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Random Drug Testing of Student Athletes by State Universities in the Wake of Von Raab and Skinner

LeRoy Pernell

RANDOM DRUG TESTING OF STUDENT ATHLETES BY STATE UNIVERSITIES IN THE WAKE OF *VON RAAB* AND *SKINNER*

LEROY PERNELL*

Looking back over the events of 1986, no occurrence in the world of intercollegiate athletics evoked the concern and anguish of the public as much as did the tragic death of Maryland basketball player Len Bias.[1] During the height of celebration of his selection by the Boston Celtic professional basketball team, Bias died suddenly. The tragedy grew when it was learned soon thereafter that his death was the probable result of cocaine use.

The Bias death served as a catalyst for many institutions to intensify their efforts to deal with the growing use of drugs among student athletes. The concern over the use of drugs by student athletes did not begin, however, with the death of Len Bias.[2] Ironically, much of the concern in the past regarding the use of drugs by student-athletes centered around the use of performance enhancing drugs such as steroids, which although ultimately harmful, purport to make the athlete's performance better.[3] There is no such pretense regarding the use of the so-called recreational drugs such as cocaine which are immediately harmful and performance impairing.

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* Associate Professor of Law, Ohio State University College of Law; J.D., Ohio State University, 1974; B.A., Franklin & Marshall College, 1971.

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

2. *See Proper and Improper Use of Drugs by Athletes: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 17 (1973); Note, *Drugs, Athletes, and the NCAA: A Proposed Rule for Mandatory Drug Testing in College Athletics*, 18 J. MARSHALL L. REV. 205 (1984); Looney, *A Test with Nothing but Tough Questions*, SPORTS ILLUSTRATED, Aug. 9, 1982.

3. Todd, *The Steroid Predicament*, SPORTS ILLUSTRATED, Aug. 1, 1983.

This "new" crisis has encouraged many institutions, out of concern for both the safety of the athletes and the welfare of the program, to take steps that many might consider drastic.[4] Random drug testing and screening are among those used most frequently.[5] The concept of drug testing is dependent upon the threat of unannounced tests as a means of deterring the student-athlete from using drugs. There is evidence to support the notion that the level of drug usage has in fact dropped in the wake of unannounced drug testing.[6]

The pressure for drug testing is coming not only from the academic arena, but from the federal government as well. The recommendations of the President's Commission on Organized Crime "touched off an explosive

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4. In March of 1986 the Big Ten Intercollegiate Conference discussed the following resolutions:

A. A student-athlete may be subject to suspension or declared ineligible for competition and/or loss of athletic financial aid:
   1. If the student-athlete takes anabolic steroids or,
   2. If the student-athlete takes any drug specified in NCAA Executive Regulation 1-7 without the knowledge of the Team Physician of the university.

B. No athletic department staff member shall dispense to student-athletes, or encourage student-athletes to take a medication without prior specific approval from the team physician.

C. To refer [B] to the Awareness Committee with the possibility of conducting a survey to determine whether testing should be recommended for the athletic department staff, and to analyze the extent of drug use among athletic department staff members.

Not all major institutions are in agreement with drug testing. Georgetown University has announced that it is opposed to drug testing. *See* Washington Post, July 21, 1986, col. 5 (final ed.).

5. The testing mechanism used most often for the random testing of student-athletes is urinalysis. There are three widely employed urine testing mechanisms: (1) Thin Layer Chromatography (TLC), (2) Radioimmunoassay (RIA), and (3) Enzyme immunoassay (EIA). Among the array of enzyme immunoassay tests is the popular Enzyme Multiplied Immunoassay Technique (EMIT). EMIT has become the predominate screening test because of its relative low cost. *See* Black, *Testing for Abused Drugs: A Primer for Executives*, in DRUG TESTING: PROTECTION FOR SOCIETY OR A VIOLATION OF CIVIL RIGHTS (National Ass'n of State Personnel Executives, eds. 1987). Despite its low cost, the EMIT test is considered by many to have unacceptable levels of reliability if not confirmed by a second test. *See* Morgan, *Urine Testing for Abused Drugs: Technology and Problems*, in DRUG TESTING: PROTECTION FOR SOCIETY OR A VIOLATION OF CIVIL RIGHTS (National Ass'n of Personnel Executives, eds. 1987); Lundberg, *Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism*, 256 J. A.M.A. 3003 (1986); Lundberg, *Urine Drug Screening: Chemical McCarthyism*, 287 NEW ENG. J. MED. 723 (1972).

A typical confirmatory test is the combined Gas-Liquid Chromatography (GC) and Mass Spectrometry (MS). GC/MS provides greater sensitivity but is considerably more expensive. *See* Black, *supra*. For a full discussion of urine testing techniques and relative strengths, see R. CRAVEY & R. BASELT, INTRODUCTION TO FORENSIC TOXICOLOGY (Biomedical Pub. 1981) and Curran, *Compulsory Drug Testing—the Legal Barriers*, 316 NEW ENG. J. MED. 318 (1987).

6. *See* Columbus Dispatch, July 1, 1986, at E1, col. 5.

debate over the constitutionality of widespread drug testing."[7] Even our elementary and secondary school systems are not immune from the growing outcry for the establishment of programs for the routine testing of drug use.[8]

The governing bodies of intercollegiate athletics have also joined in the recent resurgence of interest in curbing drug use among student-athletes. In 1984, the National Collegiate Athletic Association (NCAA) executive committee proposed a comprehensive drug testing program designed to deal primarily with the problem of performance enhancing drugs.[9] The

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7. *Mandatory Drug Testing in the Workplace*, 72 A.B.A. J. 34 (Aug. 1986).

In one report, the Commission "called for the widespread drug testing of Americans by their employers." Weiss, *Watch Out: Urine Trouble*, 56 HARPER'S MAG. at 452 (June 1986). The Commission stated:

> The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing. No Federal, State or local government funds should go directly or indirectly to programs that counsel "responsible" drug use or condone illicit drug use in any way. Laws in certain states which "decriminalized" the possession of marijuana constitute a form of condonation, and should be reconsidered. *Id.*

8. In the wake of the Bias death, some public education systems, particularly high schools, either announced the intention to, or did implement the mandatory drug testing of students. In Hawkins, Texas it was announced that students involved in the high school chorus, the marching band, or the varsity football team, would have to pass a drug test prior to being allowed to participate in the activity. *Texas School District to Test Students for Drugs, Hawkins Texas* (August 18, 1986, Reuters Ltd).

In the heart of the conservative "Bible Belt," a school district in Franklin, Kentucky became the first school district in Kentucky to announce that it would impose mandatory drug testing for all athletes beginning in the Fall of 1986. Sports News, August 2, 1986.

Not all such actions by high schools have gone without legal challenge. In Gallatin, Tennessee, the local high school became the first high school in the state to drug test its athletes (81 football players). The American Civil Liberties Union almost immediately proclaimed that the testing procedure violated the constitutional rights of the students. Sports News, July 31, 1986.

Despite protest to the contrary, increasing numbers of high school principals and coaches apparently favor the testing of students in order to head off drug problems. Dallas Morning News, August 3, 1986, at A1, col. 1.

Some schools have proposed or implemented the voluntary testing of students as an alternative. At Banning High School in Wilmington, California, a school known for its championship football teams, a voluntary drug testing program was implemented beginning September of 1986, by the Los Angeles school board. Los Angeles Times, August 12, 1986, Part 2 (Metro), at 6, col. 1 (Home ed.).

The issue of drug testing at the high school level raises many of the same issues presented by drug testing at state universities. The age and legal incapacity of minors may raise additional issues regarding the implementation of drug testing in a compulsory educational system. The exploration of such issues, however, is beyond the scope of this article.

9. The NCAA resolution, No. 163, reads as follows:

program became effective in the fall of 1986 and requires that all student-athletes participating in NCAA championship play submit to a screening for use of prohibited drugs. The tests are not only for performance enhancing drugs but also for "street drugs" such as cocaine.[10]

While the NCAA program may well deter drug use for those athletes who participate in post-season play, little control, if any, is placed on the use of drugs at times other than championship play. To fill this void, individual college athletic conferences are considering implementing drug testing policies which would not be limited to post-season play. Within the Big Ten conference, most universities already have some form of drug testing; the majority developed such programs within recent years.[11] The primary burden regarding the control of drug use among student-athletes falls on the individual institutions. However, the decision to implement a drug testing program is not an easy or uncomplicated one, particularly from a legal standpoint.[12]

Whereas, the use of controlled substances and allegedly performance-enhancing drugs presents a danger to the health of the students and a threat to the integrity of amateur sports; Now, Therefore, Be It Resolved, that the NCAA Executive Committee be directed to develop an ongoing program of drug testing to identify those students involved in intercollegiate athletics competition who have used either controlled or allegedly performance-enhancing drugs; and Be It Further Resolved that the NCAA Executive Committee shall inform each member of the Association of all details of the proposed testing program, including a list of prohibited substances, before July 1, 1984; and Be It Further Resolved, that the NCAA Executive Committee present the proposed program and legislation necessary to implement it to the 1985 Convention. National Collegiate Athletic Association, Res. 163 (1984 Convention).

The NCAA addressed the question of drug testing in 1973 when it authorized the Executive Committee to approve drug testing methods to be used regarding those who participated in NCAA championships. BYLAWS AND INTERPRETATIONS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, art. 5, sec. 2 (1973). That section provided in relevant part: "(b) The Executive Committee may authorize methods for testing student-athletes who compete in NCAA championships to determine the extent of drug usage therein." *Id.* Note, *supra* note 2, at 210-11.

10. The NCAA plan calls for the testing of athletes from member institutions "who compete in NCAA Championships and certified post-season football contests." NCAA Executive Reg. 1, sec. 7(a) (1986). Eighty substances are included in the testing protocol including psychomotor stimulants (cocaine and amphetamines), sympathomimeticamines, miscellaneous central nervous system stimulants, anabolic steroids, diuretics, street drugs (including heroin and marijuana), and other substances banned for particular sports.

11. The University of Illinois, Indiana University, University of Michigan, Northwestern University, Ohio State University, Purdue University and the University of Wisconsin, all have some form of drug testing. Jauss, *Drug Testing—a Hot Topic Among Big 10 Coaches*, Chicago Tribune, Aug. 4, 1986, at 6.

The Western Athletic Conference has also announced that it has established a committee to formulate testing standards and punishments regarding athletes who use controlled substances or performance enhancing drugs. United Press International, July 25, 1986 (press release).

12. In 1986, the Massachusetts chapter of the American Civil Liberties Union indicated that it would seek legislation to ban the use of drug tests by employers without cause. American

Much of the legal attention directed towards drug testing is on the constitutional issues raised regarding the fourth amendment privacy issues associated with involuntary drug testing by the government or those operating under color of state law. Recently, the United States Supreme Court decided two significant cases involving drug testing in either public or government-controlled employment.[13] Although neither of these cases involved random drug testing similar to the type in use at many universities, they do address significant issues of fourth amendment values.

This article will focus on the particularly complicated question of the legality of drug testing at state universities. State universities comprise a significant number of the universities involved in intercollegiate athletics at the major conference level. The state university at the same time is a branch of the state and operates under color of state law. As such, its actions fall under the additional scrutiny of the constitutional principles contained in, and incorporated through, the fourteenth amendment to the United States Constitution.

In examining the legal significance of drug testing of student-athletes at a state university, this article will closely examine the announced drug testing program at Ohio State University.[14] The Ohio State program represents one of the most comprehensive involuntary drug testing programs of student-athletes by any state university.

This article goes beyond what has become the traditional focus of fourth amendment scrutiny. It will explore additional issues concerning Due Process associated with testing techniques and the imposition of sanctions, and will explore Equal Protection issues which might be raised concerning the testing of student-athletes only.

Medical News, July 18, 1986, at 1, col. 4. The drug testing clause of major league baseball players' contracts was declared unenforceable by a federal arbitrator in 1986. Associated Press, July 31, 1986. The National Football League Players' Association filed a grievance against similar attempts made by the National Football League. Associated Press, July 9, 1986. *See generally*, Note, *An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S. CAL. L. REV. 815 (1987).

13. National Treasury Employees' Union v. Von Raab, — U.S. —, 109 S. Ct. 1384 (1989), involved an action brought by the Customs Service Employees' Union against the United States Custom Service challenging the constitutionality of a drug testing program that required employees to undergo urinalysis when applying for promotions to job positions of a sensitive nature. The other Supreme Court case, Skinner v. Railway Labor Executives' Ass'n, — U.S. —, 109 S. Ct. 1402 (1989), considered the constitutionality of regulations promulgated by the Federal Railroad Administration requiring drug testing of railroad employees following the occurrence of certain specified accidents.

14. *See* Appendix.

