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The Constitutionality of Mandatory Student-Athlete Drug Testing Programs: The Bounds of Privacy

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THE CONSTITUTIONALITY OF MANDATORY STUDENT-ATHLETE DRUG TESTING PROGRAMS: THE BOUNDS OF PRIVACY

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I. INTRODUCTION

The recent drug-related deaths of Don Rogers[1] and Len Bias[2] have piqued public concern about the use of stimulants and other performance-enhancing substances by athletes. The National Collegiate Athletic Association (NCAA)[3]

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1. Cleveland Browns defensive back Don Rogers died of a cocaine overdose on June 27, 1986. N.Y. Times, June 29, 1986, § 5, at 1, col. 3.

2. University of Maryland basketball star Len Bias died on June 19, 1986. His death, like Rogers' death, was cocaine related. N.Y. Times, June 21, 1986, at 47, col. 3. Both Rogers' and Bias' deaths were well publicized. *See, e.g.*, Reilly, *When the Cheers Turned to Tears*, SPORTS ILLUSTRATED, July 14, 1986, at 28 (survey of public reaction to the deaths of Rogers, Bias, and other athletes).

3. The NCAA is a voluntary association of nearly 1000 colleges, universities, conferences, and individuals which set all standards for eligibility, play and competition in intercollegiate sports. It began in 1950 with 387 members and has expanded yearly. *See* NATIONAL COLLEGIATE ATHLETIC ASS'N, GENERAL INFORMATION 1986-87. Its stated purposes are:

> (a) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence;
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> (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;
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> (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;
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> (d) To formulate, copyright and publish rules of play governing intercollegiate sports;
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> (e) To preserve intercollegiate athletics records;
>
> (f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association;
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> (g) To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;
>
> (h) To legislate, through bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics;
>
> (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics activities on a high level.

CONSTITUTION AND INTERPRETATIONS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (1986) [hereinafter NCAA CONSTITUTION].

has adopted a drug testing policy for establishing eligibility of student-athletes in post-season competition.[4] Concerns about NCAA post-season eligibility have caused many colleges and universities to adopt their own drug testing programs to determine, before the time of post-season competition, whether any of their student-athletes are using drugs.[5]

A common thread exists in both the NCAA and individual school testing procedures. The student-athlete must consent to drug testing or be deemed ineligible for intercollegiate competition.[6] Although these procedures are now being challenged in court,[7] various questions regarding the constitutionality of mandatory drug testing within the context of intercollegiate sports are presently unresolved.

Several inherent problems in the proposed drug testing programs could be addressed through proper design. However, questions concerning the privacy rights of student-athletes[8] and the efficacy of drug testing versus drug-use-pre-

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In Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984), the court discussed the history of the NCAA. *Id.* at 1020; *see also* Howard Univ. v. NCAA, 510 F.2d 213, 214-15 (D.C. Cir. 1975). For the purpose, organization and principles of the NCAA, see NCAA CONSTITUTION, *supra*.

4. The NCAA will screen student-athletes prior to competition. The student-athletes who test "positive" will be ineligible for post-season competition for a period of 90 days. If later testing still results in a "positive" test, student-athletes so tested will be ineligible for all post-season sports for the current and succeeding academic years. The NCAA has outlined its procedures in a pamphlet distributed to the presidents, athletic directors, faculty athletic representatives and coaches at NCAA schools. The pamphlet lists banned drugs and outlines procedures for testing, collection, selection and retesting. NATIONAL COLLEGIATE ATHLETIC ASS'N, THE NCAA DRUG-TESTING PROGRAM 1986-87 [hereinafter NCAA PAMPHLET]. As yet, the NCAA has not agreed on appropriate penalties other than individual ineligibility for post-season competition. *See* NCAA News, Jan. 28, 1987, at 1. For more discussion of the NCAA program and its provision, see *infra* notes 58 & 121-36 and accompanying text.

5. Arizona State University and University of Oregon are schools with in-house programs. *See infra* notes 6 & 121.

6. Failure to consent to drug testing imposed by the NCAA results in post-season ineligibility. Failure to consent to drug testing imposed by the individual school results in intercollegiate ineligibility. An interpretation of the NCAA policy provides that the student-athlete will not lose regular season eligibility if he does not compete in post-season competition, but will become ineligible for intercollegiate athletics if he does not sign the drug testing consent form. The University of Colorado has mandatory drug testing for student-athletes. *See* NCAA News, Oct. 27, 1986, at 1. The NCAA requires all NCAA student-athletes to consent "to be tested for the use of drugs prohibited by NCAA legislation." NCAA CONSTITUTION, art. 3, § 9-(i).

7. For example, Simone LeVant, captain of the women's diving team at Stanford University, recently challenged the constitutionality of the NCAA drug testing program. Her complaint alleges that the NCAA program violates art. I, § 1 of the California Constitution. *See* Complaint, LeVant v. NCAA, Jan. 6, 1987 (Cal. Super. Ct.) (No. 619209). A preliminary injunction was issued preventing the NCAA from enforcing the drug testing policy against LeVant, *see* Reporter's Transcript of Proceedings, LeVant v. NCAA, Mar. 11, 1987 (Cal. Super. Ct.) (No. 619209); *see also Miami (Ohio) Postpones Plan for Drug Testing of Athletes*, NCAA News, Feb. 18, 1987, at 17 (decision by Miami University (Ohio) to delay implementing random drug testing of student-athletes because of legal questions).

8. In a suit against the University of Colorado, the American Civil Liberties Union (ACLU) alleges that the University's procedures for drug testing student-athletes unnecessarily violate their rights of privacy. The suit challenges the University's two-year-old drug testing program on the basis of fourth amendment unreasonable searches and seizures and fifth amendment violations of due process. NCAA News, Oct. 27, 1986, at 1.

vention remain. This article outlines those issues relevant to the constitutionality of drug testing programs.

II. The Applicability of the State Acton Theory to Student-Athlete Drug Testing Programs

A. *General Theory*

All individual privacy and equal protection rights guaranteed under the Bill of Rights are inapplicable to private sector conduct. The Constitution does not shield a person from private conduct by a private institution, regardless of how discriminatory or wrongful the conduct. State action is a prerequisite to invoking constitutional protections.[9]

No precise formula exists to determine when otherwise private conduct constitutes state action.[10] Courts have previously construed state action to encompass persons or organizations performing governmental functions,[11] or receiving governmental assistance[12] or encouragement.[13] Despite this characterization, one court recently described the concept of state action as a "paragon of unclarity."[14] Two alternative forms of analysis exist to ascertain the presence of state

9. In Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975), the Court stated, "It is axiomatic that only governmental, not private action is subject to the constitutional restraints of the fifth and fourteenth amendments." *Id.* at 217; *see also* Shelley v. Kraemer, 334 U.S. 1 (1948) (fourteenth amendment forbids judicial enforcement of whites-only restrictive covenants); Johnson v. Educational Testing Serv., 754 F.2d 20 (1st Cir.) (fourteenth amendment due process guarantees do not protect against actions of non-government testing service), *cert. denied*, 105 S. Ct. 3504 (1985).

10. In Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984), the court summarized the test used in dealing with a foreign student's eligibility for competition: "There is no precise formula to determine whether otherwise private conduct constitutes 'state action.' After 'sifting facts and weighing circumstances,' the inquiry in each case is whether the conduct is fairly attributable to the state." *Id.* at 1021 (footnote omitted).

11. For example, courts have consistently found governmental action in the affairs of private organizations which regulate high school athletic programs and other extracurricular activities. *See, e.g.*, Wright v. Arkansas Activities Ass'n, 501 F.2d 25 (8th Cir. 1974) (regulation of off-season football practice); Baltic Indep. School Dist. No. 115 v. South Dakota High School Activities Ass'n, 362 F. Supp. 780 (D.S.D. 1973) (high school debate tournaments); *see also* Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) (because the area was a community business, bank owners of shopping center could not exclude picketers); Terry v. Adams, 345 U.S. 461 (1953) (political association sufficiently enmeshed in election machinery to constitute state action); Marsh v. Alabama, 326 U.S. 501 (1946) (operation of a company town held a governmental function); J. Weistart, The Law of Sports, § 1.14, at 32 n.155 (1979) (citing cases interpreting "state action").

12. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), the Supreme Court found state action when the government had "so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity . . . ." *Id.* at 725.

13. State encouragement or support of a private activity may constitute state action. *Cf.* Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972) (state endorsement of Y programs). *But see* King v. Little League Baseball, Inc., 505 F.2d 264 (6th Cir. 1974) (federal incorporation of little league organization insufficient government involvement to support civil rights claim).

14. *See* Frazier v. Board of Trustees of Northwest Miss. Regional Medical Center, 765 F.2d 1278, 1280 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2252 (1986).

action. Both analyses involve an examination of the facts and circumstances of each case.[15] The key inquiry in each case is whether the challenged conduct is reasonably attributable to the state.[16]

Generally, conduct can be found to be reasonably attributable to the state under either the "public function" theory[17] or the "nexus" theory.[18] Under the public function theory, a court may find state action if the actor serves a function traditionally considered the prerogative of the government.[19] In order to establish state action under the nexus theory, a court must find that the state exercised coercive power or significantly encouraged the challenged actions.[20] Within the context of amateur sports, the presence of state action depends on the facts and parties involved in the dispute. Thus, the state action analysis for student-athletes at public institutions is separate and distinct from the analysis of state action for student-athletes at private institutions.[21]

B. *State University Athletic Programs*

Conduct by officials at tax-supported state universities arguably constitutes state action under the public function theory. The United States Supreme Court has stated that public schools perform a function going to the heart of representative government,[22] and that providing public schools ranks at the apex of the function of a state.[23] The Court's statements regarding public education strongly suggest that public schools perform a public function. A logical argument can be made that maintaining an athletic program is one part of a state university's broad educational charge and public function.

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15. "[S]ifting facts and weighing circumstances" was the language the Supreme Court used in Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). The court cited this language in Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984).

16. In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court stated that the inquiry is whether the conduct is "fairly attributable to the State." *Id.* at 937.

17. The public function theory provides that state action exists if the state has surrendered part of its role to a private entity. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

18. The nexus theory allows a finding of state action when the state assumes some role in the performance by the private party. Ambach v. Norwick, 441 U.S. 68 (1979).

19. The state and federal governments have traditionally been involved in all aspects of the country's educational system. Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975). A public function is one "traditionally exclusively reserved to the State." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1975).

20. Some courts classify the action of the NCAA as state action because public institutions support the NCAA. *See, e.g.*, Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974). *But see infra* notes 35-37 and accompanying text.

