NOTES

DOES THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S DRUG TESTING PROGRAM TEST POSITIVE IF IT IS SUBJECTED TO CONSTITUTIONAL SCRUTINY?

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I. INTRODUCTION

Maintaining a delicate balance between societal interests and individual rights is a difficult but an essential task of a democratic society. When a social problem increases in magnitude, there inevitably are social pressures to alleviate this problem. The legislature, administrative agencies, and private institutions attempt to react to these social pressures. The legislature and administrative agencies at times succumb to social pressures without a thorough analysis of the constitutional implications.[1] The judiciary serves as a check upon legislative initiatives to insure the constitutionality of legislative action.

There has been a substantial amount of social pressure to enact legislation to confront the significant drug abuse problem. Drug usage clearly is a

1. *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944); *see* McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., concurring).

major social problem, as illustrated by the following statistics on drug usage. Over twenty-two million people were estimated to regularly smoke marijuana in 1983.[2] Cocaine use doubled from 1979 to 1982 for individuals over 26 years old.[3] Government estimates indicate that cocaine use among the general public increased twelve percent in 1983.[4] Current estimates indicate that there are twenty million marijuana users, one half million heroin users, and five million regular cocaine users.[5]

The federal government has implemented drug testing programs to combat drug abuse.[6] President Reagan has proposed a federal program of drug testing for public employees.[7] President Reagan contends that drug use is currently our number one problem.[8] The 1984 Crime Control Act was in part directed at drug trafficking and at distribution of drugs by organized crime.[9]

The predominant means to deal with drug abuse has been through drug testing. The question then becomes whether drug testing has been adopted at the expense of constitutional rights. This question is one that the judiciary must face in analyzing drug testing. Recently there have been several cases that have dealt with the constitutionality of drug testing by public employers. This note is intended to analyze these cases and to apply the applicable law from these cases to the testing of college athletes by the National Collegiate Athletic Association (N.C.A.A.).

Within college and professional sports there has been a substantial increase in drug use. The extent of the problem was brought to the nation's attention with the death of Len Bias and Don Rogers.

The N.C.A.A. has attempted to alleviate this problem with drug testing of athletes prior to N.C.A.A. championship events. This note will weigh the legitimate interest of the N.C.A.A. in testing athletes against the individual rights of the athletes.

This note will attempt to determine if the N.C.A.A. is a state actor and subject to the equal protection and due process clauses of the fourteenth amendment and the restrictions on unreasonable searches and seizures of the fourth amendment. Assuming the N.C.A.A. is a state actor, the next issue to consider will be whether drug testing of these college athletes is an

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2. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (1985); *U.S. Social Tolerance of Drugs on the Rise*, N.Y. Times, March 21, 1983, at A-1.

3. *See* Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (1985).

4. *Id.*; NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMMITTEE, NARCOTICS INTELLIGENCE ESTIMATE 1 (1983).

5. Zirkel & Kikoyne, *Drug Testing of Public School Employees or Students*, 37 ED. LAW. REP. 1029 (1985).

6. *See infra* notes 137-48.

7. Drug Free Federal Workplace (Exec. Order of September 15, 1986).

8. *Reagan: Drugs Are the No. 1 Problem*, NEWSWEEK, Aug. 11, 1986, at 18.

9. Farrell, *Drug Use and Academic Rules Are Probed After Death of Maryland Basketball Player*, CHRONICLE OF HIGHER EDUC., July 2, 1986, at 17, col. 2.

unreasonable search and seizure. Other challenges to the constitutionality of drug testing that will be analyzed are whether testing violates due process, the fifth amendment, the equal protection clause, or an individual's penumbral right to privacy.

II. Is the N.C.A.A. a State Actor?

The National Collegiate Athletic Association is not a public institution.[10] The N.C.A.A. is a voluntary association of nearly one thousand four-year colleges and universities, of which approximately half are public universities.[11] The N.C.A.A. compiles uniform rules and regulations that must be complied with by member institutions.[12] The bylaws of the N.C.A.A. are enacted at the annual conferences of member institutions of the N.C.A.A.[13] The bylaws are interpreted and enforced by attorneys and investigators of the N.C.A.A.[14]

Since public institutions comprise fifty percent of the rule-making process of the N.C.A.A., and the N.C.A.A. is in essence an organization created by public universities to regulate athletic competition, does this make the N.C.A.A. a state actor?

Federal jurisdiction under 28 U.S.C. § 1343(3) over allegations against the N.C.A.A. only exists if the N.C.A.A.'s actions are taken under color of state law within the meaning of 42 U.S.C. § 1983.[15] The N.C.A.A. must also be a state actor in order for the fourteenth amendment to be applicable to N.C.A.A. conduct.[16] The fourteenth amendment does not provide a shield against merely private conduct, however discriminatory or wrongful.[17] The Bill of Rights is made applicable to the *states* through the fourteenth amendment.[18]

A student athlete alleging that drug testing is unconstitutional based on the equal protection or due process clauses or upon the fourth or fifth amendment must initially prove that the N.C.A.A. is a state actor. Prior to *Arlosorff v. N.C.A.A.*,[19] the courts consistently held the N.C.A.A. was a state actor even though it is a private institution.[20] In *Howard University v.*

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10. Arlosorff v. N.C.A.A., 746 F.2d 1019, 1021 (4th Cir. 1984).
11. *Id.* at 1020.
12. Howard Univ. v. N.C.A.A., 510 F.2d 213, 215 (D.C. Cir. 1975).
13. *Id.* at 214.
14. *Id.*
15. Parish v. N.C.A.A., 506 F.2d 1028, 1031 (5th Cir. 1975).
16. Howard Univ. v. N.C.A.A., 510 F.2d 213 (D.C. Cir. 1975); *see* Martin, *The N.C.A.A. and Its Student-Athletes: Is There Still State Action?* 21 New Eng. L. Rev. 49 [hereinafter Martin, *N.C.A.A. State Action*].
17. Shelley v. Kraemer, 334 U.S. 1, 13 (1948); *see also* Johnson v. Educational Testing Serv., 754 F.2d 20 (2d Cir. 1985).
18. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).
19. Arlosorff v. N.C.A.A., 746 F.2d 1019 (4th Cir. 1984).
20. *See, e.g.*, Hennessey v. N.C.A.A., 564 F.2d 1136 (5th Cir. 1977); Regents of the Univ.

