed searches. *Id.* at 488-89. *See also* McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified* 809 F.2d 1302 (8th Cir. 1986); Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985); AFL-CIO v. Suscy, 538 F.2d 1264 (7th Cir.) *cert. denied* 429 U.S. 1029 (1976); Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974).

37. *See* COOK, *supra* note 35, at § 3.20 at 467.

38. Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.N.J. 1985) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

39. *Id.*

40. *See, e.g.*, McDonnel v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified* 802 F.2d 1302 (8th Cir. 1986).

41. *Id.*

In *McDonnell v. Hunter*,[42] the plaintiff brought an action against the Iowa Department of Corrections. Upon beginning his employment with the Department in 1979, he signed a "consent to search" form.[43] On January 17, 1984, the Department told him he would have to take a urinalysis test because he was seen with suspected drug traffickers.[44] He refused to take the test and was fired.[45]

The district court issued a restraining order and a preliminary injunction prohibiting the Department from conducting the urinalysis test unless the searching officials had reasonable suspicion, based on specific objective facts and reasonable inferences, that the employee was under the influence of alcohol or a controlled substance.[46] On review, the court of appeals held that the district court did not abuse its discretion in issuing the injunction.[47] The Eighth Circuit based its decision on an examination of four factors: 1) the threat of irreparable harm to the plaintiff; 2) the balance between this harm and the injury that granting the injunction would inflict on other parties; 3) the probability that the plaintiff would succeed on the merits; and 4) the public interest.[48] The court stated that "the violation of privacy in being subjected to the searches and tests in question is an irreparable harm that could reasonably be found to outweigh whatever increase in security the enforcement of the Department's policies might produce."[49]

City of Palm Bay v. Bauman[50] involved a similar situation. Palm Bay appealed a final judgment permanently enjoining it from requiring its police officers and fire fighters to submit to random urine tests for determining the presence of controlled substances unless probable cause existed or the urinalysis was part of a regularly scheduled periodic physical examination.[51]

The district court of appeals reversed the trial court's determination that the city could only perform the tests upon a showing of probable cause, and substituted "reasonable suspicion" as the constitutionally required standard.[52] The court drew a distinction between

42. 746 F.2d 785 (8th Cir. 1986).
43. *Id.* at 786.
44. *Id.*
45. *Id.*
46. *Id.* at 786-87.
47. *Id.*
48. *Id.*
49. *Id.*
50. 475 So.2d 1322 (Fla. Dist. Ct. App. 1985).
51. *Id.* at 1323.
52. *Id.* at 1325-26. The reasonable suspicion test requires that officials point to specific objective facts and rational inferences that they are entitled to draw from these facts in light

routine periodic physical examinations and specific testing for drug consumption, stating that the *Bauman* case did not involve urine testing conducted as a part of an annual or other routine physical examination. Certainly, municipal police officers and fire fighters must be expected to meet required minimum standards of physical condition in order to be hired and retained.[53] Thus, the *Bauman* court sanctioned drug testing as an integral part of a routine physical examination, but apparently would oppose testing solely for the purpose of determining improper use of drugs absent reasonable suspicion.

In *Turner v. Fraternal Order of Police*,[54] the District of Columbia Court of Appeals upheld the constitutionality of a police regulation that required police officers suspected of drug abuse to be tested. The court concluded that this type of drug testing procedure was constitutional on its face.[55] The court specifically limited its holding to the publicly-employed law enforcement agent seeking constitutional protection; its holding in *Turner* did not extend to the normal constitutional requirements relating to private citizens.[56] Thus, the court expressed no reservation in allowing police officers to submit to drug testing.

Public school teachers have also been subjected to random drug testing, and courts have held that the same "reasonable suspicion" standard applies to them. In *Patchogue-Medford Congress of Teachers v. Board of Education*,[57] probationary public school teachers were required to undergo urinalysis to detect drug use. The New York Supreme Court, Appellate Division, held that their tests were unconstitutional under the fourth amendment unless reasonable suspicion of drug use was involved.[58]

The court examined the teachers' expectation of privacy in light of the nature of their profession. The court observed that certain industries, because of the greater likelihood of criminal involvement, historically have been heavily regulated by the state; consequently employees of those industries reasonably have a diminished expecta-

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of their experience. It requires a showing of something less than probable cause. *Id.* at 1326.

53. *Id.* at 1324. The appellate court also concluded that the city had the right to adopt "a policy which prohibits officials from using controlled substances at any time while they are so employed, whether such use is on or off the job." *Id.* at 1326.

54. 500 A.2d 1005 (D.C. 1985).

55. *Id.* at 1009.

56. *Id.*

57. 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986) *aff'd* No. 156 (N.Y. Ct. App. June 9, 1987).

58. 119 A.D.2d at 40, 505 N.Y.S.2d at 891.

tion of privacy. Intrusive testing by a governmental agency may be permitted in these industries even in the absence of any articulated individualized suspicion.[59] The court found the teaching profession to be devoid of any diminished expectation of privacy that might be present in other public industries; therefore, the mandatory drug tests were illegal.[60]

A diminished expectation of privacy was found to exist in the horse racing industry. In *Shoemaker v. Handel*,[61] professional jockeys challenged random drug testing by state officials as an unconstitutional search and seizure. The regulations authorizing the search required no degree of specialized suspicion and were randomly applied. The court held that the warrantless search was not unreasonable *per se* because a legitimate governmental purpose rendered the intrusion into privacy reasonable.[62] Holding that the pervasiveness and the regularity of a regulatory scheme are necessary to justify a warrantless administrative search, the court concluded that horse racing, like alcohol and firearms,[63] satisfied the "pervasiveness" criteria.[64]

Although the *Shoemaker* court failed to provide an identifiable pattern for establishing priorities, it did present a number of factors to be considered in determining the reasonableness of the search in the absence of individualized suspicions. These factors included the legitimate purpose for the search,[65] the reasonableness of the procedures,[66] the highly regulated nature of horse racing, ample notice of the testing to participants, the state's interest in the safety of participants and honesty in the sport, procedural safeguards to prevent abuses of discretion, and the effectiveness of the random tests as a deterrent. After carefully weighing these factors, the court was persuaded that the drug tests did not violate the plaintiff's right to be free from unreasonable searches and seizures.[67] Although the *Shoemaker* court did not set forth guidelines to determine the reasonable-

59. *Id.* at 39, 505 N.Y.S.2d at 890.
60. *Id.*
61. 795 F.2d 1136 (3rd Cir. 1986).
62. *Id.* at 1144.
63. *Id.* at 1142. Alcohol and firearms have long been held to be activities subject to warrantless administrative searches. *See* United States v. Biswell, 406 U.S. 311 (1972), Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
64. In this regard, *Shoemaker* provides a basis upon which to distinguish college athletics because the nature of college activities does not justify warrantless searches as it may with "suspect businesses" like casinos, government-sanctioned sports-betting, horse racing, alcohol, or firearms.
65. "Legitimate purpose" refers to the integrity of the industry.
66. Arguably, urinalysis is deemed a lesser intrusion than other tests.
67. *Shoemaker*, 795 F.2d at 1143.

ness of a test, it did provide a useful summary of the fourth amendment analysis in the area of drug testing.[68]

In light of these decisions, it appears that mandatory drug testing conflicts with fourth amendment protection against unreasonable searches and seizures unless there is reasonable suspicion that substance abuse is present or the tests are part of a regularly scheduled, periodic physical examination. This constitutional safeguard protects most employees, including police officers, whose jobs require them to be alert and available to the public at all times. Unless an employer can point to specific, objective evidence that an employee is using a controlled substance, he cannot be tested for drugs by that employer. Courts have allowed exceptions when highly regulated, suspect businesses are involved.[69]

Several analogies can be drawn between the municipal employee cases and drug testing in the sports industry. Because municipal employees provide crucial public services, it is important that they are free of drugs while performing these services. Nevertheless, the courts have not yet required them to comply with unbridled mandatory drug testing procedures. Therefore, it is logical to conclude that the courts would not require an athlete, who performs a far less important service to the public, to comply with a mandatory drug testing procedure, implemented by his or her employer, that is devoid of constitutional safeguards.