21. For example, in analyzing a challenge to the application of the nexus theory to NCAA action, one court stated:

> Admittedly, [one] cannot point to any one state or governmental body that controls or directs the NCAA; . . . . Nevertheless, it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a "private" organization to which they have relinquished some portion of their governmental power.

Parish v. NCAA, 506 F.2d 1028, 1033 (5th Cir. 1975).

22. Ambach v. Norwick, 441 U.S. 68, 75-76 (1979).

23. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

State action can also be found under the nexus theory. A state-supported institution is controlled by officials either elected or appointed by the state.[24] The Boards of Regents or Trustees are generally the governing bodies for state-supported institutions and control such university functions as salaries and conditions of employment for all faculty and administrators hired within the state university. Athletic department directors and coaches are part of the university faculty and administration. Normally, athletic directors and coaches, as conditions of employment, follow an established line of authority to carry out the duties of their jobs. The line of authority runs either through the University President or directly to the governing board. Thus, actions taken within the athletic program to assure its adequate operation are actions taken by those given authority through the institution's elected or appointed governmental board. Officials from an athletic department are state agents, whether or not those officials act with the approval of some higher state authority such as the University President or Board of Regents.[25] Therefore, state university drug testing programs, administered through athletic departments, manifest state action and mandate that constitutional protections be provided to participating student-athletes.[26]

C. *Private University Athletic Programs*

Conversely, conduct by officials at private institutions will probably not constitute state action. Courts may be sympathetic to student-athletes at private universities and may agree that a private university serves a public service.

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24. Institutions have trustees, regents, or other boards. State law dictates their composition and how individuals are selected. In Arizona, for example, the Board of Regents is the governing body of the state university system. The governor appoints the members and the senate ratifies the appointment.

25. Indeed, in many cases the University President designates the athletic director as the official representative of the university for NCAA matters. *See, e.g.*, Howard Univ. v. NCAA, 510 F.2d 213, 215 (D.C. Cir. 1975) (athletic director represented university at infractions hearing). In some institutions, the athletic director/department reports to a board of directors of a separate corporation that runs the athletic department as an entity separate from the university. In other institutions, the athletic director/department reports directly to the University President. Which of the reporting lines is correct or most appropriate has been a controversial issue. Shortly after the Bias incident, Maryland changed its reporting line of authority to one of reporting directly to the chancellor. *See* UNIVERSITY OF MARYLAND, TASK FORCE ON ACADEMIC ACHIEVEMENT OF STUDENT-ATHLETES: FINAL REPORT 7 (Sept. 30, 1986). In the NCAA-required institutional self-study, one of the critical areas of concern is whether the president has direct control. According to the self-study, a reporting line outside the president's control is a cause for concern. NATIONAL COLLEGIATE ATHLETIC ASS'N, GUIDE TO INSTITUTIONAL SELF-STUDY TO ENHANCE INTEGRITY IN INTERCOLLEGIATE ATHLETICS 5-9.

26. Potential NCAA sanctions motivate implementation of some programs. That fact probably will not affect a finding of state action when a public university implements a drug testing program. However, the *Arlosoroff* court in its findings regarding NCAA-induced functions stated: "It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action." Arlosoroff v. NCAA, 746 F.2d 1019, 1022 (4th Cir. 1984). Even athletic departments established as separate corporations were established by the Boards or by state statute and exist because of state action.

Nonetheless the Court in *Rendell-Baker v. Kohn*[24] held the operation of a private school is not a traditionally exclusive state function.[28] The *Rendell-Baker* Court gave no indication that its previous comments equating public schools with state action were invalid.[29] However, its holding appears to foreclose athletes at private institutions from arguing that conduct by officials at private institutions constitutes state action.[30]

Rendell-Baker would also appear to preclude a finding of state action under the nexus theory. Private universities are typically regulated and subsidized by the government. Frequently, this regulation and support is extensive.[31] However, finding that a government entity regulates or financially supports a private sector institution will not satisfy the nexus requirement.[32] In *Rendell-Baker*, the Court stated that the focus was narrower than the degree of state involvement.[33] The Court suggested that the challenged activity must be affirmatively encouraged or required by the state.[34]

D. *NCAA Testing Program*

The NCAA program appears to enjoy immunity from application of the state action theory. Although some courts have held NCAA programs constitute state action, a recent decision has held that NCAA programs do not constitute state action.[35] A student-athlete at Stanford University recently filed suit against the NCAA, alleging that the drug testing program violated her right of privacy guaranteed under the California Constitution.[36] The privacy rights guaranteed under the California Constitution, however, are much broader than those guaranteed by the federal Constitution.[37] The constitutional protection of privacy afforded by the California Constitution is enforceable against private entities like the NCAA. The federal prerequisite of state action does not apply. In the absence of a state constitutional or statutory provision, which protects privacy rights against private entities, constitutional challenges to the drug testing programs will likely come from individual student-athletes against individual institutions and not against the NCAA. In other words, individual schools' drug testing programs implemented to meet NCAA standards will most likely be the subject of legal challenge.

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27. 457 U.S. 830 (1982).

28. *Id.* at 842.

29. The Supreme Court has recognized that the application of constitutional protections to school campuses requires special considerations. *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986); Robinson v. Board of Regents of E. Ky. Univ., 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

30. 457 U.S. at 835.

31. *See, e.g., id.* at 842.

32. *See, e.g., id.* at 843; Ponce v. Basketball Fed'n, 760 F.2d 375, 377-78 (1st Cir. 1985).

33. 457 U.S. at 842-43.

34. *Id.* at 841.

35. Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984). *But see* cases cited *supra* note 20.

36. *See supra* note 7.

37. *See* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 262-63, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1981).

III. The Applicability of Fourth Amendment Protections to Student-Athletes

A. *Drug Testing Constitutes a Fourth Amendment Search*

Assuming, arguendo, that the state action prerequisite is met, the applicability of constitutional protections for individuals subjected to drug testing programs must be determined. The fourth amendment and its provisions for the protection of individual privacy rights is the focal point of analysis. The purpose of the fourth amendment is to protect personal privacy and dignity from unreasonable searches or intrusions by the state.[38] Thus, an initial issue is whether an examination of an individual's body fluids constitutes a search.[39]

In *Schmerber v. California*,[40] the defendant was arrested and later convicted of driving an automobile while under the influence of alcohol.[41] Immediately following the defendant's arrest, a physician drew a sample of blood from the defendant at the direction of the arresting officer. The arresting officer did not have a search warrant and the defendant refused to consent to the blood test.[42] The Supreme Court concluded the blood test amounted to a search[43] and held that such testing procedures plainly constitute searches of persons, within the the meaning of the fourth amendment.[44]

Other courts have held that urinalysis and breathalyzer tests constitute searches within the meaning of the fourth amendment.[45] In *McDonell v. Hunter*,[46] correctional institution employees challenged the constitutionality of a policy subjecting employees to body and vehicle searches for drugs.[47] The body searches complained of in *McDonell* were urinalysis tests.[48] Unlike blood, urine is routinely discharged from the body, so collection requires no intrusion into the body. Nonetheless, the *McDonell* court refused to distinguish between blood and urine searches for purposes of the fourth amendment.[49] Citing *Schmerber*, the *McDonell* court concluded that an individual has a reasonable expectation of privacy in information derived from all body fluids.[50]

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38. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The fourth amendment protects individuals from unreasonable searches of the person and of the places and things in which the individual has a reasonable expectation of privacy. Terry v. Ohio, 392 U.S. 1, 9 (1968).

39. *See infra* text accompanying notes 45-59.

40. 384 U.S. 757 (1966).

41. *Id.* at 758.

42. *Id.* at 758-59.

43. *Id.* at 767.

44. *Id.*

45. *See infra* text accompanying notes 46-59.

46. 612 F. Supp. 1122 (D.C. Iowa 1985), *aff'd*, 746 F.2d 785 (8th Cir. 1987).

47. *Id.* at 1125.

48. *Id.*

49. "[U]rine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy." *Id.* at 1127.

50. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination . . . . One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

Id.

A similar result was reached in *Shoemaker v. Handel*,[51] a case involving urinalysis and breathalyzer tests administered to jockeys by the New Jersey Racing Commission.[52] The *Shoemaker* court found these tests implicated the same interests in human dignity and privacy as blood tests. Thus, urine and breath tests were held indistinguishable from blood tests for the purposes of measuring privacy rights.[53]

Finally, the court in *Allen v. City of Marietta*[54] held that urinalysis testing was a search within the meaning of the fourth amendment.[55] In *Allen*, the government forced several employees suspected of smoking marijuana to submit to urinalysis tests.[56] In support of its position, the *Allen* court cited *Schmerber* and several other courts that applied *Schmerber* to breathalyzer tests. The *Allen* court also cited one court that held a search for contraband expelled in a bowel movement constituted a search under the fourth amendment.[57]

The NCAA drug testing program requires the submission of urine samples.[58] Most universities with testing plans will follow the NCAA format and by uti-

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51. 619 F. Supp. 1089 (D.C.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

52. *Id.* at 1106.

53. "Breathalyzer and urine searches implicate the interests in human dignity and privacy found to be at stake in *Schmerber*." *Id.* at 1098.

54. 601 F. Supp. 482 (N.D. Ga. 1985).

55. *Id.* at 489.

56. *Id.* at 484.

57. *See* State v. Locke, 418 A.2d 843 (R.I. 1980); State v. Berker, 120 R.I. 849, 391 A.2d 107 (1978) (breathalyzer test as search); United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984) (bowel movements analysis as searches); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974); Davis v. District of Columbia, 247 A.2d 417 (D.C. 1968) (urinalysis as search).

58. The NCAA outlines the procedures for student-athletes as follows:

5.0. Specimen-Collection Procedures

5.1. At NCAA championships events, immediately following the final participation of the student-athlete selected for drug testing, the student-athlete will be handed a completed Student-Athlete Notification Card by an official courier that informs the student-athlete to accompany the courier to the collection station within one hour, unless otherwise directed or be subject to a penalty for noncompliance.

5.1.1. The time of notification will be recorded by the courier. The student-athlete will sign the form and will be given a copy of the form.

5.1.2. The courier will give the crew chief the original of the form upon return to the testing station.

5.1.3. During an NCAA competition, if the student-athlete must compete in another event that day, the student-athlete may be excused from reporting to the collection station within the one-hour time limit; however, the student-athlete must report to the collection station within one hour following completion of his or her last event of that day.

