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Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?*

In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.†

I. INTRODUCTION

Throughout the 1980's, drug use and abuse by amateur and professional athletes alike has prompted an increased awareness of the potential hazards to health and ethics. For example, the cocaine problem of Steve Howe, Los Angeles Dodger pitcher, received media attention[1] continuously from 1985 until he was eventually suspended from major league baseball in 1986.[2]

The International Olympic Committee (IOC) recognized the existence of drug problems in amateur athletics as early as the 1960's.[3] However, not until the 1983 Pan American Games in Caracas, Venezuela, did an IOC drug testing program commence.[4] The Caracas games received extensive media coverage when fifteen athletes tested positive for drug use and numerous others withdrew from competition to avoid possible suspension.[5] More recently, the tragic deaths of Len Bias[6] and Don Rogers[7] have brought public attention to the terrible problem of drug use and abuse in collegiate athletics. As a re-

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* For LEXIS® computerized research regarding the constitutionality of mandatory drug testing of student athletes, select the GENFED library, COURTS file; the STATES library, OMNI file; and the LAWREV library, ALLREV file. For each selection, the author suggests the following searches: (1) constitution! w/30 drug/ w/5 test! and employ! or athlet!; (2 drug w/10 test! w/30 student or school or college or university w/30 privacy and search; and (3) constitution! w/20 drug w/5 test! and student or school or athlet!. LEXIS® is a registered trademark of Mead Data Central, Inc.

† Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986).

1. L.A. Times, Mar. 3, 1985, § III, at 1, col. 2.

2. *Id.*, May 16, 1986, § III, at 1, col. 6.

3. Clarke, *Sports Medicine and Drug Control Programs of the U.S. Olympic Committee*, 73 J. ALLERGY & CLINICAL IMMUNOLOGY 740, 741, No. 5, pt. 2 (Supp. May 1984); *see also* Beckett, *Use and Abuse of Drugs in Sport*, 1981 J. BIOSOCIAL SCI., Supp. 7, 163, 164.

4. Clarke, *supra* note 3, at 741; *see also* Voy, *Education as a Means Against Doping*, TEAM HANDBALL USA, Jan. 1988, at 19, 20.

5. Neff, *Caracas: A Scandal and a Warning*, SPORTS ILLUSTRATED, Sept. 5, 1983, at 18, 19.

6. McCallum, *The Cruelest Thing Ever*, SPORTS ILLUSTRATED, June 30, 1986, at 20.

sult, drug programs established by athletic federations and associations to help educate athletes on the harmful consequences of drug use and abuse have gained widespread recognition.

However, recreational drug use is not the only problem facing today's athletes. An increasing emphasis on being the strongest and fastest competitor has caused many athletes to resort to doping.[8] Doping is "the administering or use of substances in any form alien to the body or of physiological substances in abnormal amounts and with abnormal methods by healthy persons with the exclusive aim of attaining artificial and unfair increase of performance in competition."[9] More simply put, "[d]oping comprises the administration of medications—or—the use of other means to artificially increase an athlete's competitive performance."[10] The most common methods of doping are blood doping[11] and the use of anabolic steroids.[12] Studies on steroid use and blood doping reveal that athletes utilizing these techniques can enhance their performance.[13] However, the side effects of steroids as well as those of recreational drug use are dangerous.[14]

At the age of 22, Len Bias died from cocaine overdose the day after he had fulfilled his dream by signing a professional basketball contract with the Boston Celtics. *Id.*

7. Keteyian & Selecraig, *A Killer Drug Strikes Again*, SPORTS ILLUSTRATED, July 7, 1986, at 18. Don Rogers of the Cleveland Browns, a UCLA All-American football player and 1984 American Football Conference rookie of the year, died from a cocaine overdose just one day before he was to marry his college sweetheart. *Id.*

8. Sanoff, *Drug Problem in Athletics: It's Not Only the Pros*, U.S. NEWS & WORLD REP., Oct. 17, 1983, at 64.

9. Oseid, *Doping and Athletes—Prevention and Counseling*, 73 J. ALLERGY & CLINICAL IMMUNOLOGY (pt. 2) 735, 735, No. 5, (Supp. May 1984).

10. *Id.*

11. *Id.* at 736; *see also* Voy, *supra* note 4, at 20. Because red blood cells have a higher oxygen content than white, athletes extract blood during training, separate the red cells from the white, and freeze the red cells in order to preserve them. C. KLAFS & D. ARNHEIM, MODERN PRINCIPLES OF ATHLETIC TRAINING 163 (5th ed. 1981) [hereinafter KLAFS]. Immediately before competition, these red cells are intraveneously injected into the athlete. *Id.* This procedure increases the athlete's stamina and improves performance. *Id.*; *see also* NCAA, THE 1987-88 NCAA DRUG TESTING PROGRAM (1987) (pamphlet) [hereinafter NCAA PROGRAM].

12. Oseid, *supra* note 9, at 736; *see also* Voy, *supra* note 4, at 20. Steroids are growth hormones, such as testosterone, which can be injected or taken orally. *Former Husker Fesses Up*, SPORTS ILLUSTRATED, Jan. 5, 1987, at 24; *see also* NCAA PROGRAM, *supra* note 11, at 9. Athletes use anabolic steroids to increase muscle mass. KLAFS, *supra* note 11, at 162. Additionally, anabolic steroids can increase one's aggressiveness and competitiveness. Beckett, *supra* note 3, at 166.

13. Sanoff, *supra* note 8, at 66. *But see* Hill & McKeever v. NCAA, No. 619209 (Cal. Super. Ct. Aug. 10, 1988). Although it is believed that blood doping enhances an athlete's performance, "there is no scientific evidence to show that anabolic steroids will enhance performance in any athlete." *Id.* at 16, 18.

14. Oseid, *supra* note 9, at 736. Prolonged steroid use can cause "liver damage, testicular atrophy, infertility and heart disease." Sanoff, *supra* note 8, at 64. The side effects upon women taking steroids containing testosterone include "disrupt[ing] the menstrual cycle, caus[ing] growth of facial hair and deepen[ing] the voice." *Id.*; *see also* KLAFS, *supra* note 11, at 162.

In an effort to combat both recreational and performance enhancing drug use, athletic federations and associations currently test athletes for drugs and impose stiff sanctions on those found to be users.[15] This comment will focus on collegiate athletics and the mandatory drug testing programs implemented by the National Collegiate Athletic Association (NCAA) and individual universities and colleges. The analysis will then turn to the constitutionality of these programs in light of the fourth amendment protection against unreasonable searches and seizures and the athlete's right to privacy.

II. MANDATORY DRUG TESTING PROGRAMS FOR COLLEGE ATHLETES

A. The NCAA's Program

Since 1973, the NCAA has expressly prohibited the use of "dangerous drugs" in championship events.[16] However, such a prohibition without an effective means of enforcement or deterrence amounts to no prohibition at all. Despite various NCAA programs attempting to educate athletes, coaches, and trainers on the adverse effects of drug use,[17] the prohibition in and of itself was ineffective. In 1984, the NCAA finally recognized the need to test athletes for drugs in order to prevent use and abuse in college athletics.[18]

It was not until the NCAA's 1986 convention, however, that its member institutions adopted a drug testing program.[19] This program was designed to "safeguard the health and safety of participants"[20] and to prevent student athletes from gaining an "artificially induced advantage"[21] by using performance enhancing drugs such as steroids. The program provides that each year, prior to participating in competition, the athlete must sign a consent form to be tested for certain drugs proscribed by the NCAA.[22] Apart from the drug testing program, the NCAA also requires each athlete to sign a form known as

15. *See generally*, Clarke, *supra* note 3, at 741 (U.S. Olympic Committee); *Drug Banned That Masks Steroid Use*, THE OLYMPIAN, Nov. 1987, at 41 (International Amateur Athletic Federation); NCAA, THE 1987-88 NCAA DRUG TESTING MANUAL 111 (1987) (National Collegiate Athletic Association) [hereinafter NCAA MANUAL].

16. NCAA MANUAL, *supra* note 15, at 111-12, Bylaw 5-2; Comment, *Drugs, Athletes, and the NCAA: A Proposed Rule for Mandatory Drug Testing in College Athletics*, 18 J. MARSHALL L. REV. 205, 210 (1984).

17. Comment, *supra* note 16, at 210-11.

18. *Id.* at 211 n.7.

