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I. INTRODUCTION

IN 1987, Santa Clara County Superior Court Judge Peter Stone granted an order and injunction to Stanford University diver Simone LeVant allowing her to compete in NCAA sanctioned competitions.[1] LeVant had refused to comply with NCAA regulations requiring her to sign a consent form that would obligate her to submit to urine testing for various substances at the NCAA championships.[2] A commentary in *Sports Illustrated* noted that Levant's case could lead other courts to the same conclusion: that the NCAA drug testing program violates constitutional privacy protections and is unreasonable.[3]

Since the California Superior Court ruled in the *LeVant* case,[4] the legal landscape of athletics and drug testing is continuing to change. Student athletes are challenging drug testing programs on the basis that they constitute unreasonable searches under the Fourth Amendment and under appropriate

1. Levant and Hill v. NCAA, No. 619209, slip op. at 2 (Cal. Super., Santa Clara County, Mar. 13, 1987) (order granting preliminary injunction); Levant and Hill v. NCAA, reporter's transcript of proceedings at 2 (Cal. Super., Santa Clara County, Mar. 11, 1987) (hearing on motion order); *see also* Stephen F. Brock & Kevin M. McKenna, *Drug Testing In Sports*, 92 DICK. L. REV. 505, 534-35 n.196 (1988) (summarizing the early proceedings in the *LeVant* case).

2. LeVant and Hill v. NCAA, No. 619209 (Cal. Super., Santa Clara County) (complaint). The early style of the case is confusing because Jennifer Hill and J. Barry McKeever were added as parties in February and July of 1987. *See infra* note 6 and accompanying text for further explanation.

3. SPORTS ILLUSTRATED commented:

> Stone ruled that the drug testing constituted an "obtrusive, unreasonable and unconstitutional invasion of privacy" and added that there was a reasonable probability LeVant would win her case if it went to trial. The case, however, apparently won't go to trial because the NCAA, fearing a flood of similar challenges, seems to want it to go quietly away. Richard J. Archer, who represented the NCAA . . . added that Stone's ruling was an isolated one and that LeVant based her arguments "only on the California constitution." But the U.S. Constitution also guarantees privacy and protects an individual from illegal search and seizure. And, in fact, decisions in one court often embolden other courts to take similar action. "I feel wonderful," said LeVant. "I set a precedent." That remains to be seen.

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

4. LeVant and Hill v. NCAA, No. 619209 (Cal. Super., Santa Clara County, Mar. 13, 1987).

state constitutional privacy protections, in states where that avenue is available. For example in *Hill v. NCAA*,[5] where new plaintiffs substituted for LeVant, who had graduated, a California court of appeals affirmed the superior court's finding in *LeVant*, holding that the NCAA program was unreasonable and involved an unconstitutional invasion of privacy.[6]

The California Supreme Court is currently reviewing the case, and a decision is pending.[7] A well-reasoned opinion in the *Hill* case could prove quite persuasive in other jurisdictions despite the fact that the *Hill* case relies primarily on California constitutional protections. The *Hill* case offers the first truly thorough examination of the justifications for the drug testing program implemented by the NCAA, and it involves a state constitutional privacy protection that is broader than similar Fourth Amendment guarantees. Analogous state privacy protections currently exist in other states, and they create a strong likelihood of challenge in these other venues since many suits based solely on Fourth Amendment grounds have not succeeded.[8]

Moreover, the *Hill* case is only one of the most recent challenges to the drug testing of student athletes. Drug testing is a hotly debated issue around the country. The courts in other current cases have offered a variety of analyses that are based on both state and federal protections. Some courts have found the testing programs and procedures unconstitutional, while others have upheld them, with the decisions often lacking coherent reasoning and consistency.

The scope of these issues continues to broaden. Challenges to athletic drug testing programs have been made in local school districts, as well as in the universities, often in the context of the NCAA program. Given the variety of methods and the range of jurisdictions in which these programs have been challenged, this Comment will survey recent case law and attempt to analyze the future prospects of drug testing in the context of student athletics. This Comment takes the position that the NCAA program, because it utilizes random testing methods, comprises an unconstitutional invasion of the right to privacy, and should be altered to an individualized suspicion format.

Part II of this Comment focuses on constitutional challenges to drug testing programs, specifically examining recent decisions in significant labor cases and the rationales behind those cases. Labor organizations have vigorously resisted prohibited substance testing, and the precedents set in these cases are quite relevant for student athletes in their efforts. Part III discusses the cases that currently dominate the drug testing of student athletes, comparing and contrasting their holdings and justifications. Part IV presents the

5. 230 Cal. App. 3d 1714, 273 Cal. Rptr. 402 (6th Dist.), *review granted*, 276 Cal. Rptr. 319, 801 P.2d 1070 (Cal. Dec. 20, 1990).

6. 230 Cal. App. 3d at 1747. LeVant obtained a preliminary injunction in March 1987. It was dissolved by stipulation when she graduated. Hill and McKeever became the current plaintiffs by an amended complaint. *Id.*

7. *See supra* note 5.

8. *See* David A. Cathcart, *Drug and Alcohol Policies and Testing Programs - A Review of Significant Issues*, 588 ALI-ABA 319 (1991) (reviewing issues in *Hill* and other challenges).

observations of Forrest Gregg, an individual intimately involved with collegiate and professional athletics, and offers his observations on current testing programs. Moreover, this section looks to what the foreseeable future holds for these drug testing programs. Finally, Part V recommends that the NCAA adopt a program based on individualized suspicion rather than random testing.

II. RECENT LABOR CHALLENGES TO DRUG TESTING UNDER THE FOURTH AMENDMENT: DRUG TESTING IN THE EMPLOYMENT CONTEXT

A. *SKINNER V. RAILWAY LABOR EXECUTIVES' ASSOCIATION*[9]

In *Skinner*, the United States Supreme Court scrutinized regulations promulgated by the Federal Railroad Administration (FRA) governing drug and alcohol testing of railroad employees.[10] The regulations in *Skinner* mandated blood and urine tests of employees involved in specified train accidents and allowed the testing of employees who violated certain safety rules.[11] Justice Kennedy's opinion for the majority is significant to this Comment's subject matter because it analyzes whether these regulations violate the Fourth Amendment prohibition against unreasonable search and seizure.[12]

1. The Testing Program in Skinner

Justice Kennedy noted, "The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago."[13] The FRA was concerned that the regulations present in 1983 were not significant enough to deter alcohol and drug use by employees,[14] and in 1985, it set forth new federal regulations on the subject.[15] The pertinent sections relating to drug testing include subpart C, entitled "Post-Accident Toxicological Testing," which provides that testing is mandatory upon the occurrence of specified events.[16]

Similarly, subpart D of the regulations, entitled "Authorization to Test

9. 489 U.S. 602 (1989).

10. Under the Federal Railroad Safety Act of 1970, the Secretary of Transportation has the authority to set forth appropriate rules, regulations, and standards for railroad safety. *Id.* at 606; 45 U.S.C. § 431(a) (1991).

11. *Skinner*, 489 U.S. at 606.

12. *Id.* The Fourth Amendment provides: "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

13. *Skinner*, 489 U.S. at 606. The more recent ban includes use or possession of certain drugs, which are contained in "Rule G," the industry operating rule that is enforced by practically all railroads in the country.

14. From 1972 to 1983, a survey of U.S. railroads indicated twenty-one major train accidents involving alcohol or drug use, and these accidents resulted in at least twenty-five fatalities and millions of dollars in damages. *Id.* at 606-07 (summarizing the relevant accident investigation safety reports).

15. 49 C.F.R. § 219.101 (1991).

16. *Skinner*, 489 U.S. at 609. Toxicological testing is required following a major train accident, defined as any accident involving: (i) a fatality, (ii) the release of hazardous material

for Cause," is permissive rather than mandatory and more relevant to the constitutional analysis involved in challenging the drug testing of student athletes. With respect to the urine tests authorized under subpart D, they may be ordered: (1) after a reportable accident or incident, where a supervisor has reasonable suspicion that an employee's actions or lack of action contributed to the accident or enhanced its severity,[17] or (2) in the event of specific rules violations.[18] The only other time a railroad may require urine tests is when supervisors suspect impairment and at least two supervisors determine that the appropriate circumstances exist.[19] When the supervisors suspect a substance other than alcohol to be the cause of impairment, at least one of the supervisors involved must be specially trained in detecting signs of drug use.[20]

2. *The Fourth Amendment Standard*

Looking to the proper application of the Fourth Amendment in the *Skinner* situation, the Supreme Court recalled that "[a]lthough the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the government."[21] The Court also noted that whether a private party may be deemed an agent or instrumentality of the government depends on the degree of the government's participation in the private party's activities.[22] With respect to the urine testing aspect of the regulations, the Court said, "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the federal courts of appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment."[23] Thus, urinalysis clearly constitutes a search under the Fourth Amendment.

The Fourth Amendment, however, only prohibits those searches and seizures that are unreasonable. Reasonableness is judged by balancing the privacy intrusion on the individual against the legitimate governmental interests to be promoted.[24] Generally, the search of a person must be based on

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accompanied by an excavation or reportable injury, or (iii) damage to railroad property of $500,000 or more. 49 C.F.R. § 219.201(a)(1) (1991).

17. 49 C.F.R. § 219.301(c)(1) (1991).

18. *Id.*

19. *Id.* § 219.301(c)(2)(i).

20. *Id.* § 219.301(c)(2)(ii). Whenever the result of a breath test is intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility. *Id.* § 219.303(c)(1). When a urine sample yields a positive result, the employee has sixty days to provide to the Medical Review Officer a written request for a retest. This request must specify that an approved second laboratory perform the analysis, and the employee may be required to pay for shipment costs and the reanalysis. If a negative result ensues, the railroad will reimburse the employee for these costs. *Id.* § 219.709(b).

21. *Skinner*, 489 U.S. at 614; United States v. Jacobsen, 466 U.S. 109, 113-14 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971).

22. *Skinner*, 489 U.S. at 614.

23. *Id.* at 617.

24. *Id.* at 619.

probable cause that the person has violated the law.[25] The Supreme Court noted, however, that "[w]hen the balance of interests precludes insistence on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable."[26]

Specifically, the *Skinner* court looked to *New Jersey v. T.L.O.*[27] to determine the proper analysis to utilize. The Court recognized that where privacy interests are minimal and important governmental interests compel the intrusion, a search may be reasonable despite the absence of individual suspicion.[28] It is within this limited niche that random drug testing programs attempt to justify their existence.

3. *The Balancing Test*

The federal courts have declared most drug testing programs that do not require individualized suspicion unconstitutional in the labor context.[29] But, in this case, the Supreme Court felt that any individualized suspicion requirement was justifiably waived[30] because the Court observed that the purpose of the FRA regulations was not to assist in the prosecution of employees but to prevent accidents.[31] Justifiably, the Court was very cautious

25. *Id.* at 624.

26. *Id.*; *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976).

27. 469 U.S. 325 (1985). In *T.L.O.*, the Supreme Court laid out a two-part test to determine the reasonableness of a search without a warrant or probable cause, in the context of a public high school. In the case, a school administrator had searched a student's purse for banned substances based on the suspicion that the student was smoking on school grounds in violation of school policy. The *Skinner* court interpreted the "reasonableness" test to be (1) whether the privacy interests affected are minimal, and (2) whether an important governmental interest is furthered by the intrusion. *Skinner*, 489 U.S. at 624. In the context of collegiate drug-testing, the court in O'Halloran v. University of Wash., 679 F. Supp. 997 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988), looked to the *T.L.O.* test and interpreted the "reasonableness" inquiry as: (1) whether a search was justified initially, and (2) whether a search, as conducted, was reasonably related in scope to the circumstances which justified the interference in the first place. *O'Halloran*, 697 F. Supp. at 1004; *see also* David R. Cochran, *The Privacy Expectation: A Comparison of Federal and California Constitutional Standards for Drug Testing in Amateur Athletics*, 17 HASTINGS CONST. L.Q. 533 (1990) (examining *T.L.O.*, *Skinner*, *O'Halloran*, and the relationship of the cases).

28. *Skinner*, 489 U.S. at 624.

29. *See* Craig H. Thaler, Note, *The National Collegiate Athletic Association, Random Drug-Testing, and the Applicability of the Administrative Search Exception*, 17 HOFSTRA L. REV. 641, 643 n.14 (1989), citing, with regard to Fourth Amendment requirements: Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988) (reasonable suspicion required in order for city to test fire fighters); Thomson v. Weinberger, 682 F. Supp. 829 (D. Md. 1988) (U.S. Army's drug-testing program found unconstitutional since no reasonable suspicion was required before a person could be tested); Taylor v. O'Grady, 669 F. Supp. 1422 (N.D. Ill. 1987) (testing of prison officers unconstitutional without reasonable suspicion); Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987) (testing city bus drivers unconstitutional without reasonable suspicion); Feliciano v. City of Cleveland, 661 F. Supp. 578 (N.D. Ohio 1987) (unconstitutional to test police cadets without reasonable suspicion); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (unconstitutional to test fire fighters without reasonable suspicion); Patchhogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (2d Dept. 1986), *aff'd*, 70 N.Y.2d 57, 517 N.Y.S.2d 456 (1987) (must have reasonable suspicion to test public school teachers).

30. *Skinner*, 489 U.S. at 624-25.

