Drugs vs. Privacy: the New Game in Sports

Charles A. Palmer
DRUGS VS. PRIVACY: THE NEW GAME IN SPORTS

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A society's recreation is charged with moral significance. Sport—and a society that takes it seriously—would be debased if it did not strictly forbid things that blur the distinction between the triumph of character and the triumph of chemistry.

- George Will

There are various reasons for drug abuse in the sports world. When Ben Johnson streaked across the finish line in the 1988 Olympic 100-meter dash the sports world took notice. The Olympic gold medal, the world's record and worldwide fame belonged to Mr. Johnson. When it was discovered that this was all made possible by the use of drugs, other lessons were learned. Some noticed the shame of Mr. Johnson's drug abuse. Others noticed that drug abuse enabled Mr. Johnson to win and gain athletic fame. To some, Ben Johnson's mistake was in taking drugs but to others his mistake was getting caught. The lesson is clear for this latter group. Undetected drug abuse in sports will be rewarded. If Ben Johnson had been more skillful in avoiding drug detection, he would have obtained fame through the use of drugs. Sports, as an activity, is unique in providing rewards for undetected drug abuse.

Objective tests for drug abuse began recently. Gas chromatography was first used in sports in 1965 to detect the presence of prohibited substances in the urine of three cyclists at the Tour of Britain cycle races. Drug testing of urine was first used in the Munich Olympic Games in 1972. In 1985, the United States Olympic Committee adopted a comprehensive drug testing program. In 1986, the National Collegiate Athletic Association

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3. Id. at 21.
(NCAA) followed the lead of the United States Olympic Committee (USOC) by adopting its own drug testing program.\textsuperscript{7} Drug testing technology is now available to all sports organizations desiring to detect drug abuse.

Although the abuse of drugs for personal satisfaction has been with us for a long time, the development of drugs to enhance physical performance has a more recent origin. Steroids were developed in 1935 but were not widely used until the 1950s.\textsuperscript{8}

Science has enabled us to detect drug abuse.\textsuperscript{9} Now, the law must balance the benefits of that scientific testing against an individual's privacy interests. In 1989, the United States Supreme Court decided two cases involving drug testing in the workplace.\textsuperscript{10} That court has not yet considered the question of drug testing in sports or in high school. Since drug testing in high schools and in sports present such different issues from those already decided by the United States Supreme Court, this article considers those questions. This article considers drug testing from the perspective of the high school administrator who desires to adopt such a program. It considers whether such testing is possible and, if so, how should the testing be done. This article does not consider what the law should be, but rather what the existing precedents and law will permit.

This article begins by determining whether the Fourth Amendment of the United States Constitution applies to urinalysis in high schools. Having concluded that it does, the article goes on to determine whether a warrant or probable cause is necessary for high school athletic drug testing and, if not, what is the legal standard or rule for such testing. Finally, the various aspects of high school drug testing and the effect of each on the legality of drug testing in high schools are examined.

\section{I. Mandatory Urinalysis of High School Athletes is Subject to the Fourth Amendment of the United States Constitution}

Initially, it must be determined whether the Fourth Amendment of the United States Constitution prohibits mandatory urinalysis of high school

\begin{itemize}
\item \textsuperscript{7} Tracy Dodds, \textit{NCAA Believes its Drug Test Passed}, \textit{L.A. TIMES}, Jan. 6, 1987, § 3, at 8.
\item \textsuperscript{8} American College of Sports Medicine, \textit{The Use of Anabolic-Androgenic Steroids in Sports}, 19 MED., ScI., SPORTS EXERCISE 534 (1987).
\end{itemize}
athletes. That issue is divided into two parts. First, is the process of obtaining the urine—forced urination—a search? Second, is the analysis of urine a search?

A. Urinalysis is a Search

A search occurs when the government invades an expectation of privacy that our society considers reasonable. Obtaining urine for drug testing necessarily requires the monitoring of urination. Monitoring may take many forms but it must be present to assure the integrity of drug testing. The process of monitoring urination invades deep-seated privacy expectations.

Urination is one of the most private activities in our society. Indeed, our criminal laws widely prohibit urination in public. The monitoring of urination by the government, a process which is necessary to the integrity of urinalysis, is a search pursuant to the Fourth Amendment of the United States Constitution.

Is the analysis of urine a search? Urine is a waste product that the body periodically eliminates. The Attorney General of the United States has argued that there can be no expectation of privacy in such a waste product. However, urine is analyzed to determine the substances previously consumed by the individual which are now being excreted. Analyzing urine can determine whether a person is epileptic, pregnant or diabetic, as well as whether a person has ingested prohibited substances. The potential of urinalysis to determine these various medical facts and whatever the individual may be concealing is a search pursuant to the Fourth Amendment of the United States Constitution.

13. Skinner, 489 U.S. at 617; National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987).
14. Most states include this as a violation of disorderly conduct statutes; see, e.g., D.C. CODE ANN. § 22-1121 (1991); but see VA. CODE ANN. § 15.1-37.3-10 (1950); National Treasury Employees v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987).
15. Skinner, 489 U.S. at 617.
17. Council on Scientific Affairs, American Medical Association, supra note 9, at 1311.
19. The argument can be made that there can be no reasonable expectation of privacy if the test carefully circumscribes whether illegal substances have been used. The Supreme Court has not ruled on this issue. This question is presented when the school imposes a drug testing requirement on the mandatory pre-sports physical done by a private doctor. The doctor may obtain urine to test for a number of medical conditions such as epilepsy and diabetes. Is it a search then for a high school to require a doctor obtaining urine for medical testing to also test for illegal substances? In Odenheim v. Carlstadt-East Rutherford Regional High School District, 211 N.J. Super. 59, 510 A.2d 709 (1985), a New Jersey court examined a school policy that required that mandatory physical examinations required by state policy include the drug screening of urine.
vidual has consumed involves substantial expectations of privacy. In *Skinner v. Railway Labor Executives Association*, the United States Supreme Court determined that government-mandated urinalysis was a search because it invaded expectations of privacy in private medical facts and the act of urination.

It is doubtful that the detention of a person for purposes of collecting urine is a seizure. Not every detention by the government is a seizure. High school athletes are supervised by their coaches and directed to do various things for their safety. The schools regularly restrict individual freedom of movement. It is difficult to see how the short detention of a student to urinate in a school setting is a seizure. Although the student's limitation of movement is not a seizure, the time and limitation needed for taking the urine sample must be considered in determining the intrusiveness of urinalysis.

A school may attempt to avoid Fourth Amendment restrictions by requiring consent to urinalysis as a condition of participating in interscholastic sports. Although notifying students and parents is important, denying government benefits (school-sponsored extracurricular activities) to persons wishing to retain their constitutional rights has been prohibited. Thus, the issue becomes whether the Fourth Amendment prohibits mandatory urinalysis. If there is a constitutional right, then consent will not waive it. If there is no Fourth Amendment right then a consent is not needed. Requiring consent to urinalysis in order to participate in interscholastic sports is ineffective in avoiding Fourth Amendment restrictions.

**B. Drug Testing by Public High Schools is State Action**

Searches by high schools which are public, governmental institutions are subject to Fourth Amendment restrictions. The searches of private,
non-governmental schools may not be subject to the same limitations. The
Fourteenth Amendment, which applies the Fourth Amendment to the
states only applies to "State Action." Generally, when a private school
engages in a search, its conduct would not be "State Action." A search by
a private school becomes State Action when the government's regulation or
encouragement of the search becomes so extensive that the search is actu-
ally the action of the government. The Supreme Court stated, "A state
normally can be held responsible for a private decision only when it has
exercised coercive power or has provided such significant encouragement,
either overt or covert, that the choice must in law be deemed that of the
State." Is the drug testing program in a private school the choice of the
school, or the result of the coercion or encouragement of the government?
If the drug testing program is the choice of a private school, then the
Fourth Amendment will not apply. If it is the choice of the government
which has been imposed on the school by coercion or significant encour-
agement, the testing program is limited by the Fourth Amendment.

A statute requiring all schools, including private schools, to conduct
drug testing would be just the sort of coercive power that would make drug
testing State Action and subject to the Fourth Amendment. Generally, any
more subtle exercise of coercive power is not going to be State Action. The
fact that private schools are generally regulated by the state does not make
their conduct State Action. Even when the regulation of private schools is
extensive and detailed, their programs do not necessarily become State
Action.