19. NCAA PROGRAM, *supra* note 11, at 2.

20. *Id.*

21. *Id.*

22. NCAA MANUAL, *supra* note 15, at 29, Const. 3-9-(i); NCAA PROGRAM, *supra* note 11, at 6-7. For a list of banned substances, see Appendix A to this Comment.

the Buckley Amendment Consent[23] which, among other things, gives permission to release drug test results and sets forth recordation procedures.[24] By signing the requisite forms, the athlete consents to being tested for drugs any time during the academic year; failure to sign both consent forms results in ineligibility.[25]

The NCAA uses urinalysis to determine the presence of banned substances.[26] Athletes are typically tested immediately before or after NCAA championship events or postseason games.[27] An athlete selected for drug testing is required to furnish a urine specimen in the presence of a monitor who ensures that the specimen is the athlete's and has not been doctored.[28] A detailed procedure is adhered to throughout the collection stages to accurately identify the specimen and prevent it from being tampered with.[29]

Because a positive test result can lead to suspension of either an individual athlete or an entire team, the NCAA provides a verification and an appeals process.[30] All positive tests are verified by a second lab technician to ensure accuracy.[31] If the verification confirms the positive result, the athlete's institution is then notified and within twenty-four hours, a second specimen is tested.[32] At this

23. Under the Family Educational Rights and Privacy Rights Act of 1974, a student's educational records cannot be disclosed without his consent. 20 U.S.C. § 1232g(b), (d) (1974). The Buckley Amendment Consent authorizes disclosure of educational records, including results of drug tests, to authorized school representatives in order to ascertain eligibility. NCAA PROGRAM, *supra* note 11, at 6.

24. NCAA PROGRAM, *supra* note 11, at 6.

25. NCAA MANUAL, *supra* note 15, at 29, Const. 3-9-(i).

26. NCAA PROGRAM, *supra* note 11, at 11.

27. Although the protocol provided in the NCAA Drug Testing Program gives the NCAA Committee discretion in determining the selection process, two methods are typically employed: minutes played and performance. *Id.* at 13. During postseason competition in sports such as football, the athletes having the most minutes of play time are selected. For example, in football bowl games, the twenty-two players with the most play time are tested along with 14 randomly selected reserves. Neff, *Bosworth Faces the Music*, SPORTS ILLUSTRATED, Jan. 5, 1987, at 22. In individual sports, such as track, athletes are selected for testing based on their performance vis-à-vis other athletes. NCAA PROGRAM, *supra* note 11, at 13. In addition to testing based on minutes played or performance, the NCAA also tests athletes at random or those specifically suspected of drug use. *Id.*

28. NCAA PROGRAM, *supra* note 11, at 14. Examples of doctoring a specimen include: placing chemical substances under fingernails and releasing the substance into the specimen; placing detergent or soap found in the bathroom into the specimen; entering the bathroom with another's urine and substituting it for one's own; diluting the urine with water from the toilet (the more diluted the specimen, the harder it is to obtain an accurate reading of drugs present in the sample). NATIONAL INSTITUTE ON DRUG ABUSE, URINE TESTING FOR DRUGS OF ABUSE 26 (Research Monograph Series No. 73 1986) [hereinafter NIDA].

29. NCAA PROGRAM, *supra* note 11, at 14.

30. *Id.* at 16-18.

31. *Id.*

32. *Id.* Before sealing the specimen for shipment to the lab, the athlete is required to separate the urine samples into two vials, A and B. Vial A is tested first. If a positive result is confirmed by two technicians, vial B is then tested. *Id.*

stage, the athlete or a representative from, or on behalf of, the school may witness the testing to verify the process and ensure that the specimen is the athlete's.[33] The NCAA expressly provides that all positive tests be confirmed during the second testing by gas chromatography/mass spectrometry.[34] A positive test of the second specimen will, at a minimum, result in the athlete's ineligibility during postseason competition.[35] Upon regaining eligibility, the athlete will lose one academic year of postseason eligibility if he again tests positive.[36]

B. Drug Testing Program of a Public Institution

When the NCAA implemented its drug testing program accompanied by strict sanctions, individual institutions recognized the need to test for drug use during the regular season. Testing during postseason competition neither protects players during the regular season competition nor controls drug use among individuals or teams qualifying for postseason competition. By testing during the regular season, schools recognize that an athlete's drug problem can be confronted before disqualification by the NCAA. As a result, many universities have established their own drug testing programs.[37] Although the objectives of most public university programs[38] are

33. *Id.*

34. *Id.* Gas chromatography/mass spectrometry are the most accurate drug testing processes. NIDA, *supra* note 28, at 35. The results from the gas chromatography phase of the test are confirmed during the mass spectrometry stage. Looney, *A Test With Nothing But Tough Questions*, SPORTS ILLUSTRATED, Aug. 9, 1982, at 24, 26; *see also* NIDA, *supra* note 28, at 35, 36; Voy, *supra* note 4, at 20. However, because of its high costs, gas chromatography/mass spectrometry is generally used only to confirm positive results initially produced by urinalysis. For a detailed analysis of the various methods of urinalysis, see generally NIDA, *supra* note 28; Comment, *Drug Testing in the Workplace: The Need For Quality Assurance Legislation*, 48 OHIO ST. L.J. 877, 878-84 (1987).

35. NCAA MANUAL, *supra* note 15, at 111, Bylaw 5-2-(b). The program also provides for a hearing process to contest any sanctions; yet, "[t]he right to a hearing is the institution's, not the student's." Hill & McKeever v. NCAA, No. 619209 (Cal. Super. Ct. Aug. 10, 1988).

36. NCAA MANUAL, *supra* note 15, at 111, Bylaw 5-2-(b).

37. Comment, *On Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S. CAL. L. REV. 815 n.4 (1984). In 1987, 140 (26%) NCAA member institutions had drug testing programs as compared to only 79 (10%) in 1985. NCAA DRUG EDUC. COMM., COMPARISON SUMMARY OF RESULTS OF DRUG-EDUCATION/TESTING SURVEY (1987) [hereinafter NCAA SURVEY]; *see supra* note 38.

38. This comment uses the University of California, Los Angeles (UCLA) drug testing policies as an example of those in effect at public universities in general. Since the NCAA enacted its drug testing program, 140 member institutions have established

similar to the NCAA's goals of preventing unfair competition and protecting the health and safety of athletes,[39] these programs are also directed at assisting the athlete. Unlike the NCAA's program, university drug testing programs are designed to provide counseling for the athlete in order to help combat the drug problem.[40]

University guidelines parallel the NCAA's with one major exception: universities test athletes throughout the regular season, not just during postseason competition.[41] In order to participate on an intercollegiate team, the student athlete is required to sign a consent form similar to the one required by the NCAA.[42] The athlete's signature constitutes an agreement to submit to drug testing, as described in the athletic department's policy statement, as well as an agreement to provide information on substances taken under medical supervision.[43] Upon signing the consent form, the athlete is eligible to participate in intercollegiate athletic programs.

As an intercollegiate team member, an athlete can be required to undergo a urinalysis in two situations. First, prior to participation, a preseason medical evaluation is required to ensure that the athlete is physically capable of competing.[44] During this examination a urine specimen is taken and tested for signs of drug use by the athlete.[45] Head coaches receive data on the number of samples testing positive but are not given the names of those athletes testing positive.[46] Individuals who test positive are notified, but are not sanctioned. Instead, these athletes are offered the assistance of a counseling program[47] on a voluntary basis.[48] Test results and counseling participation remain confidential.[49]

Second, the athlete may be tested if randomly selected for testing during the season.[50] In addition, all athletes testing positive during

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programs similar to UCLA's. NCAA SURVEY, *supra* note 37. For a comparison of other public universities' drug testing programs, see Comment, *The NCAA Declares War: Student-Athletes Battle the Mandatory Drug Test*, 16 CAP. U.L. REV. 673 (1987) (utilizing Ohio State University's drug testing program).

39. DEPARTMENT OF INTERCOLLEGIATE ATHLETICS, UNIV. OF CAL., LOS ANGELES, POLICY STATEMENT DRUG EDUCATION AND TESTING PROGRAM FOR UCLA STUDENT-ATHLETES, (1987-88) (pamphlet) [hereinafter POLICY STATEMENT]; *see also* NCAA PROGRAM, *supra* note 11 and text accompanying notes 19-21.

40. POLICY STATEMENT, *supra* note 39.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Interview with Dr. Judith Holland, Director of Women's Athletics, University of California, Los Angeles (Mar. 28, 1988) [hereinafter Interview].