31. *Id.* at 620-21; 49 C.F.R. § 219.1(a) (1991).

in concluding that the urine tests were permitted without individualized suspicion.[32] The Court determined that the expectations of privacy for railroad employees were diminished by the nature of the industry, which was heavily regulated to ensure everyone's safety, and because the safety goals of the industry depended on the fitness and competence of the employees.[33] Given the employee's diminished expectation of privacy and the government's compelling interest in testing, the Court concluded that the alcohol and drug tests under subparts C and D of the FRA regulations were reasonable with respect to the Fourth Amendment, despite the recognized lack of individualized suspicion.[34]

4. The Real Basis for the Court's Decision

The Court purports to conclude that no individualized suspicion is utilized in the FRA testing process, and it states that it is upholding the program because the governmental interest in testing is compelling and outweighs the privacy invasion.[35] Those statements by the Court are misleading. The Court is actually upholding the testing program because individualized suspicion does exist in the guise of an accident, or a well-trained supervisor observing an employee acting erratically.[36] No one is randomly investigated under the regulations. Rather, a major accident or some type of behavior that raises suspicion about the individual is required to permit urinalysis. In this sense, the Court is saying that since these safeguards exist for the employees, any possibility of a privacy intrusion is severely limited and therefore the testing program is acceptable.[37]

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32. *Skinner*, 489 U.S. at 626; *see infra* notes 35-37 and accompanying text. The *Skinner* Court stated:

> We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raises concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process. *The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample* . . . . The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination.

Skinner, 489 U.S. at 626 (emphasis added).

33. *Id.* at 627.

34. *Id.* at 627, 634. The dissent in the case, however, vigorously opposed the program as an unreasonable violation of the Fourth Amendment. Justices Marshall and Brennan both felt uncomfortable dismissing the "reasonable suspicion" standard as impracticable. *Id.* at 637. More significantly, they felt that the FRA field manual instructed supervisors to directly observe the employees while urinating for the test. *Id.* at 646. Marshall stated, "[T]he majority dismisses as nonexistent the intrusiveness of such 'direct observation', on the ground that FRA regulations state that such observation is not required." *Id.* at 646 n.8. Marshall noted that the regulations also state that observation is the most effective means of verifying the validity of the sample and it is unlikely the supervisors would disregard such commands in the field manual. *Id.*

35. *Skinner*, 489 U.S. at 628, 633.

36. *See supra* notes 16-20 and accompanying text.

37. This may well be the difference between Scalia and Stevens siding with the majority in

B. *NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB*[38]

In *Von Raab*, decided the same day as *Skinner*, the Court determined that the United States Customs Service did not violate the Fourth Amendment when it mandated that employees who sought transfer or promotion to certain positions in the Service would be required to submit to a urinalysis test.[39] Specifically, the Service sought to test those employees directly involved in drug enforcement, those who carried firearms, and those exposed to sensitive materials.[40] If an employee otherwise qualified for a position that fell within the testing provisions, he or she was then advised of the drug testing requirement.[41] The tests screened for marijuana, cocaine, opiates, amphetamines, and phencyclidine.[42]

1. The Factors in Favor of Upholding of the Program

The Fifth Circuit held that the required searches were reasonable with respect to the Fourth Amendment, noting that the Customs Service had attempted to minimize the intrusiveness by not requiring visual observation of the act of urination.[43] The Supreme Court affirmed the Fifth Circuit's judgment with respect to the testing of employees directly involved in drug interdiction and the agents who carried guns, but it vacated and remanded the Fifth Circuit's decision with respect to employees who merely handled clas-

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Skinner, and dissenting in *Von Raab*, where it is clear that no form of individualized suspicion existed in the testing program. *See infra* notes 52-54 and accompanying text.

38. 489 U.S. 656 (1989).

39. *Id.* at 679.

40. *Id.* at 660-61. The Commissioner of Customs implemented the drug-testing program in 1986, and drug tests were made a condition for positions that met one or more of three criteria: (1) direct involvement in drug interdiction or enforcement of directly related laws, (2) employees who must carry firearms, and (3) employees who must access classified material. *Id.*

41. *Id.* at 661. With respect to the actual procedures involved, the Court stated:

> After an employee qualifies for a position covered by the customs testing program, the Service advises him by letter that his final selection is contingent upon successful completion of drug screening. An independent contractor contacts the employee to fix the time and place for collecting the sample. On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.
>
> Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, and places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.

Id.

42. *Von Raab*, 489 U.S. at 662.

43. National Treasury Employees Union v. Van Raab, 816 F.2d 170, 177 (5th Cir. 1987), *aff'd in part, vacated in part*, 489 U.S. 656 (1989). The Fifth Circuit also stated that the government had a compelling interest in assuring that its employees were not using drugs. *Von Raab*, 816 F.2d at 178.

sified materials.[44]

The Supreme Court recognized that the government has a compelling interest in employing interdiction personnel that are of the highest integrity and judgment.[45] The Court stated that employees in sensitive government positions, like interdiction personnel, have a lower privacy expectation with regard to personal searches.[46] It also accepted the need to test customs officials entrusted to carry firearms.[47] With respect to the privacy intrusion implicated by testing these persons, the Court acknowledged that because the monitor does not directly observe the actual urination, the intrusion on privacy is further reduced.[48] Therefore, the testing of the employees was upheld.[49]

On the other hand, the Court remanded the portion of the case involving the testing of workers who would handle classified materials because it wanted a more "bright-line" delineation of exactly which employees fell into that category so that solid justifications for testing those employees could be enunciated.[50] By providing such careful scrutiny and remanding the portion of the case involving employees handling classified materials, the Court in *Von Raab* obviously took notice of the fundamental requirement necessary to find such an intrusion reasonable: the governmental interest must clearly outweigh the privacy intrusion.[51]

2. *A Surprising Dissent*

While Justices Scalia and Stevens sided with the majority in *Skinner*, they dissented in *Von Raab*, along with Justices Marshall and Brennan, who had dissented in *Skinner*.[52] Justice Scalia stated that he dissented from this opinion because the justifications, in this context, were not adequate to necessitate the intrusive urine testing.[53] He remarked, "If such a generalization

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44. *Von Raab*, 489 U.S. at 664-65.

45. *Id.* at 670 (noting that the public interest in protecting the nation's borders justified the level of intrusiveness in this case).

46. *Id.* at 671. For example, employees at the U.S. Mint should expect to be searched when they leave work, and military personnel are subject to intrusions required to assure loyalty and trust. *Id.*

47. *Id.* at 672. The Court observed that the dexterity and judgment of employees carrying firearms is extremely important and this factor reduces the expectation of privacy. *Id.*

48. *Id.* at 672-73 n.2. In this context, the Court mentioned, along with the fact that the regulations did not require the direct observation of the act of urination, that the urine samples could be examined only for specified drugs, with the employee being required to disclose personal medical information only if his test result is positive. *Id.*

49. *Von Raab*, 489 U.S. at 679.

50. *Id.* at 677-78.

51. *Id.*

52. *Id.* at 679-80.

53. *Id.* at 680-81. Scalia said:

> Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society.
>
> I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my

suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed."[54] Given Justice Scalia's generally conservative tendencies, his recognition of these privacy interests in this context offers some hope to those who fear the Court will severely diminish privacy interests without a challenge.

C. Conclusions from the Labor Cases

The Supreme Court makes clear in *Skinner* and *Von Raab* that drug testing regulations must bear a reasonable relationship to legitimate goals and needs. The waiver of probable cause or individualized suspicion will be permitted only in very limited circumstances, such as the school setting in *T.L.O.*[55] Any overly-intrusive methods will not be accepted under a Fourth Amendment search and seizure analysis.

Random drug testing programs face a heavy burden in meeting the balancing test, and safety or individualized suspicion are often the determining factors. When one closely examines the *Skinner* opinion, individualized suspicion is clearly present in some form, and that fact helped the Court to uphold the program.[56] Moreover, the safety justifications in *Skinner* were immense, given the potential for loss of life, and this factor added to the balance in favor of upholding the program.[57] In *Von Raab*, however, while the safety concern was present to a lesser degree, the fact that no individualized suspicion requirement existed weighed against the program for several of the Justices. The dissenting members of the Court in *Von Raab* take the balancing test very seriously and will not allow privacy intrusions, without individualized suspicion, when the only counterbalancing factors are general safety interests.[58]

> view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use . . . . The Court's opinion in the present case . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.

Id.

54. *Von Raab*, 489 U.S. at 684.

55. 469 U.S. 325 (1985); *see supra* note 27.

56. *See supra* notes 16-20, 35-37 and accompanying text. For the importance of safety and individual suspicion in the balancing test, see Tanks v. Greater Cleveland Regional Transit Auth., 930 F.2d 475 (6th Cir. 1991) (discussing *Skinner* and *Von Raab* and finding reasonable a transit authority's drug testing of a bus driver after a collision due to the presence of some level of individualized suspicion); *but c.f.* International Brotherhood of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991) (finding Fourth Amendment does not prohibit the Navy from randomly testing civilian employees who possess top secret security clearances).

57. *See supra* note 14.

58. *See supra* notes 52-54 and accompanying text.

III. DRUG TESTING OF STUDENT ATHLETES: AN ANALYSIS OF THE MOST SIGNIFICANT CHALLENGES

A. EARLY CHALLENGES

1. O'Halloran v. University of Washington[59]

O'Halloran involved a challenge to the University of Washington's drug testing program for athletes, under the Fourth Amendment and the Washington Constitution.[60] The University's program would have required some 800 athletes to undergo testing during their annual medical exams. The importance of the superior court opinion from this Comment's perspective is that courts have determined the privacy protection offered by the Washington Constitution to be broader than that offered by the Fourth Amendment.[61]

a. The Superior Court Decision

On July 23, 1987, King County Superior Court Judge Mattson issued an oral ruling that enjoined the University of Washington from implementing its drug testing policy against Elizabeth O'Halloran.[62] The judge was concerned with (1) whether the university had any legal basis upon which it could assure confidentiality (he ultimately concluded that this was of less importance than his second concern), and (2) whether the plan was constitutional.[63]

With respect to the constitutionality of the program, Judge Mattson noted that visual observation of urination and the testing of the specimen would generally constitute an improper intrusion into private matters.[64] He applied a balancing test, pitting the school's interests[65] in the test results

59. No. 87-2-08775-1 (Wash. Super., King County, July 23, 1987), *removed sub. nom.*, 679 F. Supp. 997 (W.D. Wash. 1988), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988), *withdrawn* No. 87-2-08775-1, subn. 65 (King Co. Super. Ct. 1989).

60. *See* O'Halloran v. University of Wash., No. 87-2-08775-1 (Wash. Super., King County, July 23, 1987) (transcript of oral opinion) [hereinafter O'Halloran transcript]. For a in-depth discussion of *O'Halloran* and related topics, see Brock & McKenna, *supra* note 1, at 538, 548-51.

61. Article I, section 7 provides:

> INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

WASH. CONST. art. I, § 7. *See also* State v. Butterworth, 48 Wa. App. 152, 737 P.2d 1297 (1st Div. 1987) (The court found art. I, § 7 violated when police obtained an unlisted address and phone number without a warrant because the Washington Constitution is much broader than the Fourth Amendment and clearly extends rights and protections beyond it.).

62. *See* O'Halloran transcript, *supra* note 60.

63. *Id.* at 5-6.

64. *Id.* at 6. The judge also believed that the proposed testing should be ruled unconstitutional because the burden of persuasion in such constitutional matters fell to the state.

65. Judge Mattson found the university's purported interests to be: (1) advancing the safety of those tested; (2) promoting the safety of the athlete's teammates; (3) achieving fairness in athletic competition; (4) protecting the school's image; and (5) protecting the financial status of the university and its athletic programs, particularly its football and basketball programs, which are the most lucrative for the school. O'Halloran transcript, *supra* note 60, at 8-10.

against the invasion and personal intrusion involved in a monitored urine test. Judge Mattson found that, as a matter of law, the program violated the Fourth Amendment and the Washington Constitution.[66] He believed the program would not further the University's interests to the extent necessary to validate the intrusion, primarily because the evidence had not convinced him that any drug use had harmed the interests that the school sought to protect. He cited the fact that the school had only two substantiated cases in approximately five years where a competitive athlete was affected by drugs.[67] To further support his decision, he stated that evidence of a special drug problem among athletes would be required to make the invasion reasonable. He also found that no testing was scheduled for other University students whose performance could be impaired by drugs, and he recalled that mass testing of firefighters had been ruled unconstitutional in an earlier Washington decision, even though the state's interests and rationales in having drug-free firefighters were much greater than mere athletes.[68] Hence, he felt the program could not withstand such scrutiny.

Judge Mattson advised the University, however, that the NCAA should be joined as a party to avoid sanctions that could be imposed on the school.[69] The University then joined the NCAA as a party. After being joined, the NCAA removed the action to federal district court, and the plaintiffs' motion to remand was denied.[70] The federal district court proceeded to examine the procedures involved in the NCAA's program, focusing on the program's constitutionality under federal law.[71] Specifically, the court examined the regulations and methods under which testing occurred.[72]

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66. *Id.* at 17. Although the NCAA had not been joined in the superior court action, Judge Mattson commented:

> It is clear that the NCAA's requirement of all athletes consenting in writing to random post-season drug testing as a condition of the University's right to participate in post-season championships and bowl events suffers from even more constitutional deficiencies than does the University of Washington's proposed program, which is much more structured and much more limited.

Id. at 20-21.

67. *Id.* at 4, 10-11.

68. *Id.* at 12-13.

