Athletes and Drug Testing: Do We Care if Athletes Inhale?

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I. Introduction

They are our heroes and role models. Occasionally, they are villains and goats. We emulate their styles and mannerisms, wear what they wear and drink what they drink (or so corporate America hopes and believes). Their influence on our behavior cannot be overstated, yet, of course, they are not our parents. Rather, they are the professional and amateur athletes of so many sports. Perhaps an old joke best demonstrates the public attitude toward its sports figures (albeit this one refers to coaches):

Three coaches flew to the NCAA convention. The plane crashed, killing all three coaches. As they approached heaven, God was sitting on his majestic throne at the pearly gates and asked each of them three questions: Who are you? What did you do? What did people think of you? The first person said, 'I'm Denny Crum. I was the second best coach in the nation. I won two national championships and over 20 games a year. The people of Ken-
tucky think I'm great.' God said, 'Fine, Denny, stand on my right side.' The second person said, 'I'm Rick Pitino. I won four SEC championships and a national championship. The people of Kentucky think I'm great.' God said, 'Fine, Rick, stand on my left side.' The third person said, 'I'm Bobby Knight. I have won three national championships, two NIT championships, the Pan Am Games, the Olympics, nine Big 10 championships and was the youngest coach ever to win 600 games. The people of Indiana think you are sitting in my chair.'

Athletes are often the epitome of "public figures." Two of this decades' biggest news stories involved sports figures — the murder trial of O.J. Simpson and the announcement by Magic Johnson that he had tested HIV positive. These stories eclipsed any news coverage of the atrocities of Yugoslavia or the Congressional battles over the nation's budget.

Whether evidenced by the latest Presidential-declared "war on drugs" or Nancy Reagan's "just say no" slogan, our society has accepted the premise that drugs are bad. The 1995 Gallup Poll on drug abuse places drugs as the number two issue concerning Americans, with crime as the number one issue. Ninety-four percent of Americans say drugs are a more serious problem than welfare reform, health care, budget deficits, and moral values. Against this backdrop of public concern over drugs, this article discusses drug testing in sports and whether a person's status as an athlete should subject that person to any greater scrutiny or sanctioning concerning the use of drugs, than the rest of society.

II. The American Drug Culture

There can be little debate that we are a drug dependent society. One need only watch prime time television for a half hour to see commercials extolling drugs to wake us up, help us sleep, relieve our stress, make us thin, or even to "correct all." Nearly every home has caffeine and alcohol products. Tobacco is sold in candy stores and gas stations. There are approximately 150,000 legal drugs in the United States, many of which are sold over-the-counter.

For the most part, these legal drugs are not the target of the government's "war on drugs." Rather, the government has targeted illegal drugs such as marijuana, cocaine, and heroin. It is politically expedient

2. Id.
3. KEVIN P. ZEESE, DRUG TESTING MANUAL § 1.02, at 1-7 (1995).
to vocally oppose such drugs and being “tough on drugs” is a popular political theme. As such, in its war, the government has pitted itself against the approximately 30 million marihuana smokers, 5 million cocaine users, and 500,000 heroin addicts.\footnote{Id. at 1-8 (citing National Institute on Drug Abuse (NIDA), Household Survey, Drug Use in the United States (1982)).}

One of the chosen battlefields in the war is the work place. For example, in bold letters on part of the cover of a government publication is the caption “70% of All Illegal Drug Users Are Employed. . . .”\footnote{Id. (citing U.S. Dep't of Labor, An Employer’s Guide to Dealing With Substance Abuse (Oct. 1990)).} The publication is intended to encourage (and frighten) employers into establishing substance abuse programs.\footnote{Id.}

Whereas there have been extravagant claims of widespread use of drugs in the work place, a 1990 American Management Association survey revealed that just three percent of randomly-tested employees tested positive for illicit drugs.\footnote{Id. (citing Rosemary Orthmann, Survey Indicates Extent of Workplace Testing, Employment Testing (July 1, 1990)).} Even where such tests have been “for cause,” the study revealed that only thirteen percent of employees tested positive.\footnote{Id.} A study of three federal agencies revealed that less than one percent of randomly-tested employees tested positive.\footnote{Id.}