The mere receipt of government funding does not make a drug testing
program State Action. The Drug-Free Schools and Communities Act
Amendments of 1989 authorize the states to use federal funds for random
drug testing for students voluntarily participating in athletic activities only
in schools which voluntarily choose to conduct a drug testing program.
This is not the type of coercive power that would make drug testing in
private schools subject to the Fourth Amendment.

27. Id.
31. Id.
32. Id. at 840.
It is only in the unlikely event that the state compels drug testing programs in all high schools that such programs in private high schools will be State Action and subject to the Fourth Amendment. Private schools, in the absence of such legislation or coercion, can conduct drug testing programs of their athletes, as they please, without limitation by the Federal Constitution.

II. If Mandatory Urinalysis of High School Athletes Is Subject to the Fourth Amendment of the United States Constitution, Then What Is the Standard for Such Searches?

The Fourth Amendment was originally applied to searches for evidence of criminal activity. Government information gathering for Civil Law purposes was permitted "as long as the State's interest was sufficiently substantial." In 1967, the Supreme Court applied the Fourth Amendment to two cases of non-criminal, administrative searches, municipal code inspections of private property and of private businesses.

Although it was clear that the Fourth Amendment would now apply to non-criminal searches, it was not clear whether the warrant and probable cause requirements of the Fourth Amendment would also apply. An exception to the warrant requirement of the Fourth Amendment was recognized when there was a history of government regulation of a business. Then, in United States v. Biswell, the Court decided that government regulation was only one factor to be considered in determining the overall reasonableness of a search without a warrant.

The exception to the requirement of a warrant in administrative searches was extended to searches of the property of schoolchildren in New Jersey v. T.L.O. In that case, a high school principal searched the purse of a student suspected of violating school rules. The court stated "[i]n our cases dispensed with the warrant requirement when "the

35. Id.
36. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court applied the Fourth Amendment warrant requirement to municipal code inspections of private property. In See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the Fourth Amendment to inspections of private business premises.
39. Id.
41. Id.
burden of obtaining a warrant is likely to frustrate the governmental pur-
pose behind the search, Camara v. Municipal Court . . . , we hold today that
school officials need not obtain a warrant before searching a student who is
under their authority." \textsuperscript{42} The proper test is reasonableness under all the
circumstances. Justice Blackmun's concurring opinion in \textit{T.L.O.} proposed
a slightly different test for eliminating the warrant requirement. He said
that it is "[o]nly in those exceptional circumstances in which special needs,
beyond the normal need for law enforcement make the warrant and prob-
able cause requirement impracticable, is a court entitled to substitute its
balancing of interests for that of the Framers." \textsuperscript{43} Having determined that
the school's interest in searching a student's purse was a "special need,"
Justice Blackmun proceeded to weigh the governmental and private inter-
est in the warrant requirement.\textsuperscript{44} Under the Blackmun \textit{T.L.O.} test, a
search is permissible if (1) there are special needs beyond the normal need
for law enforcement which make the warrant requirement impractical and
(2) the court determines the search is reasonable.\textsuperscript{45}

Determining whether a search is reasonable requires a balancing of the
government's interest in the search against the privacy of the person being
searched. The measure of the government's interest should be divided into
two parts; the harm the government is trying to prevent and the probability
that the harm will occur.\textsuperscript{46} The severity of the harm is a value judgment
made by our society. The probability of the harm occurring is more prob-
lematic in legal analysis.

There are essentially three standards of probability that the courts have
used in determining the government's interest. The court can focus on each
search and the person to be searched (individualized suspicion);\textsuperscript{47} the court
can look at the whole testing program and all of the people to be searched
in the process (the targeted class);\textsuperscript{48} or the court can ignore the probability

\textsuperscript{42} \textit{Id.} at 340.
\textsuperscript{43} \textit{Id.} at 351 (Blackmun, J., concurring).
\textsuperscript{44} \textit{Id.} at 352-53 (Blackmun, J., concurring).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} National Treasury Employees Union v. Von Raab, 489 U.S. at 671; Skinner v. Railway
Labor Executives' Ass'n, 489 U.S. at 619. See also Judge Posner's dissent in Dimeo v. Griffin, 924
F.2d 664, 676 (7th Cir. 1991), where it is pointed out that the "magnitude of danger is not the
only consideration. Probability of accident is also important. The product of magnitude and
probability is, indeed, expected accident costs." It is this "expected accident cost" which Judge
Posner carries on as part of the government's interest in testing.
\textsuperscript{47} For an example of individualized suspicion, see New Jersey v. T.L.O., 469 U.S. 325, 342
(1985), where the Court analyzed the amount of suspicion needed to search an individual student.
\textsuperscript{48} For an example of targeted class analysis, see Skinner v. Railway Labor Executives'
Ass'n, 489 U.S. 639 (1989). The United States Supreme Court stated that "a showing of individu-
alized suspicion is not a constitutional floor, below which a search must be presumed unreasona-
that the search will obtain the sought-after information when the harm has not occurred in the tested group in the past and focus instead on the severity of the harm to be prevented.49

Individualized suspicion focuses on the specific test and the individual to be tested. Thus, in New Jersey v. T.L.O.,50 the school principal suspected that one person had been smoking in the bathroom.51 Individualized suspicion is the most narrow and particularized standard. The probability that the testing series, in general, or a category of tests will produce evidence is not enough. Each test is judged individually as to its efficacy and justification.

On certain occasions when searches are standardized and are performed on a category of individuals, the court will focus its analysis on a broader category—the targeted class. This targeted class analysis does not focus on each test, but rather on a testing program.52 It does not require the same degree of probability that each test will be successful as individualized suspicion. Some probability that the overall testing scheme will produce evidence is required but each individual test will not have to be justified.53

In some situations, courts have not required any proof of prior harm (drug use) when the damage threatened is serious.54 Some damage or harm is so serious that it would be unreasonable to wait for the damage to occur before searching for it. Thus, in Rushton v. Nebraska Public Power District,55 the Eighth Circuit Court of Appeals ruled that drug testing of nuclear power plant employees was reasonable even when there was no evidence of any past employee drug use.56 The probability that a test will produce evidence in this situation is unknown. Searches in these cases are justified by the seriousness or intolerability of the harm. One of the weaknesses of this test is its subjectivity. In the targeted class analysis some

49. For an example of this approach, see National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), where the United States Supreme Court held that a search was reasonable even when there was no evidence that an appreciable number of the targeted class (customs employees) had used drugs. Id. at 660. See also Justice Scalia’s dissent in Von Raab, where he explains that he changed his position from the majority in Skinner to the dissent in Von Raab because he would require that some appreciable number of the targeted class of people to be tested had used drugs. Id. at 680, 687.
51. Id. at 328.
52. Skinner, 489 U.S. at 628; Von Raab, 489 U.S. at 674-75.
53. See Von Raab, 489 U.S. at 675 n.3.
55. Id.
56. Id. at 567.
evidence of prior harm in the class of people to be tested is required. However, when there is no requirement of prior harm, then the test becomes a more subjective test of the seriousness of the harm. It is a difficult standard for those wishing to conduct or test to apply.

It has been argued that even though probable cause is not the applicable standard in administrative searches, some degree of individualized suspicion is still required. Even when the standard is reasonableness, it is argued that the standard must focus on the reasonableness of each test (individualized suspicion). In New Jersey v. T.L.O., the Supreme Court failed to decide that question. 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. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,]...the Fourth Amendment imposes no irreducible requirement of such suspicion. ... Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." Delaware v. Prouse, 440 U.S. 648, 654-655 (1979).

Searches based upon less than individualized reasonableness are permitted. Searches of housing, businesses, fire scenes, borders, military installations, prisoners, and parolees have all been permitted without individualized suspicion. Recently the Supreme Court approved the stopping of motorists on public highways without individualized suspicion because of the minimal intrusion involved in the stop, the magnitude of the drunken

59. Id. at 342 n.8.
63. See United States v. Ramsey, 431 U.S. 606 (1977) (dealing with the search of international mail).
64. United States v. Miles, 480 F.2d 1217 (9th Cir. 1973).
65. Hudson v. Palmer, 468 U.S. 517 (1984) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order").
Thus, in certain circumstances, when the intrusiveness of the search is minimal, and the harm prevented is great, the requirement that suspicion be focused on an individual will be relaxed. In other cases, even when the intrusiveness of the search is not minimal, as in urinalysis, the courts have approved searches without individualized suspicion when the harm being prevented is serious, as in nuclear power plants.