45. POLICY STATEMENT, *supra* note 39.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Each athlete's name corresponds to a 12-digit identification number. The computer selects a single digit number and a position number. All athletes whose posi-

their preseason medical examination will be retested at this time.[51] If an athlete tests positive twice, participation in a counseling program becomes mandatory.[52] An athlete who refuses counseling forfeits his eligibility to participate in intercollegiate athletics.[53] Upon testing positive the second time, the athlete's name is then divulged to the coach.[54] Unlike the NCAA's program, the university allows the athlete to compete during the counseling program provided the athlete does not pose any unreasonable hazard to himself or others by competing.[55]

Suspension from the team will result only if the athlete tests positive a third time[56] and may also include nonrenewal of athletic aid or scholarships.[57] A student athlete's eligibility may be reinstated upon recommendation by medical personnel and agreement by the coach.[58] However, conditions such as periodic testing may be imposed upon the athlete to ensure compliance with school policies.[59] Although suspension does not occur unless the athlete's participation is unreasonably hazardous or the athlete tests positive a third time, all positive results must still be verified. The student with good cause may also request a hearing before the Senior Associate Athletic Director prior to any sanction being imposed[60] and any determinations made at this hearing may be appealed to a committee appointed by the Athletic Director.[61]

III. CONSTITUTIONAL PROTECTION: STATE ACTION REQUIREMENT

A. State Action Doctrines

To challenge the constitutionality of a program, statute, or regulation at the state level, the action must come under the ambit of the fourteenth amendment.[62] The fourteenth amendment protects indi-

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tion number is the same as the single digit number selected (i.e. the fifth number of their identification number is nine) are tested. Interview, *supra* note 44.

51. POLICY STATEMENT, *supra* note 39.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. The Civil Rights Cases, 109 U.S. 3, 12 (1883); Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

viduals against unwarranted governmental action, but it does *not* afford protection against acts by other individuals or *private* organizations.[63] Accordingly, an athlete who challenges the constitutionality of a mandatory drug testing program must first establish that the program is supported by state action. State action is present when the state supports private actions or when the state itself is the actor. In situations where the state is supporting activities by private organizations, the key determination is whether the private conduct can reasonably be attributed to the state. The United States Supreme Court has recognized three theories of state action: (1) the public function theory;[64] (2) the entanglement theory;[65] and (3) the state regulation or encouragement theory.[66]

1. Public Function Theory

The state cannot escape constitutional scrutiny by authorizing private individuals or entities[67] to perform public functions. State action occurs when a private entity performs an action which is traditionally an "exclusive" function of the government.[68] In *Evans v. Newton*,[69] the Supreme Court defined public functions as those which "traditionally serve the community,"[70] such as services provided by police and fire departments. Additionally, the state must be required to provide the service in order for the private entity assuming the duty to be considered a state actor.[71] Subsequent to their decision in *Evans*, the Court narrowed the definition of public function such that private entities must now completely displace the government when assuming the role of performing public functions.[72] Because the government cannot escape the limits of the Constitution by delegating a public function to a private entity, an individual can con-

63. The Civil Rights Cases, 109 U.S. 3, 12-13 (1883). "With the exception of the thirteenth amendment the Constitution is a restraint on governmental action and does not provide one private citizen with rights against another." E. BARRETT & W. COHEN, CONSTITUTIONAL LAW 966 (7th ed. 1985).

64. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978).

65. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-25 (1961).

66. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974).

67. In this comment, "private entity" means any private organization or private individual.

68. *Jackson*, 419 U.S. at 352. "If private actors assume the role of the state by engaging in these governmental functions, then they subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself." R. ROTUNDA, J. NOWAK & J. YOUNG, CONSTITUTIONAL LAW 426 (1986) [hereinafter ROTUNDA].

69. 382 U.S. 296 (1966).

70. A park, even in the hands of a private trustee, cannot be maintained as a segregated park because the services which it provides are "municipal in nature." *Id.* at 302.

71. *Jackson*, 419 U.S at 352-53.

72. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158-59 & n.11 (1978).

stitutionally challenge the activities of private actors assuming tasks traditionally performed by the government.

2. Entanglement Theory

When the state substantially involves itself in a private entity's actions, the private conduct becomes state action and is restricted by the Constitution.[73] The rationale supporting this theory asserts that state entanglement in private conduct forms a "symbiotic relationship."[74] Conduct emanating from this relationship is perceived by the public as state action and, therefore, the Court attributes that conduct to the state.[75]

The Court looks at several factors to determine whether a private entity's actions are distinguishable from those of the state. One factor considered is the extent of physical and economic contacts shared by the state and the private entity.[76] In *Burton v. Wilmington Parking Authority*,[77] a private restaurant located in a public parking structure was held to constitute state action.[78] The Court reasoned that because the public parking structure could not have been financed without rents collected from commercial enterprises such as the restaurant,[79] the physical and economic contacts were sufficient to find state action.

A second factor is whether the private entity receives aid from or is directly subsidized by the government.[80] The Court in *Norwood v. Harrison*[81] held that a private school's conduct amounted to state action because the school accepted textbooks from the government.[82] When state instrumentalities are entwined with private conduct, as exhibited by the *Burton* and *Norwood* cases, the acts of private entities are vicariously imposed upon the state.

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73. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

74. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972). A "symbiotic relationship" arises when the government becomes so entwined in the conduct of the private entity that the actions of the two (the private entity and the government) are indistinguishable. ROTUNDA, *supra* note 68, at 438.

75. ROTUNDA, *supra* note 68, at 440.

76. *Burton*, 365 U.S. at 723-24; ROTUNDA, *supra* note 68, at 438.

77. 365 U.S. 715.

78. *Id.* at 726.

79. *Id.* at 719.

80. Norwood v. Harrison, 413 U.S. 455, 458 (1973); ROTUNDA, *supra* note 68, at 438.

81. 413 U.S. 455 (1973).

82. *Id.* at 463-68. The Court held that "provid[ing] tangible assistance to students attending private schools" constituted direct governmental aid. *Id.*

3. State Encouragement Theory

Under the state encouragement theory, conduct of a private entity is attributable to the state when the state has "exercised its coercive power" and encouraged the challenged activity.[83] A nexus arises between state and private activity when the government influences a private entity's conduct.[84] In *Reitman v. Mulkey*,[85] the California Supreme Court invalidated a state constitutional amendment establishing a "right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."[86] The court held that the amendment encouraged discrimination and was thus state action.[87]

Although the encouragement theory is similar to the entanglement theory, state action is more difficult to establish under the former. Courts frequently refer to the encouragement theory when the acts in question stem from a private entity licensed[88] or regulated[89] by the state. However, in *Moose Lodge No. 107 v. Irvis*,[90] the Supreme Court refused to recognize that merely licensing a private entity to perform a specified function constitutes state action because the act of licensing did not significantly involve the government in the private entity's conduct or encourage the private entity's behavior.[91] Disagreeing with the majority, Justice Douglas suggested that when the state issues only a limited number of licenses, the issuance to a private entity whose conduct violates a person's constitutional rights may amount to state action.[92]

Two years later, in *Jackson v. Metropolitan Edison Co.*,[93] the Supreme Court's affirmation of *Moose Lodge* resolved any questions raised by Justice Douglas in his dissenting opinion. The Court stated: "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."[94] The Court added that regulating a private entity's conduct, who had been granted the status of a monopoly,

83. Lock & Jennings, *The Constitutionality of Mandatory Student-Athlete Drug Testing Programs: The Bounds of Privacy*, 38 U. FLA. L. REV. 581, 585 (1986).

84. ROTUNDA, *supra* note 68, at 431.

85. 387 U.S. 369 (1967).

86. *Id.* at 374 (emphasis in original).

87. *Id.* at 378-79.

88. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972). A private club does not become a state actor merely because the state issues it a license to serve alcohol. *Id.*

89. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 346 (1974). A privately owned and operated utility corporation is not a state actor despite being regulated by the state. *Id.*

90. 407 U.S. 163 (1972).

91. *Id.* at 176-77.

92. *Id.* at 182-83 (Douglas, J., dissenting).

93. 419 U.S. 345 (1974).

94. *Id.* at 350.

did not involve state action.[95] Thus, even the granting of a monopoly by the state, without greater state interaction, is not sufficient to characterize the conduct of the private monopoly as state action.