By every known reputable survey and statistical measure, the effects of tobacco and alcohol on the workplace are the greatest detriment to productivity. For example, one study reported that alcohol accounted for nearly $90 billion in lost productivity as opposed to $47 billion from all illicit drugs combined.\footnote{Id. at 1-11 (citing Harwood, Economic Costs to Society of Alcohol and drug Abuse and Illness, Research Triangle Institute (1980)).} One Canadian government study on workplace deaths revealed that of all such deaths between 1979 and 1986, alcohol was the greatest single problem.\footnote{Id. at 1-14 (citing Alleyne, et al., J Occup. Med., 33(4) 496-500 (1991)).}

The information concerning this nation’s overall drug and alcohol culture is not presented to minimize the issue of illicit drug abuse by athletes or other citizens. Rather, it is to put in perspective the stigma attached to those deemed as “drug abusers.” Regardless of the social ramifications of various substances, we are a nation of laws. And currently our laws proscribe at least the possession of certain illicit substances. As such, discussion of our overall drug culture should serve as a...
context for the thrust of this article. Hereinafter, unless expressed otherwise, any reference to the use of "drugs" by athletes refers to illicit substances.

III. Drug Laws and the Athlete

The relationship between our nation's laws and our athletes is extraordinary to the extent of the enormous impact that sports has on many of our lives. The Super Bowls are some of the most watched television programs of all time. Globally, the World Cup and the Olympics draw more television viewers than any other events. Sports news and results occupy certain news media exclusively and most media to some extent. The result of this almost insatiable demand and resulting supply of sports is that the world of sports is often viewed with microscopic precision. Yet, a tractor trailer driver, high on amphetamines, who kills a family of four with his rig, scarcely makes the local news. Drug use by athletes becomes sensationalized, even if such use has not been shown to impact on a team.

Although drug abuse is endemic to our society, as with any other segment of the population, athletes are but a microcosm of society. "Whatever happens in society is going to happen in . . . any profession," including sports. For nearly two decades, the issue of drug abuse by athletes has periodically reared its ugly head, often quite notably. Unquestionably, the tragic deaths in 1986, from cocaine overdoses, of University of Maryland's basketball star, Len Bias, and, just eight days later, Cleveland Browns safety, Don Rogers, fueled the proponents of action toward curbing drug use by athletes. In addition to these tragedies, Canada was severely embarrassed by the stripping of an Olympic gold medal in 1988 from track star Ben Johnson based on his drug abuse.

13. Of course there are substantive arguments that any use of drugs will impact on the player's performance and, hence, the team.
There are many other examples of our sports heroes falling prey to the perils of drug abuse.

IV. INSTITUTIONAL REACTION TO PERCEIVED ABUSE BY ATHLETES

The initial reaction to the perceived problem of drug abuse by athletes was objective drug testing. Such objective tests were first used in sports, in 1965, against three cyclists at the Tour of Britain cycle races.\(^1\)

In 1968, the Olympics first used drug testing at the Grenoble Games.\(^2\)

In 1985, the United States Olympic Committee instituted a formal drug testing program.\(^3\)

In 1986, the National Collegiate Athletic Association (hereinafter “NCAA”) adopted its own drug testing program.\(^4\)

Although these early drug testing programs were initially directed toward performance enhancing drugs such as steroids,\(^5\) science has progressed to enable testing for a multitude of sins. On the surface, the goals of mandatory drug testing are laudable. For example, at the collegiate level, the claimed benefits are the following: (1) promotion of safety for the athletes involved; (2) deterring the amount of drug use by the athletes; (3) educating the staff/players of the dangers of drug use and arranging for treatment; and (4) maintaining the integrity of the university through the promotion of a “drug-free” environment.\(^6\)

But, we should not allow such laudable goals to interfere with our judgment and basic understanding of the underlying rationale for singling out athletes for such exacting scrutiny. Testing for steroids is supportable as a means to ensure fair competition. But, beyond testing for such performance enhancers as steroids, what justification exists to test athletes for marijuana, for example, as opposed to testing the cheerleaders, the front office employees, the marching band, or any other employee in corporate America. These moral questions, together with the legal issues relating to drug testing of the professional and student athlete, will be the remaining focus of this article.


\(^{18.}\) Id.