The constitutionally mandated standard of proof established by the courts for drug testing of public employees is "reasonable suspicion" of substance abuse.[70] To date, this is the minimum standard of proof required; yet even this standard requires the employer to point to specific, objective facts and rational inferences.[71] A court is unlikely to require any less proof than "reasonable suspicion" before permitting an employer of professional athletes to test a player for drugs.

It appears from the municipal employee cases that a professional athlete can only be tested for controlled substances in two situations: either as part of a periodic, regularly scheduled medical examination, or if there is reasonable suspicion of drug use.[72] Thus, it

68. This summary essentially said that the fourth amendment was not violated when the state had a strong interest in the integrity of the persons being tested and when the testing procedures were not open to administrative abuse. *Id.* at 1142-43.

69. *See supra* note 64.

70. *See supra* note 52. *See also* Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982).

71. *Hunter*, 672 F.2d at 674-75.

72. *See* Patchogue-Medford v. Board of Education, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), *aff'd*, No. 156 (N.Y. Ct. App. June 9, 1987).

would be constitutionally permissible for professional sports teams to require their athletes to undergo weekly physical examinations during the season. This approach, however, would be extremely burdensome and time consuming. Similarly, athletes could be tested if a reasonable suspicion exists that they are using a controlled substance, but this suspicion requires specific, objective facts provided by the employer. The employer can make rational inferences to derive these facts based on his own experience in his profession.[73]

For example, if a player is habitually absent or late for a game or practice, a court would probably allow the employer to test the player based on a rational inference that the player might be abusing drugs or alcohol. Based on his experience with behavior of this type, the employer could point to the behavior as a specific indication of drug abuse. The same inferences could also be drawn from other types of behavior on the field, such as forgetfulness and extremely poor play as compared with the athlete's usual performance.[74] By pointing to specific indicia of substance abuse, it is conceivable that an employer could test athletes for drugs without violating fourth amendment rights.

B. The Fifth Amendment

The fifth amendment to the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ."[75]

The constitutional protection against compulsory self-incrimination was a response to historical practices such as judicial inquisitions by the ecclesiastical courts and the proceedings of the Star Chamber.[76] These early courts placed a premium on compelling persons to "admit guilt from their own lips."[77] The common law ex-

73. *See* McDonnell v. Hunter, 746 F.2d 785 (8th Cir. 1984) (affirmance of preliminary injunction).

74. A recent lawsuit between a professional baseball team and one of its players supports the belief that there may be a direct correlation between poor player performance and drug use. In May 1986, the Pittsburgh Pirates filed a lawsuit against one of its former players, Dave Parker. The Pirates argue that Parker's performance, i.e., his batting and his fielding, steadily deteriorated during his five-year contract term because of the effects of heavy cocaine use. According to the Pirates, Parker admitted that he was a heavy cocaine user while a player with the Pirates but later quit because the cocaine was interfering with his performance on the diamond. *See Pirate Suit Against Parker Breaks New Legal Ground*, JET, June 9, 1986, at 49. *See also Dave Parker, Baseball's First $1 Million Player, Now 1st To Be Sued Over His Salary*, JET, May 12, 1986, at 46.

75. U.S. CONST. amend. V.

76. Ullmann v. United States, 350 U.S. 422, 428 (1956).

77. Andresen v. Maryland, 427 U.S. 463, 470 (1976) (quoting Michigan v. Tucker, 417 U.S. 433, 440 (1974)).

pressed the privilege as *nemo tentur seipsum accusars* (no one shall be compelled to accuse himself) and courts have frequently held that no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question that will be self-incriminating.[78] The fourteenth amendment makes the protection against self-incrimination applicable to state proceedings.[79]

Essentially, there are three elements of the fifth amendment protection against self-incrimination: compulsion, communicativeness, and criminality. An analysis of each element is helpful in determining whether drug testing violates fifth amendment guarantees.

1. Compulsion.—Since voluntary drug testing has no fifth amendment ramifications, the issue is whether *mandatory* drug testing implicates the fifth amendment protection against compulsion. Clearly, it does. Indeed, it is the involuntary nature of most drug testing programs[80] that concerns athletes.

2. Communicativeness.—The primary barrier to using the fifth amendment privilege as a bar to mandatory drug testing is the fundamental rule that self-incrimination is only a testimonial or communicative privilege. In other words, the fifth amendment only protects verbal[81] incriminations of oneself. Courts have interpreted "witness" to mean one who incriminates himself orally or in writing. As Justice Holmes succinctly explained in *Johnson v. United States*,[82] "a party is privileged from producing the evidence but not from its production."[83] Thus, courts have held that when incriminating papers are apprehended from a third party or seized during a valid search by police, the self-incrimination privilege is inappropriate. Conversely, if the person is subpoenaed to produce the incriminating writings, the fifth amendment is properly invoked. The distinction is grounded on the theory that "the individual against whom the search is directed is not required to aid in the discovery, produc-

78. Bram v. U.S., 168 U.S. 532, 544 (1897).

79. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); *In re* Gault, 387 U.S. 1, 47 (1967) ("The language of the Fifth Amendment [as to self-incrimination] [is] applicable to the states by operation of the Fourteenth Amendment, [and] is unequivocal and without exception.").

80. Although the Baltimore Orioles adopted a voluntary drug testing program, most drug testing programs in professional or collegiate sports are involuntary.

81. "Verbal" in this context includes gestures and movements intended to be substitutes for verbal communication.

82. 228 U.S. 457 (1913).

83. *Id.* at 458.

tion, or authentication of incriminating evidence."[84]

The seminal case in this area is *Schmerber v. California.*[85] In *Schmerber*, the petitioner was hospitalized after an automobile accident.[86] Noticing signs of intoxication, the investigating police officer ordered the doctor to extract a blood sample from the petitioner against his will.[87] Rejecting all constitutional objections, the court held that

> [the fifth amendment privilege against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis [blood alcohol content tests] did not involve compulsion to these ends.[88]

The Court defined "testimonial or communicative" as spoken words or physical gestures such as nodding[89] and rejected the dissent's argument that the fifth amendment should apply because the test was performed in order to obtain the testimony of others. The Court held that the privilege applied "only to acts on the part of the person to whom the privilege applies . . . ."[90]

The Court noted that history and a long line of lower court authorities had consistently limited the privilege's protection to the cruel, simple expedient of compelling testimony from the witness' own mouth.[91] In doing so, the Court relied on precedent rather than clear reasoning or significant policy considerations. "Since the blood test evidence, although an incriminating product of compulsion, was neither the petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."[92]

Urinalysis testing for drugs falls squarely within the ambit of the *Schmerber* rules as non-testimonial and non-communicative. Therefore, it does not appear that a challenge based on the fifth amendment would stand under controlling Supreme Court

84. Andresen v. Maryland, 427 U.S. 463, 474 (1976).
85. 384 U.S. 757 (1966).
86. *Id.* at 758.
87. *Id.*
88. *Id.* at 761.
89. *Id.* at 761 n.5.
90. *Id.*
91. *Id.* at 763.
92. *Id.* at 765. The Court made it clear that compulsion which makes a suspect or accused the source of real or physical evidence does not violate the privilege against self-incrimination. *Id.* at 764. Under this analysis, compulsion of handwriting exemplars does not violate the fifth amendment. *See* United States v. Euge, 444 U.S. 707 (1980).

precedents.[93]

3. *Criminality.*—The final requirement that courts have imposed on persons seeking the protection of the fifth amendment is criminality: the evidence must relate to some conduct that is criminally punishable.[94]

The criminality requirement, like communicativeness, is of little value in resisting non-voluntary drug testing. The fifth amendment operates only when the information sought to be extracted presents a realistic threat of incrimination. Furthermore, the Supreme Court has held that disclosure of private information may be compelled if immunity removes the risk of criminal prosecution.[95] Finally, the fifth amendment offers no protection against administrative sanctions, which are not penal in nature.[96]

Although valid constitutional objections to mandatory drug testing of athletes may exist, case law clearly frustrates a valid fifth amendment argument. Any other conclusion requires upsetting well-settled precedents of the Supreme Court.