I. THE FOURTH AMENDMENT AND DRUG TESTING

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[15]

With these words, the framers of the Constitution established vital societal goals and values. The fourth amendment was designed to protect bodily integrity,[16] privacy,[17] and property ownership[18] by prohibiting general and exploratory searches and seizures.[19] Judicial interpretation has consistently recognized the need to impose restrictions on governmental intrusion into these protected areas in both the criminal[20] and civil context.[21]

Application of the fourth amendment to the actions of state universities is initially governed by a determination of the existence of state action within the meaning of the fourteenth amendment. A further determination is made as to whether such action invades a reasonable expectation of privacy protected by the fourth amendment.[22]

II. STATE ACTION AND STATE UNIVERSITIES

Whether the actions of state universities are to be considered state action for fourth amendment purposes is best resolved by considering the more general issue of whether the fourth amendment's application is limited to the activities of law enforcement officers or those performing a law enforcement function.[23] The issue was firmly resolved in the United States Supreme Court's decision in *New Jersey v. T.L.O.*.[24] *T.L.O.* laid to rest the suggestion that such intrusive conduct by state employees is free from fourth amendment scrutiny.[25] In that case, a teacher at a New Jersey high

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15. U.S. CONST. amend IV.
16. *See* Winston v. Lee, 470 U.S. 753 (1985); Schmerber v. California, 384 U.S. 757 (1966).
17. *See* Katz v. United States, 389 U.S. 347 (1967).
18. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).
19. *See* Weeks v. United States, 232 U.S. 282 (1914).
20. *See* Mapp v. Ohio, 367 U.S. 643 (1961).
21. In the civil context, the Court has applied the fourth amendment in instances such as See v. City of Seattle, 387 U.S. 541 (1967), and Camera v. Municipal Court, 387 U.S. 523 (1967). The Court has also recognized that civil liability may flow directly from violations of the fourth amendment. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The existence of civil liability for fourth amendment violations in the context of state operated schools has long been established. *See* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977).
22. *See Katz*, 389 U.S. at 353-58.
23. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 1.8 (2d ed. 1987).
24. 469 U.S. 325 (1985).
25. The Court stated:

school,[26] upon discovering the respondent smoking cigarettes in a school lavatory, took her and her companion to the school office where a vice-principal searched the student's purse. Marijuana, paraphernalia and other

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It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants of "writs of assistance" to authorize searches for contraband by officers of the Crown. . . . But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action" — that is "upon the activities of sovereign authority. . . ." Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory standards," . . . it would be anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

469 U.S. at 335 (citations omitted).

26. Traditionally, cases involving the application of constitutional principles to state operated educational institutions have distinguished between institutions of higher education and public schools at the high school or lower levels to the extent that the former often raise questions of the rights of individual students in residential settings. As Professor LaFave notes, there are rare exceptions to this analysis such as in the case of Keene v. Rodgers, 316 F. Supp. 217 (D. Me. 1970) which involved the search of a college student's car. W. LAFAVE, *supra* note 23, § 10.11(c), at 178-82. Additionally, high school and elementary school searches often raise questions that are inherent to the minority age group involved.

Public school authorities are often considered to be *in loco parentis* regarding minor children. Under such a view, the parent is deemed to have delegated "part of his parental authority during his life, to the tutor or schoolmaster of his child." 1 W. BLACKSTONE, COMMENTARIES 453 (1870). This doctrine has been used by some courts to justify student searches as being outside the fourth amendment on the grounds that the school may use its delegated authority to act as the parent could to carry out a private search. Thus, in Mercer v. State, 450 S.W.2d 715 (Tex. Ct. App. 1970), the Texas court upheld the delinquency conviction of the appellant, who was subjected to a search of his person by the principal. Noting that had the boy's father been called, he would have made the appellant empty his pockets anyway, the court went on to hold that the principal acted *in loco parentis* and therefore, the fourth amendment probable cause requirement did not apply. *Id.* at 716-17. The use of the *in loco parentis* doctrine in this manner has now been rejected by the United States Supreme Court in *T.L.O.*:

Such reasoning is in tension with contemporary reality and the teachings of this Court. . . . If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.

469 U.S. at 336.

Even if the *in loco parentis* doctrine had some remaining viability regarding the application of the fourth amendment, it would have no applicability to the activities of state colleges and universities. *See* W. LAFAVE, *supra* note 23, § 10.11(a), at 161.

The differences between public elementary/secondary schools and state colleges and universities are significant for fourth amendment analysis only to the extent that some light may be shed on the meaning of "reasonableness" within the context of the fourth amendment. With regard to the question of the fourth amendment application to non-law enforcement state action, the unequivocal language of *T.L.O.* applies across the board to all state run educational institutions.

items were discovered in her purse, supporting the conclusion that the student was involved in drug trafficking within the school.[27]

The Supreme Court rejected the contention that the activity of the teacher and the vice principal was not state action[28] and turned instead to the question of whether the search activity invaded a legitimate expectation of privacy, and if so, whether such an invasion was reasonable.[29] The problem of student-athlete drug testing, however, raises an additional concern not specifically addressed in *T.L.O.*. Assuming that the actions of state university officials are within the purview of the fourth amendment, as indicated by the Court, is the random drug testing of students a "search" within the meaning of the constitution?[30]

III. DRUG TESTING AND THE "SEARCH" REQUIREMENT

Two recent Supreme Court cases, *Skinner v. Railway Labor Executives' Ass'n*[31] and *National Treasury Employees' Union v. Von Raab*,[32] have resolved what had previously been an undetermined issue; namely whether drug testing by way of urine sample collection is a search protected by the fourth amendment. In *Skinner*, the Court found that urine collection constitutes an invasion of privacy interest even though no intrusion into the body is involved.[33] The privacy interest affected stems from the potential of urinalysis to reveal private medical facts, and from the common practice of

27. 469 U.S. at 328.

28. *Id.* at 334-36.

29. In Skinner v. Railway Labor Executives' Ass'n, — U.S. —, 109 S. Ct. 1402 (1989), and National Treasury Employees' Union v. Von Raab, — U.S. —, 109 S. Ct. 1384 (1989), the Court concluded that drug testing implicates the fourth amendment even when conducted for non-law enforcement purposes by government employers, or by employers subject to governmental regulations.

30. It is clear that state universities engaged in drug testing are involved in state action within the scope of the fourth amendment. A related issue, not within the scope of this article, is whether the NCAA, as a result of its extensive "legislation" and regulations, or its relationship with state institutions, is limited by the fourth amendment in its ability to randomly drug test. While this article does not resolve this issue, it should be noted that the NCAA was determined not to be a state actor for fourteenth amendment purposes in National Collegiate Athletic Ass'n v. Tarkanian, 484 U.S. 1058 (1988). In *Tarkanian*, the Court found that no state action existed as to the NCAA, even though a state university carried out its disciplinary policy against the plaintiff. It should be noted, however, that *Tarkanian* does not suggest that the state university is in any way shielded from state action scrutiny by virtue of its performance as the implementing agent of NCAA policy. Drug testing performed by a state university is state action regardless of whether it is done as a matter of university policy or at the behest of the NCAA.

31. — U.S. —, 109 S. Ct. 1402 (1989).

32. — U.S. —, 109 S. Ct. 1384 (1989).

33. *Skinner*, 109 S. Ct. at 1413.

visual and aural monitoring of urine sample collection.[34] Quoting from the Fifth Circuit, the Court noted:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without observation; indeed, its performance in public is generally prohibited by law as well as social custom.[35]

The Court's conclusion in *Skinner* and *Von Raab* that urinalysis conducted pursuant to state action is a search, is consistent with court precedent. In *Schmerber v. California*,[36] the petitioner, a driver of a vehicle involved in an accident, was hospitalized following the accident. A police officer, acting on information suggesting that the driver was intoxicated, placed the petitioner under arrest and instructed a physician to draw a blood sample for testing. Although the tests were objected to by the driver, the results were used to obtain a drunk driving conviction.

On appeal, the petitioner asserted that the taking of a blood sample was a search and seizure within the meaning of the fourth amendment, and therefore must be reasonable. The Court agreed with the petitioner's assertion and stated:

> [C]ompulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[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 . . . ." It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment.[37]

Since *Schmerber*, many courts have applied the holding to a wide range of state generated bodily intrusions,[38] including the taking of urine sam-

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34. *Id.*

35. *Id.*, quoting National Treasury Employees' Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987).

36. 384 U.S. 757 (1966).

37. *Id.* at 767 (emphasis added). The Court, after concluding that the extraction of a blood sample was a search within the meaning of the fourth amendment, went on to hold that such searches are not automatically proscribed. "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which . . . are made in an improper manner." *Id.* at 768. Noting that the officer plainly had probable cause sufficient for fourth amendment purposes, the Court found this search activity to be reasonable.

38. In United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972), the court recognized that the taking of an x-ray involved bodily intrusion sufficient to trigger the fourth amendment. In Cole v. Parr, 595 P.2d 1349 (Okla. Crim. App. 1979), the court recognized the fourth amendment

ples.[39] In particular, the latter courts have applied the *Schmerber* reasoning even though urine testing, unlike blood testing, normally does not involve an invasion of the body.

It is conceivable that in light of the distinction between blood and urine testing, the Court in *Skinner* and in *Von Raab* might have opted to consider urine testing as unintrusive and of no particular privacy interest. This notion might find some support in the well-established fourth amendment theory of abandonment;[40] however, such an approach ignores the conditions under which urine samples are produced and the private nature of this bodily function. In *McDonell v. Hunter*,[41] the court recognized that urinalysis involved fourth amendment protected expectations of privacy and stated:

> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in

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application to the taking of hair, saliva or seminal fluid samples. *See generally* Comment, *Analyzing the Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130 (1984).

39. McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986); Division 241 Amalgated Transit v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); People v. Williams, 192 Colo. 249, 557 P.2d 399 (1976); Davis v. District of Columbia, 247 A.2d 417 (D.C. Ct. App. 1968); Caruso v. Ward, 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988); Patchogue-Medford Congress v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986); State v. Rangitsch, 40 Wash. App. 771, 700 P.2d 382 (1985).

40. *See* Hester v. United States, 265 U.S. 57, 58 (1924). Agents found items dropped or thrown in a field by the defendants. The Court stated: "The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle — and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." *Id.*

But see W. LAFAVE, *supra* note 23, § 2.6(b), at 469:

> It should not be assumed, however, that in every instance in which a defendant relinquishes possession or control, albeit briefly, an abandonment for Fourth Amendment purposes has occurred. The fundamental question is whether the relinquishment occurred under circumstances which indicate he retained no justified expectation of privacy in the object.

Id. at 469; *see also* Rios v. United States, 364 U.S. 253 (1960) (passenger who drops a package in a taxicab has not necessarily abandoned the item).

41. 612 F. Supp. 1122 (D.C. Iowa 1985) (citations omitted).

such personal information contained in his body fluids. Therefore governmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment.[42]

IV. WARRANTS, PROBABLE CAUSE, AND REASONABLENESS

Application of the fourth amendment demands consideration of the traditional warrant and probable cause requirements to random drug testing of student athletes. The warrant and probable cause requirements are threshold issues to the fourth amendment command that searches be reasonable. The fourth amendment requirement of reasonableness stems from language declaring "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[43] This "reasonableness" requirement manifests itself along two distinct lines. First, "whether the [search] was justified at its inception,"[44] and second, "whether the search as actually conducted" was reasonably related in scope to the circumstances which justified the interference in the first place."[45]

The existence of a properly issued warrant, or probable cause alone where an exception to the warrant requirement is recognized, has traditionally been sufficient for justification of the search at its inception.[46] The warrant suffices because, if properly issued, it is based on probable cause determined by a neutral magistrate.[47] It is an often quoted principle that "except in certain carefully defined classes of cases, a search . . . without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[48]

The initial question regarding the warrant requirement, is whether the drug testing of student athletes should fall within that category of exigent circumstances, justifying warrantless searches. In *Von Raab* and *Skinner*, the Court concluded that the purposes of the warrant requirement are met by the stringent and well delineated circumstances set forth by the regulations establishing the testing procedure. Further, the Court in *Skinner* found that "the Government's interest in dispensing with the warrant re-

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42. *Id.* at 1127.

43. U.S. CONST. amend IV.

44. New Jersey v. T.L.O., 469 U.S. 325, 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

45. *Id.*

46. As the court stated in Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986): "What is reasonable depends upon the context in which a search takes place. Ordinarily a search requires both a warrant and probable cause to qualify as constitutionally reasonable." *Id.* at 1513. *See generally* W. LAFAVE, *supra* note 23, § 3.1(a), at 541-43.

47. *See* W. LAFAVE, *supra* note 23, § 3.1(a), at 541-43.

48. Mancusi v. Deforte, 392 U.S. 364, 370 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967)).

quirement is at its strongest when . . . the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[49] Given the relatively constant rate at which drugs are eliminated from the bloodstream, the imposition of a warrant requirement in the case of mandatory urinalysis would defeat the purpose of administering a test otherwise justified.

The question of probable cause, or a suspicion-based substitute, has proven more controversial when applied to drug testing. *T.L.O.* suggested that the traditional "probable cause" requirement is not sacroscant, but may be modified by legitimate governmental interest.[50] This language has been used by several courts as support for total abandonment of any requirement of suspicion to justify random drug testing.[51] This position, however, represents a serious misreading of the Supreme Court's language. Although *T.L.O.* notes that in some instances a requirement of a suspicion base may be discarded, in no case has the court ever abandoned suspicion in the face of substantial expectations of privacy.[52] Courts are wrong in assuming that in the balance between legitimate state interest and significant expectations of privacy, the former may completely swallow the latter.

In *Von Raab*, the Court faced a testing scheme in which only certain custom agents seeking promotion were subjected to testing. The testing did not involve an arbitrary sampling over unspecified periods of time, but

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49. Skinner v. Railway Labor Executives' Ass'n, — U.S. —, 109 S. Ct. 1402, 1419 (1989) (citations omitted).

50. Ordinarily, a search — even one that may permissibly be carried out without a warrant — must be based upon "probable cause" to believe that a violation of the law has occurred. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Sibron v. New York, 392 U.S. 40, 62-66 (1968). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental requirement of the fourth amendment is that searches and seizures be reasonable, and although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of the search . . . in certain limited circumstances neither is required.