\(^{19.}\) Id. (citing United States Olympic Comm., Division of Sports Medicine, Drug Education and Control Policy (1988)).

\(^{20.}\) The NCAA Drug-Testing Program (1986-87).


Undoubtedly, the headline-grabbing incidents of drug abuse by athletes create the impression in the eyes of the public that an epidemic exists in sports. However, there is no evidence that drug abuse is any more rampant among professional athletes than with the general public. Among student athletes, drug abuse also seems to mirror the level of abuse of the overall student population. Assuming, arguendo, that drug use among athletes at all levels proximates that of a larger unit (e.g., the general population or the "student body"), it begs the question, why should athletes be treated any differently than society as a whole?

The policy reasons used to support random testing of professional athletes are similar to the stated goals of the NCAA in its drug testing program. These policy reasons are as follows: (1) fair competition; (2) public confidence in the games; (3) high visibility of athletes as role models; and (4) the health and safety of the athletes. Former professional football player, Alan C. Page, takes issue with each of these policy reasons in his argument against special emphasis toward drug testing professional athletes. For example, with respect to public confidence in the games, Mr. Page argues that we should not demand any greater performance expectations of athletes than the persons building our cars. With respect to athletes as role models, Mr. Page argues that athletes are no different from others in society.

Just because one has the skills of a motor genius to fly through the air like a bird on the way to the basket or to make contact with a ninety-eight-mile-per-hour fastball does not mean that such individuals are immune from or have any greater ability to deal with the causes of substance abuse.

26. Page, supra note 24, at 156. Alan C. Page was the Assistant Attorney General for the State of Minnesota, Employment Law Division at the writing of his article. He was a professional football player for the Minnesota Vikings and the Chicago Bears from 1967 through 1981.
27. Id.
28. Id. at 158.
29. Id. at 159.
He goes on to counsel that rather than impose random drug testing on professional athletes, parents would be better off by telling their children that they should look up to other persons, in and out of sports, who are not drug abusers.\textsuperscript{30}

Mr. Page's arguments notwithstanding, it is overly simplistic to play ostrich to the impact of an athlete's behavior on our nation's children or its adults. We do demand greater performance in our athletes and we pay dearly to see such performance. We rarely, if ever, pay to watch someone build a car. When athletes started celebrating with "high five's," so did we. When athletes started shuffling in the end zones, so did we. When athletes change their hair style, so do we. It is only wishful thinking that the analogy does not extend to such negative attributes as drug abuse. Also, it is naive to claim that the cure simply lies in telling our children to emulate someone else. In reality, many of us would like to "be like Mike."\textsuperscript{31}

VI. THE UNIQUE STRUCTURE OF TEAM SPORTS

Before embarking on an analysis of the legal issues concerning drug testing, it is important to briefly discuss the unique issues of discipline in team sports. Most of the legal issues concerning the drug testing of professional athletes revolves around contractual obligations.\textsuperscript{32} With respect to student athletes, the primary legal issues are constitutional and hinge on whether the program is deemed to be one of state action.\textsuperscript{33} These issues become somewhat clouded due to the unique structure of team sports.

For most employees, the chain of supervision and authority is a straight vertical line. Discipline, including programs such as drug testing, are administered by the company through this chain of supervision. With team sports, the "company" is the player's club. Professional and amateur athletes at all levels are also subject to the disciplinary authority of the game's officials, such as an umpire or referee.\textsuperscript{34} With professional teams, athletes are also subject to discipline by the league, which usually can act somewhat autonomously.\textsuperscript{35}

\textsuperscript{30} Id.
\textsuperscript{31} In reference to Michael Jordan, who is reputedly the best basketball player of all time.
\textsuperscript{32} Rippey, supra note 23.
\textsuperscript{33} See, e.g., Knapp, supra note 25.
\textsuperscript{34} Id.
\textsuperscript{35} Jan Stiglitz, Player Discipline in Team Sports, 5 MARQ. SPORTS L.J. 167, 168 (Spring 1995).
In professional sports, drug testing programs can be established by the team or the league through collective bargaining. With the student athlete, drug testing programs can be administered by the school or, if applicable, the NCAA. Accordingly, the legal issues, surrounding drug testing programs, vary depending on which entity implements and administers the program.

