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CHEMICAL WARFARE: BATTLING STEROIDS IN ATHLETICS

JIM THURSTON*

If I said that I could put the shot 90 feet with the aid of a sling or two miles with a cannon, you would rightly tell me that I had missed the point of the sport.1

I. INTRODUCTION

In a blistering 9.79 seconds, Ben Johnson shattered the world and Olympic records in the 100-meter dash;2 he also shattered the myth. To many, the exposure of Ben Johnson symbolized a powerful blow against anabolic steroids;3 to others it signified the greatest advertisement contradicting the myth.4 Prior to Johnson, the myth surrounding steroid use was that only large, bulky, lethargic men and Eastern Bloc women used them. Anabolic steroids would increase size and strength while decreasing agility and speed. Although those within the steroid world knew this was inaccurate, the public perception was that steroid use was limited to those sports where size and strength were the essential prerequisites.

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2. See Benjamin, Shame of the Games, TIME, Oct. 10, 1988, at 74. Johnson’s time of 9.79 in the 100 meter dash eclipsed his own previous world record of 9.83, which he set in the 1987 World Championships in Rome. Johnson also surpassed Jim Hines’ Olympic record of 9.95 set during the 1968 Mexico City Olympic Games. However, after it was discovered that Johnson used anabolic steroids, he was stripped of his world record and gold medal.
In recent years, the use of steroids has reached epidemic levels in many sporting arenas. Many athletes believe that taking anabolic steroids will enhance their performances, and regard the use of steroids as legitimate as any other aspect of training. However, to the medical community, athletes are making a Faustian bargain with steroids. Physicians and researchers have expressed concerns over the potential risks attributed to steroid use. To some medical organizations, the illicit use of steroids to enhance athletic performance is the most haphazard and questionable medical “experiment” in modern times.

Despite the medical evidence that the introduction of steroids into one’s biological system has potentially harmful effects, some athletes believe they should be allowed to take any substances which might improve their performance. Athletes understand and accept the risks associated with these drugs in exchange for the benefits they hope to obtain. Athletes, like any other members of society, have legitimate expectations of privacy and should not be arbitrarily singled out and subjected to drug testing, particularly since steroids affect only the user and do not threaten the health and safety of others. Society does not prevent people from smoking cigarettes despite the fact that the surgeon general has warned that smoking is both addictive and hazardous to an individual’s health. And like cigarettes, neither state nor federal laws prohibit the use of steroids.


6. See infra notes 43-60 and accompanying text for an evaluation of the medical literature.

7. See infra notes 87-106 and accompanying text.

8. See, e.g., Schmeck, Concern Rises Over Steroids, N.Y. Times, Aug. 19, 1987, at D-26, col. 2. The American College of Sports Medicine deplors the use of steroids in sports and has issued a recent statement that steroids can have adverse psychological effects as well as physical effects.

9. See, e.g., Courson, Steroids: Another View, SPORTS ILLUSTRATED, November 14, 1988, at 106. The author, Steve Courson, a former NFL lineman, argues that steroids cannot be eliminated from football, and questions why steroids are treated any differently than painkillers or sleeping pills. Courson suggests that athletes should be allowed to take steroids and have their systems monitored by physicians for possible ill effects. See also Johnson, Special Report: Getting Physical - And Chemical, SPORTS ILLUSTRATED, May 13, 1985, at 38.

10. See Courson, supra note 9.

11. This article, however, disputes the claim that steroids only affect the user. See infra notes 396-99 and accompanying text.

Ethically, the use of steroids raises serious questions as to what constitutes healthy competition. The introduction of performance-enhancing drugs has threatened both the integrity of the Olympic Games, and professional sports in general. The ethical argument maintains that competition should be honorable, and that the taking of steroids is both cheating and a contradiction to the meaning of sport. However, the ethical argument based on the concept of fair play is unpersuasive to the individual who is motivated to win at any physical cost. Further, the enormous potential monetary benefits and celebrity status associated with winning an Olympic medal or playing at the professional level outweigh any ethical questions. To other athletes, it is not even an ethical question; it is a simple matter of survival. Since the competition is using steroids, so must they in order to remain competitive.

The reality is that most sports associations take a hypocritical approach to steroids: they publically denounce steroid use, yet readily offer contracts to superior athletes who use them. The reason for the casual attitude to-
wards steroid use by team owners is that unlike street drugs, which may
adversely affect a player's performance, anabolic steroids improve their
performance. Unfortunately, this see-no-evil attitude sets a poor example,
particularly for our young athletes.

Recently, the Soviet Union and the United States signed a bilateral
agreement for twice-a-year random testing of the elite athletes of each coun-
try while these athletes are training. This is the first international agree-
ment on mandatory random testing, and it is a major achievement for
combating drug use. As one international athlete stated, present drug
testing procedures are analogous to a speed trap of which everyone in town
knows. Many of these athletes “speed” until they approach the known
danger zone, at which time they simply slow down to avoid apprehension.
This rationale explains why many athletes believe only the stupid or care-
less get caught; those who press a little too hard on the accelerator or slow
down a little too late. Thus, it is time to start catching the “smart” athletes,
too.

that has been publically denounced by the N.F.L., apparently did not diminish the Cowboy's
interest in signing him. As stated by Abby Hoffman, the general director of Sports Canada:
"Either we decide to seriously deal with [steroid] drugs in sports or we turn a blind eye and carry
on with the hypocrisy." See Vecsey, supra note 3, at D-32, col. 6.

17. See infra notes 51-60 and accompanying text.

18. Dr. James Puffer, chief of the division of family medicine at the University of California-
Los Angeles School of Medicine and the chief physician of the United States Olympic team in the
1988 Summer Games states: “[M]any of us have been quite alarmed by the increasing number of
high school and junior high school athletes that were seen experimenting with these substances
[anabolic steroids]. . . . It has become frightening." See Schmeck, supra note 8; see also Charlier,
Among Teen-Agers, Abuse of Steroids May Be Bigger Issue Than Cocaine Use, Wall St. J., Oct. 4,
1988, at A-20, col. 1. The article reports that one study places at 7% the number of American
high school males who have taken or are taking steroids. Id. William Buckley, an assistant pro-
fessor of physical education at Penn State University, conducted a study for the Journal of Ameri-
can Medical Association that found that 6.6% of the male high school seniors—or as many as
500,000 nationwide—use or have used anabolic steroids and that more than two-thirds of them
first tried steroids when they were sixteen or younger. Buckley further found that this is not
casual use, but that the young athletes are “stacking the drugs,” see supra note 74, and some 30%
were using needles, see supra note 77. Scorecard, Steroids and the Young, SPORTS ILLUSTRATED,
December 26, 1988, at 21. However, the use of anabolic steroids varies from school to school,
region to region. One Florida high school conducted a non-scientific survey that revealed 18% of
the male student body responding had taken the drug. See Ingwerson, Steroids Use Reaching
These statistics are particularly alarming considering that in 1986, the number of high school
students who played football was 953,506. See Lapchick, The High School Athlete and the Future

19. See Janofsky, U.S. and Soviet Union Approve Plan on Drug Testing of Athletes, N.Y.

20. Id.

This article will first trace the origins of steroid use and examine why and how athletes use steroids and where they obtain them. It will then examine the recent medical literature to determine the positive and negative effects of anabolic steroids on the human body, and why present testing procedures are ineffective in detecting and deterring steroid use. Next, it will evaluate recent decisions in the courts to determine whether a plan for random testing could withstand the various constitutional challenges. Based upon these conclusions, this article will offer a proposed plan for the elimination of steroids from our arenas and playing fields.

II. ANABOLIC STEROIDS AND THEIR EFFECT ON ATHLETES

A. The History of Steroids

The mythical Herculean qualities associated with steroid use arose in the nineteenth century. A European physiologist injected himself with testosterone, which was extracted from a rooster's testicles, and claimed an enhancement of his virility. Testosterone, the male sex hormone, was first isolated in the twentieth century in experiments conducted by Kochakian and Murlin. In 1935, they recognized the potential anabolic effect of promoting tissue growth after injecting testosterone into castrated dogs. These dogs demonstrated a decreased protein breakdown and achieved a positive nitrogen balance. The first clinical use of testosterone occurred in 1938 when physicians injected it into underweight and systemically ill patients to stimulate weight gain. The hormone also was used as a weight gain stimulus for the survivors of the German concentration camps.

The first reported use of steroids in a non-medical setting occurred during World War II. Steroids were administered by Nazi doctors into Ger-

24. Id.
25. Id.
26. Id.
27. Id. The best known legitimate use of anabolic steroids in medicine is to treat extremely serious cases of anemia. Anabolic steroids often can stimulate the bone marrow which is the part of the body where most of the red and white blood cells originate. Anabolic steroids can also help elderly women who suffer osteoporosis and younger children with growth problems.
man soldiers to enhance their aggressiveness. The Soviet Union noted the Nazis' use of the drug and recognized that enhanced aggressiveness could be desirable in athletic competition. The Soviets experimented with steroids in the early 1950s, and it is believed that they were used in the 1952 Helsinki Olympic Games.

The introduction of steroids in the United States is often attributed to the late Dr. John Ziegler, the team physician for the United States weightlifters at the 1954 Vienna World Powerlifting Championships. A Soviet physician disclosed to Ziegler that some of the members of the Soviet team were using testosterone as an ergogenic aid to enhance their strength. Ziegler was significantly impressed with the results and began conducting some case studies on American lifters. The result was the development and introduction of Dianabol, an anabolic steroid with fewer masculinizing properties than testosterone. Dianabol became well known in the athletic arenas. By the 1956 Melbourne Olympic Games, steroid use had escalated to the point that many Olympians in strength events were either using them, or were aware of their performance enhancing abilities.

At their inception, steroids were used almost exclusively by weightlifters and throwers in track and field. Athletes in other events feared large, hulking muscles would make them lethargic and less agile. Steroid use was limited particularly to those events that required short, explosive muscle power, but not endurance or speed.

However, as more athletes began to experiment with steroids, the lethargic, non-endurance myth began to erode. By the mid-1960s, the first examinations for steroids were conducted in Belgium at an international competition in cycling. By 1968, the International Olympic Committee (IOC) medical commission established a list of banned substances and introduced its first Olympic drug testing program at the 1968 Mexico City...
Olympic Games. Anabolic steroids were not included on the list because no laboratory method was sophisticated enough or accurate enough to detect them routinely. It was not until the 1976 Montreal Olympic Games that technology was advanced enough to detect anabolic steroids in a urine sample.

Steroid use has not been limited to the amateur athletic arenas. Their use has spread into the professional ranks, particularly in football. Steroids are custom-made for football players because they give them added size and increased aggressiveness. There is no consensus regarding when or by whom steroids were first introduced into professional football, but today many players believe it is the most abused drug in the National Football League (NFL).

B. The Physical Effect of Steroids on the Athlete

The two major classifications of steroids are anabolic and corticol. Corticosteroids became widely available after cortisone, a steroid with anti-inflammatory properties, was first synthetically manufactured in 1948. Corticosteroids are used to treat a number of disorders, including arthritis and inflammatory injuries. Many athletes have had injections of corticosteroids to reduce the inflammation resulting from an injury. Unlike anabolic steroids, corticosteroids are not used to promote muscle growth.

Anabolic steroids are derivatives of the male sex hormone testosterone. Anabolic steroids were developed in an attempt to dissociate the androgenic, or masculinizing effects of testosterone use from the anabolic effects. The term “anabolic” means “constructive metabolism,” implying

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38. Id.
40. See Mellion, supra note 23, at 115.
42. Id.
44. Id.
45. Id.
46. Id.
47. See Haupt & Revere, supra note 5, at 469.
48. Id. One of the secondary sex characteristics of males, distinguishing them from females, is a relatively large muscle mass. The “anabolic effect” or tissue building effect of testosterone is largely responsible for the disparity in muscle mass between men and women. The “androgenic effect” of testosterone is responsible for the maintenance of growth of the primary male sex characteristics. However, even today, no synthetic steroid has been able to completely separate the anabolic from androgenic effect in steroids. See Stone & Lipner, supra note 22.
that these substances promote the construction of tissue. Unlike corticosteroids, anabolic steroids are not used legitimately for the treatment of injuries.

Athletes take anabolic steroids to enhance and maximize athletic performance. Three major benefits are attributed to steroid use. First, athletes can attain a greater increase in lean muscle mass and strength when anabolic steroids are used in combination with rigorous training than could be expected from strenuous training alone. Specifically, anabolic steroids promote the synthesis of protein in the skeletal muscle cells by promoting nitrogen retention and perhaps by increasing ribonucleic acid synthesis. Steroids reverse the catabolic effects of glucocorticosteroids that are released by individuals during periods of significant stress, such as athletic training or competition. This results in increased muscle growth and muscle mass, which is beneficial to athletic performance, particularly in those events that require explosive muscle power.

The second major benefit of steroid use is that athletes taking anabolic steroids experience a state of euphoria and diminished fatigue following heavy weight training or running workouts, and the athletes' bodies suffer less muscle breakdown. This decrease in muscle breakdown and recovery time permits more frequent training sessions at higher intensity and for longer periods of time. This effect is maintained as long as the athlete continues the steroid regimen.

The third benefit is that many athletes take steroids because of the increased aggressiveness these drugs are believed to stimulate. Normal psy-

50. The outspoken Seattle Seahawks linebacker, Brian Bosworth, formerly of the Oklahoma Sooners, was suspended from participating in the 1987 Orange Bowl for testing positive for anabolic steroids. Bosworth, like other athletes caught using anabolic steroids, claimed that they were used for treatment of a shoulder injury. Dr. Bentran Zarins, a Harvard Medical School orthopedic surgeon and team physician for the New England Patriots and the Boston Bruins stated that anabolic steroids are not, and never have been, used to treat injuries. "I have never done it or seen it done." He stated further: "I doubt they confuse the two. I think most people who take anabolic steroids know what they are taking." See Cowart, supra note 28, at 421. Reporters for SPORTS ILLUSTRATED interviewed several NFL team doctors, and none of them could think of a valid medical reason for giving anabolic steroids to a player. See Johnson, supra note 41, at 42.
51. See Mellion, supra note 23, at 115.
52. See Bergman & Leach, supra note 5, at 171.
53. See Haupt & Rovere, supra note 5, at 474.
54. See, e.g., Lamb, infra note 74.
55. See Bergman & Leach, supra note 5, at 171.
56. Id.
57. See Lamb, infra note 74, at 474-75.
58. See Mellion, supra note 23, at 115.
chological behavior becomes "polarized," resulting in a more hostile, aggressive and assertive nature. This increased aggressiveness may drive athletes to train harder and longer without the usual fatigue. For some of the heavier users, the effects do not necessarily go away as soon as the competition is over.

