NOTES

The Privacy Expectation: A Comparison of Federal and California Constitutional Standards for Drug Testing in Amateur Athletics

Introduction

The nation's concern with the drug problem increases daily with each new story recounting a tragedy directly related to drug abuse.[1] Whether it is the death of an addict in an inner-city slum or the passing of a middle-class American who just wanted to "see what it is like," the drug abuse problem in the United States grows with its list of victims. The problem reaches much further, however, than the simple causal connection between overdose and death. The drug problem touches the lives of those who deal with drug users, and even extends to dealings with foreign countries. Consider the death of Drug Enforcement Agent Enrique "Kiki" Camarena, murdered while working in Mexico to stem the massive flow of illegal drugs across the border.[2] The blatant abduction, torture, and murder of a United States law enforcement agent on foreign soil is unprecedented,[3] and demonstrates both how lucrative the black market for regulated or illegal drugs has become and to what lengths those involved will go to preserve the drug trade.[4]

The fear that drug use compromises the integrity of everything from our work to our play has led to attempts to implement drug testing programs in many areas of American life.[5] Particular attention concerning

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1. For example, two tragedies directly related to the drug problem in America are the death of Benji Ramirez, possibly the first death of an athlete directly attributable to steroids, *see* Telander and Noden, *The Death of an Athlete*, SPORTS ILLUSTRATED, Feb. 7, 1989, at 68, and the death of Enrique "Kiki" Camarena, *see infra* note 2 and accompanying text.

2. Shannon, *Desperados*, TIME, Nov. 7, 1988, at 84; *Thousands Mourn Slain Drug Enforcement Agent*, Oakland Tribune, March 5, 1989, § A, at 5, col. 1.

3. Shannon, *supra* note 2, at 84.

4. *Id.*

5. *See* Cowart, *Random Testing During Training Competition May Be the Only Way to Combat Drugs in Sports*, 260 J. A.M.A. 3556(2) (Dec. 23, 1988); Duda, *Cocaine May Increase Drug Tests*, 14 Physicians & Sportsmedicine 37 (Aug. 1986).

drug testing has focused on the workplace and the athletic arena.[6] The deaths of budding basketball superstar Len Bias and veteran professional football player Don Rogers,[7] and more recently, the death of David Croudip, a defensive back for the Atlanta Falcons,[8] testify to the infiltration of drugs into athletics. While such incidents have prompted increases in the use of drug testing, the issue whether such tests will be part of standard operating procedure in sports has by no means been resolved.

Probing into an individual's private life raises serious constitutional issues. The "penumbra" of rights surrounding the First, Fourth, Fifth, and Ninth Amendments to the United States Constitution guarantees an individual's right to privacy.[9] In addition, California has gone a step further by specifically securing the right to privacy in Article I of the California Constitution.[10]

This Note examines the conflict between an amateur athlete's right to privacy under the United States and California Constitutions and the mandate of the National Collegiate Athletic Association (NCAA) that all student-athletes be tested for specified banned drugs or be prevented from participating in college athletics.[11] Part I of this Note describes the NCAA's drug-testing plan. Part II examines the right to privacy under the United States Constitution and an application of this standard to the drug testing of a student-athlete in *O'Halloran v. University of Washington*.[12] Part III discusses the right to privacy under the California Constitution and its application to student-athlete drug testing in *Jennifer Hill & Barry McKeever v. National Collegiate Athletic Association*.[13] Part IV of the Note compares the analysis used by the two courts, finding that the *O'Halloran* opinion is better reasoned because it more accurately describes the realities of drug use in sports and the need for drug testing in order to deter or stop such use. The Note concludes by suggesting that while the opinion in *Hill* may represent a victory in the fight against drug testing of student-athletes, it is more likely only an isolated exception: drug testing appears to be here to stay.

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6. *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (drug testing of customs agents); Burnley v. Railway Labor Executives' Ass'n, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989) (drug-testing of train crews involved in accidents); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986) (drug testing of horse racing personnel in New Jersey).

7. Keteyian and Selcraig, *A Killer Drug Strikes Again*, SPORTS ILLUSTRATED, July 7, 1986, at 18 (Both Len Bias and Don Rogers die as a result of cocaine use.).

8. Ballard, *Nightcap*, SPORTS ILLUSTRATED, Oct. 17, 1988, at 24 (David Croudip dies after drinking a drink containing cocaine.).

9. *See* Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965).

10. CAL. CONST. art. I, § 1.

11. The 1987-88 NCAA Drug-Testing Program, Part II, Constitution 3-9-(i).

12. 679 F. Supp. 997 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

13. No. 619209 (Santa Clara Super. Ct., August 10, 1988).

I. The NCAA Drug-Testing Plan

The NCAA's drug-testing program requires that student-athletes sign a statement whereby the athlete "consents to be tested for the use of drugs prohibited by NCAA legislation."[14] The list of prohibited drugs includes drugs commonly associated with drug abuse and death, such as cocaine, drugs used to enhance performance, such as steroids, and drugs used to modify body characteristics to disguise the use of banned drugs, such as diuretics.[15] The NCAA plan requires analysis of the student-athlete's urine to determine use of banned substances.[16] The plan also stipulates that the furnishing of the urine sample by the student-athlete be monitored to ensure the integrity of the sample.[17] It is this requirement for monitored testing and its invasion into the athlete's private life that has formed the basis of the constitutional challenge to drug testing of student-athletes.

II. The Federal Standard

A. The Right to Privacy

The Supreme Court has interpreted the United States Constitution and the Bill of Rights to include "penumbras" that give "life and substance" to the specific guarantees found therein.[18] Among the most important rights created by these "penumbras" is an individual's right to privacy.[19] That right to privacy is guarded by the "strict scrutiny" standard—the highest standard used by the Supreme Court offering the greatest protection of our personal rights.[20] Included in this right to privacy is the right protected by the Fourth Amendment's restriction on government searches and seizures.[21] The question presented in the context of drug testing is whether this right to privacy may be invoked to protect an individual from having to provide a urine sample that will be tested for the presence of banned drugs.

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14. *Id.*

15. *See* Benjamin, *Shame of the Games*, TIME, Oct. 10, 1988, at 74, 76.

16. The 1987-88 NCAA Drug-Testing Program, Part V, Protocol, Section 1.2. The program includes provisions for the athlete to declare the use of legitimate drugs such as cold medications.

17. The 1987-88 NCAA Drug-Testing Program, Part V, Protocol, Section 5.0-5.5.

18. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

19. *Id.* at 482.

20. The "strict scrutiny" test employed by the Supreme Court is generally reserved for cases in which state action creates suspect classifications or impinges on constitutionally protected rights, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973), such as the right to privacy. In these situations the challenged action must be narrowly tailored to serve an important government interest. Wygant v. Board of Educ., 476 U.S. 267, 274 (1986); United States v. Paradise, 480 U.S. 149, 167 (1987).

21. U.S. CONST. amend. IV.

B. Application to Student-Athlete Drug Testing

To establish federal jurisdiction, a complaint must state a federal issue, such as the deprivation of a right protected by the United States Constitution. The student-athlete may establish such a claim based on a violation of the right to privacy under 42 U.S.C. section 1983, which provides a private cause of action for civil rights violations.[22] To state a cause of action under section 1983, the plaintiff must satisfy the two-prong test of *Parrat v. Taylor*.[23] The plaintiff must demonstrate first that the conduct complained of was committed by a person acting under color of state law,[24] and second that the "conduct deprived [the victim] of rights, privileges or immunities secured by the Constitution or laws of the United States."[25]

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22. *See* Zeller v. Donegal School District Bd. of Educ., 517 F.2d 600 (3rd Cir. 1975) (federal courts have jurisdiction to entertain complaints brought under 42 U.S.C. § 1983 for deprivation of civil rights); *see also* O'Halloran v. University of Wash., 679 F. Supp. 997, 1001 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

23. *O'Halloran*, 679 F. Supp. at 1001 (quoting Parrat v. Taylor, 451 U.S. 527, 535 (1981)).

24. Although a thorough examination of whether the acts of an NCAA member-college constitute state action is beyond the scope of this Note, the issue will be addressed briefly here because of its importance in determining whether the action falls within federal jurisdiction. In order to establish state action, the student-athlete must show that in implementing the NCAA rules the school and the NCAA are acting as agents of the state. *See* National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 461 (1989) (the deprivation of an individual right must come at the hands of the state in order for the party to be afforded due process protection under the Fourteenth Amendment). The student-athlete must show that the NCAA specifically, rather than the school, is a state actor because an injunction against the school will stop only that particular school from enforcing the NCAA regulations. If a school fails to abide by the regulations, the school and all its sports programs will be dropped from the NCAA. *See infra* note 31 (University of Washington has moved to prevent the NCAA from terminating membership based on University's failure to administer drug-testing program).

Until recently, the federal courts were unable to definitively answer whether the NCAA was a state actor. The leading case in this area was Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984), in which Chaim Arlosoroff was declared ineligible to play under one of the NCAA eligibility rules. Arlosoroff sued for a preliminary injunction claiming a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 1020. The court found that the Equal Protection and Due Process Clauses were inapplicable to the case because the action of the NCAA at issue was private conduct and not state action. *Id.* at 1022. The court reviewed the relevant case law history, noting that early holdings found the NCAA to be a state actor based on "the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action." *Id.* at 1021. The *Arlosoroff* court recognized that the Supreme Court had rejected this idea in Blum v. Yaretsky, 457 U.S. 991 (1982), and reconciled the decision by ruling that earlier cases proclaiming the NCAA a state actor were incorrectly decided. *Arlosoroff*, 746 F.2d at 1021.