VII. CONSTITUTIONAL PARAMETERS TO DRUG TESTING

A. General Considerations of Drug Testing

Although there is no federal law regulating drug testing, there is legislation allowing public high schools to use federal funds for drug testing programs. The legislation neither prescribes nor prohibits drug testing programs.

The constitutional challenges to drug testing have generally fallen into the following interrelated categories: (1) right to privacy; (2) unreasonable search and seizure; (3) due process; (4) equal protection; and (5) self-incrimination. These constitutional issues have been resolved by the courts predominantly using the same analysis concerning the testing of government employees. Accordingly, the discussion of the legal issues of drug testing athletes begins with the parameters of employee drug testing.

In 1986, President Reagan issued an executive order requiring federal agencies to establish drug testing programs for employees in sensitive positions, including those employees in public health and safety positions (e.g., law enforcement officers). Even prior to the order, some federal agencies promulgated regulations providing for drug testing of employees. The United States Supreme Court cases of Skinner v. Railway Labor Executives' Ass'n and National Treasury Employees Union v. Von Raab provide the framework for analysis of employee drug testing programs. These cases stand for the proposition that, for

36. Id. at 168, 169.
37. Zeese, supra note 3, at §§ 7.02-03.
39. Id.
44. 489 U.S. 656 (1989).
the most part, state action is an essential ingredient before the court will consider a constitutional claim. In *Skinner*, the Federal Railroad Administration (hereinafter "FRA") promulgated regulations establishing "for cause" drug testing of railroad company crew members, following a major train accident and other specified events. The United States Supreme Court, in *Skinner*, considered exclusively the issue of whether the FRA's drug testing program violated the Fourth Amendment's prohibition against unreasonable search and seizure. The Court first acknowledged that, generally, the Fourth Amendment does not apply to a search or seizure by a private party; nonetheless, even though the railroad company in *Skinner* was a private employer, the Court concluded that there was sufficient federal regulation of the industry to establish the requisite state action.

Having decided that the Fourth Amendment applies in *Skinner*, the Court next addressed issues of the warrant requirement and whether probable cause was required. The Court recognized that although the purpose of the warrant requirement is to protect privacy interests, there is a compelling government interest served by the FRA regulations and that the drug test under the regulations posed only limited threats to the justifiable expectations of privacy by the employees. As such, the Court carved out an exception to the warrant requirement for state-directed drug testing of employees.

In *Von Raab*, the National Treasury Employees Union (hereinafter "NTEU") challenged a mandatory, suspicionless, drug testing program, established by the Commissioner of the United States Customs, as a condition of employment for certain enforcement positions. The NTEU sued to have the program declared unconstitutional as a violation of the Fourth Amendment. Referring to its same-day decision in *Skinner*, the Court again held that the agency's mandatory drug tests withstood the reasonableness standard for warrantless searches.

### B. State Action in Amateur Sports

Since the seminal cases of *Skinner* and *Von Raab* were premised on state action, this section discusses drug testing programs instituted by

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45. 489 U.S. at 606.
46. Id.
47. Id. at 614.
48. Id. at 620-21.
49. 489 U.S. at 660.
50. Id. at 663.
51. Id. at 677.
other state actors such as public schools, including state colleges and universities. In 1969, the United States Supreme Court proclaimed that public school students "do not shed their constitutional rights . . . at the schoolhouse gate."52 In 1993, the Colorado Supreme Court reviewed the University of Colorado's random, suspicionless drug testing program with the principle issues being the voluntariness of student consent and the school's administration of the program.53 The court deemed the issues as a question of fact and afforded great weight to the trial court's findings concerning perceived shortcomings in the drug testing process and the obtaining of student consents.54 Accordingly, the Colorado Supreme Court upheld the trial court's finding that the state failed to carry its burden of proof in establishing that the consent forms were voluntarily submitted.55 Further, the court determined that the state failed to prove a compelling state interest because of a lack of evidence that there was a drug problem at the school.56