T.L.O., 469 U.S. at 340-41 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

51. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Poole v. Stephens, 688 F. Supp. 149 (D. N.J. 1988).

52. In the "closely regulated industry" cases mentioned earlier, the Court indicates in each that because of the nature of the commercial industry, the proprietor in essence had no expectation of privacy regarding inspections of the property. The long history of inspections and regulations had, in each case, conditioned the owner to expect constant and unannounced entry by the state. This rationale has never been applied by the Court to searches of the person or for that matter, searches of non-commercial personal property. What the Court has done is use the state interest/privacy interest balancing test to reduce — but not eliminate the probable cause requirement to reasonable suspicion.

rather, represented certain testing at known times.[53] Consequently, the Court stated: "The procedures prescribed by the Customs Service for the collection and analysis of the requisite samples do not carry the grave potential for arbitrary and oppressive interference with the privacy and personal security of the individuals."[54] In *Skinner*, the testing occurred only after certain specified accidents or incidents. Thus, the Court was not faced with random selection but instead with semi-generalized suspicion.

Further, in neither case was actual observation of urine collection present. In *Von Raab*, the test subject produces a urine sample behind a partition,[55] and in *Skinner*, the subject was transported to a medical facility where observation of urine production was not required.[56] The privacy interest is actually stronger in drug testing plans which require persons to be subject to observation while taking a urine test.[57]

The existence of a strong privacy interest as part of the equation of reasonableness is of little doubt. Of a more speculative nature, however, is the assertion of a legitimate state interest sufficient to overcome the significant expectation of privacy, in testing for cocaine and other "recreational drugs." The case for a legitimate state university interest in mandatory drug testing is briefly stated in the introduction to the Ohio State policy:[58] "(1) To serve as a deterrent to drug or alcohol use by the athlete; (2) To identify athletes who are addicted to substances; (3) To promote education and arrange treatment for the athlete who needs help; and (4) To protect the integrity of the Ohio State University."[59]

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53. As the Court noted in National Treasury Employees' Union v. Von Raab, — U.S. —, 109 S. Ct. 1384, 1394 (1989), intrusion at known places and times significantly minimizes the intrusion on privacy, and thereby makes governmental action more reasonable. *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

54. *Von Raab*, 109 S. Ct. at 1394 n.2.

55. *Id.* at 1388.

56. *Skinner*, 109 S. Ct. at 1418.

57. Hill v. National Collegiate Athletic Ass'n, Case No. 619209, Statement of Intended Decision (California Superior Court, Santa Clara Cty. 1987); *see also* Feliciano v. City of Cleveland, 661 F. Supp. 578 (N.D. Ohio 1987).

58. *See* Appendix.

59. The Ohio State University statement of purpose bears remarkable similarity to the statements of purpose for many universities, *e.g.*, University of Illinois: "The purposes of drug testing are as follows: (1) To serve as a deterrent to drug use by the athlete; (2) To identify athletes who are substance abusers; (3) To promote education and treatment for the athlete." UNIVERSITY OF ILLINOIS SUBSTANCE ABUSE PROGRAM ADOPTED BY THE A.A. BOARD OF DIRECTORS AT A SPECIAL MEETING - MAY 23, 1985; Indiana University statement of purpose provides:

> To generally educate Indiana University student-athletes concerning the problems of drug abuse; To educate any student-athlete identified with a problem regarding the use of drugs as it may affect the athlete and his/her team and teammates; To provide a common mechanism for the detection, sanction and treatment of specific cases of drug abuse; To provide

The stated purposes have in common their reliance on certain assumptions that are seldom documented. These assumptions can be characterized as: (A) Drug use by student-athletes is rampant; (B) It is disproportionate when compared with non-athletes; (C) Recreational drug use poses an unusual, serious risk of harm; and (D) Athletes, because of high visibility, create a substantial risk of embarrassment to the university. Whether these assumptions are true, or if true, justify significant invasion of privacy without probable cause (or reasonable suspicion), is a question requiring a closer look.

A. Drug Use Among Student-Athletes - Epidemic or Hysteria?

The motivation behind an editorial in the Akron Beacon Journal, endorsing a drug testing program by Kent State University,[60] aptly sums up public opinion. The editorial board was asked how can student-athletes be subjected to testing without testing other segments of the university community. The response was: "Athletes are special. And drugs are a pervasive special problem with them. Witness Len Bias."[61]

The public perception of drugs as a special problem for athletics can be traced back to the Olympics and to NCAA concerns over performance enhancing drug use in the 1970s.[62] Such concerns culminated in congressional hearings in 1973,[63] and the decision of the NCAA to develop a drug testing program. Drug usage in this category was apparently difficult to measure, even though estimates ranged as high as 68 percent use by the University of California's football team.[64]

Only in recent years has attention turned to "recreational" drug use. A 1985 study by Michigan State University surveyed and compared drug use

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reasonable safeguards to insure that every student-athlete is medically fit to participate in athletic competition; To prevent any drug use by Indiana University student-athletes; To identify any student-athlete who may be using drugs and to identify the drug, and; To encourage the prompt treatment of drug dependency.

INDIANA UNIVERSITY DEPARTMENT OF INTERCOLLEGIATE ATHLETICS DRUG SCREENING PROGRAM AND POLICIES; University of Iowa provides: "Protect individual student-athletes, their teammates, and the university from irremediable adverse consequences of NCAA-sponsored drug testing; Promote education, counseling and treatment for the student-athlete who needs help with substance abuse." UNIVERSITY OF IOWA DEPARTMENTS OF INTERCOLLEGIATE ATHLETICS DRUG EDUCATION AND TESTING PROGRAM, MAY 13, 1986.

60. Akron Beacon Journal, December 14, 1986, at 8.

61. Cooper, *Our Search for an Editorial Position: The Drug Testing Dilemma*, Akron Beacon Journal, December 14, 1986, at 7.

62. Note, *supra* note 2.

63. *Id.* at 205.

64. This statistic was apparently not derived from empirical research, but from testimony before an NCAA Committee. *See id.* at 207.

of athletes and non-athletes. The results showed that marijuana use among student-athletes ranged from 25 to 35 percent, as opposed to 42 percent among the general student college population.[65] Cocaine use was estimated to be 17 percent for student-athletes and non-athlete students.[66] Such results counter the public perception that student-athletes use drugs more often than does the general student body.

The issue of justification for drug testing of student-athletes was raised judicially, perhaps for the first time, in a challenge by a Stanford University student-athlete to the NCAA drug testing program.[67] In enjoining the NCAA program, the court noted the following:

> The most informative evidence on the scope of the problem of drug use among student athletes is provided by the NCAA's own test results from the 1986-87 season. Of 3,511 students tested, only 34 were declared ineligible. Of that, 31 were football players. Of those 34 ineligible students 26 were positive for steroids and 7 for cocaine.[68]

If, as suggested, student-athletes present no greater threat of drug abuse than non-athletes, then the only remaining "state interest" that might justify singling out student-athletes for privacy invasion is their high visibility as role models and university representatives. There is no question that in certain sports, student-athletes are viewed as role models. There is some question, however, of the university's responsibility to protect that image. More importantly, concerns regarding role models, images, ethics, and morality, all must be balanced against the individual's reasonable expectation of privacy.[69]

B. Particularized Reasonable Suspicion

Assuming that the foregoing discussion may suggest some legitimate state interest, it is certainly not so strong as to justify the unprecedented step of total negation of the reasonable suspicion requirement in favor of random testing. However, courts have had little difficulty in recognizing that the traditional probable cause standard may be altered, consistent with the requirements of reasonableness.

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65. Anderson & McKeag, *Substance Abuse Habits of College Student Athletes*, INSTITUTE OF SOCIAL RESEARCH, Michigan State University (1985).

66. *Id.*

67. Hill v. National Collegiate Athletic Ass'n, Case No. 619209, Statement of Intended Decision (Superior Ct. Calif., Santa Clara Cty., 1987).

68. *Id.* at 10.

69. As the Court noted in *Hill*: "Maintaining high ethical standards in the medical profession has been held not to be such a compelling need that an individual's privacy and right to make personal medical decisions should be infringed." *Id.* at 11 (citation omitted).

The basic message of *T.L.O.*, that "probable cause" is not an irreducible requirement of a valid search,"[70] has been heard by lower courts regarding drug testing in the workplace.[71] These cases recognize that the traditional probable cause requirement is applicable to criminal cases only.[72] In the context of administrative actions, the legitimate state interest and the expectation of privacy are satisfied by use of the less restrictive "reasonable suspicion" standard.[73]

A question unanswered in *T.L.O.* is whether the reasonable suspicion requirement must be particularized as to individuals, or whether class suspicion would suffice.[74] As applied to the student-athlete, past statistical data might form the basis of reasonable suspicion for whole teams, or perhaps all student athletes, if the concept of individualized suspicion is rejected. In *Skinner*, it appears that the Court concluded suspicion need not be particularized in the traditional sense. The railroad employees subject to mandatory urinalysis by the Federal Railroad Administration's regulations

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70. *T.L.O.*, 469 U.S. at 340.

71. Amalgamated Transit Union 1277 v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987); Capua v. City of Plainfield, 643 F. Supp. 1507 (D. N.J. 1986); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 1985); Patchogue-Medford Congress v. Board of Educ., 805 N.Y.S.2d 888 (1986).

72. In *Patchoque-Medford*, the court affirmed the lower court's striking of a requirement that teachers seeking tenure submit to random urinalysis. In doing so, it pointed out: "We note, however, that we reject the argument that the type of test proposed in this case is warranted only upon a showing of a full-scale probable cause. Probable cause is not required where the search is not aimed at the discovery of evidence for use in a criminal trial." 805 N.Y.S.2d at 891.

73. Although it is less than clear that a reduction in the probable cause requirement is justified, in *Camara* the Court based its reduction in the probable cause standard in large part on the fact that the search was non-personal in nature and was a limited invasion of privacy. 387 U.S. at 537. Observed urination, as discussed above, is a very personal intrusion and a significant invasion of privacy.

In *T.L.O.*, the Court held that rather than requiring "probable cause to believe that the subject of the search has violated the law" it is sufficient regarding what was a non-personal search, that "reasonable grounds [exist] for suspecting that the search will turn up evidence that the student has violated . . . the rules of the school." 469 U.S. at 342.

Previously, in Terry v. Ohio, 392 U.S. 1 (1967), the Court defined reasonable suspicion as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." 392 U.S. at 21. Further, the facts forming the basis of reasonable suspicion must (a) be judged against an objective standard, (b) be available to the searcher at the moment of search, and, (c) "[w]arrant a man of reasonable caution in the belief" that the action taken was appropriate. *Id.* at 21-22.

74. "We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities." *T.L.O.*, 469 U.S. at 342 n.8. However, the Court goes on to say in the same note: "Exceptions 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.* (citation omitted).

were only those "who are involved in certain train accidents."[75] The FDA promulgated regulations after a review of accident investigation reports and found that "from 1972 to 1983 the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or a contributing factor."[76]

The nexus between drug-alcohol use and accidents provided a basis to attempt to control substance abuse. However, of significance to the Court in resolving the question of fourth amendment mandated reasonable suspicion, is the regulation requirement that testing occur only as an aftermath to an actual accident. It is therefore difficult to conclude that the requirement of particularized reasonable suspicion is totally abandoned because of the strong governmental interest in testing. The issue of whether such suspicion is a necessary element of a state university-sponsored random drug testing program for student-athletes must be resolved in light of the unsubstantiated level of drug use among a class of individuals who are not involved in a sensitive or high public danger environment.

The general, and proper, approach taken by most courts considering the issue has been to require particularized suspicion.[77] Critics of particularized suspicion claim that university athletic staffs, as a practical matter, are incapable of effectively spotting indicia of drug use sufficient to give rise to suspicion. Additionally, there is some concern that the relationship between student-athletes, on the one hand, and training staff, coaches and administrators on the other, would be materially damaged by the university playing the roles of watchdog, investigator and accuser.

In any event, the concern that university personnel are unable to suspect drug use, is a matter of training. In 1971, the Drug Education Committee of the NCAA produced the booklet, *The Coach: Drugs, Ergogenic Aids and the Athlete.*[78] The publication indicates that although the problem of recognizing drug use is complicated, "[t]he person who begins to show personal-

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75. *Skinner*, 109 S. Ct. at 1407. As the Court noted:

[U]pon the occurrence of certain specified events Toxicological testing is required following a "major train accident," which is defined as any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of $500,000.

Id.

76. *Id.* at 1407.

77. *See* Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

78. National Collegiate Athletic Association (1971). This document was presented before Congress as part of the house inquiry in drug use among college athletes. *See supra* note 2. Ironically, the Ohio State head trainer, Alan Hart was a member of that committee, along with Robert W. Pritchard, Worchester Polytechnic Institute, Donald L. Cooper, M.D., Oklahoma State University, and Harden Jones, Ph.D., University of California, Berkeley.

ity changes or who withdraws from his usual activities may be suspect. It has been shown that drug abusers frequently will miss classes. They will begin to do work in the classroom that is below their previous performance levels."[79] The booklet goes on to list 15 factors which may indicate drug use in the student athlete.[80]

Aside from the protection of the substantial privacy interest involved, individualized reasonable suspicion serves a function particularly significant in the search for student-athletes involved with "recreational drugs." The disproportionately high percentage of student-athletes receiving widespread media and public attention for alleged marijuana and/or cocaine use are Black. Such attention fosters beliefs that Blacks are more prone to drug use of this nature. These conclusions are made despite a lack of reliable statistical and/or sociological data to support such conclusions based on race. Racism is certainly not unknown in our educational and legal systems. Unfettered discretion in the hands of predominantly White university offi-

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79. Drug Education Committee of the NCAA, *The Coach: Drugs, Ergogenic Aids and the Athlete*, at 4 (1971).