C. *The Constitutional Right of Privacy*

"Right of privacy" is a generic term encompassing various rights recognized as inherent in the concept of ordered liberty.[97] The right to privacy prohibits governmental interference in intimate personal relationships or activities; it allows freedom of the individual to make fundamental choices involving himself, his family and his relationships with others.[98] The Supreme Court considers the right of

93. *See Schmerber*, 384 U.S. 757 (1966). Nevertheless, fifth amendment challenges to drug testing continue. *Cf.* Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (prison's program of drug testing did not violate fifth amendment rights); Walters v. Secretary of Defense, 725 F.2d 107 (D.C. Cir. 1983) (compulsory drug testing in military does not offend fifth amendment). *See also* Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wis. 1985); Hoeppner v. State, 379 N.W.2d 23 (Iowa Ct. App. 1985); Newman v. Coughlin, 110 A.D.2d 981, 488 N.Y.S.2d 273 (1984) (urinalysis of prisoners approved over various constitutional objections, no fifth amendment analysis). *See generally Federal Government Defends Drug Tests to Court*, *supra* note 13.

94. Thus, the following questions would arise: (1) Would the mere presence of illegal substances in a person's system subject him to criminal liability?; (2) Has the testing entity warranted that the results of the test will not be made available to law enforcement authorities; and (3) Will the results be used solely to determine eligibility?

95. United States v. Fisher, 425 U.S. 391 (1976).

96. *See* Kim v. Rosenberg, 363 U.S. 405 (1960); *see also* Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985) (where the only result of drug testing would be civil administrative penalty, the fifth amendment was not violated).

97. *See* Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting); BLACK'S LAW DICTIONARY 1075 (5th ed. 1979).

98. *Id.*

privacy to be a fundamental right.[99] Justice Blackmun, writing for the majority in *Roe v. Wade*,[100] admitted that the constitution does not explicitly mention a right of privacy.[101] Still, he believed that such a fundamental right existed whether it was founded in the fourteenth amendment's concept of personal liberty and restrictions upon state action, or in the ninth amendment's reservation of rights to the people.[102] Regardless of the source of the right of privacy, it is clear that such a fundamental constitutional right does, in fact, exist.

Traditionally, the Supreme Court has applied strict judicial scrutiny to cases in which a fundamental constitutional right or interest is at stake.[103] Since the right of privacy is a fundamental constitutional right, any conduct or statute that interferes with that right must meet the requirements of strict judicial scrutiny in order to be upheld.[104] Strict scrutiny presumes that the conduct or statute conflicting with the fundamental right is unconstitutional. The conduct or statute will withstand scrutiny only if it is the least restrictive means tailored to compelling state interests.[105]

The right of privacy has been successfully asserted to defeat a proposed drug testing program for junior high school students.[106] In *Merriken v. Cressman*,[107] a junior high school student and his mother brought an action to prevent the introduction of a proposed drug testing program. The program was designed to identify potential drug abusers and to prepare certain necessary interventions, including psychotherapy, for potential drug abusers. The plaintiffs named the county commissioners, the area school board members, the school superintendent, and the junior high school principal as defendants. The Critical Period of Intervention (CPI) program purported to identify potential drug abusers through the use of detailed questionnaires that inquired into many personal and private matters. The court held that the CPI program was unconstitutional on the ground that it violated the plaintiffs' right to privacy.[108]

In reaching its conclusion, the *Merriken* court focused on the ultimate use of the information acquired by the defendants through

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99. Roe v. Wade, 410 U.S. 113 (1973).
100. *Id.*
101. *Id.* at 152.
102. *Id.* at 153.
103. *See* Dunn v. Blumstein, 405 U.S. 330 (1972).
104. *Id.* at 336.
105. *Id.* at 343.
106. Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).
107. *Id.*
108. *Id.* at 922.

the CPI. The court applied a balancing test in which it weighed the invasion of privacy by the CPI program against the public need for a program that would possibly prevent drug abuse. The court struck the balance in favor of the right of privacy, reasoning that neither the testing procedure nor the significance of the results had been sufficiently presented to either the child or his parents. Furthermore, the court was not persuaded that the test was reliable or credible, or that it was genuinely fighting the drug problem.[109]

Although the plaintiffs contended that the CPI program would violate other constitutional rights, the *Merriken* court stated that implementation of the program would violate no constitutional right other than privacy.[110]

In *Shoemaker v. Handel*, the court's concern was whether athletes have an absolute expectation of privacy that precludes drug testing.[111] As previously noted,[112] the plaintiff-jockey brought an action challenging New York State Racing Commission regulations that provided for the administration of breathalyzer and random urinalysis tests to all jockeys to test for alcohol and drug use. The court upheld the challenged regulations because they did not violate the plaintiff's right to privacy.[113]

The *Shoemaker* court distinguished between two types of privacy interests: the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions.[114] In the court's view, the former privacy interest, rather than the latter, was implicated. The court referred to that interest as one of "confidentiality."[115] According to the *Shoemaker* court, "[t]he right to privacy is not absolute. The state has the power to compel disclosure of otherwise private information when its interest in the information outweighs the individual's inter-

109. *Id.* at 921.

110. *Id.* The court further explained that a new state statute had rendered the self-incrimination issue moot. This Pennsylvania statute attempted to prevent the use of information, obtained confidentially from students, from being used against them in legal proceedings without consent. See 42 PA. CONS. STAT. ANN. § 5945 (Purdon 1982) for the statute in its present form. The statute referred to by the *Merriken* court, PA. STAT. ANN. tit. 24, § 13-1319, was repealed by the Judiciary Act Repealer Act, 1978 Pa. Laws 202, No. 53, § 2(a)(1260). The present statute is substantially similar to the original § 13-1319.

111. 619 F. Supp. 1089 (D.N.J. 1985).

112. *See supra* notes 61-64.

113. Other challenges included arguments that the regulations constituted an unreasonable search and seizure, violated the jockey's right to due process and deprived him of equal protection of the laws. *Id.*

114. *Id.* at 1105 (quoting Whalen v. Roe, 429 U.S. 589, 598-600 (1977)).

115. *Id.* at 1105.

est in non-disclosure."[116] The court articulated several factors which it considered in evaluating the competing interests:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent non-consensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.[117]

In student athletics, the question of whether a given mandatory drug testing program for student-athletes is violative of their constitutional right of privacy depends chiefly on the intrusiveness of the program. The most important factors to consider in weighing the degree of intrusiveness for purposes of the right of privacy include the means of testing,[118] the type of drugs for which the test is administered,[119] who conducts the testing,[120] when testing is administered,[121] and notification of procedures used.[122] The possible variations for a drug testing program are virtually limitless. Consequently, the constitutionality of drug testing programs is likely to be capable of determination only on a case-by-case basis.

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116. *Id.* at 1106 (citing Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978)).

117. *Id.* (quoting United States v. Westinghouse Electric Corp., 638 F.2d 570, 578 (3d Cir. 1980)).

118. Three bodily fluids may be the subject of drug testing procedures: blood, urine and saliva. Each of these fluids involves a different type of drug testing procedure, and each involves a different degree of intrusiveness. Clearly, lie detector tests and psychological tests are so excessively intrusive as to be unconstitutional.