69. *Id.* at 21. Judge Mattson eventually ordered the NCAA to be joined as a third party defendant. *See* O'Halloran v. University of Wash., No. 87-2-08775-1 (Wash. Super., King County, July 24, 1987) (order compelling joinder). He also issued a temporary restraining order prohibiting the NCAA from imposing penalties on the University of Washington for not adopting its own or the NCAA's testing program. O'Halloran transcript, *supra* note 60, at 21-22 (temporary restraining order and order to show cause).

70. O'Halloran v. University of Wash., 679 F. Supp. 997, 998 (W.D. Wash. 1988).

71. The district court stated:

> The NCAA's drug-testing program requires student athletes annually, prior to participation in intercollegiate competition during the academic year in question, to sign a statement in which he/she . . . submits information related to eligibility, recruitment, financial aid, amateur status and involvement in organized gambling activities concerning intercollegiate athletics competition under the governing legislation of this Association, and consents to be tested for the use of drugs prohibited by NCAA legislation.

Id. at 998. *See also* 1987-88 NCAA Drug-Testing Program, Part II, Constitution 3-9-(i) (detailing the program).

72. The specimen collection procedures under the testing program were set forth in §§ 5.0-5.5. The district court examined the provisions and explained:

b. The Federal District Court's Opinion

O'Halloran based her claim on United States Code section 1983, which requires that the allegedly unconstitutional conduct complained of be committed under the color of state law.[73] Therefore, the first issue addressed by the district court was whether or not the NCAA constituted a state actor. After a short discussion of the issue, the court found that the NCAA was a private entity and not a state actor.[74] Even though the judge felt the "state actor" requirement had not been met, the court proceeded to analyze the second factor anyway: a deprivation of rights under the Constitution.[75]

c. The Fourth Amendment Inquiry

After accepting that the urine test was a search, the lower court focused its attention on whether that search was reasonable under the Fourth Amendment.[76] The court approached the reasonableness inquiry by means of its interpretation of the two-part test set forth in *T.L.O.*[77] The *O'Halloran* court phrased the inquiry as (1) are there reasonable grounds for expecting that urinalysis of student-athletes will show evidence of drug use, and (2) is the scope of the program tailored to fit the need?[78] The court concluded that the testing program was reasonable after attempting to balance both sides' interests.[79] The court concluded "that the expectation of privacy alleged is diminished in an athletic program . . . and that the relative encroachment is outweighed by the greater interests in the health of the student-athletes and

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> The student athlete must among other things appear at a time certain as notified, provide adequate identification, and provide a urine sample in a beaker provided in a sealed plastic bag. The furnishing of the specimen will be monitored by observation to insure the integrity of the sample. A witness may accompany the student-athlete to the collection station to certify identification and observe processing of the forms and the specimen.

O'Halloran, 679 F. Supp. at 999.

73. 42 U.S.C. § 1983 (1988). To state a claim under § 1983, one must establish two elements: "(1) the conduct complained of was committed by a person acting under color of state law; and (2) this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981).

74. *See O'Halloran*, 679 F. Supp. at 1001-02; *see also* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (remedial school's discharge of some employees did not constitute a state action for the purposes of the First or Fourteenth Amendment, even though the school relied on some public funds); Blum v. Yaretsky, 457 U.S. 991 (1982) (patient care decisions made by individual doctors at a state-funded nursing home are not "state action."); Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984) (adoption of an NCAA rule which denied eligibility for further intercollegiate competition was not state action).

75. *O'Halloran*, 679 F. Supp. at 1002.

76. *Id.*

77. 469 U.S. at 337 (1985); *see supra* note 27.

78. *O'Halloran*, 679 F. Supp. at 1004-05. The court felt that the only basis needed for the NCAA to conduct this testing was evidence of some past incidents of improper drug use by athletes. The court believed that since the media had directed attention to these incidents, and since the suspicion was directed at particular participants in an activity rather than randomly picking individuals out off the street, no unreasonable intrusion was involved. *Id.* The court noted that other questions regarding the reasonableness of the testing would be dealt with in its privacy analysis. *Id.*

79. *Id.* at 1005.

fair competitions."[80]

The district court's approach to the privacy analysis is surprising. The analysis trivializes the plaintiff's claim that monitored urination is an invasion of privacy, stating that it is a "small intrusion in the context of a university's athletic program."[81] The fact that some element of "communal undress" is present in an athletic context and that the athletes must routinely undergo medical examinations appeared to be the basis for the court's conclusion that the monitored urine testing is constitutionally acceptable.[82]

d. The Opinion's Shortcomings

The concern about what information could be revealed by the tests was, in the district court's opinion, lessened by the fact that the NCAA would seek out only certain banned substances.[83] The court, however, failed to recognize that the NCAA's list of substances is not inclusive, instead touting the affidavit of Robert Dugal, a member of the International Olympic Committee Medical Commission, who disclosed many of the evils of drug use.[84] In the process, the court failed to take into account the broader privacy protection offered by the Washington Constitution than by the Fourth Amendment, or to take seriously the legitimate concerns set forth by *O'Halloran*.

While the goals of the court may be laudable, the failure to adhere to obvious constitutional standards is apparent in the opinion. Unfortunately, on appeal to the Ninth Circuit, the case was reversed on a procedural technicality, eventually remanded to state court, and finally dismissed.[85] Though no clear and final decision has evolved from the case, it was one of the first cases to focus on the relevant issues necessary in such a privacy challenge. Given that the privacy protections offered under the Washington Constitution are broader than under the Fourth Amendment, the likelihood of success on a Washington constitutional-based challenge to a drug testing program is more probable due to the increased scrutiny such invasions face today in state courts.

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80. *Id.*

81. *Id.*

82. *Id.*

83. *O'Halloran*, 697 F. Supp. at 1005.

84. *Id.* at 1006-07.

85. *See* O'Halloran v. University of Wash., 856 F.2d 1375, 1381 (9th Cir. 1988), where the Ninth Circuit determined that the state's third party complaint against the NCAA was an issue of state law, and that the NCAA could not properly claim the presence of diversity jurisdiction. Specifically, while O'Halloran's motion was pending, the university withdrew its plan to test without individualized suspicion, and therefore all charges against the school were dropped. The only remaining issue became whether the NCAA could penalize the school for failure to conduct a drug testing program, and the Ninth Circuit ruled this was a pure question of state law. *See O'Halloran*, 856 F.2d at 1381; *see also* Cochran, *supra* note 27, at 537 n.31. The Ninth Circuit sent the case back to the state court, where it was ultimately dismissed. Therefore, it is questionable whether the superior court or district court opinion has more precedential value. In the author's opinion, it is clear the superior court opinion more closely adheres to guiding constitutional principles.

2. Schaill by Kross v. Tippecanoe County School Corporation[86]

Schaill appears to provide support for those who favor drug testing. The school corporation in question implemented a drug testing program involving high school athletes and other extra-curricular participants. Specifically, in the fall of 1987, after discovering the use of marijuana by five baseball players, the board of trustees for Tippecanoe County School Corporation (TSC) adopted a drug testing program requiring all student athletes and cheerleaders to be tested by random urinalysis.[87] If students wished to participate in athletics they and their parents were required to sign a consent form whereby the students agreed to submit to random urinalysis. Failure to consent brought varying levels of penalties and suspensions.[88] The method of selection for testing was random.[89]

Darcy Schaill and another student athlete attacked the program under United States Code section 1983, as an unreasonable search violating the Fourth Amendment, and also on due process grounds.[90] The federal district court denied relief for the search and seizure and due process claims.[91] Upon further consideration, the Seventh Circuit affirmed the judgment of the district court.[92] In its analysis, the Seventh Circuit began with a discussion that reaffirmed that a urine test is a search within the meaning of the Fourth Amendment.[93] The court explained, "The fact that urine is volunta-

86. 679 F. Supp. 833 (N.D. Ind. 1988), *aff'd*, 864 F.2d 1309 (7th Cir. 1988).

87. *Schaill*, 864 F.2d at 1310.

88. The actual penalties imposed were: a suspension from 30% of all games for a first positive test, a 50% suspension for a second positive, a one year suspension for a third positive, with a fourth positive resulting in the student being banned for the rest of high school. *Schaill*, 874 F.2d at 1311.

89. Specifically, a piece of paper with each athlete's assigned number was placed in a box, with the athletic director and the head coach of each team allowed to choose numbers during the particular sports season. The Seventh Circuit further described the actual procedure:

> The student selected for testing is accompanied by a school official of the same sex to a bathroom, where the student is provided with an empty specimen bottle. The student is then allowed to enter a lavatory stall and close the door in order to produce a sample. The student is not under direct visual observation while producing the sample; however, the water in the toilet is tinted to prevent the student from substituting water for the sample, the monitor stands outside the stall to listen for the normal sounds of urination and the monitor checks the temperature of the sample by hand to assure its genuineness.

Id.

90. *Id.* at 1310-11; *see also* Note, *Search and Seizure—Suspicionless Drug Testing—Seventh Circuit Upholds Drug Testing of Student Athletes in the Public Schools.*—Schaill v. Tippecanoe County School Corp., 103 HARV. L. REV. 591, 596 (1989) [hereinafter *Search and Seizure*] (stating that the court focused on the need for regulation in the school environment and ignored the potential of cooperation and education).

91. Schaill v. Tippecanoe County Sch., 679 F. Supp. 833 (N.D. Ind. 1988) (the district court concluded that the tests were searches under the Fourth Amendment but that they were not unreasonable).

92. *Schaill*, 864 F.2d at 1310.

93. The court stated:

> There can be little doubt that a person engaged in the act of urination possesses a reasonable expectation of privacy as to that act, and as to the urine which is excreted. In our society, it is expected that urination be performed in private, that urine be disposed of in private and that the act, if mentioned at all, be described in euphemistic terms.

rily discharged from the body and treated as a waste product does not eliminate the expectation of privacy which an individual possesses in his or her urine."[94] Since a great deal can be determined about a person by conducting a urinalysis, such a search raises privacy concerns and must be analyzed under proper constitutional scrutiny.

a. The Reasonableness of the Search: The Proper Inquiry?

The appellate court next inquired into the reasonableness of the search and the level of suspicion required under constitutional standards.[95] The court determined it should recognize the test utilized in *New Jersey v. T.L.O.* as the guiding precedent in its analysis.[96] The essence of the *T.L.O.* decision is that a school environment forces teachers to utilize fast and informal disciplinary procedures and that warrant and probable cause requirements are impractical in that limited context: school searches are to be evaluated on the basis of their reasonableness under all the circumstances.[97]

Rather than utilizing a proper constitutional analysis to determine whether this was a situation calling for some form of individualized suspicion, the Seventh Circuit arbitrarily decided that the school corporation need only meet the less-demanding general reasonableness standard set forth in *T.L.O.*[98] The significance of this leap by the court is that it circumvented the proper inquiry into whether or not some form of individualized suspicion was required by the circumstances of this case and Fourth Amendment constitutional safeguards. The *Schaill* court appears to read *T.L.O.* as giving courts a free hand to apply a reasonableness test to any search in an academic context. Such a conclusion is in no way justified.

The court in *Schaill* never properly addressed the question of whether the search involved in the TSC drug testing program, conducted without the higher standard of individualized suspicion, was justified under constitutional standards in this particular instance. Such a finding is, however, implied by its discussion of the many cases where the individualized suspicion requirement does not apply.[99] After examining certain situations where in-

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Id. at 1312.

94. *Id.*

95. *Id.*; *see Search & Seizure, supra* note 90, at 593.

96. *Schaill*, 864 F.2d at 1314.

97. *Id.*; *see also Search and Seizure, supra* note 90, at 593 (raising the relevant point that the *Schaill* court failed to consider that the school environment is perfectly suited to the implementation of a drug testing program based on individual suspicion, and noting that while probable cause is too stringent a standard for the school environment, the court should resist departing from the principle that evidence is required to infringe upon an individual's privacy).

98. *Schaill*, 864 F.2d at 1315. As recently noted, "[s]uspicionless searches remain a relatively new phenomenon in fourth amendment jurisprudence" and it was not until the later cases of *Skinner* and *Von Raab* that the Supreme Court ever approved a suspicionless search that intruded on a person's bodily integrity. *See Search & Seizure, supra* note 90, at 595.

99. *See Schaill*, 864 F.2d at 1316-17. The *Schaill* court discussed the *T.L.O.* decision and stated:

> In *T.L.O.* the Supreme Court expressly reserved decision on whether individualized suspicion was always necessary to validate a search under the reasonableness standard adopted in that case. The Court noted that there was no "irreducible requirement" that individualized suspicion be present for a search

dividualized suspicion was not required,[100] the court turned to the actual balancing test implicated by a reasonableness analysis.[101] The court noted that, on the one hand, there is an obvious expectation of privacy associated with the act of urination.[102] However, the court stated:

> [T]he privacy considerations are somewhat mitigated on the facts before us because the provider of the urine sample enters a closed lavatory stall and the person monitoring the urination stands outside listening for the sounds appropriate for what is taking place. The invasion of privacy is therefore not nearly as severe as would be the case if the monitor were required to observe the subject in the act of urination.[103]

The court, like the *O'Halloran* court, also emphasized that there was "an element of 'communal undress' inherent in athletic participation," which it believed led to a lessening of personal expectations of privacy.[104] Similarly, since student athletes and cheerleaders who participated prior to the drug program had been obligated to give a urine sample in relationship to a mandatory physical exam each year, the court viewed the new procedures as only slightly more intrusive.[105]

b. More Difficulties in the Court's Analysis

At this point in the privacy analysis, the reasoning of the court is difficult to follow. After recalling that the urine sample taken during the routine medical exams in the past had not been monitored, had only been tested for sugar, and was only seen by the student's private physician, the court stated that "[t]he fact that such samples are required suggests that legitimate expectations of privacy in this context are diminished."[106] There is obviously a great difference between giving an unmonitored urine sample to one's personal physician in the context of a routine physical examination and giving one in the presence of a school official so that the sample can be tested for drug use.