IV. COLLEGE DRUG TESTING PROGRAMS—IS THERE STATE ACTION?

A. NCAA

To challenge the constitutionality of the NCAA's mandatory drug testing program, it is necessary to establish that the NCAA's actions are attributable to the state.[96] Prior to 1984, courts followed the public function and entanglement theories and held that NCAA activities constituted state action.[97] However, in *Parish v. NCAA*,[98] the fifth circuit took an interesting approach by finding NCAA actions to represent a government function because the court believed the government would step in to organize college athletics if the NCAA ceased to exist.[99]

This determination in *Parish* was buttressed by the more common interpretation of what is a government function, the public function theory. The court reasoned that in conjunction with athletics, the NCAA also regulates certain educational aspects of colleges and universities.[100] Thus, because states have a "traditional interest" in the education system, and because the NCAA was organized by educational institutions and not athletic departments, the court held that the NCAA's actions reflected a traditional government function.[101]

Though *Parish* was affirmed in subsequent cases, not all courts utilize the public function theory. For example, in *Howard University v. NCAA*,[102] decided the same year as *Parish*, the court focused on the character of NCAA members and found state action under the entanglement theory.[103] The court found a symbiotic relationship to

95. *Id.* at 350-52.
96. *See supra* notes 62-63 and accompanying text.
97. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 364-65 (8th Cir. 1977); Parish v. NCAA, 506 F.2d 1028, 1032-33 (5th Cir. 1975); Howard Univ. v. NCAA, 510 F.2d 213, 217 (D.C. Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254 (9th Cir. 1974). *But cf.* McDonald v. NCAA, 370 F. Supp. 625, 631 (C.D. Cal. 1974). "The NCAA has an existence separate and apart from the educational system of any state." *Id.*
98. 506 F.2d 1028 (5th Cir. 1975).
99. *Id.* at 1033.
100. *Id.* at 1032 n.11.
101. *Id.* at 1032 & n.11.
102. 510 F.2d 213 (D.C. Cir. 1975).
103. *Id.* at 216-20.

exist[104] since approximately fifty percent of NCAA membership is comprised of federal and state funded institutions.[105] Therefore, the court felt it was unnecessary for the government action to be exclusively or directly that of the association before attributing the conduct to the state.[106] In *Howard University*, the entanglement was found to be present when governmental action was one of several "co-operative forces."[107] Under both the public function and entanglement theories, NCAA actions are required to conform to the limitations imposed upon the state by the Constitution. Recent court decisions, however, have altered these traditional notions of state action.

In the 1984 decision of *Arlosoroff v. NCAA*,[108] the fourth circuit undermined the required findings of the traditional public function and government entanglement theories by effectively overruling cases attributing the NCAA's actions to the state.[109] Rejection of the traditional public function theory in *Arlosoroff* was based upon two separate grounds. First, the court interpreted *Rendell-Baker v. Kohn*[110] to reject the premise that "indirect involvement of state governments could convert what otherwise would be considered private conduct into state action."[111] Since all member institutions have an equal voice in the politics of the NCAA,[112] state institutions do not play a more pervasive role than private ones, and the *Arlosoroff* court found the presence of the state to constitute indirect involvement.[113] Thus, the mere fact that approximately one-half of the NCAA is comprised of public institutions cannot in and of itself render the NCAA a state actor.

Second, the court strictly interpreted *Jackson* to require that the function assumed by a private entity be both traditionally and exclu-

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104. *Id.* at 219-20.
105. *Id.* at 219.
106. *Id.*
107. *Id.*
108. 746 F.2d 1019 (4th Cir. 1984).
109. *Id.*
110. 457 U.S. 830 (1982) (holding private school not a state actor even though 90 to 99% of the school's operating budget came from public funds).
111. *Arlosoroff*, 746 F.2d at 1021.
112. NCAA MANUAL, *supra* note 15.
113. *Arlosoroff*, 746 F.2d at 1022; *see also* Barbay v. NCAA, 1987 U.S. Dist. LEXIS 393 (E.D. La.). The *Barbay* decision points out that:

> Although the rules promulgated by the NCAA are followed by public, state-subsidized institutions such as LSU, that fact alone does not require a finding that the decision to promulgate the list of banned substances and the drug testing procedures was the decision of the state. Under *Rendell-Baker*, state regulation or subsidization of an institution will not create a § 1983 cause of action without other evidence. There must be a further showing that the state university caused or procured the adoption of the NCAA regulation in question.

Id. at 13.

sively reserved for the state before being declared state action.[114] Although the NCAA's regulations often overlap the educational aspects of college,[115] the primary function of the NCAA is to regulate intercollegiate athletics.[116] The state has never assumed this function, and despite the state being the most likely candidate to replace the NCAA should it cease to exist, this fact alone is insufficient to find state action.[117]

In addition to invalidating findings of state action based on the public function theory, the court in *Arlosoroff* also rejected cases holding the NCAA to be a state actor under the entanglement theory.[118] Although financial contributions by public institutions account for more than one-half of the NCAA's revenues,[119] the conduct of the NCAA cannot be "fairly attributable to the state."[120] The court found that subsidies provided by state institutions did not "alter the basic character of the NCAA as a voluntary association of public and private institutions."[121] Moreover, because all members, both private and state institutions, have an equal vote, state involvement in the regulatory functions of the association did not compel the adoption of the bylaws establishing the mandatory drug testing program. Therefore, according to the *Arlosoroff* and *Rendell-Baker* decisions, the NCAA is a private actor and thus, the constitutional limitations on state conduct are not applicable to its mandatory drug testing program.[122]

B. In-House Programs

As with all entities whose conduct comes under constitutional scrutiny, state action must be found in an institution's own drug testing

114. *Arlosoroff*, 746 F.2d at 1021.

115. Parish v. NCAA, 506 F.2d 1028, 1032 n.11 (5th Cir. 1975). The NCAA conditions eligibility on academic performance as well as physical capability. *Id.*; *see* NCAA MANUAL, *supra* note 15, at 7, Const. 2-1-(c) (requiring that "eligibility rules . . . comply with satisfactory standards of scholarship . . .").

116. *See generally*, NCAA MANUAL, *supra* note 15, at 7, Const. 2-1.

117. *Arlosoroff*, 746 F.2d at 1021.

118. *Id.* at 1022.

119. *Id.* at 1021.

120. *Id.*

121. *Id.*

122. At the time of this writing, the United States Supreme Court had granted the petition for certiorari filed in Tarkanian v. NCAA, 741 P.2d 1345 (Nev. 1987), *cert. granted*, 108 S. Ct. 1011 (1988). At issue is whether the NCAA is a state actor such that a coach, suspended by a member university in compliance with the NCAA's rules, can challenge the suspension on due process grounds. *Id.*

program in order to successfully sustain a claim under the fourteenth amendment.

1. Public Institutions

Since the 1970's, the United States Supreme Court has recognized that providing public education is a traditional government function.[123] Additionally, lower courts have also found state action by applying the entanglement theory.[124] A public institution is considered a state actor because the state elects or appoints a school's board of regents whose functions include establishing rules, defining procedures, and hiring faculty.[125] As a state actor, the conduct of official school representatives, such as athletic directors, must also be attributed to the state.[126] Therefore, regulations such as the mandatory drug testing of athletes must comply with constitutional restrictions.

2. Private Institutions

Unlike public education, providing private education is not held to be a traditional government function.[127] Unless the court can establish that the state provides financial support or regulates the school such that the state actually compels the challenged conduct, state action does *not* exist.[128] Therefore, mandatory drug testing programs created by private institutions cannot be challenged under the fourteenth amendment.[129]

V. FOURTH AMENDMENT CHALLENGE

A. Application of the Fourth Amendment

The Constitution of the United States expressly guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[130] The fourth amendment, made applicable to the states by virtue of the

123. "Providing public schools ranks at the very apex of the function of the state." Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). "Public education, like the police function, fulfills a most fundamental obligation of government to its constituency." Ambach v. Norwick, 441 U.S. 68, 76 (1979).

124. Lock & Jennings, *supra* note 83, at 586.

125. *Id.*

126. Morale v. Grigel, 422 F. Supp. 988, 996 (D.N.H. 1976); Smyth v. Lubbers, 398 F. Supp. 777, 784 (W.D. Mich. 1975).

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

128. *See supra* notes 75-99 and accompanying text.

129. However, drug testing programs can be challenged under a state constitution which does not require state action, such as California's. Hill & McKeever v. NCAA, No. 619209 (Cal. Super. Ct. Aug. 10, 1988). For instance, the right of privacy granted by Article 1, section 1 of California's Constitution "protects against intrusion by both private and governmental entities." *Id.* at 24; *see also* Schmidt v. Superior Court, 43 Cal. 3d 1060, 742 P.2d 209, 240 Cal. Rptr. 160 (1982).

130. U.S. CONST. amend. IV.

fourteenth amendment,[131] guarantees that individuals are protected against "arbitrary invasions by governmental officials."[132] While fourth amendment challenges were traditionally made in connection with police conduct,[133] the Supreme Court has since held that the fourth amendment reaches conduct of *all* government officials acting in an official capacity.[134] Therefore, a finding of state action is sufficient to invoke the protection of the fourth amendment.