5.1.4. The student-athlete may have a witness accompany him or her to the station to certify identification of the student-athlete and to monitor the ensuing procedures.

5.2. Only those persons authorized by the crew chief will be in the testing station.

5.2.1. Upon entering the collection station, the student-athlete will provide adequate identification to the crew chief or a designate. The time of arrival is recorded on the Student-Athlete Signature Form and a crew member (Urine Donor Validator) will be assigned to the student-athlete for continuous observation within the station.

5.2.2. The student-athlete will select a new beaker that is sealed in a plastic bag from

lizing NCAA-sanctioned laboratories and testing methods, will attempt to recreate in advance the NCAA post-season competition testing.[59] The use of these urinalysis tests clearly constitutes a search under the fourth amendment.

B. *The Fourth Amendment Requirement of Reasonableness*

Having established that urinalysis constitutes a search, the next issue to be resolved is the reasonableness of such a search. The fourth amendment does not constrain all governmental intrusions. The fourth amendment's protections are not absolute. Only those searches that are deemed unreasonable are prohibited.[60] The determination of reasonableness depends on the type of search and the circumstances surrounding the search.[61]

1. The Search Warrant Requirement

Generally, the fourth amendment requires a warrant as a prerequisite to a lawful search. The warrant must be based on probable cause and issued by a neutral magistrate.[62] Subject to a few specific exceptions, warrantless searches are "per se" unreasonable under the fourth amendment.[63] The warrant ensures that the inferences justifying the search are ultimately drawn by disinterested magistrates instead of officers participating in the frequently competitive enterprise of uncovering crime.[64] In the case of institutional or NCAA testing, no warrants are issued; the testing is automatically required of all student-athletes.[65]

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a supply of such and will be accompanied by the crew member until a specimen of at least 100ml, preferably 200ml, is provided.

5.2.3. Fluids given student-athletes who have difficulty voiding must be in unopened containers (certified by the crew chief) that are opened and consumed in the station.

5.2.4. If the specimen is incomplete or inadequate, the student-athlete must remain in the collection area under observation of the validator until the sample is completed. During this period, the collection beaker must be kept covered and controlled by the student-athlete being tested. . . .

NCAA PAMPHLET, *supra* note 4.

59. The NCAA provides guidelines for universities that wish to adopt drug testing policies and procedures. The guidelines suggest adoption of a written policy statement before testing begins. The policy statement should include signed waiver statements. NATIONAL COLLEGIATE ATHLETIC ASS'N, SUGGESTED GUIDELINES: FOR CONSIDERATION BY NCAA MEMBER INSTITUTIONS CONTEMPLATING A DRUG SCREENING PROGRAM (Apr. 1, 1986). For discussion of drug testing procedures, see *infra* notes 120-37 and accompanying text.

60. The test for reasonableness as outlined by the Supreme Court depends on a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

61. *See infra* text accompanying note 62-110.

62. *See* Katz v. United States, 389 U.S. 347 (1967).

63. Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

64. Johnson v. United States, 333 U.S. 10, 14 (1962).

65. The student-athlete signs the following consent form:

Drug-Testing Consent

In the event I participate in any NCAA championship event or in any NCAA certified postseason football contest on behalf of an NCAA member institution during the current academic year, I hereby consent to be tested in accordance with the procedures adopted by the NCAA to determine if I have utilized, in preparation for or participation in such

2. Warrantless Search Exceptions

Courts have carved out exceptions to the search warrant requirement when a legitimate governmental purpose makes intrusion into privacy reasonable, even in the absence of a warrant.[66] The exceptions include situations involving some exigent circumstance, such as an immediate danger to police officers or the community[67] or the risk that evidence will be destroyed while a warrant is being obtained.[68] The state may also conduct a warrantless administrative search when the search is necessary to advance a regulatory scheme and when the regulation is sufficiently comprehensive and defined.[69] Thus, warrantless administrative searches of commercial property for firearms have been found constitutional.[70] Similarly, warrantless administrative searches in industries that have a history of governmental supervision and, therefore, no reasonable expectation of privacy have been held constitutional.[71] Finally, warrantless administrative searches have been held constitutional in industries in which the public has a special regulatory interest, for health, safety, or general welfare reasons.[72]

Another exception to the search warrant requirement has been applied, although not uniformly, in cases involving searches of government employees.[73]

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event or contest, a substance on the list of banned drugs set forth in Executive Regulation 1-7-(b). I have reviewed the rules and procedures for NCAA drug testing and I understand that if I test "positive" I shall be ineligible for postseason competition for a minimum period of 90 days and may be charged thereafter upon further testing with the loss of postseason eligibility in all sports for the current and succeeding academic year. I further understand that this consent and my test results will become a part of my educational records subject to disclosure only in accordance with my written Buckley Amendment consent and the Family Education Rights and Privacy Act of 1974.

Signature of Student-Athlete Date

NCAA PAMPHLET. The failure to sign results in ineligiblity for intercollegiate athletic championships. NCAA CONSTITUTION, *supra* note 3, art. 3, § 9-(i).

66. Warrantless searches pursuant to a comprehensive and well-defined regulatory presence are permitted if necessary to further the regulatory scheme. Donovan v. Dewey, 452 U.S. 594, 596-601 (1981).

67. Stop-and-frisk searches, Terry v. Ohio, 392 U.S. 1 (1968) and hot pursuit searches, Warden v. Hayden, 387 U.S. 294 (1967), are exceptions granted to protect police officers and society when a crime is being committed.

68. For example, the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body eliminates the alcohol. Evidence may dissipate if police take time to secure a warrant. Therefore, the Court does not require a warrant in such situations. *Schmerber*, 384 U.S. at 770-71.

69. Whether a warrant is necessary to render an inspection program reasonable under the fourth amendment depends upon the pervasiveness and regularity of the regulatory scheme. Donovan v. Dewey, 452 U.S. 594, 606 (1981).

70. United States v. Biswell, 406 U.S. 311 (1972).

71. Liquor sales and businesses are considered to be part of such an industry. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). *But see* Marshall v. Barlow's, Inc., 436 U.S. 307 (1970) (warrantless search of industry subject to OSHA regulations held unconstitutional).

72. Horse racing is such an example. *Shoemaker*, 619 F. Supp. at 1089.

73. The cases on government employees are not uniform, but all appear to involve "a balancing of the individual's expectation of privacy against the government's right as an employer

Courts entertaining this exception have balanced the individual's expectation of privacy against the government's right as an employer to investigate employee misconduct relevant to both the employee's job performance and the government's performance of its statutory responsibilities.[74]

3. The Universal Requirement of Reasonableness

A search that qualifies under one of the exceptions is not necessarily reasonable for purposes of the fourth amendment. A warrantless search that falls within one of the exceptions is still subject to an independent requirement of reasonableness.[75] However, the test of reasonableness under the fourth amendment is imprecise and cannot be applied mechanically. In each case, the court must balance the need for the particular search against the inherent invasion of personal rights.[76]

Various factors are relevant to the issue of reasonableness when a warrantless search is conducted. To accommodate both the public's need for the search and the individual's right to privacy, many courts require some degree of individualized suspicion as a prerequisite to reasonableness.[77] Yet even this requirement is not absolute.

In some situations, the balance of interests precludes the insistence on some amount of individualized suspicion.[78] In those situations, other safeguards are

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. . . to investigate employee misconduct which is directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities." Allen v. City of Marietta, 601 F. Supp. 482, 489 (N.D. Ga. 1985).

74. For example, a warrantless search of a postal employee's locker for stolen mail was upheld as reasonable. United States v. Bunkers, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975). In United States v. Collins, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966), the warrantless search of a customs employee's jacket was held reasonable because his supervisors had grounds to believe he was pilfering goods coming through customs. In United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), *aff'd*, 379 F.2d 28 (3d Cir. 1967), a warrantless search of a United States Mint employee's locker was sustained as justified in maintaining security. Finally, in United States v. Grisby, 335 F.2d 652 (4th Cir. 1964), a warrantless search of a Marine corporal's living quarters was upheld as a proper exercise of military authority.

75. The test of reasonableness requires balancing the government's interests with the individual's rights to be free from intrusion. Camara v. Municipal Court, 387 U.S. 523 (1967).

76. Customs' interest in protecting from pilfering, United States v. Collins, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966), and the Treasury's interest in mint security, United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3d Cir. 1967), outweighed the individuals' rights to privacy. However, the balance in favor of the state gives way if the invasion to the individual's privacy is too great. In United States v. BLOK, 188 F.2d 1019 (D.C. Cir. 1951), the warrantless search of a police department employee's desk was invalid because the employee had a reasonable expectation of privacy in the desk. The desk was assigned to her exclusive use. *Id.* at 1019. Other examples include a warrantless wire tap of a government employee's telephone, United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968), and the warrantless search of a criminal investigator's wastebasket. United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972), *aff'd in part, rev'd in part*, 479 F.2d 290 (2d Cir. 1973), *rev'd*, 415 U.S. 239 (1974).

77. In McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd*, 746 F.2d 785 (8th Cir. 1987), the court explained the "reasonable suspicion" test as requiring a basis of "specific objective facts and rational inferences that may be drawn from those facts in light of experience." *Id.* at 1129.

78. *See, e.g.*, Kuehn v. Renton School Dist., 103 Wash. 2d 594, 694 P.2d 1078 (1985)

applied to ensure the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.[79] Thus, the intrusiveness of a search can be minimized by a showing of legitimate purpose, a demonstration of the reasonableness of the search procedures, and a review of the degree to which search procedures are followed. Each of these safeguards is relevant in the absence of individualized suspicion.[80]

4. Reasonableness of Drug Testing Related to the Standard of Individualized Suspicion

The reasonableness of blood, urinalysis, and breathalyzer tests, like the reasonableness of other searches, depends on a variety of factors. Courts have held that individualized suspicion is a prerequisite to reasonableness with respect to these three types of searches. In *Schmerber*, for example, the Supreme Court held that interests in human dignity and privacy protected by the fourth amendment precluded searches involving intrusions into the body's surface on the remote possibility that relevant evidence might be secured.[81] The Court required a strong possibility or clear indication that evidence would be discovered[82] before permitting a search. The *Schmerber* court intended the rule to apply even in situations where a risk existed that evidence would disappear unless an immediate search was conducted.[83]

The court in *McDonell*[84] required some degree of individualized suspicion. The drug testing policy in *McDonell* was designed to serve the security requirements at state correctional facilities.[85] The *McDonell* court indicated the right of the state to search its employees must be evaluated in the context of the work place.[86] For example, security considerations at correctional facilities reduce the

(mandatory search of the luggage of high school students before they left on a school-sponsored band trip was unreasonable and unconstitutional absent reasonable suspicion of a rule violation to justify each individual search).