C. Why Athletes Take Steroids

Many professional, collegiate and high school athletes are engaged in one of the largest, and perhaps most lethal, experiments when they introduce anabolic steroids into their systems. The use of steroids by athletes in the United States has been estimated as high as one million persons, or one in every two hundred fifty people.

Sports have evolved from a recreational pastime to a lucrative money-making venture, not only at the professional level, but also at the Olympic and collegiate levels. Speed and strength have opened the door to financial opportunities, and a perplexing marriage has been forged between sports and steroids. The concept of sports as a fun, recreational activity has been superseded by sports as a business.

Many athletes will sell their bodies to steroids for an opportunity to win a gold medal or a place on a professional or college team. Some of these athletes stand on the verge of fame and fortune, and if they can obtain even the slightest edge on their competition through the use of anabolic steroids, they care little if it is outlawed in international or intercollegiate competition. To the elite athlete, these small, incremental increases in muscular performance may constitute the difference between winning and losing, and these changes may be perceived as critical to the athlete. Since the introduction of steroids to sports, the reason for steroid use has remained the same: the pursuit of the winning edge.

It is clear from the testimonial evidence that athletes have the potential to engage in extreme behavior if they believe they can achieve this winning

59. See Cowart, supra note 28, at 421.
60. See Schmeck, supra note 8. For an example of the devastating effects of steroids see Chaikin & Telander, infra note 62.
61. See Telander, A Peril For Athletes, SPORTS ILLUSTRATED, Oct. 24, 1988, at 114. Dr. Forest Tennant, a California researcher estimates "as many as one million athletes," or one in every 250 persons in the U.S. are using anabolic steroids. See Benjamin, supra note 2, at 76. Terry Todd, a physical education teacher, told the California State Assembly that two to three million persons, athletes and non-athletes, are using anabolic steroids. See Millions of Americans Take Steroids, Says Professor, Reuters N. Am Serv., Aug. 13, 1985.
The amount of money that Olympic stars and professional athletes can now receive has raised the risks athletes are willing to take. For other elite athletes, there is no choice. Many athletes do not want to use steroids, but they concede that they must because they believe other athletes on competing teams are using them. Some athletes feel compelled to experiment with anabolic steroids so they can become the best at this elite level of competition. As stated by a New York Jet rookie offensive tackle:

"I played against a lot of guys that I know for a fact were using steroids. I saw them one year, the next year they came back 15 pounds heavier, stronger and they looked different. They played better and hit harder. That was one piece of the pie in my decision. I will do anything to become the best lineman in the N.F.L."

For many, however, it is not a matter of being the best; rather it is simply a matter of survival. "It's big in the USFL [United States Football League, now defunct] because if you don't make it here, you're thrown right out into the real world." For those engaged in sports, society's emphasis on athletics has changed from fair play and participation to winning and competition. Many athletes feel that they are under tremendous pressure to do anything to win. This emphasis on win at all costs is evident not only at the elite levels of competition, but has descended to the high school students and even younger.

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62. See, e.g., Chaikin & Telander, The Nightmare of Steroids, SPORTS ILLUSTRATED, Oct. 24, 1988, at 82-102. The article recounts the horrifying exploits of a steroid using collegiate football player, Tommy Chaikin. Chaikin attributes much of his off-the-field aggressiveness to steroids, which included many fights, and even pulling a loaded shotgun on a boy delivering pizza because in Chaikin's enraged steroid state, he believed it was funny. Chaikin's nightmare culminated one night when he sat on his bed with a loaded .357 magnum revolver pressed under his chin, fortunately he was interrupted before he could pull the trigger.

63. See supra notes 14 and 15.

64. For many United States Olympic athletes, there is a feeling that the Eastern Bloc countries have been successful in masking their athletes' steroid use. These athletes believe if they do not also take steroids they will be placed at a physical disadvantage. See Bergman & Leach, supra note 5, at 172. For example, a former world champion ski jumper Hans-Georg Aschenbach, and former sport official Juergen Noczenski, both from East Germany claim that all of the elite sports stars from East Germany are required to use steroids. Noczenski and Aschenback stated that those who did not use steroids were forced out of the national squad, and two recent 1988 Olympic champions, skater Katarina Witt and swimmer Kristin Otto, are among those who regularly used steroids. Neither Witt or Otto have ever tested positive for steroids. See East German Athletes' Steroid Use Told, The Chicago Tribune, June 28, 1989, sec. 4, at 9.


66. See Johnson, supra note 41, at 43.

67. See Mellion, supra note 23, at 113.

68. See Schmeck, supra note 8.
Many teen athletes see the best and the biggest athletes using steroids at all levels of competition, and these athletes become their role models. Anything that their role models use becomes acceptable as just another risk of the game. If using steroids is all right for the guy scoring touchdowns on television, it must be all right for them. Ironically, while these young athletes use steroids to increase their size and strength, they actually are arresting the natural growth processes of their bodies.69

D. “Pyramiding” and “Stacking”: The Athletes’ Dosage

Part of the problem in determining the true effects of steroids on the human body is the ethical “Catch-22” that confronts many doctors. Although researchers and medical organizations have a pronounced interest in determining the effects of steroids, the dosages used by the elite athletes is often one hundred times the therapeutic dose.70 Such dosages given to a controlled study group would breach the margin of safety, and could expose the participants to potentially dangerous health risks.71 The amount used by the athletes far exceeds the amount that any physician could ethically administer to a controlled study group.72 This lack of conclusive medical data has undercut the medical community’s warnings and credibility with the athletes.73

In order to maximize the anabolic effect of steroids while minimizing the likelihood of detection, many athletes have developed so-called “stacking”74 and “pyramiding”75 regimens of drug administration. These two procedures progressively increase both the dose and types of steroid to achieve the optimal anabolic effect. Athletes generally use anabolic steroids in a cyclical manner;76 they inject77 or ingest78 the drugs for periods of four
to eighteen weeks and then have "drug holidays," ranging from one month to a year before starting another cycle.79

"Pyramiding" occurs when the athlete starts with a low dosage level at the beginning of each cycle,80 then each week the dosage is increased until the athlete hits the apex of the "pyramid." Once this highest point is reached, a progressive decrease in the amount of drug ensues to minimize the risk of detection while retaining the maximum benefits. The scheduling and amount of intake are directly related to the testing date.81 Generally, no drugs are used during the final week before competition or testing.82

"Stacking" involves the use of one steroid agent taken in conjunction with another.83 For example, while the athlete receives a weekly steroid injection, an oral steroid tablet might be "stacked on top" of the other drugs. Many athletes engage in combinations of these practices like "stacking the pyramid" where high doses of three, four or even five different steroid agents are taken simultaneously.84

Due to the limits on controlled study groups, it is not possible to state with any certainty the adverse effects that will result from the long-term practice of ingesting massive doses of anabolic steroids. These side effects throughout the body. The injectables have become more popular than the orals in recent years because they are administered less frequently. See Lamb, supra note 74, at 32.

78. Oral steroids are favored because they are more difficult to detect than the injectables, yet they are disfavored because they are more toxic to the liver. See Haupt & Rovere, supra note 5, at 477.

79. See Letter, supra note 75.

80. Id.

81. See Lamb, supra note 74, at 33. Ben Johnson ran a world record time of 9.83 in the 100-meter dash at the 1987 World Championships in Rome, and he passed the post-race drug test. However, in June 1989, Johnson testified before a Canadian government inquiry that he was on a steroid program leading up to the 1987 championships, yet he passed the drug testing by arranging his drug cycle so that the steroids he used would clear out of his system by the testing date. See Hersh, Johnson's World Marks Likely to be Erased, The Chicago Tribune, September 5, 1989, sec. 4, at 2, col. 3. In fact, it was reported by Canadian officials that Johnson was tested after various track meets a total of eight times during an eighteen month stretch prior to the 1988 Seoul Olympic Games, yet at no time did he test positive for drugs. See Atkin, Johnson Disqualification Spotlights Drug Problem, Christian Science Monitor, September 28, 1988, at 18, col. 1; see also Janofsky, Steroid Testimony: What Effect, N.Y. Times, March 5, 1989, sec. 8, at 1, col. 2. The article states that doctors familiar with steroids and other performance enhancing drugs know how long they remain in the athlete's system, which is essential to the athlete in order to avoid testing positive after competition. Id.

82. See Lamb, supra note 74, at 33.

83. Id.

84. See Letter, supra note 75. The practice of "stacking" derives from the athletes' belief that if one pill or a certain size dosage could give them good results, two, three or four pills or a larger dosage would give them better results. See Chaikin & Telander, supra note 62, at 94; see also Courson, supra note 9, at 54.
may not be realized for another decade. It is the belief of one prominent physician that “young athletes who take heavy doses of anabolic steroids for [sixty] to [ninety] days should expect to die in their [thirties] or [forties]."

E. The Side Effects of Steroids

Anabolic steroids have a number of potentially harmful side effects that can be classified into three user groups: adult males, adult females and prepubescent. In the adult male, the introduction of synthetic hormones results in decreased levels of follicle stimulating hormones (FSH) and luteinizing hormones (LH). This can result in a decreased production of sperm and testosterone by the testes, which can lead to atrophy of the testes. Increased incidence of liver tumors and abnormal liver functions have been noted in patients using anabolic steroids, particularly oral steroids. Liver, prostate and testicular cancer have been linked to steroid use. Acne is commonly exacerbated, baldness is accelerated, and a decrease in high density lipoproteins (HDL) cholesterol is noted in steroid athletes, suggesting increased cardiovascular risks. There have been several deaths linked to steroid use, including one reported case of Acquired Immunodeficiency Syndrome (AIDS).

In adult women, severe masculinizing effects have been documented, including hair growth on the chin and cheeks, male-pattern baldness, deepening of the voice, shrinkage of breast size, enlargement of the clitoris, uterine atrophy and menstrual irregularities. Steroids used by pregnant women can inhibit the development of the female embryo, and cause

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85. See Janofsky & Alfano, supra note 73. The medical community has expressed concern about the potential effects of steroids that may not be realized for a few decades, which will be too late for many athletes. As Dr. Burt Evans stated: “I shudder to think of some of the things I condoned 40 years ago. Now we are paying the price in pain for our ignorance of that long ago. I hope it's not the same case with steroids.” Id.
86. See Benjamin, supra note 2, at 77.
88. Id.
89. Id.
90. See Lamb, supra note 74, at 32, 35.
91. See Benjamin, supra note 2, at 77.
93. See Letter, AIDS in a Bodybuilder Using Anabolic Steroids, NEW ENG. J. MED., Dec. 27, 1984, at 1701. As part of a bodybuilding program, the patient had been injecting anabolic steroids on a weekly basis with needles that were often shared with other bodybuilders.
94. See Lamb, supra note 74, at 36.
pseudohermaphroditism or even the death of the fetus. Like their male counterparts, steroid use by females has been linked to several deaths.

In pre-adults, anabolic steroids can cause the premature closure of the bone growth plates resulting in a shorter stature. Ironically, high school athletes believe steroids will increase their size and enhance their ability to obtain an athletic scholarship. However, the reality is that steroids will stunt their natural growth process and could potentially be more damaging than beneficial to obtaining a collegiate scholarship.

The other major side effect includes what has been popularly called "roid rage." As noted earlier, for training and competition purposes the increased aggressiveness has been classified as a benefit of steroid use. However, once out of the arena, "roid rage," or the increased aggressiveness, is an adverse side effect. Wild aggression and paranoid delusions are common in some steroid users. Denoted by the medical community as a "pseudo-Alzheimer's type dementia," steroid use can lead to episodes of increased aggressiveness and spontaneous violence. A recent Harvard

95. Id. at 35.
96. See, e.g., An Athlete Dying Young, TIME, Oct. 10, 1988, at 77. Birgit Dressel, a West German heptathlete, died an agonizing death at the age of 26, due to a massive allergic reaction to numerous drugs she ingested. Id.
97. See Haupt & Rovere, supra note 5, at 480.
98. Even Steve Coursin, former NFL lineman, and advocate of allowing athletes to use anabolic steroids, does not believe it is wise for teenagers to use them. "I never recommend steroids to high school kids. I tell them they're too young. I say wait until you get everything you can from your body, naturally." See Johnson, supra note 41, at 50. Keith Wheeler, a biochemist at Ross Laboratories in Columbus, Ohio, would agree with Coursin's advice. "You may have a kid who's genetically gifted to be 6-foot-5 and 235 pounds, but with steroids you may end up with a 5-foot-10 obese teen on your hands." See Charlier, supra note 18. Although a rather extreme example, most medical researchers would agree with Wheeler that anabolic steroids can harm a teenager's natural genetic structure. See Haupt & Rovere, supra note 5, at 480; see also Strauss, supra note 49, at 744.
99. See Benjamin, supra note 2, at 77.
100. See supra notes 58-60 and accompanying text.
102. See, e.g., Drooz, Steroid Use A Widening Addiction, Doctor Says, L.A. Times, Oct. 9, 1988, sec. 3, at 20, col. 6. Traditionally, scientific literature dealing with physiological effects of anabolic steroids is generally based upon observations on infrahuman subjects, i.e., rats. In order to systematically study structural as well as functional effects of anabolic steroids with human beings, muscle tissue must be excised and histologically examined. See Stone & Lipner, supra note 22, at 353. This presents obvious problems. However, recently such researchers as Pope and Katz have observed and documented the effects of steroids on human subjects. Their results suggest that major psychiatric symptoms may be a common adverse effect of anabolic steroids. See Pope & Katz, supra note 101.
study showed anabolic steroid users may suffer from psychotic or near-psychotic symptoms, manic episodes and major depression.103

Steroid use can also be both physically and psychologically addictive.104 Physically, many athletes experience severe depression following cessation of the drug similar to that of any other drug addict.105 Psychologically, steroid use can be compulsive and unstoppable, in what has been termed by the medical community as “reverse anorexia.”106 The steroid users have an uncontrollable obsession with being big instead of skinny. This obsession results in the continuing or increased usage of anabolic steroids.