In National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988), the Supreme Court affirmed the *Arlosoroff* holding that the NCAA was not a state actor. It now appears that student-athletes challenging the drug-testing plan of the NCAA will have difficulty establishing the necessary elements of a cause of action under the federal Constitution.

25. *O'Halloran*, 679 F. Supp. at 1001 (citing Parrat v. Taylor, 451 U.S. 527, 535 (1981)).

1. Deprivation of a Constitutionally Protected Right

Assuming that the plaintiff can show state action,[26] the individual must then show that he or she has been deprived of a constitutionally protected right[27]—in this case, the right to privacy—in order to make a claim under section 1983. This privacy issue was recently addressed in *O'Halloran v. University of Washington*,[28] a case in which Elizabeth O'Halloran, a sophomore on the University of Washington track team, challenged the NCAA drug-testing program. The suit was originally brought against the University in Washington state court, but was removed to federal court after the NCAA was ordered joined as a third party defendant.[29] O'Halloran sought a preliminary injunction that would allow her to compete during the pendency of the action without meeting the NCAA drug-testing requirements.[30] The district court effectively ruled on the merits of the case in denying the injunction.[31]

In examining the issue of the student's right to privacy, the *O'Halloran* court set forth a two-step analysis.[32] The court found it necessary first to establish whether there was a search, and second to decide whether any such search was reasonable.[33]

The court in *O'Halloran* made a cursory inquiry, basically relying on precedent, before concluding that "the NCAA's urine testing program is a search for Fourth Amendment analysis."[34] This holding, in

26. *See supra* note 24 and accompanying text.

27. *O'Halloran*, 679 F. Supp. at 1001 (citing *Parrat*, 451 U.S. at 535).

28. 679 F. Supp. 997, 1005 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988). It should be noted that the court dealt with the privacy issue only after establishing that the NCAA was not a state actor, and that therefore plaintiff's claim had failed at step one of the *Parratt* test.

29. O'Halloran v. University of Washington, 856 F.2d 1375, 1377-78 (1988).

30. *Id.* at 1378.

31. *O'Halloran*, 679 F. Supp. at 997. While O'Halloran's motion was pending, the University dropped its plan to conduct drug-testing in the absence of individualized suspicion, and as a result, all claims against the University were dropped. 856 F.2d at 1378. Meanwhile, in light of an order from a Washington Superior Court enjoining the University from requiring students to sign the NCAA consent form as a condition of eligibility to compete on athletic teams, the University filed a third party complaint against the NCAA. *Id.* at 1380. The University's goal was to prevent the NCAA from exercising its right to drop the University from its status as an NCAA member for failure to comply with the NCAA's drug-testing program. *Id.* at 1380-81. Since the claims against the University were dismissed, the only remaining issue was whether the NCAA could drop the University for failure to comply with membership requirements—the drug-testing program. The court held that this was a "pure question of state law," and remanded to the Washington state court. *Id.* at 1381.

Although *O'Halloran* was reversed on procedural grounds, this reversal is unlikely to affect the analysis with respect to the substantive right to privacy issues in the federal courts. *See infra* notes 34-35 and accompanying text.

32. 679 F. Supp. at 1002.

33. *Id.*

34. *Id.* (citing Schmerber v. California, 384 U.S. 757 (1966) (blood tests are searches); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) (urine tests are searches)).

the context of student-athlete drug testing, is consequently not likely to be a point of contention in future litigation in this area.[35]

After determining that there was a search, the court next addressed whether the search was reasonable.[36] Citizens of the United States are constitutionally guaranteed the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[37] For purposes of fourth amendment analysis, what constitutes a reasonable search "depends on the context within which [the] search takes place."[38] If a search is conducted pursuant to a warrant issued for probable cause, the search is reasonable;[39] a warrant, however, "is not the sine qua non of reasonableness."[40] Generally, a warrantless search is unreasonable except in certain well-defined cases.[41] These exceptions include "searches incident to lawful arrest, the 'automobile exception,' hot pursuit, plain view, border searches, administrative searches of closely regulated industries, inventory searches, searches of schoolchildren's possessions at school, and consent."[42]

There was no warrant in *O'Halloran*; the "search" was simply an implementation of the NCAA's drug-testing plan by the University of Washington. Thus, the *O'Halloran* court did not require a showing of "probable cause" for the search to be reasonable.[43] The court relied on

35. In a case with similar issues, Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988), the court found that although drug-testing through the taking of urine samples did constitute a search for fourth amendment purposes, probable cause and the warrant requirement did not apply. *Id.* at 1315. Based on a "balancing of the nature and quality of the intrusion against the importance of the governmental interest alleged to justify the intrusion," the court found that the drug-testing program did not violate the Fourth Amendment. *Id.* at 1322 (citing United States v. Place, 462 U.S. 696, 703 (1983)). The court recognized a convergence of factors that made the search reasonable: the diminished expectation of privacy in the athletic environment; the voluntary participation of students in athletics; the pervasive regulation of athletics; the school's interest in maintaining a drug-free program; the limited discretion of the officials performing the search; and the limited uses of the information sought—that is, the information may be used for noncriminal educational and rehabilitative purposes only. *Id.* at 1322. As this Note will demonstrate, these are essentially the same factors used by the *O'Halloran* court in its analysis. *See infra* notes 100-101 and accompanying text. Although *O'Halloran* was reversed, the reversal was on procedural grounds. *See supra* note 31.

36. 679 F. Supp. at 1002.

37. *Id.* (quoting U.S. CONST. amend. IV.).

38. *Id.* at 1002 (quoting O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985))).

39. U.S. CONST. amend. IV.

40. *O'Halloran*, 679 F. Supp. at 1002 (quoting Burnley v. Railway Labor Executives' Ass'n, 839 F.2d 575, 582 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989)).

41. *Id.*; *see also* Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967).

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

43. *Id.* at 1005.

Railway Labor,[44] in which the Ninth Circuit balanced " 'reasonable expectations of privacy' " against " 'the governmental interest in the safe and efficient operation of the railroads,' "[45] and concluded that probable cause was not required to show reasonableness of the search.[46] The *O'Halloran* court continued to follow the lead of *Railway Labor*, citing *New Jersey v. T.L.O.*[47] to determine the standard for reasonableness.[48] In *T.L.O.*, Justice Blackmun stated in a concurring opinion that the warrant requirement could be excused "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[49] The Court in *T.L.O.* set out a two-prong test to determine whether a search is reasonable absent a warrant and/or probable cause.[50] Following this test, the *O'Halloran* court first analyzed whether the search was justified at its inception, and then examined whether the search as conducted was reasonably related in scope to the circumstances that justified the interference in the first place.[51]

The *O'Halloran* court also took notice of the reasonableness standard propounded in *O'Connor v. Ortega*.[52] This standard requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[53] The standard also considers both whether there is a belief that the wrongdoing will be revealed by the search and whether the scope of the search is reasonable.[54] The court in *O'Halloran* combined the *O'Connor* and *T.L.O.* standards to create its own test of what constitutes a reasonable search under the circumstances,[55] first applying the *T.L.O.* two-prong test to determine whether the basis for, and the scope of, the search was reasonable,[56] and second, following the *O'Connor* test by weighing the competing interests of the two parties.[57]

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44. 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

45. *O'Halloran*, 679 F. Supp. at 1004 (quoting *Railway Labor*, 839 F.2d at 586).

46. *Id.* at 1002-05.

47. 469 U.S. 325 (1985).

48. *O'Halloran*, 679 F. Supp. at 1004.

49. 469 U.S. at 351 (Blackmun, J., concurring).

50. *Id.* at 341.

51. 679 F. Supp. at 1004.

52. *Id.* at 1003-04 (citing O'Connor v. Ortega, 480 U.S. 709, 719 (1987)).

53. *O'Connor*, 480 U.S. at 719 (quoting United States v. Place, 462 U.S. 696, 703 (1983); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). Note that this is the same standard used by the court in Schaill by Kross v. Tippecanoe County School Corp., *see supra* note 35.

54. *Id.* at 726.

55. *O'Halloran*, 679 F. Supp. at 1004-05.

56. *Id.*

57. *Id.* at 1004-07.

2. *Application of the* T.L.O. *Test to the* O'Halloran *Facts*

The inquiry in *O'Halloran* was whether there were "reasonable grounds for believing that urine tests of student-athletes will turn up evidence of misconduct—inappropriate [sic] drug use."[58] The Supreme Court had not previously determined whether this suspicion must be individualized, that is, aimed at a particular person. The Court in *O'Connor* did find "individualized suspicion"; nevertheless, the Court expressly declined to decide whether individualized suspicion must exist.[59]

The *Railway Labor* court also addressed the individualized suspicion issue.[60] *Railway Labor* considered whether it was permissible for the Federal Railroad Administration to conduct mandatory blood and urine tests after certain train accidents and fatal incidents, or to authorize breath and urine tests subsequent to other accidents and incidents.[61] In holding that individualized suspicion was "essential to finding toxicological testing of railroad employees justified at its inception,"[62] the *Railway Labor* court distinguished on two grounds those situations in which a search of a person is permitted without a warrant or individualized suspicion. First, the degree of intrusion in, for example, searches at automobile checkpoints or preboarding searches of airline passengers, does not approach the level involved in toxicological[63] testing of body fluids; and second, in each case there is a vital government interest, such as national self-protection or the need to combat terrorism, which excuses the requirement of particularized suspicion.[64]

The *O'Halloran* court rejected both the *O'Connor* and *Railway Labor* approaches and instead held that individual or particularized suspicion was not required to show reasonableness.[65] It reasoned that past incidents of improper drug use by athletes, "widely publicized" in the news media, were adequate grounds for search. The court was persuaded by the NCAA's "laudable" goal of "attempting to educate, ferret out,

58. *Id.* at 1004. The *Railway Labor* court, which originated this standard for determining whether a search was justified at its inception, used the word "suspecting," 839 F.2d 575, 587 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989), whereas *O'Halloran* used the word "believing," 679 F. Supp. at 1004.