However, before being cloaked with fourth amendment protection, the injured party must establish that: (1) a search and seizure was conducted by a state official without a warrant; (2) the search was unreasonable; and (3) the state official did not procure the injured party's consent.[135] This section will analyze whether the student athletes can successfully challenge mandatory drug testing programs conducted by the state on fourth amendment grounds.

1. Search and Seizure

The fourth amendment protects against unreasonable intrusions upon the human body.[136] In *Schmerber v. California*,[137] the defendant challenged the constitutionality of a blood sample extracted at the request of a police officer while the defendant was unconscious in order to establish his blood-alcohol level.[138] Upon review, the Supreme Court held that the intrusion into the defendant's person constituted a search and seizure[139] and therefore, the constraints of the fourth amendment applied.[140]

When confronted with the question of whether a urine sample constitutes a search, courts have analogized a urinalysis to an involuntary extraction of blood[141] since both involve an intrusion into the

131. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
132. New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).
133. *Id.* at 334-35.
134. *Id.* at 335.
135. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
136. Schmerber v. California, 384 U.S. 757, 767 (1966).
137. 384 U.S. 757 (1966).
138. *Id.* at 758.
139. "Seizure of an individual, within the Fourth Amendment, connotes the taking of one physically or constructively into custody and detaining him. . . ." BLACK'S LAW DICTIONARY 1219 (5th ed. 1979).
140. *Schmerber*, 384 U.S. at 776-78.
141. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 879 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988); National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 386 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

person's body. Courts have further held that taking a urine sample is a search under the fourth amendment even "[t]hough urine, unlike blood, is routinely discharged from the body so that no actual intrusion is required for its collection, [because] it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference."[142] Therefore, under mandatory state drug testing programs, a search and seizure occurs when the student athlete is required to produce a urine specimen.

2. Reasonableness of the Search

Despite the occurrence of an unwarranted search, the urinalysis procedure is not automatically held unconstitutional unless the intrusion into the person's body is unreasonable.[143] Although reasonableness depends upon the context surrounding the search,[144] no exact parameters of what is reasonable have been established.[145] Instead, the courts apply a balancing test to determine whether the state's interest in conducting the search outweighs the intrusion produced by the search.[146] If the state's interest prevails, the search is found to be reasonable.

When public universities established drug testing programs, they had two goals in mind. First, they believed that testing for drugs would deter athletes from using dangerous substances and thereby protect student health and safety.[147] This belief included a reaffirmation that in order to prevent drug use, the athletes needed to be educated on its harmful side effects. Second, the ideal of equitable competition was promoted by ensuring that no athlete would legally have an "artificially induced advantage."[148]

While legitimate interests support the universities' programs,[149] these interests must be weighed against the invasion of the student

142. *Capua*, 643 F. Supp. at 1513.

143. U.S. CONST. amend. IV.

144. *Capua*, 643 F. Supp. at 1513.

145. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

146. *Id.*

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

148. *Id.*

149. O'Halloran v. University of Wash., 679 F. Supp. 997, 1002 (W.D. Wash.), *rev'd*, 1988 U.S. App. LEXIS 12354 (9th Cir. 1988). "We reverse the district court's order denying the motion to remand this case to state court. We remand the action to the district court with directions that the court remand the *entire case* back to the state court from which it was removed." 1988 WL 92211 (9th Cir. 1988) (emphasis added). Because the district court's ruling was reversed only on jurisdictional grounds, the opinion is still persuasive as to the constitutional issues.

athlete's rights. The courts must determine the intrusiveness of the search based upon an individual's legitimate expectation of privacy and the reasonableness of the circumstances surrounding the search.[150] In *Katz v. United States*,[151] the Supreme Court established a two-pronged test in analyzing the legitimacy of an individual's privacy expectations. First, the person must have a subjective expectation of privacy.[152] Second, the individual's subjective expectation of privacy must be recognized as reasonable by society.[153]

The first prong of the *Katz* test is satisfied by the initiation of the constitutional challenge itself. An individual not having an expectation of privacy in the production of a urine specimen will not be challenging the constitutionality of urinalysis procedures. The second prong of the test is evaluated by determining society's views on the reasonableness of the intrusion. Since even public restroom facilities provide individual stalls for privacy, the act of urinating is traditionally considered a private act.[154] Therefore, requiring a student athlete to urinate in the presence of another party is highly intrusive.

However, the intrusiveness of urinalysis alone does not render the search unconstitutional. An additional factor to consider is whether the intrusiveness of the search outweighs the state's interests in conducting the search in light of the surrounding circumstances. The state's interests in detecting drug use will outweigh the intrusion upon the athlete's privacy expectations if the state can establish that: (1) the search was "justified at its inception" and (2) the search "was reasonably related in scope to the circumstances which justified the interference in the first place."[155]

A search is "justified at its inception" when the party conducting it has reasonable grounds, based upon objective facts, for suspecting that the search will reveal evidence of a violation.[156] Mandatory drug testing of athletes is reasonable under two circumstances. First, testing is reasonable if the party conducting it specifically suspects drug

150. *See generally* Katz v. United States, 389 U.S. 347 (1967).
151. 389 U.S. 347 (1967).
152. *Id.* at 361, (Harlan, J., concurring).
153. *Id.*
154. Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986). The individual has "a legitimate expectation of privacy in [his] urine until the decision is made to flush the urine down the toilet and the urine is actually flushed down the toilet." National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).
155. Terry v. Ohio, 392 U.S. 1, 20 (1968).
156. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985); McDonnell v. Hunter, 612 F. Supp. 1122, 1130 (D.C. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

use,[157] and that suspicion is directed toward the student being tested.[158] Second, an entire group of similarly-situated athletes may be tested if a significant number of unidentifiable individuals among the group are suspected of using drugs.[159] However, in *Capua v. City of Plainfield*,[160] the court noted a problem with group testing in that "it casually sweeps up the innocent with the guilty" and forces the innocent party to "submit to a highly intrusive urine test in order to vindicate his or her innocence."[161] This runs contrary to the American legal system which is premised on the belief that an individual is presumed innocent until proven guilty.

Drug testing programs conducted by public universities may not withstand constitutional scrutiny. Two situations frequently arise in which a collegiate athlete may be tested and each must be examined separately. The first analysis involves drug tests conducted during preseason medical examinations, whereas the second analysis is triggered by random drug testing during the regular season.

The constitutionality of preseason drug testing was addressed in *Odenheim v. Carlstadt-East Rutherford Regional School District*.[162] The New Jersey Superior Court in *Odenheim* held that requiring high school students to submit to urinalysis during a mandatory physical examination for the purpose of detecting drug use was unconstitutional.[163] Although upholding the constitutionality of medical examinations performed to protect the health and safety of both student athletes and those coming in contact with them, the court found that drug testing was "not reasonably related in scope to the circumstances which initially justified the interference."[164] Because the school possessed less intrusive means to deal with drug use, the inclusion of drug tests along with preseason physical examinations violated a student's fourth amendment rights as well as the right of privacy.

In contrast to *Odenheim*, the United States District Court in *O'Halloran v. University of Washington*[165] held constitutional a drug testing program implemented by the university which included an annual testing of all collegiate athletes.[166] The court found that

157. *Capua*, 643 F. Supp. at 1516; Lovvorn v. City of Chatanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988); Hill & McKeever v. NCAA, No. 619209 (Cal. Super. Ct. Aug. 10, 1988).

158. *Capua*, 643 F. Supp. at 1516; *Lovvorn*, 647 F. Supp. at 880.

159. City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985).

160. 643 F. Supp. 1507 (D.N.J. 1986).

161. *Id.* at 1517.

162. 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

163. *Id.* at 713.

164. *Id.*

165. 679 F. Supp. 997 (W.D. Wash.), *rev'd*, 1988 U.S. App. LEXIS 12354 (9th Cir. 1988).

166. *Id.* at 998.

the public's interest in preserving the integrity of college athletics, coupled with the institution's interest in protecting the students' health and safety, outweighed the slight intrusion produced by the search.[167] The court studied the initial intrusion created by a required preseason medical examination and held:

> The health of participants in vigorous sports activities is of primary importance to the university and the student athlete, so it follows that health examinations should be very routine. Certainly in the context of health examinations, viewing and touching is tolerated among relative strangers that would be firmly rejected, to say the least, in other contexts. While provision of a urine sample is not extraordinary in an ordinary health examination, witnessing the act is. Nevertheless, in the context of a university's athletic program where student health is a primary interest, monitored urination to preserve the integrity of the urine sample taken as part of an announced program to foster education and deterrence of drug misuse and abuse does not constitute an unreasonable invasion of privacy.[168]

O'Halloran supports the constitutionality of public university drug programs which test athletes during their preseason medical examination.[169] Therefore, based upon the *O'Halloran* court's analysis, drug testing by a public university during a medical examination, designed to determine the athlete's fitness and ability to safely participate in competition, is constitutional.