The court's privacy analysis, however, continued and the court revealed

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> to be constitutional: it also observed that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."

Id. at 1315 n.5.

It is from this logic that the court in *Schaill* seems to imply that no individualized suspicion is required in the TSC situation. To reach such a conclusion would require a finding that the privacy interests implicated are minimal and that sufficient safeguards in any program exist to protect people from subjective discretion. Given the later *Skinner* and *Von Raab* decisions, the *Schaill* court's reasoning is improper. *See supra* notes 25-28 and accompanying text.

100. Note that these cases do not implicate situations involving a search nearly as intrusive as the TSC drug testing program. *See Schaill*, 864 F.2d at 1316-17.

101. *Id.* at 1318.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Schaill*, 864 F.2d at 1318; *see also Search and Seizure*, *supra* note 90, at 594 (noting that since the students usually provide their personal physician with a urine sample, they would have a lesser expectation of privacy in providing one to school officials).

106. *Schaill*, 864 F.2d at 1318.

the existence of another element that it believed weighed against the student's expectations of privacy: the students were participants in "interscholastic athletics."[107] The Indiana High School Athletic Association required minimum grade averages and imposed residency and eligibility requirements. The court believed that these characteristics of athletic participation further reduced any expectation of privacy.[108] But the logic of comparing the requirement of submission to a urine test to a prohibition on drinking or smoking does not present a sensible analysis of the degree of privacy invaded.[109] The court, in attempting to show the similarities between drug testing and other prohibitions in interscholastic athletics, loses sight of the differences in the means and the end. For example, the court states that prohibitions on drinking, smoking, and drug use have been upheld against state and federal constitutional challenges. Such an analysis, however, is unfulfilling because stopping teens from using drugs or alcohol is the end to be achieved; obviously such regulations will not fail a constitutional analysis.

But the drug testing program adopted by TSC is the means to secure that end and clearly involves a much greater degree of intrusion and cannot be analyzed in the same manner. The cases the court cites are cases where athletes have been required to be clean shaven, or have been disciplined for attending events where alcoholic beverages were served.[110] The differences in the intensity of the privacy invasion are clear.

c. A Summary of the *Schaill* Court's Balancing Test

The *Schaill* court concluded its diminished expectation of privacy argument along the lines of "constructive notice" reasoning.[111] The court's premise was that athletes live a high visibility existence and since everyone knows that professional and Olympic athletes get tested for drugs, all athletes are on constructive notice that they too may be tested.[112] Hence, the court reasoned that all these factors combined to diminish the participant's privacy expectations to the point that any legitimate school interest would outweigh them.

Not surprisingly, the court then found substantial governmental interests in deterring and eliminating the drug problem in schools.[113] Specifically, the court noted that the district court had found that approximately sixty percent of Indiana high school students had tried marijuana, and that it was a reasonable inference that the athletes in the TSC district fit the same profile.[114] The issue also arose as to whether TSC officials would be required to disclose the results of positive drug tests to law enforcement officials under

107. *Id.*
108. *Id.*
109. *Id.* at 1318 n.9.
110. *Id.*
111. *Schaill*, 864 F.2d at 1319.
112. *Id.* The court acknowledges, however, that it would be improper to endorse testing all students attending a school, and that it would not imply that testing of athletes would lead to testing of students involved in other extra-curricular activities. *Id.* at 1319 n.10.
113. *Id.* at 1320.
114. *Id.* One should question, however, whether this is a truly reasonable inference.

Indiana law.[115] While the school stated that it had no intention of using the program as a criminal prosecution mechanism, the court implied that nothing could prevent such a use of the program and that the issue could be raised later if that came to be the program's use.[116]

d. Due Process Concerns

The court concluded its constitutional evaluation by examining Schaill's challenge on due process grounds. Schaill claimed that the procedures offered to challenge a positive result were insufficient on due process grounds.[117] However, the court found that any liberty interest was not infringed because the stigma attached to being removed from an athletic team was minimal, stating, "[I]t is highly speculative to assume that the reasons for a student's suspension from athletic competition will become general knowledge, and that the student's reputation will be adversely affected by a suspension."[118] Statements such as this one offer evidence of the skewed and unrealistic approach of some courts to drug testing programs.[119]

The court ultimately weighed the privacy and governmental interests and found in favor of permitting the drug testing program.[120] *Schaill*, while differing from many cases in that it took place in a high school context, provides significant insight into how a court may twist the proper constitutional inquiry.

e. A Plausible Extension of the *Schaill* Court's Logic

The court's reasoning is ambiguous, as indicated by its extensive and incoherent analysis of the many factors that it claims diminish the athletes' expectations of privacy. One may consider the following scenario as an extension of the *Schaill* court's logic. Given the court's ad hoc clustering of factors in its reasonableness analysis, it is not unthinkable that TSC could implement a program to test all cheerleaders' urine samples to determine birth control pill use.

For example, assume that a cheerleader became pregnant during the past year. The school could state that it was interested in the health and safety of its students, just as in the drug testing scenario, and that it wanted to discourage promiscuous behavior and provide additional sexual counseling con-

115. *See Schaill*, 864 F.2d at 1322 n.18.

116. *Id.* Such a prospect obviously raises further privacy concerns, and perhaps offers the opportunity to challenge the urinalysis program on terms more related to criminal search and seizure contexts where probable cause and warrant requirements are not as easily excused.

117. *Id.* at 1323. The court explained the procedures as follows: "[T]he athletic director will inform a student and his or her parent or guardian of a positive test result which has been confirmed . . . . The student and parent or guardian then have the opportunity to have a reserved portion of the specimen retested at a laboratory of their choice." *Id.*

118. *Id.*

119. *See* Craig Neff, *Bosworth Faces the Music*, SPORTS ILLUSTRATED, Jan. 5, 1987, at 24 (a recent example of why the court's reasoning is improper).

120. *Schaill*, 864 F.2d at 1324.

cerning AIDS to any girls found to be taking birth control pills.[121] Given the current abortion debate and the variety of proposed or enacted laws requiring parental consent to perform abortions on women under eighteen, the proposed scenario is alarmingly plausible.

But what makes this scenario even more plausible is the fact that the *Schaill* court bypasses the Fourth Amendment requirements of probable cause or individualized suspicion and leaps immediately into a reasonableness inquiry, judged under all the circumstances of the situation. The Supreme Court has made it clear that only in very limited circumstances will it excuse the requirement of individualized suspicion.[122] After the Court's decisions in *Skinner* and *Von Raab*, it is obvious that one may not assume that a program is to be examined only under reasonableness standards. Hence, it seems unlikely that *Schaill* would be upheld under present standards.

3. Bally v. Northeastern University[123]

In *Bally*, a member of the varsity track team brought a state-based claim against Northeastern University because he had been declared ineligible due to his refusal to sign both Northeastern's and the NCAA's drug testing consent form for the 1987-88 season.[124] Northeastern's testing program required both regular and post-season urinalysis, and any varsity athlete at Northeastern was also subject to NCAA testing in post-season competition. The actual test used by Northeastern required a monitor of the same sex to visually observe the specimen being given. Any sample testing positive for enumerated substances[125] required the suspension of the athlete from the team.[126]

Bally's challenge alleged that forcing student athletes to consent to drug testing in order to participate in sports: (1) violated their civil rights under Massachusetts law; (2) violated their right to privacy under Massachusetts law; and (3) constituted a breach of contract.[127] Since Northeastern is a private university, Bally did not attempt to bring a Fourth Amendment claim, requiring a showing of state action. The superior court judge hearing

121. This author suggests that such a possibility is no more unreasonable than justifying random urinalysis by a comparison to a prohibition on facial hair.

122. *See supra* notes 25-28 and accompanying text.

123. 403 Mass. 713, 532 N.E.2d 49 (1989). The action was remanded to state court after Bally attempted to bring the action in federal district court and the court remanded for lack of jurisdiction. *See* Bally v. NCAA, 707 F. Supp. 57 (D. Mass. 1988).

124. *See* Todd A. Leeson, *The Drug Testing of College Athletes*, 16 J.C. & U.L. 325, 330 (1989) (noting that *Hill* and *Bally* were the only two state-based attacks on drug testing up to the time of the article).

125. Northeastern tested for amphetamines, barbituates, benzodiazepine, cannabinoid, cocaine, methaqualone, opiates, phencyclidine, anabolic steriods, and testosterone. *Id.*

126. *Id.* The reasons given by the university for this type of program were: (1) to promote health and safety; (2) to promote fair competition; and (3) to assure that student athletes are not viewed as drug-users and that they do not tarnish the school's reputation. *Id.*

127. *Id.* (Massachusetts Supreme Court ignored the breach of contract claim); LeRoy Pernell, *Drug Testing of Student Athletes: Some Contract and Tort Implications*, 67 DENV. U. L. REV. 279 (1990) (analysis of how a variety of tort and contract issues are raised by drug testing programs).

the matter granted summary judgment for Bally on the privacy and civil rights claims but granted summary judgment for Northeastern on the contractual issue.[128] Northeastern appealed and the Supreme Judicial Court of Massachusetts reversed, finding no civil rights or privacy violations based on state law.[129]

a. The Civil Rights Claim

The court first analyzed a possible claim under the Massachusetts Civil Rights Act.[130] The court noted that the Civil Rights Act was intended to provide a remedy for victims of racial or sexual harassment and not to create a vast constitutional tort.[131] The type of claim alleged required proof that rights guaranteed by the United States or Massachusetts were interfered with or one had attempted to interfere with them by "threats, intimidation, or coercion."[132] The court held that Bally's claim fell short due to a lack of proof of "threats, intimidation, or coercion."[133] The court noted a meritorious claim on such a cause of action would require that the activity be directed at a particular person or class of persons.[134] The court offered illustrations of the type of activity required to state a civil rights claim, such as a woman who was physically and verbally harassed, in a sexual manner, by her employer.[135] The basic element of a civil rights claim in Massachusetts appears to be physical confrontation or a substantial threat of harm.[136]

The court stated of Bally's claim and of Northeastern's drug testing program, "Northeastern is conditioning Bally's intercollegiate athletic participation on consent to drug testing by urinalysis. It is indiscriminate, impartially administered testing, and is not comparable with the direct assault found in cases where we have granted relief under the Massachusetts Civil Rights Act."[137] In Bally's situation, the court felt he set forth no individualized threat nor any threat of serious harm.[138] It seems reasonable that the type of injury alleged by Bally is not cognizable under a civil rights act. The coercion present in Bally's situation is of a more subtle nature and is not generally recognized in a civil rights context.

b. The Privacy Issue

Turning to the privacy issue, the court stated that most of its opinions regarding privacy involved public dissemination of information and Bally did not allege any such disclosure.[139] For example, the court cited a case

128. *Bally*, 532 N.E.2d at 50.
129. *Id.*
130. *Id.*; *see* MASS. GEN. L. ch. 12, § 11I (1989).
131. *Bally*, 532 N.E.2d at 52.
132. *Id.* (quoting MASS. GEN. L. ch. 12, § 11H (1989)).
133. *Id.*
134. *Id.*
135. *Id.*; *see* O'Connell v. Chasdi, 400 Mass. 686, 687-88, 511 N.E.2d 349 (1987).
136. *See, e.g.*, *Bally*, 532 N.E.2d at 52.
137. *Id.* at 53.
138. *Id.*
139. *Id.* The relevant privacy section of the Massachusetts law at issue states: "A person

raising cognizable privacy concerns in which a doctor divulged confidential patient information.[140] Why the court has chosen this obviously narrow construction of Massachusetts privacy law is unclear, but it appears likely that the pertinent provision of Massachusetts law could be construed to provide broader protections. For example, the court noted that it refused to decide whether the privacy statute protects against attempted interference with a person's privacy.[141] Such a narrow reading of state privacy law is not realistic given the litany of personal invasions that can occur today.

c. The Questions Left Unanswered by the Court's Analysis

Massachusetts apparently interprets its privacy statute to provide protection more akin to a tortious interference of privacy claim rather than one related to a Fourth Amendment reasonableness inquiry. While that may be the drafters' intentions, the court's analysis only confuses the issue by failing to decide whether Massachusett's law offers any explicit privacy protections regarding constitutional invasions of privacy. This skewed analysis makes the case useless as a reliable authority with respect to the privacy concerns implicated by a drug testing program.

While one may infer that the *Bally* decision implies that no state protection against unreasonable searches is present in Massachusetts, the answer is not clear. As one scholar has noted, however, this case is important because it offers evidence of a limitation in bringing a state-based challenge to drug testing: states may choose to construe their laws in a unique way even though their constitutional provisions are nearly identical to those of another state.[142] Hence, while one may feel more certain as to how a federal court will conduct a Fourth Amendment analysis, or as to how a state court that has previously addressed a drug testing case may handle the issue, there are no guarantees as to how a state court will interpret the language of its constitution when first addressing such an issue.