Many of these questions regarding drug testing were settled in a pair of cases decided by the United States Supreme Court. In *Skinner v. Railway Labor Executives' Ass'n*, the Court had to decide whether government regulations authorizing blood and urine testing of railroad employees involved in serious train accidents were permissible under the Fourth Amendment. The regulations did not require individualized suspicion of the railroad workers to be tested. Any worker involved in a serious train accident would be tested, whether showing signs of alcohol or drug abuse or not. Instead of focusing on the individuals to be tested, the Court looked at the chances that someone in the targeted class of persons to be tested would produce evidence of drug or alcohol abuse. The Court stated:

... [a] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. ... In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusion in question here.

The *Skinner* case established the following propositions of Fourth Amendment law which are applicable to the urine testing of high school athletes: (1) urine testing (the collection of urine and its testing for drug metabolites) is a search subject to the Fourth Amendment; (2) a search warrant is not required for urine testing; (3) probable cause is not required; and (4) individualized suspicion of the person to be tested is not a necessary prerequisite to urine testing. The *Skinner* case approved urine testing based upon its reasonableness as applied to a class of people, railroad

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68. *Id.*
69. *Id.* at 624.
70. *Id.* at 617.
71. *Id.* at 624.
72. *Id.*
73. *Id.* at 631-33.
workers. There was no consideration or justification of the testing of each worker to be tested.

The case which immediately followed Skinner, Treasury Employees Union v. Von Raab, went one step further. That case involved the question of whether the United States Customs Service could require urinalysis of employees who seek transfer or promotion to positions involving drug interdiction, carrying firearms, or handling classified information. The Commissioner of Customs in that case stated that "Customs is largely drug-free." Thus, there was no individualized suspicion and no reason to believe that an appreciable number of the targeted class of employees had used drugs. The absence of any previous drug abuse by the employee to be tested or by the group of employees to be tested prompted Justice Scalia to part company with the majority in Skinner by saying:

Today, in Skinner, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated connection between such use and grave harm rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

Nevertheless, the majority in Von Raab approved the urine testing program even in the absence of evidence of individualized or targeted class drug use. The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. . . . The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

Thus, prior drug use or suspicion of drug use in the individual or group to be tested is not an essential prerequisite to drug testing of urine. When the harm to be prevented is substantial, a search may be conducted to deter that

74. Id. at 633.
76. Id.
77. Id. at 683.
78. Id. at 673.
79. Id. at 680-81 (Scalia, J., dissenting).
80. Id. at 674-75.
harm. Again, the Court held that a search is reasonable if the valid public interests served by the search outweigh the interference with the privacy of the person to be searched.\textsuperscript{81}

Abuse of drugs by someone in the targeted class of individuals to be tested is still relevant. The governmental interest, as previously argued, combines the probability of harm occurring with the severity of the harm if it does occur. Proof of drug abuse in the class of persons to be tested increases the probability of the harm and thus the government's interest.\textsuperscript{82}

A lesser harm that is more likely to occur can also justify a search. It is not only the severity of the harm the government is trying to prevent, but also the probability that someone in the targeted class of individuals to be tested will cause that harm, that must be analyzed. This determines the government's interest in the search. The government's interest in the search is then weighed against the intrusiveness of the search in order to determine the reasonableness of the search. There is no minimum severity of the harm and no minimum probability that the harm will occur which is essential.

Just as the dissenting Justices in \textit{Von Raab} would require, as a minimum, some evidence of drug abuse in the targeted class of persons to be tested, so would most state courts and the state constitutions they interpret. Thus, virtually every state court that has examined drug testing in high schools has commended school administrators for their attempts to combat drug abuse, but determined that the intrusiveness of drug testing cannot be justified in the absence of drug abuse in the targeted class of the persons to be tested.

In \textit{Odenheim v. Carlstadt-East Rutherford Regional School District},\textsuperscript{83} a high school established a policy requiring an annual physical examination of each student, including urine tests to determine the presence of controlled substances. The New Jersey Supreme Court found that analyzing the urine for controlled substances was unreasonable. The Court said that

\begin{quotation}
[T]he raw numbers and percentages of student referred to a student assistance counseling as compared with the total student body is not reasonably related in scope to the circumstances which justified the interference, urinalysis, in the first place.\textsuperscript{84}
\end{quotation}

\textsuperscript{81} Id. at 671.

\textsuperscript{82} Id. at 674-75. The Court concluded: "Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal."


\textsuperscript{84} Id. at 713.
The *Skinner* targeted-class analysis was a minimum standard in New Jersey.

The New York Court of Appeals used a targeted-class analysis in *Patchogue-Medford College of Teachers v. Board of Education*. That case involved a school district which required all probationary teachers submit to urinalysis to detect potential drug abuse. The Court looked at the specific targeted class of teachers when stating:

> Although the District notes, as we have in the past, the prevalence of drugs in the schools among students, and more recent statistics showing a similar problem in the general work force, there is nothing in the record to indicate that this is also a problem among teachers generally or in this particular School District.

The New York Court, in applying the New York and Federal Constitutions, was unwilling to approve urinalysis unless some prior drug use in the targeted class of individuals to be tested, here teachers, was shown.

The National Collegiate Athletic Association (NCAA) ran into the same targeted-class requirement in its drug testing program of college athletes at Stanford University. In that case the trial court enjoined the NCAA from enforcing its drug testing program of college athletes at Stanford University. In affirming the trial court’s decision, the California Court of Appeals stated:

> In summary, substantial evidence supports the trial court’s findings . . . . First, the evidence did not support the NCAA’s claim that there is significant drug use among student-athletes, and that by testing, students’ health and safety and the integrity of the competition will be protected.

Again, a California court examining California laws required some prior drug abuse in the class of people to be tested (the targeted class) before approving such testing.

A Michigan trial court in *Hess v. Melvindale-North Allen Park School District* enjoined a drug testing program. The court found no proof of "drug or alcohol abuse by any segment of the student population, including athletes." As a result, the Wayne County Circuit Court enjoined the drug testing program.

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86. Id. at 331.
88. Id. at 422.
90. Id.
As a result of the above cases, one can reach certain conclusions about the legality of drug testing:

(1) The courts will not require justification of the reasonableness of each drug test on each individual. Individualized suspicion of the person to be tested is not required. Random drug testing within a defined class of individuals is possible.91

(2) Random drug testing is more intrusive of privacy than individualized drug testing. More people will be searched. More people who are totally free of prohibited activity will be tested. The severity of the harm being prevented, necessary to justify random drug testing, will have to be greater or more compelling than that necessary to justify individualized suspicion or probable cause.92

(3) The United States Supreme Court will not necessarily require proof that the group of people to be tested have abused drugs. National Treasury Employees Union v. Von Raab93 establishes that prior drug abuse in the targeted or tested class is not a necessary prerequisite to drug testing under the United States Constitution.94

(4) Many state courts will require proof of drug abuse in the targeted class of persons to be tested before approving a random drug testing program.95 Examination of state precedent is necessary in order to determine how the targeted class is defined. Some courts will approve drug testing on high school athletes upon a showing that high school athletes nationwide are likely to abuse drugs.96 Other courts will require evidence of drug abuse in the particular school to be tested before approving drug testing in the school.97

III. Is Mandatory Urinalysis of High School Athletes Reasonable?

Having concluded that the Fourth Amendment applies to mandatory urinalysis of high school student-athletes and that the Fourth Amendment requirements of a warrant and probable cause do not apply, the applicable test is whether the search-urinalysis is reasonable under all the circum-

92. Id. at 674-75.
94. Id. at 674.
95. Supra notes 81-88.
stances.\textsuperscript{98} The United States Supreme Court has developed several tests of whether a search is reasonable. In \textit{New Jersey v. T.L.O.},\textsuperscript{99} the Court said

\begin{quote}
Determining the reasonableness of any search involves a twofold inquiry; first, one must consider "whether the ... action was justified at its inception," \textit{Terry v. Ohio}, 392 U.S. at 20; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."\textsuperscript{100}
\end{quote}

In determining whether the search was justified at its inception, the government's interest in conducting the search is balanced against the intrusion into the individual's privacy. This balancing is done on a case-by-case basis looking at the different factual circumstances of each case.