N.C.A.A.,[21] the court held that the N.C.A.A. is a state actor.[22] The *Howard* court stated that public institutions provide the majority of the funding for the N.C.A.A.[23] State institutions are also a dominant force in implementing N.C.A.A. rules and regulations.[24] State institutions provide the majority of the members of the governing council of the N.C.A.A.[25] Although the N.C.A.A. is a private entity, a private entity's "conduct . . . may become so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action."[26] The *Howard* court concluded that the N.C.A.A.'s involvement with the government "while not exclusive is 'significant'" and all N.C.A.A. actions appear impregnated with a governmental character.[27]

The *Howard* court further stated that the N.C.A.A. negotiates television contracts, and a portion of the revenues from the television contracts are distributed to the member institutions.[28] The association between the N.C.A.A. and public institutions is mutually beneficial, as illustrated by the shared television revenues.[29] The N.C.A.A. can be considered a state actor since the N.C.A.A. has a type of symbiotic relationship with the public institutions.[30]

In *Parish v. N.C.A.A.*,[31] the N.C.A.A.'s actions were considered state action on a basis other than the "symbiotic relationship" and the "impregnated with governmental character" theories. *Parish* espouses the "public function" theory as a means of determining whether state action is present. This theory is similar to the "impregnated with governmental character" theory. Athletic participation is one aspect of a student's higher educational experience.[32] Regulation of college athletics is necessary in order to enhance this educational experience.[33] The N.C.A.A., as the overseer of college athletics, is taking the responsibility for a traditional government function, the education of students.[34] Providing a function that traditionally is performed

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of Minn. v. N.C.A.A., 560 F.2d 352 (8th Cir. 1977); Howard Univ. v. N.C.A.A., 510 F.2d 217 (D.C. Cir. 1975); Parish v. N.C.A.A., 506 F.2d 1029 (5th Cir. 1975); Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (9th Cir. 1974); Buckton v. N.C.A.A., 366 F. Supp. 1152 (D. Mass. 1973); *but see* McDonald v. N.C.A.A., 370 F. Supp. 625 (C.D. Cal. 1974).

21. Howard Univ. v. N.C.A.A., 510 F.2d 217 (D.C. Cir. 1975).
22. *Id.* at 219.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 217 (quoting Evans v. Newton, 382 U.S. 296, 299 (1966)).
27. *Id.* at 220.
28. *Id.*
29. *Id.*
30. *Id.*; *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).
31. Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975).
32. *Id.*
33. *Id.*
34. *Id.* at 1032-33.

by the government is a sufficient basis to make a private entity a state actor.[35]

The *Arlosorff v. N.C.A.A.*[36] case has taken a stance different from the almost universally held position that the N.C.A.A. is a state actor.[37] The *Arlosorff* court in explaining its divergence from prior case law states that these cases "rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court"[38] in *Rendell-Baker v. Kohn* and *Blum v. Yaretsky.*

The *Arlosorff* court states that the N.C.A.A. performs a public function. However, performing a public function is not dispositive; the public function must be one "traditionally exclusively reserved to the state." The operation of a school is not a function exclusively reserved to the states,[39] therefore regulating college athletics clearly is not a function exclusively reserved to the states.[40] The "traditionally reserved to the state" requirement appears to undermine the "public function" and "impregnated with governmental character" theories which supported the conclusion that the N.C.A.A. is a state actor.

The *Arlosorff* court also stated that, although the N.C.A.A. receives substantial public subsidies, unless the state precipitated the action complained of, the conduct cannot possibly be construed as state action.[41] The *Arlosorff* court concluded that there was no evidence of the public institutions providing the controlling impetus for the implementation of the regulation complained of and therefore the N.C.A.A. was not a state actor.[42]

This conclusion appears to suggest that one factor used to determine the existence of state action varies on a case by case basis, depending upon the degree of control of the public institution over the rule or regulation complained of. The *Arlosorff* court asserts that the N.C.A.A. can only be a state actor when it initiates the activity complained of *and* when it is performing a function traditionally reserved to the state.[43] Therefore, since one of the two factors necessary in determining the existence of state action can vary upon a case by case basis, the holding in *Arlosorff* may be interpreted narrowly if subsequent courts conclude that the N.C.A.A. is performing a

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35. *Id.* at 1032.

36. Arlosorff v. N.C.A.A., 746 F.2d 1019 (4th Cir. 1984).

37. *See, e.g.*, Hennessey v. N.C.A.A., 564 F.2d 1136 (5th Cir. 1977); Parish v. N.C.A.A., 506 F.2d 1029 (5th Cir. 1975); Buckton v. N.C.A.A., 366 F. Supp. 1152 (D. Mass. 1973); *but see* McDonald v. N.C.A.A., 370 F. Supp. 625 (C.D. Cal. 1974).

38. Arlosorff v. N.C.A.A., 746 F.2d at 1021 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1975)).

39. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

40. Arlosorff v. N.C.A.A., 746 F.2d at 1021.

41. *Id.* at 1022.

42. *Id.*

43. *Id.*

function traditionally exclusively reserved to the states.