59. 480 U.S. at 726.

60. 839 F.2d at 575, *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989). Although the Ninth Circuit in *Railway Labor* found that urine testing was not minimally intrusive and thus could not withstand fourth amendment scrutiny, 839 F.2d at 586, the Supreme Court, on appeal, used a similar analysis but found that the search/drug test was reasonable, *Skinner v. Railway Labor*, 109 S. Ct. at 1417, just as the court held in *O'Halloran*, 679 F. Supp. at 1005.

61. 839 F.2d at 577-79.

62. *Id.* at 587.

63. Toxicology relates to the testing of body fluids for poisons. In the context of a drug-testing program, any banned or prohibited drug would be classified as a "poison."

64. *Railway Labor*, 839 F.2d at 586.

65. *O'Halloran*, 679 F. Supp. at 1004.

and deter drug abuse among student-athletes," concluding that there was "a reasonable basis for believing that urine testing will turn up evidence of inappropriate drug use by student-athletes."[66]

The *O'Halloran* court distinguished *Shoemaker v. Handel*[67] as involving different circumstances.[68] In *Shoemaker*, the court upheld the validity of warrantless breath and urine testing of New Jersey race track personnel such as jockeys and trainers, on the grounds that such testing is exempt from typical fourth amendment considerations under the administrative search exception.[69] The *Shoemaker* court ruled that in order to fall within this exception, the government action must reflect, first, a showing of "strong state interest in conducting an unannounced search," and second, that "the pervasive regulation of the industry [has] reduced the justifiable privacy expectation of the subject of the search."[70] The court found that New Jersey's strong interest in maintaining the integrity of the horse racing industry justified warrantless searches.[71] Also, the nature of New Jersey horse racing regulations created a decreased expectation of privacy.[72] The combination of a strong state interest and reduced expectation of privacy were sufficient to pass the standard for the administrative search exception.[73] The *Shoemaker* court recognized the distinction between the search of premises and persons, but found that when the principal regulatory concern was the person, "the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable."[74] The court also noted that administrative searches were unlike traditional warrantless searches since the jockeys were subjected to breathalyzer tests daily,[75] and knew that they could be subject to warrantless urinalysis testing on

66. *Id.*

67. 795 F.2d 1136 (3rd Cir. 1986).

68. *O'Halloran*, 679 F. Supp. at 1004.

69. 795 F.2d at 1142. An administrative search is an exception to the traditional "warrant based on probable cause" requirement of the Fourth Amendment. In order for a search to fall within this exception it must meet three requirements under current Supreme Court standards: First, the government must have a substantial interest in the regulatory scheme pursuant to which the inspection is made; second, a warrantless inspection must be necessary to further the scheme; and third, the statute under which the inspection program operates must serve as a constitutionally adequate substitute for a warrant. New York v. Burger, 482 U.S. 691, 702-03 (1987). The court in *Shoemaker* listed only two requirements that must be met in order for a search to fall within the exception, though the third requirement from *Burger* was arguably satisfied in *Shoemaker* as well.

70. *Shoemaker*, 795 F.2d at 1142. *But see supra* note 69 and *infra* note 199 (three requirements for the administrative search exception under the Supreme Court's decision in *Burger*, 482 U.S. 691 (1987)).

71. *Shoemaker*, 795 F.2d at 1142.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1139.

days they raced. Thus, they had at least general notice of impending searches.[76] The jockeys' only remaining concern was the potential invasion of privacy resulting from the lack of confidentiality of the test results. The court found that this issue was not ripe for adjudication and left the jockeys with the option of returning to court if the Racing Commission failed to comply with the proposed confidentiality rules.[77]

Arguably, however, *Shoemaker* need not be distinguished. Instead it may serve as precedent for the holding in *O'Halloran*. Both cases involve essentially equivalent warrantless searches. The search in *Shoemaker* was conducted pursuant to a regulation of the New Jersey State Racing Commission,[78] while the search in *O'Halloran* was conducted pursuant to the 1987-88 NCAA Drug-Testing Plan.[79] Neither regulation requires a warrant, but both put the testee on notice of the possibility of a breath or urine test.[80] Also, both courts recognized a public interest in maintaining the integrity of the regulated field.[81] In fact, the *O'Halloran* court expressly recognized the common public interest element it shares with *Shoemaker*.[82] *Shoemaker* held that the principal concern of the regulation was the person—the jockey.[83] The *O'Halloran* court expressly held that the student-athlete was the principal concern of the regulation, and this holding was supported by the NCAA drug-testing plan.[84] The significant difference is that *Shoemaker* maintained that the horse racing industry is pervasively regulated,[85] while *O'Halloran* did not say the same of the NCAA, although arguably it is.[86]

With regard to the second *T.L.O.* prong, *O'Connor v. Ortega* stated that "[t]he search will be permissible in its scope when 'the measures

76. *Id.* at 1142.

77. *Id.* at 1144.

78. N.J. ADMIN. CODE tit. 13, § 70-14A.10-11 (1985).

79. The 1987-88 NCAA Drug-Testing Program, Part II, Constitution 3-9-(i).

80. The regulation at issue in *Shoemaker* provided that the jockeys would be subject to a breathalyzer test every day, and might be subject to a urine test on days they raced. 795 F.2d at 1139. The NCAA regulation provides that the student-athlete must sign a consent form prior to the season in which she agrees to be tested for use of the enumerated banned drugs prior to participation in a postseason/championship event. *O'Halloran*, 679 F. Supp. at 998. Failure to sign the consent form will result in a denial of eligibility to play in regular season competition, and failure to submit to the drug test (or submitting and testing positive) will bar the student from participating in any postseason events. *Id.* The student-athlete was put on notice by the regulation requiring her consent prior to the season that she might be subject to testing prior to participation in any postseason events.

81. *See Shoemaker*, 795 F.2d at 1142; *O'Halloran*, 679 F. Supp. at 1003.

82. *O'Halloran*, 679 F. Supp. at 1003.

83. *Shoemaker*, 795 F.2d at 1142.

84. Consider the prefatory statement to the 1987-88 NCAA Drug-Testing Plan, stating that the goals of the plan are to preserve the integrity of collegiate athletics by making sure that no participant has an "artificially induced advantage," and to "safeguard the health and safety of the participants." Preface to The 1987-88 NCAA Drug-Testing Program.

85. 795 F.2d at 1142.

86. *See* note 198 and accompanying text.

adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the misconduct.' "[87] As with the first prong of *T.L.O.*, however, the *O'Connor* Court declined to determine whether the standard had been met, thus failing to engage in any analysis of the application of this second prong.[88]

The holding in *T.L.O.* provides a standard for applying the second prong of the test. *T.L.O.* involved the search of a fourteen-year-old student's purse by a school official. The court found that the search was reasonable based on consideration of all the attendant circumstances.[89] Part of the inquiry was based on the two-part test at issue here. The Court did not analyze the second prong extensively, but did indicate in a footnote that courts should defer to the judgment of school officials when evaluating the rules governing conduct in schools, unless the rule violates some "substantive constitutional guarantee."[90]

Like the *O'Connor* Court, *O'Halloran* made short work of this second prong of the *T.L.O.* test. Stating simply that "the scope of the program is fully tailored to address the need," the court found that the second prong of the test was satisfied.[91] "The rationale for the time, place, manner, and type of testing is discussed fully in [the doctor's] affidavit, and the court will not substitute its judgment for the expertise of those who developed the . . . program."[92] As in *T.L.O.*, the court deferred almost exclusively to the judgment of the rulemaking body and avoided making any independent judgment of its own.