119. Several broad categories of drugs may be tested for, including performance-enhancers, street drugs, and dangerous drugs. There may be some overlapping between these categories. But, it is clear that the greater the number of substances tested for, the more intrusive the drug testing program is likely to become.

120. Drug testing procedures may be conducted by any number of persons, including coaches, trainers, or independent laboratory technicians. In general, the more people who are privy to the test results, the more intrusive the search.

121. Drug testing programs may provide for random testing, testing in conjunction with the pre-season physical, follow-up testing once positive test results have occurred, or some combination of these. In general, the greater the frequency of the tests, the more intrusive a testing program is.

122. Notification procedures may be the single most important factor in determining the constitutionality of a given drug testing program. Notification deals with the number of persons who have access to drug testing results and how widely publicized the test results of particular athletes become. In general, the greater the degree of publicity, the less likely that the drug testing program will be constitutional.

IV. Professional Sports: Drug Testing Programs

A. *The National Basketball Association*

A number of the professional athletic associations have already instituted drug testing programs or are in the process of implementing them. For example, the National Basketball Association (NBA) announced a drug testing program in the spring of 1983.[123] The program stresses extensive educational and rehabilitative processes for fighting drug abuse.[124] Pursuant to its agreement with the NBA Players' Association, if a player has been convicted of, or pleads guilty to, a crime involving the use or distribution of heroin or cocaine,[125] or if the league determines guilt through procedures outlined in the agreement, the player may be permanently dismissed from the league. Three such infractions precipitate dismissal from the NBA;[126] however, there is an appellate process that permits reinstatement.[127] According to attorneys for the NBA, two players have been barred from the league for improper drug use.[128]

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123. Copies of the NBA's drug testing program are available in the offices of the *Dickinson Law Review*.

124. *Id.* at 1. The NBA program encourages voluntary treatment by providing for counseling and medical assistance at the club's expense. *Id.*

125. The league focuses its concern primarily on cocaine and heroin because they appear to pose the greatest threat. *Id.* at 2. The cocaine-related deaths of Len Bias and Don Rogers reinforce the need to focus on cocaine abuse among athletes. *See supra* note 9 and accompanying text. It should be noted, however, that cocaine abuse is a national problem and not a problem confined to athletes. This is especially true since a new distillate of cocaine called "crack" is now on the market. R. Smith, *The Plague Among Us*, NEWSWEEK, June 16, 1986, at 15. With the advent of crack, cocaine has from four to five million users who come from the nation's board rooms, assembly lines and study halls. *Id.* In fact, it is believed that crack cocaine has suddenly become America's fastest growing drug epidemic and potentially its most serious. *Crack and Crime*, NEWSWEEK, June 16, 1986, at 16. The national cocaine hotline received a reported 2,200 calls per day as of June 1986. This figure almost doubles the peak number of calls (1,200) received just a few months prior to June 1986. It is believed that about one third of the calls received come from crack abusers. *Crack: The Road Back*, NEWSWEEK, June 30, 1986, at 53.

126. Copies of the Agreement are available in the offices of the *Dickinson Law Review*.

127. *Id.* A player may file an appeal for reinstatement after two years with the approval of both the Commissioner and the Players Association. To date, only one NBA player has been permanently disqualified. In announcing the disqualification of Michael Ray Richardson, NBA Commissioner David J. Stern stated:

> My purpose today is to inform you that in tests where results were confirmed last evening, Michael Ray Richardson has tested positive for the presence of cocaine in his system. As a result, under the Collective Bargaining Agreement between the NBA and the Players Association, Michael Ray Richardson is permanently disqualified from playing in the National Basketball Association. The test result in question confirms that Mr. Richardson has lapsed into drug usage for a third time since January 1, 1984, the effective date of the anti-drug program. As you know, three such instances require permanent disqualification.

Statement by NBA Commissioner David J. Stern (February 25, 1986) (on file at the University of Tennessee Law Library).

128. Telephone interview with Gary Bettman, Vice President and Legal Counsel for the

The NBA offers seminars to support its belief that education should be a major part of the program.[129] The seminars discuss improper drug use and its ramifications for athletes.[130] Additionally, the seminars facilitate an understanding of how to deal with players with drug problems.[131] One objective of these seminars is to promote openness and trust between athletes and counselors.[132]

Under the program, voluntary treatment is encouraged. A player, the team, or the league may initiate treatment. Upon release the player is assigned a counselor in his team's home community,[133] and the player is required to attend group therapy at Narcotics Anonymous.[134] In addition to weekly sessions, the player must also attend private monthly sessions and quarterly group sessions.[135] If a player misses one game, two flights, or two practices within a one-week period, that player must report for a drug test within twenty-four hours.[136] The entire program is run independently from the league itself.

B. The National Football League

The National Football League (NFL) was established in 1920[137] as an unincorporated association of eleven teams whose members voluntarily, without charter, formed an organization by mutual consent for purposes of promoting common enterprises and objectives.[138] In 1961, Congress passed a law that exempted the NFL from monopoly charges.[139] This law allowed the NFL to enter into contracts on behalf of member teams.[140] Acting on behalf of member teams in 1982, the NFL entered into a collective bargaining drug testing plan agreed to by the League and the National Football League Players' Association (NFLPA). Commissioner Pete Rozelle subsequently implemented a second program without the approval of the NFLPA. The NFLPA claims Rozelle's program violates the col-

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National Basketball Association (September 1986).

129. NBA Drug Testing Program, *supra* note 123, at 3.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 5.

134. *Id.*

135. *Id.*

136. *Id.* at 5-6.

137. NATIONAL FOOTBALL LEAGUE, THE NFL'S OFFICIAL HISTORY OF PROFESSIONAL FOOTBALL 19 (T. Bennett ed. 1978) [hereinafter HISTORY OF FOOTBALL].

138. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir. 1984).

139. Monopolies are made illegal by the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7.

140. HISTORY OF FOOTBALL, *supra* note 137, at 32.

lective bargaining agreement and has threatened a law suit. Rozelle's program calls for two mandatory random tests during the season, in addition to the current preseason urinalysis.[141]

The collective bargaining plan requires one mandatory drug test to be given with the standard physical examination.[142] The current system does not require additional tests except when the club physician, upon reasonable cause, directs a player to Hazelden, the chosen independent body for testing for chemical abuse or dependency problems. There is no spot-checking for chemical abuse or dependency by the club or the club physician.[143]

C. *The Baltimore Orioles*

Although organized baseball has not yet arrived at a league-level testing plan, various teams have introduced their own testing programs. The substance abuse program of the Baltimore Orioles is illustrative. The program was created to improve the public's perception of the players, while at the same time offering players assistance when needed.[144] It originated with Baltimore attorney/agent Ron

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141. E. Brody & L. Weisman, *Battle Lines Drawn Over Rozelle Plan*, USA Today, July 8, 1986, at C-2, col. 1.

142. 1982 Collective Bargaining Agreement between the NFL Management Council and the National Football League Players Association § 6. Copies available in the offices of the *Dickinson Law Review*.

143. *Id.* at § 7.

Commissioner Pete Rozelle attempted to implement random drug testing for NFL players during the 1986 season. His plan required all players to take two unscheduled urinalysis tests during the 1986 season. He announced the plan after unsuccessfully attempting to persuade the players' union to subject themselves to a stronger drug program. The NFLPA resisted and arbitration followed.

The arbitrator, Richard Kasher of Philadelphia, ruled that Rozelle's plan violated the terms of the union contract with the players and could not be implemented. Kasher found that the commissioner's authority to make rules was supplanted by specific language in the collective bargaining agreement that established clear procedures concerning the drug testing program. The agreement allows testing during pre-season physical examinations, and "reasonable cause" testing if there is reason to believe a player is on drugs. It rules out spot-checking for drugs. Kasher concluded that such a drastic measure as random drug testing would have been included in the agreement if it was intended to be used as a method of drug testing by the negotiators.