Most recently, the United States Supreme Court squarely addressed the issue of mandatory, suspicionless drug testing of public school athletes in Veronia School District 47J v. Acton, which involved a school district policy of drug testing all students (in any grade) who participate in interscholastic athletics.57 After experiencing what was perceived as an increase in drug-related discipline problems during the 1980s, the Veronia School District, with input from parents, instituted a drug testing program for its athletes. Singling out athletes was premised on the belief by school district officials that the athletes were ring leaders of a drug-inspired counterculture.58

Dealing first with the right to privacy, the Court took note of the special custodial responsibility that the state has with students.59 As such, the Court reasoned that students had a lesser expectation of privacy against the state as their schoolmaster.60 Student athletes enjoy even lesser expectations of privacy because they voluntarily subject themselves to a heightened degree of regulation.61 As to the nature of

54. Id. at 932.
55. Id.
56. Id. at 945.
58. Id. at 2388.
59. Id. at 2391-92.
60. Id. at 2391.
61. Id. at 2393.
the government intrusion, the Court compared collection of a student urine sample to an encounter in a public restroom and determined that such procedures constituted only "negligible" privacy interests.\textsuperscript{62}

Finally, citing to \textit{Skinner} and \textit{Von Raab}, the Court in \textit{Acton} found that the school district had demonstrated the requisite compelling interest in preventing drug use by students in general and student athletes in particular.\textsuperscript{63} \textit{Acton} was a 6-3 decision and has sparked criticism based, in part, on a perceived deviation from the holdings in \textit{Skinner} and \textit{Von Raab}.\textsuperscript{64} Nonetheless, the message is clear. The United States Supreme Court is a willing participant in the war on drugs as it relates to suspicionless testing of student athletes by state actors.

\section*{C. NCAA Actions in Amateur Sports}

The cases discussed in the preceding section relate solely to implementation of drug testing programs by state actors. However, college athletics, in particular, are under the auspices of the NCAA, which in 1986, implemented its own drug testing program.\textsuperscript{65} As originally implemented, the program was extremely broad in that it banned over three thousand substances and its original goals were to protect the health and safety of the athletes and to preserve fair competition.\textsuperscript{66} The current program consists of random, suspicionless drug testing.\textsuperscript{67} Athletes must sign consent forms and, failing such consent, the athlete is deemed to be ineligible to participate in all intercollegiate sports.\textsuperscript{68} As might have been expected, the NCAA program was challenged and became subject to judicial scrutiny.

As discussed in the preceding section, the threshold constitutional inquiry in drug testing is whether the program is a state action. Hence, the first issue to successfully challenge the NCAA's program is whether the NCAA can be determined to be a state actor, or if its activities are colorable as state action. In 1988, the United States Supreme Court appeared to have put this issue to rest in \textit{National Collegiate Athletics Ass'n}

\begin{itemize}
\item \textsuperscript{62} 115 S.Ct. at 2393.
\item \textsuperscript{63} \textit{Id.} at 2395.
\item \textsuperscript{65} \textit{Supra} note 20.
\item \textsuperscript{66} \textit{Id.} at 3.
\item \textsuperscript{67} NCAA 1992-93 Drug Testing/Education Programs 12.
\item \textsuperscript{68} \textit{Id.} at 2.
\end{itemize}
Jerry Tarkanian was the highly successful coach of the University of Nevada-Las Vegas (UNLV) men's basketball team, who was ordered to be suspended, by the NCAA, for recruiting violations. Tarkanian argued that the NCAA's actions were colorable as state action since they resulted in a delegation of power by its members (state colleges and universities). The Court rejected this argument by holding that NCAA's conduct in disciplining players for infractions of NCAA rules is to be viewed as private, rather than state action.

In 1994, the California Supreme Court, in *Hill v. National Collegiate Athletics Ass'n*, similarly rejected a Constitutional challenge to the NCAA's drug testing program. Even though the *Hill* court held that the California Constitution proscribes invasions of privacy by private actors, it nonetheless upheld the NCAA's drug testing program based on the significant interest of the NCAA to protect the athlete's health and safety.

### D. Professional Sports

An obvious distinction between the legal issues facing drug testing programs of amateur sports and professional sports is the degree of state action. Public schools and state-run colleges and universities are state actors, and students at these institutions benefit from full constitutional protection. However, most, if not all, professional teams, in the United States, are privately owned and therefore, not subject to the same array of constitutional restrictions.