79. In Hunter v. Auger, 672 F.2d 668, 673 (8th Cir. 1982), the court stated that general suspicions should relate to the individual or property searched. General suspicions can be based on an anonymous tip.

80. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (warrantless automobile searches for illegal aliens without individualized suspicion constitutional at reasonably located checkpoints); *cf.* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (random searches by border patrols unconstitutional without a warrant or probable cause).

81. *Schmerber*, 384 U.S. at 769-70.

82. *Id.* at 770.

83. *Id.* The Court found that the defendant's symptoms of intoxication established probable cause and that the test chosen to measure the defendant's blood-alcohol level was both reliable and administered in a reasonable manner. The Court thus affirmed the test's reasonableness. *Id.* at 771-72. Probable discovery of evidence was not the only factor considered by the *Schmerber* court in analyzing the reasonableness of a warrantless blood test. The *Schmerber* court also considered the reliability of blood tests and the procedures involved in administering the tests. *Id.* at 770-71. In *Schmerber*, a physician performed the test in a hospital, the quantity of blood taken was minimal, and the procedure involved no risk, trauma or pain. *Id.* at 771; *see infra* note 154.

84. 612 F. Supp. 1122 (D.C. Iowa 1985), *aff'd*, 746 F.2d 785 (8th Cir. 1987).

85. *Id.* at 1126.

86. *Id.* at 1128. Thus, searches that are reasonable at correctional facilities may be unreasonable if performed in another setting.

scope of an individual's reasonable expectation of privacy.[87] However, the *McDonell* court insisted that even prison officials' right to conduct searches is limited.[88] Neither prisoners, visitors, nor prison employees lose all of their fourth amendment rights at the prison entrance.[89] Although security considerations necessitate searches of persons entering correctional facilities, those searches must conform to an appropriate standard. The *McDonell* court concluded that appropriate standards can be only as intrusive as reasonably necessary to preserve security.[90]

With respect to blood, urinalysis, and breathlyzer tests, the court held that a prison employee could not be forced to submit to these kinds of searches in the absence of reasonable suspicion that the employee was under the influence of alcohol or controlled substances.[91] The court acknowledged that these tests, like telephone taps and residence searches, would help an employer discover drug use and other useful information about employees.[92] The usefulness of these tests, however, does not make these types of searches constitutionally reasonable.[93]

Some courts have emphasized factors in addition to individualized suspicion in determining the reasonableness of blood and urinalysis tests. In *Division 241 Amalgamated Transit Union v. Suscy*,[94] a bus drivers' union challenged the constitutionality of employment rules requiring bus drivers to submit to blood and urinalysis tests. The employment rules incorporated the individual suspicion requirement. The tests were only administered to drivers who had been involved in a serious accident or who were suspected of being under the influence of alcohol or controlled substances.[95]

The *Suscy* court affirmed the reasonableness of these searches, but did not rely solely on the presence of individualized suspicion. The *Suscy* court stated that an individual's expectation of privacy and the reasonableness of a search are determined by balancing the claims of the public against the interests of

87. *See* Armstrong v. New York State Comm'r of Correction, 545 F. Supp. 728, 730 (N.D.N.Y. 1982) (search of prison employees "not governed by the traditional probable cause and warrant requirements").

88. "[S]ecurity considerations do not cause prisoners to lose *all* of their constitutional rights at the prison gates." 612 F. Supp. at 1128; *see also* Bell v. Wolfish, 441 U.S. 520, 558-59 (1979) (convicted prisoners retain at least some fourth amendment rights); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

89. 612 F. Supp. at 1128.

90. *Id.* at 1128-29. The state in *McDonell* failed to persuade the court that the searches reasonably furthered state interests absent a reasonable suspicion of wrongdoing. The court found the possibility that drug users would be more likely to smuggle drugs to prisoners was "far too attenuated to make seizures of body fluids constitutionally reasonable." *Id.* at 1130.

91. *Id.*

92. *Id.*

93. *Id.* "[T]here is no doubt about it — searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one." *Id.*

94. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

95. *Id.* at 1267.

the individual.[96] The employment rule requiring testing was designed to ensure that bus and train operators were fit to perform their jobs. The court felt the public's interest in the safety of mass transit outweighed the individual's interest in refusing to disclose physical evidence of drug abuse. Thus, the court justified the intrusion because of the presence of both individualized suspicion and a valid public interest.[97]

5. Reasonableness of Drug Testing Related to the Employee's Job Function and Risk to Society

Other courts have completely disregarded the presence or absence of individualized suspicion in analyzing the reasonableness of blood and urinalysis tests. In *Allen v. City of Marietta*,[98] the government fired several employees after they tested positive for marijuana use.[99] The employees worked around high voltage electric wires.[100] Without reference to the presence of individualized suspicion or probable cause, the *Allen* court found that the tests were reasonable for fourth amendment purposes.[101] The court cited various cases in which the reasonableness of warrantless searches of government employees was determined by balancing the individual's expectation of privacy against the government's right as an employer to investigate employee misconduct directly relevant to the employee's job performance and the government's performance of its statutory responsibilities.[102] With respect to the tests in *Allen*, the court concluded that the city had a right to conduct warrantless searches to detect drug use because such use could affect the ability of employees to safely perform their work.[103]

In *Shoemaker*, the New Jersey District Court held that random urinalysis and breathalyzer tests of jockeys by the New Jersey Racing Commission were rea-

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96. *Id.*

97. *Id.* "[T]he CTA has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs." *Id.*

98. 601 F. Supp. 482 (N.D. Ga. 1985). Although the court did not refer to individualized suspicion, the facts of the case clearly indicate that the city had probable cause to test. Based on reports of employee drug use, which may have contributed to numerous injuries to employees, the city manager commenced an undercover investigation to determine which employees were using drugs on the job. *Id.* at 484.

99. *Id.*

100. *Id.*

101. *Id.* at 489-92. The investigation allegedly revealed a correlation between employees observed smoking marijuana and those involved in "unexplained" accidents. *Id.* at 484. The affected employees were advised that they would be fired unless they took a urine test. *Id.* All six plaintiffs elected to take the test, tested positive, and were discharged. *Id.*

102. *Id.* at 489-90. The cases suggest that the government's right to investigate conduct relevant to the employee's performance outweighs the employee's expectations of privacy. The search allowed the government to effectively discharge its statutory responsibility rather than to investigate a crime unrelated to the employee's job performance. *Id.* at 491. In *Allen*, the searches were conducted not in connection with any criminal investigation, but "as part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work." *Id.*

103. "The City has a right to make warrantless searches of its employees for the purpose of determining whether they are using or abusing drugs which would affect their ability to perform safely their work with hazardous materials." *Id.*

sonable searches under the fourth amendment.[104] The tests were conducted without a search warrant and in the absence of individualized suspicion.[105] Balancing the need for the challenged searches against the invasion of personal rights, the court concluded that the public need was greater than the protected privacy rights.[106]

The *Shoemaker* court noted the New Jersey courts had consistently viewed horse racing and casino gambling as demonstrating the same regulatory factors as liquor and firearms.[107] As a result, the horse racing and casino gambling industry, like the liquor and firearms industry, had a history of regulation. The *Shoemaker* court validated the constitutionality of warrantless and random urinalysis and breathalyzer tests for jockeys for two reasons. First, horse racing historically had been subjected to extensive regulation by the state.[108] Second, the state had a vital interest in ensuring safe and honest horse racing.[109] The court further noted that the presence of a legitimate purpose and the reasonableness of the procedures followed precluded the need for individualized suspicion.[110]

IV. The Applicability of the Fourth Amendment to Student-Athlete Drug Testing Programs

A. *The Individualized Suspicion Requirement*

The focus of much of the controversy surrounding drug testing programs in the sports industry involves the presence or absence of individualized suspicion as a prerequisite to testing. The NCAA and many universities have adopted programs requiring collegiate athletes to submit to random testing.[111] Although the NCAA and university programs remain legally unchallenged, random drug testing has generally been opposed in professional sports by players'

104. 619 F. Supp. at 1104.

105. *Id.* at 1100.

106. *Id.* at 1104.

107. *Id.* at 1099. *See, e.g., In re* Martin, 90 N.J. 295, 313, 447 A.2d 1290, 1299 (1982) (demonstrating the same regulatory factors as liquor and firearms); *see also supra* note 71 and accompanying text (warrantless administrative searches upheld in industries where a history of pervasive government regulation made privacy expectations unrealistic). In State v. Dolce, 178 N.J. 275, 428 A.2d 947 (Super. Ct. App. Div. 1981), the court held that "corruption in horse racing is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. . . . It was doubtless with these important considerations that the legislature gave the Racing Commission full regulatory power over horse racing in this state." 619 F. Supp. at 1100; *see supra* note 71 and accompanying text.

108. 619 F. Supp. at 1102. The plaintiffs argued that the tests measured not only impairment at the race track, but also private drug use away from the track, which would not necessarily indicate a jockey's present impairment. The court found that the state had implemented testing procedures to guard against "false positives which might serve to punish jockeys for their private behavior off regulated premises." *Id.* at 1104.

109. *Id.* at 1102.

110. *Id.* at 1101.

111. *See supra* note 4; *infra* note 227.

associations.[112] The American Council on Education, taking a similar approach, has launched a program that focuses on drug education and drug use prevention and denounces random testing as a violation of an individual's privacy.[113]

Assuming state action exists, a strong argument could be made that student-athlete drug testing should be performed only on a showing of probable cause. The Supreme Court's position in *Schmerber*, that the fourth amendment precludes searches based merely on the remote possibility that relevant evidence might be secured, is unequivocal. The security considerations, which the *McDonell* court held reduce the scope of an individual's reasonable expectation of privacy, are not present in intercollegiate athletics. The same public interest in public safety present in *Suscy* is not present in intercollegiate athletics. Presumably, the NCAA and individual institutions would argue that the public's interest in maintaining drug free athletic programs at major universities precludes insistence on individualized suspicion.[114] Whether this interest outweighs the individual's right to privacy, however, is questionable.[115] A strong argument could be made that probable cause should be a prerequisite to any drug test administered as part of a student-athlete drug testing program.

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112. Angell, *Baseball*, THE NEW YORKER, May 5, 1986, at 50.