Kasher went on to hold that parts of Rozelle's plan are reasonable and are not precluded by the agreement. He allowed Rozelle to appoint a drug advisor to oversee the NFL's drug program, and to designate a laboratory to conduct the drug tests. Kasher also cleared Rozelle's plan to test draft-eligible players for drugs, and to subject "positive" test players to reasonable cause testing at any time during the twelve months after the player signs an NFL contract. Also, he ruled that the commissioner has the right to spell out the urinalysis tests permitted by the agreement, including identification of such prohibited substances as marijuana, cocaine, and steroids.

Finally, Kasher suggested that when the contract expired in 1987, the parties segregate the drug issue from other issues in order to facilitate a more effective bargaining atmosphere. He also approved all of Rozelle's plan as reasonable except for random testing.

144. G. Pomerantz & D. Sell, *Union to Fight Drug Testing*, Washington Post, January

Shapiro, who represents at least twenty of the Orioles.[145]

The program involves voluntary participation; once agreed upon, it cannot be revoked. The designated physician has discretion to administer random drug tests.[146] Between three to six tests are administered during a season in a manner that does not disrupt the team or players' routine.[147] If a player tests positive, that player can request corroboration of the results.[148] If further tests are positive, the player agrees to enter a program selected by a physician and the player's attorney.[149] Although the team is notified when treatment requires more than twenty-one days leave, it may not impose sanctions upon a player who enters a treatment program.[150] The club is responsible for the testing costs, and the player or medical insurance covers the treatment costs.[151]

D. *Program Comparison*

The NBA's program, as well as the current NFL system,[152] appears to be constitutionally permissible. The NBA places great emphasis on education and help for the athlete; the program is not designed for punishment.[153] Furthermore, testing only occurs if the team has a reasonable suspicion of drug abuse.[154] The NFL tests at the beginning of the season as part of a regularly scheduled medical examination.[155]

The Baltimore Orioles' program presents some difficulty; it provides for random tests as part of a voluntary program; once agreed upon, participation cannot be revoked.[156] Should a player be subjected to a drug test, with no "reasonable suspicion" requirement, even though he agreed to it at one time? The issue then becomes the player's waiver of a known right or privilege.[157] If the player realized

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29, 1986, at D-1, col. 1.

145. Copies of the Baltimore Substance Abuse Program are available in the offices of the *Dickinson Law Review*.

146. *Id.*

147. *Id.* at 3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. The system proposed by Commissioner Rozelle, which provided for two mandatory, random tests, would almost certainly fail a constitutional challenge. *See supra* note 143.

153. See *supra* note 136 and accompanying text.

154. See *supra* notes 142-43 and accompanying text.

155. See *supra* note 72 and accompanying text.

156. *See supra* notes 152-54 and accompanying text.

157. *See* Johnson v. Zobst, 304 U.S. 458, 464 (1937).

he was waiving a right, then no constitutional issue arises.[158] If, on the other hand, the player did not understand his right to refuse testing, a constitutional problem could arise.

V. Amateur Sports: Drug Testing Programs

A. *The Requirement of State Action*

In addition to the fourth amendment implications, drug testing of amateur athletes raises additional constitutional questions. The courts have scrutinized student-oriented rules and sanctions to determine their validity under the equal protection and due process clauses of the fourteenth amendment.[159] Whether drug testing rules can withstand such a constitutional challenge merits discussion.

The equal protection clause of the fourteenth amendment states that "no state shall deny to any person within its jurisdiction the equal protection of the laws."[160] To determine whether drug testing of student athletes violates the equal protection clause, it is first necessary to decide the threshold question of whether that testing constitutes state action. For an act by athletic governing bodies (such as the National Collegiate Athletic Association (NCAA), Statewide High School Athletic Associations (SHSAA) and the United States Olympic Committee (USOC)) to constitute state action, there must be significant governmental involvement so that the challenged action can be measured against the constitutional protection of the fifth and fourteenth amendments.[161] In *United States v. Guest*,[162] the Supreme Court outlined the requisite level of involvement that constitutes state action. According to the Court,

> "[G]overnment action may be found even though the government's involvement is not either exclusive or direct; government action may be found even though the government's participation was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."[163]

Government involvement has been found in the SHSAA and the NCAA through the federal and state funding of those institutions, even though they are private, voluntary associations.

158. *Id.*

159. *See generally* V. Carrafiello, *Jocks Are People Too: The Constitution Comes To the Locker Room*, 13 CREIGHTON L. REV. 843 (1980).

160. U.S. CONST. amend. XIV § 1.

161. The fifth amendment is made applicable to the states by the fourteenth amendment. *See supra* note 79 and accompanying text.

162. 383 U.S. 745 (1966).

163. *Id.* at 755-56.

The NCAA extensively regulates and supervises inter-collegiate athletics, thereby providing an immeasurably valuable service for its member institutions. The NCAA regulates the amateur status of student athletes, sets financial aid policies, prescribes playing seasons and minimum academic standards, and performs many other duties as well. Although the NCAA is a private organization, courts have found that its functions constitute state action under the fifth and fourteenth amendments.

In *Parish v. NCAA*,[164] five college basketball players challenged the constitutionality of the NCAA eligibility rule that required a grade point average of 1.6. The players sought injunctive relief to prevent the NCAA from enforcing its ruling that basketball players with grade point averages lower than 1.6 were ineligible to compete in NCAA-sponsored tournaments and televised games. The court held that when state-supported educational institutions, their members and officers play such an important role in the college athletic association's programs, the activities of such an association constitute action taken under color of state law. The court reasoned that the NCAA, by assuming the role of coordinator and overseer of college athletics in the interest of both the individual students and of the institution, is performing a traditional governmental function.[165]

Other courts have also considered the NCAA's enforcement of its rules and regulations to be state action. In *Associated Students, Inc. v. NCAA*,[166] a student organization and individual students filed suit against the NCAA because its eligibility rule limited participation in athletics to students with a minimum grade point average of 1.6. The court held that the enforcement actions of the NCAA constituted state action and therefore were subject to the constraints of the fourteenth amendment.[167]

When rules and regulations promulgated by statewide high school athletic associations infringe upon an individual's constitutional rights, courts have found a nexus linking the association's action to state action. In *Gilpin v. Kansas State High School Activities*

164. 506 F.2d 1028 (5th Cir. 1975).

165. *Id. But see* Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946) (where private individuals or groups exercise powers or carry out functions that are governmental in nature, they become agents or instrumentalities of the state and are subject to the fourteenth amendment).

166. 493 F.2d 1251 (9th Cir. 1974).

167. *Accord* Howard University v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Williams v. Hamilton, 497 F. Supp. 641 (D.N.H. 1980); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983).

Association, Inc.,[168] a female high school student requested and was granted permission by school officials to participate on the school's otherwise all male cross-country ski team. Prior to the team's first meet, the plaintiff was informed that her participation was barred by a Kansas State High School Activities Association rule. The plaintiff filed suit under the civil rights laws claiming a deprivation of equal protection. The court held that the State High School Athletic Activities Association, a voluntary non-profit organization created to regulate, supervise, promote and develop interscholastic activities of secondary state schools, acts under color of state law. Therefore, its actions constituted state action. The court reasoned that the association uses public school funds to support itself, and that the association has exclusive control over the state's athletic programs. Thus, its actions are subject to treatment as state action.[169]

Courts have found violations of the fourteenth amendment in cases in which the rules set up by a high school athletic association deprived students of their equal protection rights. In *Cape v. Tennessee Secondary School Athletic Association et. al*,[170] a female student filed suit claiming that the State of Tennessee had denied her the right to equal protection of the laws as guaranteed by the fourteenth amendment. The plaintiff claimed that the rules for girls' basketball, created and enforced by the defendant athletic association, were different from those applied to boys' basketball. The court agreed that the rules violated the fourteenth amendment because they denied a significant educational experience to a class of its citizens solely on the basis of sex, with no rational justification for different treatment. The court also found the requisite nexus between the State Athletic Association and the state, the actions of the association therefore constituting state action.