80.

1. Inability to coordinate, stand or walk.
2. Muddled speech.
3. Impaired judgment (barbituate user).
4. Rapid pulse.
5. Restlessness.
6. Jittery.
7. Muscular twitches.
8. Heavy sweating and bad breath (hallmarks of amphetamine abuse).
9. Nervous, highly talkative, over-active, possibly hostile, aggressive and paranoid behavior (amphetamine).
10. Marijuana abuse:
    Acute effects —
    . . . red eyes are fairly common symptoms.
    . . . may begin to miss gym class and then other classes.
    . . . increased appetite with special craving for sweets.
    Persisting effects —
    . . . clumsiness.
    . . . lowered attention span.
    . . . regular user is apathetic, listless and careless about his personal habits.
    . . . may lead to lack of motivation and loss of long-term goals.
    . . . may have recognizable odor on their person.
11. Pinpoint pupils — could be heroin or another narcotic abuse.
12. Chills.
13. Needlemarks on arms and legs. Addicts often wear long-sleeved sweaters, even in summer to both keep warm and hide scars.
14. A person's language (his jargon) may indicate he uses drugs.
15. Episodes of stupor and incoherent speech may indicate possible acute LSD intoxication.

Id. at 5.

cials creates ripe opportunities for racial oppression.[81] Subjecting Black Americans to significant invasions of privacy without an articulable, objective, reasonable basis was one of the prime concerns motivating the appellants in *Terry v. Ohio*.[82] While certainly not enough to control improper invasions of privacy based on impermissible racial grounds, particularized suspicion is a significant protection.

C. *The Administrative Search Exception*

Exceptions to the probable cause requirement have been recognized in several areas. Of particular significance are so-called "administrative searches."[83] Not all searches covered by the fourth amendment engender the same protection. Searches that serve "special governmental needs"[84] and are part of an administrative scheme may trigger reduced scrutiny under the fourth amendment. To understand the impact of fourth amendment considerations on the drug testing of athletes, it is necessary to determine if and how such activities fit within the context of administrative searches.

The notion that an administrative search is immune from fourth amendment restrictions has been firmly rejected by the Supreme Court.[85] The real question is not whether the fourth amendment is applicable, but rather to what extent do the strictures of probable cause and reasonableness apply to such activities.

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81. For example, the public interest in college athletics centers on football and basketball, sports where, on many university teams, Blacks are disproportionately represented. Drug testing results, in all probability, will be more closely scrutinized in these areas.

82. 392 U.S. 1. *Terry* involved Black individuals who were stopped after being observed "acting suspicious." The Court noted: "The President's Commission on Law Enforcement and Administration of Justice found that "[i]n many communities, field interrogation are a major source of friction between the police and minority groups. President's Commission of Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967)." *Id.* at 14 n.11.

Similarly in Kolender v. Lawson, 461 U.S. 352 (1982), Edward Lawson was stopped and subsequently arrested 15 times, solely because he was a Black man with long hair walking in white neighborhoods. The Court invalidated the subsequent arrest noting that serious questions about whether particularized reasonable suspicion existed to allow such conduct under *Terry*. *Id.* at 363-65 (Brennan, J., concurring).

83. "Administrative" or "regulatory" searches refers to those non-criminal evidence seeking search activities carried out by administrative agencies in furtherance of a legislative or administrative plan. For a full discussion of the history of administrative searches see Note, *The "Administrative" Search From Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261 (1989).

84. *Skinner*, 109 S. Ct. at 1414-15.

85. *See* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

The Supreme Court's approach to administrative searches has its origin in the 1967 cases of *Camara v. Municipal Court*[86] and *See v. City of Seattle*.[87] The Court recognized in both decisions that the fourth amendment was applicable in protecting individual rights and that privacy rights must be protected in a civil context as well as in criminal proceedings. In *Camara* and *See*, the Court found that even in a civil context, as a general rule, a warrant is required for administrative searches. Since *Camara* and *See*, however, the definition of what constitutes an exception to the general rule has been unclear and subject to debate.[88]

Regarding probable cause, the Court recognized that administrative searches could be based on less than traditional probable cause, i.e., reasonable suspicion. In *Camara*, the Court noted that in determining if reasonable suspicion is appropriate, it must consider the history of judicial and public acceptance of the search, the public interest to be served by the

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86. 387 U.S. 523 (1967).

87. 387 U.S. 541 (1967).

88. *See* Note, *supra* note 83, at 267.

In Donovan v. Dewey, 452 U.S. 594, 602-05 (1981), the Court held that the warrantless inspection, without notice, of stone quarries pursuant to a requirement of the Federal Mine Safety Act, was reasonable within the meaning of the fourth amendment because, unlike private homes, administrative searches of commercial property may be justified solely by the governmental interest to be served. The expectation of privacy that an owner of commercial property has differs significantly from that of a private homeowner. Note however, that even the warrantless search of commercial property is limited and such searches may not occur under a scheme that "devolves almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search. Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978).

In United States v. Biswell, 406 U.S. 311, 316-17 (1972), a warrantless search of a locked storeroom of a pawn shop conducted during business hours, pursuant to authority granted under the Gun Control Act of 1968, was upheld. The Court stated: "We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, *and the possibilities of abuse and the threat to privacy are not of impressive dimensions*, the inspection may proceed without a warrant where specially authorized by statute." *Id.* at 317 (emphasis added).

In Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970), a federal agent, while a guest on the petitioner's premises, noted a possible violation of the federal excise tax law. Subsequently, a forcible entry of a locked liquor storeroom, after permission to search had been refused by the petitioner, was made and evidence seized. Although the Court held that no warrant was necessary for a search of commercial property, it found that the search in this case was not authorized, nor envisioned by Congress in enacting the liquor control provisions of 26 U.S.C. § 5146(b). *Id.* at 73-75.

It is interesting to note that the search in *Colonnade* was disallowed even though the federal officer apparently had probable cause to believe an offense had been committed. It is also interesting to note that in all three cases the Court does not discuss whether, apart from the issue of the necessity of a warrant, searches are required to be based upon probable cause (or as discussed later, some substitute) in order to meet the reasonableness requirement. The silence on this issue is only explained by the Court's emphasis on the lower expectation of privacy associated with the search of commercial property as a normal aspect of business regulation.

search, and the absence of any other method of achieving the appropriate administrative goal.[89]

One area in which the Court has recognized both an exception to the warrant requirement and has accepted a reduction of the probable cause requirement, is that of "closely regulated industries."[90] A closely regulated industry is identified as one where the "industry [has] such a history of government oversight that no reasonable expectation of privacy could exist."[91]

In *Skinner v. Railway Labor Executives' Association*, the Court applied the doctrine of closely regulated industry to the question of urinalysis. Although the Court accepted the application of the fourth amendment to urinalysis authorized by federal regulation, it viewed the closely regulated nature of the railroad industry as a significant factor in reducing the expectation of privacy ordinarily associated with urination. The Court stated: "More importantly, the *expectations of privacy* of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to insure safety."[92] The Supreme Court emphasized that unlike other administrative schemes the employees themselves were the object of regulation as opposed to their field of endeavor.[93]

The Supreme Court's reliance on the "closely regulated industry" approach in *Skinner*, in essence adopts the Third Circuit's position in *Shoemaker v. Handel*[94] regarding the drug testing of race track jockeys. In *Shoemaker*, the Third Circuit framed the issue in terms of whether the ad-

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89. 387 U.S. at 537.

90. The "closely regulated industry" exception to the general warrant requirement has its origins in a series of Supreme Court cases, beginning with *Colonnade* and continuing in *Barlow's*, where the Court stated: "Certain industries have such a history of government oversight [sic] that no reasonable expectation of privacy could exist . . . ." 436 U.S. at 313; *see also Donovan*, 452 U.S. at 599-601; *Biswell*, 406 U.S. at 315-16. The theory was more clearly explained by the court in Ballo v. Baldridge, 724 F.2d 753 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984):

> In determining whether warrantless searches in a closely regulated industry are reasonable we must decide whether the regulatory scheme in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.

Id. at 765-66 (quoting *Donovan*, 452 U.S. at 603).

91. *Marshall*, 436 U.S. at 313.

92. Skinner v. Railway Labor Executives' Ass'n, — U.S. —, 109 S. Ct. 1402, 1418 (1989).

93. We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here however, the covered employees have long been a principal focus of regulatory concern.

Id. at 1418.

94. 795 F.2d 1136 (3d Cir. 1986).

mittedly applicable fourth amendment[95] reasonableness requirement was satisfied by adherence only to a warrant requirement. Several well known jockeys challenged the New Jersey Racing Commission's requirement that *inter alia* all jockeys submit to daily breathalyzer tests and random urinalysis. The Court noted that the general requirement of a warrant has been subject to exceptions, particularly in the area of administrative inspections, and went on to hold that, (1) a strong state interest in conducting unannounced searches combined with, (2) the heavily regulated nature of horse racing, reduced the justifiable privacy interest of the subjects of the admitted search. It is interesting that the court on this point viewed the question of the jockey's personal privacy of no greater interest than the historical privacy of the horse he or she rides.

The application of the *Shoemaker* approach to student athletes at state universities would require the recognition of college athletics as a "closely regulated industry." In this regard, there is little question that intercollegiate athletics is heavily regulated at the national level; however, this regulation is largely self-imposed by way of membership in various amateur athletic associations.[96] The most notable of these organizations is the National Collegiate Athletic Association (NCAA). The NCAA is comprised of over 800 four-year colleges and universities voluntarily associated and regulated by rules, by-laws and regulations to which each member institution agrees to adhere.[97] The regulations are enforced through a six step administrative process consisting of: (1) a preliminary inquiry, (2) an official inquiry, (3) a hearing before the Committee on Infractions, (4) a report of findings, (5) an assignment of penalties, and (6) a right to appeal.[98]

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95. The defendant New Jersey Racing Commission, recognized the applicability of *Camara* and *See* and conceded that the fourth amendment applied to state administrative agency searches. *Id.* at 1141.

96. As pointed out by Professors Robert C. Berry and Glenn M. Wong: "Amateur athletic associations are a pervasive part of American society. Individuals in the United States begin participating in such organizations at an early age (Pop Warner Football, Biddy Basketball, etc.) and continue to do so through adulthood." 2 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 3 (1986).

97. *Id.* at 15.

98. The NCAA constitution provides:

Section 1. Purposes. The purposes of the association are:

(a) To initiate, stimulate and improve intercollegiate athletic programs for student-athletes and to promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence;

(b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;

(c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;

Although this highly structured administrative scheme gives a great deal of support to the notion that intercollegiate athletics is a "heavily regulated industry," the NCAA constitution and regulations make clear that individual institutions control the governance of athletic programs within its respective institution. NCAA regulations are designed to control intercollegiate competition and do not restrict the ability of member institutions to set their own standards for governance and control. Indeed, the NCAA drug testing policy[99] applies only to intercollegiate competition, and does not restrict a member institution from developing its own policy. In addition to membership in the NCAA, most institutions are also associated with regional conferences. These conferences in turn have developed rules and regulations for the governance of conference members.

The freedom of member institutions to adopt their own policies regarding eligibility, academic progress and non-intercollegiate student-athlete conduct distinguishes them from the type of heavy regulations on the day to day activities of the jockeys in *Shoemaker* or the railroad workers in *Skinner*. Even if the argument that collegiate athletics is a "closely regulated industry," has some merit, difficulty exists in applying the *Shoemaker* fourth amendment rationale. While there may be "an obvious analogy between state regulation of professional jockeys as athletes and public college or university regulation of student athletes,"[100] the two-pronged approach employed by the *Shoemaker* Court must be satisfied.

In *Shoemaker* the Third Circuit noted:

> There are two interrelated requirements justifying the warrantless administrative search exception. First there must be a strong state interest in conducting an unannounced search. Second, the pervasive

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(d) To formulate, copyright and publish rules of play governing intercollegiate sports;
(e) To preserve intercollegiate athletic records;
(f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of this Association;
(g) To cooperate with other amateur athletic organizations in promoting and conducting national and international athletic events;
(h) To legislate, through bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics; and
(i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic activities on a high level.

1985-86 NCAA MANUAL, Constitution 2-1.

99. Although the NCAA drug testing program is beyond the scope of this article, it should be noted that at least one court has found that not only do student athletes retain their expectation of privacy, but also that requiring such testing without individualized probable cause is impermissible under the fourth amendment. *See* Hill v. National Collegiate Athletic Ass'n, Case No. 619209, Statement of Intended Decision (Superior Ct. Calif., Santa Clara Cty, 1987).

100. Spicer, *Drug Testing, Student Athletes, and the Constitution*, 13 VA. BAR A. J. 11 (1987).

> regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search.[101]

In *Von Raab* and *Skinner*, neither of which involved random testing,[102] the Court viewed the governmental interest as one of concern for public safety in critical situations.[103] Other courts which have found an overriding state interest sufficient to shift the balance of reasonableness in favor of the state, have limited such applications to instances of public safety or significant issues of public trust.[104] While many of us "take our sports seriously" it would be inimical to the entire concept of amateur athletics to conceive of the student-athlete as critical to the health, safety or even the public trust of society.

Without the "critical position" rationale, a regulatory search justification under *Skinner* must depend upon the second interrelated prong: the lower expectation of privacy flowing from a history of extensive regula-

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101. *Shoemaker*, 795 F.2d at 1142 (citations omitted).