113. The American Council on Education statement on student-athlete drug testing programs provides in part:

> Any institution with a drug testing program should also provide a formal drug education program with emphasis on the hazards of drugs in regard to their use generally as well as in athletics specifically. Coaches, trainers, student trainers and student managers should also be involved in the educational program. Likewise, assistance should be provided in rehabilitating student-athletes who have engaged in the use of performance-affecting drugs.

AMERICAN COUNCIL ON EDUCATION, SELF-REGULATION INITIATIVES: RESOURCE DOCUMENTS FOR COLLEGES AND UNIVERSITIES: STUDENT ATHLETE DRUG TESTING PROGRAMS (Aug. 1986) [hereinafter ACE STATEMENT]. Guideline 1 of the statement provides as follows:

> The purpose of programs testing intercollegiate athletes for use of drugs should be to detect and deter use of performance-affecting drugs that undermine the integrity of athletic competition and to promote the physical and/or psychological well-being of athletes. Tests should focus upon drugs whose abuse can reasonably be anticipated to affect performance, health, or safety in athletic competition. It is undesirable to employ drug testing programs to detect more general use of drugs.
>
> Each program should be set forth fully and completely in writing. Each element of the testing program should be covered, including the responsibilities of all persons administering the program, the persons entitled to receive confidential information and the procedures to be followed to preserve the confidentiality of the information.

114. See *infra* text accompanying notes 206-12 for a discussion of the legitimacy of treating student-athletes differently from other students.

115. Intercollegiate athletics has become the training ground and stepping stone for professional athletics. Multi-million dollar contracts ride on the success or failure of a student-athlete and his teammates during intercollegiate competitions. The overnight success and rags-to-riches stories of many college athletes serve as inspiration to the upcoming generation. The risk of a drug-laden sports program is the potential sociological damage through the influence of successful student-athletes who rely on performance-enhancing substances. *See Members to Get More Help with Drug Education*, NCAA News, Apr. 30, 1986, at 1 (NCAA recommends that education and testing combine to correct a problem before drug testing levels are reached); *see also* ATHLETIC DRUG POLICY TASK FORCE, DRUG TESTING OF USC ATHLETES (May 3, 1984) (recommending implementation of drug education program as part of orientation for all incoming students) [hereinafter USC POLICY].

B. *The Employee's Job Function and Risk to Society Requirement*

As noted earlier, not all courts have required individualized suspicion as a prerequisite to reasonableness. The *Allen* court based its decision on the right of the city as an employer to investigate employee misconduct directly related to job performance.[116] The court in *Shoemaker* concluded the state's vital interest in horse racing, and its history of regulating that industry, outweighed individual privacy interests and eliminated the need for individualized suspicion.[117]

The circumstances surrounding the drug tests in each of these cases are distinguishable from the circumstances surrounding the proposed drug testing programs in amateur sports. For example, the employer/employee relationship in *Allen*, unlike the student-athlete/university relationship in intercollegiate sports, involved extremely dangerous work.[118] *Shoemaker*, although factually similar to drug testing in intercollegiate athletics, is also distinguishable.[119] Sports franchises, leagues, universities and the NCAA have all been subject to governmental regulation; however, they have not been regulated as extensively as horse racing. At the same time, the state's concern with health, safety and other public interests in horse racing is unique because legalized gambling, absent from other sports, is a significant feature of the horse racing industry.

C. *Student-Athlete Drug Testing Programs as Administrative Searches*

Despite the differences between the horse racing industry and intercollegiate athletics, student-athlete drug testing programs are arguably more analogous to the type of administrative search conducted in *Shoemaker* than to the type of search conducted in cases requiring individualized suspicion. In order for a student-athlete drug testing program to be a valid administrative search, however, the institution must demonstrate that the program serves a legitimate public interest. Many of the historical and factual justifications for drug testing in the horse racing industry do not exist in intercollegiate sports. The NCAA has publicly stated that its testing program is designed to promote the public interest by protecting the health and safety of student-athletes and by ensuring fair and equitable competition in intercollegiate athletics.[120] Similarly, an individual institution will typically argue that its own drug testing program is

116. *Allen*, 601 F. Supp. at 491.

117. *Shoemaker*, 619 F. Supp. at 1099-1100.

118. 601 F. Supp. at 484.

119. Because successful athletic programs can generate enormous amounts of money, one could argue that intercollegiate sports should be regulated to the same extent as horse racing. Successful college programs attract donations, boosters, gate receipts and large television contracts. Intercollegiate sports are similar to horse racing in that (1) the money-earned-potential is great; (2) the use of performance-enhancing substances can substantially increase the money earned; and (3) the potential to control or affect the outcome of individual contests is great once a drug or financial connection is made. Perhaps intercollegiate athletics has historically had no overall regulatory scheme because of its tendency to self-regulate at an acceptable level. In short, college sports has only now begun to recognize and deal with the dangers associated with drug use historically recognized in the horse racing industry.

120. NCAA PAMPHLET, *supra* note 4.

designed to help ensure the health and safety of its student-athletes,[121] and to maintain discipline and order within the institution.[122]

1. Health, Safety and Discipline Objectives

Previous fourth amendment decisions involving universities and students address the health, safety, and disciplinary objectives of an administrative search in a university setting. Warrantless searches of student dormitory rooms by university officials have been challenged on at least two occasions. In both *Smyth v. Lubbers*[123] and *Morale v. Grigel*,[124] school officials brought disciplinary proceedings against students after finding marijuana during the search of dormitory rooms.[125] Neither search was characterized as administrative. Furthermore, dormitory searches obviously differ from urinalysis tests. Nonetheless, these two cases suggest that a state university must, to validate an administrative drug testing program, demonstrate that the program furthers the objectives of the institution.[126]

In *Smyth*, the defendant argued the dormitory search helped maintain discipline and order within the institution. Interestingly, the *Smyth* court rejected the idea that discipline and order was crucial to the university's educational function. The court found that a midnight raid conducted without a warrant on the plaintiff's dormitory room violated the plaintiff's fourth amendment rights.[127] Noting that nearly all college students were adults, the court indicated that a university's interest in maintaining strict discipline was not as great as an elementary or secondary school's disciplinary interest.[128]

More significantly, the court was unimpressed by the college's assertion that obedience to drug laws and regulations was crucial to the school's educational function. The court rejected the school's argument that an extraordinary means of enforcement should be allowed. To support its position, the *Smyth* court noted a contradictory school policy that allowed possession of alcohol on campus.[129]

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121. *Purpose of the Athletic Drug Policy*
1. To prevent use of illicit drugs by student-athletes before, during, and after the official season in each sport.
2. To educate any athlete regarding usage as it may affect the athlete and his/her team and teammates.
3. To insure the health and safety of the A.S.U. student-athlete.
4. To educate student-athletes about problems associated with drug use.
5. To see that any chronic dependency is treated and addressed properly.
6. To encourage discussion about any question the athlete may [sic] have, either specifically or generally about usage of drugs.

POLICY STATEMENT ON DRUG TESTING AT ARIZONA STATE UNIVERSITY [hereinafter ASU POLICY].

122. Smyth v. Lubbers, 398 F. Supp. 777, 789-90 (W.D. Mich. 1975).
123. 398 F. Supp. 777 (W.D. Mich. 1975).
124. 422 F. Supp. 988 (D.N.H. 1976).
125. *Smyth*, 398 F. Supp. at 781; *Morale*, 422 F. Supp. at 991-94.
126. *Smyth*, 398 F. Supp. at 790; *Morale*, 422 F. Supp. at 997-98.
127. 398 F. Supp. at 786-88.
128. *Id.* at 789.
129. *Id.* at 790.

The court stated that the college, other students, and the educational function were not victims of the private possession and use of marijuana.[130] Acknowledging that the college had an important interest and duty in enforcing drug laws and regulations, the court still rejected the argument that such an interest justified disregard for the normal privacy rights of adults.[131]

In the context of university drug testing programs, the precedential value of *Smyth* is unclear. The midnight search in *Smyth* was not held to be an administrative search.[132] More importantly, the court found the search did not comply with the fourth amendment.[133] Thus, the *Smyth* court held that a discipline and order justification could not validate an otherwise unconstitutional search. A comprehensive drug testing program is distinguishable from random warrantless searches of dorm rooms.[134] Nonetheless, the *Smyth* court indicated that policing the use of drugs among students is not crucial to a school's educational function. As a result, a discipline and order argument will probably not validate a student athlete drug testing program.

The defendant in *Morale* raised the health and safety objective to justify its intrusion into the student's privacy. The *Morale* court seemed willing to accept the conclusion that the plaintiff, by signing the resident contract to live in the dormitory, consented to health and safety inspections that furthered legitimate university interests. In the event that the drug tests administered to intercollegiate athletes are challenged, the NCAA and individual institutions will probably argue that urinalysis searches are related to the same health and safety objectives raised in *Morale*[135] and thus constitute valid administrative searches.

The decision in *Morale* and the court's willingness to validate border inspections, roadblocks, and other types of administrative searches suggest that a court might be willing to validate a university drug testing program on health and safety grounds. However, the *Morale* court required the inspections to entail minimal intrusions.[136] A urinalysis test is not the same type of intrusion challenged in *Morale*.[137] A urinalysis test involves a much more substantial intrusion. A search of one's body fluids is more like a strip search than a search of one's residential premises. Whether a court would conclude that the institution's in-

130. *Id.*

131. *Id.*

132. *Id.* at 786.

133. *Id.* at 793.

134. However, the planned NCAA implementation is a strictly random one. For example, the samples will be taken at the 1986-87 championships and 3,000 male and female student-athletes will be tested. Who will be tested is not predetermined. For example, in baseball, ten players from each team will be tested. In football, 36 players will be tested — 22 based on playing time and 14 at random. In golf, the top five individual leaders plus five others at random will be tested. *See NCAA Drug-Testing Protocol is Approved*, NCAA News, May 7, 1986, at 1.

135. That interest must be separate and distinct from the interest served by the state criminal law. 422 F. Supp. at 998.

136. *Id.* Student-athletes sign a consent form. For the text of the consent form recommended by the NCAA see *supra* note 65.

137. *See also* Camara v. Municipal Court, 387 U.S. 523 (1967) (lower standard of probable cause required in administrative search).

terest in health and safety justifies the need for this type of intrusion, at the expense of one's individual privacy rights, is questionable.

2. Fair and Equitable Competition Objective

Another articulated objective of student-athlete drug testing programs is to ensure fair and equitable competition.[138] Presumably, universities believe that there is a correlation between drug use and performance. The validity of a fair and equitable competition objective depends, at least partly, upon the ability of current drug testing technology and programs to accomplish that objective.