3. *Weighing the Competing Interests*

After the *O'Halloran* court found that the two-prong test of *T.L.O.* was satisfied, it continued its reasonableness inquiry by weighing the alleged invasion of the student-athlete's constitutional right to privacy against the countervailing interests of the drug-testing program. The "interests" in the program included the public health interest as well as the interests of the University and the NCAA in fair competition.[93]

As discussed earlier, the NCAA plan requires monitored collection of the urine specimen in order to maintain the integrity of the sample.[94] It is this aspect, coupled with disclosures about an individual's private life that a chemical analysis of a urine sample is likely to yield, that forms the basis for the student-athlete's right to privacy claim. *O'Halloran* ex-

87. 480 U.S. 709, 726 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).
88. *Id.*
89. 469 U.S. at 340-42.
90. *Id.* at 342 n.9.
91. *O'Halloran*, 679 F. Supp. at 1005.
92. *Id.*
93. *Id.*
94. The 1987-88 NCAA Drug-Testing Program, Implementation of the NCAA Drug-Testing Program, § 5.2.1.

amined this alleged invasion of privacy in the context of a university athletic program and concluded that the drug-testing program constituted a relatively small intrusion into the individual's private life.[95] In support of this conclusion, the court stated that there is "a diminished expectation of privacy in the context of a university athletic program."[96] This "diminished expectation of privacy" potentially would allow an alternative avenue of enforcing a drug-testing program against student-athletes that is discussed in part V.[97] Next, the court pointed out that health examinations are fairly routine for an athlete, and in the context of such an examination, a certain amount of viewing and touching was allowed among relative strangers that would be firmly rejected in most other situations.[98] The court recognized that while providing a urine sample in an ordinary health examination may be fairly routine, doing so in front of a witness was extraordinary. Nevertheless, the court held that this was not an unreasonable invasion of the student's right to privacy.[99]

The court next addressed whether the countervailing interests outweighed the student-athlete's right to privacy. The court looked to the affidavit of Professor Dugal, the plaintiff's drug-testing expert, and the 1987-88 NCAA Drug-Testing Program to determine the program goals. These goals were to stop or deter the misuse and abuse of drugs in college athletics, to educate student-athletes about the dangers of using drugs, to preserve the health of student-athletes, to make sure that no participant in athletics has an unfair, artificially induced advantage, and to maintain the integrity of college athletics.[100] In light of the importance and validity of these interests as compared to the student-athlete's right to privacy, the court found that the "[p]laintiff has not demonstrated that there has been an invasion of any constitutionally protected right requiring invalidation of the drug-testing program."[101]

4. Summary of the Federal Standard

The *O'Halloran* case fairly represents the typical scenario of a student-athlete challenging the NCAA's drug-testing program in federal court. In order to establish a cause of action, the student must satisfy the two-step test propounded in *Parratt v. Taylor*.[102] There must first be a

95. *O'Halloran*, 679 F. Supp. at 1005.

96. *Id.* at 1002.

97. *See infra* notes 193-210 and accompanying text.

98. *O'Halloran*, 679 F. Supp. at 1002. The court also noted that there is an element of communal undress present in the context of a University athletic program that is not present in other cases, *e.g.*, Burnley v. Railway Labor Executives' Ass'n, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986).

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

100. *Id.* at 1006-07.

101. *Id.* at 1007.

102. 451 U.S. 527, 535 (1981).

showing of "state action," followed by a showing that the student-athlete is deprived of a constitutionally protected right, such as the right to privacy.[103] As demonstrated in *O'Halloran*, the current state of the law leaves the student-athlete unable to satisfy either of the test's requirements, and thus the cause of action will fail.

O'Halloran is typical in another sense in that the opinion deals with an attempt to obtain a preliminary injunction—the plaintiff's primary objective. Without that injunction, the clock runs on the student-athlete's eligibility during the pendency of the case. Since the student-athlete only has four years of eligibility in college athletics, every year that passes is a year lost in terms of athletic eligibility.[104] As noted in *O'Halloran*, the Ninth Circuit standard for the grant of a preliminary injunction is determined on "a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness."[105] If a plaintiff is unable to demonstrate that she could establish a cause of action, there is absolutely no chance of success on the merits of the case, and the preliminary injunction would thus be denied.

III. The California Standard

A. The Right to Privacy

The right to privacy has special significance in California. The right is specifically guaranteed in the California Constitution.[106] By contrast the federal Constitution does not mention privacy, although the United States Supreme Court has located the right to privacy in the "penumbra" of rights guaranteed by the Fourth, Fifth and Ninth Amendments.[107] The right of privacy guaranteed by the California Constitution is consequently more extensive than that guaranteed by the federal Constitution.[108] The question is whether this more extensive right to privacy will protect the student-athlete from the NCAA drug-testing plan where the federal Constitution has failed.

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103. *Id.*

104. The college athlete's eligibility is governed by the rule that is generally stated as giving the athlete "five to play four." That is, once an athlete enters college sports, she may play four years in any one sport. The athlete is given five years, however, in which to use these four years of eligibility; the athlete can thus sit out a season in the event of an unforeseen eventuality, such as injury or academic problems.

105. *O'Halloran*, 679 F. Supp. at 999 (citing Card v. Governing Bd. of Grossmont Union High School Dist., 790 F.2d 1471, 1473 n.3 (9th Cir. 1986)).

106. CAL. CONST. art. I, § 1; *see also* Bartling v. Superior Court, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220, 225 (1984).

107. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). *See infra* notes 18-19 and accompanying text.

108. *See* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 262-63, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1987).

B. Application of the California Standard to Student-Athlete Drug Testing

The most recent case to test the validity of the drug testing of student-athletes in California is *Jennifer Hill & Barry McKeever v. NCAA*.[109] This case, brought by Stanford linebacker Barry McKeever and Jennifer Hill, co-captain of the women's soccer team, challenged the NCAA drug-testing regulation. The challenge was based on a violation of the student-athlete's right to privacy under the California Constitution.

As in *O'Halloran*, the *Hill* plaintiffs sought a preliminary injunction. In *Hill*, the court used a much more stringent test for whether the right to privacy has been invaded. Since the plaintiffs did not bring the claim in federal court, they did not have to assert that the NCAA or the University was a state actor because the California right to privacy applies to intrusions by both private and governmental entities.[110] The *Hill* court recognized that "the right to privacy is not absolute,"[111] but held that once an invasion of privacy has been shown, the burden shifts to the defendant to satisfy a four-part test to prove the invasion is justified. The defendant must show that: (1) a "compelling interest" necessitated the intrusion; (2) the invasion was "necessary to further that purpose"; (3) the intrusion was "narrowly drawn to assure maximum protection of the constitutional interests at stake"; and (4) there was no "less intrusive means" to achieve that interest.[112]

1. Is There an Invasion of the Right to Privacy?

The *Hill* court found unequivocally that the NCAA's drug-testing program invaded the plaintiff's right to privacy.[113] The court found four different invasions of the right: (1) the taking of monitored urine samples[114]; (2) the resulting disclosure of "private and secret details about the athlete's private life"[115]; (3) the "media attention and speculation" about the test results of student-athletes declared ineligible[116]; and (4) the

109. No. 619209 (Santa Clara Super. Ct., Aug. 10, 1988) [hereinafter *Hill*].

110. *See* Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

111. *Hill* at 24.

112. *Hill* at 24-25 (citing Long Beach City Employees v. City of Long Beach, 41 Cal. 3d 937, 948, 719 P.2d 660, 666, 227 Cal. Rptr. 90, 96-97 (1986); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975); Boler v. Solano County, 201 Cal. App. 3d 467, 247 Cal. Rptr. 185 (1987)).

113. *Hill* at 11.

114. *Hill* at 25.

115. *Id.*; *see* Boler, 201 Cal. App. 3d 467, 247 Cal. Rptr. 185; *see also* Feliciano v. City of Cleveland, 661 F. Supp. 578, 588 (N.D. Ohio 1987); People v. Triggs, 8 Cal. 3d 884, 892, 506 P.2d 232, 237, 106 Cal. Rptr. 408, 413 (1973).

116. *Hill* at 25; *see* White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 830, 134 Cal. Rptr. 839, 842 (1976).

unwarranted intrusion into the medical treatment of a student-athlete.[117] For purposes of this article, it is useful to look at the factual basis for each of these findings which are based solely on testimony taken at trial.

The NCAA program requires that the collection of samples be monitored to insure the integrity of the samples.[118] The *Hill* court found that direct monitoring of an athlete urinating was not necessary to the collection of a valid sample.[119] Furthermore, the court found that the requirement that the act of urination be watched by an NCAA monitor who is not necessarily a member of the medical profession is both "degrading and embarrassing."[120]

Obviously, toxicological testing of an individual's urine is going to reveal details about the nature of the substances that the individual is ingesting, as well as personal details such as medical conditions. The *Hill* court found that the discovery of such information impermissibly invaded an individual's right to privacy.[121] The court was particularly concerned that the urinalysis might reveal the presence of drugs legally taken but prohibited by the NCAA plan, such as over-the-counter medications or anabolic steroids taken pursuant to a doctor's orders; the presence of drugs, such as marijuana, taken with no connection to athletic performance; or the presence of a substance over which the athlete has no control, such as the passive inhalation of marijuana smoke.[122]

The *Hill* court also found it "virtually impossible" to avoid the media speculation attendant to the situation in which the NCAA declares an athlete ineligible under the its drug-testing plan.[123] The court found that this type of attention is "counterproductive and psychologically damaging to a student-athlete, whether or not he did anything improper."[124]

Finally, the court found that the test results and/or declarations by the student-athlete would yield "confidential medical information" and details of "sensitive medical conditions"; these disclosures would constitute an unwarranted invasion of the individual's right to privacy,[125] and would also interfere with both the athlete's right to self-treatment and

117. *Hill* at 25; *see* Bartling v. Superior Court, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220, 225 (1984).

118. The 1987-88 NCAA Drug-Testing Program, Implementation of the Drug-Testing Program § 5.2.1.

119. *Hill* at 10. Presumably the court felt alternative measures were sufficiently reliable, such as taking the temperature of the sample to ensure its freshness.

120. *Id.* at 10, "Conclusion of Fact" #14.

121. *Id.* at 10, "Conclusion of Fact" #5-16, 18.

122. *Id.* at 10-11.

123. *Id.* at 11, "Conclusion of Fact" #17.