One cannot analyze drug tests as a generic or monolithic concept. Instead, the provisions of each program must be examined. The reasonableness of a drug test will differ based upon its circumstances.\textsuperscript{101} There are different governmental reasons for drug testing. High school athletes use different kinds of prohibited drugs. The reasons for testing will vary depending on the type of drug use suspected. "Street drugs" such as marijuana and cocaine present far different governmental concern in sports than do those drugs which are perceived as performance-enhancing, such as steroids.

There are different procedures to be followed in conducting drug testing. Some procedures, such as direct observation of urination, are very intrusive. Others, such as the use of outside medical personnel, serve to minimize the intrusiveness of the test. Therefore, it is fundamental that one cannot comment on the reasonableness of urinalysis alone. What is the governmental interest in drug testing? Which drugs are being searched for when the urinalysis is done? How reliable is the testing procedure? What procedures are used to obtain the urine? All of these questions and others must be analyzed, both separately and then together, in order to reach an opinion on the reasonableness or legality of each high school testing program.

\textsuperscript{99} 469 U.S. 325 (1985).
\textsuperscript{100} \textit{Id.}
A. The High School's Interest in Athletic Drug Testing Will Depend Upon the Type of Drug Use Suspected.


The athletic performance-enhancing drug of greatest concern is anabolic-androgenic steroids. Anabolic means muscle-building, androgenic means masculinizing, and steroids are hormones.\(^{(102)}\) Anabolic-androgenic steroids are derived from the male hormone, testosterone.\(^{(103)}\) They are made by slightly modifying natural testosterone so that it can be absorbed by the body and not rapidly degraded by the liver.\(^{(104)}\)

Steroids are not for the lazy. Taking steroids brings about an increase in lean muscle mass only when given to athletes who train intensively both before and after steroid use and maintain a high-protein diet.\(^{(105)}\)

Anabolic steroids have been shown to increase the amount of weight that may be lifted in a single repetition of a lifting exercise.\(^{(106)}\) Experimentation with one group having actual steroids and another group having a placebo is not possible since the group with the steroids experiences such noticeable effects on their weight and muscle mass that everyone in the experiment knows who is taking the actual steroids.\(^{(107)}\) The effect of steroid use on athletic performance, while not totally clear, seems to be established by the known effect on lean muscle mass, the effect upon aggressiveness, and its tremendous popularity among large numbers of experienced athletes.\(^{(108)}\)

There is no controversy as to whether anabolic steroids have adverse effects. The detrimental effects of steroids on the liver, the cardiovascular system, the male and female reproductive system and the psyche of the athlete have all been conclusively established.\(^{(109)}\) Widespread use of anabolic androgenic steroids is of recent origin.\(^{(110)}\) Many of the most serious adverse effects of steroid abuse take time to develop.\(^{(111)}\) It is probable that the steroid abusers of the 1970s and 1980s needed time for adverse effects to ap-

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103. Id.
108. VOY & DEETER, supra note 102, at 27.
110. WADLER & HAINLINE, supra note 104, at 56.
111. VOY & DEETER, supra note 102, at 27.
PEAR. They are now, with the increasing age of steroid users, beginning to appear. The prospect is frightening.

In a recent interview with Dr. Robert Huizenga, former team physician for the Los Angeles Raiders football team, the doctor was asked

Q: Does the steroid danger go beyond the NFL?
Dr. Huizenga: Conservative estimates say a million people in the U.S. use anabolic steroids, not just for sports but for appearance. Most are young people. I think we have a real time bomb on our hands.\textsuperscript{112}

Surveys of steroid use among high school students have produced varying results. One study of male and female steroid use by eleventh grade males and females indicated that 11 percent had used or were using anabolic steroids.\textsuperscript{113} Eighty-four percent of steroid abusers in that study were involved in sports.\textsuperscript{114} Another study published in the Journal of the American Medical Association found that 6.6 percent of twelfth grade male students used or have used steroids.\textsuperscript{115} In that study, more than one-third of the steroid users used the drug for the first time at age 15 or younger.\textsuperscript{116} Almost half reported that their primary reason for using steroids was “to improve athletic performance.”\textsuperscript{117} The study concluded that “[p]articipation in sports activities was significantly different between users and nonusers, with the users more inclined to participate in school-sponsored athletics and, specifically, more likely to participate in football and wrestling.”\textsuperscript{118} Finally, the Institute for Social Research at the University of Michigan, in its survey of drug abuse, indicated that three percent of high school seniors used steroids.\textsuperscript{119} Whatever the correct percentage of steroid use may be, Dr. Huizenga’s conclusion seems to be accurate.

Testing for steroid use presents a dilemma. There are two types of anabolic steroids; the oil-based and the water-soluble.\textsuperscript{120} The oil-based steroids are absorbed into body fat. They are taken by injection. These slowly released steroids remain in the body for a longer period of time and are diffi-

\textsuperscript{112} Lyle Alzado, I’m Sick and I’m Scared, \textit{Sports Illustrated}, July 8, 1991, at 23.
\textsuperscript{113} Mimi Johnson, \textit{Anabolic Steroid Use by Male Adolescents}, 83 \textit{Pediatrics} 921 (1989).
\textsuperscript{114} Id. at 922.
\textsuperscript{116} Id. at 3442.
\textsuperscript{117} Id. at 3443.
\textsuperscript{118} Id. at 3442.
\textsuperscript{120} VOY & DEETER, supra note 102, at 17-19.
cult to expel when testing is imminent.\textsuperscript{121} Oil-based steroids are far less
dangerous since they do not pass through the liver.\textsuperscript{122} The water-soluble
steroids are taken in pill form and are much faster-acting.\textsuperscript{123} These sub-
stances clear the body within an average of three to four weeks (clearance of
steroids from the body varies greatly depending upon weight and other fac-
tors). Orally taken, fast clearing steroids are much more dangerous to one's
health than the injected steroids because they pass through and affect the
liver.\textsuperscript{124} Thus, when drug testing begins, the steroid user will probably
move from the safer but longer acting oil-based steroids to the more danger-
ous but quicker clearing orally taken steroids. The athlete using faster
clearing oil-based steroids will be better able to avoid positive urine tests by
discontinuing use before the test.\textsuperscript{125} The high school, testing for steroids,
better find them or it will only make them more dangerous.

Anabolic steroids differ from many other types of illegal drugs since
they do not have to be present in the body to affect performance.\textsuperscript{126} They
are used to build lean muscle mass.\textsuperscript{127} It is this lean muscle mass and not
the immediate effect of the drug that increases athletic ability. Testing for
steroids at the athletic event will probably prove ineffective because the ster-
oid user will not take the drugs for a period of time prior to the event so
that they clear his or her body and are not detected by drug testing. How-
ever, the lean muscle mass, performance enhancing effect will still be pres-
ent. Steroid testing, in order to be effective, must cover a significant period
of time before the athletic event. Announced drug testing gives the steroid
user a fixed and easy target time to avoid steroid use. Only through random
steroid testing, over a significant period of time before the competition, can
these significant threats to high school athletes be deterred.

The government has a significant interest in preventing the use of ana-
bolic steroids. The available studies on their use indicate that a significant
number of high school athletes use steroids. Those high school students
that use steroids will probably suffer adverse health effects, some of which
will be very serious.

The studies quoted above on the incidence of steroid abuse in high
school athletics may justify testing among all high school athletes. In Skin-

\textsuperscript{121} Id. at 18.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 17-18.
\textsuperscript{124} Id. at 18.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 93.
\textsuperscript{127} American College of Sports Medicine, supra note 106, at 534.
ner v. Railway Labor Executives' Ass'n, the Supreme Court found that drug testing of railroad workers involved in train accidents, regardless of whether there was any suspicion of prior alcohol or drug abuse by the railroad worker to be tested, was reasonable. This finding was based in part on the discovery of a history of alcohol abuse, not in the particular railroad to be tested, but in the whole railroad industry. If prior alcohol abuse in the railroad industry is a factor supporting urine testing in that industry, then a history of steroid abuse in high schools must also be a factor supporting drug testing of high school athletes.