Two aspects of the drug tests used in intercollegiate athletics undermine the fair and equitable competition objective. First, the urine screens currently administered by the NCAA and individual institutions frequently produce unreliable results.[139] Thus, a student-athlete could conceivably test positive, even though the student-athlete had never used any of the substances banned by the institution.

Second, the tests will in most cases fail to reveal anything meaningful about an athlete's performance. The tests used to assess drug use do not indicate intoxication or impairment.[140] Thus, the information revealed by these tests may, in many cases, be irrelevant to athletic performance. The manner in which marijuana is assimilated by the body illustrates this point.

Marijuana's psychoactive ingredient, deltatetrahydrocannabinol (THC), remains in the body for only a short period of time, regardless of whether the person tested is a chronic user or simply an occasional user. THC does not accumulate in the the body or brain and does not appear to any appreciable degree in the urine. Rather, THC is rapidly broken down by the body into several metabolites that are assimilated into fatty acid tissues, stored, and excreted gradually.[141]

The drug screens currently administered in intercollegiate sports do not specifically identify the presence of any particular drug. Instead, the tests measure metabolites of the drug that remain in the body for hours, days and even weeks, depending upon the drug.[142] Alcohol is washed out of the body within twelve hours. Cocaine can be detected only for two or three days.[143] Steroids can be detected long after the drug has been injected.[144]

In the case of marijuana, the tests measure minute quantities of THC metabolites. Marijuana is metabolized more slowly than most drugs and, like

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138. *Id.*

139. *See infra* notes 156-76 and accompanying text.

140. Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction, LeVant v. NCAA, Jan. 6, 1987 (Cal. Super. Ct) (No. 619209) (citing NATIONAL INST. ON DRUG ABUSE, EMPLOYEE DRUG SCREENING — DETECTION OF DRUG ABUSE BY URINALYSIS 13 (1986)); Consensus Report, *Drug Concentrations and Driving Impairment*, 254 J. A.M.A. at 2618-21 (1985)) [hereinafter LeVant Memorandum].

141. Zeese, *Marijuana Urinalysis Tests*, 1 DRUG L. REP., 25, 26 (1983).

142. *Id.*

143. Stille, *Drug Testing*, Nat'l L.J., Apr. 7, 1986, at 1, 22-24.

144. *See, e.g.*, Neff, *Bosworth Faces the Music*, SPORTS ILLUSTRATED, Jan. 5, 1987, at 20-25.

steroids, can be detected for weeks and even months.[145] A report published in the September 1982 American Journal of Psychiatry revealed that THC metabolites remained in the urine of six chronic marijuana users for periods ranging from fourteen to thirty-six days.[146] In one study, marijuana was detected eighty-one days after use.[147] In addition, the test is so sensitive that passive inhalation of marijuana can cause positive test results. Thus, THC metabolites can show up in the urine of non-marijuana smokers who are exposed to marijuana smokers.[148]

The THC metabolies identified by the tests, however, have no psychotropic effects. In other words, there is no correlation between urinary metabolite levels and marijuana's psychoactive effects. Marijuana smokers do not remain high for several days after they smoke. The high from marijuana lasts for only a few hours or as long as the THC remains in the body before being broken down into metabolites.[149]

The information revealed through urinalysis tests concerning the presence of marijuana reflects the limitations of current drug testing technology with respect to all drugs. The drug tests administered by the NCAA and its member institutions do not measure impairment. In fact, the information not revealed by the tests is actually more significant than the information that the tests provide.

The tests cannot differentiate between chronic users and occasional users and cannot identify people who are smoking on the job versus people who may merely be using marijuana on an occasional basis.[150] The tests cannot reveal the intensity of the exposure, the size of the dose, or when the drug was ingested.[151] Urinalysis testing cannot establish drug impairment or even adverse effect. Although more information may be obtained by analyzing a blood or plasma sample, even those tests will not conclusively confirm intoxication. The correlation between blood concentrations and impairment has not been fully established.[152] Finally, several of the drugs banned by the NCAA are legal.[153] Thus, the athlete may have taken a particular drug for legitimate health reasons. Given the limitations of current drug testing technology, a court is not likely to accept an argument that current student-athlete drug testing programs further the fair and equitable competition objective.

D. *Student-Athlete Drug Testing Programs and the Reasonableness Factor*

Characterizing a student-athlete drug testing program as an administrative search will not automatically validate the program. Legitimate public health,

145. Stille, *supra* note 143, at 24; Zeese, *supra* note 141, at 26.
146. Zeese, *supra* note 141, at 26.
147. Stille, *supra* note 143, at 24.
148. Zeese, *supra* note 141, at 28.
149. *Id.* at 26, 28.
150. *Id.* at 28-29.
151. Stille, *supra* note 143, at 24.
152. Zeese, *supra* note 141, at 28.
153. *E.g.*, caffeine is banned if the concentration in the urine exceeds 15 micrograms/ml. NCAA PAMPHLET, *supra* note 4. Alcohol is banned from the sport of rifle. *Id.*

safety, and welfare concerns may eliminate the need for a warrant based on probable cause. These concerns do not, however, eliminate the need for reasonableness. Administrative searches, like all warrantless searches, are subject to an independent test of reasonableness. The reasonableness test is not precise or mechanical, and the reasonableness of any particular search will depend upon the facts peculiar to that search.

1. The Central Factor of Reliability in Reasonableness

Several of the fourth amendment drug testing cases suggest that the reasonableness of a particular test depends in part on the reliability of the actual testing procedures. Thus, the *Schmerber* court, in analyzing the reasonableness of the warrantless blood test, considered not only the presence of probable cause but also the reliability of the test and the manner in which the test was performed.[154] The issue of reliability was also raised in *Shoemaker*. The plaintiffs argued the drug tests not only measured impairment at the race track but also provided information concerning private drug use away from the track that would not necessarily indicate a jockey's present impairment.[155] With no supporting analysis of the reasonableness of the tests, both courts concluded the challenged testing procedures were reasonable. The *Schmerber* court found that the test chosen to measure the defendant's blood-alcohol level was both reliable and administered in a reasonable manner.[156] Similarly, the *Shoemaker* court found the state had implemented testing procedures to guard against false positives that could improperly punish jockeys for their private behavior.[157]

The issue of reliability also surfaced in *Storms v. Coughlin*,[158] an action brought by a group of prisoners challenging a state prison drug testing program. The program consisted of random urinalysis tests administered daily to prisoners in an effort to detect traces of narcotics and marijuana.[159] The *Storms* court actually rejected the individualized suspicion requirement, at least within the context of correctional institutions. Furthermore, the court concluded the state's interest in conducting the challenged searches outweighed the intrusion of personal rights occasioned by those searches.[160] Yet, even though security considerations outweighed the need for individualized suspicion, the court still stressed that the

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154. "Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." 384 U.S. at 771.

155. 619 F. Supp. at 1104.

156. 384 U.S. at 771.

157. 619 F. Supp. at 1104. The court stated:

> First, any positive test is checked against the certification form for valid drug use, pursuant to a prescription from a physician. Second, only a significant drug presence will generate a positive reading. Third, the state is using special procedures to guard against misinterpretation of positives for marijuana use, given that metabolites signifying such use may remain in the urine for weeks. Fourth, a jockey can request a hearing to fight the tests, test results and the imposition of any penalties he believes wrongfully administered under the regulations.

Id.

158. 600 F. Supp. 1214 (S.D.N.Y. 1984).

159. *Id.* at 1216.

160. *Id.* at 1220.

searches had to be conducted in a reasonable manner.[161] In examining the reasonableness of the searches, the court considered the reliability of the tests and the manner in which they were performed. The *Storms* court scrutinized the various testing procedures where the possibility existed that particular prisoners could be targeted for purposes of harassment.[162]

Schmerber indicates that reliability is an important factor in determining the reasonableness of a warrantless drug test. *Shoemaker* and *Storms* also indicate that reliability is an important factor in determining the reasonableness of an administrative drug test. Thus, the nature of the test itself will undermine the reasonableness of student-athlete drug testing programs. The inexpensive state of the art drug testing technology currently utilized by universities frequently produces unreliable and inaccurate results.[163]

2. Current Reliability in Drug Testing

Current drug testing procedures are unreliable for a number of reasons. The tests are designed to yield a qualitative positive or negative result. The potential exists for both false negatives and false positives.[164] A false negative indicates no evidence of drugs present in the urine even though the person tested has recently ingested one of the drugs sought.[165] The EMIT test[166] is extremely sensitive and, unless the enzyme function is altered, false negatives rarely occur.[167]

False positives, however, frequently occur.[168] Because the test is so sensitive, the results can be positive even though the drug sought is not present.[169] Both failure to clean the instruments, and human error, can produce unreliable results.[170] The test sample has to be picked up, placed in a machine, and labeled; when the volume of tests increases, so does the error rate.[171]

Even in the absence of human error, false positives commonly occur because of cross-reactivity. Cross-reactivity means that other substances produce the same reaction in the urine as marijuana.[172] Research performed by the Syva Company

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161. *Id.* at 1221.

162. The district court observed that the Centers for Disease Control in Atlanta, Georgia found the EMIT urine screening to be 97-99% accurate. *Id.*

163. The ACE statement on testing programs calls for procedures for verification and review of test results. ACE STATEMENT, *supra* note 113.

164. J. Morgan, Performance Under Field Conditions of an Enzyme-Immunoassay Screening Test for Urinary Cannabinoids (unpublished manuscript).

165. Morgan, *Problems of Mass Urine Screening for Misused Drugs*, J. OF PSYCHOACTIVE DRUGS, Oct.-Dec. 1984, at 308-09.

166. "EMIT, a Syva trade name, stands for enzyme multiplied immunological technique." J. Morgan, *supra* note 164, at 2 n.*.

167. Morgan, *supra* note 165, at 308-09.

168. *Id.* at 309.

169. *Id.*

170. *Id.*

171. *Id.*

172. Zeese, *supra* note 141, at 26.

revealed eleven substances, including aspirin, that create false positives.[173] Other research indicates that certain prescription analgesic drugs may cause false positives.[174] Moreover, the human body produces substances that may create false positives in urine screens.[175] Because tests are not drug specific, they do not indicate whether a person who tests positive has smoked marijuana, taken aspirin, or used some other drug.[176] Thus, the danger exists that many student-athletes might lose their eligibility or be disciplined on the basis of inaccurate test results.