Another recent case bearing upon the issue of state action is *Ponce v. Basketball Federation.*[44] Although *Ponce* does not involve the N.C.A.A., the general principles of this case can have an impact upon whether the N.C.A.A. is a state actor. The *Ponce* court focuses upon the nexus analysis to determine if a private entity can be a state actor.[45] Under the nexus analysis, state action exists if there is a close nexus between the "State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[46] The nexus requirement ensures that a public entity will only be liable for acts performed jointly with a private entity when the state is directly responsible for the specific conduct of which the plaintiff complains.[47] In essence for a nexus to exist between the state and a private entity the state must be exerting " 'coercive power' " or " 'significant encouragement, either overt or covert' " to be held responsible for a private decision.[48] In *Ponce* the court focused upon the encouragement provided by the state to a private institution, the Puerto Rican Basketball Federation. The court concluded that Puerto Rico did not actively participate in the decisions of the basketball federation.[49] In essence, the *Ponce* court stated this case might be decided differently if there were shared responsibility for the implementation and enforcement of the regulations.[50]

The *Ponce* dicta were adopted in *D'Amario v. Providence Civic Center Authority.*[51] In *D'Amario* civic center employees enforced a "no camera" rule at certain artistic performances; the employees were treated as state actors.[52] Since state actors enforced the rules implemented by a private entity, state action existed.[53]

The *Ponce* dicta and *D'Amario* provide support for considering the N.C.A.A. a state actor in the post-*Arlosorff* era. Public institutions possess a shared responsibility for the promulgation and enforcement of the N.C.A.A.'s drug testing program and thus can be considered state actors under the nexus analysis.

In addition to showing that the N.C.A.A. is a state actor, there also must be a showing that the deprivation of an individual's right or privileges

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44. Ponce v. Basketball Fed'n, 760 F.2d 375 (1st Cir. 1985).

45. *Id.* at 377.

46. *Id.* (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

47. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

48. Ponce v. Basketball Fed'n, 760 F.2d at 378 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982)); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

49. Ponce v. Basketball Fed'n, 760 F.2d at 379.

50. *Id.*

51. D'Amario v. Providence Civic Center Auth., 783 F.2d 1 (1st Cir. 1986).

52. *Id.* at 3.

53. *Id.*

was created by the state or by a rule of conduct imposed by the state.[54] Since public institutions, which are state actors, are the predominant group in implementing N.C.A.A. rules, the state has in effect created rules of conduct governing college athletes and therefore the second part of the state action inquiry is satisfied.

What effect will *Arlosorff* and the *Ponce* dicta have upon the determination of whether the N.C.A.A. is a state actor? Will *Arlosorff* be interpreted in the narrow manner previously discussed and will *Ponce* have a positive effect upon the state action distinction? In *McHale v. Cornell University*,[55] the court adopted the reasoning of *Arlosorff* concluding that "*Rendell-Baker* and *Blum* mandate a different decision . . . from *Howard* and *Parish*."[56] In *Justice v. N.C.A.A.*,[57] however, the court concluded that the N.C.A.A. was a state actor without analyzing *Rendell-Baker* and *Blum*.

One commentator, in analyzing the *Arlosorff* case and its impact upon whether the N.C.A.A. is a state actor, focused on the factual differences between *Arlosorff* and *Rendell-Baker* and *Blum*.[58] In *Rendell-Baker* the plaintiffs worked at a private school which dealt with students having drug, alcohol, and behavioral problems.[59] The plaintiffs were discharged by the private school. But the private school was considered a contractor with the Boston schools; the city did not have any public employees on the board of trustees;[60] the city did not participate in the decision to discharge; and in fact the city did not even require an explanation of the reasons for discharge.[61]

In *Blum v. Yaretsky*,[62] medicaid patients were discharged without receiving a notice from the nursing home.[63] The nursing home obtained New York State funding which was contingent upon private physicians reviewing the reasonableness of the costs of patient care.[64] The State of New York appeared to review the nursing home's actions only on a post-hoc basis.[65]

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54. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); *see also* Johnson v. Educational Testing Serv., 754 F.2d 20, 23 (1st Cir. 1985).

55. McHale v. Cornell Univ., 620 F. Supp. 67, 68 (N.D.N.Y. 1985).

56. *Id.* at 69; *see* Martin, *N.C.A.A. State Action*, *supra* note 16, at 69-70.

57. Justice v. N.C.A.A., 577 F. Supp. 356 (D. Ariz. 1983).

58. *See* Martin, *N.C.A.A. State Action*, *supra* note 16, at 71.

59. Rendell-Baker v. Kohn, 457 U.S. at 831-32; Martin, *N.C.A.A. State Action*, *supra* note 16, at 70.

60. Rendell-Baker v. Kohn, 457 U.S. at 833; Martin, *N.C.A.A. State Action*, *supra* note 16, at 70.

61. Rendell-Baker v. Kohn, 457 U.S. at 833; Martin, *N.C.A.A. State Action*, *supra* note 16, at 70.

62. Blum v. Yaretsky, 457 U.S. 991 (1982).

63. Blum v. Yaretsky, 457 U.S. at 993; Martin, *N.C.A.A. State Action*, *supra* note 16, at 71.

64. Blum v. Yaretsky, 457 U.S. at 994-95; Martin, *N.C.A.A. State Action*, *supra* note 16, at 71.

65. Blum v. Yaretsky, 457 U.S. at 994-95.

In *Blum* and *Rendell-Baker* it is evident that state intervention was minimal. But the degree of control that public institutions have over the rules and regulations of the N.C.A.A. is clearly pervasive: public institutions play the predominant role in implementing the N.C.A.A. rules. Public institutions determine the parameters of the N.C.A.A.'s actions prior to their implementation, rather than afterward as in *Blum*. The N.C.A.A. also is an enormous organization which has powers far greater than those of a small urban school or a private medical review committee.[66]

Besides the fact that *Blum* and *Rendell-Baker* are distinguishable from cases involving the N.C.A.A., and that the N.C.A.A. may be a state actor under the nexus analysis, the most persuasive reason for concluding that the N.C.A.A. is a state actor was proposed in *Parish v. N.C.A.A.*[67] In *Parish*, Judge Thornberry in concluding that the N.C.A.A. is a state actor stated "it would be a strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private organization' to which they have relinquished some portion of their governmental power."[68] This viewpoint expressed by Judge Thornberry is referred to as the delegation theory. The delegation theory is a legitimate means of preventing the circumvention of the state action requirement; this theory prevents circumvention, irrespective of whether there is an intentional or unintentional effort to avoid the state action requirement.