Recently, the “steroid defense” was introduced to the criminal justice system. A criminal defendant claimed that his frenzied use of anabolic steroids had raised his level of aggressiveness to the point where he was unable to appreciate that his actions were criminal.107

F. Obtaining Steroids: The Black Market

As you will be informed by any civil libertarian or steroid user who has tested positive, anabolic steroids are not illegal.108 They are not classified as a controlled substance. Anabolic steroids can be legally obtained through prescription, or illegally through the black market.109

It has been estimated that only twenty percent of steroid users obtain them by prescription and that the black market supplies the other eighty percent.110 This estimate has particularly disturbed many doctors because the drugs are generally self-administered without supervision or training, and in most instances in ignorance of the potential harmful, even lethal,

103. See Pope & Katz, supra note 101.
104. Id.
105. See Vecsey, supra note 3; see also Strauss, supra note 49.
106. See Drooz, supra note 102; see also Johnson, supra note 41, at 49.
107. See Thomas, Steroid Use Goes On Trial, N.Y. Times, April 2, 1986, at A-22, col. 1. Michael David Williams, a 26-year old Navy aircraft mechanic and avid body builder, broke into six Maryland homes and set fire to three of them. After a full confession, his lawyer raised a defense of diminished capacity due to steroid use.
108. See supra note 12. Brian Bosworth, the outspoken former All-American linebacker of the Oklahoma Sooners, was highly critical of the NCAA after they banned him from participating in the 1987 Orange Bowl after he tested positive for steroids. “Steroids are a legal drug . . . . I’ll continue to fight against the abuse of drugs — recreational drugs that are destroying society. Steroids aren’t destroying society.” See Cowart, supra note 43, at 56.
consequences. Further, since most of these drugs are obtained through illicit channels, there is no guarantee that the product is genuine or even safe.

However, the black market shows little sign of abating since demand for the drugs is great. Federal authorities now estimate that sales of illicit steroids in the United States exceed $100 million a year. The black market further encourages steroid use because of the easy and cheap availability of the drugs. Athletes have no problem obtaining illegal steroids through gymnasiums, health clubs, mail-order houses, and in many instances other athletes and even coaches.

The unauthorized sale of steroids in the United States was recently upgraded from a misdemeanor to a felony by Congress. However, they have not been on the list of substances that the Drug Enforcement Administration (DEA) actively pursues. In recent years, other U.S. agencies have begun cracking down on the illegal steroid traffickers. In 1985, a drug task force was formed by the Justice Department, Federal Bureau of Investigation (FBI) and the Food and Drug Administration (FDA) to begin nationwide criminal investigations of the black market distribution of anabolic steroids. Several arrests have been made of suspected dealers, illegal manufacturers and distributors. The legal manufacturers and distributors were advised of their responsibility to ensure that their sales of steroids

111. See Schmeck, supra note 8. "What they [steroid users] get, basically, is a bottle with white pills in it" and the steroid users have little, if any, real knowledge of the strength or even the true identity of what they are getting. Id.

112. See Penn, supra note 109, at A-20. More than half of the steroids smuggled into the U.S. are counterfeit, bearing the names of reputable manufacturers. When some of these drugs were tested, they were found to contain high concentrations of cortisone, a by-product that is supposed to be removed and that can be deadly if administered to a person allergic to it. Id.

113. See Alfano & Janofsky, On the Black Market, Drugs Are In Easy Reach of Public, N.Y. Times, Nov. 18, 1988, at A-1, col. 1. The demand for counterfeit steroids increased in the United States when the F.D.A. determined that generic steroids were not of any great medical value and limited their production. Id.; see also Penn, supra note 109.

114. See Penn, supra note 109. Richard Fitton, former strength coach at Auburn, was sentenced to four and one-half years in prison and five years probation for conspiracy to import steroids and a litany of other charges. E.J. Kreis, former strength coach at Vanderbilt, was indicted for illegally selling 100,000 doses of anabolic steroids to athletes of three universities. See Scorecard, SPORTS ILLUSTRATED, Dec. 9, 1985, at 11.

115. The Anti-Drug Abuse Act of 1988 was signed into law on November 29, 1988. The distribution of anabolic steroids is proscribed in section 2403.


117. See Penn, supra note 109.
were limited only to authorized customers, and were requested to report unusually large or frequent orders of certain steroid products.118

G. Present Testing Procedures For Steroids

Keeping drugs out of competition is the goal of many testing procedures governing sports. However, most drug testers agree that a clean report at competition time does not necessarily mean that the athlete did not use drugs during training and prior to the competition.119 Because of the present testing procedures, it is impossible to determine which athletes may have gained an advantage over the rest of the competitors due to steroids.120

The problem with current steroid testing procedures is that the athlete knows the exact date and the exact drugs for which he or she will be tested.121 This allows the athlete several ways to "beat" the testing procedure: either by using extra drugs to mask the steroids they have already ingested,122 or by stopping usage of the drug in time to clean out their systems. This explains the "pyramiding" and "stacking" procedures that

119. See Cowart, Pre-Olympic Games, Now In Progress, Demand World-Class Medical Teamwork, J. A.M.A., Aug. 14, 1987, at 741; see also Bergman & Leach, supra note 5. The athletes caught only represent the tip of the steroid "iceberg." The New York Times reported that at least half of the 9000 athletes competing in the Seoul Olympics have used anabolic steroids. See Janofsky & Alfano, System Accused of Failing Test Posed by Drugs, N.Y. Times, Nov. 17, 1988, at A-1, col. 1.
120. In the 1987 World Track Championships in Rome, Ben Johnson set a world record in the 100 meter dash. After the race, Johnson was immediately tested for illegal drug use. The tests came back negative. However, after testing positive for anabolic steroids at the 1988 Olympic Games, Johnson testified before the Canadian Board of Inquiry that he had been on steroids prior to setting the world record in Rome in 1987. In fact, Johnson testified that he had been on steroids for six years prior to his 1987 world record in Rome, yet at no time prior to the 1988 Olympics did Johnson test positive for steroids. See Noden, SPORTS ILLUSTRATED, June 26, 1989, at 98; see also, Hersh, supra note 81.
121. See infra notes 132-40 and accompanying text.
122. See Lamb, supra note 74, at 33. Some athletes are using injections of human gonadotropin to stimulate a more gradual secretion of natural testosterone from the testes to avoid detection. Id. Diuretics also were used for masking drug use until they were added to the list of forbidden drugs in 1988. Diuretics are used to help the athlete produce more urine in hopes of diluting the steroid beyond the limits of detection. See Benjamin, supra note 2, at 75. Spain's Pedro Delgado won the 1988 Tour de France cycling championships but tested positive for probenecid, a diuretic. Probenecid was not prohibited until after the race, and Delgado kept his championship. Id. Athletes are now even injecting testosterone to mask steroid use. A normal male passes between 40 and 110 billionths of a gram per milliliter of testosterone in their urine. Anabolic steroids, a synthetic derivative of testosterone, reduces the actual production, so that only between 15 to 30 billionths of a gram are passed. Athletes hope that by injecting testosterone prior to testing, their urine sample will reflect a higher concentration of testosterone to mask steroid use. See Altman, supra note 39.
many athletes follow. It allows them to obtain optimal results from steroid use while minimizing the likelihood of detection.

In addition to using masking agents, many athletes are experimenting with new drugs. The human growth hormone (hGH), medically known as somatotropin, and the growth hormone (GH), are two powerful new drugs that athletes are using because they hope for the same anabolic effects as steroids. Presently, hGH and GH are not on the list of drugs banned from international athletic competition, and also are believed to be undetectable in current drug testing procedures.

Anabolic steroids are taken far in advance of any competition or testing date and are metabolized so extensively that laboratories must look not only for the drug itself, but also for the metabolic by-products. Testing requires state-of-the-art drug identification laboratories using gas chromatography and mass spectrometry, which can separate and identify chemical compounds and chemical by-products from the sample. At peak efficiency, with ordinary staffing, these laboratories can analyze only forty samples a day.

The tests are conducted by examining a sample of the athlete's urine. Athletes are required to submit to this urinalysis procedure only at high level competition because the analysis is expensive, ranging from $100 to $250 per test. These costs reflect not only the expensive equipment used, but also the creation of metabolic pattern libraries in which to store the different chemical patterns.

123. See Lamb, supra note 74, at 33; see also Council Report, supra note 116.
124. Id. The New York Times reports that underground research has enabled athletes to use as many as a dozen performance enhancing substances that present testing procedures cannot detect. See Janofsky & Alfano, supra note 119.
125. See Cowart, supra note 43, at 57.
126. See Altman, supra note 39, at C-3, col. 1.
127. See Cowart, supra note 28, at 422. The staffing at the state of the art testing centers is generally low, and this contributes to the small number of testings that can be accomplished during normal efficiency. However, when staffing is increased, the labs have much greater potential and can commit to 24-hour turnaround testing. For example, during the 1984 Summer Olympic Games, the Ziffren Olympic Analytical Facility in Los Angeles tested more than 1,650 samples in a little more than ten days. Id.
128. See Benjamin, supra note 2, at 77.
129. Id.
131. See Cowart, supra note 43, at 57. Testing for various synthetic drugs is extremely complex. The number and type of metabolites differs with each drug. The chemical formulations of each metabolite can vary in terms of how long it has been present in the body. Some metabolites appear within hours of ingestion and quickly disappear; others appear only days or weeks after the
The actual testing procedure varies at the different competitive levels. At the Olympic level, urine tests for anabolic steroids began in 1976. The four top finishers in each individual event, plus one athlete selected at random from the field, are tested for the presence of illegal substances. The athletes are given one hour following competition to report and produce a urine sample.

On January 10, 1986, the National Collegiate Athletic Association (NCAA), the governing body of college athletics, authorized drug testing for any athlete competing in an NCAA-sanctioned championship event and in eighteen of the major college post-season football bowl games. To be eligible for intercollegiate championship competition, each collegiate athlete must sign a consent form stating they will submit themselves to drug testing procedures. The failure to sign a current form will result in ineligibility for that particular athlete from any NCAA-sanctioned collegiate championship.

Although the NCAA has not sanctioned the random testing of athletes outside championship events, several leagues have considered such testing.

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steroid has been taken. This can result in as many as ten different patterns for one drug. See Altman, supra note 39.

132. See Lamb, supra note 74, at 32-33.

133. See Janofsky, supra note 13. In weightlifting in addition to the top four finishers, two other athletes are chosen randomly, rather than only one.


135. See, e.g., White, N.C.A.A. Votes for Drug Testing, N.Y. Times, Jan. 15, 1986, at A-19, col. 4. The NCAA conducts 78 championship events for men and women. The testing would allow the NCAA to randomly examine any of the athletes entered in those events. Any athlete testing positive for any one of 86 prohibited drugs will be barred from the championship competition and suspended from the sport for at least 90 days thereafter. Id.

136. The student athlete signs the following consent form:

Drug-Testing Consent

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

Signature of Student-Athlete


137. See 1987-88 NCAA Drug Testing Program, Part II, CONST. 3-9-(i).
The Big Ten Football Conference recently discussed mandatory league-wide testing of football players for anabolic steroids. University of Michigan's athletic director and former football coach, Bo Schembechler stated: "Testing is the only right thing to do . . . . That isn't a great revelation. When you're talking about the health of a kid, we have to do everything possible to eliminate this from the game." 139

In the NFL, the players are tested during training camp as part of their team physicals. Any other testing of the athlete during the year must be based upon a showing of "reasonable cause" to suspect drug use. 140

III. THE CONSTITUTIONALITY OF DRUG TESTING: A NEED FOR STATE ACTION

In evaluating the constitutionality of any drug testing program, a threshold inquiry must be made regarding the status of the party allegedly violating the athlete's rights — in this case the testing organization. A violation of the individual rights and liberties guaranteed by the Bill of Rights can only be prohibited if the testing organization's activities are found to constitute "state action." 142 The doctrine of state action was formulated more than one hundred years ago, yet despite its antiquity, it still operates as a viable limitation on suits of constitutional discrimination.

A. The Doctrine of State Action

The Constitution itself is focused primarily upon the operations of government, so there are relatively few references to individual rights. Responding to the demand for additional constitutional protections for the individual, the First Congress drafted the Bill of Rights. On its face, the Bill of Rights is abound with individual rights and liberties. However, in 1833, the Supreme Court, led by Chief Justice John Marshall, held that the particular provisions of the Bill of Rights shielded individuals only from actions initiated by the national government. 143

More than three decades later, the post-Civil War amendments provided the Court with another opportunity to apply the fundamental princi-
pals of the Bill of Rights to any discriminatory action, public or private. However, in the Civil Rights Cases, the Supreme Court determined that the individual protections of the Bill of Rights, and later, to the extent that the post-Civil War amendments were incorporated, limited only national and state action and not the acts of private individuals or entities. Writing for the majority, Justice Bradley stated:

[C]ivil rights, such as are guarantied [sic] by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual.  

This left a sphere of private autonomy free from governmental infringement — a sphere of private behavior in which individuals are free to discriminate. The Constitution can "erect no shield against merely private conduct, however discriminatory or wrongful."  

The doctrine of state action is not strictly confined to actions taken by the legislative, executive, judiciary or administrative branches of the federal and state governments. In certain situations, state action can be found to include actions of seemingly private individuals or organizations. Where it is alleged that a federal or state statute is discriminatory and state action is obvious, the court will not make any formal inquiry into the matter. However, where the alleged violations are those of a seemingly private individual or entity, the issue of state action will arise. Absent a finding of state action, the court can afford no remedy for the constitutional infraction, and the private individual or entity is free to discriminate.