Despite insistence by the courts that the reliability of a test is relevant to the issue of reasonableness, the possibility of inaccurate test results might not necessarily invalidate a drug test. The reasonableness of a drug test also appears to be related to the purpose of the test and the intended use of the test results.[177] *Storms* suggests that even unreliable drug tests may be reasonable as long as they are used only as presumptive evidence that the specific drug in question might be present, and not as the basis for disciplinary proceedings.

In *Storms*, the court suggested that confirmation of the test by alternative

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173. *Id.*

174. *Id.*

175. *Id.* at 28; *see also* Morgan, *supra* note 165, at 312 (false positives may result from reactions with human enzymes).

176. Morgan, *supra* note 165, at 309.

177. Questions concerning the reliability of drug testing procedures have not been limited to fourth amendment challenges. A Massachusetts Superior Court has addressed the issue of whether drug screening procedures, which purport to identify the presence of specific chemicals in a urine sample, are recognized as reliable by the scientific community and thus admissible as evidence in a court of law. Divoll & Greenblatt, *The Admissibility of Positive EMIT Results as Scientific Evidence: Counting Facts, Not Heads*, 5 J. CLINICAL PSYCHOPHARMACOLOGY 114, 114 (1985) (citing Findings of Fact & Conclusions of Law in Support of Temporary Restraining Order, Kane v. Fair, Aug. 5, 1983 (Mass. Super. Ct. 1983) (No. 136229)). In *Kane v. Fair*, a group of inmates challenged the use of the EMIT test on the grounds that the test was not recognized as an accurate scientific device. The inmates asserted that the test did not meet the minimum constitutional standards for use as evidence in finding an inmate guilty of a disciplinary offense. *Id.* The *Kane* court found that a positive EMIT result could not be used as evidence in a disciplinary hearing unless the positive result was confirmed by an alternative method of analysis. *Id.* at 115.

The admissibility of scientific evidence in a court of law is permitted when the tests or procedures are generally accepted by the scientific community involved. Frye v. United States, 293 F. 1013 (1923). The acceptance need not be universal and the test need not be infallible; however, no substantial doubts should exist concerning the test's reliability. Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963). The Georgia Supreme Court adopted a more rigorous standard. The court held that to be admissible, the scientific test in question must be scientifically certain or verifiable. Camp v. State, 249 Ga. App. 519, 292 S.E.2d 389 (1982).

Although the EMIT test is used by most hospitals in the United States, the *Kane* court found that the basis for the test's wide acceptance was not necessarily pertinent to its scientific accuracy. Divoll & Greenblatt, *supra*, at 116. For example, the test's popularity could be related to various factors: effective promotional and marketing efforts, quickness of testing procedures over competitive procedures, or superior availability of institutional resources to implement the EMIT test. *Id.* The *Kane* court examined the scientific certainty of the EMIT test as well as the manufacturer's own scientific assessment. The court concluded that no evidence had been introduced to warrant a finding that EMIT was generally accepted or independently validated by the scientific community. *Id.*

methods may be a factor in the determination of reasonableness.[178] The plaintiffs in *Storms* submitted evidence undermining the reliability of the EMIT urine screen administered by the correctional institution.[179] The plaintiffs' evidence included a printed statement issued by the manufacturer of the EMIT process. The manufacturer's statement advised that the EMIT test results were useful only as an indication, and should be confirmed by alternative testing methods. The manufacturer emphasized that independent confirmation is critical when use of test results contemplates loss of rights or corrective action.[180]

On the basis of the evidence, the plaintiffs alleged that the issue of reliability raised due process as well as fourth amendment privacy questions.[181] The court dismissed the due process claim on the facts of the case.[182] One plaintiff who tested positive successfully challenged the reliability of the test at a hearing and was not disciplined.[183] Thus, any violation of due process rights was speculative. The court specifically stated, however, that the plaintiffs could still challenge the use of the EMIT process under the fourth amendment.[184] The *Storms* court acknowledged that, in the absence of supporting evidence of behavior exhibiting drug use, unreliable test results were a weak basis for instituting disciplinary action.[185]

The NCAA has taken action designed to minimize the likelihood of unreliable drug tests. The NCAA has executed contracts with two premiere drug testing laboratories: The National Institute for Scientific Research at the University of Quebec, Montreal, and the University of California at Los Angeles Medical Center.[186] These two laboratories conducted the drug screening tests for the Summer Olympic Games in 1980 and 1984, respectively.[187] In addition, the NCAA employs only nurses and doctors in the sample collection process.[188] However, individual institutions probably cannot afford to employ the same caliber of laboratories or personnel necessary to satisfy judicial and evidentiary standards of reliability.[189]

E. *The Possible Consent Exception to Fourth Amendment Concerns*

As the discussion above indicates, a state may conduct warrantless administrative searches when a legitimate governmental purpose makes the intrusion of privacy reasonable. In the absence of a legitimate purpose, student-athlete

178. 600 F. Supp. at 1221-22.
179. *Id.* at 1222.
180. *Id.*
181. *Id.* at 1217.
182. *Id.* at 1226.
183. *Id.* at 1225.
184. *Id.* at 1226.
185. *Id.* at 1225.
186. NCAA News, Sept. 29, 1986, at 1.
187. *Id.*
188. *Id.*
189. NATIONAL COLLEGIATE ATHLETIC ASS'N, SYNOPSIS: NCAA DRUG TESTING PROGRAM 1 (Oct. 1986) [hereinafter SYNOPSIS].

drug testing programs do not constitute valid administrative searches and are invalid unless supported by a warrant based on probable cause. The NCAA and individual institutions may argue that disciplinary or health and safety objectives constitute a legitimate governmental purpose. Both *Smyth* and *Morale*, however, indicate that disciplinary or health and safety objectives will not necessarily validate warrantless student-athlete drug testing programs. The lack of any correlation between current drug testing technology and impairment, as well as the unreliability of these tests, suggests that courts will not accept a fair and equitable competition justification for these tests.

State universities may attempt to insure the validity of their programs, in the event the courts fail to find a legitimate governmental purpose, by requiring student-athletes to consent to drug testing. An individual may validate a warrantless search by consent.[190] Validation of drug testing by consent depends on whether the student-athlete's consent is voluntary and intelligent, and whether the search is constitutional.[191]

A student entering a state university does not waive his or her constitutional rights by enrolling at the university.[192] A state cannot condition attendance at a university on a waiver of a student's constitutional rights.[193] A state university cannot require a student-athlete to consent to what would otherwise be an unconstitutional search.

In *Smyth*, the court held that a warrantless raid on the plaintiff's dormitory room violated the plaintiff's fourth amendment rights.[194] The search led to the seizure of marijuana and the plaintiff's suspension from school for two years.[195] Because the search did not otherwise comply with the fourth amendment, the court refused to accept the school's argument that the search was valid because the plaintiff had consented to the search when he signed a residence hall contract.[196] The court based its holding on the proposition that a state cannot condition university attendance on a waiver of constitutional rights.[197]

The *Morale* court faced a similar situation. School officials brought disciplinary proceedings against the plaintiff after finding marijuana seeds and a pipe during a search of the plaintiff's dormitory room.[198] The officials conducted the search under the pretense of attempting to locate a stolen stereo.[199] The

190. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

191. *Id.* at 222. The voluntariness of the consent may be doubtful because the student-athlete cannot participate in either intercollegiate sports (if the consent is for a university) or post-season competition (if the consent is for the NCAA program). *See supra* note 6.

192. *See* Robinson v. Board of Regents of E. Ky. Univ., 475 F.2d 707, 709 (6th Cir. 1973).

193. *Id.* Dicta in *Morale* indicates that a state university cannot condition attendance on the student's renunciation of constitutional rights. 422 F. Supp. at 999. In Piazzolo v. Watkins, 442 F.2d 284 (5th Cir. 1971), the court stated that the rental of a state university dormitory room cannot be conditional upon a waiver of the right to be free from unreasonable searches and seizures.

194. 398 F. Supp. at 793.

195. *Id.* at 783.

196. *Id.* at 788-89.

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

198. 422 F. Supp. at 991-96.

199. *Id.* at 991-93.

Morale court rejected arguments by the defendant that the search was pursuant to a reasonable health and safety inspection and that the plaintiff had, by signing a student residence contract, consented to the search.[200] The court held that the plaintiff's consent to extensive searches for stolen property was invalid and stated that the university could not condition attendance on a waiver of constitutional rights.[201]

These cases demonstrate a potential problem because a state university may not have the authority to require an athlete to consent to unconstitutional searches. Thus, the validity of student-athlete drug testing programs may hinge on the reliability of the urinalysis tests administered by universities. If unreliable test results undermine the reasonableness and consequently the constitutionality of the test, unreliable test results will also undermine the student's consent.

F. *Developing an Effective Student-Athlete Drug Testing Program*

In the future, improved drug testing procedures may eliminate reliability problems. To minimize problems with reliability, current student-athlete drug testing programs should contain procedures under which positive test results will be confirmed by alternative testing methods. In addition, consent should be specifically addressed to the drug testing program, and not to the university's general rules and regulations.[202] In *Smyth*, the court refused to accept an argument that a generalized consent was valid.[230] The *Smyth* court stated that blanket authorization in a general contract that permits a college to search a student's room for violation of any substantive regulations the college elects to adopt is unconstitutional. The court also indicated that blanket authorization that permits the college to employ whatever search regulations it chooses to adopt is not the type of focused, voluntary, and spontaneous consent contemplated by the Constitution.[204] Thus, in order to be valid, a consent form needs to address the specifics of the student-athlete drug testing program.[205]

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200. *Id.* at 998-99.
201. 398 F. Supp. at 789.
202. *Id.* at 788.
203. *Id.*
204. *Id.*; *Morale*, 422 F. Supp. at 999.
205. For example, the NCAA uses a consent form that appropriately covers the specifics. The form used is as follows:

> I have administered this statement after providing the student-athlete: (1) a copy of the NCAA Rules and Regulations Information Sheet; (2) an opportunity to ask any questions and receive answers thereto with regard to NCAA regulations; and (3) an opportunity to review NCAA regulations and the official interpretations thereof in the NCAA manual; further, to the best of my knowledge, the student-athlete's certification on this form is true and correct, and the student is ____(insert "eligible" or "ineligible" in blank) to participate in the sport or sports of intercollegiate ____; finally, I am not aware of any additional information concerning the student-athlete that would result in ineligibility under NCAA legislation or constitute a violation of NCAA regulations on part of the student or this institution.