III. Drug Testing: Will It Test Positive After Applying Constitutional Standards?

As previously mentioned, the constitutionality of the N.C.A.A. drug testing program is irrelevant if the N.C.A.A. is not a state actor. If the N.C.A.A. is considered a state actor, the fourth amendment provides a bona fide attack upon the constitutionality of drug testing. Simone Levant, a Stanford swimmer, is the first individual successfully to have attacked the constitutionality of the N.C.A.A.'s drug testing program.[69] The N.C.A.A.'s actions were considered to be unconstitutional based primarily upon Califor-

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66. Martin, *N.C.A.A. State Action*, *supra* note 16, at 71.

67. Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975).

68. *Id.* at 1033; *see* J. Weistart & C. Lowell, The Law of Sports § 1.14, at 8 (Supp. 1985):

> The critical question to be examined [regarding the N.C.A.A.] is whether the state's constitutional responsibilities end when the state agrees to have standards of conduct and eligibility defined in a collective venture in which it participates. It is likely that there are limitations upon the extent to which the state can use the delegation device to confine its obligations. The prospect of a continuing constitutional duty seem especially strong in those situations in which the state agrees to have the N.C.A.A. apply to its athletes standards devised by the latter group.

See Martin, *N.C.A.A. State Action*, *supra* note 16, at 73-74.

69. Levant v. N.C.A.A., No. ____, slip op. at ____ (Santa Clara Superior Court 1987).

nia's constitutional amendment dealing with the right to privacy. Since this California constitutional amendment was the primary basis of the *Levant* court's decision, the case's precedential value outside of California is limited. In order to determine if the N.C.A.A.'s urinalysis test is unconstitutional, it is necessary to rely upon cases dealing with the testing of public employees.

The fourth amendment is the applicable constitutional provision which governs the constitutionality of the N.C.A.A.'s urinalysis testing. The fourth amendment to the United States Constitution states: "The right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."[70]

The threshold question then is whether urinalysis is a search and seizure within the meaning of the fourth amendment.

Courts have stated that a person has an interest in personal privacy and bodily integrity, in which the government cannot freely intrude.[71] In *Schmerber v. California*,[72] the state of California extracted blood from an unwilling individual to determine his level of intoxication.[73] The *Schmerber* court held that an intrusion into the body is an unwarranted intrusion by the state.[74] Governmental intrusion into the human body is at least as offensive as an intrusion into a person's property.[75]

The taking of urine has been compared to the taking of blood from an unwilling donor.[76] No intrusion into the body is involved; but there is an intrusion into an area of privacy which deserves protection from arbitrary interference.[77] Blood testing and urinalysis not only detect the consumption of alcohol or drugs, they also detect physiological facts about a person.[78] "Each individual has a legitimate expectation of privacy in the 'personal information' bodily fluids contain."[79] Based primarily upon the foregoing rationale, urinalysis has consistently been held to be a search and seizure within the meaning of the fourth amendment.[80]

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70. U.S. CONST. amend. IV (emphasis added).

71. Winston v. Lee, 470 U.S. 753, 766 (1985); *see* United States v. Ramsey, 431 U.S. 606 (1978); Schmerber v. California, 384 U.S. 757 (1966).

72. Schmerber v. California, 384 U.S. 757 (1966).

73. *Id.* at 766.

74. *Id.* at 767.

75. *Id.*

76. Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986); *see also* Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (2d Div. 1986).

77. Capua v. City of Plainfield, 643 F. Supp. at 1514; Storms v. Coughlin, 600 F. Supp. at 1218.

78. Capua v. City of Plainfield, 643 F. Supp. at 1514.

79. *Id.*

80. McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986); Shoemaker v. Handel, 795 F.2d 1135 (3d Cir. 1986); National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986), *rev'd*, 808 F.2d 1057 (5th Cir. 1987);

Since urinalysis is a search or seizure, the prevailing question then is whether urinalysis is an unreasonable search and seizure. The reasonableness of a search ultimately focuses upon a balancing of each individual's privacy rights and the legitimate interests of the government.[81] Various tests have been established to determine the reasonableness of a search; however, "[t]he test of reasonableness is not capable of precise definition or mechanical application."[82] An approach frequently taken in determining a search's reasonableness is the following: "(1) focusing upon the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it . . ."[83] (4) whether upon entering a particular endeavor there was a justifiable expectation of maintaining privacy.[84]

In viewing the scope of the particular intrusion created by urinalysis, it is necessary to analyze a person's "subjective expectations of privacy" and whether the expectation is considered reasonable by society.[85] Courts have consistently held that an individual has a legitimate and reasonable expectation of privacy in the discharge of urine.[86] A person has a greater expectation of privacy as to searches of his body than as to searches of his personal effects.[87]

Urinalysis is comparable to the taking of blood, which has been deemed to be a highly invasive search.[88] Urinalysis is considered to be extremely intrusive since urine contains physiological secrets which can be disclosed through urinalysis.[89] Urinalysis can detect disorders totally unrelated to the purpose of urinalysis, such as epilepsy and diabetes.[90] The fact that physiological secrets, which a person has a strong interest in keeping confidential, are detected by urinalysis, coupled with the lack of a countervailing legitimate need for this medical data, serves as a factor weighing in favor of treat-

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Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984).

81. National Treasury Employees Union v. Von Raab, 649 F. Supp. at 387; Capua v. City of Plainfield, 643 F. Supp. at 1025-26.

82. Bell v. Wolfish, 441 U.S. 520, 559 (1979); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d at 40, 505 N.Y.S.2d at 890.

83. Bell v. Wolfish, 441 U.S. at 559.

84. Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d at 40, 505 N.Y.S.2d at 890.

85. Wolz v. United States, 389 U.S. 347, 361 (1967).

86. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726, 733 (S.D. Ga. 1986); National Treasury Employees Union v. Von Raab, 649 F. Supp. at 387; Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d at 40, 505 N.Y.S.2d at 890-91; Caruso v. Ward, 506 N.Y.S.2d 789 (1986).