124. *Id.*

125. *Id.* at 10, "Conclusion of Fact" #12. Specifically, the court noted that women athletes were asked whether they were taking birth control pills.

the doctor's ability to treat the athlete.[126] This finding was also based in part on the section of the California Health and Safety Code that states in part that "adult person[s] have the fundamental right to control the decisions relating to the rendering of their own medical care."[127]

Based on the foregoing findings, the *Hill* court ruled that the NCAA's drug-testing program invaded the right to privacy of Jennifer Hill and Barry McKeever.[128]

2. *Is the Invasion Justified?*

Once the invasion of the right to privacy is shown, the defendant must carry the "heavy burden" of justifying the invasion.[129] As stated earlier, the defendant must show that: (1) a "compelling interest" necessitated the intrusion; (2) the invasion was "necessary to further that purpose"; (3) the intrusion was "narrowly drawn" to assure maximum protection of the constitutional interests at stake; and (4) there was no "less intrusive means" to achieve that interest.[130] The court found that the NCAA failed on all four counts.

The *Hill* court first addressed the question whether a sufficient compelling interest existed to justify the invasion of privacy. The court looked at whether there was sufficient evidence of drug use by college athletes to justify the intrusion[131] or whether the health and safety of the student-athlete was of sufficient concern to create a compelling need for drug testing.[132] In addition, the court examined whether the interest in fair competition could justify this invasion of the student-athlete's privacy.[133]

Based on testimony heard at trial, the *Hill* court found that the majority of student-athletes do not use or abuse drugs.[134] To support this finding, the court looked to the results of past NCAA drug-testing programs, which found little evidence of drug use by student-athletes.[135] In fact, the program found that less than 1% (34 of 3511) of the students tested under the 1986-87 Program were declared ineligible and that no woman had ever been declared ineligible.[136] Moreover, the court found

126. *Id.* at 10, "Conclusion of Fact" #13.

127. CALIFORNIA HEALTH & SAFETY CODE, § 7186 (West 1990).

128. *Hill* at 25.

129. *Id.* at 25 (citing Boler v. Superior Court, 201 Cal. App. 3d 467, 247 Cal. Rptr. 185 (1987)).

130. *Id.* at 24-25.

131. *Id.* at 11.

132. *Id.* at 14.

133. *Id.* at 16.

134. *Id.* at 11.

135. *Id.*

136. *Id.* at 11-12. It seems odd that the court would use evidence from the program it is evaluating to test the validity of that program, especially since the NCAA program will tend to deter drug use and the results of the test will therefore tend to understate the actual number of

that despite the evidence of low drug use, the statistics may have overstated the problem. The court based its finding on: (1) the fact that some testing is based on reasonable suspicion, thereby tending to give higher percentages of findings of drug use; (2) the fact that the data is derived from the number of tests, not the number of students, and since positive samples are retested, one athlete may account for several positive findings; (3) the fact that samples that test positive for more than one banned substance are counted as one sample but multiple results; and (4) the fact that some positive results may have come from proper use of medication, such as prescription drugs.[137]

As for the types of drugs used, the court found only scattered evidence of the use of street drugs, such as cocaine or marijuana, while the majority of the evidence found showed use of anabolic steroids.[138] Finally, the court found no evidence of use of diuretics in wrestling to "make weight."[139] The court found that "[a]ll the evidence taken together demonstrates that there is no drug involvement in any sport except football and that the problem relates only to steroid use and involves a small minority of the football players."[140] Based on the foregoing, the *Hill* court found insufficient evidence of drug use to "create a compelling need for drug testing."[141]

As for the idea that drug testing is necessary to protect the health of student-athletes, the court was very blunt:

> Even if protecting health and safety is one of the goals of the current NCAA drug-testing program . . . there is no evidence that drug use in athletic competition is endangering the health and safety of student-athletes. There is no evidence that any college athlete has ever been injured in competition as a result of drug use.[142]

Further, there was no finding "that any student-athlete ha[d] ever injured anyone else as a result of drug use."[143] The court concluded that the

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student-athletes who are drug users. This use of evidence creates a circular argument that is akin to claiming that there is no need for a police force in a certain area because that area has a large police force and there is little or no crime. It does not require a great leap of logic to conclude that the reason there is little evidence of drug use is because of the regulatory efforts, not despite them. The *O'Halloran* court addressed precisely this issue when it said, "It should be observed additionally that such [drug] testing will have a deterrent effect, and that over time less evidence will be found. Such evidence of the program's success should not be used to demonstrate lack of need for the program or that the program has no reasonable basis." 679 F. Supp. at 1004.

137. *Hill* at 12.

138. *Id.* at 13.

139. *Id.* at 13-14. "Make weight" refers to the efforts of a wrestler to fall within the boundaries (defined by weight) of his class of competition.

140. *Id.* at 14.

141. *Id.*

142. *Id.*

143. *Id.*

program might actually be harmful to students by banning FDA-approved medications designed to improve the health of the student-athlete, and by failing to protect the student-athlete's health in other areas, (i.e., by testing for measles, or prohibiting the use of alcohol or smoking).[144] Furthermore, the NCAA provides no program for counseling or rehabilitation for drug users.[145] Based on these findings, the court ruled that the health and safety of the student-athlete fell short as a compelling reason for justifying drug testing among student-athletes.[146]

The *Hill* court also found that despite the fact that promoting fair competition was a stated goal of the NCAA program, there was no evidence to establish that any of the banned substances actually enhanced the athletes' performance.[147] The court found that "[a]t best, the . . . performance enhancement [possibilities] of steroids is a scientific controversy which will not be resolved in the foreseeable future,"[148] and "no one has scientifically demonstrated that . . . improvements in strength will translate into enhanced performance for football players."[149] Also, there was no evidence that amphetamines, "street drugs," or diuretics enhance performance, and if anything they may be harmful to athletic performance.[150] Based on this dearth of evidence, the court found no compelling need to test for drugs to ensure fair competition.[151]

The court found that the NCAA program did not serve its purpose since the testing method did not demonstrate sufficient accuracy,[152] and an athlete could therefore be declared ineligible on insufficient data.[153] The court also found that the NCAA program did not effectively reach its goal of promoting fair competition and protecting the health and safety of the student-athlete.[154]

The court acknowledged that although the NCAA testing method was the most reliable available, "it is not perfect."[155] After giving cursory treatment to some rather complex scientific conclusions, the court essentially held that while the testing was generally accurate, an unacceptably high possibility of error existed in the process.[156] The court also

144. *Id.* at 15.
145. *Id.*
146. *Id.* at 14.
147. *Id.* at 16.
148. *Id.*
149. *Id.*
150. *Id.* at 16-18.
151. *Id.* at 17.
152. *Id.* at 20.
153. *Id.* at 20.
154. *Id.*
155. *Id.* at 18.
156. *Id.* at 19. As evidence for its holding, the court pointed out that the testing cannot distinguish between heroin and morphine. This is a significant distinction since morphine has redeeming values as a drug when administered as medical treatment by a physician, while

found that the method of testing for marijuana could result in a positive test when the student-athlete had merely passively inhaled marijuana smoke while in the same room as someone smoking marijuana.[157]

The *Hill* court based its conclusion that the NCAA failed in its attempt to promote fair competition on the finding that the NCAA program, as designed, would not determine whether a student-athlete had used a banned substance in preparation for a postseason event.[158] The court found that the NCAA program failed in several respects: the testing did not determine whether the banned substance affected the athlete's performance; the testing was done so far in advance of the game ("days or weeks") that the test could not possibly determine whether the drugs affected performance; positive tests for marijuana could show up long after the effect of the drug had worn off; tests conducted during postseason could not detect the presence of steroids used primarily in training; drug testing has not been scientifically shown to be an effective deterrent to drug use; and drug testing without counseling or rehabilitation is not an effective deterrent.[159] These findings led the court to conclude that the NCAA drug-testing program was ineffective in achieving its stated goal.

Based on the evidence at trial, the court, in few words, found the program overbroad because its tests "include[d] substances which do not enhance athletic performance."[160] Also, the list of banned substances was "fatally overbroad" because each category of banned substances contained the words "others" or "and related compounds," making it impossible to define exactly which drugs were banned and which were not.[161]

Finally, the *Hill* court found that the NCAA had not carried its burden of showing that there was no less intrusive means available to further the stated goals of promoting fair competition and protecting the safety and health of the student-athlete.[162]

These problems aside, the *Hill* court focused on two possible alternatives, drug education and counseling and testing based on reasonable suspicion.[163] The court found that drug education would be an effective

heroin does not. Another potential for error the court identified is that the consumption of food containing poppy seeds can result in a positive test for opiates.

157. *Id.* at 20.

158. *Id.*

159. *Id.* at 21.

160. *Id.* at 20.

161. *Id.* As evidence to support this finding, the court pointed out that even the NCAA personnel in charge of the program are unable to identify which drugs are banned. Three witnesses at trial thought codeine was on the list of banned substances, one was not sure, and two thought it was excluded from the list.

162. *Id.* at 22.