Stimulant abuse in our high schools is well known; fortunately, it appears to be declining. The latest Institute of Social Research study on stimulant abuse indicates that the percentage of high school seniors who have taken stimulants within the last year is still over nine percent.

Highly trained runners, swimmers and throwers all showed small but noticeable improvement in athletic performance after using amphetamines. Amphetamines delay the point of fatigue during sustained aerobic exercise, thus causing longer, more sustained performance. Amphetamines also improve performance in tasks requiring prolonged attention. Thus, amphetamines are one of the drugs having performance-enhancing effects.

Amphetamines are addictive and can, after prolonged use, cause serious behavioral and personality changes. Amphetamine abuse can cause its users to become assaultive and dangerous to others. Since amphetamines, like steroids, are performance-enhancing drugs, the government's interest in testing for amphetamines is similar to its interest in testing for steroids. The methods used to test athletes for amphetamines, however,

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129. "The FRA [Federal Railroad Administration] noted that a 1979 study examining the scope of alcohol abuse on seven major railroads found that 'an estimated one out of every eight railroad workers drank at least once while on duty during the study year.'" Id. at 607.
131. Id., Table 2, at 7.
135. WADLER & HAINLINE, supra note 104, at 84.
136. Id. at 84.
must differ. Unlike steroids, amphetamines must be present in the body in order to stimulate performance.\textsuperscript{137} Therefore, testing for amphetamines at the time of the athletic event is necessary. Coaches will probably not be able to identify amphetamine abuse by observing their athletes. Thus, random drug testing at the time of the athletic event is reasonable when the school is attempting to detect amphetamine abuse.


There are no available systematic studies of whether cocaine has performance-enhancing attributes.\textsuperscript{138} Systematic medical testing using cocaine would not be legal or ethical.\textsuperscript{139} Anecdotal evidence indicates that cocaine abuse interferes with athletic performance. Both Tim Raines of the Montreal Expos and Lonnie Smith of the Atlanta Braves have reported that cocaine interfered with their athletic performance.\textsuperscript{140}

Marijuana directly affects essential athletic skills such as eye-hand coordination, perceptual accuracy, reaction time and tracking ability.\textsuperscript{141} In \textit{Schaill by Kross v. Tippecanoe County School Corp.},\textsuperscript{142} the court noted an incident in which a baseball player was hit by a pitch, suffering a broken nose as a result of drug impairment.\textsuperscript{143}

Given the deleterious effects of cocaine and marijuana use on athletic performance, athletes more than other students are motivated to avoid the use of these drugs. It was found that varsity athletes in eleven NCAA colleges were substantially less likely to use marijuana or cocaine than the general population of college students. (Male college student marijuana use, forty-one percent, varsity athlete use twenty-nine percent; male college student cocaine use, nineteen percent, varsity athlete use six percent.)\textsuperscript{144}

While athletic use of marijuana and cocaine may be lower than that of the general population, it is still high. Marijuana and cocaine use begins at

\begin{itemize}
\item 137. \textit{Voy & Deeter}, \textit{infra} note 102, at 37.
\item 138. \textit{Wadler & Hainline}, \textit{infra} note 104, at 84.
\item 139. Since the possession, use and delivery of cocaine is illegal in all states and the deleterious effect of the drug has been established, scientific experimentation of cocaine's effects is not possible.
\item 142. 864 F.2d 1309 (7th Cir. 1988).
\item 143. \textit{Id.} at 1320.
\item 144. William Anderson et al., \textit{A National Survey of Alcohol and Drug Use by College Athletes}, 19 \textit{Physician and Sportsmedicine} 101 (1991).
\end{itemize}
Most college athletes who use alcohol or drugs reported that their first experiences with these substances were during junior high school. A high school has an interest in prohibiting marijuana and cocaine abuse among its students. These substances are prohibited for all citizens and the deleterious effects upon high school age and below is even more severe. However, that interest in preventing substance abuse is very similar to the government's law enforcement program to prevent substance abuse in general.

Testing high school athletes for the use of marijuana and cocaine but not testing all high school students can be justified, if at all, for two reasons. First, high school athletes are community leaders in their school, where students are particularly prone to follow. Prevention of drug abuse among these community leaders will have a disproportionate impact upon drug abuse in the whole high school population. The leadership ability of high school athletes, however, is not uniform throughout all high schools. Athletes' leadership will vary from school to school with a great deal depending upon how successful the particular team is in athletic competition. If the leadership attributes of high school athletes are the real reason for drug testing, then other student leaders such as class presidents should also be tested. Although the leadership attributes of high school athletes are a factor in justifying drug testing, they are not compelling.

Second, athletes participate in activities that are dangerous if the participant is intoxicated or impaired by drug use. The Seventh Circuit Court of Appeals found in Schaill:

[T]hat the use of drugs presented a particular threat to athletes and cheerleaders. Due to alterations of mood, reduction of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes was particularly threatened. At trial, Jacob Burton, the assistant principal and athletic director at McCutcheon High School, testified to three instances in which athletes had admitted that injuries had been caused or exacerbated by drug impairment during athletic contests. In one instance, a baseball player misjudged a pitch and turned toward the ball, suffering a broken nose as a result.

This rationale for drug testing creates certain technological and legal problems for urinalysis as a type of drug testing. Urinalysis can detect prior

145. Id.
146. Id.
147. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1320 (7th Cir. 1988).
148. Id.
drug use but it does not determine the extent of impairment at the time of the testing.\textsuperscript{149} Certain cases have placed a great deal of emphasis on the fact that urinalysis does not measure the extent of current impairment. The United States Supreme Court dealt with this issue in \textit{Skinner v. Railway Labor Executives' Association.}\textsuperscript{150} The Court said that the evidence obtained from drug testing need not be dispositive in order to justify a search.\textsuperscript{151} Testing to determine prior drug use will assist the school in focusing its drug counseling and rehabilitation programs. It will also significantly deter drug abuse, a factor which the Supreme Court deemed important in \textit{Skinner.}\textsuperscript{152} Even though urinalysis will not establish the extent of drug impairment at the time of the athletic event, it still serves important and necessary functions.

The testing of only high school athletes raises questions of equal protection. This is a question of under-inclusiveness (not enough people are being tested) rather than over-inclusiveness (too many people are being tested). Since separating athletes from non-athletes in a high school does not involve a fundamental right or a suspect class,\textsuperscript{153} the test for equal protection purposes is whether there is a rational basis for separating the two classes. The rationale for drug testing high school athletes for marijuana and cocaine discussed above, the capacity of the high school athlete to be a leader and the danger to a drug-impaired athlete while participating in sports, while not compelling, is enough to meet the rational relationship test.\textsuperscript{154} This is especially true if the high school makes a specific finding of fact regarding its reasoning to test only athletes since the courts give a great deal of deference to school officials in their determinations of how to run their schools.\textsuperscript{155}

4. The School's Interest in Testing for Other Drugs.

There are other drugs which present a significant threat to high school athletes. Diuretics are relatively common drugs (they are prescribed for hypertension and congestive heart failure) which are used to promote urine formation.\textsuperscript{156} They are used for two purposes in sports. Diuretics help an

\begin{itemize}
\item \textsuperscript{149} WADLER \& HAINLINE, \textit{supra} note 104, at 210.
\item \textsuperscript{150} 489 U.S. 602 (1989).
\item \textsuperscript{151} \textit{Id.} at 631-32.
\item \textsuperscript{152} \textit{Id.} at 632.
\item \textsuperscript{153} Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833, 845 (D. Ind. 1988), aff'd, 864 F.2d 1309 (7th Cir. 1988).
\item \textsuperscript{154} 679 F. Supp. at 854, 857.
\item \textsuperscript{155} \textit{Id.} at 858.
\item \textsuperscript{156} WADLER \& HAINLINE, \textit{supra} note 104, at 160.
\end{itemize}
athlete lose weight to "make weight" in wrestling.\textsuperscript{157} They also promote urine formation which will reduce the concentration of prohibited substances in the urine and decrease the chances of detecting those prohibited substances by urinalysis.\textsuperscript{158} Diuretics, when taken for the above reasons, are taken without a doctor's prescription, a practice that certainly can lead to harmful effects. Diuretics are drugs which should be monitored in any drug testing program.