The Supreme Court has articulated four ways in which essentially private conduct can be deemed to be state action. For purposes of this arti-

144. 109 U.S. 3 (1883).
145. Id. at 17.
146. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). This maxim is best exemplified in Moose Lodge No. 107 v. Irvis, where despite a private club's overtly racially discriminatory policies, absent state action, the repugnant policies could not be prohibited. 407 U.S. 163 (1972).
147. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1984) (dismissal of private school teacher did not constitute state action, even though the school received sufficient public funds, because there was an insufficient nexus between the school's employment practices and funding program).
148. See, e.g., New Jersey v. T.L.O., 469 U.S. 325 (1985) (high school officials need not obtain a warrant prior to searching a student who is under their authority; however, school officials must have reasonable grounds to suspect that the search will turn up incriminating evidence).
149. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). The Court noted that several different tests for determining "state action" had been articulated in prior decisions: (1) the "public
cle, only two are important: the "nexus test" and the "public function test." 150

Under the nexus test, there must be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." 151 Private actions are not ascribed to the State unless it has exercised coercive power or has provided such significant encouragement, either overtly or covertly, that the action must be deemed to be that of the state. 152

Under the public function test, it is not enough to show that the private individual or entity was serving a "public function." 153 Rather, the private action must be an activity that is "traditionally the exclusive prerogative of the state." 154 Although many functions have been traditionally performed by state governments, very few are exclusively reserved to the state. 155 The public function test is particularly stringent and has not been invoked in over two decades. 156

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150. The two other tests recognized by the Court in Lugar are clearly not applicable to the drug testing policy of the NCAA. The "state compulsion" test applies only in the context of state domination of the private entity. See, e.g., Peterson v. City of Greenfield, 373 U.S. 244 (1963) (state laws compelling racial discrimination by private parties violated the fourteenth amendment).

The "joint action" test has occasionally been equated with the "nexus" test, but was limited by the Court in Lugar to prejudgement attachment cases. Lugar, 457 U.S. at 939 n.21. See generally Blum v. Yarotsky, 457 U.S. 991 (1982) (Medicaid recipients failed to prove that substantial state funding of nursing home established "state action" in regard to nursing home's decision to transfer Medicaid recipients to lower levels of care). But see NCAA v. Tarkanian, 488 U.S. 179 (1988). Justice White's dissent begins: "The question here is whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also become a state actor." Id. at 199. White's dissent concludes that the NCAA and UNLV were joint actors and therefore the NCAA was a state actor; however the majority held that the interests of UNLV and the NCAA "have clashed throughout the investigation" and that they were "antagonists, not joint participants ..." Id. at 196 n.16.


152. Blum, 457 U.S. at 1004.

153. Lugar, 457 U.S. at 939. In Jackson, The Court stated that although "[d]octors, optometrists, lawyers ... and [a] grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services "affected with a public interest,"" their activities do not constitute state action. Jackson, 419 U.S. at 354.


155. Flagg Bros., v. Brooks, 436 U.S. 149, 158 (1978). It has been suggested by the Court that such activities as education, fire and police protection, and even the collection of taxes, may not satisfy the public function test. Id. at 163.

156. The last decision by the Court holding a function to be traditionally the exclusive prerogative of the state was Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). That decision was limited in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and eventually overruled in Hodgens v. NLRB, 424 U.S. 507 (1976).
In *Rendell-Baker v. Kohn*, the Court considered both the nexus and the public function tests. The employees of a private school brought a federal civil rights action claiming that school officials had wrongfully terminated their employment in violation of their first, fifth and fourteenth amendment rights. The school had received public funds that accounted for at least ninety percent of the school's operating budget, and it was heavily regulated by the state. The Court held that there was no state action because there was an insufficient nexus between the school's employment practices and the government funding program. The decision to terminate the claimants' employment was not compelled or in any way influenced by the state regulation. As Chief Justice Burger's majority opinion articulated:

The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts. . . . Here the relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students.

Under the public function test, the Court held that although there "can be no doubt that the education of maladjusted high school students is a public function," it is not a service that is in the exclusive province of the state. The mere fact that a private entity performs a function that serves the public interest does not make the activity state action.

Despite the prevalence of the state in the operations of the school, absent a showing that the state influenced or retained some control over the decision making of the private entity, the Court will not find the requisite state action.

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158. Id. at 835.
159. Id. at 832.
160. Id. at 833.
161. Id. at 840-41.
162. Id. at 841.
163. Id. at 840-41.
164. Id. at 842.
165. Id.
166. Id.; see also supra note 153.
167. As Justice Marshall's dissent cogently points out: "The school receives almost all of its funds from the State, and is heavily regulated. This nexus between the school and the State is so substantial that the school's action must be considered state action." *Rendell*, 457 U.S. at 847 (Marshall, J., dissenting).
1. State Action at the High School Level

Where it is alleged that a state or federal statute has violated a student’s rights at a public high school, state action is obvious, and the Court will not make a formal inquiry into the matter. Accordingly, the rights and liberties of the public high school students are protected by the federal constitution. However, where a private school is involved in the alleged violation, *Rendell-Baker v. Kohn* provides that there must be sufficient ties between the alleged wrongful activity and the state to justify intervention. Absent compelling state influence regarding the wrongful activity, no state action will be found, and the federal constitution will not protect the rights and liberties of the students.

2. The Collegiate Level: Do NCAA Regulations Constitute State Action?

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association consisting of approximately nine hundred and sixty public and private colleges and universities. Nearly one-half of its members are public institutions, which provide the NCAA with more than one-half of its decisions regarding rules and regulations.

The NCAA is the governing body for the majority of collegiate athletics. It holds annual meetings in which all its members are represented. At these conventions, rules are promulgated to insure minimum standards for scholarship, sportsmanship and amateur status. Each institution that is a member of the NCAA must abide by these rules and regulations. An elected counsel is empowered to enforce these rules and regulations, and

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170. In *Rendell-Baker*, the plaintiff was an employee of the privately operated school. However, whether the plaintiff is an employee or student of a private school should make no difference in the state action analysis, since it is the nexus between the state and the challenged action upon which the Court focuses, and not the status of the plaintiff.
173. There are several other national associations regulating intercollegiate sports, including the National Association of Intercollegiate Athletics (NAIA), which is composed mostly of small enrollment four-year colleges and universities; the National Junior College Athletic Association, composed of two year colleges; and the Association of Intercollegiate Athletics for Women (AIAW), controlling women’s sports for many colleges and universities. However, since the NCAA began offering national championships in women’s sports in 1981-82, the AIAW membership has declined. The NCAA is the largest and most powerful of the national associations.
175. Id.
may impose penalties for violations against both the university and individual players for any violations.\textsuperscript{176}

Although the NCAA is not a public institution, prior to the decision in \textit{Rendell-Baker}, most courts considered NCAA actions to be "state action," and therefore, subject to the limitations of the fourteenth amendment.\textsuperscript{177} The rationale was that the NCAA performed a public function by regulating intercollegiate athletics and that there was substantial interdependence between the NCAA and the public institutions, which comprised about one-half of its members.\textsuperscript{178} Further, it was the opinion of these courts that the public institution members played a "substantial although admittedly not pervasive"\textsuperscript{179} role in the NCAA funding and decision-making. Accordingly, this indirect involvement of state governments, through publically funded universities, could convert what was seemingly private conduct into state action.\textsuperscript{180}

Since \textit{Rendell-Baker}, an overwhelming majority of courts have held that the adoption, implementation and enforcement of NCAA rules does not constitute state action.\textsuperscript{181} In \textit{Arlosoroff v. National Collegiate Athletic Association},\textsuperscript{182} a college tennis player challenged the NCAA and sought an injunction restricting the enforcement of an NCAA eligibility rule.\textsuperscript{183} Arlosoroff alleged that NCAA rules constituted state action subject to the equal protection and due process limitations of the fourteenth amendments.\textsuperscript{184}

The \textit{Arlosoroff} court held that although the NCAA may be said to perform a public function by regulating intercollegiate athletics, in order to conclude that the NCAA conduct is attributable to the state, a claimant

\textsuperscript{176} Id.

\textsuperscript{177} See, e.g., Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977), \textit{cert. dismissed}, 434 U.S. 478 (1977); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974).

\textsuperscript{178} \textit{Howard Univ.}, 510 F.2d at 218.

\textsuperscript{179} Id.

\textsuperscript{180} Id.

\textsuperscript{181} See, e.g., McCormick v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Karamanou v. NCAA, 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); \textit{Arlosoroff}, 746 F.2d 1019; \textit{O'Halloran}, 679 F. Supp. 997; Barbay v. NCAA, 1987 WL 5619 (E.D. La. 1987) (WESTLAW, Allfeds database); Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987); Kneeland v. NCAA, 650 F. Supp. 1047 (W.D. Tex. 1986); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985); see also Ponce v. Basketball Fed'n of Com. of Puerto Rico, 760 F.2d 375 (1st Cir. 1985) (Puerto Rican amateur sports association, analogous to NCAA, is not state actor); Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984) (in dicta, court stated that NCAA is not state actor).

\textsuperscript{182} 746 F.2d 1019 (4th Cir. 1984).

\textsuperscript{183} \textit{Id. at} 1020.

\textsuperscript{184} \textit{Id.}
must show either that: (1) the NCAA was serving a function that was "traditionally exclusively reserved to the states"\textsuperscript{185} prerogative; or (2) the state in its regulatory and subsidizing function caused or ordered the NCAA action.\textsuperscript{186} Absent such a showing, the conduct could not be said to be "state action" and could not be challenged under the fourteenth amendment.\textsuperscript{187}

The \textit{Arlosoroff} court then held that although the NCAA's scheme of regulating intercollegiate athletics may be of some public service, it is not a function that is traditionally reserved to the state.\textsuperscript{188} Moreover, although the NCAA is made up of public and private universities, there was no indication that state universities "vote[d] as a block . . . over the objection of private institutions"\textsuperscript{189} and caused or ordered the NCAA actions.\textsuperscript{190} Accordingly, the NCAA regulations are adopted through the representatives of all of its members, and not as a result of government compulsion.\textsuperscript{191} The adoption of the NCAA rules is private conduct and not state action. Thus, the \textit{Arlosoroff} court effectively foreclosed all challenges of the NCAA rules constituting "state action" since neither prong of the test could be effectively proven.

In \textit{O'Halloran v. University of Washington},\textsuperscript{192} a student athlete challenged not only the NCAA drug testing program, but further alleged that the University of Washington's implementation and administration of the NCAA program constituted "state action."\textsuperscript{193} The \textit{O'Halloran} court held that the enforcement of the NCAA testing program by the University of Washington, a public university, did not constitute state action.\textsuperscript{194} The \textit{O'Halloran} court cited the \textit{Arlosoroff} test stating:

\begin{quote}
It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action.\textsuperscript{195}
\end{quote}

The \textit{O'Halloran} court concluded that the State of Washington had not exercised coercive power or provided significant encouragement, overtly or

\begin{itemize}
\item \textsuperscript{185} \textit{Id.} at 1021 (quoting \textit{Jackson v. Metropolitan Edison Co.}, 419 U.S. 345, 352 (1975)).
\item \textsuperscript{186} \textit{Id.} at 1022; \textit{see also supra} notes 149-50 and accompanying text.
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id.} at 1021.
\item \textsuperscript{189} \textit{Id.} at 1022.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} 679 F. Supp. 997 (W.D. Wash. 1988), \textit{rev'd on procedural grounds}, 856 F.2d 1375 (9th Cir. 1988).
\item \textsuperscript{193} \textit{Id.} at 998.
\item \textsuperscript{194} \textit{Id.} at 1000.
\item \textsuperscript{195} \textit{Id.} at 1001 (quoting \textit{Arlosoroff}, 746 F.2d 1019, 1021-22).
\end{itemize}
covertly, to the University of Washington so that either the promulgation or enforcement of the NCAA drug testing program could be deemed to be state action.196

The United States Supreme Court recently granted certiorari to determine whether the enforcement of the NCAA rules by a public university constituted state action.197 In *NCAA v. Tarkanian*,198 Jerry Tarkanian, the head basketball coach of the University of Nevada-Las Vegas (UNLV), a public university, was sanctioned by UNLV officials after an NCAA committee concluded that Tarkanian had violated ten NCAA rules governing the recruitment of potential players.199 Pursuant to the agreement between the NCAA and its fellow members, the NCAA requested that UNLV officials suspend Tarkanian or additional penalties would be assessed against the university.200 Tarkanian, facing demotion and a substantial reduction in pay, brought suit alleging that UNLV’s actions in compliance with the NCAA rules and recommendations made the NCAA’s conduct “state action.”201

Although the Court agreed that UNLV was without question a state actor and that its conduct was clearly influenced by the rules and recommendations of the NCAA, it did not follow that UNLV’s actions in compliance with the NCAA rules and recommendations turned the NCAA’s conduct into state action.202 Writing for the majority, Justice Stevens stated that despite the NCAA rules, UNLV still retained the authority to withdraw from the NCAA and establish its own standards and that “the NCAA did not — indeed, could not — directly discipline Tarkanian or any other state university employee.”203 Despite the fact that withdrawal from the NCAA was not a viable option for a national collegiate basketball “power-house” like UNLV, Justice Stevens stated that although “UNLV’s options were unpalatable does not mean that they were nonexistent.”204

The *Arlosoroff* court established that the NCAA regulations, such as drug testing, are immune from the application of the state action doctrine.205 The *O’Halloran* court further insulated the NCAA drug testing program by holding that a public university’s implementation of the pro-

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196. Id. at 1002.
199. Id. at 188.
200. Id.
201. Id.
202. Id. at 195.
203. Id. at 197.
204. Id. at 198, n.19.
205. 746 F.2d 1019 (4th Cir. 1984).
program does not constitute state action. The Tarkanian Court validated both these rulings with an incisive decision. Further, absent a finding of state action, the NCAA athlete will be unable to rely on the federal constitutional safeguards to protect them. This means the NCAA is free to institute mandatory random drug testing of its NCAA student-athletes free from any federal constitutional limitations.

The only constitutional safeguard remaining for collegiate athletes is a state constitution or statutory provision providing additional protections. For example, Simone LeVant, the captain of the Stanford University women's diving team, successfully challenged the constitutionality of the NCAA drug testing program. LeVant alleged that the NCAA testing program violated her right to privacy under article I, section 1 of the California Constitution. The privacy rights guaranteed under the California Constitution are broader than those guaranteed by the federal constitution and are enforceable against private entities like the NCAA. Accordingly, the federal doctrine of state action is inapplicable.