In cases involving the United States Olympic Committee, the courts have not found the nexus between the government and the committee to constitute state action. The United States Olympic Committee is a corporation that was created and granted a federal charter by Congress in 1950.[171]

In *Defrantz v. United States Olympic Committee*,[172] twenty-five athletes filed suit against the Olympic Committee for an injunction

168. 377 F. Supp. 1233 (D. Kan. 1974).
169. *See supra* note 167 and accompanying text.
170. 424 F. Supp. 732 (E.D. Tenn. 1976).
171. United States Olympic Association Incorporation Act, Pub. L. No. 81-805, 64 Stat. 899 (codified as amended at 36 U.S.C.A. § 371 *et seq.* (1968 & Supp. 1987).
172. 492 F. Supp. 1181 (D.D.C. 1980).

barring the Committee from carrying out a resolution not to send an American team to participate in the 1980 Moscow Olympics. The court, while acknowledging the Olympic Committee's federal charter, considered the Committee to be a private defendant. The court held that, since the federal government did not control the Committee, the Committee's decision not to send a team to the games did not constitute state action and therefore did not give rise to an actionable claim for the infringement of a constitutional right.[173]

To find state action in an athletic governing board, courts have agreed that there must be a nexus between the government and the athletic board. This nexus must be sufficient to show that the "[c]onduct that is formally private may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[174] Courts have been reluctant to find the necessary nexus in cases involving the United States Olympic Committee; however, in cases involving the NCAA and the SHSAA, the courts have explicitly found such a nexus. Courts appear to look to funding sources to make this determination. When funds that the participating schools pay to the organization for membership are derived from federal and state financial aid, courts will find a nexus. In cases in which no direct governmental funds are present, courts have failed to find state action.

Once state action is determined to exist, equal protection challenges to drug testing of student athletes can be considered. The fourteenth amendment to the Constitution prohibits a state from denying any person within its jurisdiction the equal protection of the laws.[175] The equal protection clause requires that persons in similar circumstances be given equal protection with respect to the enjoyment of personal rights and in the prevention and redress of wrongs. The constitutional guarantee of "equal protection of the laws" means that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property and in their pursuit of happiness.[176]

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173. *See also* Burton v. United States Olympic Committee, 574 F. Supp. 517 (C.D. Cal. 1983).

174. Evans v. Newton, 382 U.S. 296, 299 (1966).

175. *See supra* notes 72 and 153 and accompanying text.

176. *See also* Polar Ice Cream and Creamery Co. v. Andrews, 208 F. Supp. 899 (N.D. Fla. 1962); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (equal protection of the laws requires that all persons be treated alike under like circumstances and conditions).

Equal protection is a difficult concept to define. No general definition would apply to all situations; therefore, equal protection questions must be determined on a case-by-case basis. The appropriate standard for finding a violation of equal protection is whether the classification created by a particular drug testing program bears some reasonable relationship to the program's legitimate purposes. In *Reed v. Reed*,[177] the Supreme Court stated:

> In applying [the equal protection clause], this Court has consistently recognized that the fourteenth amendment does not deny to states the power to treat different classes of persons in different ways. The Equal Protection Clause . . . does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).[178]

A drug testing scheme violates the equal protection clause if it provides for different treatment of similarly situated persons and if that different treatment is not reasonably based on the legitimate purpose of the scheme. Furthermore, the different treatment would have to result in the violation of a person's rights, privileges and immunities as guaranteed by the Constitution of the United States.

Neither an athlete's right to an education, nor the prospect of a professional athletic career, has been deemed a fundamental constitutional right.[179] Yet, assuming that a drug testing program does violate a student-athlete's constitutional rights, three questions remain to be answered before there is a violation of the equal protection clause. First, who is a "similarly situated person"? Are all student-athletes on the same competitive level similarly situated? Are only student-athletes in similar educational institutions (private, public, size, etc.) similarly situated? Are coaches and trainers similarly situated with student-athletes? Second, what constitutes "different treatment"? To treat persons who test positive for drug use differently than those who do not is probably permissible. However, whether random testing or even different treatment of those who test posi-

177. 404 U.S. 71 (1971).
178. *Id.* at 75-6 (citations omitted).
179. *See Drugs, Athletes, and the NCAA, supra* note 12, at 219.

tively would be constitutional is unclear. Finally, the determining factor in deciding whether a given drug testing scheme violates the equal protection clause is likely to be the legitimate purpose of the scheme. If the scheme's purpose were to exclude from competition all athletes who use drugs, the analysis would be very different from that of a scheme whose purpose was merely to identify those athletes who have a drug abuse problem in order to provide counseling, medical treatment and educational training.

As a whole, the equal protection issue asks "who should be subjected to drug testing?" Ironically, those drug testing programs designed to restore the integrity of athletics limit drug testing to players. If the integrity of athletics were truly at stake, a more complete drug testing program should include coaches, trainers, managers, and athletic directors. Furthermore, the question arises of why there is a concerted effort to test athletes, while doctors, lawyers, judges, politicians, and business executives—persons who hold positions requiring greater responsibility and attentiveness—are normally not suggested as candidates for drug testing.

In addition to equal protection, the fourteenth amendment also provides that no state shall "deprive any person of life, liberty or property without due process of law."[180] The fourteenth amendment is a limitation on state power, while the fifth amendment provides an identical limitation on the powers of Congress. The concept of due process of law has a dual aspect: substantive and procedural. The due process clauses not only accord procedural safeguards to protected interests, but also protect substantive aspects of liberty against impermissible governmental restrictions.[181]

The leading Supreme Court case on procedural due process is *Mathews v. Eldridge*,[182] in which the Court set out a three-prong test for procedural due process requirements. In *Mathews*, the plaintiff challenged the constitutional validity of administrative procedures used to assess a continued disability after a state agency terminated his social security benefits. The Court held that due process did not require an evidentiary hearing prior to termination of the plaintiff's social security benefits.[183] However, the due process clause did require analysis of three distinct factors: 1) the existence of a private interest that will be affected by the official action; 2) the risk

180. U.S. CONST. amend. XIV § 1.
181. Harrah Independent School District v. Martin, 404 U.S. 194 (1979).
182. 424 U.S. 319 (1976).
183. *Id.*

of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and 3) the nature of the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[184]

The first step in any due process analysis is to identify the interest involved, whether it is life, liberty or property.[185] A student-athlete's interest in life could not be affected by a mandatory drug testing program; he is unlikely to have a liberty interest in participating in collegiate athletics; nor is he likely to have a property interest in that participation, especially since the athlete receives no compensation for his efforts. Nevertheless, a student's interest in participating in sports may rise to a level deserving of due process protection because of the totality of the circumstances. Regardless of the type of interest a student athlete has in athletic participation, that interest is determined by state law.[186]

Other important factors to consider in a due process challenge to a drug testing program by a public school include the degree of deprivation imposed by the program on athletes who test positive, and the degree to which notice and hearing are provided to those athletes before sanctions are imposed. A drug testing program could provide for penalties, including warnings; notification of coaches, trainers or parents; further testing, suspension and expulsion. The Supreme Court case of *Goss v. Lopez*[187] requires that, once a state extends the right to education to public high school students in general, due process requires that students be afforded notice and a hearing before being suspended from school.[188] The Court found that students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the due process clause. The Court went on to say that:

> Since misconduct charges "[i]f sustained and recorded could seriously damage the students' reputations as well as interfere with their later educational and employment opportunities," the state's claimed right "to determine unilaterally and without process whether the misconduct has occurred" immediately col-