102. As noted earlier, the treasury agents in *Von Raab* knew they were to be treated in order to be considered for promotion. In *Skinner*, the railway employees knew that the occurrence of an accident would trigger the possibility of drug testing. In both cases the expectation of privacy was reduced by the triggering circumstance. *Von Raab*, 109 S. Ct. at 1384.

103. In *Von Raab*, the governmental interest was characterized as ensuring the fitness of "our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Von Raab*, 109 S. Ct. at 1392. The ability to detect drug use among customs agents was, in the view of the Court, necessary to protect the ability of agents to "discharge their duties honestly and vigorously" and to protect "the safety of their fellow agents." *Id.* at 1389.

In *Skinner*, the court stated:

> By contrast, the government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities.

109 S. Ct. at 1419.

104. In Poole v. Stephens, 688 F. Supp. 149 (D.N.J. 1988), the district court reviewed the cases upholding random, mandatory drug testing as part of state regulation of a "closely regulated industry." In rejecting a corrections officers' union challenge of a New Jersey plan to randomly test all correction officer recruits, the court noted: "Throughout these cases runs a common thread that the particular job to be performed by the employee is the critical factor that tips the balance of rights in favor of the reasonableness of a random (or similar) urinalysis testing program." *Id.* at 155.

The court went on to find that correction officers were similarly situated with school bus drivers, customs agents, train operators and nuclear power plant operators in occupying critical safety and health positions or, in the case of the *Shoemaker*, horse racing jockeys' positions requiring special public confidence.

tion.[105] The university regulation must "have such a history of government oversight [sic] that no reasonable expectation of privacy could exist . . . ."[106]

In *New York v. Burger*,[107] the United States Supreme Court again recognized that those who operate commercial premises in a "closely regulated industry" may have a reduced expectation of privacy sufficient to overcome the traditional requirement of a warrant and probable cause.[108] However, such a departure from the traditional reasonableness requirement will be constitutional only if three criteria are met: First, there must be a substantial governmental interest at stake,[109] second, "the warrantless inspections must be "necessary to further [the] regulatory scheme,"[110] and third, the established regulatory procedure for inspection "must perform the two basic functions of a warrant; it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."[111]

More importantly however, the expectation of privacy and protection regarding day to day student life, from random unannounced drug testing, distinguishes university created mandatory testing from the type of administrative searches tacitly approved in *Marshall v. Barlow's, Inc.*.[112] Despite the existence of the regulation of student life as part of higher education, courts have traditionally recognized that individual student privacy is a cherished and protected right. In *Morale v. Grigel*[113] the court held that a student has a privacy interest that is invaded where the university searches a dormitory room without probable cause. Similarly in *Smyth v. Lubbers*[114] the student's right to privacy was invaded where the university staged a midnight dormitory raid.

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105. In fact the example typically given of lower expectations of privacy in this context more often than not describes situations of no expectation of privacy. It is the nature of closely regulated businesses that constant scrutiny is the order of the day. This factor may well explain the Court's willingness to completely do away with particularized suspicion in commercial searches of this nature. *See* New York v. Burger, 482 U.S. 691 (1987).

106. Marshall v. Barlow's, Inc. 436 U.S. 307, 313 (1978).

107. 482 U.S. 691 (1987).

108. *Id.* at 702.

109. *Id.* at 703; *see also* Donovan v. Dewey, 452 U.S. 594, 602 (1981).

110. *Burger*, 482 U.S. at 704.

111. *Id.*

112. 436 U.S. 307 (1978).

113. 422 F. Supp. 988 (D.N.H. 1976).

114. 398 F. Supp. 777 (W.D. Mich. 1975).

D. Reasonable Scope of Intrusion

The second prong of the fourth amendment reasonableness requirement is that the "search is reasonably related in scope to the circumstances which justified the search in the first place."[115] The purpose in drug testing student athletes, as indicated above, involves identifying drug users, and deterring drug use. While such a purpose may be insufficient alone under the fourth amendment, when preceded by reasonable, individualized suspicion, such searches have been deemed reasonable in scope.

Not all searches based on probable cause or reasonable suspicion, however, are deemed reasonable.[116] The scope of the search and the method employed will offend the fourth amendment if unreasonable. For example, the obtaining of evidence from the human body, even in the face of valid suspicion, must be reasonable.[117] Notwithstanding the existence of probable cause, a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect. Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity.[118] In *Winston v. Lee*,[119] the Court concluded that surgery requiring general anesthesia, solely for the purpose of conducting a search was unreasonable.[120] But intrusions less physically drastic have not been found unreasonable.[121]

The issues raised by random drug testing of student-athletes in terms of fourth amendment protection are not resolved by *Von Raab* and *Skinner*. *Von Raab* gives us little guidance because it does not address the problem of significant expectations of privacy. The treasury agents facing a one time drug test for promotion purposes know and anticipate the state intrusion. In this respect they are like the welfare recipient in *Wyman v. James*.[122] The parallel in athletics might be the athlete facing an announced or regu-

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115. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 588 (9th Cir.), *rev'd sub nom.*, Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

116. *See* Tennessee v. Garner, 471 U.S. 1 (1985), where the Court found that the use of deadly force to "seize" an unarmed suspect was unreasonable even though clear probable cause for arrest existed; *see also* Jones v. Latexo School Dist., 499 F. Supp. 223 (E.D. Tex. 1980), where the court raised questions of whether the use of german shepard dogs to sniff search school children was reasonable.

117. *See* Winston v. Lee, 470 U.S. 753 (1985) (considered reasonablenss of invading the body by surgery to obtain evidence).

118. *Id.* at 761.

119. *Id.*

120. *Id.* at 766.

121. *See, e.g.*, United States v. deHernandez, 473 U.S. 537 (1985) (observation of the defendant passing her bowels was not unreasonable where reasonable suspicion existed); Schmerber v. California, 384 U.S. 757 (1966).

122. 400 U.S. 309 (1971).

larly scheduled physical at which urinalysis is performed. *Skinner* also lacks the aspect of randomness associated with the Ohio State plan. The Ohio State plan does not depend on a triggering event that will alert the athlete to the distinct possibility that he or she will, in the immediate future, be drug tested. Neither does either case resolve the issue presented by the Ohio State plan of consent. Can consent sufficient to avoid fourth amendment concerns be obtained from the student-athlete?

V. CONSENT AS AN ALTERNATIVE TO FOURTH AMENDMENT RESTRICTIONS

The Ohio State drug testing program is similar to practically all state university programs in that it requires that the student-athlete execute a signed consent to random drug testing.[123] Whether such a signed consent is sufficient to avoid application of fourth amendment protections is readily gleaned from the simple recognition of the characteristics of the persons being required to waive their constitutional protection. Can a student who is typically a high school student, 18 years old or younger, most likely (at least in the major sports — football and basketball) Black, poor and thus traditionally excluded from higher education, voluntarily relinquish his or her constitutional rights? Additionally, are such waivers valid where the alternative is to be denied a scholarship and thus effectively denied an opportunity for college?[124]

In order to avoid application of the fourth amendment, consent must be voluntary.[125] Voluntariness has defied precise definition,[126] and must be determined by considering the totality of the circumstances on a case by case basis.[127] *Schneckloth v. Bustamonte*,[128] indicated some of the "circumstances" to be considered; age, education level, intelligence, and lack of advice concerning constitutional rights. To this list other courts have added the doctrine of "unconstitutional conditions"[129] which prohibit forcing the

123. *See* Appendix.

124. Although theoretically a potential student might attend another institution if she/he does not wish to attend a school with mandatory drug testing, practically speaking, such an alternative is non-existent. Aside from the impact on and damage to the reputation from "refusing" drug testing, the timing of most requests for signed consents makes impossible the choice of an alternative school, without at least the loss of valuable eligibility.

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

126. "Cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Id.* at 224.

127. *Id.* at 227.

128. *Id.* at 218.

129. The doctrine of unconstitutional conditions has its roots in the 1925 decision of Frost Trucking Co. v. Railway Comm'n, 271 U.S. 583, 593-94 (1925):

relinquishment of fourth amendment rights in order to receive government benefits.[130] Looking at these various factors raises serious questions as to whether execution of the Ohio State type of consent form constitutes a voluntary consent for fourth amendment purposes:

AGE - Because the beginning student-athlete is required to sign this form prior to attending college he or she will typically still be in their teen years and often under the age of majority (18). Minors are not automatically incapable or incompetent to give consent.[131] However, the youth and the relatively unsophisticated nature of the individual is a significant factor.

EDUCATION - It is the height of irony that a university would require high school students (many of them from "poor" schools with limited resources) to consent to the relinquishment of their constitutional rights, while at the same time proclaiming a need to "improve" the academic quality of the same student *via* the recently enacted proposition 48,[132] which has as its central tenet, the poor educational preparation of the student-athlete. Even the best educated high school student is at best — only a high school student.

LACK OF INFORMATION REGARDING CONSTITUTIONAL RIGHTS - Ohio State, like most universities engaged in drug testing, either denies that the student has a constitutional right to withhold consent, or does not inform the student of any realistic option.[133] Regarding the Black teen-

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It is not necessary to challenge the proposition that, as a general rule, the state having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that the guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id.

130. Courts have recognized that even the threatened loss of a privilege (such as athletic scholarship/participation) may constitute an unconstitutional condition. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

For a full discussion of the doctrine's application to collegiate athletics, see Scanlon, *Playing the Drug Testing Game: College Athletes, Regulatory Institutions, and the Structure of Constitutional Argument*, 62 IND. L.J. 863, 930-42 (1987).

131. *See* Fare v. Michael C., 422 U.S. 707 (1979).

132. In 1983, the NCAA enacted bylaw changes, which were commonly referred to as Proposition 48. The core of the bylaw provision conditioned eligibility upon the achievement of certain scores on the standardized college entrance exams, and the achievement of a grade point average of 2.0 or better in certain "core" courses. For a discussion of the racial implications, see Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101 (1984).

133. Indeed, given the consequences of refusal, there is no realistic option but to sign.

ager who is often inexperienced with legal doctrine and isolated in a predominantly white environment, is not far removed from the young men confronted with similar constitutional choices in Scottsboro, Alabama in 1932.[134] No student is provided anything close to information that suggests that any right to resist drug testing exists.

The doctrine of "unconstitutional conditions," i.e. that the waiver of a constitutional protection can not be demanded in exchange for a government benefit, has already been applied to drug testing in the workplace. The result has been almost unanimous in finding consent involuntary.[135]

In *Piazzolo v. Watkins*,[136] the Fifth Circuit rejected the notion that admission into a dormitory could be conditioned on consent to forego fourth amendment protection. University officials attempted to justify the search of student rooms under a regulation which provided: "The College reserves the right to enter rooms for inspection purposes . . . ."[137] The Court rejected the claim of consent pursuant to this regulation and indicated: "The regulation cannot be construed or applied so as to give consent to a search for evidence . . . . [O]therwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches as a condition to his occupancy of a college dormitory room."[138] If the ultimate test of voluntariness is whether the student consent is "the product of an essentially free and unconstrained choice,"[139] it is difficult to imagine a teenager faced with the choice of scholarship and education or nothing, as acting in a manner sufficient to satisfy the demands of fourth amendment consent.

The fourth amendment problems posed by mandatory, random drug testing are serious, and quite likely insurmountable. These problems are not resolved by consideration of cases allowing drug testing in the workplace because the rationale for workplace drug testing is considerably different and potentially stronger than the testing of amateur, student-athletes not engaged in critical or dangerous positions. *Von Raab* and *Skinner* are not dispositive of such issues.

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134. *See* Powell v. Alabama, 287 U.S. 45 (1932), which involved the famous "Scottsboro Boys," nine teenage Black men accused of rape who were faced with a hostile environment and forced to trial under conditions that forced "waiver" of practically all basic constitutional protection. Their conviction was overturned because of denial of basic due process.

135. *See* McDonell v. Hunter, 829 F.2d 1302 (8th Cir. 1987); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

136. 442 F.2d 284 (5th Cir. 1971).

137. *Id.* at 286.

138. *Id.* at 289; *see also* Morale v. Grigel, 442 F. Supp. 988 (D.N.H. 1976).

139. *Schneckloth*, 412 U.S. at 225 (citation omitted).

However, the fourth amendment problem is but one of the significant legal issues raised by forced urinalysis of student-athletes at state universities. Issues of due process raise equally serious concerns.

VI. PART II - DUE PROCESS CONSIDERATIONS

The Ohio State program, like most university programs, permits the imposition of sanctions for "positive" test results without the benefit of any prior hearing. The sanctions are significant for a young athlete; and can include: suspension, possible loss of scholarship and removal from the team.

The less serious sanctions are, in actuality, significantly onerous. While not formally listed as such, the opprobrium which arises from the identification of the student as a drug user is as much a sanction and a deterrent as the loss of any of the other privileges attendant to being a student-athlete. The typical testing program requires that positive results be revealed to the coaching staff, the trainer, and the athletic director. It does not take a great deal of imagination to foresee that a student's positive drug test will be discovered, at least by the student's fellow team members. In addition, it is likely that a suspension would be reported by the press when athletes from major schools are involved.

Given this certain impact on reputation, coupled with the potential loss of a scholarship (and thus perhaps the ability to attend college and ultimately seek a professional sports career) are such interests protected by due process? *Wisconsin v. Constantineau*[140] would certainly suggest that the protected concept of liberty[141] is infringed by state action which "attaches a

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140. 400 U.S. 433 (1971). In *Constantineau*, the police, pursuant to statutory authorization, posted notices identifying the respondent as a person to whom sales of alcohol were forbidden. The posters also intimated that the respondent was a drunk. No hearing was held prior to the postings. The Court stated: "The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. *Id.* at 436. The Court continued: "[W]here the State attaches a 'badge of infamy' to the citizen, due process comes into play." *Id.* at 437.

141. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court stated:

> While this court has not attempted to define with exactness the liberty thus guaranteed [by the fourth amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399 (citations omitted).

badge of infamy."[142] This defamation triggers due process not in the abstract, but only where it, in turn, impedes or denies other benefits or privileges which are themselves a protected property interest.[143] The student-athlete facing loss of a scholarship and a significant impact on career possibilities has his or her liberty/property interest encroached upon in a very real sense,[144] and is not within the "mere defamation" category.[145]

Assuming a protected interest exists, what due process procedures are owed the student-athlete? Although due process is considered a flexible concept,[146] certain basic notions predominate. A quick response would suggest that notice and a hearing is necessary when confronted with infringement of protected interests.[147] But to so state is to give an incomplete

142. *Constantineau*, 400 U.S. at 436.

143. In Paul v. Davis, 424 U.S. 693 (1975), a photograph of the respondent was circulated which identified him as an "active shoplifter" although he was never convicted of shoplifting. No hearing was held prior to the distribution of the flyer. As a result, the respondent was warned by his employer against any further involvement. The Court held that reputation alone was not a protected liberty or property interest. Unless the damage to reputation is coupled with an impairment of the ability to exercise some other protected interest, due process protections are not triggered.

144. The question of whether a student-athlete has a property interest in a future professional career is an interesting and not thoroughly resolved question. Some cases such as Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975), view the mere expectation of a professional career as too speculative to invoke due process protection. But cases such as Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982), present a different, and perhaps more realistic view. In *Hall*, the student-athlete, a member of the university basketball team, claimed that he had been rejected from admission to a degree granting program within the university in bad faith and without due process. The Court found, after hearing, that the evidence demonstrated that if the student were not admitted to a program he would not be able to participate on the team and would lose "a significant opportunity to be a second round choice in the National Basketball Association draft . . . thereby acquiring a probable guarantee of his first year compensation as a player . . . ." *Id.* at 106. The Court continued: "The private interest at stake here, although ostensibly academic, is the plaintiff's ability to obtain a "no cut" contract with the National Basketball Association." *Id.* at 108.

145. There is, however, little support for the notion that a student has a property interest in intercollegiate competition alone. *See* Colorado Seminary v. NCAA, 570 F.2d 320 (10th Cir. 1978).

146. "[D]ue process is flexible and calls for such procedural protection as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

147. The case of Goss v. Lopez, 419 U.S. 565 (1975) represents perhaps the Supreme Court's first recognition of the application of due process to the educational system. In holding that high school students facing temporary suspension have a property and liberty interest under the fourteenth amendment, the Court stated: "At the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing." *Id.* at 579.

Any doubt as to the application of the *Goss* principles to state institutions of higher education was resolved by Board of Curators v. Horowitz, 435 U.S. 78 (1978) and Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Both cases recognized the application of *Goss* to state universities but limited the impact to instances of disciplinary actions as opposed to "academic"

response. While the content of adequate notice may readily be known,[148] providing an adequate hearing is much more difficult. Hearings may be pre-sanction or post-sanction. They may be informal meetings, or they may be formal adjudicatory events. Because of the sanctions imposed pursuant to university drug testing programs, it is necessary to examine what type of hearing will satisfy due process requirements.

A. Timing of Due Process Hearing

A hearing of some form is always required.[149] However, whether a hearing must be held prior to the denial of or infringement upon the protected interest is a function of a careful balancing of interest and analysis of concerns involved. In *Mathews v. Eldridge*,[150] the Court expressed this balancing in a three part test:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[151]

Each of these factors requires close examination in the context of a state university, not only as to whether a pre-sanction hearing must be held, but also to determine the nature and quality of the hearing if required.

1. Private Interest

The interest of the student in maintaining his or her good reputation, and a scholarship, if any, is a central concern of due process and the student alike. Without a "clean" reputation there may very well be no scholarship. Without a scholarship (for the poorest and often most vulnerable student)

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actions, i.e., failure to satisfy academic requirements, although the distinction between the two often grows thin. *See* Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132 (1987) (actions taken regarding drug use clearly fall into disciplinary category and whatever procedure that requires).

148. The timing and content of adequate notice is largely a function of accommodating competing interests. *Goss*, 419 U.S. at 579. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), was the first federal case to recognize the application of the due process clause to state supported colleges. The court found that "notice should contain a statement of the specific charges and grounds which if proven, would justify expulsion . . . ." *Id.* at 158.

149. Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

150. 424 U.S. 319 (1975).

151. *Id.* at 335.

there is no higher educational opportunity, or entrance into the professional athletic selection system — the draft (at least in football and basketball).[152]

In *Mathews*, the court found that a pre-termination hearing was unnecessary because the social security recipient's benefits could be retroactively granted with no real loss, should he eventually prevail. The student-athlete may not have a similar ability to be "made whole." If a student is suspended from the team for any length of time, subsequent reinstatement does not result in an extension of the student's eligibility for intercollegiate play under most conference or NCAA regulations.[153] A reinstated scholarship might, on the surface, appear to adequately restore a lost benefit. However, if the reinstatement of scholarship is not timely, i.e. sufficiently quick to allow for the student's education to proceed uninterrupted, then the lost scholarship may combine with an inability to proceed in school, and would result in an irreparable lost professional opportunity.

But by far the most irreparable injury is to the student-athlete's reputation itself and the professional impact that may follow. A student-athlete once associated with drugs enters a valley of rumors from which he or she will never emerge whole. The "protection" of confidentiality included in so many programs is a small shield against the public speculation that flows from the known fact that the student is no longer a "player." Once soiled, the student-athlete is a pariah in the selective professional world which is so dependent on public image and perception.

The private interests are strong but are not the only factors favoring a pre-sanction hearing. The second prong of the *Mathews* test, the risk of erroneous deprivation, is perhaps the greatest factor raising due process concerns.

2. The Risk of Erroneous Deprivation

Urinalysis, as conducted by most university drug testing programs, presents significant risks of error — referred to in scientific parlance as false-positives and false-negatives. Yet urinalysis is the testing mode of

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152. Even without the draft, the taint of association with drugs is enough to effectively destroy a professional sports career. Witness the Canadian Olympian, Ben Johnson. *See* Fost, *Ben Johnson: World's Fastest Scapegoat*, New York Times, October 20, 1988 at A27, col. 3.

In Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982) the court stated: "The plaintiff, [a college basketball player], lost existing scholarship rights; he cannot enroll in another college without sitting out a year of competition under athletic rules." *Id.* at 107-08. "The privacy interest at stake here . . . is the plaintiff's ability to obtain a "no cut" contract with the National Basketball Association." *Id.* at 108.

153. The NCAA, for example, provides that a student has only five years of eligibility and does not provide for any exception for suspension. *See* NCAA Bylaw 5-1-(d) (1986).

choice because it is relatively inexpensive, does not require medical personnel in the collection process, and is safer and less intrusive than blood testing.

The accuracy problems with urinalysis center around the concepts of (1) sensitivity (what proportion of users are properly detected by the test), (2) specificity (the ability to properly distinguish nonusers as negatives), and (3) positive predictive value (the ability to correctly identify users as positives). Additionally, the ability of drug testing to accurately indicate not only drug use, but also drug impairment, of the individual within the areas of legitimate concern to the university is also seriously questioned.[154]

The sensitivity, specificity and predictive value level of the most popular initial screening test (EMIT)[155] is low, and a disturbing percentage of false-positives have been noted.[156] Ironically, commentators have noted that the problem increases where the drug use in the subject population drops.[157] Put simply, the smaller the percentage of drug use within the student-athlete group tested the greater the rate of false-positives. This is particularly disturbing when it is remembered that despite popular opinion to the contrary, drug use among student-athletes is, in many instances, less than that among non-student-athletes.[158]

The problem of the inaccuracy of drug testing and its relationship to procedural due process, was noted in *Jones v. McKenzie*[159] where the court concluded that a hearing prior to termination was required. It is interesting that even though the inability of urinalysis to measure current impairment has received some judicial attention, the question that is seldom asked in university circles is whether cocaine or marijuana use actually significantly

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154. That is, if the purpose of drug testing is to identify and eliminate those students whose performance is impaired or enhanced by drugs, then that rationale would require that testing seek to measure the degree of such impairment. Despite this obvious goal, most tests do not seek to control for actual impairment. Instead, programs work on the assumption that any drug use in the past is currently affecting athletic performance.

155. Enzyme Multiplied Immunoassay Technique (EMIT), is one of several immunoassay methods used which employs antibodies to detect drugs. For a further discussion designed for lay understanding, see Black, *supra* note 5.

156. *See* Hanson, *Drug Abuse Testing Programs Gaining Acceptance in the Workplace*, 64 CHEMICAL & ENGINEERING NEWS 7 (1986).

157. *See* Lundberg, *supra* note 5.

158. *See* W. ANDERSON & D. MCKEAG, SUBSTANCE ABUSE HABITS OF COLLEGE STUDENT ATHLETES (Institute of Social Research, Michigan State University 1985).

159. 628 F. Supp. 1500 (D.D.C. 1986). In *Jones*, the court found that an employee (in this instance, a city school bus driver) could not be dismissed on the basis of a single test. The court noted that the manufacturer of the EMIT test and the Food and Drug Administration recommended that in light of the risk of inaccuracy, a second confirmatory test employing an alternative testing method should be used. *Id.* at 1505-06.

impairs athletic performance or increases significantly the danger factor during activity. Although the answer to the latter seems obvious, urinalysis does not measure *current* blood levels of intoxication.[160]

The use of a confirming second test is the answer to much of any scientific uncertainty that may exist as to false positives. Nevertheless, the quality and reliability of different tests may leave room for question.[161] These factors tend to support the need for a more structured procedural due process. However, the burden and cost of such procedures is a legitimate concern, and is included in the balancing test.

3. Government Interest - University Burden

The delay and the interference with the day to day functioning of a team are not factors to be ignored in the due process equation. Certainly the requirement of a hearing before any sanction is imposed following a "positive" test would be unworkable for most programs.[162] However, hearings have not traditionally been required as a matter of due process before the imposition of *any* sanctions. Courts have required pre-sanction hearings primarily where significant, tangible benefits and privileges were in danger.[163]

In the context of school administration, *Goss v. Lopez* rejected a pre-sanction hearing requirement in regards to temporary suspensions.[164]

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160. The National Institute on Drug Abuse has stated: "The positive results of a urine screen cannot be used to prove intoxication or impaired performance. Inert drug metabolites may appear in urine for several days, even weeks (depending upon the drug), without related impairment." *See* J. WALSH & R. HAWKS, EMPLOYEE DRUG SCREENING 4 (National Institute on Drug Abuse 1986).

161. *See supra* note 6.

162. A large athletic program (such as Ohio State's — with 34 intercollegiate teams) would lose the benefits of immediate action if such a program was forced to provide a hearing prior to the imposition of counseling following all positive results.

163. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Snidach v. Family Finance Corp., 395 U.S. 337 (1969). As Professor Nowak has stated:

> A pre-deprivation rather than post-deprivation process should be required wherever there is an established state procedure that would take a property interest; the state's interest in destruction of the property in such instances is minimal because the state designed system should be able to accommodate some procedure for consideration of the individual interest in the property prior to its deprivation.

NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW § 13.8 n.25 (1986) [hereinafter NOWAK & YOUNG].

164. In Goss v. Lopez, 419 U.S. 565 (1974), high school students were suspended for disciplinary reasons, without a hearing for periods varying up to 10 days. The Supreme Court held that although students had a protectable due process liberty and property interest, a hearing prior to suspension was not necessary where the student's presence posed a danger to persons or property. In such cases, the Court directed that a hearing should follow "as soon as practicable." The

However, colleges have traditionally provided pre-sanction hearings in disciplinary matters where the sanction was less than dismissal.[165] *Goss* also distinguished between sanctions imposed for academic reasons and sanctions imposed as a matter of discipline.[166] A fine line, however, based solely on dismissal or expulsion is hard to draw. The impact of other sanctions in drug testing programs can be as, if not more, devastating.

Other sanctions, including the requirement of counseling, can be considered so grave and intrusive that a pre-sanction hearing may be required, despite the burden on the university.[167] The various sanctions presented by the Ohio State program, following a "positive" drug test, present varying degrees of burden and impediments possibly triggering the need for a pre-sanction hearing.

B. Removal From All Teams for One Year and Potential Loss of Scholarship

This sanction involves the loss of intercollegiate play and the possible loss of scholarship as well as damage to reputation via adverse public perception. The risk of erroneous deprivation of these protected interests[168] within the meaning of the *Mathews* test, exists in proportion to the danger of false positives.[169] It also flows from the possibility of this sanction being imposed for "non-cooperation."[170]

The burden of a hearing on the university, within the meaning of *Mathews*, is the same for all sanctions.[171] While concerns over the health and safety of the players and the community are often relied on as justification for drug testing, there has been little evidence to support a contention that team suspension and scholarship removal *without* prior hearing is necessary in order to meet those concerns. While removal from a team and the loss of a scholarship may not be a university's equivalent of the "death penalty," it

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principles of *Goss* have been applied to Universities as well. *See* Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985); University of Missouri v. Horowitz, 435 U.S. 78 (1978).

165. *See* Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J. L. & EDUC. 337, 344 (1982).