The second phase of analysis involves the constitutionality of randomly testing athletes during the regular season. Courts have continually held that randomly testing individuals is a fourth amendment violation.[170] Unless the university can point to articulable facts showing a reasonable and individualized suspicion of drug use by a particular athlete, an individual cannot be required to submit to a random drug test.[171] A reasonable, individualized suspicion exists if an athlete tests positive for drugs in a previous legitimate test. Therefore, random drug testing by universities during the regular season is unconstitutional except when applied to those athletes previously testing positive for drug use.

3. Consent

Assuming that a mandatory drug testing program is considered un-

167. *Id.*
168. *Id.*
169. *Id.* at 997.
170. Lovvorn v. City of Chatanooga, 647 F. Supp. 875, 882 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988); Capua v. City of Plainfield, 643 F. Supp. 1507, 1517 (D.N.J. 1986); McDonnell v. Hunter, 612 F. Supp. 1125, 1130 (D.C. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).
171. *See supra* text accompanying notes 157-58.

reasonable, and therefore unconstitutional, the search is nevertheless valid if consent is given.[172] Simply signing a consent form, however, does not amount to a "blanket waiver" of all fourth amendment rights.[173] Only by consenting to a *reasonable* search can an individual waive rights guaranteed under the fourth amendment.[174] In *Schneckloth v. Bustamonte*,[175] the Supreme Court ruled that in order for a consent to be valid,

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified . . . intrusion against which the Fourth Amendment is directed.[176]

Voluntariness is "an individual's ability to choose between alternatives."[177] However, the alternatives must be viable to avoid a coerced consent.[178] For example, an employer who rejects a union's contract proposal and watches his employees strike has made a voluntary, yet hard decision. In contrast, the choice between performing an act or dying constitutes coercion, since death is not a viable alternative. Being forced to make difficult decisions is not an involuntary decision and does not constitute coercion. Therefore, a party who is forced to choose between distasteful alternatives has voluntarily made the decision although the choice was difficult.[179]

In *National Treasury Employees Union v. Von Raab*,[180] the district court carved an exception to the opinion that hard choices are nevertheless voluntary decisions. In *Von Raab*, the District Court determined the constitutionality of the United States Customs Service drug testing plan.[181] Customs Service workers seeking promotion to specific positions enumerated in the plan were required to submit to urinalysis.[182] The plan was less intrusive than those employed by public universities since direct monitor observation was not required.[183] However, promotion was conditioned upon the worker's consent to be tested in a similar manner to intercollegiate athletes who are tested before being eligible for competition.[184] The district court in *Von Raab* held that a worker's consent was involuntary

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172. *Schneckloth*, 412 U.S. 218, 219 (1973).
173. *McDonnell*, 612 F. Supp. at 1131.
174. *Id.*; *see also Schneckloth*, 412 U.S. at 222.
175. 412 U.S. 218 (1973).
176. *Id.* at 228.
177. Comment, *supra* note 37, at 824.
178. *Id.* at 825.
179. *Id.*
180. 649 F. Supp. 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).
181. *Id.*
182. *Id.* at 382.
183. *Id.*
184. *Id.*

where failure to consent resulted in losing employment and government benefits.[185] Although the foregoing alternatives appear more viable than the choice of life or death, the court found that when failure to consent to drug testing results in an individual's loss of a property right, the decision to forego that right is not a viable alternative.[186]

Five months after the *Von Raab* court granted a permanent injunction prohibiting the Customs Service from testing its employees for drugs, the United States Court of Appeals vacated the injunction.[187] The appellate court held that the testing program was reasonable, and therefore, not a violation of the employee's fourth amendment rights.[188] Contrary to the district court's decision, the court of appeals held that the employee's consent was voluntary.[189] The court's rationale was twofold: (1) the employee is voluntarily seeking employment in a "covered position" and (2) the employee's current position is not jeopardized if after applying for a transfer, he later decides to forego the drug test.[190] Therefore, the consent is not coerced and is not a violation of the employee's fourth amendment rights.

Mandatory drug testing programs involving student athletes are similar to the Customs Service drug testing provisions. In order to participate in intercollegiate athletics, the athlete is required to sign two consent forms, the NCAA's "Drug-testing Consent" form and a university consent form.[191] However, unlike the employees of the Customs Service who retain their positions if they refuse to consent to testing, if the athlete refuses to sign either form, eligibility to compete is lost. For many athletes, the loss of eligibility results in revocation of scholarships which may deny the athlete a college education.[192] Athletes, especially those on scholarship, have "a property right of present economic value at stake."[193] Because the athlete is distinguishable from the employee in *Von Raab*, the district court's

185. *Id.* at 388.
186. *Id.* at 390-91.
187. 816 F.2d at 178.
188. *Id.* at 180-81. The Customs Service is justified in testing employees who seek employment in "covered positions." "Covered positions" include jobs where the employee (1) is "directly involve[d] [in] the interdiction of illicit drugs," (2) is required to carry a firearm, or (3) has access to classified information. *Id.* at 178.
189. *Id.* at 178.
190. *Id.* at 173.
191. *See supra* notes 24-25, 42-43 and accompanying text.
192. Comment, *supra* note 37, at 826; *see also* Comment, *supra* note 16, at 224-25.
193. Comment, *supra* note 37, at 826. *But see* Parish v. NCAA, 506 F.2d 1028, 1034 (5th Cir. 1975).

analysis of the consent to drug testing should be utilized. Under this rationale, a scholarship athlete choosing between sustaining economic loss or giving consent is not faced with viable alternatives. Therefore, an athlete's decision to consent is coerced and thus invalid.

Another means of invalidating an athlete's consent is premised on the parties' bargaining positions. In *Hill & McKeever v. NCAA*,[194] the court recognized that "any constitutional right may be waived or bargained away as a result of free bargaining."[195] However, the court found the NCAA to be a monopoly such that the student is placed at a disadvantage and since no other regulatory body exists, the student *must* waive his rights in order to compete in intercollegiate athletics.[196] Accordingly, the court held:

> 'Consent' to drug testing in these circumstances is a fiction. There is no equal bargaining between the athletes and the NCAA. Without free and equal bargaining the theoretical underpinnings of contract law vitiated [sic]. [Citations omitted.] Thus, while a negotiated consent to drug testing may be accepted as a reasonable intrusion, the consent to testing given by student athletes in this case does not render the testing program a reasonable invasion of privacy.[197]

Therefore, based on *Hill & McKeever*, a student athlete's consent is not a valid waiver of his constitutional rights.

VI. THE FUNDAMENTAL RIGHT OF PRIVACY

A. *Privacy Rights of Individuals*

The Constitution does not expressly guarantee an individual's right of privacy. Since 1891, however, the Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[198] Although an individual's fundamental right of privacy is recognized in relation to family interests,[199] the Court has been reluctant to extend that right to one's own body.[200] In 1986, however, the right of privacy was ex-

194. No. 619209 (Cal. Super. Ct. Aug. 10, 1988). Two student athletes at Stanford University challenged the NCAA's drug testing program under California's Constitution. *Id.* The ruling was limited to Stanford athletes, but because of the ramifications of this decision, the NCAA will most likely file an appeal.

195. *Id.* at 6.

196. *Id.*

197. *Id.* at 7.

198. Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891). The Supreme Court has recognized that the right of privacy exists in the Constitution through the first, fourth, and fifth amendments as well as in the penumbras of the Bill of Rights and the ninth amendment. Roe v. Wade, 410 U.S. 113, 152 (1973). The Court has also utilized the fourteenth amendment's guarantee of liberty to find a right of privacy. *Id.*

199. *Roe*, 410 U.S. 413 (abortion); Eisenstadt v. Baird, 405 U.S. 1029 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education).

200. Bowers v. Hardwick, 478 U.S. 186 (1986) (holding Georgia statute criminalizing sodomy constitutional and not violative of a fundamental right of the defendant); *see*

panded to include nonfamilial situations in *National Treasury Employees Union v. Von Raab*.[201] In *Von Raab*, the district court held that the Customs Service drug testing plan violated a worker's constitutional right of privacy.