B. More Current and Successful Challenges

1. Brooks v. East Chambers Consolidated Independent School District[143]

In *Brooks*, high school students brought a class action suit in which they sought to prove the school district's drug testing program for grades six through twelve violated their federal constitutional rights.[144] This suit was different from others in that the plaintiff was not a student athlete but rather a member of the high school's Future Farmers of America program, who sought to obtain a temporary restraining order to prevent his exclusion from

shall have a right against unreasonable, substantial or serious interference with his privacy." Mass. Gen. L. ch. 214, § 18 (1989).

140. *Bally*, 532 N.E.2d at 53; *see* Tower v. Hirschhorn, 397 Mass. 581, 588, 492 N.E.2d 728, 731 (1986).

141. *Bally*, 532 N.E.2d at 54 n.5.

142. *See* Gibbs, *infra* note 190.

143. 730 F. Supp. 759 (S.D. Tex. 1989).

144. *Id.* at 760. The school district approved the plan in 1988, which called for consent to urinalysis as a prerequisite to participation in extra-curricular activities.

future competitions if he did not submit to a drug test.[145] The school district had adopted the program based on the recommendations of a few parents and some random inquiries made by the principal of East Chambers High School.[146]

a. The Testing Program

The court, in examining the program, noted that there was no evidence that drugs or alcohol had caused any specific problems relating to extra-curricular activities. The high school principal, in fact, testified that he had only witnessed two events (involving alcohol) that disrupted activities in seven years.[147] In fact, the court stated, "The school district evidently is responding with its program to a perceived public demand that the schools 'do something' about the general societal problem of substance abuse."[148] The testing program required that all fall participants be tested once at the semester's start and then randomly throughout the school year, with about thirty students per month being tested.[149] The court recognized that during the past year only thirteen high school students did not participate in some extra-curricular activity that would have subjected them to testing.[150] In effect, the program was a means to allow the school district and principal to test and retest nearly any student they chose. The actual testing procedures involved summoning the students from class to the principal's office, with no effort made to disguise which students would be tested.[151] The student was confronted by the principal and school nurse about his or her drug use and then led to the bathroom to provide the sample alone. The water in the toilet, however, was colored to prevent adulteration of the sample.[152] After the student exited the bathroom, the nurse felt the container for proper

145. On the day the suit was filed, the plaintiff was requested to submit to a drug test and was barred from participation after his refusal. Subsequently, an order restrained the school district from barring him until a preliminary injunction hearing could be held.

146. The program was supposedly adopted because:

> (1) "Student athletes . . . are respected and admired by a large segment of the student body and . . . are expected to hold themselves as good examples of conduct, sportsmanship and training . . . ."
> (2) "It has been widely recognized that using drugs and alcohol can cause serious . . . harm."
> (3) "A student who uses drugs can be a danger to himself, his teammates or opponents."
> (4) "The schools . . . offer extra-curricular participation only to drug-free students."
> (5) "ECCCISD has a duty to protect the health and well-being of all its students involved in extra-curricular activities," and
> (6) "[E]xtra-curricular activities are . . . a privilege."

Id. at 761.

147. *Id.* The school district appeared to be paranoid about drug use. For example, they had begun a drug-sniffing dog program, but were forced to discontinue it because the dogs found so few drugs. *Id.*

148. *Id.*

149. *Brooks*, 730 F. Supp. at 761-62.

150. *Id.* at 761 n.1.

151. *Id.* at 762.

152. *Id.*

warmth.[153] Clearly, this testing procedure is one of the least intrusive, with regard to procuring the specimen, that has been used in a drug testing program.

b. The Federal Constitutionality Analysis

The *Brooks* court first examined the requisite element of "state action" in its inquiry into the constitutionality of such a search, and quickly concluded that a drug testing program implemented by a public school board constitutes governmental action. The court then applied the *Von Raab* approach to a Fourth Amendment analysis. First, the court examined the conduct involved in the search and then the court judged this conduct against a reasonableness standard.[154] The *Brooks* court noted that both the Fifth Circuit and U.S. Supreme Court recognized that urinalysis intrudes upon reasonable expectations of privacy and, thus, constitutes a search under the Fourth Amendment.[155] The *Brooks* court then stated, "The test is a search regardless of whether the actual act of urination is observed, because the analysis of urine is capable of disclosing facts about which an ordinary citizen has a reasonable expectation of privacy."[156] Hence, the East Chambers Consolidated Independent School District (ECCISD) program spawned a Fourth Amendment issue.[157]

The *Brooks* court then referred to the two-part inquiry announced in *T.L.O.* and analyzed the Fourth Amendment issue in similar terms: (1) was the action appropriate from the inception, and (2) was the search reasonably related in scope to the circumstances justifying the action initially.[158] This appears to be the proper analysis required by the U.S. Supreme Court and enunciated in *Skinner* and *Von Raab*; specifically stated, is the individualized suspicion requirement waived and, if so, is the search reasonable?[159] The court properly began its analysis by stating that generally the constitutional test requires that the search of a student be based upon an individualized suspicion of wrongdoing.[160] Since the ECCISD test was not based upon reasonable suspicion, the test could pass constitutional muster only by being necessitated by a congruence of specific circumstances.[161]

The court determined that the special circumstance the school district had to show in this instance was that the extra-curricular participants were more prone to drug use than other students.[162] The court stated this would be difficult to demonstrate since the participants are less likely to use drugs and

153. *Id.*
154. *Brooks*, 730 F. Supp. at 763; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).
155. *Brooks*, 730 F. Supp. at 763.
156. *Id.*
157. *Id.* The court stated that the constitutionality of this drug testing program was a case of first impression for the Southern District of Texas and the Fifth Circuit. *Id.*
158. *Id.* at 764; *see supra* note 27.
159. *See supra* notes 25-28 and accompanying text.
160. *Brooks*, 730 F. Supp. at 764.
161. *Id.*
162. *Id.*

alcohol because Texas law bars students who have poor grades from participating, and it follows logically that if students had substance abuse problems, it would be indicated in their grades.[163] Based on this rationale, the court found the school district failed to demonstrate the compelling need necessary to conduct the search without reasonable suspicion.[164]

Moreover, the court noted that all courts that have examined drug testing of a general student group in public schools have found such programs unconstitutional.[165] Since the ECCISD program literally tested all students in the school, the *Brooks* court pronounced it the most intrusive program of any school district in Texas.[166] Similarly, the court felt that the program was unlikely to accomplish its stated goals of protecting the health and well-being of students involved in extra-curricular activities.[167] The court's biggest concern appeared to be with alcohol and the fact that testing for it would not indicate its presence if the student had not ingested it within 24 hours.[168]

c. The Court's Conclusions

The school district attempted to rely on *Schaill*.[169] The *Brooks* court, however, announced that *Schaill* was probably no longer good law because of the subsequent decisions in *Skinner* and *Von Raab*.[170] The *Brooks* court recognized that the interest in this case was far less than the compelling ones in *Skinner* and *Von Raab*, and yet the interests in those cases were questioned as being insufficient.[171] In the school context, no compelling interest exists, like the protection of lives in *Skinner*, so the testing program is not supported by the required compelling interest.[172] Thus, the testing program was judged unconstitutional, and a permanent injunction was granted to prevent urine testing.[173] The Fifth Circuit endorsed the trial court's holding in this matter by affirming the decision without opinion.[174] While this case differs from some others in that it took place in a high school environment, the opinion is quite logical and recognizes the significance of recent labor cases in the drug testing area. Hence, its logic may prove persuasive to other courts.

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163. *Id.*

164. *Id.* at 765.

165. *Brooks*, 730 F. Supp. at 765.

166. *Id.* In fact, the court felt it could not even devise a more intrusive type of program.

167. One commentator believes that by expanding the program outside athletics, the school diminished its purported justifications of protecting against the health and safety risks involved in athletic competition. *See* Charles Feeney Knapp, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 IOWA L. REV. 107, 131 (1990).

168. *Brooks*, 730 F. Supp. at 765.

169. *Id.*

170. *Id.* at 766.

171. *Id.*; *see supra* notes 33, 52-54 and accompanying text. The public safety interests in those cases were far greater than any alleged interest in drug testing student athletes.

172. *Brooks*, 730 F. Supp. at 766.

173. *Id.*

174. *Brooks*, 930 F.2d 915 (5th Cir. 1991).

2. Derdeyn v. University of Colorado, Boulder[175]

In *Derdeyn,* student athletes sought to challenge the constitutionality of the University of Colorado's drug testing program through a class action suit.[176] The method of challenge was based on a student athlete's right to be free from unreasonable searches, privacy concerns, due process of law, and equal protection.[177] The trial court found the program unconstitutional as an unreasonable search under the Fourth Amendment and under Colorado Constitution article II., section 7, and it found the consent required of students to be invalid because it was coerced.[178] The appeal by Colorado was based solely on the urinalysis program.[179]

a. The Appellate Court's Analysis

The appellate court's opinion tends to follow the recent and obviously applicable case law in its analysis. After a quick notation that urinalysis has been deemed a search under the Fourth Amendment, the court recognized that state privacy concerns were implicated and that the drug testing program is also a search under article II, section 7 of the Colorado Constitution.[180] The parties stipulated that as a state institution, any action regarding the drug testing program constituted state action.[181]

The court began its analysis by noting the proper level of inquiry under the Supreme Court labor cases of *Skinner* and *Von Raab.* After looking to the language of those decisions, the court determined that the University's interest in preventing drug use could not rise to the compelling interest standard required in those cases.[182] Rather, the court stated, "[T]here are no public safety or law enforcement interests that are served by such sports programs. Accordingly, we hold that the urine testing program here at issue is unconstitutional under the Fourth Amendment."[183]

Since the court recognized that the privacy protection under Colorado article II., section 7 may be more expansive than the federal protection, the court also concluded that the drug testing program violated the Colorado Constitution.[184] The court also affirmed the trial court's finding on the coerced consent issue because, recognizing that student athletes had made economic and other far-reaching commitments to the school, their choice with

175. 832 P.2d 1031, 1032 (Colo. App. 3d Div. 1991), *cert. granted,* (Colo. July 13, 1992).

176. *Id.* The university's purported goals appear to have been coextensive with those of the NCAA program: (1) to prepare athletes for drug testing in NCAA sanctioned events; (2) a concern for its athlete's health; (3) an interest in promoting its image; (4) to ensure fair competition. While the exact manner of testing varied slightly over several years, it generally involved urine samples given under direct visual observation and testing was based on both random sampling and reasonable suspicion. *Id.*

177. *Id.* at 1033.

178. *Id.*

179. *Id.* Rapid eye examinations involving reasonable suspicion were also part of the program, but were not mentioned in the appeal.

180. *Id.* (court looked to the decisions in *Skinner* and *Von Raab,* among others).

181. *Id.*

182. *Derdeyn,* 832 P.2d at 1034-35.

183. *Id.* at 1035.

184. *Id.*

regard to the consent forms was far from free and voluntary.[185]

From an overall perspective, this case represents the outcome one could reasonably expect when a court looks to the pertinent standards set out in *Skinner* and *Von Raab*. It is far more coherent than *Bally* and is likely to carry far more precedential value because of its well-reasoned analysis.

b. The Court Upholds the Reasonable Suspicion Portion of the Program

The court, however, dissolved the portion of the injunction preventing drug testing based on probable cause. The court, citing the *T.L.O.* opinion, stated that reasonable suspicion is a valid basis to conduct a search in many situations.[186] Though the present university program failed to address objective criteria for conducting drug testing based on reasonable suspicion, the court refused to rule out the possibility that a reasonable suspicion drug testing program might be constitutionally permissible. Thus, the court affirmed the injunction, except for the section stating all testing not based on probable cause was unconstitutional.[187] *Derdeyn* represents the most recent decision on drug testing programs and one of the better opinions. The court looked to the appropriate standards for analyzing such a program and properly reasoned that such programs should be based on individualized suspicion, unless a compelling interest exists like that in *Skinner*.

3. Hill v. NCAA[188]

Hill is the most significant decision in the athletic drug testing area because it is the first real interpretation of NCAA drug testing data by a court and also because the challenge is primarily based on a state constitutional privacy protection, an avenue of challenge that is increasingly leading to new success against the NCAA.[189] *Hill* is also an obvious illustration of the chaos that has been created by the differing analyses by various courts, but it offers the most thorough inquiry into the actual NCAA methods of drug testing employed and the purported rationale for such testing.[190]

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185. *Id.*

186. *Id.*

187. *Derdeyn*, 832 P.2d at 1035-36. Specifically, the court reversed the portion of the injunction that prohibits all testing not based on probable cause.

188. 230 Cal. App. 3d 1714, 273 Cal. Rptr. 402 (6th Dist.), *review granted*, 276 Cal. Rptr. 319, 801 P.2d 1070 (Cal. Dec. 20, 1990).

189. *See* Leeson, *supra* note 124 (generally discussing several challenges to various programs, including early proceedings in the *Hill* case, and the *Bally* and *O'Halloran* decisions).

190. *Hill*, 230 Cal. App. 3d at 1719; *see also* Annette Gibbs, *Drug Testing and College Athletes: Conflicts Among Institutions, Students, and the NCAA*, 67 W. EDUC. L. REP. 1 (1991) (discussing *Hill*, *Bally*, and other important cases involving drug testing and further investigating the justifications behind the programs. Gibbs is a Professor and the Director of the Curry School's Center for the Study of Higher Education at the University of Virginia. She examines the alternatives to the current NCAA program, citing the drug testing program of the University of Montana, developed with the assistance of attorneys from the ACLU, as a possible model. The changes made in that program include only testing randomly for a few performance-enhancing drugs, testing for street drugs only upon a finding of probable cause, and giving athletes the choice of unobserved specimen collection).