3. State Action at the Professional Level: The National Football League

Although state governments regulate professional sports franchises, in light of the decision in Rendell-Baker, it is difficult to conceive these regulations constituting state action. The collective bargaining agreement that regulates the testing procedures is an agreement between the owners and the NFL players. There is no indication that the state caused or ordered the testing, nor is the regulation of professional athletics a function that has traditionally been the exclusive prerogative of the state.
IV. MANDATORY RANDOM DRUG TESTING AND THE CONSTITUTIONAL IMPLICATIONS

The drug testing of athletes calls into question four constitutional guarantees: (1) freedom from unlawful searches and seizures; (2) the right of privacy; (3) equal protection rights; and (4) due process of law. The following sections will examine the impact of drug testing upon the rights and privileges of professional, collegiate and high school athletes to drug testing.

A. The National Football League and Unilateral Implementation of Random Testing

In the National Football League (NFL), the drug testing policies are governed by the collective bargaining agreements between the players association (NFLPA) and the management counsel (NFLMC). A unionized employer, like the NFLMC, which implements a drug testing program for its employee-players, must comply with the requirements of the National Labor Relations Act (NLRA). With respect to wages, hours and other terms and conditions of employment, the NLRA requires that the employer and union bargain in good faith.

The 1982 agreement provides only for testing during physicals, and any additional tests must be based upon “reasonable cause” to believe the player is using illegal drugs. The agreement specifically provides that there will be no “spot checking for chemical abuse or dependency” by an NFL franchise. Although the NFL has conducted past drug testing, the testing was limited to “street drugs.” The NFL did not begin testing for steroids until 1987.

However, the NFL’s new policy of testing for steroids runs into serious legal questions in light of the 1982 Agreement. An employer who decides

211. For the purposes of this article, the only professional challenges that will be examined are those by the National Football League Players Association.
212. See 1982 COLLECTIVE BARGAINING AGREEMENT, art. XXXI, §§ 5, 7.
214. Section 8(d) of the NLRA states that “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” Id.
215. As of the date of this publishing, the league and the players have been without a contract since September 1, 1987, although most of the 1982 provisions are presently being followed. See George, Gap Gets Wider in Labor Negotiations, N.Y. Times, Nov. 23, 1988, at A-21, col. 3.
216. 1982 COLLECTIVE BARGAINING AGREEMENT, art. XXXI, § 7.
217. Id.
to implement a drug testing program, or to change an existing one, would be deemed to have changed a condition of employment. As with any condition of employment, the NFLMC would be required to bargain over the contents of a new, or the changing of an old policy. The NFLMC could not implement it unilaterally; thus, critics argue that the NFL has no legal basis on which to test for steroids.

A recent opinion of an NFL arbitrator confirmed that the NFLMC could not unilaterally implement a drug testing program. The arbitration decision stemmed from a statement by NFL Commissioner Pete Rozelle that the NFL would begin a program of randomly testing the players for drugs. Rozelle and the NFLMC contended that the order for random testing was an exercise of residual disciplinary authority that was vested in the Commissioner pursuant to the 1982 Agreement. Rozelle contended that he had violated the bargained-for provision on drug testing because his disciplinary authority superseded any agreement provisions. The arbitrator did not agree with this contention:

[C]ertain . . . subject areas, such as drug testing and the evaluation of chemical dependency treatment facilities were addressed by the collective bargaining agreement and represented limitations on club and/or the Commissioner’s right to change those agreements . . . . [T]he Commissioner’s rule-making authority was supplanted, in certain respects, by specific agreement language . . . which established clear procedures concerning . . . testing . . . [The Players’ Association has] consistently resisted suggestions from the Commissioner . . . which would have enlarged the scope of testing for chemical dependency by including “unscheduled” analyses.

219. Analogous court decisions have held that the implementation of testing programs for current or prospective employees is a changed condition of employment and is a mandatory subject of collective bargaining. See, e.g., Peerless Publications, Inc., 231 N.L.R.B. 244 (1977), remanded, 636 F.2d 550 (D.C. Cir. 1980) (new disciplinary proceedings); Medicenter, Mid-South Hospital, 211 N.L.R.B. 670 (1975) (new polygraph testing for present employees); Amoco Chemicals, 211 N.L.R.B. 618, 622-23 (1974), enforced in pertinent part, 529 F.2d 427 (5th Cir. 1976) (alteration of work and disciplinary rules).

220. See National Football League Players Association and National Football League Management Council, (Kasher, Arb.) (Oct. 25, 1986) (Unpublished opinion). On July 7, Commissioner Rozelle publically announced his unilateral new drug testing program that would require every player to submit to two unscheduled urine tests during the regular season. Id.

221. Id.

222. Id.

223. Id. In a related but separate decision, Commissioner Rozelle sought to have every player tested for drugs as part of the post-season physical exam. The NFLPA asserted that any urinalysis or blood testing during the post-season physical exam violated the existing collective bargaining agreement that authorized only two forms of drug testing: (1) the mandatory drug test during pre-season physicals; and (2) testing upon reasonable cause. These issues were also submitted to an arbitrator who found that Rozelle and NFLMC could not impose post-season drug
As suggested by the arbitration decision, and other analogous judicial decisions, where players and management have bargained for a specific provision, such as drug testing, management does not have the authority to unilaterally change or expand the scope of testing provisions by asserting inherent managerial rights. If management wants a mandatory random drug testing program, such a program must be bargained for in good faith and specifically stated within the bargaining agreement.

After dragging their feet for years, Pete Rozelle and the NFL owners announced that beginning with the 1989 football season, any player found to be using anabolic steroids will be suspended in the same manner as those who use recreational drugs. A positive testing will result in a warning, a second offense will bring a thirty-day suspension, and a third offense a minimum one-year suspension. However, a football player is still tested only once a year, and detection can be easily avoided. In dealing with the problem of steroids, the standard of "reasonable cause" is unworkable. If the Players' Association truly represents the best interests of the players, then they should not hesitate to adopt a mandatory random drug testing policy for anabolic steroids and their synthetic derivatives.

B. Random Testing and the Fourth Amendment

1. Does Drug Testing Constitute a "Search" Within the Meaning of the Fourth Amendment?

The fourth amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." This imposes a standard of reasonableness upon the exercise of discretion by government officials in order to safeguard the privacy and security of individuals against arbitrary intrusions by government officials. However, before coming under the scrutiny of the fourth amend-
ment's "reasonableness" standard, the challenged governmental conduct must first constitute a "search" or a "seizure." Does the taking of urine from an athlete for testing purposes constitute a "search" or a "seizure?"

A majority of federal circuit courts have held that urine tests are searches for fourth amendment purposes. In Schmerber v. California, the Court held that extracting blood from a criminal defendant to determine his alcohol levels was a search within the meaning of the fourth amendment. Other courts deciding the urine testing question have drawn analogies to Schmerber; however, opponents are quick to point out that urine, unlike blood, is a waste product that is routinely discharged and does not involve any physical intrusion into the body, as taking a blood sample requires. Therefore, unlike Schmerber, it cannot be said that the taking of urine violates an individual's bodily integrity.

The District Court for the Southern District of Iowa evaluated these assertions in McDonell v. Hunter 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 legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available for others to collect and analyze in order to discover the personal physiological secrets it holds, except as a part of a medical examination. Both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came. One clearly has a

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231. Id. at 767.


233. See infra notes 225-36 and accompanying text.

234. Id.

reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.236

Accordingly, the McDonnell court held that the compelled production of urine for drug testing analysis constitutes a search within the meaning of the fourth amendment.237 Although a urine test does not require puncturing an individual's body cavity, the governmental intrusion differs only in degree, not kind. An individual has a legitimate expectation of privacy not only in the expulsion of these fluids, but also in their contents.238

2. The Reasonableness of Random Testing

Having established that the collection of urine constitutes a search, the next inquiry is whether the search was reasonable. Generally, the fourth amendment requires a warrant based upon probable cause as a prerequisite to any lawful search. However, the fourth amendment does not mandate the issuance of a warrant, and the Supreme Court has enumerated several exceptions to the warrant requirement.239

The warrantless search exceptions include searches made incident to a lawful arrest,240 searches when there is immediate danger to a police officer or to the community,241 searches when exigent circumstances are present,242 searches when a risk exists that the evidence might be destroyed,243 or searches in highly regulated industries.244 However, even these exceptions may be limited by the fourth amendment's requirement of reasonableness.

236. Id. at 1127. It can be said that a person has a double expectation of privacy in the taking of samples for testing. First, a person has a legitimate expectation that the government will not intrude upon their body and forcefully extract a sample. This extraction can be done with either a needle or a test-tube. Second, a person has a legitimate expectation of privacy in the actual contents of the sample taken. The revelations contained within the blood or urine are as secret and private as one's diary, for they reveal to the government information that would otherwise be unavailable.

237. Id.

238. See supra note 236.

239. See infra notes 240-44.

240. Chimel v. California, 395 U.S. 752 (1969) (warrantless search of person and the area within person's reach is permissible pursuant to a valid arrest).

241. Terry v. Ohio, 392 U.S. 1 (1968) (officer may make reasonable search for weapons of persons believed to be armed and dangerous regardless of probable cause).


243. Schmerber, 384 U.S. 747 (1966) (removal of blood from suspect for testing in an emergency situation is permissible without search warrant if reasonable means are used).

244. Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless administrative search of commercial property pursuant to federal statute is proper if inspection necessary to ensure law is properly enforced).
In determining the reasonableness of the search, a court must balance the nature and quality of the intrusion against the legitimate governmental interests advanced by the search.\(^{245}\) In *O'Connor v. Ortega*,\(^{246}\) the Court stated that the determination of "reasonableness" is a two-step inquiry: (1) "whether the . . . action was justified at its inception,"\(^{247}\) and (2) "was it reasonably related in scope to the circumstances which justified interference in the first place."\(^{248}\) What is reasonable depends "on the context within which a search takes place."\(^{249}\)


In the context of fourth amendment protections as they relate to the rights of students in public schools, the Court in *New Jersey v. T.L.O.*\(^{250}\) announced a specific test for search of students by school authorities. The Court stated that the "legality of the search of a student should depend simply on the reasonableness, under all circumstances of the search."\(^{251}\)

In determining the reasonableness of the search, the *T.L.O.* Court balanced the different interests and concluded that although the students have a legitimate expectation of privacy, the school must maintain an atmosphere that is conducive to learning.\(^{252}\) Accordingly, school officials need not obtain a warrant to conduct a search, nor are they subject to a probable cause standard of suspicion.\(^{253}\)

The *T.L.O.* Court expressly left open, and thus implied, that searches in a school setting do not require individualized suspicion.\(^{254}\) There must only be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school."\(^{255}\)

Under the first prong of the *O'Connor* test, to be "justified at the inception," a court must examine if the problem of drugs in high school athletes

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\(^{246}\) 480 U.S. 709 (1987).

\(^{247}\) *Id.* at 726 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

\(^{248}\) *Id.*

\(^{249}\) *Id.* at 719 (quoting *T.L.O.*, 469 U.S. at 341).

\(^{250}\) 469 U.S. 325 (1985).

\(^{251}\) *Id.* at 341.

\(^{252}\) *Id.* at 340.

\(^{253}\) *Id.*

\(^{254}\) Courts have generally held that prior to testing a public employee, the state must possess reasonable suspicion that a particular employee was under the influence of drugs. See *supra* note 229. In *T.L.O.*, the Court stated: "We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities." 469 U.S. at 342, n.8.

\(^{255}\) *T.L.O.*, 469 U.S. at 342.
will operate to “justify school authorities in conducting searches unsupported by individualized suspicion.”256 Under the second prong, the measures adopted must be reasonably related to the objectives of the search, and not be excessive in light of the age and sex of the student and the nature of the infraction.257

In *Schaill v. Tippecanoe County School Corporation*,258 the District Court for the Northern District of Indiana examined the T.L.O. factors in the context of a high school athletic drug testing program. The program required that all varsity athletes consent to random urinalysis drug testing before being eligible for interscholastic sports.259 The student athletes sought an injunction to prevent the school district’s implementation of the testing program, and claimed the program violated the students’ fourth amendment rights.260

The *Schaill* court began its analysis by examining whether the testing was “justified at the inception.” The court referred extensively to the T.L.O. decision and concluded it had to examine whether “the circumstances peculiar to this case will operate to ‘justify school authorities in conducting searches unsupported by individual suspicion,’”261 since there was no evidence that these particular athletes used drugs.262 The empirical evidence showed that twenty to thirty percent of the students nationwide have used drugs and that drug use, particularly in public schools, was a matter of serious national concern.263

The *Schaill* court held the testing was justified at the inception because

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256. *Id.* at 342 n.8; *See also Schaill*, 679 F. Supp. at 852.
259. *Id.* at 835-36. The Tippecanoe County School Corporation (TSC) required that students involved in interscholastic sports submit the following form:

I have received and have read and understand a copy of the “TSC DRUG EDUCATION AND TESTING PROGRAM.” I desire that ______ participate in this program and in the inter-scholastic athletic program of ______ School and hereby voluntarily agree to be subject to its terms. I accept the method of obtaining urine samples, testing and analyses of such specimens, and all other aspects of the program. I agree to cooperate in furnishing urine specimens that may be required from time to time. I further agree and consent to the disclosure of the sampling, testing and results as provided for in this program. This consent is given pursuant to all State and Federal Privacy Statutes and is a waiver of rights to non-disclosure of such test records and results only to the extent of the disclosures authorized in the program.

*Id.* at 836. Once a sample is provided it is given to a competent laboratory and is tested for alcohol, street drugs and performance enhancing drugs such as steroids. *Id.* at 837.
260. *Id.* at 835.
261. *Id.* at 852 (quoting *T.L.O.*, 469 U.S. at 342 n.8).
262. *Id.* at 835.
where there are social concerns at stake, wide latitude will be given to school officials. The law is clear that this court's role is not to set aside decisions of school administrators, even where the school's position might be viewed as lacking in wisdom or compassion, which here, it is not so viewed.264

The next inquiry was whether the testing was reasonably related and not excessive in scope. The Schail court recognized that the testing program involved students aged fourteen through eighteen, and that school officials cannot run roughshod over the rights of students.265 However, the court noted that athletes have a "unique identity within the school community" and "commit themselves to a system of discipline"266 not imposed on the general student population. The participation in interscholastic athletics, in and of itself, reduces the student athletes' legitimate expectation of privacy.267 These factors, taken in conjunction with the school's interest in maintaining a drug-free athletic program, the health and safety of the students and the preservation of an environment conducive to learning outweighed the student athletes' expectations of privacy.268 Accordingly, the Schail court held that the drug testing program did not violate the student athletes' fourth amendment rights.