V. The Applicability of Equal Protection to Student-Athlete Drug Testing Programs

Assuming a student-athlete drug testing program meets the requirements of an administrative search and is based on a valid consent, the student-athlete may still have a fourteenth amendment equal protection argument. Arguably, the student-athlete is being singled out, because the typical university student is not being tested. The equal protection clause guarantees that people who are similarly situated will be similarly treated.[206] A student athlete could question whether the school's interest in testing athletes for drug use is more important than its interest in testing other students, such as medical students, students employed by the university, and students involved with the university's daily operations.

However, because the student-athlete's equal protection argument does not involve a fundamental right, like voting,[207] or a suspect classification, like race,[208] the university's objectives will be scrutinized under the mere rationality analysis. The mere rationality analysis is the least probing standard used by the courts.[209] If a court finds a legitimate state objective that is rationally related to the university's program, the court must give great deference to the state's purpose.[210] A university's safety and health objectives will probably meet the mere rationality test.

Although the student-athlete may argue that the university's drug-testing program, by only involving athletes, does not go far enough in carrying out the university's objectives, this argument will likely fail. The United States Supreme Court has held that a key feature of the mere rationality test is that legislation will not be invalidated because it only deals with part of the problem.[211] It is perfectly acceptable for the university to address the drug problem one step at a time.[212]

VI. Suggestions for the Implementation of a Student-Athlete Drug Testing Program

The implementation of a student-athlete drug testing program is a sensitive undertaking. The grounds for legal challenges are plentiful and well-substantiated. There are, however, certain minimum requirements of a drug testing program that should be put in place before testing is undertaken. These min-

206. *See* U.S. Const. amend. XIV.

207. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

208. Korematsu v. United States, 323 U.S. 214, 216 (1944).

209. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1158 (5th Cir. 1970); Parish v. NCAA, 361 F. Supp. 1220, 1220-26 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).

210. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 460-67 (1981); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1158 (5th Cir. 1970).

211. Railway Express Agency v. New York, 336 U.S. 106 (1949).

212. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

imum requirements are taken from the constitutional boundaries discussed in sections II - V of this article.

A. *Advance Disclosure of Eligibility Requirements*

Generally, the student-athlete is confronted with a series of university and NCAA forms on arrival at the institution.[213] The forms are presented in a way that indicates there will be no eligibility for competition without their completion.[214] Although most student-athletes complete the forms without objection, it is generally their first exposure to the forms, and little explanation is given.[215] The drug testing consent form is part of a large package of paper work.[216]

One of the questionable aspects of obtaining a signed consent contract from a student-athlete is the absence of a meaningful choice for the student-athlete. At a minimum, the conditions and waivers normally presented on arrival at the university should be presented prior to the time the student-athlete signs a national letter-of-intent. The suggested advance disclosure is analogous to the employment doctrine of advance disclosure of preconditions of employment such as drug testing, lie-detector tests, and credit evaluations.[217] The NCAA has a form providing that all NCAA requirements be disclosed prior to the time the student-athlete arrives at the institution.[218]

The advance disclosure gives the student-athlete the opportunity to choose a different institution, a non-NCAA school, or elect not to participate in intercollegiate athletics. Whether these choices will cure defects in the consent forms is unclear. If all NCAA institutions use the same form, a strong argument could be made that providing a student-athlete with a choice to either attend a non-NCAA school or elect not to participate in intercollegiate athletics is not a meaningful choice.

B. *Exercise of the Least Intrusive Means of Collection*

Since one of the possible challenges to student-athlete drug testing programs is the intrusion on privacy, institutions should carefully develop the procedures used to collect urine samples for testing. The interests of the actual chain of custody of the sample must be balanced with the individual student-athlete's privacy, without compromising reliability of the test. Making the collection procedure similar to a medical check up would probably satisfy both the interests of reliability and privacy. Supervision while the sample is provided is acceptable but may not require physical observation. Addressing areas of concern, such

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213. These forms include historicals (summarizing past competition), medical disclosures and various academic forms.

214. Failure to sign the form results in ineligibility. *See* NCAA PAMPHLET, *supra* note 4.

215. No other procedures are required in the signing of the form.

216. The forms are extensive. *See supra* note 213.

217. *See* 4 A. CORBIN, CORBIN ON CONTRACTS § 973, at 910 (1951); *see also* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (discussion of advance disclosure).

218. *See supra* note 205.

as limited access and controlled environments, can establish reliability of the procedure without unduly intruding on the individual's privacy. Also, these measures would fulfill the requirement of having a medical procedure followed.[219]

C. *Recognition of the Limitations of Test Reliability*

One of the areas of concern of fourth amendment protections is the reliability factor of administrative searches or tests performed. The reliability of drug testing analysis is not yet to the point of standard admissibility as evidence.[220] The NCAA procedures employ laboratories with the best available technology and personnel with the most experience in the area of sports testing.[221] However, most institutions will not be in a financial or logistical position to contract with these laboratories. Therefore, most student-athlete drug testing programs will be forced to rely on local laboratories and personnel. The reliability of local operations as well as the limitations of current drug testing technology weaken the validity of the tests.

At a minimum, institutions should mitigate the consequences of unreliable test results through the implementation of a policy of non-penalty for first-time results or a waiting period for verification. For example, if a student-athlete tests positive, the institution should not take disciplinary action until the student-athlete has the chance to retest or to have the urinalysis test performed at a different laboratory. The postponement of deprivation of rights until a student-athlete is able to pursue independent alternate verification is a method for overcoming problems of reliability.

D. *The Right of Appeal*

The consequences of a positive test result minimally deprive a student-athlete of the privilege of participation in intercollegiate competition. Such deprivation should not occur until the student-athlete has the opportunity for some modified form of a hearing. Some institutions adopt a drug testing policy that requires the student-athlete to obtain medical treatment or counseling if the student-athlete tests positively for drugs. In addition, the student-athlete must retest in thirty to ninety days. The initial result does not deprive the individual of any rights or privileges. It is only upon a second positive result that there may be some suspension from participation.[222] Even the second-time suspension should not occur without the right of test verification and appeal. The appeal should be an administrative proceeding held before a panel consisting of a medical expert, a student representative, and an administrator.[223]

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219. The NCAA will use a medical setting with medical personnel and will observe the collection of samples using medical personnel. *See* NCAA PAMPHLET, *supra* note 4.

220. *See* Rust, *Drug-Testing: The Legal Dilemma*, 72 A.B.A. J. 51 (Nov. 1986).

221. SYNOPSIS, *supra* note 189, at 2.

222. *See* USC POLICY, *supra* note 115; ASU POLICY, *supra* note 121.

223. For example, ASU's policy requires a panel consisting of a doctor, a student officer and the Vice President of Student Affairs. ASU POLICY, *supra* note 121.

E. *Education as a Tool for Drug-Use Prevention*

Both the NCAA and the American Council on Education agree that drug testing and performance enhancement are not the sole hand-in-hand concerns.[224] Positive test results require the institution to assume some responsibility for the education and rehabilitation of the affected student-athlete. Both organizations advocate counseling for those who test positive, and the need for on-going educational programs for all student-athletes.[225] Besides providing student-athletes with needed guidance and information, drug testing education programs serve to demonstrate the public health and safety interests of state institutions.[226]

VII. Conclusion

The constitutionality of student-athlete drug testing programs has not been determined in the courts. Several of the legal questions raised by these programs will undoubtedly be resolved through litigation. Many schools are abandoning their own drug testing programs in the face of actual or potential student-athlete challenges.[227]

The institutions that choose to implement drug programs must recognize the individual student-athlete's right to privacy and attempt to balance that right with the institutional objective of reducing or eliminating drug use among student-athletes. Few would argue that eliminating drug use among student-athletes is not a desirable goal. However, a court might ultimately conclude that the balance of individual versus institutional or public interests precludes the random drug testing of student-athletes in the absence of individualized suspicion or probable cause. Thus, student-athlete drug programs should stress education and treatment. Education and treatment will further the institutional goal of eliminating drug use with minimal intrusion into the student-athlete's constitutional right of privacy.

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224. Other concerns are the general and academic well-being of the student-athlete. *See* ACE Statement; NCAA Pamphlet *supra* note 4, preface.

225. *See* NCAA News, Apr. 30, 1986, at 1.

226. The NCAA outlined its Drug Education Program on September 29, 1986, and it will consist of: (1) A distribution to NCAA members and key high schools of a videotape depicting the harmful effects of drug and alcohol abuse; (2) Semi-annual seminars on drug education and testing; (3) The sponsorship of a drug-education team available for speaking engagements; (4) Thirty second television commercials during NCAA championship events; (5) NCAA drug testing explanation brochure; (6) National Youth Sports Program sponsorship with a requirement of a minimum of three hours of drug-substance abuse education. *NCAA Outlines Drug-education Program for Academic Year*, NCAA News, Sept. 29, 1986, at 4.

227. For example, the University of California at Berkeley has abandoned its drug testing plans. NCAA News, Dec. 16, 1986, at 19. The Office of the Attorney General of the State of Washington has advised against drug testing. University of Washington Division, Office of the Attorney General, Legal Aspects of Drug Testing in Intercollegiate Athletics Programs (July 18, 1986). Additionally, the University of Oregon has requested an opinion from Oregon's Attorney General on the constitutionality of its drug testing program. NCAA News, Jan. 21, 1987, at 10. Finally, Miami University (Ohio) postponed its program because of unresolved legal questions. *See* NCAA News, Feb. 18, 1987, at 17. Stanford University is philosophically opposed to drug testing and has "put its trust in the individual student-athlete to be responsible for his or her own actions." Calvert, *Personal Choice is Key to Drug-Control Effort*, NCAA News, Oct. 27, 1986, at 2.

The public interest in eliminating drug use among airline pilots, air controllers, bus drivers, or surgeons may in fact warrant a reduction in one of our most cherished constitutional rights. The potential harm to the public from drug use by surgeons or air controllers, for example, may be great enough to preclude insistence upon individualized suspicion or probable cause. However, any justification or objective advanced by the NCAA to legitimize the mass screening of student-athletes who are subjected to testing merely because of their status as athletes is questionable. Eliminating drug use among student-athletes is a legitimate and admirable goal. Nonetheless, to invade the privacy of the innocent to uncover the guilty establishes a dangerous precedent. Furthermore, the precedent is one which the fundamental principles and protections of our Constitution reject.[228]

228. LeVant Memorandum, *supra* note 140 (citing Capue v. City of Plainfield, No. 86-2992 (D.N.J. Sept. 18, 1986)).