87. Capua v. City of Plainfield, 643 F. Supp. at 1517.

88. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. at 733; National Treasury Employees Union v. Von Raab, 649 F. Supp. at 386-87, *rev'd*, 808 F.2d 1057 (5th Cir. 1987). *But see* Mack v. United States, No. 85-5764 slip op. at 7 (S.D.N.Y. April 21, 1986).

89. McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd*, 809 F.2d 1302 (8th Cir. 1987); *see* Whalen v. Roe, 429 U.S. 589, 602 (1977).

90. Capua v. City of Plainfield, 643 F. Supp. at 1519.

ing urinalysis as an unreasonable search.[91]

Urinalysis also invades a person's expectation of privacy in his off-duty conduct. Urinalysis can detect marijuana metabolites some two or three weeks after use of the drug.[92] Thus, urinalysis detects drug use for some time after a person has recovered from the influence of the drug.[93] The ability to detect and reprimand off-duty conduct that can be wholly unrelated to a person's job performance has an Orwellian quality.

The manner of conducting the test is another factor to consider in determining the reasonableness of urinalysis testing. The N.C.A.A.'s drug testing program provides that upon entering a urine collection station "a crew member (Urine Donor Validator) will be assigned to the student athlete for continuous observation while in the station."[94] The courts consider the intrusiveness of direct observation of a person undergoing a urinalysis test to be another factor which exacerbates the intrusiveness and unreasonableness of urinalysis.[95] Direct observation of the excretion of bodily fluids, one of the most personal bodily functions, is extremely humiliating and embarrassing.[96] Another detail exacerbating the embarrassing nature of N.C.A.A. drug tests is that "if the initial urine sample is inadequate, the student must remain in the collection area under observation of the validator . . . [and] the collection beaker must be covered by the athlete."[97]

The expectation of privacy, when entering college athletics or any endeavor, is another factor to consider in determining the reasonableness of urinalysis. In a highly regulated industry, an employee's expectation of privacy is diminished.[98] Industries that have been considered highly regulated, in which employees have a diminished expectation of privacy, are horse racing,[99] firearm sales,[100] and casino gambling.[101] Clearly college athletics are not in any manner as closely regulated by the government as horse racing, firearm sales, or casino gambling.

In fact, college athletics are probably not as closely regulated by the government as the teaching profession. In *Patchogue-Medford Congress of Teachers*,[102] it was held that teachers' expectations of privacy were not re-

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91. *Id.*
92. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. at 732.
93. *Id.*
94. N.C.A.A. Rule 5.21 (1986).
95. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. at 734.
96. Capua v. City of Plainfield, 643 F. Supp. at 1508; *see* United States v. Sandler, 644 F.2d 1163, 1167 (5th Cir. 1981).
97. N.C.A.A. Rule 5.24 (1986).
98. Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d at 40, 505 N.Y.S.2d at 890.
99. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986).
100. United States v. Boswell, 406 U.S. 311, 316 (1972).
101. *In re* Martin, 447 A.2d 1290 (N.J. 1982).
102. Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (2d Div. 1986).

duced when they went to work for a public school.[103] Since teachers do not have reduced expectations of privacy, college athletes' expectations of privacy are probably not reduced when they put on their athletic uniforms.

The final factor to be considered is the legitimate interests of the N.C.A.A. and whether they justify the initiation of urinalysis testing. The legitimate interests of the N.C.A.A. must outweigh the intrusiveness of the search. Public employers clearly have an interest in investigating potential misconduct relevant to an employee's performance of his duties.[104] The nature of the particular occupation can enhance the legitimate interests of a state actor. For instance, the state's legitimate interests are substantial if a person works in a safety-related position,[105] in a highly regulated industry,[106] or in a prison.[107]

The N.C.A.A. also has an interest in discovering potential misconduct relevant to performance. One of the N.C.A.A.'s goals is to prevent performance-enhancing drugs,[108] while a public employer's goal is to prevent drug usage resulting in a decline in performance. This twist makes the legitimate interests of the N.C.A.A. different from those involved in the public employee drug testing cases. The legitimate interests of the N.C.A.A. are not on an equal footing with those of public employers, since employers have a more substantial interest in preventing the use of drugs that impair performance of employees than the N.C.A.A. has in preventing the use of drugs which enhance performance. Clearly public employers in a highly regulated industry or a safety-related field have a much greater interest in detecting drug usage than does the N.C.A.A.

The N.C.A.A. also has an interest in preventing college athletes from using drugs that are potentially harmful to the health and safety of the athlete.[109] Although this clearly is a legitimate interest of the N.C.A.A., the N.C.A.A. does not have the right to play the role of brother's keeper and intrude into an athlete's off-campus conduct.

The N.C.A.A. is also likely to contend that it has an interest in ensuring that college athletes have a good public image, and in providing positive role models to high school and grade school students. The conduct of college athletes both on and off the playing field can have a dramatic impact upon the reputation of a college or university. Further, college and professional athletes often serve as role models to high school and grade school students.

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103. *Id.*

104. Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

105. *See* Amalgamated Transit Union v. Susey, 538 F.2d 1264 (7th Cir. 1976) (bus drivers); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (police officers and firefighters).

106. *See* Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) (individuals in horse-racing industry).

107. *See* Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986).

108. N.C.A.A. Preface to Rules and Regulations for Drug Testing (1986).

109. *Id.*

Role models can have a profound impact upon the behavior of an individual.

Although the maintenance of a good public image would be beneficial, does it rise to the level of a legitimate interest serving as justification for the intrusion into personal privacy? Police officers challenging the constitutionality of urinalysis serve as a good indication of how the preceding issue will be resolved. In *American Federation of Government Employees v. Weinberger*,[110] the government contended urinalysis is required to investigate hints of police corruption, since police corruption undermines public confidence in law enforcement.[111] The possibility of police corruption was not deemed to be a legitimate governmental interest.[112]

In *Shoemaker v. Handel*,[113] the court took a different stance as to the legitimacy of protecting public confidence.[114] *Shoemaker* involves the testing of jockeys, and the court stated that urinalysis was necessary to protect the public's interest in maintaining confidence in gambling on horse races.[115]

The N.C.A.A.'s interest in public confidence would appear to be more similar to that involved in *American Federation of Government Employees* than to that involved in *Shoemaker*. Public confidence is essential to the success of horse race gambling.[116] Public confidence is preferred but not essential to the operation of a police force[117] and college athletics. Therefore, public confidence in college athletics is probably not a legitimate justification for using urinalysis testing.