163. *Id.*

means of deterring drug use.[164] Again, based on testimony at trial, the court found that a drug education program would deter drug use by student-athletes because it would teach them the dangers of drugs and show them that drugs do not enhance athletic performance, but have only a placebo effect at best.[165]

The court further stated that a drug education program is a viable alternative that had not been adequately considered by the NCAA.[166] In support of this alternative the court looked at the money spent on education as opposed to testing. From 1975 to 1985 the NCAA spent $200,000 on drug education, while in 1986 alone, the first year of the drug-testing program, the NCAA spent $1,000,000 on drug testing.[167]

The court also found that the NCAA "ha[d] not adequately considered and used testing based on a reasonable suspicion as an alternative to [its] random testing [program]."[168] Presumably, the court in *Hill* would find that testing based on reasonable suspicion satisfied the need for probable cause, and therefore the "search," providing a urine sample, would pass constitutional muster. The court indicated that a program based on reasonable suspicion is a less intrusive means that the NCAA may use to achieve its stated goals and that such programs had been upheld by other courts.[169] The court specifically looked at testing for anabolic steroids based on reasonable suspicion. The court identified several factors as indicators of the possible use of anabolic steroids. These factors included large weight increases over a short time span, aggressive behavior, pimples, body odor and changing hair patterns.[170] The court recognized that these indicators were not infallible, but stated that the current NCAA program was also fallible.[171] While the court acknowledged these shortcomings, the opinion leaves several gaping holes. Even assuming that the court's brief outline would suffice as a testing procedure for anabolic steroids based on reasonable suspicion, the court did not describe probable cause for a "search" for the other drugs on the NCAA list of banned substances. A program based on "reasonable suspicion" will simply encourage drug users to be more secretive and more creative in disguising the signals that might indicate the use of drugs.

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 23.
169. *Id.* at 27. *See also* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).
170. *Id.* at 23.
171. *Id.*

3. *The Right to Privacy Versus the Privilege to Play*

The NCAA argued that participation in college athletics is a privilege, not a right, and therefore the NCAA can require student-athletes to waive their right to privacy in exchange for the privilege of playing college athletics.[172] In rejecting this argument,[173] *Hill* relied on *Long Beach City Employees Association. v. City of Long Beach*.[174] In *Long Beach*, the court held that an individual could not waive the constitutional right of privacy in exchange for a privilege. *Hill* echoed this holding, stating that "[t]he NCAA cannot coerce student-athletes to give up a (sic) constitutional privacy rights as a condition of eligibility. . . ."[175]

The possible waiver of a constitutional right was the last hurdle the *Hill* court had to clear. Since the right to privacy could not be waived in exchange for the privilege to play, the rest of the holding fell into place. The court had found that drug testing of student-athletes constituted an invasion of privacy.[176] Once the invasion of privacy had been established, the NCAA was required to show: (1) that a "compelling interest" necessitated the intrusion; (2) that the intrusion was "necessary to further that purpose"; (3) that the intrusion was "narrowly drawn" to assure maximum protection of the constitutional interests at stake; and (4) that there was no "less intrusive means" to achieve that interest.[177] The court found that the NCAA had failed in an attempt to make any of these required showings and consequently the court permanently enjoined the NCAA from enforcing its drug-testing policies against Stanford student-athletes.[178] The NCAA could not require that student-athletes sign waiver forms as a condition of participation in athletics.[179] In addition, it could not declare these athletes ineligible or take punitive action against any athlete for failure to comply with the drug-testing program or in any way discriminate against Stanford or its athletes as a result of the court order.[180]

IV. Discussion: A Critical Comparison of *Hill* and *O'Halloran*

Although the two cases, *O'Halloran* in United States district court and *Hill* in California state court, dealt with the same subject and issues, the two courts resolved those issues completely differently. The remain-

172. *Id.* at 27.
173. *Id.*
174. 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986).
175. *Hill* at 27.
176. *Id.* at 11.
177. *See supra* note 112 and accompanying text.
178. *Hill* at 27-28.
179. *Id.*
180. *Id.*

der of this Note will examine how the analyses differ and will discuss whether the cases can be reconciled.

The *O'Halloran* court began by determining whether the student-athlete had been deprived of a constitutionally protected right. The court focused on whether there was a search, and if so, whether it was reasonable, the most extensive analysis centering on what standard would suffice to render the search "reasonable."

The court then weighed the student-athlete's interest in the right to privacy against the competing interests in the administration of the drug-testing program. The court found that the inquiry into whether there had been an invasion of the right to privacy was one of degree.

The *Hill* court attempted to develop a bright-line test, but the court drew lines relying on vague or questionable standards. It first determined the existence of an invasion of the right to privacy—a yes-or-no inquiry with no gray areas. The court then stated that if it found an invasion of the right, the defendant (NCAA) must satisfy a four-part test justifying the invasion.

Generally, a search conducted pursuant to a warrant issued for probable cause is reasonable.[181] *O'Halloran* found a search reasonable even though the search was not conducted pursuant to a warrant issued for probable cause and did not fall into one of the enumerated exceptions to the warrant/probable cause requirement.[182] *O'Halloran* applied the two-prong test of *New Jersey v. T.L.O.*[183] to determine whether the basis for, and the scope of, the search was reasonable. The court then weighed the competing interests of the two parties as required by *O'Connor v. Ortega*[184] to complete the reasonableness inquiry.[185]

A. Does "General Suspicion" Create a Reasonable Basis for Search or an Invasion of the Right to Privacy?

The first prong of the *T.L.O.* test deals with whether a search is justified at its inception. In the drug-testing context, the primary issue is whether there is a need for individualized suspicion, or whether a general suspicion with regard to drug use by student-athletes will suffice. The *O'Halloran* court found no need for individualized suspicion.[186] The goals of the NCAA and past evidence of drug use by student-athletes gave the NCAA a reasonable basis for conducting a search.

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181. *See supra* note 39 and accompanying text.

182. *See supra* notes 42-57 and accompanying text.

183. 469 U.S. 325, 341 (1985).

184. 480 U.S. 709 (1987).

185. *See generally* O'Halloran v. University of Washington, 679 F. Supp. 997, 1004-07 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

186. 679 F. Supp. at 1004.

As for the second prong of the *T.L.O.* test, whether the search is reasonably related in scope to the circumstances that justified the search at its inception, the courts generally defer to the judgment of the rule-making body;[187] this deference essentially guarantees a finding that the prong has been met. *O'Halloran* found that "widely publicized" drug use by student-athletes was sufficient evidence to justify a search (the taking of a urine sample).[188] By contrast, the *Hill* court found that the majority of student-athletes do not use or abuse drugs, and that drug use by student-athletes is not therefore a sufficiently compelling justification for the invasion of the right to privacy.[189] Furthermore, the *Hill* court found that the media attention associated with the declaration that an athlete is ineligible for failing the drug test constituted an invasion of the student-athlete's right to privacy.[190] The evidence for this finding came from test results from the 1986-87 NCAA drug-testing program.[191]

Regarding the evidence of drug use by student-athletes, the *O'Halloran* opinion is better reasoned. The *O'Halloran* court found that in light of the evidence of drug use by student-athletes and the laudable goals of the NCAA, no individualized suspicion was necessary for the search to be reasonable.[192] The court gave great deference to the NCAA on this issue. This deference gains greater significance in light of the suggestion in the following section of this Note for implementing a statutory drug-testing program for student-athletes. This suggestion, if enacted, would probably pass California's constitutional right-to-privacy standard.

B. Making the Test "Reasonable" by Statute: Applying *Burger* to Drug Testing of Student-Athletes

In *New York v. Burger*,[193] the Supreme Court ruled on the validity of a statute that authorized warrantless inspections of vehicle-dismantling businesses (junkyards). The avowed purpose of the statute was to deter the use of junkyards as a conduit for the disposal of stolen vehi-

187. *See T.L.O.*, 469 U.S. at 343 n.9; *O'Halloran*, 679 F. Supp. at 1005.

188. *O'Halloran*, 679 F. Supp. at 1005.

189. *Hill* at 14.

190. *Id.* at 11. Media coverage of drug use is accepted more readily as evidence of drug use than as invasion of privacy. The idea that media coverage constitutes an invasion of privacy suggests that a student-athlete would have a cause of action against said media for a violation of that right. This suggestion presents freedom of speech problems, *i.e.*, prior restraint, beyond the scope of this Note. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (Four Justices found that there could be no prior restraint unless grave damage to the country was a virtual certainty—hardly likely given the facts of *Hill* or *O'Halloran*. In addition, Justices Black and Douglas would never allow a prior restraint of the press.).

191. *See supra* note 136 and accompanying text.

192. *O'Halloran*, 679 F. Supp. at 1004.

193. 482 U.S. 691 (1987).

cles.[194] The defendant and junkyard business owner, Joseph Burger, challenged the statute, claiming searches undertaken pursuant to the statute violated his constitutional right to be free from unreasonable searches and seizures.[195] The Court upheld the statute, finding that it fell within the exception to a warrant requirement as an administrative inspection of a "closely regulated" business that has a lesser expectation of privacy.[196] The situation in *Burger* may be analogized to the drug testing of student-athletes. The *Burger* Court pointed out that when the person subjected to a search has a reduced expectation of privacy, the warrant and probable cause requirements have a lessened application.[197] In *O'Halloran*, the court noted the "diminished expectation of privacy in the context of a university athletic program."[198] The *Burger* exception thus might allow a corresponding lessening of the warrant and probable cause requirements.

The *Burger* Court enumerated three criteria that, if met, would deem the search reasonable under the administrative search exception. The government must have a "substantial" interest in the regulation and its purpose, the regulation must be "necessary to further the regulatory scheme," and the statute must provide a "constitutionally adequate substitute for a warrant."[199]

Before addressing these three criteria, however, the Court had to find that the business at issue—vehicle dismantling—was a "closely regulated" business.[200] The Court noted that the duration of the regulatory scheme was relevant, but found that although the automobile is a relatively new phenomenon, automobile junkyards are simply a branch of an industry (general junkyards and secondhand stores) that had existed and had been regulated for many years, and that automobile junkyards are consequently a closely regulated industry.[201] The Court used a circular argument: the automobile junkyard industry is closely regulated because the statute regulating the industry suggests that it is. The Court avoided the issue of the relative youth of the industry by saying that it was a branch of an industry that had historically been regulated.