On appeal, the Seventh Circuit upheld the constitutionality of the Tippecanoe County School random drug testing policy.269 The Schail II court acknowledged that the prospective searches of these high school athletes were to take place not only without a probable cause or a warrant, but also in the absence of any individualized suspicion of drug use by the students tested.270 Following the lead of the T.L.O. decision, the Schail II court stated that the suspicionless searches of random student-athletes for drugs are permissible:

[Interscholastic athletes have diminished expectations of privacy, and have voluntarily chosen to participate in an activity which subjects them to pervasive regulation of off-campus behavior; the school's interest in preserving a drug-free athletic program is substantial, and cannot adequately be furthered by less intrusive means; the [drug-testing] program adequately limits the discretion of the officials performing the search; and the information sought is intended

264. Id.
265. Id. at 852.
266. Id. at 856.
267. Id.
268. Id. at 856-57.
269. See Schail v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).
270. Id. at 1315.
to be used solely for noncriminal education and rehabilitative purposes.271

The Schaill cases may be a harbinger of drastic changes in the testing of high school athletes for drugs. However, the Schaill opinions should be restricted to situations involving the random testing of student athletes for steroids and should not permit blanket random testing of student athletes for any and all drugs.272 As several studies have indicated, as a group, athletes are no more likely than the general student population to use “social drugs” such as alcohol, marijuana, hashish, cocaine or psychedelics; however, athletes are more likely to use steroids.273 Therefore, absent reasonable suspicion, school officials and administrative personnel should only be able to test high school athletes, or any athlete, for anabolic steroids but not for street drugs.274

b. Collegiate Drug Testing

Although the implementation of NCAA rules by a university has been held not to be state action,275 this section will cover situations, like in California, where a state constitution or statute provides that the doctrine of state action is not applicable to private institutions.276 This would make private entities, like the NCAA, amenable to constitutional challenges. This section will propose a solution to the constitutional prohibitions so that the NCAA can randomly test athletes.

(1) Reasonable Suspicion

In the context of college or university students, the Supreme Court has not articulated any special standard for fourth amendment analysis. The constitutionality of any drug testing procedure will be scrutinized under the same standards as public sector employees that are tested. Federal courts are split on whether the testing of employees absent “reasonable suspicion” is a violation of the fourth amendment.277

271. Id. at 1322.
272. See infra notes 286-97 and accompanying text.
274. See infra notes 286-97 and accompanying text.
275. See supra notes 197-204.
276. See supra notes 207-09 and accompanying text.
277. Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1545 (6th Cir. 1988) and the cases cited therein. However, in Skinner, 109 S. Ct. 1402 (1989) and Von Raab, 109 S. Ct. 1384 (1989), the Court held that public employees can be tested for drugs absent reasonable suspicion.
In *O'Halloran v. University of Washington*, a student athlete sought an injunction against the enforcement of the NCAA drug testing procedure, stating that the testing, absent reasonable suspicion, violated the fourth amendment and the student athlete’s reasonable expectation of privacy. The *O'Halloran* court, relying on the *T.L.O.* standards, asserted that the testing would be justified at the inception if there were “reasonable grounds for believing that urine tests of student-athletes will turn up evidence of misconduct.” The court held that “past incidents of improper drug use by athletes” within the nationwide athletic population, taken in conjunction with the university’s efforts to deter drug abuse among its student athletes, gave the university reasonable grounds for testing.

The *O'Halloran* court came to the right conclusion, but it was not persuasive in its logic. There is no indication that the *T.L.O.* holding, which lowers the reasonable suspicion standard for high school students, can be extended to college students. As Justice Powell’s concurring opinion in *T.L.O.* articulates, the public high school setting presents a unique bond between the student and teacher:

> The special relationship between teacher and student also distinguishes the setting within which school children operate . . . . [T]here is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student’s welfare as well as for his education.

Other courts and commentators have noted that there is a distinction between the college and high school contexts and that they should not be treated similarly. The special relationship that develops in the smaller high school classroom setting cannot be transposed into the collegiate classrooms where hundreds of students sit in on a lecture, and student-professor interreaction is virtually non-existent. The commonality of interests and the feelings of personal responsibility for the students’ welfare articulated by the *T.L.O.* Court are not present at the collegiate level. The standard of reasonable suspicion gave the *O'Halloran* court problems, and in the context of steroid testing, it would be troublesome for any court.

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279. *Id.* at 1002-04.
280. *Id.* at 1004.
281. *Id.*
282. *Id.*
283. 469 U.S. at 349-50.
As noted earlier, courts have generally required that the state possess a reasonable suspicion that a particular employee was under the influence of drugs prior to testing. The problem with the reasonable suspicion standard in the context of anabolic steroid testing is that steroids do not manifest any outward symptoms like street drugs. In Capua v. City of Plainfield, the District Court of New Jersey correctly articulated that in testing for street drugs, the reasonable suspicion standard should govern. “[O]ne so under the influence of drugs as to impair the performance of his or her duties must manifest some outward symptoms which, in turn, would give rise to a reasonable suspicion.”

Unlike street drugs, steroid use is not typically accompanied by characteristic signals that give rise to an articulable basis for suspecting drug use. Steroid use is not easily recognized by physical characteristics like slurred speech, red or glassy eyes, problems with equilibrium or other aspects of motor coordination like street drugs.

As Professor Dugal, a member of the International Olympic Committee Medical Commission, stated, it is a “practical impossibility to detect by observation alone the use of anabolic steroids.” Although there are certain side effects, they are not common to all athletes, and much depends upon the dosage.

In the context of steroids, the reasonable suspicion standard would be unworkable. Would the reasonable suspicion arise when an athlete sets a

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286. See supra note 239 and accompanying text.
287. See infra notes 291-92, 295 and accompanying text.
289. Id. at 1517-18.
290. Id. at 1518.
291. See Note, Shoemaker v. Handel and Urinalysis Drug Testing: Looking for an American Standard, 21 GA. L. REV. 467, 484 (1987) (“drug... use is typically accompanied by characteristic signals that give rise to an articulable basis for suspecting such conduct. Substance abuse is generally identifiable by erratic behavior, distinctive odors, and certain paraphernalia associated with drug use.”).
292. See Note, Dragnet Drug Testing in Public Schools and the Fourth Amendment, 86 COLUM. L. REV. 852, 872-73 (1986) (“A child under the influence of drugs exhibits familiar and easily recognizable physical characteristics; slurred speech, red or glossy eyes, problems with equilibrium and other gross motor coordination, drowsiness or excessive rowdiness, and, with some narcotics, a distinctive odor.”).
294. See Bergman & Leach, supra note 5.
295. Unlike street drugs, anabolic steroids enhance an individual's performance; they do not adversely affect it. Steroids are practically impossible to detect by observation alone. See supra note 293-94. Therefore, although the reasonable suspicion standard might be appropriate in testing for street drugs, when outward symptoms may appear, the standard is unworkable in situations involving the use of anabolic steroids. The ingestion of steroids does not mean that that individual will suddenly develop bulging biceps and rippling pectorals that would give rise to
world record, or runs for two hundred yards in a football game, or perhaps hits forty home runs and steals forty bases in a single baseball season? Or perhaps reasonable suspicion would arise when an individual substantially surpasses his or her previous best performance, like long jumper Bob Beamon or baseball player Roger Maris. Maybe athletes like Steffi Graf, Eric Dickerson and Greg Louganis should be tested because they are too good in their respective sports. Unlike street drugs, where the standard of reasonable suspicion should govern, anabolic steroids present a unique and difficult problem; therefore, testing for anabolic steroids cannot be subjected to the reasonable suspicion standard.

(2) The "Highly Regulated Industry" Exception to Reasonable Suspicion and the Shoemaker Extension

An exception to the reasonable suspicion standard has been recognized in industries that are pervasively regulated. The Court has recognized that in order to ensure compliance with a regulatory scheme, the government may undertake inspections of the premises occupied by those highly regulated industries without a warrant and without any degree of individually reasonable suspicion. Athletes not requiring hulking muscles also use steroids. Cyclists, marathoners, and even bobsledders are now using steroids. Archers, pistol and rifle shooters, and pentathletes use propanolol and other beta blockers to slow their heart rate down, so the athlete can be more steady in his or her aim. See Altman, For New Specialists In Drug Detection, Athletes Set Fast Pace, N.Y. Times, Nov. 22, 1988, at C-3, col 3. Robert Voy, head of the U.S. Olympic Committee sports program stated: "They're [steroids] used in almost every sport now." See The Growing Threat of Steroids, Boston Globe, Nov. 1, 1988, at 77.

296. After the detection of Ben Johnson's steroid use, the world record breaking performances of other athletes were tarnished by unfounded accusations of steroid use. American female track stars Florence Griffith Joyner and Jackie Joyner-Kersee were targets of such accusations after they set new world records. See Axthelm, supra note 14, at 56. After Jose Canseco of the Oakland Athletics became the first baseball player in history to hit 40 homeruns and steal 40 bases in the same season, there were allegations that Canseco achieved these feats through the aid of anabolic steroids. See, e.g., Downey, Oakland Strong Men Have More Muscle Than Bulgarian Weightlifters, L.A. Times, Oct. 9, 1988, at Sports-6, col. 1.

297. In the 1968 Mexico City Olympic Games, Bob Beamon jumped 29 feet, 2-1/2 inches in the long jump to set a world record that advanced the previous world record of Igor Ter-Ovanesyan by more than 21 inches and that still stands today. To many, it was one of the greatest athletic feats of all-time. Yet, Beamon never jumped beyond 27 feet either before or after his feat in the Olympics. Roger Maris, a baseball player for the New York Yankees hit 61 home runs in 1961. The 61 home runs is still a major league record, yet in no other season did Maris hit more than 40 home runs. It would be ludicrous to suggest that Beamon, Maris or scores of other athletes used steroids, yet they recorded feats that are beyond explanation. They excelled in their sports through innate athletic ability, not clandestine chemistry.

298. See, e.g., Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless administrative search of commercial property pursuant to federal statute is proper if inspection necessary to ensure law is properly enforced).
alized suspicion.\textsuperscript{299} The Court's rationale is that the institution of a regulatory scheme and the existence of the federal regulatory program in and of itself diminishes the reasonable expectation of privacy of those involved in the industry.\textsuperscript{300}

In \textit{Shoemaker v. Handel},\textsuperscript{301} the District Court for the District of New Jersey extended the "highly regulated industry" exception of the reasonable suspicion standard so as to include not just the search of the premises, but also the search of persons.\textsuperscript{302} \textit{Shoemaker} involved a challenge to the regulations of the New Jersey Racing Commission requiring jockeys to submit to random urine testing.\textsuperscript{303} The jockeys contended that these regulations violated their constitutional rights.\textsuperscript{304}

The court upheld the testing program, absent reasonable suspicion, stating that the jockeys voluntarily participated in horse racing, which is a unique industry subject to pervasive and continuous regulation by the state.\textsuperscript{305} Jockeys are licensed by the state and have received ample notice of the regulations, and therefore they must accept the unique benefits and burdens of their trade. Among these burdens is the submission to inspections intended to further legitimate state interests in ensuring that horse races are safely and honestly run and that the public perceives them as so.\textsuperscript{306}

The Third Circuit, in \textit{Shoemaker II},\textsuperscript{307} affirmed the district court's extension of the doctrine but emphasized that the "holding applies only to . . . urine sampling of voluntary participants in a highly-regulated industry."\textsuperscript{308}

The \textit{Shoemaker II} court also stated that there are two interrelated requirements justifying the warrantless administrative search exception. First, the

\begin{enumerate}
\item[299.] \textit{Id.} at 598-600.
\item[300.] \textit{Id.} at 600.
\item[301.] 608 F. Supp. 1151 (D. N.J. 1985).
\item[302.] At its inception, the administrative search was limited only to searches of the premises. In \textit{Camera v. Municipal Court}, 387 U.S. 523 (1967), the Court emphasized that the administrative search was "neither personal in nature nor aimed at the discovery of evidence of [a] crime, they involve a relatively limited invasion of the urban citizen's privacy." \textit{Id.} at 537.
\item[303.] \textit{Shoemaker}, 608 F. Supp. at 1159.
\item[304.] \textit{Id.} at 1155. The jockeys argued that the regulations violated their fourth, fifth and ninth amendment rights, and the due process and equal protection clauses of the fourteenth amendment.
\item[305.] \textit{Id.} at 1156.
\item[306.] \textit{Id.} at 1157-58.
\item[307.] 795 F.2d 1136 (3d Cir. 1986). The \textit{Shoemaker II} court recognized that its holding would be an extension of the exception: "[T]he question that arises in this case is whether the administrative search exception extends to the warrantless testing of persons engaged in the regulated activity." \textit{Id.} at 1142.
\item[308.] \textit{Id.} at 1142 n.5.
\end{enumerate}
state must have a strong interest in conducting an unannounced search.\textsuperscript{309} Second, the pervasive regulations of the industry must have reduced the justifiable expectations of privacy of those individuals being tested.\textsuperscript{310}

Examining the first prong of the \textit{Shoemaker II} test, there are three state interests implicated in conducting unannounced searches of athletes for anabolic steroids. First, like \textit{Shoemaker II}, the health and safety of the athletes using the steroids is an obvious concern. The medical literature has increased the evidence of the adverse effects of steroids.\textsuperscript{311} Further, anabolic steroids affect not only the users, but the health and safety of those players not using steroids is also implicated.\textsuperscript{312}

Second, protecting the integrity of the game is essential to society. Certainly the forces that influence society will influence professional sports; however, young athletes do not idolize and emulate the behavior of the general population. Compounding the problem of drug abuse in athletics is that our youth see it and often imitate it. The elimination of steroids from sports will not only help the individual participants engaged in competition, but it will also strengthen the public’s confidence in athletics.