The use of human growth hormones is the newest fad in drug abuse among athletes. These drugs are genetically engineered substitutes or supplements for the body's naturally produced growth hormones.\textsuperscript{159} The dangers of these substances need not be discussed here because they cannot be detected by the technology available in today's drug testing.\textsuperscript{160} Prevention of these drugs will have to be left to law enforcement (human growth hormone is a closely monitored prescription drug)\textsuperscript{161} and education.

Obviously, there are a variety of other substances which can be performance-enhancing or particularly dangerous to the high school athlete. Common substances such as caffeine,\textsuperscript{162} alcohol and tobacco fit this category\textsuperscript{163} as well as less common substances such as barbiturates, narcotics, and ephedrine. High school administrators will have to be particularly attentive to the possibility that these substances are being abused in their schools.

\section*{B. The High School Athlete Has a Lessened Expectation of Privacy.}

In weighing the reasonableness of any drug testing program, the government's interest in the drug testing must be weighed against the expectation of privacy of the person being tested. We have already discussed the substantial expectation of privacy our society has in the act of urination. However, that expectation of privacy is mitigated somewhat when the testing is performed in the context of high school sports. As pointed out by the court in \textit{Schaill}, "[t]here is an element of 'communal undress' inherent in athletic

\begin{thebibliography}{99}
\bibitem{157} \textit{Id.} at 161.
\bibitem{158} \textit{Voy \& Deeter, supra} note 102, at 53.
\bibitem{160} \textit{Wadler \& Hainline, supra} note 104, at 72.
\bibitem{161} Council Report, \textit{supra} note 159, at 1703.
\bibitem{162} Coffee has varying effects on athletic performance. It has a different effect on short duration activities than endurance activities. J. Steven \& D. Joensen, \textit{Caffeine and Sports Performance}, 13 PHYSICIAN AND SPORTSMEDICINE 191 (1985).
\bibitem{163} In the 1972 Olympic Games, asthmatic swimmer Rick DeMont was disqualified for taking ephedrine. K. Sidney \& W. Lifcoe, \textit{The Effects of Ephedrine on the Physiological and Psychological Responses to Submaximal and Maximal Exercises in Man}, 9 MED., SCI., SPORTS EXERCISE 95 (1977).
\end{thebibliography}
participation which suggests reduced expectation of privacy." Medical and physical examinations of athletes, including urine testing, have been required by high schools for years. High school athletic competition places students into a highly regulated and controlled atmosphere. The high school athlete expects to be supervised as to training, equipment, eligibility, rules of the game and all other aspects of the participation in high school sports. Participation in high school sports does not waive any expectation of privacy, but lessens any legitimate, objective expectation of privacy. This must be considered in determining the extent of the invasion of privacy.

C. Warrantless Searches - Urinalysis Must Be Circumscribed by Regulations.

The Fourth Amendment requires that there be some control of searches imposed by disinterested third parties. Those people conducting searches should not be allowed unfettered, arbitrary discretion to search. The warrant requirement satisfies that need in many cases. The warrant requirement is particularly suited to the many different factual situations presented in law enforcement. Each factual situation can be presented to a disinterested magistrate for objective evaluation of the reasonableness of that search. When the warrant requirement becomes impracticable, as it is in urine testing, then some other means of monitoring the discretion of the searcher must be imposed. The urine testing of athletes does not present a myriad of factual situations. It is a relatively standardized procedure. This allows the disinterested monitor to anticipate the circumstances which

164. Schall v. Tippecanoe County School Corp., 864 F.2d 1309, 1318 (7th Cir. 1988).
166. "Schoolchildren, may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." New Jersey v. T.L.O., 469 U.S. 325, 339 (1985). Although T.L.O. established that a warrant and probable cause are not required in the schools, it also concluded that schoolchildren have a right to privacy in the schools.
168. Florida v. Wells, 495 U.S. 1 (1990), where the Supreme Court held that an inventory search conducted without regulations governing the police was invalid. The Court said that "the individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering criminal evidence." Id. at 4.
171. Id. at 622.
172. Id.
will justify urine testing before those circumstances arise. This is achieved by implementing written regulations which circumscribe the authority of school officials before the urine testing begins.\footnote{1}{This is achieved by implementing written regulations which circumscribe the authority of school officials before the urine testing begins.} Thus, written regulations are not an option for a urine testing program, they are a necessity.

The scope and frequency of the search, urine testing, must be carefully tailored to the particular government interest being served.\footnote{2}{The scope and frequency of the search, urine testing, must be carefully tailored to the particular government interest being served.} The discretion of the people conducting the tests should be limited as much as practicable. Regulations should be developed that circumscribe who will be tested, how the urine sample will be obtained, the necessary security and chain of custody of the sample, the testing of the sample by competent laboratories, the retention of the sample for independent confirmation, and the consequences of failure to take the test and positive test results. Sanctions for violation of the regulations by the persons doing the testing should be provided. It is important for the integrity of the process that officials administering the test pay careful attention to the regulations.\footnote{3}{It is important for the integrity of the process that officials administering the test pay careful attention to the regulations.}

\section*{D. The Particular Attributes of Each Drug Testing Program Must Be Analyzed.}

Drug testing programs will vary. Some will be more intrusive of expectations of privacy than others. Under the Supreme Court’s reasonableness test, the intrusiveness of the search on personal privacy will be weighed against the government’s interest in the search.\footnote{4}{Under this test, the Supreme Court considers the intrusiveness of the search on personal privacy against the government’s interest in the search.} Thus, the more intrusive the particular search or urinalysis, the more likely it will be ruled unreasonable. The particular attributes of each drug testing program must be analyzed. When the regulations governing drug testing are developed by the school, every opportunity to minimize the intrusiveness of the testing which is consistent with the integrity and effectiveness of the program should be adopted. Following are some of the areas where the intrusiveness of drug testing programs differ. These areas should be considered in drafting regulations. When possible, the least intrusive alternative should be adopted so that the reasonableness of the test can be maximized.

\footnotetext[1]{1}{\textit{Id.}}\footnotetext[2]{2}{\textit{Id.}}\footnotetext[3]{3}{\textit{Id.}}\footnotetext[4]{4}{\textit{Id.} at 622; see also Camara v. Municipal Court of San Francisco, 384 U.S. 523, 532 (1967).}

One of the functions of a warrant is to assure the citizen that a search is authorized by law.\(^{177}\) When the search is done without a warrant some mechanism should be developed to minimize any "unsettling show of authority."\(^{178}\) One of the means to assure the persons to be tested of the legal authority of the search is to notify them that they are subject to search. The more specific the notification, the better. Warning athletes that they will be tested provides them with notice that school officials have been authorized to conduct urinalysis by higher authority in the school. The students and their parents know then that the testing program was not the whimsical, arbitrary decision of the coach. The Supreme Court has found that advance notification of testing serves to minimize the intrusiveness of the search.\(^{179}\) Not only does the party to be searched have notification of the legal authority of the people conducting the test, they also, according to the Supreme Court, have a lessened expectation of privacy.\(^{180}\) They realize that they will be searched when they show up for the athletic contest. Thus, when a welfare recipient was given advance notice of the state's policy of visiting welfare recipients in their homes, the Court held that the welfare recipient had a lessened expectation of privacy.\(^{181}\) When the Court found that motorists knew or could reasonably find out about the location of checkpoints on the highway, the intrusion on their privacy was lessened.\(^{182}\)

The specificity of notification will vary. The school could give one week advance notification of exactly who is going to be tested. This procedure would give clear, unequivocal notice which would significantly lessen the intrusion of privacy. However, this procedure would have practical shortcomings. Urinalysis is expensive. The school will probably want to save money by testing less than all of the athletes. If they do test less than all of the athletes, advance notification of the people to be tested would eliminate any deterrent value on the athletes not tested. Also, advance notification of testing will allow the steroid user to cease use of that drug in time for the

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179. Von Raab, 489 U.S. at 672 n.2 (1989). See also United States v. Bickel, 30 M.J. 277 (1990), where the United States Court of Military Appeals held that the extensive notice given to service members about the military's drug-testing program is a significant factor in determining the reasonableness of drug testing. Id. at 284.
test while the other non-tested steroid users will be given a go-ahead for drug use. Notification of the class of individuals to be tested, such as football players, without naming the particular persons to be tested will maximize deterrent value. If the purpose of the test is to deter amphetamine use, then advance notification of the time of testing will not be a problem, because amphetamines must be present to be effective. Advance notification should be given to members of the athletic team that they may be tested for amphetamines at the time of the athletic competition.