Even where drug testing programs in professional sports are determined to be the result of state action, the courts have afforded wide latitude to such programs. For example, in 1986, five famous jockeys challenged state regulations requiring drug testing of jockeys. The Third Circuit Court of Appeals, in determining that jockeys are athletes, upheld the regulations based on the government's extensive regulation of

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70. *Id.* at 187.
71. *Id.* at 196.
72. *Id.*
73. 865 P.2d 633 (Cal. 1994).
74. *Id.* at 600.
75. *Deryden*, 863 P.2d at 936.
the sport and the government's interest in maintaining public confidence in the integrity of the sport.\textsuperscript{77}

For the most part, however, drug testing in professional sports is not subject to state regulation. As such, drug testing programs in professional sports have mostly been challenged on the basis of contractual obligations, in particular collective bargaining agreements.\textsuperscript{78} In some sports, where contract negotiations had stalled on the issue of drug testing, leagues attempted to unilaterally impose drug testing programs. For example, ten days after the death of Cleveland Browns player Don Rogers,\textsuperscript{79} National Football League (hereinafter "NFL") Commissioner, Pete Rozelle, announced a plan for drug testing of athletes during the playing season.\textsuperscript{80} The NFL Players Association immediately sought to enjoin the league from implementing the program as in conflict with the collective bargaining agreement.\textsuperscript{81} The arbitrator of the dispute ruled that the plan's unscheduled testing conflicted with the bargaining agreement.\textsuperscript{82} Similarly, an attempt by Major League Baseball (hereinafter "MLB") Commissioner, Peter Ueberroth, to institute mandatory drug testing of players was determined to be a violation of MLB's collective bargaining agreement.\textsuperscript{83}

The success of any employee-related program, particularly one as emotionally charged as drug testing, rests with the "buy in" of its participants. Accordingly, the collective bargaining process should be allowed to provide the necessary forum for debate and resolution of drug testing programs in professional sports.

VIII. SANCTIONING THE ATHLETE DRUG ABUSER

Most of the plethora of literature on drug testing programs in sports addresses the constitutional and policy issues of such programs; yet, the literature is more often than not tantalizingly silent as to the applicable remedies and sanctions for potential and actual drug abuse by athletes. In theory, if the professed rationales of fair competition and the health and safety of athletes behind such programs in sports has any merit, the

\textsuperscript{79} Reilly, supra note 15.
\textsuperscript{80} Norma Roth, Sports Policies Toward the Use of Drugs by Players, 31 Boston B.J. 28 (July/Aug. 1987).
\textsuperscript{81} Id. at 29.
\textsuperscript{82} Id.
\textsuperscript{83} Rose & Girard, supra note 78, at 800.
remedies for drug use would naturally be severe. In a 1988 first page Houston Chronicle article, captioned Life Ban Urged for Drug Users in Pro Sports, the then head of the House Narcotics Committee, Representative Charles B. Wrangle, urged that professional athletes caught using drugs, even for the first time, be banned permanently from their league.84

All existing drug testing programs in professional sports combine the carrot with the stick; with the major aim being education and treatment, and punishment only if those fail.85 For example, the National Basketball Association program rewards players who seek treatment by paying for such treatment. Suspension or expulsion occurs only after repeated violations.86 A baseball player seeking treatment is granted amnesty from discipline.87

In amateur sports, there is far more stick than carrot. For example, the NCAA rules include a provision that students found using drugs are ineligible for post-season competitions for ninety days, with increasing sanctions for continued abuse.88

Remedies and sanctions for drug abuse are purportedly based on the safety of the athletes and the impact of such use on the sport itself.89 Under these premises, why should athletes who are sexually promiscuous not be similarly sanctioned? The Magic Johnson story provides a prime example of how such promiscuity affects player safety and the sport itself. Accordingly, why should athletes not be subject to periodic testing for HIV?90 Left undiscussed in the literature is whether the relative nature of the offense should impact on the degree of discipline. If drug abuse is considered to be a crime,91 perhaps such abuse should be treated as any other crime of similar magnitude. For example, if the related criminal offense for use (i.e., possession) would be a misdemeanor offense, why should sanctions against players for drug abuse be any greater, or less, than for similar misdemeanors. If drug abuse is deemed to be an employee performance issue, then why should such