Third, an unannounced search of randomly selected athletes is the only legitimate means to establish an effective steroid testing program. Present testing procedures do not deter steroid use.\textsuperscript{313} Many athletes ingest steroids as close as a week prior to the testing dates without detection.\textsuperscript{314} The reasonable suspicion standard is unworkable since there are no outward symptoms that would signal the use of steroids.\textsuperscript{315} If the “lower” standard of reasonable suspicion cannot be satisfied, the burden of showing probable cause also would be unattainable. The warrantless administrative search exception is the only means of effectively deterring athletes from ingesting steroids.

\textsuperscript{309} \textit{Id.} at 1142. In justifying the extension of the exception, the \textit{Shoemaker II} court stated: “[W]hile there are distinctions between searches of persons, in the intensely-regulated field of horse racing, where the persons engaged in the regulatory activity are the principal regulatory concern, these distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable.” \textit{Id.}

\textsuperscript{310} \textit{Id.; see also} Policeman’s Benevolent Ass’n of N.J. v. Washington Tp., 850 F.2d 133, 136 (3d Cir. 1988) (application of the \textit{Shoemaker II} test).

\textsuperscript{311} \textit{See supra} notes 87-106 and accompanying text.

\textsuperscript{312} \textit{See infra} notes 397-98 and accompanying text.

\textsuperscript{313} \textit{See supra} notes 119-20 and accompanying text.

\textsuperscript{314} \textit{See supra} note 82.

\textsuperscript{315} \textit{See supra} notes 291-94 and accompanying text.
In *United States v. Biswell*, the Court upheld a federal agent's warrantless search of a licensed gun dealer's storeroom. The Court held that the warrantless inspection did not violate the fourth amendment, stating:

Federal regulation of the interstate traffic in firearms is not deeply rooted in history... but close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the state in regulating the firearms traffic within their borders.

The *Biswell* Court further stated that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection." Testing athletes for steroids, like the search in *Biswell*, would be ineffective if a warrant or reasonable suspicion were required.

Assuming that the "state interest" aspect of the *Shoemaker II* test is met, the second hurdle of the test involves the individual's justifiable expectations of privacy being reduced because of the pervasive regulations of the industry.

There is no field that so pervasively and objectively reduces one's expectations of privacy as athletics. In athletics, an individual's expectations of privacy are substantially lower than that of the general population. Most, if not all, varsity programs require the administration of a physical exam prior to the athlete obtaining approval to compete in extracurricular sports. The purpose of this testing is not to invade the student's privacy, but to determine the relative health and ensure the safety of the individual prior to participation in strenuous athletic activities. The male physical exam is a very intrusive one, and certain aspects of the exam involve the physician actually touching the male genitals. The female exam is equally as intrusive and involves the physician touching the female's breasts and vaginal area. No other school activity involves or would permit the actual physical intrusion upon an individual's body.

The privacy expectations are further lowered by the day-to-day interaction between athletes in communal showers and dressing rooms. Physical exams and the communal conditions are not imposed upon the general student population, yet athletes voluntarily choose to accept them. By electing to participate in the sports programs, the athlete has chosen a less private atmosphere in which to live.

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317. *Id.* at 315.
318. *Id.* at 316.
319. *See supra* note 310.
Although the NCAA is highly regulated and the athletes may have a reduced expectation of privacy due to the regulations, the NCAA is not an industry. Biswell and the other administrative search exception cases all involved the regulation of industries.

National Treasury Employees' Union v. Von Raab,320 involved a union bringing an action challenging the constitutionality of the Customs Service requiring urine testing for drug use in certain sensitive jobs. The Fifth Circuit recognized that this testing program did not involve a highly regulated industry, yet, by analogy, it invoked the administrative search exception:

[The Custom Service regulations] call for the same kind of balance between the need for the search and the invasion of the individual’s expectation of privacy. Individuals seeking employment in drug interception know that inquiry may be made concerning their off-the-job use of drugs and that the tolerance usually extended for private activities does not extend to them if investigation discloses their use of drugs.321

The NCAA regulations are also analogous to those in the highly regulated industry exceptions. The athletes know, prior to joining a sports team, that they could and will be tested for drugs pursuant to the NCAA regulations. And like Shoemaker II, the athletes are the principal concern of the NCAA regulations.

(2) The NCAA: Regulating the “Industry” Of Intercollegiate Athletics

The violence began in the late nineteenth century. Football was a game with few rules and without direction. The Boston Post called it the “most atrociously brutal game through-out.”322 By 1903, there were not only journalistic complaints, but the legislature protested as well.323 Several states sought through the legislature to outlaw college football.324 This produced a few rule changes, but the 1905 football season was plagued with eighteen deaths and one hundred forty-nine serious injuries attributed to college football.325 James Roscoe Day, the Chancellor of Syracuse Univer-

320. 816 F.2d 170 (5th Cir. 1987) aff’d in part 485 U.S. 903 (1989) (The Court affirmed the suspicionless drug-testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms).
321. Id. at 180.
323. Id.
324. Id.
325. Id. at 13. Critics were not only in the newspapers and state senates, but also in the theaters. In 1905, one of the great theatrical successes of the season was “The College Widow,” a black satire about the violence in college football. Id.
sity, stated: "One human life is too big a price for all the games of the season."\textsuperscript{326}

Public pressure and common sense dictated that regulation was needed. On October 9, 1905, President Theodore Roosevelt brought the seriousness of college football violence to national attention when he called a special White House conference and summoned the various football leaders.\textsuperscript{327} On December 28, 1905, under the direction of Captain Palmer E. Post of West Point, the Intercollegiate Athletic Association of the United States (IAAUS) was organized.\textsuperscript{328} However, in the 1909 season, thirty-three college football players were killed, demonstrating that even more stringent rules were needed.\textsuperscript{329}

By 1912, the IAAUS would be renamed the National Collegiate Athletic Association, and in the words of Captain Post, it would be: "the voice of college sports."\textsuperscript{330} The ideals of the NCAA founders transcended the game itself, for the NCAA was founded not only to regulate the rules of the game, but also the conduct of those who played the game.

One of the first actions taken by the NCAA Football Rules Committee was the adoption of a code of ethics, which stated:

\[\text{[T]he first obligation of every football player is to protect the game itself, its reputation and its good name. He owes this to the game, its friends and traditions. There can be little excuse for any player who allows the game to be smirched with unsportsmanlike tactics.} \textsuperscript{331}\]

From its inception more than eighty years ago, the NCAA regulations focused on two primary objectives: safety and the integrity of the sport. Although the initial roll-call has grown from sixty-two schools regulating one sport, football, and now encompasses nearly one-thousand schools and dozens of sports, the principles of the NCAA as a regulating body have not changed: safety of the athletes and integrity of the game are the main objectives.

The current NCAA Constitution, bylaws, and enforcement procedures entail two hundred and fifty-two pages of rules and regulations as complex
as any regulatory scheme. These sections regulate the eligibility of athletes, academic standards, principles of ethical conduct, scholarship and financial aid requirements, recruiting, squad and coaching limitations, disciplinary proceedings, and sanctions for those who violate these standards.

As the Arlosoroff court noted, the NCAA serves a regulating role: The NCAA may be said to perform a public function as the overseer of the nation's intercollegiate athletics. It introduces some order into the conduct of its programs and enforces uniform rules of eligibility. The fact that the NCAA's regulatory function may be of some public service lends no support to the finding of state action, for the function is not one traditionally reserved to the state.

In Shoemaker II, the Third Circuit emphasized that the exception to the reasonable suspicion standard applies only to the urine sampling of voluntary participants in a highly regulated industry. Collegiate athletes, like jockeys, are voluntary participants in a highly regulated industry, intercollegiate athletics. The principal regulatory concern of the NCAA is the NCAA athlete. Accordingly, the random testing of NCAA athletes, absent any indicia of reasonable suspicion, should withstand any fourth amendment constitutional challenges.

C. Random Testing and the Equal Protection Clause

The equal protection clause of the fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Any claim under the equal protection clause is evaluated by a court under one of two tests: (1) the "rational basis" standard

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333. NCAA MANUAL, Constitution 3-9.
334. Id. at 3-3.
335. Id. at 3-6.
336. Id. at 3-4.
337. Id. at 3-5.
338. Id. at 3-10.
339. Id. Enforcement 1(a)-12(f)(2).
340. Id.
341. 746 F.2d at 1021.
342. 795 F.2d 1136 (5th Cir. 1986).
343. Id. at 1143 n.7.
344. U.S. CONST. amend. XIV.
or (2) the "strict scrutiny" standard. The "strict scrutiny" standard is used when the claimant can show that a fundamental right is at stake, or a suspect class is placed at a disadvantage by the program.

The participation in interscholastic or intercollegiate athletics is not a constitutionally protected fundamental right. Athletes do not make up a "suspect class" that entails a categorization based upon race, nationality, religion, alienage or gender. Thus, the "strict scrutiny" standard can not be applied to evaluate the constitutionality of a drug-testing program under the fourteenth amendment.

Since the "strict scrutiny" standard is inapplicable, the equal protection clause demands only that the school's drug testing program bear some rational relationship to a legitimate state purpose. This inquiry involves two elements: (1) does the drug testing program have a legitimate purpose; and (2) did the school officials reasonably believe that the use of the classification would promote that purpose.

In Shoemaker, racehorse jockeys challenged the Racing Commission's mandatory random drug testing program under the equal protection clause. The court, using the rational relationship test, held that subjecting jockeys to random drug testing was rational and furthered legitimate safety interests of the state by reducing the possibility of accidents and deaths among the jockeys while racing. As in Shoemaker, the concern with drug testing in athletes is a health and safety concern of the individual participants.

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346. Id.
348. See, e.g., Karmanos v. Balter, 816 F.2d 258, 260 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953, 959 n.2 (6th Cir. 1986); Jones v. Wichita State Univ., 698 F.2d 1082, 1086 (10th Cir. 1983); Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681, 682 (6th Cir. 1976); Parish v. NCAA, 506 F.2d 1028, 1034 (5th Cir. 1975); Schaill, 679 F. Supp. at 853; Barbay v. NCAA, 1987 WL 5619 (E.D. La. 1987) (WESTLAW, Allfeds Database).
350. See Rodriguez, 411 U.S. at 40. If a court finds a legitimate state objective that is rationally related to the university's testing program, the court must give great deference to the state's purpose. Id. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
353. Id. at 1105.
354. Id.
In *Schaill*, a public high school student athlete challenged the school’s drug testing program on equal protection grounds. The student athlete claimed that the drug testing procedure as a prerequisite to participation in the athletic program violated equal protection because non-athletes engaged in activities as strenuous as athletes, yet were not required to submit to drug testing. The *Schaill* court stated that unlike other school activities, “participation in interscholastic sports presents unique health or safety risks for drug users.” The court rejected further the argument that athletes were being singled out, stating that the drug testing is not compelled upon the student athlete; it is their choice and if they do not want to be subject to the testing procedure, “there remains with the [student athlete] the option of not being an athlete and thereby avoiding the possible testing.”

As long as a testing procedure is uniform and applicable to all varsity student athletes, it will withstand equal protection claims. Even a program that is limited to particular sporting events, such as football or track and field, could withstand equal protection challenges if the school could effectively demonstrate that steroid use is more prevalent in those sports than in other school sports programs. Any attempt by athletes to challenge the legitimacy of the testing because it does not deal with steroid abuse among the general student population also will fail. A court will not invalidate a testing program solely because it only deals with part of the problem.

**D. Random Testing and the Due Process Clause**

No state shall “deprive any person of life, liberty, or property, without due process of law . . . .” The fundamental touchstones of the due process clause of the fourteenth amendment are notice and fundamental fairness. However, if a “life, liberty, or property” interest is not at stake, no process is required at all.

At the high school and collegiate level, student athletes have claimed that they have a property interest in participating in interscholastic or inter-

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356. *Id.* at 857.
357. *Id.*
358. *Id.*
359. *Id.* at 854.
361. U.S. CONST. amend. XIV.
collegiate athletics,\textsuperscript{363} and a liberty interest in freedom from the stigma that would attach if suspended from athletics on the basis of a positive drug test.\textsuperscript{364} Courts have denied such claims because participation in athletics has been deemed a privilege and not a fundamental right protected by the Constitution.\textsuperscript{365}

In \textit{Schaill},\textsuperscript{366} the court rejected a high school athlete's claim that high school athletics provide a vehicle to college through athletic scholarships, and that deprivation of the right to compete in the high school athletic program denied the claimant a property interest.\textsuperscript{367} The court stated that although a student's aspirations for a college scholarship were admirable and of understandable importance to the athlete, they "do not establish any legally protected interests."\textsuperscript{368}

In \textit{Barbay v. National Collegiate Athletic Association},\textsuperscript{369} a collegiate football player was banned from participating in the Sugar Bowl for testing positive for steroids.\textsuperscript{370} The athlete claimed that his inability to display his skills in the Sugar Bowl was an irreparable injury and had damaged his reputation, in which he claimed to have a legitimate property interest.\textsuperscript{371} The court rejected both claims and upheld the actions of both the NCAA and the university.\textsuperscript{372}

Even assuming that there was a legitimate protected interest involved, the fourteenth amendment does not prohibit such deprivations where adequate due process procedures are provided.\textsuperscript{373} The due process clause requires that an individual be given notice and an opportunity to be heard prior to the deprivation of a right. Any drug testing procedure must pro-


\textsuperscript{365} See supra note 348. In \textit{Schaill II}, the Seventh Circuit stated: "It is highly speculative to assume that the reasons for a student's suspension from athletic competition will become general knowledge, and that the student's reputation will be adversely affected by the suspension." \textit{Schaill}, 864 F.2d at 1323.

\textsuperscript{366} 679 F. Supp. 833.

\textsuperscript{367} Id. at 854-55.

\textsuperscript{368} Id. at 855.


\textsuperscript{370} Id. at 1.

\textsuperscript{371} Id. at 14-15.

\textsuperscript{372} Id. The court stated that not being able to play in a bowl game was not an irreparable injury, since professional football scouts do not predicate their assessments solely on the basis of post season competition. Even assuming arguendo that Barbay had a property interest in his reputation, he had not shown that he was defamed or that his reputation was damaged.