Notifying a class of athletes in advance that some or all of them will be tested for use of marijuana, cocaine, diuretics or amphetamines at the time of the athletic contest will not sacrifice the effectiveness of drug testing but will lessen the intrusiveness of the test. However, advance notification of the time of testing will allow the steroid user the opportunity to tailor his or her drug taking to the time of the test. Testing for steroids will, therefore, have to be done on a random basis at unannounced times in order to be effective.

The school will want to send a copy of the regulations governing drug testing to each athlete and parent. Advance notification of the regulations governing drug testing, while less than the most specific notice possible, still serves to lessen the intrusiveness of urinalysis at no corresponding loss in the effectiveness of the drug testing program.

2. Written Regulations Should Narrowly Define the Category of Athletes Subject to Drug Testing.

A school must narrowly define the category of athletes to be tested. The reasons for testing one segment of high school athletes will not justify the testing of all athletes. Even if a high school believes that football players and wrestlers are taking steroids, that conclusion will not support the testing of all high school athletes. In National Treasury Employees Union v. Von Raab, the Supreme Court remanded that drug testing case for further hearing because it could not be determined whether there was adequate justification for testing each category of employee. The Court ruled that those employees who handled sensitive information could be subjected to drug testing or urinalysis, but the Court was not convinced that the testing directive of the Customs Service included only those “employees likely to gain access to sensitive information.” The class of athletes to be tested

184. Id. at 677-78.
185. Id. at 676.
186. Id. at 678.
must also be narrowly defined. The class may include those individuals which the school has a legitimate interest in testing but the class should be narrowly defined to include only those people. This point will require some study and analysis by the school. The category of athletes to be tested may not be defined more broadly than necessary to meet the defined purposes of the drug testing program.

If the high school accepts the position paper of the American College of Sports Medicine on *The Use of Anabolic Steroids in Sports*, which states that steroids can cause strength gain but cannot increase the aerobic capacity of an athlete, then a sport-by-sport analysis is required. Football and wrestling, which require the competitive use of strength, would justify urinalysis for steroids. However, it is difficult to see how one could justify testing for steroids among basketball players, baseball players or swimmers. The testing of the track team may have to be separated into the various sports in track so that runners are not tested while the athletes who throw the shotput are tested. The school may then want to test all sports for amphetamine use. A definitive decision must be reached as to why the school wants to search for marijuana and cocaine. If it is because athletes are student leaders, then all sports may be tested. If it is because of the intoxicating effects of these drugs and the danger of an intoxicated person participating in athletic events, then a sport-by-sport analysis is required. It is difficult to see how a runner who is not so intoxicated as to be noticed by a coach would be a danger to himself or herself. Thus, the reasons for drug testing must be analyzed on a sport-by-sport basis. Not only the reasons, but also the expectation of privacy in each sport must be analyzed. The categories of athletes to be tested must be narrowly defined so that only those individuals who fit the reasonableness test are subject to testing.

3. The Regulations Should Carefully Circumscribe Those Substances for Which Urine is Tested.

Urine testing has the potential to go well beyond the testing for improper drugs into areas which the high school has no legitimate interest. The urine tester can determine whether the person producing the urine is pregnant, is taking birth control pills, or is diabetic. Therefore, the testing of urine samples for purposes other than specific improper drug usage should be prohibited by the regulations. Not only should the testing be limited but some mechanism to enforce that regulation must be imple-
mented. The District Court in *Merriken v. Cressman*\(^{190}\) invalidated a drug test when it held that although the regulations limited drug testing, there were no specifics as to how the regulations would be enforced.\(^{191}\) The people handling urine samples and results will be primarily school personnel. Since a school cannot pass criminal laws, school employee or labor sanctions should be included in the drug testing regulations. The school should also develop a secure means of handling the drug testing results so that unauthorized people do not have access to the information.


If possible, the results of urine testing should not be turned over to the police. The premise of urine testing without a warrant and probable cause is that the testing is being done for administrative, non-criminal law purposes.\(^{192}\) If the results of urine testing are turned over to criminal law authorities, then that premise is undermined. It may not always be possible to lawfully refuse to turn such information over to the police. Some states require that all information of drug abuse must be turned over to the police. If that is the case, the intrusiveness of the test would be increased. The Eighth Circuit Court of Appeals has stated that:

[T]he need for protection against governmental intrusion diminishes if the investigation is neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated.\(^{193}\)

Access to drug testing results must also be carefully limited and guarded. The more people who are informed of positive drug testing results, the more intrusive the drug test. In *Merriken v. Cressman*,\(^{194}\) the Court struck down a psychological testing program for drug abusers because, among other reasons, access to the information was not sufficiently limited. The school should decide beforehand who should have access to the drug test results. Parents and the student should receive the results of drug testing. Some person must be designated by the school to administer the drug testing program. That person should receive the information and

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192. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). In *Skinner*, 489 U.S. at 621 n.5, the majority said that even though the results of blood testing could be turned over to law enforcement authorities, the search was valid since it was not done as a pretext for criminal investigation. The dissent specifically objected to turning drug testing results over to the police. *Id.* at 650-51.
refer it to the appropriate school personnel for carrying out the remedy designated by the regulations. Access by coaches is preferable so that they are aware of the drug abuse on their team. Sending the information to the student's teachers should be considered by the school. While school teachers certainly have reason to know of drug abuse, most are not trained drug abuse counselors. The drug testing program is not carried out for the academic part of the school program. If the school decides to provide access to teachers or other school personnel, the school needs to consider the reason and specifically articulate them in the regulations. The more people who have access to the drug testing results, the more intrusive drug testing will be. The school must limit access as much as possible. As stated above, some sanctions for the violation of such confidentiality should be set forth so that the program is in fact kept strictly confidential.

5. High School Athletes Should Be Asked to Disclose Medical Information Which Could Explain a Positive Test Result After Their Urine Tests Positive for Prohibited Substances Rather Than at the Time the Urine Is Collected.

Sometimes the person tested is lawfully taking a medication that will cause a positive test result. All drug testing programs must gather information about prescription drugs being taken before reaching an informed decision about a positive drug test. When should this information be gathered? Should medical information be obtained before the test or after the test shows a positive test result? In *Skinner v. Railway Labor Executives' Ass'n*, the persons to be tested were asked at the time the urine was collected to list all medications taken within the past 30 days. Although this procedure was approved in *Skinner*, it is certainly more intrusive than gathering the information after a positive test result. It is also less efficient. Most of this information will be gathered from people who do not test positive for any drug. Many people who do not ultimately test positive for drug use will have to disclose private medical information. Gathering medical information at the time the sample is collected is more intrusive of privacy than collecting this information afterward.


One of the most important variables in drug testing procedures is whether to require direct observation of urination. A drug testing program

196. Id. at 626 n.7.
that requires direct observation of urination is highly intrusive of personal privacy. The Supreme Court quoted the Fifth Circuit Court of Appeals in saying:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.\(^{197}\)

The Supreme Court in *Von Raab* found that a drug testing program which did not provide for direct observation of urination was less intrusive of personal privacy.\(^{198}\)

Direct observation of urination helps to assure the integrity of the testing process. There are many ways to cheat the urine collection process. Bringing urine from other persons by various means and passing it off as coming from the tested person has certainly been used in the past to thwart urine testing.\(^{199}\) When the person to be tested is given advance notice of the time of testing, the opportunity to cheat is apparent. The only way definitely to stop this type of cheating is by direct observation of urination, yet cheating can be minimized without direct observation of urination. Jackets and other outer garments which could carry or conceal containers should be taken before the test. An observer can be stationed directly outside the stall where urination takes place to monitor the process by sound. The observer can test the urine for its temperature when it is presented. The stall where the urine is produced should have blue dye in the urinal or toilet so that the person to be tested cannot get liquids in the stall. All of these procedures make cheating more difficult but not impossible. The person designing the testing program, therefore, faces a dilemma. Should the test provide for direct observation of urination and thus be more invasive of privacy or should the test not provide for direct observation of urination and run the risk of successful cheating?