The foregoing analysis indicates the legitimate interest of the N.C.A.A. in conducting urinalysis. The question then becomes whether the N.C.A.A.'s legitimate interest outweighs the intrusiveness of the search and justifies random testing of college athletes.

The N.C.A.A.'s interest in random drug testing is likely to be held less significant than the individual's interest in avoiding the intrusiveness of the search. This prediction is based upon the prior analysis indicating the intrusiveness of the search, and also on the fact that the legitimate interests of the N.C.A.A. are not as substantial as those of other state actors. This prediction is also based on the overwhelming consensus that random drug testing is an unreasonable search and seizure.[118] There are only a few cases in

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110. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986).
111. *Id.* at 735; *see* Caruso v. Ward, 506 N.Y.S.2d 789 (Sup. Ct. 1986).
112. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. at 735.
113. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986).
114. *Id.* at 1142.
115. *Id.*
116. *Id.*
117. *See* Capua v. City of Plainfield, 643 F. Supp. at 1531.
118. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986); Penny v. City of Chattanooga, 648 F. Supp. 815 (E.D. Tenn. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). These are only the most recent cases holding that random drug testing is an unreasonable search and seizure.

which random drug testing has been deemed a reasonable search and seizure.[119] Within the cases authorizing random drug testing, the state actor has had a significant state interest, since the individuals tested have been military personnel, prisoners or prison employees, or workers in a highly regulated industry or a safety-related occupation. College athletes obviously do not fit into one of the employment areas justifying random drug testing.

Although random drug testing is usually not considered a reasonable search and seizure, testing based upon reasonable suspicion has consistently been ruled reasonable.[120] Drug testing based upon reasonable suspicion minimizes the intrusiveness of the search and only slightly impinges upon the legitimate interests of the state.[121]

The reasonable suspicion standard normally requires that suspicion be directed at the person searched.[122] The reasonable suspicion standard, therefore, is synonymous with individual suspicion.[123] "The fourth amendment allows [a state actor] to demand urine of an employee only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience."[124] The reasonable suspicion or individual suspicion standard provides protection from arbitrary governmental intrusion, while still providing limitations upon an employee's rights, in order to serve the legitimate interests of the state.[125]

The N.C.A.A. drug testing program permits testing at individual team championships based on random draw, position, or suspicion.[126] In team championships and at football bowl games, testing may be performed "on the basis of playing time, positions and/or N.C.A.A. approved random selection."[127] In order to withstand constitutional scrutiny, it would be advisable for the N.C.A.A. to perform drug testing based upon reasonable suspicion rather than on a random basis.

The N.C.A.A.'s random drug testing program's only conceivable saving grace is the thorough testing procedures implemented by the N.C.A.A.[128] The testing results are kept confidential unless the N.C.A.A. Executive

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119. McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (prison guards); Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986) (prisoners randomly tested); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) (individuals in horse racing industry); Seelig v. McMickens, N.Y.L.J., Aug. 7, 1986, at 1, col. 3 (N.Y. Sup. Ct. 1986) (correction officers driving prison vans); McLeod v. City of Detroit, 39 F.E.P. Cases 225 (E.D. Mich. 1985) (applicants for firefighter positions).

120. *See infra* note 121. Some courts have even required probable cause before urinalysis was performed.

121. Capua v. City of Plainfield, 643 F. Supp. at 1522.

122. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. at 732; Capua v. City of Plainfield, 643 F. Supp. at 1517.

123. Capua v. City of Plainfield, 643 F. Supp. at 1517.

124. *Id.*

125. *Id.* at 1518.

126. N.C.A.A. Rule 4.2 of Drug Testing Program (1986).

127. N.C.A.A. Rule 4.3.

128. *See* N.C.A.A. Rules 5.1-7.6.

Committee provides authorization for public submission of the reports.[129] "Standardless and unconstrained discretion" is the evil created by urinalysis testing; therefore, if there are safeguards which clearly state "the legitimate purpose and reasonableness of the procedures followed and the degree to which they minimize the intrusion on the privacy interests of the person searched," individualized suspicion is not required.[130] In *Capua v. City of Plainfield*,[131] the court appears to suggest procedural protections may be the most important factor in analyzing the reasonableness of a urinalysis program.[132] Based upon the dicta in *Capua*, at least the New Jersey courts are willing to give substantial weight to the testing procedures adopted.

One problem with the N.C.A.A. testing procedures is that regardless of the confidentiality of the results, an athlete detected using drugs is ineligible for athletic participation, and the individual's absence can imply a positive test result. Therefore procedural protections can be unsuccessful, due to the inference drawn from the athlete's absence from participation. The media will quickly perceive the absence of a key player and assume the athlete tested positive.

Further, even if there were a means of insuring the confidentiality of the test results, random urinalysis drug testing still is a highly intrusive unreasonable search, even when procedural safeguards exist.

The N.C.A.A. requires student athletes to sign drug testing consent forms representing their interest to participate in the drug testing program.[133] If an athlete does not submit the consent form, he or she is declared ineligible for athletic participation.[134]

The key issue regarding consent is whether signing the consent form waives an athlete's fourth amendment rights. Recent cases involving public employees have squarely addressed this issue. Consent to an unreasonable search and seizure as a condition of employment does not suspend a person's fourth amendment rights.[135] Consent to urinalysis as a condition of employment is also construed as an involuntary, coerced consent.[136]

Based upon these recent cases, the N.C.A.A.'s consent form would appear not to waive the constitutional rights of an athlete. Relinquishing fourth amendment rights is not a reasonable condition of athletic participation. Even if athletic participation is a reasonable condition of employment,

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129. N.C.A.A. Rule 7.5.