\textsuperscript{373} Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1984); see also \textit{Schaill}, 679 F. Supp. at 853.
vide a comprehensive outline of the exact conduct that is prohibited so that the athlete will have fair notice and warning of the conduct that invokes disciplinary action. Prior to being disciplined, the athletes must be given notice of the charges against them, and they must be provided with an opportunity to challenge the test results or to refute the charges.\textsuperscript{374}

\textbf{E. Random Testing and the Right of Privacy}

The Constitution does not provide any explicit passages guaranteeing individuals the right to personal privacy. In the seminal case of \textit{Griswold v. Connecticut},\textsuperscript{375} the Supreme Court, by judicial fiat, recognized that there exists a right of privacy and that there also exists certain "zones of privacy."\textsuperscript{376} As later noted by the Court in \textit{Roe v. Wade},\textsuperscript{377} the right of privacy only extends to those rights deemed by the Court to be "fundamental"\textsuperscript{378} or "implicit in the concept of ordered liberty."\textsuperscript{379}

Although not specifically guaranteed, the Court recognizes two types of privacy interests: (1) the individual interest in avoiding disclosure of personal matters,\textsuperscript{380} and (2) the interest in independence in making certain kinds of important decisions.\textsuperscript{381} The latter decisions generally involve interests particular to family or child rearing.\textsuperscript{382} The drug testing of athletes

\textsuperscript{374} The Tippecanoe County School Corporation (TSC) sets forth excellent guidelines for any drug testing program. If a student is randomly selected, the athletic director will inform the student and his or her parent or guardian of positive test result. The tests are confirmed by a gas chromatography/mass spectrometry, which produce results with a 95% confidence level. The student and parent or guardian will also have the opportunity to offer evidence to the athletic director that may explain or exonerate the student. The athletic director may then consult with a toxicologist to determine whether the student's explanation could account for a positive result. As stated by the \textit{Schall} \textit{II} court: "[T]he TSC policy provides the student with notice of the charges against him or her, and an opportunity to rebut the charges at a meeting with the school-disciplinary authority." \textit{Schall}, 864 F.2d at 1323.

\textsuperscript{375} 381 U.S. 479 (1965).
\textsuperscript{376} The \textit{Griswold} "zone of privacy" was created by the Court bringing together the first, fourth, fifth and ninth amendments of the Constitution. These rights have "penumbras, formed by emissions from those guarantees which give life to the right of privacy." \textit{Griswold}, 381 U.S. at 484.

\textsuperscript{377} 410 U.S. 113 (1973).
\textsuperscript{378} Id. at 118 (quoting with approval Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
\textsuperscript{379} Id.
\textsuperscript{381} Id.

\textsuperscript{382} See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to educate one's child as one chooses); Meyer v. Nebraska, 262 U.S. 390 (1923) (the right to study German in a private school). As stated by Justice McReynolds, "liberty" encompasses "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, to establish a home and bring up children, to worship according to the dictates of his own conscience, and generally to enjoy those
would fall into the former, the right of privacy in not disseminating the contents of one’s body.\textsuperscript{383}

The right of privacy is not absolute; governmental intrusion is permissible and must be balanced against important state interests.\textsuperscript{384} In \textit{Roe}, the Court recognized a state’s interest in safeguarding public safety and welfare as legitimate.\textsuperscript{385}

In \textit{Schaill},\textsuperscript{386} two prospective high school varsity athletes claimed that the collection of urine testing samples violated their privacy rights.\textsuperscript{387} The \textit{Schaill} court began its analysis by recognizing that there were legitimate privacy interests involved in monitoring urination, even if the monitoring is non-visual.\textsuperscript{388} However, the court held that the surrounding circumstances particular to athletics reduced the athletes’ legitimate expectation of privacy:

The student athlete, along with the choice of participating in interscholastic sports, embraces certain customs, activities, and values that are unique to the athletic environment. Physical interaction among athletes is generally more commonplace among student athletes than among students in the general population, as exemplified by repeated and frequent use of communal showers and dressing rooms, the requirement of a yearly physical and in some instances, by the actual physical contact that is part of the sports activity. These factors, again, in and of themselves are not determinative, nor do they serve the purpose of negating privacy expectations.\textsuperscript{389}

These reduced expectations taken in conjunction with the important state interest of maintaining a drug-free athletic program and concerns for the health and safety of the athletic participants outweighed the students’ privacy interests.\textsuperscript{390}

In deciding the privacy issue, the \textit{Schaill} court also was impressed with two other factors: the non-observation policy of collecting the urine sam-

\textsuperscript{383} See supra note 238 and accompanying text.
\textsuperscript{384} See, e.g., \textit{Whalen}, 429 U.S. at 602; \textit{Roe}, 410 U.S. at 154.
\textsuperscript{385} \textit{Roe}, 410 U.S. at 154.
\textsuperscript{386} \textit{Schaill}, 679 F. Supp. 833.
\textsuperscript{387} \textit{Id.} at 856-57.
\textsuperscript{388} \textit{Id.} at 857.
\textsuperscript{389} \textit{Id.} at 856.
\textsuperscript{390} \textit{Id.}
and the provision that no student athlete who tested positive would be disciplined in any way academically, nor could the tests result in suspension or expulsion of any student athletes. These measures insured as much privacy to the student athlete without compromising the integrity of the testing procedure and punished the athlete only for his extra-curricular activities without impinging on the educational process.

Although personal autonomy and rights of privacy are laudable and essential axioms, when an individual’s conduct interferes with another’s personal autonomy, an absolute freedom can no longer be recognized by society. As the English philosopher and economist John Stuart Mill once stated: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it.” An individual cannot have an objectively reasonable expectation of privacy when his or her conduct adversely affects the rights of others.

The use of anabolic steroids involves not only the health and safety of the individual player using the drug, but it also affects the safety of the other individuals on the playing field not using the drug. Anabolic steroids are performance enhancers; they develop bigger, stronger and faster athletes.

Indirectly, athletes not using steroids are placed at a competitive disadvantage. To retain their starting position or even to just make the team, these athletes are forced to become steroid users. As Dr. Charles Yeslis, Professor of Health Policy and Administration at Penn State University, said: “Clearly steroids give you an advantage over people who aren’t taking

391. Schall, 679 F. Supp. at 857. The testing procedure provided that the student selected for the testing is accompanied by a school official of the same sex into the bathroom. The student is provided with an empty specimen bottle and allowed to enter a lavatory stall and close the door in order to produce the sample. At no time is the student under direct visual observation while producing the sample; however, the integrity of the exam is not compromised by the non-observation policy. A dye is added to the toilet bowl to prevent diluting the sample, and the general temperature of the sample is noted upon collection to prevent the athlete bringing in another’s urine. Further, a chain of custody of the samples is designed to insure the accuracy and anonymity of the testing procedure. Schall II, 864 F.2d at 1311.

392. Id. at 858.


394. Id. at 141.

395. See, e.g., L. Tribe, American Constitutional Law at 1372-73 (1988) (“The intuition that one’s safety is wholly one’s own business is simply too far out of phase with the reality of our interdependent society to find any plausible expression in our constitutional order.”).

396. See infra notes 397-98.
them."397 Dr. Charles Brown, the past president of the NFL Physicians' Society, stated that when some players use steroids and others do not, the "competition at that level is no longer equal."398

Directly, steroids enhance an athlete's ability to accelerate at greater speeds while retaining more muscle mass. Particularly in a sport like football, as Einstein's most rudimentary principles exemplify, this will result in a more forceful and powerful collision than could be generated absent steroids. Those not armed with steroids are prone to sustain more injuries. As one NFL linebacker articulated:

Steroids are the worst problem in the NFL. I just want to play football with the body the Lord gave me. Some of these guys we play are nothing but muscle. When you get hit by them, something has to go.399

If a person smoked cigarettes all day in their own house, without interfering with the rights of others, no judicial power should be exercised over them to enjoin their activity. However, once they take that cigarette into the public domain and prejudicially affect the rights of others, judicial authority can and should be exercised over that activity. When steroids are on the playing fields or in the athletic arenas, they have entered the public domain, and no legitimate expectation of privacy can exist when others' rights are adversely affected.

V. PROPOSED RANDOM DRUG TESTING PROGRAM FOR ATHLETES

In order to decrease their availability to the public, anabolic steroids and their synthetic derivatives must be reclassified by Congress as a controlled substance. This would impose tighter controls on their manufacture and their distribution by licensed physicians, and could expose dealers to prison terms of up to twenty years and fines of up to $250,000 for each count. States also can enact legislation prohibiting a physician from prescribing anabolic steroids for the purpose of athletic enhancement.400

397. See Rhoden, supra note 65; see also Cooper, Athletes are Losers by Winning With Illegal Drugs, N.Y. Times, Jan. 27, 1985, at Sports-2, col. 1. "Attempting to discourage the use of anabolic-androgic steroids is a very difficult task, the main reason being that the athletes and many coaches think that they must take them to compete with other athletes they know are taking them. Many athletes feel compelled to experiment with the anabolic-androgic steroids whether or not they like the idea of their use." Id.

398. Id


400. Currently, in Indiana it is a felony for a physician to prescribe anabolic steroids for the purpose of enhancing athletic performance. Alabama, California, Colorado, Florida, Louisiana, New Mexico, North Carolina, Ohio, Texas and Virginia have enacted legislation aimed at the
Internally, there must be strict sanctions levied against those who aid and abet the athlete in obtaining and using steroids. Any doctor, coach or trainer who makes these drugs available to the athlete should, in addition to any criminal sanctions, be forever banned from associating again within that sport.

Realistically, these proposals will only have a slight impact on the amount of drugs available. Only by decreasing the demand for these drugs will there ever be an effect on the black market. As long as there is a demand, the black market will flourish. To stop this demand requires a three-step solution: (1) random mandatory testing must be instituted at the professional and collegiate levels; (2) there must be more severe sanctions against those who are caught using performance enhancing drugs; and (3) athletes must be educated on the adverse effects of steroids.

To more accurately gauge those involved with performance enhancing drugs, random testing must be instituted. Athletes must be tested not only at competition time but randomly during their training periods. Currently, all athletes at all levels know exactly when their testing is to take place and for which the drugs that they will be tested. Accordingly, they schedule their drug intake during their training periods to maximize benefits and to minimize detection.401 The only way that testing for performance enhancing drugs is to have any effectiveness is to make random testing mandatory throughout the year.

Once the testing program is instituted, the system must allow the athlete with a steroid problem to come forward voluntarily and to submit him or herself to treatment without a sanction. For those who do not volunteer themselves for treatment, there must be a serious disincentive to prevent the use of steroids. This entails stricter penalties for the athletes caught using performance enhancing drugs. If an athlete tests positive for anabolic steroids, or for any synthetic derivative, they should be suspended from competition for one-quarter of their season, and they should be required to submit to an education and rehabilitation program to be eligible to reenter the league. The second offense should bring a one year suspension, and they should again be required to submit themselves to a longer educational and rehabilitation program. A third offense would result in a player's unconditional expulsion from the sport.


401. See supra notes 121-25 and accompanying text.
However, the initiation of any steroid testing program will not eliminate those determined to obtain an advantage. Many synthetic derivatives are presently being used by the athletes, and many of these are undetectable in testing.\textsuperscript{402} To prevent this situation, the testing program must list all substances that are banned from competition, including those not presently traceable through testing. Prior to each season the athlete must sign a statement that they have not and will not use any of the listed banned substances. When the testing becomes sophisticated enough to detect these synthetic drugs, and if the athlete tests positive, absent a viable medical explanation, they will be suspended.

At the NCAA and professional level, these tests must be linked together to provide a more effective deterrent. If a player tests positive in college or at the international level, the player will have one strike against him. For example, any team bidding for the services of Ben Johnson would be taking him with one infraction. These infractions would then carry over into any other athletic arena the athlete entered.

The importance of education and rehabilitation cannot be overemphasized. Any drug testing program must be constructive, not simply punitive. A drug testing program with only sanctions will not stop the problem; it will only move it to a new arena, the streets. Reverse anorexia and chemical dependency are serious concerns and must be treated accordingly.

The danger and adverse effects of steroids must be addressed by our educational systems prospectively, and not only after a problem has occurred. In 1986 the California assembly passed the Steroid Education Act, which is a step in combating the widespread use of anabolic steroids.\textsuperscript{403} The bill will provide for an educational program for students in junior and senior high school on the negative aspects of steroids.\textsuperscript{404} The NCAA must enact similar programs for its collegiate athletes and make participation a mandatory prerequisite for incoming freshmen.

\textsuperscript{402} See supra notes 123-24 and accompanying text.

\textsuperscript{403} Title 2, ch. 253, § 51262 (1986) provides: "The Legislature hereby finds and declares that the use of anabolic steroids to expedite the physical development and to enhance the performance level of secondary school athletes presents a serious health hazard to these student athletes. It is the intent of the Legislature in enacting this measure that, beginning with the 1987-88 school year, schools be encouraged to include in instruction in grades 7 to 12, inclusive, in science, health, drug abuse, or physical education programs a lesson on the effects of the use of anabolic steroids. In order to increase the knowledge of students about the effects of the use of anabolic steroids, the Superintendent of Public Instruction shall develop a steroid education package consisting of teacher lesson plans, student pamphlets, parent pamphlets and video tapes to be distributed directly to school districts." (Added by Stats., 1986, c. 253, § 1).

\textsuperscript{404} Id.
VI. Conclusion

The exposure of Ben Johnson can be classified only as a victory if the governing bodies of all sports realize the severity of the anabolic steroids problem in athletics. Present testing procedures of the NCAA and the NFL are ineffective and in need of much revision. The present NCAA bylaws prohibiting steroid use do not affect the vast majority of the athletes, and those who do participate in a bowl game or championship event can easily stop or mask their steroid intake prior to testing. The NFL’s hypocritical, see-no-evil attitude has become a tacit endorsement for steroid use.

Random testing of our NCAA and professional athletes for steroids is a harsh principle for many to accept, yet it is a needed remedy. To state that this proposal does not care, or that it neglects the rights of athletes is misguided. The safety and well being of the athletes beyond the game itself is the motivation for this proposal. Random testing can be thought of as a civil liberties issue or as a way of protecting those in a high risk business. The individual rights and liberties of the Constitution are precious, but the millions of athletes that are confronted with steroid use everyday are even more precious. Too many athletes are making the wrong decision, and it is time to take the decision out of their hands. It is time to return athletics to a battle between who is the better athlete, and not a battle between who has the better chemist.