> The Court finds that the Customs Directive detracts from the dignity of each Customs worker covered under the plan and invades the right of privacy such workers have under the United States Constitution. Excreting bodily wastes is a very personal bodily function normally done in private; it is accompanied by a legitimate expectation of privacy in both the process and the product. The Customs Directive unconstitutionally interferes with the privacy rights of the Customs workers.[202]

When an individual asserts an infringement upon his constitutional right to privacy, the state must show that a compelling interest exists which justifies limiting the individual's rights.[203] The state must also establish that the "legislative enactments [were] narrowly drawn to express only the legitimate state interests at stake."[204] Invasions of privacy, such as the one created by a public institution's drug testing program, have been upheld on the basis that the intrusion was "necessary to protect the health and safety of the general public."[205] Protecting the public's health, safety, welfare, and morals is within the police power of the state[206] and exercising this power is always a legitimate state interest[207] which may rise to the level of a compelling state interest.[208] Therefore, states can infringe upon a person's fundamental right of privacy to preserve the health and safety of the public, provided that the intrusion is the least restrictive means available.[209]

In *Handel v. Shoemaker*,[210] the constitutionality of a New Jersey

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also Gillow, *Compulsory Urinalysis of Public School Students: An Unconstitutional Search and Seizure*, 18 COLUM. HUM. RTS. L. REV. 111, 113 n.10 (1986).

201. 649 F. Supp. 380, 389 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

202. *Id.* In vacating the district court's permanent injunction against the Customs Service, the court of appeals did not have the opportunity to discuss the employee's right to privacy; the union did not use this argument as a basis for supporting the injunction. *Von Raab*, 816 F.2d at 181.

203. *Roe*, 410 U.S. at 155.

204. *Id.*

205. Comment, *supra* note 16, at 228; *see also* Schmerber v. California, 384 U.S. 757 (1966).

206. Euclid v. Amber Realty Co., 272 U.S. 365, 373 (1926).

207. *Id.* at 372-73.

208. Fundamental rights, including an individual's right of privacy, can only be restricted if the state can show a compelling interest in doing so. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

209. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

210. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

Racing Commission regulation allowing stewards to test jockeys, trainers, and grooms for alcohol and drugs was challenged. The court of appeals found that the horse racing industry needed to be highly regulated in order to protect the wagering public who relies on its integrity.[211] The court recognized the jockey's right of privacy regarding the invasion of his body and the medical information revealed by the drug test.[212] However, the court held that substance abuse by jockeys negatively affected the integrity of the industry, and therefore, the state had a strong interest in protecting the wagering public.[213] Because the test results were protected against unauthorized disclosure, the regulation was upheld.

B. Privacy Rights of Student Athletes—Are Mandatory Drug Tests an Invasion?

Although students are subject to the rules and regulations of their university, enrolling at an institution does not waive the student's constitutional rights.[214] University students are afforded the same constitutional rights as any other adult,[215] and thus, the fundamental right of privacy is not diminished by attending college.

When analyzing a public university's drug testing program, it is important to delineate the differences between testing student athletes and testing other individuals such as jockeys. Unlike the highly regulated horse racing industry, intercollegiate athletics are not regulated by the state.[216] Because the state does not regulate college athletics, the student athlete's expectation of privacy is not diminished. Therefore, according to the court's decision in *Von Raab*, there must be a compelling state interest which is accomplished through the least intrusive means in order for a public university's mandatory drug program to pass constitutional muster.

While drug tests have been held constitutional on the grounds that they are essential to protecting the public's perceived integrity of athletic competition,[217] a university's interest in drug testing is unique in that it is not directed at public perception. The primary interests of collegiate drug policies are twofold: (1) the university is seeking to protect the student athlete from the harmful effects of drugs and

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211. *Id.* at 1138. Regulation of the industry reduces a jockey's expectation of privacy and neither a warrant nor consent is needed to perform the search. *Id.* at 1142.

212. *Id.* at 1144.

213. *Id.* at 1142.

214. Smyth v. Lubbers, 398 F. Supp. 777, 785 (W.D. Mich. 1975).

215. *Id.*; *see also* Gillow, *supra* note 200, at 119-20.

216. Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984).

217. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986). *See also Von Raab*, 816 F.2d at 180-81 (drug testing was necessary to protect the integrity of the Customs Service because the employees in "covered positions" are involved in enforcing drug smuggling laws).

(2) the university is fighting to maintain equitable competition.[218] Although the school's interests are limited to student athletes, the Supreme Court has recognized the state's need to attack a public problem, such as drug abuse, in a piecemeal fashion.[219]

Regulations designed to curb drug use among athletes must be narrowly tailored to fulfill legitimate state interests. Randomly selecting athletes to be tested is not the least intrusive means to detect drug abuse and poses several problems. First, the program presumes all athletes guilty until proven innocent by requiring them to forego their right of privacy and submit to urinalysis. The least intrusive means to combat the drug problem and protect the health of student athletes would be testing only those athletes suspected of drug use.

Another problem associated with random testing is the manner in which information acquired from the test results is disseminated. The athlete's fundamental right of privacy encompasses all information concerning his body.[220] Furthermore, the Supreme Court recognizes an individual's privacy right in medical information.[221] A public university's drug testing program should contain explicit provisions stipulating methods of disclosure in order to keep results confidential and protect the privacy rights of the athlete. Effective methods of disclosure are essential because of the publicity that athletes appearing in postseason competitions attract.[222]

VII. PROPOSAL FOR A DRUG TESTING PROGRAM FOR COLLEGE ATHLETES

Although the constitutionality of mandatory drug testing programs in college athletics may legitimately be attacked, it is difficult to argue with the policies behind such programs and the intentions of the

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

219. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

220. Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *see also Recent Developments—Constitutional Law: The Fourth Amendment and Drug Testing in the Workplace*, 10 HARV. J.L. & PUB. POL'Y 762, 764 (1987).

221. *Shoemaker*, 795 F.2d at 1144 (citing Whalen v. Roe, 429 U.S. 589 (1977)).

222. The absence of a starting player is not as noticeable during the regular season compared to the athlete's absence during postseason competition. Interview, *supra* note 44. During the regular season, students are unable to compete for various undisclosed reasons, such as academic ineligibility or injury. *Id.* However, the absence of a starting player during postseason competition receives much publicity. Neff, *supra* note 27; *see also* Hill & McKeever v. NCAA, No. 619209 (Cal. Super. Ct. Aug. 10, 1988) at 11. "It is virtually impossible to avoid media attention and speculation when an otherwise eligible student is declared ineligible for a bowl game or championship competition because of a positive drug test." *Id.*

NCAA and individual institutions. Drug use and abuse is a widespread problem facing all aspects of society, not just sports. Universities are providing an integral service to athletes by educating them on the hazards of drug use and abuse and providing counseling to those athletes already involved with drugs. In 1988, the NCAA's postseason testing combined with the National Football League's scouting tests revealed a decline in the number of college football players testing positive for drugs.[223] It is therefore essential to maintain testing, but guidelines must be established to protect the athlete's constitutional rights. This comment proposes a drug testing program able to pass constitutional muster.

Since the key factor in determining constitutionality is whether the state's interests outweigh the invasion of the athlete's rights,[224] it is important that the program specifically state the testing institution's goals and interests. Legitimate interests include protecting the athlete's health and safety as well as maintaining fair and equitable competition.[225] However, such recognized interests are not sufficient in and of themselves to tip the scales in favor of the state. Athletes must also have notice of both the testing procedures as well as the types of substances which will trigger positive test results. Only substances affecting the athlete's health and safety or those enhancing performance should be tested; otherwise, the student athlete may argue that the testing procedures have no rational relation to the interests of the state.[226]

In addition, the program must be implemented in a fashion which best facilitates the state's goals. Because athletes are becoming more skilled at establishing patterns of drug use which elude detection by urinalysis, testing must occur throughout the regular season as well as postseason competition. One particular flaw of the NCAA's program is that it tests only those athletes or teams who excel in their sport.[227] This number is relatively small considering the total

223. L.A. Times, Mar. 10, 1988, § III, at 6, col. 2. Statistics are unavailable to show whether the implementation of testing actually produced the decrease in positive test results, or whether players learned how far in advance they could use drugs without testing positive. *Id.*

224. *See supra* note 49 and accompanying text.

225. O'Halloran v. University of Wash., 679 F. Supp. 997, 1007 (W.D. Wash.), *rev'd*, 1988 U.S. App. LEXIS 12354 (9th Cir. 1988).

226. *Id.* All substances contained in Appendix A are performance enhancing. "[T]he classes of drugs banned are 'misused or abused in sport primarily for the purpose of improving performance . . . all the drugs which are banned provoke adverse effects and untoward reactions which may be detrimental to a student-athlete's present and future health.' " *Id.* at 1006. *But see* Hill & McKeever v. NCAA, No. 619209 at 16-18 (Cal. Super. Ct. Aug. 10, 1988) (substances banned by NCAA do not enhance performance).