166. In *Horowitz*, the Court limited the *Goss* decision to suspensions and dismissals that were the result of inappropriate conduct as opposed to academic failure. The Court reasoned that the dismissal of a student for academic reasons does not necessitate a hearing because such would unduly "risk deterioration of many beneficial aspects of the faculty-student relationship." 435 U.S. at 90.

167. *See* Golden, *supra* note 165.

168. *See supra* notes 154-61.

169. *See supra* note 156.

170. *See* Appendix.

171. The exception is that costs are increased if the sanction is imposed after expenditures have already been made concerning previously attempted "lesser" sanctions such as counseling.

is certainly the exercise of university penal power. At the very least, a pre-sanction hearing may be required.

C. *Suspension for Two Weeks - Conditional Reinstatement*

If removal from intercollegiate activity may reasonably trigger reputation damage and/or loss of demonstrable potential for professional earning,[172] the due process need for a pre-suspension hearing is not limited by a suspension of two weeks in duration.[173]

D. *Mandatory Counseling*

The case of *Gorman v. University of Rhode Island* presents a sobering view of the significance of the impact of forced counseling.[174] However, considering its context, *Gorman* presented a situation of required psychiatric counseling without any evidence of disease. Drug testing presents at least two significant differing factors. First, counseling flowing from a "positive" test is not a sanction imposed in the type of evidentiary void present in *Gorman* — so long as only those who test positive are required to attend counseling.[175] Second, the risk of immediate harm to a drug-user is much greater, and potentially more devastating (i.e. life threatening) in the short run, than the type of "quarrelsome" conduct, apparently believed to be evidence of an aberration of thought process in *Gorman*. Whatever harm may be generated by an erroneous referral to counseling can be corrected by a post-sanction hearing so long as confidentiality within the program is maintained and suspension from team activity is not present.

Assuming that a hearing is necessary, either as a precedent to the imposition of a sanction to otherwise, certain questions concerning the content of the hearing still remain.

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172. Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982).

173. In *Goss*, the Supreme Court found that disciplinary suspensions in public schools of 10 days required a hearing prior to suspension unless a threat to the health and safety of the community required otherwise. 419 U.S. at 581.

174. In Gorman v. University of Rhode Island, 646 F. Supp. 799 (D.R.I. 1986), a student sought to enjoin his dismissal from the defendant university. Gorman, a student activist, was involved in several verbal disputes with administration officials, which gave rise to accusations of verbal harassing and intimidation. As a result, a student disciplinary panel imposed upon Gorman the sanction of mandatory psychiatric counseling, and if deemed necessary, treatment.

After granting the plaintiff relief because of the University's failure to provide procedural due process in the form of a transcript and an impartial panel, the Court went on to state: "[T]he sanction of compulsory psychiatric treatment is a 'shocking extreme.' An individual has a constitutionally protected right to privacy and this privacy right covers the individual interest in avoiding disclosure of personal matters [and] the interest in independence in making certain kinds of important decisions." *Id.* at 814 (citing Carey v. Population Services Int'l, 431 U.S. 678 (1977)).

175. This of course assumes the validity of the testing process.

E. Right to Counsel/Access to Test Sample

The right to a hearing is meaningless without a right to be effectively heard.[176] Yet the recognition of the right to legal counsel in due process hearings has had a spotted history.[177] In the context of due process hearings regarding university disciplinary actions, the courts have often relied on the principle that "[student] rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."[178] While there has been virtually no support for the notion that there exists a right to appointed counsel, there has been a split in authority over the question of whether a student may use counsel of choice,[179] and what role the attorney, if any, plays.[180]

The need for counsel in student challenges of drug testing results and/or sanctions, is greater than the need for counsel in other disciplinary hearings.[181] In drug related disciplinary hearings, the possibility of contemporaneous or subsequent criminal prosecution, with the attendant risk of self incrimination, looms large. The fact that drug related prosecutions rely heavily on evidence procured by search, seizure and confession, heightens the significance of the university process and increases the need and the role of an attorney for the student.[182]

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176. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

177. The Court, in Goldberg v. Kelly, 397 U.S. 254 (1970), found that the interest of welfare recipients in the uninterrupted receipt of welfare benefits was so strong as to require a pre-termination hearing. The Court went on to hold that such recipients must be allowed to use retained counsel. However, the Court stopped short of requiring that counsel be provided at state expense. *Id.* at 268-69.

In *Goss*, the Court "stopped short" of requiring that students be allowed an opportunity to secure counsel. 419 U.S. at 583. The Court suggested, but did not resolve, that the presence of counsel may have an adverse impact on the teaching process. *See generally* Latourette & King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 217 (1988).

178. Nash v. Auburn University, 812 F.2d 655, 664 (11th Cir. 1987). Even in the presence of massive deprivation of property/liberty interests, i.e., permanent termination of parental rights, the Supreme Court has found that due process did not require *appointed* counsel. *See* Lassiter v. Social Serv., 452 U.S. 18 (1981).

179. Note, *Due Process Rights in Student Disciplinary Matters* , 14 J. C. & U. LAW 359, 373 (1987).

180. *Id.*

181. In *Goss*, the Court found that more formal procedures may be required in more difficult disciplinary cases. 419 U.S. at 584.

182. *See* Maness v. Meyers, 419 U.S. 449 (1975). In *Maness*, the Court recognized that even in the context of a civil deposition, counsel had the right and responsibility to advise a client of his right against self incrimination.

The use of counsel in disciplinary hearings outside the context of drug testing is not *per se* unusual.[183] The more difficult problem is to what extent the student's counsel, or the student if unrepresented, must have access to any disputed urine sample in order to adequately respond to allegations. Recognition that the presence of counsel is meaningless unless counsel is supplied the means to present an adequate defense is not new in the context of due process.[184] Yet the question of whether samples taken for scientific evaluation must be made available is only partially settled.[185]

The Supreme Court has suggested, in *California v. Trombetta*,[186] that the state has no duty to preserve breath samples for defense use because such evidence does not normally possess exculpatory value,[187] and comparable evidence might be obtained by other means. In *Arizona v. Youngblood*,[188] the Court held that even where such evidence may have exculpatory value, due process is not violated by the state's failure to preserve so long as the state acts in good faith. Urinalysis, however, does not fall into the category of breath analysis. Reliability is not firmly established where methods such as EMIT, or TLC are used.[189] Assuming a mechanism exists for preserving urine samples that is not cost prohibitive, due process may require that the university, in good faith, make available the urine sample for further testing.[190]

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183. *See* Golden, *supra* note 165, at 344-45. Dean Golden notes that 62.1% of the colleges surveyed allow for the participation of legal counsel.

184. In Kent v. United States, 383 U.S. 541 (1966), the Court recognized that a child had a due process right to a hearing prior to his transfer from juvenile to adult jurisdiction for trial. Additionally, the Court held that the child had a right to appointed counsel and that counsel, to be effective, must have access to social records relied on by the state to justify the transfer. *Id.* at 562.

185. In Ake v. Oklahoma, 470 U.S. 68 (1985), the Court considered the extent to which a criminal defendant, entitled to appointed counsel as a matter of the sixth amendment, is also entitled to the expert services of a psychiatrist at state expense in order to adequately put forth an insanity defense. Pointing out the dangers of an inaccurate resolution of the issue of sanity, the Court held that the providing of assistance in making a "scientific" defense was essential. *Id.* at 1094.

186. 467 U.S. 479 (1984). Although also a criminal case, the Court's due process discussion has implications in a civil context as well. *See* United States v. Augenblick, 393 U.S. 348 (1969).

187. The Court reasoned that the established accuracy of the intoxilyzer test indicated that defense testing would merely confirm the previous result. *Trombetta*, 467 U.S. at 488-90.

188. — U.S. —, 109 S. Ct. 885 (1988).

189. *See* Hanson, *supra* note 156.

190. Indeed, if there exists some basis for reasonably concluding that a given test is inaccurate or that it may provide exculpatory evidence there may be an obligation on the part of the university that it make such information available to the student. In a series of cases, the Court has stated that in criminal prosecutions, as a matter of due process, the state is obligated to disclose exculpatory or favorable evidence which it may have in its possession. *See* United States v. Bag-

F. Impartial Hearing Panel/Standard of Proof

A university that conducts and analyzes its own drug tests puts itself in an awkward, but not necessarily, unconstitutional position. The precepts of due process have traditionally recognized that "[a]n impartial decisionmaker is a basic constituent of minimum due process."[191] However, the fact that both investigation of drug use *via* testing and administrative review of subsequent determinations may take place within the same university or program does not act to deprive the individual of impartiality or due process.[192]

In any disciplinary hearing pertaining to drug testing, the standard of proof must at least be that of a preponderance of the evidence.[193] However, in *Smyth v. Lubbers*, the court suggested the seriousness of the consequence can demand a higher standard.[194]

The application of due process to the consequences of drug testing at the college level is inevitable. The extent to which it will apply, and the means by which it will be implemented, will be decided largely on a case by case basis, in accordance with the traditional due process analysis.[195]

VII. PART III - EQUAL PROTECTION IMPLICATIONS OF UNIVERSITY DRUG TESTING

The decision to subject a segment of the student body, i.e., student athletes, to drug testing, while excluding non-athlete students, raises questions of equal protection. Discrimination by the state university is not always illegal or unconstitutional. Only discrimination for legally unacceptable reasons is proscribed.[196]

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ley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

191. Megill v. Board of Regents, 541 F.2d 1073, 1079 (5th Cir. 1976); *see also* Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

192. *See* Withrow v. Larkin, 421 U.S. 35 (1975). Persons involved in the investigation may actually sit on the hearing panel as long as impartiality can be otherwise insured. *See, e.g.*, Hilman v. Elliot, 436 F. Supp. 812 (D.C. Va. 1977); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968).

193. Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

194. *Id.* at 799. "However, given the nature of the charges and the serious consequences of conviction, the court believes the higher standard of 'clear and convincing evidence' may be required . . . the court recommends that the college give serious consideration to adopting the 'clear and convincing' standard for future cases." *Id.*

195. *See* Rochin v. California, 342 U.S. 165 (1952).

196. Equal protection under the fourteenth amendment guards against only unreasonable distinctions. Rinaldi v. Yeager, 384 U.S. 305 (1966).

In determining if and when state sponsored discrimination exceeds constitutional boundaries, two standards have developed. The first standard examines whether the basis for discrimination between similarly situated individuals or groups is a "suspect classification," requiring strict scrutiny by the court,[197] or whether the discriminatory scheme impairs a constitutionally protected fundamental interest. If a "suspect classification" or "fundamental interest" is found to exist, the state has the responsibility[198] to show that discriminatory conduct furthers a legitimate, compelling state interest.[199]

The second standard requires that there exists a rational relationship between the discrimination sought to be justified, and a legitimate state interest which is furthered by the classification.[200] The state interest in avoiding embarrassment and in deterring drug use is certainly legitimate, and initial statistics would suggest that testing has in fact been effective in furthering these goals. However, whether the "compelling" interest test would be satisfied is another question.

In the context of student drug testing, classifying students as athlete/non-athlete is not a "suspect" classification in that it does not share the characteristics normally associated with such invidious actions. Unlike race or alienage, the student-athlete status does not involve any immutable, insular characteristic, traditionally protected. Rather athletics is an option voluntarily engaged in by the student.

There is perhaps more that can be said about the "real" suspect class question created by the current approach to random drug testing. While there does not appear to be supportive empirical data currently available, it does nonetheless appear to be true that the true focus of random drug testing for cocaine and marijuana, is the Black athlete. Public concern and university action has sprung primarily from media attention to drug use among athletes in the area of basketball and football; sports that are disproportionately represented by Black athletes. The athletes "caught," like Len

197. Korematsu v. United States, 323 U.S. 214 (1944). Suspect classifications have generally been found to exist where state discrimination was based on immutable characteristics of the individual such as race or nationality. Carolene Products v. United States, 304 U.S. 134 (1938).

198. However, in Washington v. Davis, 426 U.S. 229 (1976), the Court indicated that the burden is on the plaintiff to prove that a seemingly neutral provision has an impermissible discriminatory effect.

199. *Korematsu*, 323 U.S. at 214.

200. Vance v. Bradley, 440 U.S. 93 (1979). The "lesser" standard of rational relationship has traditionally been applied to classification schemes among student-athletes and between student-athlete and non-student-athletes. *See* Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974) (upheld the NCAA rule setting the minimum grade point average necessary for eligibility); *see also* Jones v. Wichita State Univ., 698 F.2d 1082 (10th Cir. 1983).

Bias, have predominately been Black. While race certainly does not entitle or excuse an athlete in the use of illegal drugs, it may well play a role in the willingness to invade protected interest.[201]

If, in fact, the focus of a university drug testing program will be on sports in which Black athletes predominate, then is a hidden suspect class created requiring the strictest of scrutiny?[202] The notion of disparate impact has received recognition in cases of racial discrimination under Title VII.[203] For equal protection, however, proof of disparate impact alone i.e., Non-Whites affected disproportionately, is not sufficient.[204] Thus, despite the particularly disproportionate burden of drug testing scrutiny that may be borne by the Black athlete, it is unlikely that the administration of the testing program will ever produce the evidence of intent necessary to satisfy an equal protection claim. Suspect classifications, based on race, are therefore not a particularly profitable analytic tool in this instance.