184. *Id.* at 321.
185. *See generally Drugs, Athletes, and the NCAA, supra* note 12.
186. *See* Goss v. Lopez, 419 U.S. 565 (1975).
187. *Id.*
188. *Id.*

lides with the due process clause's deprivation of liberty.[189]

The Court also maintained that neither the property interest in the educational benefit temporarily denied, nor the liberty interest in reputation, is so insubstantial that suspensions constitutionally may be imposed by a procedure the school chooses.[190] Thus, if the damage to a student-athlete's reputation or educational benefits by sanctions imposed under a drug testing program is substantial, the school would likely have to provide notice and a hearing prior to the imposition of such sanctions.[191]

The unreliability of drug testing is perhaps the best argument for due process procedural requirements prior to sanctions against a student-athlete tested for drugs. The Centers for Disease Control estimated that roughly half of the drug tests performed by the nation's thirteen largest laboratories were unsatisfactory.[192] This means that, even under the most sophisticated drug testing procedures now available, many student-athletes accused of using illegal drugs could be innocent. In addition, the vast majority of drug testing programs do not use the most technologically advanced procedures because of the expense involved. As a result, most drug testing will have a margin of error greater than ten percent. It seems incredible that a drug testing program could provide for the arbitrary imposition of sanctions when the margin of error is known to be so high.

B. The National Collegiate Athletic Association

The goal of the National Collegiate Athletic Association (NCAA) drug program is to provide clean, fair competition in championship and post-season bowl games.[193] To facilitate this objective and to prevent drug-induced advantages, the NCAA uses urinalysis to determine if banned drugs are being used to enhance performance.[194]

Through the use of gas chromatography/mass spectrometry, the NCAA analyzes urine samples.[195] Its Executive Committee oversees the program that is used at championship and post-season bowl

189. *Id.* at 574-75 (citations omitted).

190. *Id.* at 575-76. *See also* Brewer v. Austin Independent School Dist., 779 F.2d 260 (5th Cir. 1985) (student charged with misconduct may not be suspended from a public school without minimum procedures required by the due process clause).

191. *Id.*

192. *See* FORBES, August 11, 1986, at 102.

193. NCAA Drug-Testing Program, at 1. This plan was passed April 1, 1986. Copies are available at the office of the *Dickinson Law Review*.

194. *Id.*

195. *Id.*

games.[196] The NCAA imposes penalties on all athletes with positive tests results; the penalties are consistent with existing policies in the NCAA By-Laws.[197] The NCAA also imposes penalties on athletic personnel and programs when there was knowledge of the drug use.[198] All athletes are subject to testing upon entering a post-season athletic event.[199] Typically, the top team or individual will be tested along with other randomly-selected teams and individual athletes.[200]

C. *The United States Olympic Committee*

The United States Olympic Committee (USOC) observes essentially the same list of banned drugs as the International Olympic Committee.[201] The list is extensive and may even include common over-the-counter drugs such as Co-Tylenol and decongestants.[202] The primary focus of the USOC's attack is on central nervous system stimulants, pain killers, antibiotics, steroids, alcohol and certain beta blockers. The USOC also focuses on drugs that may be used in blood-doping.[203] Any discovered use of banned drugs results in a loss of eligibility for at least six months for a first offense, and at least four years for a repeat offense.[204]

VI. Policy Considerations: The Conflict

Only four years have passed since the dreaded year described by George Orwell in his futuristic prophecy, *1984*. Yet there is already substantial evidence of government support and public interest in programs that screen individuals to detect various undesirable traits.

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196. *Id.*
197. *Id.*
198. *Id.*
199. As of January 1987, two suits had been filed against the NCAA challenging the drug testing program. LSU Football player Roland Barbay brought an action after he was banned from participating in the Sugar Bowl because he tested positive for steroids. His suit was dismissed because of discrepancies in his statements as to when he used the steroids.

The American Civil Liberties Union filed a lawsuit on behalf of Simone Levant, captain of the Stanford University Women's Diving Team, who was barred from all diving events because she refused to consent to urinalysis testing. The suit charged that drug testing of student athletes is an unconstitutional invasion of privacy. In *Levant*, the court issued a preliminary injunction preventing the NCAA from imposing sanctions upon Levant. She had refused to submit to drug testing prior to the NCAA diving championships. The NCAA did not appeal the ruling. The issue was mooted when Levant failed to qualify for the diving championships. *See Levant*, No. 619209 (Cal. Super. Mar. 11, 1987).

200. NCAA Drug Testing Program, *supra* note 193, at 4. Recently, the legal challenges to the NCAA's drug testing program have intensified. *See* The Chronicle of Higher Education, August 5, 1987, at 1, col. 2; SPORT MAGAZINE, May 1987, at 6.
201. USOC Committee Report, March 10, 1986, at 1.
202. *Id.*
203. *Id.* at 1-2. *See also supra* note 2 and accompanying text.
204. *Id.* at 4.

Government and private employees are given lie detector tests; motor vehicle operators are given random sobriety tests; armed services members are tested for exposure to the AIDS virus; and athletes and others are tested for drug abuse.

Economic considerations play an important role in the heightened interest in testing. Drug use is costing the American economy over $30 billion each year in employee illness, absenteeism, poor workmanship, low productivity, and work theft.[205] Increasingly, team owners and sports association executives see player performance suffer because of drug abuse, and they are moving to discourage drug use.[206]

That bus drivers, airplane pilots, prison guards and other persons holding positions involving public safety may be drug users can send chills of anxiety down the spine of even the most ardent supporter of constitutional liberties. Why then, is a major focus of the war on drugs on the sports front? Athletes clearly are not the only persons using illegal drugs. It is the nation's love affair with sports that makes athletes natural leaders and excellent vehicles for pressing the anti-drug crusade. Despite this fact, important values such as privacy must be balanced with the public concerns. Furthermore, it is clear that tests may irreparably harm players.[207] The inaccuracy of drug testing risks false accusations; and testing itself tends to arouse public notions of guilt, rather than of possible innocence.

The issue becomes whether the dangers that drug testing seeks to contain are greater than the assault on constitutional liberties that drug testing has become. Whereas the legal aspects of this issue must be resolved within the political and judicial process, its scientific and technical aspects must also be examined.

Roger P. Maickel, Professor of Pharmacology and Toxicology at Purdue University, states that the results of urinary drug tests are incorrect as often as fifteen to twenty percent of the time.[208] Dr. James Woodford, an Atlanta chemist with a Schedule I license from the Drug Enforcement Administration, suggests that an unusually high number of blacks test positive in random drug testing; "melanin," the substance responsible for skin pigmentation, is present in

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205. *See How Drugs Zap the Nation's Strength*, U.S. NEWS AND WORLD REPORT, May 16, 1983, at 55.

206. *See supra* notes 26-29 and accompanying text.

207. *See infra* note 216 and accompanying text; *see also supra* note 192 and accompanying text.

208. USA TODAY, February 1987, at 13. An internal military investigation uncovered sloppy practice which left in doubt the results of 46,000 positive urine samples from Army personnel in 1982-83. *See* FORBES, Aug. 11, 1986, at 102.

urine and is often mistakenly identified as marijuana.[209] Furthermore, legitimate drugs and even some natural foods can cause urine to test positive.[210]

Dr. Peggy Alsup, former medical director of Medicaid for the State of Tennessee, stated the problem a different way:

> Drug testing, on its face, is nothing but a diagnostic tool like any other test, but what makes it different is that it gives the false hope that we are getting to the root of the problem. Nothing is further from the truth. What we will have is another industry, the drug testing industry.[211]

Another problem emerges as well. According to Dr. Alsup, most cocaine use is traceable for only one day and marijuana use for only a few days. Even comprehensive testing may fail to show relatively recent drug use.[212]

A fair and practical alternative to random mandatory drug testing is needed. Testing programs such as those proposed at a recent conference on drug testing sponsored by the National Institute on Drug Abuse (NIDA) appear promising from the perspective of both employers and employees.[213] In fact, the NIDA program captures the spirit of the Baltimore Orioles' program.[214] NIDA's program limits initial testing to persons in special situations, such as workers whose jobs pose a risk to others; even then the program tests only when there is strong evidence of abuse. In addition, workers are notified that they are being tested for drugs; and all positive results are confirmed by further tests.[215] Test results are confidential and rehabilitation is stressed.