In *Hill*, the Sixth District of the California Court of Appeals affirmed a permanent injunction against the NCAA, which had been granted by the Santa Clara Superior Court, and which prohibited enforcement of the NCAA drug testing program against Stanford athletes.[191] Though originally brought by diver Simone LeVant, who subsequently graduated from Stanford, the current plaintiffs, Jennifer Hill, co-captain of the women's soccer team during her senior year, and J. Barry McKeever, a linebacker on the football team, both had signed the NCAA consent forms for the 1986-87 school year but did not wish to do so again and wanted the injunction to apply to the 1987-88 season.[192] Hence, they sought declaratory and injunctive relief against the NCAA.[193] The violations alleged included unlawful search and seizure under article I of the California Constitution and due process violations.[194]

The plaintiffs stated the NCAA tests are, " 'degrading, humiliating, and embarrassing,' that the tests are incapable of measuring factors relevant to athletic performance, that there are, in fact, no drugs which enhance athletic performance, and that the program required no showing of individualized suspicion, probable cause, or compelling necessity."[195] The plaintiffs relied solely on the unconstitutional privacy violation claim in the injunctive proceedings.[196]

a. Privacy, the NCAA, and the California Constitution

The NCAA is a voluntary, private association and has been determined not to be a state actor.[197] Therefore, claims under the traditional Fourth Amendment analysis failed because the required "state action" was not present.[198] However, since this action was based on the California Constitution, article I, section 1, state action was not required because that section protects California citizens from both governmental and nongovernmental con-

191. *Hill*, 230 Cal. App. 3d at 1752.
192. *Id.* at 1722.
193. *Id.* at 1721.
194. *Id.*
195. *Id.* at 1722; *but c.f.* Michael Janofsky, *Track and Field: Complex Issues Arise in Steriods Testimony*, N.Y. TIMES, Mar. 4, 1989, at 51, Col. 5 (discussing Charlie Francis's testimony where, as Ben Johnson's former coach, he described Johnson's use of the drug and noted how the steroids contributed to performance enhancement); Patricia Loverock, *The Athlete of the Future*, L.A. TIMES, Mar. 19, 1989, Magazine, at 12 (noting that the Soviets found steroids effective for building bigger, stronger muscles).
196. *Hill*, 230 Cal. App. 3d at 1721. Barry McKeever had also made a claim, in addition to the privacy violation, of negligent interference with economic relations. *Id.* While the court does not address this economic claim, future challenges may be made on this basis given the unprecedented money available to professional athletes and the obvious relationship in most sports between college athletic success and a professional sports career. Furthermore, athletics had an economic influence on McKeever's attendance at Stanford, since he attended Stanford on a full athletic scholarship and could not have afforded Stanford without it. *Id.* at 1722.
197. *See* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988). The U.S. Supreme Court found that although the University of Nevada-Las Vegas was clearly a state actor, the NCAA was an association of public and private institutions and that the NCAA's regulatory function was not state action even if a state institution enforces the NCAA's regulations.
198. *See* Gibbs, *supra* note 190, at 3.

duct.[199] Section I provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."[200] Recent California case law has interpreted the state constitutional privacy right conferred to be equivalent with other fundamental rights more traditionally acknowledged as being protected under the U.S. Constitution, e.g., the right to defend life.[201]

b. The Necessity of a Compelling Interest

The NCAA argued that privacy guarantees under California law must be balanced against the interests and needs of the NCAA, here, the disclosure of drug testing results.[202] The NCAA refused to recognize that the privacy protections offered by the California Constitution were greater than those afforded by the Fourth Amendment, instead regarding the proper test to be the measure between the degree of the government's interest and the extent of the personal intrusion. Such a test implies that the NCAA believes that the court should find that the only inquiry required is one of reasonableness under all the circumstances. This was the analysis under *Schaill*, but as the *Brooks* court noted, such an analysis is no longer proper.[203]

The *Hill* court, however, noted a distinction between the criminal and noncriminal search context. Specifically, the court stated that Fourth Amendment search and seizure protections and California constitutional privacy protections are "coextensive" only with regard to police activity in a criminal context.[204]

The court then properly looked to *Skinner* for guidance outside the criminal context, recalling that the Fourth Amendment only affects unreasonable search and seizures: *Skinner* involves balancing the government's interests with the particular intrusion.[205] In cases outside normal law enforcement activities, the *Hill* court recognized that departures from normal warrant and probable cause requirements may be justified by the situation.[206] However, the *Hill* court took note of two important facts raised by *Skinner* in approving the testing of railroad employees involved in accidents: (1) the urine sample was not furnished under direct visual observation, thus limiting

199. *Hill*, 230 Cal. App. 3d at 1725.

200. CAL. CONST. art. I, § 1.

201. *See* Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 15, 267 Cal.Rptr. 618, 629-30 (1st Dist.), *cert. denied*, 111 S. Ct. 344 (1990) (court concluded the employer had not demonstrated a sufficient interest to justify testing "office employees" whose jobs did not implicate any safety concerns).

202. *Hill*, 230 Cal. App. 3d at 1725. *See also* David A. Cathcart, *Drug and Alcohol Policies and Testing Programs—A Review of Significant Issues*, C588 A.L.I.- A.B.A. 319 (1991) (reviewing the significant issues in *Hill* and noting other states with express constitutional protections of privacy).

203. *Hill*, 230 Cal. App. 3d at 1725-26; *see supra* notes 170-172 and accompanying text.

204. *Hill*, 230 Cal. App. 3d at 1726.

205. *Id.*; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

206. *Hill*, 230 Cal. App. 3d at 1726. The court in *Hill* noted that the basis of the departure from warrant and probable cause requirements in *Skinner* was the necessity of protecting the public from rail accidents.

the intrusion of privacy, and (2) the employees expectations of privacy were significantly less in such a heavily regulated industry.[207]

Furthermore, the *Hill* court acknowledged the *Von Raab* decision and stated that the suspicionless drug testing of Customs employees and border officers in certain groups had been carefully considered by the Supreme Court.[208] The Court only upheld the testing in *Von Raab* because the "compelling interest" in protecting the national borders outweighed the employees' privacy expectations, which clearly had to be diminished given the type of job being performed.[209] The *Hill* court attempted to follow the NCAA's logic that the *Skinner* justifications should be applied in this case. Such an argument assumed that the athletes' expectation of privacy was reduced because of their extensive regulation in other respects, that the NCAA's concern with health and safety was substantial, and that allowing such testing would deter drug use and outweigh any intrusion.[210]

The *Hill* court also recognized that the plaintiff's claims in this case rested on California constitutional protections, not the Fourth Amendment.[211] This fact evidences the primary difference from some other drug testing analyses, because, as the court stated:

> "California courts deciding claims under article I, section 1, require the state to show a compelling interest before it can invade a fundamental privacy right . . . ." This test places a heavier burden on [the proponent] than would a Fourth Amendment privacy analysis, in which the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[212]

Thus, the *Hill* court noted the different balancing test required in article I, section 1 cases, as distinguished from Fourth Amendment cases. The degree of governmental interest required in such cases is not just a rational relationship to a legitimate goal but rather a compelling state interest: it must be necessary in order to accomplish a state goal.[213]

c. The Compelling Interest Test

The NCAA program required that its members, such as Stanford University, force athletes like Hill and McKeever to submit to drug testing or be barred from competing.[214] The *Hill* court determined that to uphold the drug testing program, the NCAA must show: "(1) the testing program re-

207. *Hill*, 230 Cal. App. 3d at 1726-27.
208. *Id.* at 1727.
209. *Id.*
210. *Id.* The court recognized the NCAA was relying on *Schaill*, where that court had found the high school athletes' expectations of privacy reduced by other forms of regulation they endured and by the desire to prevent great harm to the students. *Id.*; *Schaill*, 864 F.2d at 1318-20.
211. *Hill*, 230 Cal. App. 3d at 1728.
212. *Id.*; *see also Luck*, 218 Cal. App. 3d at 20.
213. *Hill*, 230 Cal. App. 3d at 1728. In this sense, the court's inquiry differs from a Fourth Amendment determination of whether probable cause may be overlooked and, instead, a reasonableness balancing test applied.
214. *Id.*

lates to the purposes of the NCAA regulations which confer the benefit (participation in intercollegiate competition); (2) the utility of imposing the program manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no less offensive alternatives."[215] To determine whether the NCAA program met that test, the *Hill* court undertook an extensive examination of the purposes and methods involved in the NCAA program.

d. The Purported NCAA Justifications

The NCAA asserted that many athletes felt that drugs enhanced their performance and that other athletes felt compelled to take drugs to maintain their competitive edge.[216] Furthermore, the NCAA stated that the drugs caused a health risk to the athletes taking them as well as to other participants, and that street drugs affected the integrity of NCAA sports since those students were more likely to become embroiled in gambling, point shaving, and bribery.[217] Even though the NCAA's own drug testing committee had recommended against the use of a drug testing program developed and administered by the NCAA, the NCAA adopted such a drug testing program in 1986.[218] To outline how the program generally works, the testing in most sports is done at NCAA championships where athletes are picked and told to report to give a specimen within an hour after participating in an event; as of August 1, 1990, the NCAA and many athletic conferences have implemented a second requirement that participants in some programs may now be required to submit to a test at any time during the academic year.[219] In the *Hill* case, the NCAA presented extensive evidence that detailed its testing program. Six categories of drugs were banned including psychomotor and nervous system stimulants, sympathomimetic amines, anabolic steroids, beta blockers and alcohol in rifle sports, diuretics, and street drugs.[220] As of the time of trial, the NCAA's list of banned substances constituted fifty-eight single-spaced printed pages and was labelled, "THIS IS NOT CONSIDERED A COMPLETE LIST! RELATED SUB-

215. *Id.* at 1728-29.
216. *Id.* at 1729.
217. *Id.*
218. *Id.*
219. *See* Gibbs, *supra* note 190; *see also* NCAA NEWS, May 23, 1990, at 1 (noting the recent changes in the NCAA program).
220. The *Hill* court detailed the evidence and described the types of drugs in each category:
CATEGORY 1 (psychomotor and nervous system drugs) includes amphetamines, cocaine, crack, caffeine. This requires coffee, tea, and caffeinated soft-drinks to be declared.
CATEGORY 2 (sympathomimetic amines) was eliminated by 1989-90. The category had included allergy pills, cold tablets, and cough syrups.
CATEGORY 3 (anabolic steroids) includes nandralone, stanozolol, and testosterone.
CATEGORY 4 (beta blockers and alcohol) only involves rifle sports and drugs which slow the heart beat.
CATEGORY 5 (diuretics) includes any type of this drug which increases weight loss or dilutes urine.
CATEGORY 6 (street drugs) includes amphetamine, cocaine, heroin, marijuana, and methamphetamine.
Hill, 230 Cal. App. 3d at 1731.

STANCES ARE BANNED!"[221] The actual NCAA prohibition only involved student athletes who tested positive for a banned substance used "in preparation for or participation in an NCAA championship or certified postseason football contest."[222] Whether or not the athlete used the drugs was irrelevant. The court noted that students who admitted to drug use were not barred if their urinalysis is negative, nor were they barred if the school's drug test was positive and the NCAA's was negative.[223]

e. NCAA Findings

The trial court in this case found that the NCAA's own evidence supported the position that a minuscule amount of drug use by NCAA athletes took place, and the court stated that the student athletes actually used drugs far less than their peers.[224] In fact, the trial court felt the testing indicated "remarkably little drug use by student athletes involved in NCAA competition."[225] The NCAA attempted to rely on anecdotal testimony at trial, but most of it involved international athletics, contained hearsay difficulties and was labelled untrustworthy by the court.[226] Though this Comment does not strive to examine fully the technical merit of the testing procedures involved in the NCAA program, the *Hill* court also stated that many of the positive marijuana tests were unreliable because they came from one particular lab that provided no concentration levels so that the positives could be obtained without actually smoking marijuana.[227]

The court also appeared to conclude that such drug testing is relatively useless to determine steroid use, clearly the most prevalent drug used by student athletes, because water-based steroids clear the athlete's system in a few days and the NCAA's testing program would probably not detect their use.[228] Thus, the *Hill* court found many of the NCAA's justifications and methods lacking. The NCAA failed to demonstrate the necessary relationship between the progam and its stated purposes, as is required under the first level of the compelling interest test.

f. The Court's Balancing Test

The court, however, continued its analysis under the second part of the compelling interest test, which requires a decision as to (1) whether the NCAA program invades a protected constitutional interest, and (2) whether

221. *Id.* at 1730.
222. *Id.* at 1732.
223. *Id.*
224. *Id.* First, no women athletes in any sport had tested positive and been barred from competition under the NCAA program. In 1986-87, less than one percent of the approximately 3500 athletes tested yielded positive results and most of that one percent involved football. In 1987-88, approximately 1600 athletes were tested (presumably those the NCAA felt most likely to catch) and only 1.3% tested positive. *Id.*
225. *Hill*, 230 Cal. App. 3d at 1732.
226. *Id.* at 1733.
227. *Id.* at 1734.
228. *Id.* at 1735.

the benefit of the program exceeds the intrusion.[229] The plaintiffs raised four privacy concerns: (1) visual observation of urination is embarrassing and degrading; (2) the program interferes with medical confidentiality; (3) the program interferes with medical assistance; and (4) the NCAA is attempting to control athletes' activity off the playing field.[230]