If amateur athletics could be categorized as a closely regulated industry, drug testing of student-athletes might be legitimized pursuant to a statute similar to the one in *Burger*. The first step would be to pass a detailed statute suggesting that college athletics are closely regulated and

194. *Id.* at 708-09.

195. *See id.* at 696-98.

196. *Id.* at 712-13.

197. *Id.* at 702.

198. *See* note 94-99 and accompanying text; O'Halloran v. University of Washington, 679 F. Supp. 997, 1002 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

199. *Burger*, 482 U.S. at 703.

200. *Id.* at 703-04.

201. *Id.* at 705-06.

requiring drug testing of student-athletes. Although the NCAA program itself has a relatively short history, NCAA sports are a branch of sports in general. In addition, both the multiplicity of rules by which the games are played and the detailed rules governing the eligibility of college athletes suggest that sports have been closely regulated since their formal organization. Thus, based on this history, NCAA sports would be considered a closely regulated industry.

The next step would be to examine the statute in light of the three-part *Burger* test to determine whether the search qualifies as an exception to the warrant requirement. The test first requires a showing of a substantial state interest in the regulatory scheme. This part of the test was satisfied in *Burger* by the strong state interest in deterring auto theft.[202] *O'Halloran* and *Hill* differ on this issue. *O'Halloran* found strong state interests in deterring drug use, in protecting the health of the student-athlete, and in promoting fair competition.[203] On the other hand, *Hill* found that none of these considerations justified the invasion of privacy.[204] Despite the *Hill* court's finding, however, the court did not attempt to deny the potential strong governmental interests. The court contended only that the state had failed to provide sufficient evidence to support a finding that these interests existed and, further, that these conclusions were based on questionable findings of fact.[205] Hence, it seems reasonable that both the *Hill* and *O'Halloran* courts could find a strong state interest in the regulation.

As for the second part of the test, the *Burger* Court found that the warrantless administrative search furthered the regulatory scheme by deterring auto theft, and that a warrantless search was necessary to further that purpose, since the prerequisite of a warrant could easily have frustrated the purpose of the search.[206] Similarly, in the context of drug testing of student-athletes, the argument could be made that because drugs pass through a person's system, evidence of their use becomes undetectable after a certain period of time. A warrant requirement thus would frustrate the purpose of the search by giving the student-athletes time to make sure they were "clean."

To satisfy the third part of the test, the statute must provide a constitutionally adequate substitute for a warrant.[207] The statute must advise the target of the search that the search is being conducted pursuant to the regulation and is properly defined in terms of time, place, and

202. *Burger*, 482 U.S. at 709.

203. O'Halloran v. University of Washington, 679 F. Supp. 997, 1006-07 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988)

204. *See generally Hill* at 11-18.

205. *See supra* notes 131-171 and accompanying text.

206. *Burger*, 482 U.S. at 710-11.

207. *Id.* at 703.

scope of the inspection.[208] The *Burger* Court found this requirement satisfied when the statute stated that inspections would be made "on a regular basis," "during usual business hours."[209] The inspection would be made only of vehicle-dismantling and related industries, and the permissible scope of the search covered only the records of the business and any vehicles or parts of vehicles.[210] This general definition of time, place, and scope is sufficient to meet the test of a "constitutionally adequate substitute for a warrant." It should be a simple exercise to draft a statute to meet this broad requirement: such a statute might specify searches on a "regular basis" or during "usual business hours."

If the California legislature enacted such legislation, it would be difficult for a state court to strike it down under the United States Constitution in light of the Supreme Court's holding in *Burger*. In the view of the *Burger* Court, a statute of this kind creates an exception to the warrant requirement, and thus a search pursuant to such a statute is reasonable.

C. In Which Direction Should the Balance of Interests Tip?

In its final inquiry, the *O'Halloran* court compared relative weights of the competing interests. *O'Halloran* balanced the individual's right to privacy against the competing interests of stopping or deterring drug abuse, educating the student-athlete about using drugs, protecting the health of the student-athlete, and maintaining the fairness and integrity of college athletics.[211] After finding an invasion of the right to privacy, *Hill* looked for a compelling interest to justify the invasion. The interests addressed by the *Hill* court were essentially those enumerated in *O'Halloran*: stopping or deterring drug use, protecting the health and safety of the student-athlete, and ensuring fair competition.

Each court weighed privacy expectations against public interest considerations, but the findings of the two courts stand in stark contrast to each other. This section of the Note will evaluate the differing findings and the reasons for them, and examine which finding is more rational.

1. The Right to Privacy

The *O'Halloran* court almost conceded an invasion of the right to privacy, but it examined the extent to which the right had been breached and weighed that invasion against the competing interests. The *Hill* court clearly found an invasion of the right to privacy because of the risk of media publicity, but did not discuss the degree to which the right had

208. *Id.*

209. *Id.* at 711.

210. *Id.* at 711-12.

211. O'Halloran v. University of Washington, 679 F. Supp. 997, 1006-07 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

been invaded.[212] The *Hill* court also found an invasion of the right because a drug test might reveal information about medical treatment the athlete was receiving and because the athlete might test positive as a result of legally taking drugs that are on the NCAA's banned list.[213] *Hill* gave little weight to the provision in the NCAA program that allows the student-athlete to declare the use of legitimate drugs that may affect the test results, such as cold or diet medications.[214] The court also ignored the fact that the samples and test results are anonymous, identified only by code number. This code number is broken to reveal the identity of the student-athlete only after a positive test is returned and confirmed by additional testing.[215] Thus, the invasion of the right to privacy is not as drastic as *Hill* would seem to indicate.

The *O'Halloran* court undertook a more reasonable evaluation of the invasion of the right. The court acknowledged relevant factors contributing to "a diminished expectation of privacy in the context of a university athletic program": an element of communal undress is present in university athletic programs, but not in other mandatory drug-testing cases, (i.e. *Railway Labor*, *Shoemaker*); and health examinations, that allow an amount of viewing and touching among relative strangers that would be firmly rejected in most other situations, are fairly routine for an athlete.[216] The *O'Halloran* court did not deny an invasion of the privacy right, but suggested that the invasion be viewed as one of degree rather than in simple black and white terms, especially since steps are taken to ensure anonymity in the testing, and it is only after a positive test is found that the identity of the athlete is revealed.

2. *Competing Interests*

The *Hill* court found that in order for drug testing to pass constitutional muster, it must be supported by a compelling need. The court found insufficient evidence to support that required compelling need. As has already been discussed, part of the evidence for that finding was based on a questionable use of statistics from past NCAA drug-testing programs.[217] The *Hill* court also examined evidence of the types of drugs used, and found only scattered use of cocaine and marijuana. Additionally, the court found that "[t]he minimal evidence of drug use is almost

212. Nor did the court discuss the problems associated with a finding that factually accurate reporting by the news media constitutes an invasion of privacy. *See supra* notes 123-124, 190 and accompanying text.

213. *Hill* at 10-11.

214. The 1987-88 NCAA Drug-Testing Program, Part V, Protocol. *See also O'Halloran*, 679 F. Supp. at 999.

215. 679 F. Supp. at 1005.

216. *See supra* notes 96-99 and accompanying text.

217. *See supra* notes 134-137, 191 and accompanying text.

entirely limited to anabolic steroid use. . . ."[218] The court also noted that there was no good evidence that wrestlers had used diuretics to "make weight" or to dilute urine to avoid testing positive for other drugs.[219]

Nevertheless, if diuretics are used to disguise the presence of other drugs, negative test results could be interpreted as evidence that the diuretics work. Presumably the NCAA placed diuretics on the list of banned substances because the mere presence of diuretics may indicate an attempt to mask the use of other drugs. On one hand the court acknowledged that one reason the program tests for diuretics is that they are used in masking the presence of other banned drugs. The court concluded, however, that the absence of positive tests means the athletes are not using drugs, although such results may indicate only that the student-athletes are effectively avoiding being detected, and not whether drugs are being used.

The court's argument was based on the premise that drug testing will catch every drug user and that if a person is using drugs, she will test positive. But the NCAA drug-testing program is not random or unannounced. Since the student-athlete knows she will be tested, it seems natural that there would not be many positive tests. When drug testing is announced, the student-athlete obviously has advanced warning and may take steps to avoid detection of drug use.

Drug testing may cause student-athletes to stop using drugs. Nevertheless, lack of positive test results should not be presumed to be evidence that the program is ineffective or is not working. As the *O'Halloran* court noted, "the program will have a deterrent effect, and . . . [s]uch evidence of the program's success should not be used to demonstrate lack of need for the program or that the program has no reasonable basis."[220]

Again, the *O'Halloran* opinion is better reasoned. The *Hill* court argued that, because the program does not result in positive tests for the use of banned drugs, the program is ineffective and unnecessary.[221] Since the program is aimed at deterring and stopping drug use, however, a lack of positive test results could easily be interpreted as evidence that the program is working. The *Hill* court's reasoning is fallacious because the goal of the program is to deter drug use and such programs will have a natural deterrent effect.[222] Thus, an indication of the program's success is a decrease in the number of positive test results. The court's reasoning suggests there must be more positive test results in order to show a need

218. *Hill* at 13.

219. *Id.* at 13-14. The practice of taking diuretics to dilute urine is commonly known as "masking." Since the diuretics also work to flush water from the system, evidence of other drug use is eliminated in the discharge.

220. O'Halloran v. University of Washington, 679 F. Supp. 997, 1004 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

221. *See Hill* at 12-13.