130. Shoemaker v. Handel, 619 F. Supp. at 1101, *aff'd*, 795 F.2d 1136 (3d Cir. 1986) (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

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

132. *Id.* at 1520.

133. N.C.A.A. Student Athlete Consent Form.

134. *Id.*

135. American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. at 736; National Treasury Employees Union v. Von Raab, 649 F. Supp. at 388, *rev'd*, 808 F.2d 1057 (5th Cir. 1987).

136. *Id.*; *see* Schleckenloth v. Bustamonte, 412 U.S. 218 (1973).

the consent to drug testing is not voluntary, based upon the automatic ineligibility of an athlete refusing to sign a consent form.

IV. Does the N.C.A.A. Drug Testing Program Violate the Fifth Amendment?

The fifth amendment has just recently been recognized as another justifiable means of attacking the constitutionality of drug testing. The district court, in *National Treasury Employees Union v. Von Raab*,[137] held that drug testing violates a person's fifth amendment protections against self-incrimination.[138] In *Von Raab* customs service employees who sought promotions were required to submit to urinalysis and also were required to list medications and contact with illegal drugs in the last thirty days.[139]

The N.C.A.A. urinalysis program requires an athlete to provide urine samples; however, contact with illegal substances in the last thirty days does not have to be revealed to the N.C.A.A. Instead, an athlete when signing the drug consent form is required to certify that, to the best of his knowledge, he will not test positive for drug usage.[140] An athlete must also certify that he was not improperly recruited and has not been involved in organized gambling involving collegiate competitions.[141] Falsely answering these questions can jeopardize an athlete's eligibility.[142] The N.C.A.A. program appears to have the same incriminatory effect the *Von Raab* procedures possessed.

The only question remaining is whether the *Von Raab* holding is contrary to existing precedent. The fifth circuit, in deciding the appeal in *Von Raab*, concluded that urinalysis does not violate a person's fifth amendment rights.[143] The fifth circuit came to this conclusion because the self-incrimination privilege only protects an accused from testifying against himself or from providing "evidence of a testimonial or communicative nature."[144] The district court in *Von Raab* was aware of this limitation upon the self-incrimination clause,[145] which was developed in *Schmerber v. California*.[146] In *Schmerber* the forcible taking of blood was held permissible under the self-incrimination clause. The district court in *Von Raab* concluded that *Schmerber* was distinguishable, since probable cause was required in

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137. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986), *rev'd*, 808 F.2d 1057 (5th Cir. 1987).

138. *Id.* at 388.

139. *Id.*

140. N.C.A.A. Student Consent Form (4th provision).

141. *Id.*

142. *Id.*

143. National Treasury Employees Union v. Von Raab, 808 F.2d 1057 (5th Cir. 1987).

144. Schmerber v. California, 384 U.S. 757, 761 (1966).

145. National Treasury Employees Union v. Von Raab, 649 F. Supp. at 388, *rev'd*, 808 F.2d 1057 (5th Cir. 1987).

146. Schmerber v. California, 384 U.S. 757 (1966).

Schmerber and was not required in *Von Raab*.[147] Moreover, *Schmerber* involved only the taking of a blood sample, while *Von Raab* involved the taking of a urine sample and a statement regarding contact with illegal substances.[148] The district court in *Von Raab* then surmised that the urinalysis program provides "evidence of a testimonial or communicative nature."[149]

Even if the district court's conclusion is not adopted by other courts, the N.C.A.A.'s program may still violate the fifth amendment because athletes must certify that they have not been improperly recruited and have not been involved in organized gambling involving collegiate competitions. Thus the program may violate the fifth amendment by presuming that an athlete is guilty until he establishes his innocence.[150]

V. Due Process Challenges to the N.C.A.A.'s Urinalysis Program

The fourteenth amendment requires due process of law before a state can deprive a person of life, liberty or property. Procedural due process requires that a protected right cannot be taken away without first giving "notice and opportunity for hearing appropriate to the nature of the case."[151] Substantive due process protects certain interests from arbitrary state action.[152] Procedural due process will be the focus of the following discussion.

In order to attack drug testing on procedural due process grounds, the initial requirement is the denial of a right previously recognized by state law.[153] An athlete who is declared ineligible is deprived of participation in intercollegiate and post-season competition. The predominant view is that athletes do not have protected property rights under state law to participate in intercollegiate athletics, post-season competition, or television coverage of athletic events.[154]

In *Colorado Seminary v. N.C.A.A.*,[155] the court thoroughly analyzes an athlete's property interest in athletic participation. Although the right to public education is a protected property interest,[156] there is not a property

147. National Treasury Employees Union v. Von Raab, 649 F. Supp. at 388, *rev'd*, 808 F.2d 1057 (5th Cir. 1987).

148. *Id.*

149. *Id.*

150. *See* Capua v. City of Plainfield, 643 F. Supp. at 1524.

151. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 Am. Bus. L.J. 309, 312 [hereinafter Bible, *Screening Workers for Drugs*].

152. Bible, *Screening Workers for Drugs*, *supra* note 151, at 342.

153. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1491 (1985); Justice v. N.C.A.A., 577 F. Supp. 356, 364 (D. Ariz. 1983).

154. Hawkins v. N.C.A.A., 652 F. Supp. 602, 610 (C.D. Ill. 1987); Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975); Justice v. N.C.A.A., 577 F. Supp. 356 (D. Ariz. 1983); Colorado Seminary v. N.C.A.A., 417 F. Supp. 885 (D. Colo. 1976).