> The court described the embarrassing procedure at issue as follows:
> Subjects are required to disrobe from the area of their armpits to their knees, exposing their genitals, and to produce a urine specimen of at least 100 milliliters while under visual observation. If a subject is unable to "fill the beaker," he or she is given fluids and required to remain under the observation of the NCAA validatory until successful.[231]

The court then recognized that urinalysis is an activity protected under the privacy aspects of article I, section 1, and stated that visual or aural monitoring of urination automatically raises privacy issues.[232]

The court then examined California law to determine the breadth of the privacy interest concerned. It noted prior California holdings indicating that procreative choice is a fundamental right that is invaded by requiring women to declare the use of birth control pills, that the right to control one's own medical treatment was also protected, and finally, that the right to privacy is generally broad and allows protection of one's medical history and related concerns.[233] Thus, the court determined that the NCAA program invaded the state constitutional privacy interest that is essential to other constitutional protections and that requires a compelling public need in order to be compromised.[234] Therefore, the NCAA had to provide a compelling need to interfere with such an interest.

g. A Strict Evaluation of the NCAA Justifications

The NCAA set forth two basic reasons that its testing program was necessary: (1) to protect the health and safety of student athletes, and (2) to preserve fair competition. Just as the trial court had concluded earlier, the *Hill* court found that no evidence had been set forth to show that drug use had endangered NCAA athletes in competition, and the court further indicated that almost all over-the-counter drugs, if misused, could cause as much harm as most of the substances banned by the NCAA.[235] Specifically, the

229. *Hill*, 230 Cal. App. 3d at 1737.
230. *Id.* at 1737-38.
231. *Id.* at 1720.
232. *Id.* at 1738 (The court recalled the Fifth Circuit's language in *Von Raab*, which described urination as an action that is performed without observation under tradition and social custom).
233. *Id.* at 1738-39.
234. *Id.* at 1739.
235. *Id.* at 1740. Though tragic, the deaths of Len Bias and Don Rogers, the two most notable athletes whose deaths were linked to drug use, did not occur in connection with athletic competition. Their drug use raises societal concerns for young adults in general rather than student athletes specifically. *See infra* note 244; Tom Callahan, *An Empty Dream: Len Bias Dies at 22*, TIME, June 30, 1986, at 73; Mark Gladstone & Mark Heister, *Cause of NFL Player's Death In Sacramento Is To Be Determined; He Was To Be Married Today*, L.A. TIMES, June 28, 1986, at 2, Col. 4.

court stated that "there was no evidence that any student athlete had ever injured anyone else as a result of drug use. Unlike pilots and railroad workers, athletes are not responsible for the safety of others."[236]

From a broader perspective, the *Hill* court appeared swayed that the NCAA did not truly have athletes' health in mind when they began their drug testing program, but rather that the NCAA sought to control the athletes' behavior, on and off the playing field. For example, the NCAA did not require measles vaccinations to participate in competition, even though measles outbreaks had occurred at several NCAA events, and the court noted that the NCAA's justification for this position was that student athletes and other college students should not be treated differently.[237] Furthermore, the evidence indicated that doctors often did not prescribe appropriate medication due to the NCAA regulations. In examining the list of banned substances, one can see that most listed drugs are approved by the FDA and are intended to revive the immune system.[238]

The NCAA also did not ban alcohol, except in rifle sports, and it did not ban cigarette smoking, both of which have a much greater overall negative health effect than the banned substances.[239] Finally, no rehabilitation or assistance was offered to any athlete regardless of whether he tested positive or not, even though the NCAA admitted that such treatment was essential to any program.[240] It is obvious that the court found the health and safety justifications lacking.

Next, the court turned to the NCAA's fair competition argument.[241] Both the NCAA's special drug committee and the trial court found insufficient evidence to indicate that any banned substances enhanced competitive athletic performance.[242] In fact, the court found the likelihood of decreased performance due to loss of concentration and trembling just as realistic a scenario.[243] Also, street drugs have garnered the most media attention regarding abuse in several publicized deaths,[244] yet the trial court clearly determined that drugs like cocaine and marijuana impair athletic performance.[245] The court noted that even if drugs did enhance performance, the NCAA's testing program would not detect much of the claimed

236. *Hill*, 230 Cal. App. 3d at 1740.
237. *Id.*
238. *Id.*
239. *Id.* at 1740-41.
240. *Id.* at 1741.
241. *Id.*
242. *Hill*, 230 Cal. App. 3d at 1741. Members of various NCAA drug committees testified no substance on the NCAA list had been shown to consistently increase the student athlete's performance in competition and that any of the drugs could hinder or improve athletic performance no more than is due to normal physiological changes. Steroids are generally considered the most effective drug to build body mass and strength but another physician and clinician testified that there was no hard scientific evidence to substantiate the claim that steroids consistently enhanced performance. *Id.* at 1741-42.
243. *Id.* at 1742.
244. The most publicized drug-related tragedy of a student athlete is that of Len Bias, the University of Maryland basketball star who died of a cocaine overdose. *See* John Leo, *How Cocaine Killed Leonard Bias*, TIME, July 7, 1986, at 52.
245. *Hill*, 230 Cal. App. 3d at 1743.

use. For example, steroids would be used during training in the pre-season and would not show up in post-season drug tests.[246] Thus, the court concluded that the NCAA testing program failed to accomplish its supposed purpose in preserving equitable competition.[247]

h. Alternatives

The third part of the compelling interest test required the NCAA to show that no less offensive alternatives existed that furthered the program's purported goals.[248] Both the trial and appellate courts involved in this case found that the NCAA program failed this test.[249] First, the NCAA's use of drug education was literally nonexistent.[250] The court's statements about the effects of an education program are compelling. The court noted:

> The NCAA witnesses have testified that even if drugs do not enhance performance, some athletes think they do. This is exactly the type of problem that is best addressed by an educational program rather than by punitive testing. Drug education is effective in destroying the myths concerning drugs in sports . . . . A successful drug education program would also deter drug use at all times, unlike the NCAA drug testing program which only deters use near postseason events.[251]

The court continued, "Effective drug education which teaches athletes to deal with the stress and underlying causes for drug use is more appropriate for educational institutions than the NCAA's drug testing program which only teaches athletes to 'say no' to drugs only when they believe they may be caught."[252] Hence, the drug testing program failed the third constitutional requirement in that reasonable alternatives existed to the unnecessarily intrusive program.[253]

i. The *Hill* Court's Conclusions

The court recommended that the NCAA examine testing based upon reasonable suspicion.[254] The court recognized that substances like steroids produce unmistakable characteristics that are easily recognized by trainers and coaches, and that other organizations, like the NBA, rely on reasonable suspicion testing.[255] The court also determined that the NCAA drug testing

246. *Id.* at 1744.
247. *Id.*
248. *Id.* at 1728-29, 1745.
249. *Id.* at 1745.
250. From 1975-85, the NCAA spent about $200,000 dollars on drug education, with the extent of the education consisting of a brochure and posters; in 1986-87, the NCAA spent more than one million dollars on drug testing. *Id.*
251. *Hill*, 230 Cal. App. 3d at 1745.
252. *Id.*
253. *Id.* at 1747.
254. *Id.* at 1746.
255. *Id.* For an illustration of how drug abuse usually is obvious, examine the case of Roy Tarpley and his experience with the Dallas Mavericks. Clearly the symptoms of serious drug use are difficult to disguise, and drug use resulted in the loss of Tarpley's career in the NBA. Perhaps education could have done more for Tarpley at an earlier stage in life. The threat of a drug testing program, even one based on reasonable suspicion, was clearly not enough to deter Tarpley's drug use since it is hard to think of a greater deterrence than losing a multi-million

program was overbroad and unnecessarily inclusive.[256] By using the words "and related compounds" the NCAA could claim innumerable substances fit within its list of banned substances.[257] Furthermore, the court concluded that the NCAA could not force student athletes to waive their right to privacy guaranteed under the California constitution in order to participate in NCAA sanctioned events.[258] By conducting a thorough examination of the NCAA's justifications, and by properly applying the compelling interest test, the *Hill* court reached the same conclusion that the *Derdeyn* court did: the NCAA should base its testing program on reasonable suspicion of drug use.[259]

j. Recent Developments in the *Hill* Case

The *Hill* case is presently before the California Supreme Court, and the decision may have long term ramifications by influencing the decisions of similarly situated states. In their briefs to the California Supreme Court, the plaintiffs, Hill and McKeever, appear to have the better-reasoned position. The NCAA's arguments are misplaced because they ignore the fact that the NCAA is not a state actor.[260] The NCAA also argues that the compelling interest test is not the proper standard by which to judge its drug testing program, and that California's right of privacy does not apply to private actors.[261]

Hill and McKeever's position is more logical because their position recognizes: (1) that when the California electorate passed the privacy initiative through a vote, it affirmed the legislative intent that privacy be treated equivalently with other fundamental rights and that those rights should yield only to a compelling public need; and (2) that the initiative directly applied to non-governmental actors and that California courts had interpreted it as such.[262]

Moreover, Hill and McKeever demonstrate that the NCAA's argument

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dollar contract to play professional basketball. *See Tarpley: Stardom Brought Drugs; Pro Basketball: Banned NBA Player Says Money and Freedom Led Him to Cocaine Addiction*, L.A. TIMES, Jan. 6, 1992, SC, at 6. (stating that Tarpley was ill-prepared to handle the money and lifestyle the NBA offered).

256. *Hill*, 230 Cal. App. 3d at 1746.

257. *Id.* 1747.

258. *Id.* Another potentially important aspect of the case involved the NCAA's argument that prohibiting enforcement of the NCAA testing program against Stanford would violate the commerce clause (art. I, sec. 8, cl. 3) of the U.S. Constitution. The NCAA claimed that such an injunction would stop the NCAA from creating uniform rules for its competition. The *Hill* court, stated, however, that the local benefit involved, the right to privacy, was of paramount importance. Furthermore, the trial court stated that the NCAA had successfully conducted championships for 80 years without drug testing. *Id.* at 1747-49.

259. *Id.* at 1746.

260. *See* Opening Brief of Petitioner, filed Feb. 21, 1991, at 13 (where the NCAA relies on cases in which governmental interests were implicated and the application of a balancing test was proper).

261. *Id.* at 12-19 (improperly attempting to rely on cases involving government actors and the tests used in those cases); *see* Supplemental Brief of Petitioner, filed March 26, 1992, at 34 (NCAA utterly and completely ignores the legislative history relating to the state constitutional right to privacy in California).

262. *See* Supplemental Reply Brief of Respondents, filed April 10, 1992, at 1-2, 6.

that they had "notice" of the intrusions is irrelevant, stating, "The radical proposition that a fundamental right can be lost as long as there is prior notice is not supported by the cases and is anathema to basic constitutional values."[263] Similarly, they address the NCAA's "diminished expectations" argument by recognizing that people who belong to health clubs also use communal lockers and showers and that this everyday occurrence is not sufficient to permit monitored urinalysis and disclosure of contraceptive and medical information.[264] When the California Supreme Court correctly applies the law, they will find the NCAA program unconstitutional under the California privacy guarantee.

IV. THE CASE FOR THE NCAA AND RELATED TESTING PROGRAMS: DOES THE HARM OUTWEIGH THE GOOD? WILL THE PROGRAM SURVIVE? SHOULD IT?

A. AN INSIDER'S VIEW OF THE NCAA PROGRAM

1. Forrest Gregg's Background

The courts deciding drug testing matters are often placed in difficult positions because they may not fully understand the justifications set forth by the NCAA and may not understand the players to the same degree as people involved with athletics. Thus, it is important to acknowledge the views of those working with student athletes to gain a better understanding of whether dismissal of the NCAA's purported justifications is reasonable. Forrest Gregg is clearly one of the most credible sources involved with both collegiate and professional athletics. Currently, Gregg is director of athletics at Southern Methodist University, a school riddled with NCAA difficulties in the 1980s. These difficulties culminated in the first-ever death penalty for SMU's football program, but the school has come full circle in its NCAA compliance.

Gregg played collegiate football at SMU in the 1950s and then went on to a fifteen year pro career, including two Super Bowl victories with the Green Bay Packers.[265] After his playing career ended, Gregg continued his association with football by coaching in the NFL for eleven years, earning both the NFL and AFC coach-of-the-year honors.[266] After coaching SMU's football program for two years, Gregg relinquished his duties to become the full-time

263. *Id.* at 15.

264. *Id.* at 19 (observing that the leap from communal lockers to urination in front of a monitor is a "slippery slope" argument).

265. Fourteen of Gregg's seasons were spent as an offensive tackle with Green Bay, and one season was spent with the Dallas Cowboys. The legendary Vince Lombardi called Gregg "the finest player I have ever coached." Southern Methodist University Football Program at 8 (1991).