Despite efforts to develop plans that provide notice and that overcome other objections, many people, including athletes, continue to oppose most plans. One commentator, Fern Schimer Chapman, openly opposes the NFL's proposed drug testing program and has quoted Boston Red Sox pitcher, Bob Stanley, as saying: "I don't take drugs, and I don't believe I should have to piss in a bottle to prove I don't."[216] While Mr. Stanley's comments are understandable, they

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209. Letter of James Woodford (on file at the University of Tennessee College of Law).

210. USA TODAY, February 1987, at 13.

211. Conversation with Dr. Peggy Alsup (June 15, 1986).

212. *Id.*

213. Sitomer, *Drug Testing: Balancing Private Rights With Public Safety*, CHRISTIAN SCIENCE MONITOR, May 8, 1986, at 23.

214. Copies of the NIDA proposed programs are on file at the offices of the *Dickinson Law Review*.

215. *See* Sitomer, *supra* note 213.

216. F.S. Chapman, *Tests Harm Players By Violating Privacy*, USA Today, July 15,

overlook the fact that testing does not arise out of malice or insensitivity, but rather out of the failure of drug testing supporters to understand that the technology is inadequate to prevent false accusations. For this reason, among others, screening is often counterproductive.

The constitutional implications for a free society are self-evident and testing is an exceedingly dangerous procedure. Testing without probable cause requires setting aside the important constitutional protection against unreasonable searches and seizures. Testing conflicts with other important constitutional guarantees as well, such as privacy, due process and equal protection.

VII. A Model Drug Testing Program

Few persons would dispute the fact that a significant number of athletes, both college and professional, have used performance-enhancing and recreational drugs. Even so, the rush to test for drug use raises broad concerns about the potential for trampling important constitutional rights. There is little question that persons have a constitutionally protected expectation of privacy in their bodily functions. Urine tests, for example, undoubtedly raise constitutional concerns even if they are completely accurate; however, numerous studies report error factors exceeding twenty-five percent of those tested.

Is there a model drug testing plan that does not violate the constitutional rights of athletes? Such a plan might well require the following:

> 1) Across-the-board testing of all athletic personnel — including trainers, coaches, and management — in order to make drug testing truly a condition of employment;
>
> 2) A limited number of tests during the course of the season, or a single preseason drug test with the physical examination;
>
> 3) No random testing without the subject's consent, unless:
>
> (a) testing is limited to substances that pose a significant health risk to the athlete, trainer or coach;
>
> (b) testing is limited to quantities of the substance at which there is a substantial health risk;
>
> (c) probable cause triggers the random testing in the first place; and
>
> (d) there is a reasonable alternative for the individ-

1986, at 10A, col. 1.

ual subjected to random testing, such as a release form waiving liability of coaches, management, league, etc., so the subject could compete at his or her own risk; or a policy by which the subject could refuse to take the test and forfeit participation on that particular day. Any penalties or sanctions for non-participation because of refusal to take a drug test should be incorporated as a team policy in each testing subject's contract;

4) The development of a drug testing policy outlining the procedures and purposes behind the policy;

5) Drug testing by the least intrusive medical procedures, *i.e.*, saliva test, urine test, blood test in that order;

6) All drug testing — whether based on probable cause or previously scheduled — limited to those substances that pose a significant health hazard to the athlete, trainer or coach. The tests might differentiate between the type of subject tested, since the same substance causes different health risks to the athlete, trainer, and coach. Additionally, trainers and coaches would be less likely to be subjected to the adverse effects of performance-enhancing drugs;

7) Drug testing programs should be conducted and administered only by professional medical personnel. Results should be reported only as positive or negative, and the medical personnel should take appropriate actions based on standards of accepted medical practice. Medical personnel should be in-house and have independent judgment. As long as the results were confidential, such testing might even be conducted by the governing sports body, *e.g.*, NFL, NHL, NBA, NCAA, etc.;

8) Drug testing results should not be made public to anyone outside of the sport itself under any circumstances. The press should be denied the specific medical data that the drug testing program yields;

9) Before any drug testing program is implemented, there should be effective legal guarantees that grand juries and prosecutors cannot gain access to the information. However, the evidence should be admissible in civil cases, so that drug testing results would not be fabricated in order to escape unfavorable or unprofitable contracts. Placing control of the program solely in the hands of qualified medical professionals also should help prevent misuse of sensitive information.

A drug testing program like the one outlined above would substantially prevent potential violations of the constitutional rights of athletic personnel. The effectiveness of such a program depends on its purpose. The proposed program would be most effective if the

purpose is, first and foremost, to protect the athletic personnel from health risks and potential injury. Conversely, the model program would be a dismal failure if its purpose were to reassure the public that athletes do not use drugs. The effectiveness of a drug testing program also depends upon its degree of intrusiveness. The more intrusive the drug testing program, the more likely that the program will violate the constitutional rights of athletic personnel. This is especially true of mandatory programs. The key to the effectiveness of any program to reduce drug and alcohol abuse is cooperation — not force, intrusion or punishment. The more voluntary a program is, the more likely it is to succeed. Drug testing, by itself, is of no value. To be effective, testing must be coupled with educational services, counseling and medical treatment.

Drug testing will be disastrous for all concerned so long as its purpose is solely to allay public fears of widespread drug abuse by athletes. It is undeniable that a problem of drug and alcohol abuse exists in athletics. It is equally undeniable that the same problem exists in our society as a whole. Drug testing will produce positive results only if the health and well-being of the athlete or other test subject is the primary concern. Invariably, drug testing will be most successful in a program of voluntary participation designed to help those who recognize that they have a problem and genuinely desire help. Since education, counseling and medical treatment are already available for most athletic personnel, it is questionable why drug testing programs should be implemented at all.

VIII. Conclusion

Drug abuse is not a problem that is limited to sports enterprises; it is an American problem. Like any efforts at ameliorating problems in society, the factor critical to success rests in the objectives sought: What do drug testing programs seek to accomplish? If the programs seek to rid athletics of the menace of drugs or athletes who abuse drugs, they are likely to fail. Athletes who depend on drugs will find ways to avoid the testing procedures, or they may resort to the use of drugs that are not detectable by available procedures. Furthermore, studies suggest that at least one of every ten athletes who test positive for the presence of illegal drugs are in fact drug-free. What will become of them? Good programs take into account the possibility of laboratory error and readily offer re-testing opportunities.

Drug testing procedures, as a whole, should give way to counseling and treatment. After all, drug testing procedures are not effec-

tive weapons in the war against drugs in the United States. Athletes should not be required to risk their future careers in athletics and their reputations as citizens because of mandatory drug testing programs of dubious worth. Mandatory testing is a serious intrusion into the athlete's constitutionally protected zone of privacy. There is little evidence that current voluntary drug abuse programs are less effective than mandatory programs. Most voluntary programs offer counseling, education, support, and treatment for athletes.

If the objective of a drug testing program is the restoration of confidence and integrity in athletes, the objective must be achieved without mandatory drug testing that violates dignity, legal rights and common sense. And while there can be little objection to coaches and owners focusing on player performance, barring a player from competition does not offer to the player the treatment and rehabilitation that he needs.

Penalties and sanctions on the user are not likely to win the war on drugs. Compulsory testing for illicit drug use simply passes on the responsibility while the root causes remain.