227. *See supra* note 27 and accompanying text.

number of competitors in intercollegiate athletics.[228] Testing all athletes after every competition would best achieve the desired results but would be unfeasible.[229] Even testing all athletes at least once during their season is not feasible since such tests are expensive and only a limited number of laboratories are equipped to adequately handle urinalysis.[230] Therefore, the best method of selecting which athlete to subject to urinalysis is by choosing those athletes reasonably suspected of individualized drug use.

According to the courts, establishing individualized suspicion is not as difficult as it appears, and searches based upon suspicion have been recognized as constitutional.[231] The intrusiveness of a search is minimized when the state can establish a reasonable basis for its need to conduct a search of a specific individual.[232] In the *Capua* decision, the court noted: "Certainly one so under the influence of drugs as to impair the performance of his or her duties must manifest some outward symptoms which, in turn, would give rise to reasonable suspicion."[233] In reality, however, it is almost impossible to determine whether an athlete is taking drugs.[234] Even if recognizing those athletes using drugs was impossible, an individual's constitutional right to privacy cannot be jeopardized absent a compelling state interest.[235] Therefore, it is better to let an athlete using drugs go undetected than intrude on his constitutional rights.

In addition to a constitutional selection process, the method of col-

228. The University of Washington has 698 athletes competing in intercollegiate athletics. *O'Halloran*, 679 F. Supp. at 999. There are approximately 800 member institutions of the NCAA. Karmanos v. University of Mich., 816 F.2d 258, 260 (6th Cir. 1987).

229. Testing all student athletes would be constitutional because "there are reasonable grounds for believing that urine tests of student-athletes will turn up evidence of misconduct—inappropriate drug use." *O'Halloran*, 679 F. Supp. at 1004.

230. NIDA, *supra* note 28; *see also*, Neff, *supra* note 27, at 23.

231. *See supra* note 174.

232. Gillow, *supra* note 200, at 124-25.

233. Capua v. City of Plainfield, 643 F. Supp. 1507, 1518 (D.N.J. 1986).

234. "[T]here is a 'practical impossibility of detecting by observation alone the use of anabolic steroids, depressants and even stimulants in most cases.' " *O'Halloran*, 679 F. Supp. at 1007) (quoting Professor Dugal, International Olympic Committee Medical Commission member). *But see* Hill & McKeever v. NCAA, No. 619209 at 23 (Cal. Super. Ct. Aug. 10, 1988). "There are factors which can give rise to a clinical suspicion of use of anabolic steroids, including large increases in weight over a short period of time, aggressive behavior, pimples, body odor, changing hair patterns and others." *Id.*; Comment, *Random Urinalysis: Violating the Athlete's Individual Rights?*, 30 How. L.J. 93, 95 (1987). "An athlete's use of drugs is likely to result in irregular attendance at practices and games, in sub-par performance due to impaired reflexes, coordination and endurance . . . ." *Id.*

235. Roe v. Wade, 410 U.S. 113, 155 (1973).

lecting the urine specimen must include constitutional safeguards. Requiring an athlete to urinate in the presence of another person prevents any doctoring of the sample. Yet, such a collection process also violates the athlete's right of privacy.[236] However, an unadulterated urine sample can be obtained by less intrusive means without jeopardizing the athlete's right to privacy. For instance, a clean sample can be obtained if the bathroom is sanitized.[237] To prevent the athlete from bringing another person's urine into the bathroom, a monitor of the same sex may pat down the athlete's outer clothing to detect any concealed containers.[238] By eliminating the monitoring of the collection process, the intrusion is minimized, thereby protecting the athlete's privacy rights.

Finally, it is essential that the program provide an appeals process as well as effective sanctions. Because of the possibility of a false positive result, an athlete testing positive must be given the opportunity to have his sample retested by a different method, preferably gas chromotography/mass spectrometry. Only after confirmation of the positive test result should the athlete be sanctioned. However, merely punishing the athlete by suspending eligibility does not fully achieve the state's goals. The state should make counseling and rehabilitation programs available to the athlete. Otherwise, the state's interest in protecting the athlete's health and safety is not fostered.

Since athletic ineligibility will not always encourage athletes to change their habits, those capable of participation should be allowed to continue competing on the condition that they also take part in a counseling or rehabilitation program. By conditioning eligibility in this manner, athletes are more likely to stop using drugs. Loss of eligibility alone is not the solution because it places the athlete outside the control of the athletic department's drug testing and counseling programs. Although it is important to keep the athlete involved in the athletic program, stricter sanctions, such as suspension, must be utilized if the athlete continues to use drugs.

VIII. CONCLUSION

The constitutionality of the NCAA's drug testing program is difficult to challenge under the federal constitution because the current judicial trend is that the NCAA is a private entity, and not a state actor. Therefore, the NCAA need not conform to the constitutional limitations imposed upon state action by the fourteenth amendment.

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236. *See supra* note 203 and accompanying text.

237. Hill & McKeever v. NCAA, No. 619209 at 2-3, 5 (Cal. Super. Ct. Aug. 10, 1988).

238. Terry v. Ohio, 392 U.S. 1, 27 (1968). A limited search, conducted by patting down the individual's outer clothing, is not intrusive when there exists reasonable suspicion that the individual is concealing something. *Id.*

Like the NCAA, private universities need not be concerned with the constitutionality of their programs under the state action doctrine since they are not state actors. However, the NCAA drug testing program, as well as private institutions' programs may be challenged under a state constitution not requiring state action.[239]

Meanwhile, public universities, as state actors, must mold their drug testing programs to conform to the Constitution. Based upon cases involving drug testing in the workplace, the random testing aspect of public university programs violates an individual's constitutional rights. Although the interests which support testing are legitimate, an individual's constitutional rights should not be sacrificed.

> The threat posed by the widespread use of drugs is real and the need to combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections. A combination of interdiction, education, treatment, and supply eradication will serve to reduce the scourge of drugs, but even a reduction in the use of drugs is not worth a reduction in our most cherished constitutional rights.
>
> The public interest in eliminating drugs in the workplace [and in college athletics] is substantial, but to invade the privacy of the innocent in order to discover the guilty establishes a dangerous precedent; one which our Constitution mandates be rejected.[240]

ALLISON ROSE

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239. Hill & McKeever v. NCAA, No. 619209 (Cal. Super. Ct. Aug. 10, 1988). Although the current ruling applies only to Stanford athletes, future decisions rendered on appeal could affect all California institutions. Telephone interview with Mary Ann Seawell, Stanford University News Service (Aug. 25, 1988). This case will most likely be appealed because of the radical effect it will have on drug testing programs in both public and private universities, as well as the NCAA.

240. Capua v. City of Plainfield, 643 F. Supp. 1507, 1522 (D.N.J. 1986).

APPENDIX A
NCAA BANNED DRUG CLASSES
1987-88

The following is a list of banned substances as printed in the 1987-88 NCAA Drug-Testing Program as enacted by Executive Regulation 1-7-(b).

(1) Psychomotor and central nervous system stimulants:

amiphenazole
amphetamine
bemignoe
benzphetamine
caffeine
chlorphentermine
cocaine
cropropamide
crothetamide
diethylpropion
dimethylamphetamine
doxapram
ethamivan
ethylamphetamine
fencamfamine
meclofenoxate
methylamphetamine
methylphenidate
nikethamide
norpseudoephedrine
pemoline
pentetrazol
phendimetrazine
phenmetrazine
phentermine
picrotoxine
pipradol
prolintane
strychnine
AND RELATED COMPOUNDS

(2) Sympathomimetic amines:

clorprenaline
ephedrine
etafedrine
isotharine
isoprenaline
isoprenaline
methoxyphenamine
methylephedrine
phenylpropanolamine
AND RELATED COMPOUNDS

(3) Anabolic steroids:

clostebol
dehydrochlormethyl-testosterone
fluoxymesterone
mesterolone
methenolone
methandienone
nandrolone
norethanddrolone
oxandrolone
oxymesterone
oxymetholone
stanozolol
testosterone
AND RELATED COMPOUNDS

(4) Substances banned for specific sports:

Rifle:

alcohol
atenolol
metroprolol
nadolol
pindolol
propranolol
timolol
AND RELATED COMPOUNDS

(5) Diuretics:

acetazolamide
bendroflumethiazide
benzthiazide
bumetanide
chlorothiazide
chlorthalidone
ethacrynic acid
flumethiazide
hydroflumethiazide
methyclothiazide
metolazone
polythiazide
quinethazone
spironolactone
triamterene
trichlormethiazide

furosemide
hydrochlorothiazide

(6) Street drugs:
amphetamine
cocaine
heroin

AND RELATED
COMPOUNDS

marijuana
methamphetamine
THC (tetrahydrocannabinol)
OTHERS