266. *Id.* Gregg coached the Green Bay Packers from 1984 to 1987, the Cincinnati Bengals from 1980 to 1983, and Cleveland Browns from 1975 to 1977. He also coached the Toronto Argonauts of the CFL in 1979. *Id.* Obviously Gregg's experience in athletics transcends many generations.

athletic director at SMU, overseeing fifteen athletic teams.[267]

2. Forrest Gregg's Views on the NCAA Program

In a recent interview, Gregg offered his assessment of the NCAA drug testing program.[268] He stated of the program overall, "I think it's very good for college athletics that we have it."[269] He noted that participation in NCAA athletics is voluntary and that he finds it is reasonable for the NCAA to take measures to uphold the integrity of its program.[270] Moreover, Gregg bluntly asserted, referring to those who refuse to test, "I have a message for them, that if you don't want to take the test, then don't be in the NCAA and don't be an athlete."[271]

a. The NCAA Program and Its Benefits

On a general level, Gregg also sees little concern regarding the substances tested for because all of the positive tests resulted from illegal substances in the first place.[272] He responds to the argument that the NCAA has not spent adequate funds on drug education by noting that student athletes are not majoring in "drug education." He stated that SMU currently gets funds from the Southwest Conference and the NCAA for drug education, with the point of the program being to educate the students not to use drugs and not to abuse legal substances like alcohol.[273] In terms of what information a typical football player receives about drugs at SMU, Gregg said that the students are approached in a reasonable manner, and that coaches constantly remind them of the pitfalls of drugs but attempt to avoid lecturing them.[274] With regard to doing more in the area of drug education he said, "I feel that if we spent as much money on drug education as we do in testing, students would have to major in drug education."[275] However, Gregg expressed his fear of what is going on with drugs at the grade school level, based on the information he receives from players and other sources, and he believes that the early stages of school are a proper area in which to focus current drug education programs, though he is unsure if the testing program in the *Brooks v. East Chambers* situation is necessary. But he stated that if his children were required to be tested in the sixth grade, related to any extra curricular activity, he would have no problem with it. In fact he noted,

267. *Id.*

268. Interview with Forrest Gregg, Director of Athletics of Southern Methodist University, in Dallas, Tex. (Jan. 28, 1992).

269. *Id.*

270. *Id.* Gregg maintains that with such a premium placed on winning, young athletes are easily influenced or convinced of assertions related to enhancing their performance. He also believes in the danger of steroids and recognizes the dangers they pose to young athletes, since from the viewpoint of his experience, they do enhance strength and mass build up. *Id.*

271. *Id.*

272. *Id.* Gregg is unaware of any disciplinary action resulting from a positive based on over-the-counter type drugs on the NCAA list and has no objection to including alcohol on the list of banned substances for athletes.

273. Interview with Forrest Gregg, *supra* note 268.

274. *Id.*

275. *Id.*

"Some parents might learn a lot about their kids."[276]

Moreover, with respect to the direct observation methods used in the NCAA testing, Gregg stated that from his experience, "If you're going to do a legal drug test, the only way is that it be observed."[277] As far as enhancing performance, he recognized that steroids are the only performance enhancing drug, and he believes the evidence is clear that steroids do enhance performance and that they are used by athletes in several sports.[278] Also, steroids are clearly the most appealing drug to football players for several reasons. In a typical scenario, Gregg stated that a young player who weighs 230 pounds is told by the coach he must weigh 270 if he wants a starting position. He can eat a great deal and lift weights, but steriods assure him he can build muscle quicker. Furthermore, a secondary effect of steroids is increased aggressiveness and Gregg notes that every football coach looks for more aggressive players. Gregg also stated that steroids are the primary drug that testers are looking for, even though many other substances are on the NCAA list.[279]

b. The Necessity of the NCAA

Since the NCAA's role has been heavily debated in many contexts, especially with regard to its status as a non-state actor based on the *Tarkanian* decision, the power it exerts in drug testing is an obvious area of criticism by many schools and in many legal challenges. But Gregg is convinced that a watchdog is necessary to regulate the competition because, with such a premium placed on winning programs, the temptation to enhance performance is immense.[280] Another fact that may be surprising to many is that Gregg is impressed by the manner in which NCAA decisions are made. He stated that he is not aware of any railroading of provisions through the governing body and that every school is allowed to voice an opinion.[281] Thus, it would seem that a program that most schools do not agree with will not be implemented.

c. Conclusions

Generally, Gregg sees the results of the program as a benefit. As a Southwest Conference school, most athletes at SMU are tested on a random, season-long basis.[282] Gregg's perception is that drugs are obviously a large

276. *Id.*

277. *Id.* He noted various ways he had seen athletes mask test results and he believes, based on his collegiate and professional experience, the only way to conduct a valid test is to observe it. *Id.*

278. *Id.* Gregg also feels that all the negatives that come out of steroid use far outweigh the benefit and this is an aspect that needs to be stressed in education. But in terms of amphetamines and other drugs, he feels they do nothing to enhance performance.

279. Interview with Forrest Gregg, *supra* note 268.

280. *Id.*

281. *Id.* This tends to diminish the inferences in cases like *Hill* that the drug provisions were forced through with most of the schools dissenting.

282. *Id.* The Southwest Conference testing program is basically co-extensive with the NCAA program, with minor procedural and protocol changes each year. *See* Appendix I,

problem in today's overall culture, but athletes are spotlighted on the playing field and are role models for many people. While the drug problem is obviously greater on the street than on the playing field, athletes are subject to much greater scrutiny and must accept that responsibility when making the decision to participate.[283] To sum up Gregg's opinion, drug use has decreased overall in college athletics due to the combination of education and testing, both of which are vehicles to prevent the real demon related to drug use, addiction.[284]

Gregg notes that cases like Roy Tarpley and Dexter Manley are unfortunate because drugs have become the most important things in their lives since they are willing to give up lucrative careers to use drugs. The obvious addiction in those cases is likely something that the NCAA program may help to prevent. Many similar cases have cropped up in recent years.[285]

B. THE FUTURE FOR THE NCAA GENERALLY

New state statutes in Florida, Illinois, Nebraska, and Nevada may pose a significant threat to the manner in which the NCAA conducts its programs and investigations.[286] The *Tarkanian* Supreme Court ruling caused a great furor because it established that the NCAA, since it is not a state actor, need not abide by the due process clause of the U.S. Constitution.[287] While the Tarkanian investigation involved questions of illegal cash payments to players, the effects of potential and pending retaliatory laws authored by state legislators may have long-reaching effects for the NCAA drug testing program. States are beginning to determine that they must ensure fair investigation and due process by the NCAA through state laws.[288] As anger in the states grows toward the NCAA, drug testing may become a victim of that anger.

Many states currently have state privacy protections that are broader than federal constitutional standards.[289] If state courts are forced to examine these provisions more closely, as the courts in *Hill* and *Derdeyn* were, the NCAA may begin to consistently lose drug testing challenges based on state privacy protections. Other states that lack broader protections may be pressured to author state constitutional amendments which protect their citizens

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SWC Drug Testing Program, SWC DIRECTORY, CONSTITUTION, BYLAWS AND SPORTS MANUAL, 57 (1991-92).

283. Interview with Forrest Gregg, *supra* note 268.

284. *Id.*

285. *See* Gary McClain & Jeffrey Marx, *A Bad Trip*, SPORTS ILLUSTRATED, Mar. 16, 1987, at 42 (describing how Villanova basketball star and national champion Gary McClain became addicted to cocaine).

286. Constance Johnson, *De-fense against the NCAA*, U.S. NEWS AND WORLD REPORT, Jan. 13, 1991, at 25.

287. *Id.* at 25; *see supra* note 197; *contra* James L. Arslanian, *The NCAA and State Action: Does The Creature Control Its Master?*, 16 J. CONTEMP. L. 333 (1990) (proposing that Justice White's dissent in *Tarkanian* was the better reasoned position).

288. *See* Arslanian, *supra* note 287.

289. *See* Cathcart, *supra* note 8.

from drug testing intrusions, especially in situations where a "compelling interest" standard would not be met.

C. States Where Challenge Is Ripe

Explicit state constitutional privacy protections are currently contained in several state constitutions.[290] For example, under the Florida constitution, Florida courts have held random drug testing unreasonable but approved drug testing based on reasonable suspicion.[291] In New York, the court of appeals held that both the state and federal constitutions prohibited drug testing of all probationary teachers, barring reasonable suspicion.[292] Several state constitutions also contain explicit constitutional language that would appear to offer protection from drug testing, but no one has yet made significant challenges in those venues.

For example, in Montana, the constitution states, "The right of the individual to privacy is essential to the well-being of a free society and shall not be infringed upon without the showing of a compelling State interest."[293] This language appears to create a judicial climate similar to that in *Derdeyn*, where the court found that the justifications for drug testing student athletes fell short of a compelling state interest.[294] Given that such state constitutional provisions currently exist in many states, that more may be passed, and that several state courts have recognized state privacy provisions as a basis for protection from NCAA drug testing, any future challenges will likely be directed toward the state avenues, especially given the requirement of state action for challenge on Fourth Amendment grounds.

V. CONCLUSION: A COMPROMISE OF TESTING BASED ON INDIVIDUALIZED SUSPICION

Since the NCAA drug testing program is obviously facing many fierce legal challenges, its program and others like it should be changed to utilize individualized suspicion rather than random methods. Steroids are the only drug that student athletes realistically use for performance enhancement and the only drug likely to be detected. The side effects of steroids are obvious to anyone around the athlete for any period of time[295] and create the ideal conditions for drug testing based on individualized suspicion of use.[296]

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290. *Id.*

291. City of Palm Beach v. Bauman, 475 So. 2d 1322 (Fla. App. 5th Dist. 1985). The state based privacy protection is contained in Florida Constitution Art. I., § 23, which states:

> Every Natural person has the right to be left alone and free from governmental intrusion into his private life except as otherwise provided herein.

FLA. CONST. art. I., § 23.

292. Patchogue-Medford Congress of Teachers v. Board of Educ., 510 N.E.2d 325 (N.Y. 1987).

293. MONT. CONST. art. II., § 10.

294. *Derdeyn*, 832 P.2d at 1034-35. This may also be a reason why the University of Montana has modified their drug testing program. *See* Gibbs, *supra* note 190.

295. Not only do steroids cause increased aggressiveness, but they also may cause hair loss and acne, along with other varying effects. Interview with Forrest Gregg, *supra* note 268.

296. The NCAA situation appears analogous to *Skinner*, where reasonable suspicion of

Coaches and their assistants are in a perfect position to recognize behavior suggesting drug use. Similarly, it is in their best interests to keep their players drug free. Some critics will argue that coaches will overlook or even quietly encourage drug use, but the responsibility in this area must fall on both the schools and the regulatory body.

Institutions must take a harder look at their coaching staffs based on both their integrity and experience, rather than just the latter. Moreover, compliance directors, or similarly situated personnel, who oversee an academic institution's compliance with eligibility factors, are already properly situated in many schools to observe and police both the athletes activities and the coaches monitoring them.[297] Given the fact that the NCAA is poorly received by many state legislatures and that the drug testing program and similar ones are likely to face many successful state challenges, implementing an individualized suspicion program would be an appropriate gesture to pacify the athletes. It would also allow the program to withstand constitutional scrutiny more readily because any court examining a program based on individualized suspicion would not face the additional hurdle of justifying the program's lack of reasonable suspicion, and the program would more readily meet a compelling interest inquiry. It would not, however, destroy the essential goals and benefits of the program.[298]

The NCAA athletic program and the experience it offers to both student athletes and fans is unique.[299] Unfortunately, collegiate athletics often brings out both the best and worst in people. Drug use is obviously an important issue in the context of student athletics and one with which the schools and the governing body are justifiably concerned. But as Forrest Gregg pointed out, these student athletes cannot be expected to major in "drug education" and drugs are not a part of the vast majority's lives. Education and testing together play a role in deterring drug use, but reasonable responses to difficult issues typically yield the best results.

Presently, the NCAA program, and related ones, face an uphill battle for their continued existence. *Derdeyn* and *Hill* offer insights into how many state court battles will be fought and what the probable outcome for the

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drug use by a supervisor (or a train accident) was required to trigger urinalysis. *See supra* notes 16-20 and accompanying text. Given the more compelling basis for testing in *Skinner*, anything more than an individualized suspicion NCAA testing program seems overly intrustive in the student athletic context.

297. For example, SMU employs Charles Howard as a compliance director. He has extensive legal and NCAA training and is fully equipped to oversee a program based on individualized suspicion and to assure that coaches are alert to signs of drug use, forcing suspicious cases to be tested. When combined with an athletic director like Forrest Gregg, players and coaches receive a clear message about drug use: DO IT OR ALLOW IT AND YOU ARE GONE.

298. In cases of serious drug use, like Dexter Manley and Roy Tarpley, the signs of growing addiction are obvious and individualized suspicion would function perhaps even more effectively than random testing, since the athlete could be tested when use was occurring. *See supra* note 255 (discussing Tarpley's cocaine addiction); *see also* Ira Berkow, *Why Manley? Why Now?*, N.Y. TIMES, Nov. 22, 1989, § D, at 19 (Manley was banished from the NFL for life after his third positive test for substance abuse).

299. Consider the fact that the term "March Madness" is used to describe the interest in the annual NCAA basketball tournament.

NCAA is. While Fourth Amendment challenges to these drug testing programs have been largely unsuccessful, with the exception of *Derdeyn*, new life has been given to challengers in the form of state constitutional provisions. A program based on individualized suspicion would continue to fulfill the NCAA justifications for the program, but it would leave students feeling less violated and would give schools a greater role in the program because of their monitoring function. Such a program would enhance the cooperation required between institutions and their regulating body and perhaps foster growth rather than ill-will.

Regardless of what changes take place in the future, drugs and drug testing programs will remain in some respect. The NCAA and the institutions that comprise it have taken a leading role with respect to the resolution of many difficult issues. At present, it is necessary for the NCAA to reevaluate its methods and goals, and to recognize that the program's goals may be achieved in a manner less intrusive to personal privacy concerns. The health and vitality of both NCAA athletes and the NCAA athletic program are dependent on a proper balance of these competing interests.