85. Champion, supra note 40, at § 21.2.
86. Id.
87. Id.
88. supra note 67, Bylaw 5-2.
89. Rose & Girard, supra note 78, at 792.
91. This assumes that a player must first possess drugs to abuse them. Most applicable criminal statutes would relate to possession of illegal drugs.
abuse not be treated as any other employee performance problem. It is beyond the intended scope of this article to delve into the myriad of issues surrounding these premises. However, they are surfaced for the purpose of highlighting that perhaps the phrase “drug abuse” has conjured such a negative image, that in our zeal to fight the “war on drugs,” we have lost perspective and focus as to the nature of the underlying offense.

IX. PROPOSED SOLUTIONS

Given the varied categories of athletes and actors, and the varied nature of drug testing programs (e.g., random vs. “for cause”), it would be difficult to establish one set of guidelines from which to operate. Nonetheless, both the NCAA and professional sports have attempted to tackle the problem independently. The NCAA’s drug testing program is continually evaluated and administered by its members through a formal committee.92

In 1991, a report of a special task force, on drug abuse in the workplace, recommended a sort of Model Act, “The Substance Abuse Testing Act,” to guide employers in developing and implementing drug testing programs.93 The task force consisted of sixteen members from business, education, criminology, labor, and the judiciary.94 The report addressed the issues of both random and “for cause” drug testing.95 The fundamental recommendations of the task force provided that employers should establish a written policy, provide notice, define the substances to be tested for, determine competency of labs to be used, and have adequate procedures for confirmation of positive results.96 Included as part of the task force report was an article by former professional football player Alan C. Page, who fully supported the concepts included in the Act, provided that professional athletes be treated no differently than other employees.97 Whether such a Model Act, if implemented, can endure depends in large part on the collective bargaining process.

94. Id. at 7.
95. Id. at 10.
96. Id. at 11, 12.
The literature of sports, this article included, often discusses athletes in terms of role models for our youth. Yet, we should not lose perspective that our athletes are themselves our youth. Most non-professional athletes are no more than teenagers. Even our professionals, many of whom we make into millionaires, are young adults. Perhaps the most overlooked response to the perceived problem is that rather than perceive athletes as role models, we should recognize that athletes themselves need role models.98 One need only look at the antics of Jerry Jones, the owner of the NFL’s Dallas Cowboys, who thumbs his nose at the rules of the NFL, to understand why so many of the Cowboys players are currently suspended for substance abuse.99

X. Summary and Conclusions

The courts will afford, even a state actor, wide latitude in establishing a random, suspicionless drug testing program, provided that the program is based on a demonstrable need for such a program. Non-state actors, such as the NCAA or professional teams, are bound mostly by state law or contractual obligations. Any drug testing program should abide by adequate procedural safeguards.

Drugs abuse among athletes discredits sports as an institution as well as the respective team or school. The best evidence indicates that the behavior of our athletes serves as a model for many of us in society. Drug testing of employees in sensitive positions has become an accepted part of our culture. As a society, we have demanded that same higher level of a “drug free” work force with our sports teams. We do not want our heroes injured and we do not want them do be perceived as anything less than the icons we make them out to be.

But, we should not lose perspective in our support for the “war on drugs.” Our athletes, our heroes, are but a microcosm of society, reflecting its best and its worst. As such, we should provide whatever carrots and other support we can to ensure a drug-free sports environment. We should resist the temptation to drop the anvil on those of our heroes who occasionally stumble. There are less oppressive means to address the problem than to forever ban a person from participating in an endeavor he or she has prepared for most of his or her life. As with any form of

99. Id. at C8. See also, Dave Goldberg, Spotlight: Cowboys' Troubles — 'Boys will be boys, but not like this. Dallas looks to polish image, CINCINNATI ENQUIRER, Apr. 7, 1996, at C8.
punishment, whether for violation of law or rules of conduct, such punishment should be meted out on a progressive scale based on the history of the offender's violations, and should be measured against the underlying nature of the offense in comparison to other violations of similar magnitude.

As we demand our athletes to be role models for our youth, we should provide leadership and role models for the athletes themselves. They are, after all, what we in society have made them to be.