155. Colorado Seminary v. N.C.A.A., 417 F. Supp. 885 (D. Colo. 1976).

156. Gross v. Lopez, 419 U.S. 565, 574 (1975); Colorado Seminary v. N.C.A.A., 417 F.

interest in each separate aspect of the educational process.[157] Since athletic participation is only one of the components in the educational process, it does not receive constitutional protection in Colorado.[158] Although procedural due process protections were not afforded the athletes in *Colorado Seminary*, the court concedes that if an athlete is deprived of a scholarship, procedural protections may be invoked.[159]

In *Parish v. N.C.A.A.*,[160] the court concludes athletic participation does not entail a property or liberty interest. Denying an athlete N.C.A.A. tournament experience and television exposure does not result in compensable injury to an athlete's potential professional career, because the damages are far too speculative.[161] A property or liberty interest exists only if there is more than an abstract need or desire. There must be a legitimate claim of entitlement to it.[162]

Although the prevailing view is that participation in intercollegiate athletics and post-season competition does not qualify as a property or liberty interest, there are a few cases espousing a contrary position.[163] State law recognizing a property interest in college athletic participation exists exclusively in Minnesota. Athletic participation is a property right capable of protection in these Minnesota cases because participation is an integral facet of education,[164] and N.C.A.A. sanctions could conceivably foreclose the possibility of participating in professional sports.[165]

If other courts adopt the Minnesota court's conclusion that post-season competition and athletic participation are interests capable of protection, then the N.C.A.A. drug testing program must satisfy due process standards. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[166] Three factors are relevant in determining the procedural protections which must be afforded an individual.

The first of these factors is the private interest that will be affected by

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Supp. at 895.

157. Colorado Seminary v. N.C.A.A., 417 F. Supp. at 895; *see* Albach v. Otto, 531 F.2d 983, 985 (10th Cir. 1976).

158. Colorado Seminary v. N.C.A.A., 417 F. Supp. at 895.

159. *Id.*

160. Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975).

161. *Id.* at 1034, n.17.

162. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Justice v. N.C.A.A., 577 F. Supp. 356, 364 (D. Ariz. 1984).

163. *See infra* notes 166-67.

164. Regents of the Univ. of Minn. v. N.C.A.A., 422 F. Supp. 1158, *rev'd*, 560 F.2d 352 (8th Cir. 1977) (court declined to determine whether there is a property interest in athletic participation); Note, *Drugs, Athletes, and the N.C.A.A.: A Proposed Rule for Mandatory Drug Testing in College Athletics*, 18 J. MAR. 205 (1984) [hereinafter Note, *A Proposed Rule for Mandatory Drug Testing*].

165. Behagan v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972); Note, *A Proposed Rule for Mandatory Drug Testing*, *supra* note 164, at 213.

166. Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

> the official action; second the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[167]

As previously stated, the private property interest affected by drug testing of college athletes is minimal at best. In turning to the second factor it should be noted that normally an EMIT test is the initial procedure for testing drug usage. EMIT tests have been estimated to be as high as ninety-five percent accurate[168] and as low as seventy-five percent accurate.[169] In view of the inaccuracies of the EMIT test, some courts require an alternative testing procedure such as gas chromatography or a second EMIT test.[170]

The N.C.A.A.'s drug testing program appears to withstand the due process challenge since a student has notice of the drug testing program and is given an opportunity to appeal a positive test result.[171] An athlete's university is given an opportunity to require another test of the athlete's urine specimen.[172] Thanks to the existence of these procedures, and of the N.C.A.A.'s interest in preventing drug abuse, the N.C.A.A. fulfills the minimal due process requirements necessary to suspend an athlete for drug use, even if college athletic participation is considered a property or liberty interest capable of protection.

VI. Other Possible Constitutional Attacks upon the N.C.A.A. Urinalysis Program

The N.C.A.A. regulations dealing with the selection of athletes for drug testing can encounter equal protection challenges. N.C.A.A. Rule 4.3 permits the selection of student athletes for drug tests at N.C.A.A. team championships and bowl games based on playing time or position. If this rule is utilized it can result in disparate treatment of the star and the bench warmer. Playing time is an arbitrary basis for selecting athletes to be tested for drug use. Nevertheless, the N.C.A.A. program probably does not violate equal protection because the deferential rational basis test would be applied to this program.

Another possible constitutional challenge to the N.C.A.A.'s urinalysis program is that the urinalysis program violates an individual's penumbral right of privacy.[173] The right to privacy emanates from the guarantees of the

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167. *Id.* at 333.
168. Harmon v. Auger, 768 F.2d 270 (8th Cir. 1985).
169. Peranzo v. Coughlin, 608 F.2d 1504, 1511 (S.D.N.Y. 1985).
170. Wycoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985); Peranzo v. Coughlin, 608 F.2d 1504 (S.D.N.Y. 1984).
171. N.C.A.A. Rule 7.2.2.1.
172. *Id.* at Rule 7.2.2.2.
173. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); National Treasury Employees

Bill of Rights.[174] According to the district court in *National Treasury Employees Union v. Von Raab*,[175] the right to personal privacy in the excretion of bodily fluids is within the zone of privacy protected by the Constitution.[176] The fifth circuit in overturning the district court's decision did recognize an individual's interest in bodily integrity, but did not recognize a right to privacy in the excretion of a fluid.[177]

VII. Conclusion

Although drug abuse is a major social problem, attempts to alleviate illicit drug use should be made within the constraints of the Constitution. The N.C.A.A. and public institutions have attempted to tackle the drug abuse problem, however, several of the techniques used are unconstitutional. As previously stated, only if the N.C.A.A. is considered a state actor will the N.C.A.A.'s drug testing program be subject to constitutional challenges. If the N.C.A.A. is a state actor, then the N.C.A.A.'s drug testing program could conceivably violate the fourth amendment, the equal protection clause of the fourteenth amendment, and the penumbral right to privacy embodied in the Bill of Rights.

Joseph V. Fonti

Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986), *rev'd*, 808 F.2d 1057 (5th Cir. 1987).

174. Griswold v. Connecticut, 381 U.S. at 482.

175. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986), *rev'd*, 808 F.2d 1057 (5th Cir. 1987).

176. *Id.* at 389.

177. National Treasury Employees Union v. Von Raab, 808 F.2d 1057, 1061-62 (5th Cir. 1987); *see* Winston v. Lee, 470 U.S. 753 (1985). *Winston* dealt with a hospital's removal of a bullet from Winston without his consent; the case recognized an individual's interest in bodily integrity.