222. *See O'Halloran*, 679 F. Supp. at 1004.

for the program. In essence the court's argument would mean that student-athletes must use drugs in the face of announced drug testing, thus testing positive for banned substances and forfeiting their eligibility, for the tests to be deemed necessary.

The *Hill* court found insufficient evidence of drug use and concluded that college athletes in general do not use drugs, and that drugs therefore cannot be a threat to the health of the student-athlete. The court stated that there is no evidence that drug use has caused an athlete to injure himself or someone else.[223] Furthermore, the court found the program lacking in that it did not protect other areas of student-athlete health.[224]

The *Hill* court seemed to suggest that the NCAA should ban the use of substances, such as cigarettes and alcohol, that are perfectly legal to purchase and use. While most people would not argue that the use of cigarettes or alcohol does not pose a health threat, the NCAA cannot stop a student-athlete from exercising his own free will and freedom of choice. Similarly, it seems that the court would condition a drug-testing program in the name of health and safety by requiring the NCAA to provide for all the health and safety needs of its student-athletes. It would be unreasonable to charge the NCAA with the responsibility of vaccinating student-athletes for measles (and presumably requiring the NCAA to provide any other vaccination or medication the student-athlete might need) simply because the NCAA has undertaken a program to protect one aspect of a student-athlete's health and safety.[225] The NCAA's program deals with an area of the student-athlete's life that is shared with the NCAA, specifically, participation in college athletics.[226] The NCAA should not be penalized for attempting to achieve the worthwhile goal of stopping drug use by making it responsible for the entire health needs of every student-athlete.[227]

Although the *Hill* court found fault with the NCAA program because it does nothing to stop the most serious drug problem in America, alcohol abuse,[228] the court did not even address the issues of the health threat posed by the drugs on the NCAA's banned list. *O'Halloran* found that "all the drugs which are banned provoke adverse effects and untoward reactions which may be detrimental to a student-athlete's present

223. *Hill* at 14.

224. *See Hill* at 15. The court suggested that the NCAA should provide measles vaccinations, or prohibit smoking or the use of alcohol.

225. *See, e.g.*, Bowen v. Owens, 476 U.S. 340, 347 (1986) ("This Court has consistently recognized that in addressing complex problems a legislature 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' " (citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955))).

226. A health-benefit package provided by the NCAA for student-athletes is not an unreasonable proposal. Nevertheless, because of the complexity of development and administration, consideration of such a proposal is beyond the scope of this analysis.

227. Note, also, that some type of broad health plan is generally provided by most schools.

228. *Hill* at 15.

and future health."[229] The issue of whether or not the drugs banned by the NCAA actually enhance performance is discussed below, but assuming that the drugs on the banned list have absolutely no effect on performance. It strains reason to argue that cocaine, marijuana, heroin, and the myriad other drugs on the banned list do not threaten the health of the student-athlete even if it is conceded that the drugs do not affect performance. While the NCAA's program may not deal with alcohol abuse, the NCAA should get some credit for attempting to deal with the abuse of other drugs which may not be as widely used yet pose no less threat to the health of the student-athlete.

The *Hill* court specifically found that the NCAA failed to carry its burden of showing that steroids enhance athletic performance.[230] Even assuming, however, that they have no performance-enhancing effect, the growing use of steroids would indicate that despite what science may tell us, athletes believe they enhance performance, and this belief encourages widespread use.[231] The dispute over the performance-enhancing qualities of steroids gives way to questions of adverse health effects. While available data on these effects is sparse due to the generally covert use of steroids and the reluctance of doctors to conduct tests due to the questionable long-term side effects, steroid use has been linked to prostate, liver, and testicular cancer, shrinkage of the testicles, and sterility.[232] Steroid use is also linked to a changed mental state. It can cause uncontrollable fits of aggression and rage followed by extreme states of stress and anxiety, to the point of creating suicidal tendencies.[233] The *Hill* court is willing to extract a very high price in human pain and suffering simply because there are no definitive answers to the questions of the performance enhancement and adverse effects of steroids.

Finally, the *Hill* court found that despite the fact that promoting fair competition is a stated goal of the NCAA program, there is no evidence to establish that any of the banned substances actually enhance the athlete's performance.[234] As previously discussed, the possibility that the banned substances may not enhance performance seems a weak justification for not policing their use since evidence suggests that drugs are used extensively to enhance performance whether they work or not.[235]

229. 679 F. Supp. at 1006 (quoting Professor Dugal who testified concerning the need for a drug-testing program).

230. *Hill* at 17.

231. Estimates place at one million the number of athletes using steroids in the U.S. alone. *See* D. Benjamin, *Shame of the Games*, TIME, Oct. 10, 1988, at 76.

232. *Id.* at 77.

233. *See* Chakin and Telander, *The Nightmare of Steroids*, SPORTS ILLUSTRATED, Oct. 24, 1988, at 82.

234. *Hill* at 16.

235. *See supra* notes 230-232 and accompanying text.

The circumstantial evidence with regard to steroid use suggests an opposite conclusion than that reached by the *Hill* court. The Olympics and other major international amateur sporting events routinely test for banned substances including steroids. One problem with the testing is its expense, about $100 per test.[236] The governing bodies of these international sports competitions are willing to invest a rather substantial sum to test for the presence of drugs that do not enhance performance. *Hill* also argued that it has never been "scientifically demonstrated" that improvements in strength will translate into enhanced performance.[237] Scientific evidence aside, if talent and technique are equal, the stronger athlete will prevail. Increases in strength may also compensate for deficiencies in other areas and allow the less talented athlete to prevail. Physical strength is a significant component of athletic achievement; artificially enhancing an athlete's strength can give that athlete an unfair advantage.

Hill also found evidence that drugs such as stimulants not only do not enhance performance, but may in fact impair performance because of distractibility, loss of concentration, shaky or tremulous hands, and jumpiness.[238] Nevertheless, the integrity of sports would be jeopardized as much by impaired performance as by enhanced performance. An athletic event is no less tainted when performance is artificially depressed than when it is enhanced. The *Hill* court surely did not mean to imply that drug use is acceptable if it has no effect or a detrimental effect on athletic performance, and becomes unacceptable only at that point at which athletic performance is enhanced.

Hill further argued that there is no evidence that the use of diuretics enhances athletic performance.[239] This argument ignores the suggestion made by the *Hill* court itself[240] and the reality of the situation, that diuretics are not taken for their performance-enhancing qualities, but instead to flush water from the athlete's body, thereby reducing the athlete's weight and enabling him or her to qualify to compete in a particular weight class.[241] Diuretics are also taken to mask the use of other drugs that may (or may not) enhance performance.[242] Performance enhancement is not the proper inquiry when addressing the use of diuretics.

The *O'Halloran* court addressed the public perception of college athletics while the *Hill* court was silent on the issue. The *O'Halloran* court followed the lead of the court in *Shoemaker*, which noted that "[p]ublic confidence forms the foundation for the success of an industry

236. D. Benjamin, *Shame of the Games*, TIME, Oct. 10, 1988, at 77.
237. *Hill* at 16.
238. *Id.* at 17.
239. *Id.*
240. *Id.* at 13-14.
241. D. Benjamin, *Shame of the Games*, TIME, Oct. 10, 1988, at 75.
242. *Id.*

based on wagering."[243] While the success of college athletics is not based on wagering, it is axiomatic that an overall aura of fairness determines how well the public will receive a given sport. Enthusiasm will be low if the public perceives that the winner of a contest will be the one with the best pharmacist. Also, the success of the NCAA sports program will indirectly turn on the public's perception of fairness. For example, a vast majority of the NCAA's funding comes from revenues generated from selling television commercial time during the NCAA Final-Four Basketball Tournament. This advertising time will not command a high price if no one will turn on the game because of public perception that the game lacks integrity.

V. Conclusion

The battle lines have been drawn in the war on drug testing. It is being fought in two forums, the state and federal courts. Clearly the NCAA has the upper hand in this war. The *O'Halloran* case demonstrates that the federal courts are defeating constitutional challenges on two fronts. Student-athlete plaintiffs have failed to make either of the necessary showings to establish a federal case: that NCAA action constitutes "state action,"[244] or that they have been deprived of their constitutionally protected right to privacy.[245]

Hill is an example of a success story in the student-athletes' war on drug testing. The key to *Hill* lies in the more extensive protection of the right to privacy granted by the California Constitution.[246] Under the California Constitution, as demonstrated by *Hill*, the student-athlete can win an injunction against NCAA drug testing.[247]

The question remains whether the battle lines are entrenched or whether we can expect some shifting of the fronts. As this Note argues, notwithstanding the greater constitutional protection afforded by the California Constitution, the arguments that are propounded in the federal forum seem to be delivered from a firmer logical and factual basis.[248] In addition, it now appears that the student-athletes will have no federal forum after the holding in *Tarkanian*[249] establishing that the NCAA is not a state actor. Though *Hill* constitutes a setback to the NCAA, time will tell whether it marks a changing of the guard or, as is more likely, if

243. Shoemaker v. Handel, 795 F.2d 1136, 1142 (3rd Cir. 1986).

244. *See supra* note 24 and accompanying text.

245. *See supra* notes 27-28 and accompanying text.

246. *See supra* notes 106-08 and accompanying text.

247. *See supra* notes 113-28 and accompanying text.

248. *See supra* notes 211-243 and accompanying text.

249. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 464 (1989).

it is simply an unexpected pocket of resistance that will soon be overwhelmed by the forces fighting the war on drugs.

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