Directly observing urination is not unreasonable or illegal just because there is a less intrusive testing process. In *Skinner v. Railway Labor Executives' Ass'n*,\(^{200}\) the Supreme Court held that there was no requirement that a

\(^{197}\) *Skinner*, 489 U.S. at 617, quoting from National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (1987).

\(^{198}\) *Von Raab*, 489 U.S. at 673 n.2.

\(^{199}\) See STU WHITNEY & BOB KOURTAKIS, BEHIND THE GREEN CURTAIN 61-92 (1990). Michigan State University Football players used urine bags taped to their bodies with other people's urine in order to pass NCAA drug testing. See also United States v. Turner, 33 M.J. 40 (1991), where the accused dipped the specimen cup in the toilet and submitted toilet water as her urine sample.

\(^{200}\) 489 U.S. 602 (1989).
drug program use the "least intrusive" means of testing. Thus, the direct observation of urination is not invalid per se, nor is the proper test whether there is a less intrusive means that is effective. Rather, direct observation is another factor in the balancing analysis. Since direct observation of urination is more invasive of personal privacy, it could, in an otherwise close case, make drug testing unreasonable. If all other factors were constant, it would take a greater government interest to justify a testing program with direct observation than without. In the final analysis, with high school athletes who will be less sophisticated in drug test cheating and who may, at their age, feel greater emotional impact from direct observation of urination, high school drug testing without observation of urination is preferred.


A drug testing program must have a close and substantial relation to the governmental goal of deterring drug use. Questions about the accuracy of drug testing bring this into question. In National Treasury Employees v. Von Raab, it was argued that the drug testing scheme was not sufficiently productive to justify the intrusion into personal privacy occasioned by urine testing. The Supreme Court did not deny that this was a proper question, but instead found the procedures used in that case were adequate.

The EMIT test is the cheapest and most widely used urine test available today. The test uses substances or antibodies which only react to the metabolites of certain drugs. One of the major advantages of the test is that it can be administered by relatively untrained personnel. The EMIT test, however, has some serious drawbacks. The antibody used reacts to mari-

201. Id. at 629 n.9 (1989).
202. In National Treasury Employees Union v. Yeutter, 918 F.2d 968, 975 (D.C. Cir. 1990), the court specifically considered the requirement of visual observation of urination in an otherwise valid drug testing program. The court said, "This provision is distinct and clearly severable from those that govern reasonable suspicion testing generally, so it is appropriate to measure the observation requirement itself against the core constitutional test of reasonableness. Because we can discern no weighty government interest in observation that counterbalances its intrusion on employee privacy, we hold that his procedural provision violates the Fourth Amendment." Id. at 975-76.
203. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). The Supreme Court required a search to be "reasonably related in scope to the circumstances which justified the interference." Id.
205. Id. at 676.
206. WADLER & HAINLINE, supra note 104, at 204-05.
207. ROBERT DECRESCE ET AL., DRUG TESTING IN THE WORKPLACE 82-83 (1989).
jauna metabolites and to certain decongestants and anti-inflammatory drugs used by athletes. 

Although the EMIT test, because of its low cost, is a worthwhile screening test it should not be used alone. The United States District Court for the District of Columbia found in Jones v. McKenzie that the discharge of an employee based upon the results of the EMIT test alone was arbitrary and capricious. In that case, the initial, positive EMIT test result was confirmed by another EMIT test administered manually.

A better method is to use the EMIT test as a screening test and then retest using the best, but more expensive, gas chromatography-mass spectrography (GS/MS) test. The GS/MS urine test is the most sensitive and accurate technique currently available in the field of drug testing. The EMIT screening test with a GS/MS confirmation was noted as "highly accurate" in National Treasury Employees Union v. Von Raab. The Seventh Circuit Court of Appeals found the GS/MS test was "the most accurate of the urinalysis test available." Since the use of the EMIT test alone is not legally acceptable, the use of the EMIT as a screening test, with the GS/MS as a confirming test, is currently the only legally acceptable urine testing process.

8. A High School Should Require the Counseling and Rehabilitation of Athletes Who Test Positive for Prohibited Drugs.

The school must determine what it will do with a urine test that indicates prior drug use. We have already concluded that the warrant and probable cause requirements of the Fourth Amendment do not apply to drug testing done for administrative purposes. If drug testing is done for law enforcement or Criminal Law purposes, then it will require a warrant and probable cause. Therefore, in order to avoid the warrant and probable cause requirements, the school should avoid Criminal Law or law enforcement objectives. The objective of drug testing should be to identify drug abusers and to rehabilitate them. Written regulations should suspend athletes from competition until the effects of performance-enhancing drugs

208. Id. at 204; see also E. Marshall, Testing for Drugs, 241 SCIENCE 150 (1988).
210. Id. at 1505.
213. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1311 (7th Cir. 1988).
214. One school system provided progressive penalties after each positive drug test. After the first positive drug test the athlete was suspended from 30% of the remaining athletic contests, the second positive test resulted in suspension from 50% of the games, a third positive test resulted in
have dissipated and until further drug testing and rehabilitation can assure
that the student-athlete is not at risk of further drug abuse. The specific
provisions regarding the length of suspension should vary depending upon
the particular type of prohibited drug which was detected, the amount of
the drug detected, and whether the student has a history of prior drug
abuse. The requirement for rehabilitation will also vary depending upon
the school resources and the prospects for rehabilitation of the individual.

Once the school adopts written regulations setting forth its rehabilita-
tion objectives, the courts are not likely to interfere with the decisions of
school officials regarding activities in school.

IV. CONCLUSION

Random drug testing of high school athletes is legally possible. The
reasonableness of each drug testing program will have to be analyzed on a
case-by-case basis. The threat posed by the use of prohibited drugs will
have to be weighed with the probability that those drugs are being used.
This will constitute the school’s interest in drug testing which must be bal-
anced against the intrusiveness of each testing program.215

There are three primary threats posed by athletic drug abuse in high
school. All of the prohibited drugs pose a serious health threat to the ath-
etic user. Many of the drugs, such as steroids and amphetamines, artifi-
cially enhance the performance of the user, undermining legitimate athletic
competition. It has also been argued that athletes, with their enhanced visi-
bility in the school community, have a greater potential to influence the
acceptability of drug taking in the school community.

The federal courts will not necessarily require evidence of prior drug
abuse in order to justify drug testing. There are no absolute minimums in
federal court analyses of drug testing. Overall reasonableness is the stan-
dard. However, the state courts are likely to require some evidence of drug
abuse in the class of people to be tested. National studies on the use of

court said that mandatory urinalysis of a female athlete was reasonable because “[t]he invasion of
her privacy interest by the specimen collection procedures of the drug-testing program are out-
weighed by the compelling interest of the University and the NCAA in protecting the health of
student athletes, reducing peer pressure and temptations to use drugs, ensuring fair competitions
for the student-athletes and the public, and educating about and deterring drug abuse in sports
competition.” Id. at 1007.
steroids, amphetamines, cocaine and marijuana can be used to show use of 
those substances by high school students and high school athletes. How-
ever, some state courts will require proof of drug use within the class of 
persons to be tested in the school where the testing is to be done. Often this 
requirement can be met by anecdotal evidence of drug use in the school.

Testing programs vary as to their intrusiveness on personal privacy. 
The design of the program must balance the efficacy of drug detection 
against the assault on the personal privacy of the person being tested. Written regulations promulgated before drug testing takes place are necessary. 
The regulations should narrowly define the class of athletes to be tested, 
those substances which the testers are authorized to search for, the people 
who have access to drug test results and the ramifications of a positive drug 
test. Ultimately, all indications of drug use in urinalysis must be confirmed 
by a gas chromatography-mass spectrometry test. Each high school will 
have to determine whether to require direct observation of urination and 
whether to question the people being tested about their use of other pre-
scription drugs at the time of the test or at the time of a positive drug test 
result. These questions require a careful balancing of the added intrusiveness 
on personal privacy of each procedure against the added accuracy in 
drug testing which each procedure produces.

Administering a drug testing program for high school athletes will be 
difficult. However, the continuing threat posed by certain prohibited drugs 
may make it necessary.