While the question of "suspect" classification may be easy to resolve, the problem of whether a fundamental interest sufficient to trigger strict scrutiny is involved, is another matter.[205] Fundamental rights, for purposes of equal protection, are generally considered to be those rights which are "explicitly or implicitly guaranteed by the Constitution."[206] In that context, fourth amendment protection associated with the search of the person *via* drug testing would appear, as a matter of logic, to be the type of guaranteed right protected by the more stringent test of equal protection analysis. However, "[t]he life of the law has not been logic: it has been experience."[207] Experience has demonstrated that state action "which classify

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201. *See* Terry v. Ohio, 392 U.S. 1 (1967).

202. Note that to some extent Ohio State avoids this problem by planning to test all student-athletes, in all sports programs. *See* Appendix. However, to the extent that administration of the program results in more frequent testing in football and basketball (presumably because of their high visibility), the disparate impact may still occur.

203. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

204. In Arlington Heights v. Metropolitan Hous. Auth., 429 U.S. 252 (1977), the Court held that disparate impact alone was insufficient to show that the defendants' rezoning denial violated equal protection. Despite evidence that the racial impact of the defendants' actions was known, the Court held that equal protection requires proof of discriminatory intent. Discriminatory intent may be shown by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers. *Id.* at 264-68.

205. Although the concept of "strict scrutiny" in instances of infringement of "fundamental rights" has been ingrained in our analytical doctrine for years, see Graham v. Richardson, 403 U.S. 365, 375-76 (1971); Kramer v. Union School Dist., 395 U.S. 621 (1969); and Shapiro v. Thompson, 394 U.S. 618 (1969), how fundamental rights are determined for purposes of equal protection is less than clear.

206. San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 33-34 (1972).

207. O.W. HOLMES, COMMON LAW 1 (1881).

persons in terms of their abilities to exercise rights which have specific recognition in the first eight amendments do not generally arise as equal protection issues."[208] Rather, such actions are normally challenged as a "violation of the specific guarantee without any need to resort to equal protection analysis."[209] One exception, that might ostensibly be of significance in the context of state university sanctioned drug testing, is the possibility that such conduct may infringe upon fundamental rights of privacy constitutionally protected by the equal protection clause, independent of the ambit of the fourth amendment.

The right to privacy has found its place among those small lists of fundamental rights which invoke strict scrutiny analysis.[210] However, privacy recognition for equal protection purposes has centered around issues of personal choice in matters of personal lifestyle. The use of "recreational" drugs (cocaine and marijuana) which is the focus of much of the modern drug testing effort, is unlikely to be afforded the constitutional protection of privacy as a matter of personal choice.[211] Assuming a lack of fundamental interest, the segregating of athlete from non-athlete for purposes of drug testing, does not violate equal protection.[212]

VIII. CONCLUSION

The student-athlete often exists in a fishbowl world of public scrutiny. His or her every activity becomes food for public consumption. When students in this public light fall victim to the lure of a societal vice such as drugs, the public often feels betrayed and outraged by the gladiator's fall from grace. The concern generated by athlete drug use is thus both one of disapproval of lifestyle and a need to mold change.

In this, the beginning of the 1990s, public sentiment against drug use has manifested itself by marking the drug user, not as a victim but as a perpetrator. Moreover, there is a firmly held notion among many that drug use is a matter of free choice, and as such all one need do is "just say no."

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208. NOWAK & YOUNG, *supra* note 163, at 782. "In these instances the denial of the right to one class of persons is likely to be held a violation of the specific guarantee without any need to resort to equal protection analysis." *Id.*

209. *Id.*

210. *See* Carey v. Population Services Int'l, 431 U.S. 678 (1977); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

211. However, the question is very much alive where broad spectrum drug testing programs test for wide ranges of legal as well as illegal substances. An individual right to personal choice regarding over-the-counter products and legally prescribed medicines may very well create a privacy interest sufficient to invoke strict scrutiny.

212. *See* Moreland v. Western Pa. Interscholastic, 572 F.2d 121 (3d Cir. 1978).

In this context, random drug testing serves the purpose of deterrence through fear of detection.

Society pays a price as well as receives a benefit from random drug testing. Basic principles concerning the sanctity of privacy and the necessity of due process are strained by programs such as Ohio State's. The testing of student-athletes at state universities represents a significant expansion of governmental intervention which goes far beyond concerns for public safety. The relative unimportance of athletics in comparison to law enforcement or public transportation makes it hard to justify such intrusions on grounds of strong governmental interest. Still, it would be naive to suggest that the state will or should turn its back to this serious social problem. What is needed, however, is not uncontrolled urination on demand but comprehensive education and disciplined control of illicit sources.

The acceptability of random testing of student-athletes should not be judged by the lack of student outcry or publicly expressed indignation. The student-athlete exists on campus only so long as financial resources are made available and "playing time" is allowed. Under such circumstances, the student is in the worst position to denounce the invasion of his or her rights and will wisely accept such action with silence.

While cases such as *Von Raab* and *Skinner* may indicate judicial tolerance of drug testing, it should not be assumed that such tolerance is unlimited. Grave issues still remain concerning the fourth amendment implications of random drug testing. Governmental invasion of the restroom must of necessity and social sensibilities, have limits. Requiring that at least some level of suspicion exists before state intrusion into so private a function as urination is not impractical or unreasonable. Articulable standards for determining suspicion exists and can be used without causing the destruction of athletic programs. As suggested by the facts in *Von Raab* and *Skinner*, technological advances may reduce the need for the significant intrusion privacy occasioned by direct observation of urination.

Due process is a concept that requires more than mere lip service. A realistic understanding of the student-athlete makes it clear that he or she has much to lose. The damage that can be caused by the identification of the student-athlete with drug use, is serious and irreparable, regardless of whether such an association is rightfully or wrongly made. To assure due process, universities must do more than is currently being done. More resources will need to be spent on assuring accuracy and reviewability of test results. Such costs may well force universities to reconsider whether the benefit of drug testing is worth that cost.

Finally, it is important to remember that the path to hell is often strewn with good intentions. The desire to force students to do what is good for

them may mask the greater societal harm of destroyed personal integrity and individual rights. Loss of privacy, dignity and reputation, is too high a price to ask the student-athlete to pay.

IX. APPENDIX

On July 25, 1986, the Ohio State University sent to all parents and/or guardians of Ohio State student-athletes the following program description together with a consent form which all athletes were required to read and sign.

OHIO STATE UNIVERSITY
Department of Intercollegiate Athletics
Drug Education and Testing Program
1986-87

The Department of Intercollegiate Athletics of the Ohio State University firmly believes that the use of drugs and alcohol can have a negative effect on the performance of the student athlete, both in the classroom and in sports. This program is designed to deal with this critical area.

A. Purpose of Drug Testing

Although educational efforts will continue to be a major thrust of the department, a program of testing of the urine of student athletes will be undertaken as an adjunct to this program. The purpose of drug testing is as follows: (1) To serve as a deterrent to drug or alcohol use by the athlete; (2) To identify athletes who are addicted to substances; (3) To promote education and arrange treatment for the athlete who needs help; (4) To protect the integrity of the Ohio State University.

Every attempt has been made to protect the rights of the individual student athlete and the institution.

B. Method of Drug Testing

All student athletes shall be informed in writing about the drug testing program. A copy of this program will be given to the student athlete and a copy sent to each parent or guardian.

The Team Physician shall explain to the members of each squad the procedures of the drug testing program and answer any questions. A consent form for testing of urine samples and authorization for limited release of information shall be given to each athlete to sign.

Tests will be primarily conducted for drugs of abuse, such as amphetamines, cannabinoids (substances contained in marijuana), cocaine, and other controlled substances. They may also include procedures to detect anabolic steroids and other so-called performance enhancing drugs. All tests will be performed on urine.

The testing may be announced or unannounced. Urine will be collected by professional personnel and will be numbered. The trainer will match the individual player with a master list that is prepared so that the signature of the athlete will correspond with the number on the specimen bottle. The specimen will be transported to the clinical laboratory at Ohio State University Hospital, where the director of the laboratory will proceed with the testing. The master list of numbered urine will be given to the Head Team Physician. He and he alone will know the identification of the individual athlete. Refusal to provide a urine specimen will be considered a positive test result.

C. Dealing with Positive Tests

If the results of the urine tests are positive, these results will be given to the Team Physician by number. The Team Physician will inform the athlete of the presence of a substance in his or her urine. The Team Physician will advise the athlete of the nature of the substance and the health hazards involved.

The Team Physician will have the authority, under the consent form, to privately advise the Head Coach, Head Trainer, Drug Counselor, or other necessary athletic staff personnel of the nature and extent of the substances present in his/her system.

Drugs banned for use by the student-athlete will be divided into three categories. Sanctions will be imposed differently in each of these groups.

GROUP A

Marijuana and Hashish (THC)

(Street names: grass, pot, weed, tea, Mary Jane)

GROUP B

Stimulants - Amphetamines, Ritalin and related compounds.

(Street names: uppers, pep pills, bennies, dexies, speed)

Depressants - Methaqualone, barbiturates, diazepam and related compounds.

(Street names: downers, stumblers, ludes, sopors, red devils, yellow jackets and rainbows)

Hallucinogens - LSD, PCP, Mescaline and related compounds.

(Street names: acid, scramblers, mind benders)

Anabolic Steroids - Winstrol, Dianabol, Deca-Durabolin and related compounds.

GROUP C

Cocaine and Heroin *SANCTIONS TO BE IMPOSED IN THE CASE OF POSITIVE TESTS ARE AS FOLLOWS*:

GROUP A - THC

First Positive

1. Probation
2. The Head Coach will be informed of the results of the test.
3. The Team Physician will discuss the positive test with the student-athlete. If the athlete admits to a problem with the substance he/she will be referred to a drug counselor. If the athlete refuses counseling or denies a problem with the substance, weekly urine tests will be instituted and continued for the remainder of their career. Those athletes going directly to counseling will also be tested weekly.
4. There will be no sanction imposed

Second Positive - (any drug in groups A, B, or C)

1. Intrasquad discipline by the Head Coach. This will vary from sport to sport but will involve some punishment which will be meaningful to the athlete.
2. Counseling is mandatory.
3. Drug tests will be performed weekly for the remainder of the career of the athlete.

Third Positive - (any drug in groups A, B, or C)

1. Immediate suspension from the squad (minimum of 2 weeks).
2. Evaluation by a Drug Counselor and regular attendance to whatever program is suggested.
3. Reinstatement can be considered after a period of time but also must be approved by the Head Coach, Team Physician and Director of Athletics.
4. Weekly drug tests for the remainder of the athletic career.

Fourth Positive - (any drug in groups A, B, or C)

1. Removal from the squad for a minimum of one year. Financial aid *may* be continued as long as the athlete follows certain guidelines (attendance at class, continued drug testing and continued drug counseling).

GROUP B - Stimulants, Depressants, Hallucinogens & Anabolic Steroids

First Positive

1. The Coach will be informed of the results of the test.
2. Major intrasquad discipline shall be imposed by the Head Coach.
3. Drug counseling is mandatory.

4. Weekly drug testing will be done for the career of the athlete.

Second Positive - (any drug in groups A, B, or C)

1. Immediate suspension from the squad (minimum of 2 weeks).
2. Evaluation by a Drug Counselor and regular attendance to whatever program is suggested.
3. Reinstatement can be considered after a period of time but must be approved by the Head Coach, Team Physician and Director of Athletics.
4. Weekly drug tests for the remainder of the athletic career.

Third Positive - (any drug in groups A, B, or C)

1. Removal from the squad for a minimum of one year. Financial aid *may* be continued as long as the athlete follows certain guidelines (attendance at class, continued drug testing and continued drug counseling).

GROUP C - Cocaine and Heroin

First Positive

1. Immediate suspension from the squad (minimum of 2 weeks).
2. Evaluation by a Drug Counselor and regular attendance to whatever program is suggested.
3. Reinstatement can be considered after a period of time but must be approved by the Head Coach, Team Physician and Director of Athletics.
4. Weekly drug tests for the remainder of the athletic career.

Second Positive - (any drug in groups A, B, or C)

1. Removal from the squad for a minimum of one year. Financial aid *may* be continued as long as the athlete follows certain guidelines (attendance at class, continued drug testing and continued drug counseling).

Any athlete who does not report regularly for weekly testing or misses a counseling session will be subject to suspension or dismissal. It is possible that a formal drug rehabilitation program (in-patient) will be recommended for the athlete. The Athletic Department will be recommended for the athlete. The Athletic Department will encourage and be supportive of the student-athlete's participation in appropriate drug treatment but cannot assume financial responsibility for this treatment.

We strongly urge that parents avail themselves of the University insurance program which assumes some of the expense for illness and injury not athletically related. (See Student-Handbook).

The Department of Intercollegiate Athletics will make every effort to keep test results confidential except as provided above and will oppose disclosure thereof to any persons within or outside the University.

D. General Principles

(1) As a required condition for any student to be a member of an Ohio State varsity intercollegiate athletic team, he/she must agree to participate in the Athletic Department's Drug Testing Program. Such monitoring is considered an extension of the ongoing physical examination of our athletes and is in the best interests of both the students and the University to conduct a reasonably comprehensive Drug Testing Program.
(2) At a minimum, all Ohio State varsity athletic teams shall be tested four times annually.
(3) All positive test results are considered cumulative for the career of the Ohio State student-athlete.
(4) Any drug not specifically listed on the penalty chart is subject to classification by the team physician for inclusion on the chart.

Any exception to the above regulation must be authorized by the Director of Athletics.

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

TO: TEAM PHYSICIANS
THE OHIO STATE UNIVERSITY
COLUMBUS, OHIO 43210

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

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

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

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

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

_____ _____

Signature Date

_____

Name (Please Print)