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Walter T. Champion Jr.

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# THE NCAA'S DRUG TESTING POLICIES: WALKING A CONSTITUTIONAL TIGHTROPE?

WALTER T. CHAMPION, JR.\*

## I. INTRODUCTION

When you stride to the plate in a wheezer and geezer softball game, your mind may focus on many pressing concerns; for example, your 0-for-20 streak. But one thing you don't dwell on is the possibility of the softball league's testing you for drug use.<sup>1</sup>

Drug testing in softball certainly does sound absurd. However, it appears as if drug testing will be the norm for college athletes. The National Collegiate Athletic Association (NCAA) has stressed the desirability of year-round drug testing as the standard for all of its member schools.<sup>2</sup> The Southwest Conference has picked up the NCAA's baton and initiated a random drug testing program for its athletes.<sup>3</sup> Although drug testing is not new in sports, these recent developments appear to be a giant step in the invasion of the athlete's right to privacy.

In recent years, the NCAA has tested for both street drugs (*e.g.*, cocaine) and enhancement drugs (*e.g.*, steroids) during post-season tournaments. The NCAA also requires that all athletes sign a consent form that allows for drug testing.<sup>4</sup> This signed, somewhat forced, "consent" form is a prerequisite for athletic participation.

But what about the privacy dilemma that arises from drug testing? Drug testing requires urinalysis, and one could argue that urine is certainly a private matter. The courts, however, generally do not concur with this analysis.<sup>5</sup> Most courts feel that athletes do not have a legitimate expectation of privacy in this type of situa-

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\* Associate Professor of Law and Director of the Law Library, at Texas Southern University Law School; B.A., St. Joseph's University; M.A., Western Illinois University; M.S., Drexel University; J.D., Temple University. He is also the author of the recent treatise, *FUNDAMENTALS OF SPORTS LAW*, portions of which were used to write this article.

1. Champion, *Drug Tests: Bane or Benefit? Athletes' Rights Shorted*, Houston Chron., May 13, 1990, at 24B.

2. *Id.*

3. Lindberg, *Drug Tests: Bane or Benefit? SWC'S program excels*, Houston Chron., May 13, 1990, at 24B.

4. BYLAW art. 14.1.3, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL, 1991-92, at 1-120.

5. See generally *Schail v. Tippecanoe County School Corp.*, 679 F. Supp. 833 (N.D. Ind. 1988), *aff'd* 864 F.2d 1309 (7th Cir. 1988) (*Schail* held that random urine testing of public school athletes did not violate the fourth amendment); W. CHAMPION, *FUNDAMENTALS OF SPORTS LAW* 383-85 (1990).

tion. An athlete's expectation of privacy is diminished by a pattern of testing that ordinarily accompanies athletic involvement (pre-season physical), by the mechanisms of the test itself (urinating in a closed stall with the "monitor" outside listening for the appropriate sounds) and the general condition of athletic involvement (for lack of a better term, the locker room mentality).<sup>6</sup>

Another possible attack on drug testing of college athletes is that it is a violation of the student's equal protection rights. A student's equal protection rights could be interpreted to require equal treatment of all students. That is, athletes who participate in a laudatory extracurricular activity will be subjected to drug testing, while collegiate couch potatoes come under no such scrutiny. Is that fair? The courts say that it is.

Since athletes are not a suspect classification, and athletic participation is not a fundamental right, the standard for evaluating the constitutionality of mandatory and random drug testing is merely one of minimal rationality. The drug testing program must have only a rational relation to a compelling interest: namely, the laudable goal of controlling drug usage in our colleges. This is a test that the NCAA will never lose.

## II. WHY WE TEST

American society has fallen behind Nancy Reagan: Everyone wants to just say, "No." This healthy preoccupation with drug usage has, of course, filtered into sports. Tragically, this has been emphasized over and over again with the death of Len Bias, the expulsion of Ben Johnson from the Olympics, and Dexter Manley's "life ban" from the NFL, among others.<sup>7</sup> If, *arguendo*, Americans want a clean society, they must also want athletes who are clean. This is certainly understandable, since athletes are a role model to susceptible American youth. This understandable emphasis has taken the form of a near mania, with drug testing in all branches and at all levels of sports. The policies of different sports toward the use of drugs by players cover the gamut, from statutory

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6. *Schail v. Tippecanoe County School Corp.*, 679 F.Supp. 833 (N.D. Ind. 1988), *aff'd* 864 F.2d 1309 (7th Cir. 1988). See generally Comment, *Search and Seizure — Suspicionless Drug Testing of Student Athletes in the Public Schools — Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), 103 HARV. L. REV. 591 (1989); Comment, *Is Innocence Forever Gone? Drug Testing High School Athletes. Schail v. Tippecanoe County School Corp.*, 54 MO. L. REV. 425 (1989); and Annotation, *Validity Under Federal Constitution of Regulations, Rules or Statutes Allowing Drug Testing of Students*, 87 A.L.R. FED. 148 (1988).

7. *Manley Banned: Reinstatement Possible After a Year*, Houston Chron., Nov. 19, 1989, at 13B.

requirements for mandatory drug testing to collective bargaining and voluntary programs. However, there is a limit to the range and breadth of the various drug testing programs. These parameters are set by the United States Constitution.<sup>8</sup>

One can say that Len Bias did not die in vain. The NCAA has provisions that require all athletes to sign a consent form to drug testing as part of their statement pertaining to eligibility, recruitment aid, amateur status, and involvement in organized gambling activities concerning intercollegiate athletic competitions.<sup>9</sup> Failure to adhere to this statement will render the student ineligible to participate in all competition.<sup>10</sup> The NCAA also has a random, mandatory drug testing program in connection with post-season intercollegiate athletic activities. A student found to be using a substance on the NCAA's list of banned drugs will be ineligible for post-season competitions for 90 days after the test date. If he or she still tests positive after being restored to eligibility, he or she will lose one season of post-season eligibility in all sports.<sup>11</sup>

Until recently, the NCAA could directly test students for drugs only in post-season play. However, in the fall of 1990, the NCAA will begin a year-round drug testing program.<sup>12</sup> The individual colleges and the athletic conferences can also supplement the NCAA's program. The NCAA, in turn, has published suggested guidelines for its member schools covering the appropriate drug screening program.<sup>13</sup>

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8. W. CHAMPION, FUNDAMENTALS OF SPORTS LAW 376 (1990).

9. BYLAW art. 14.1.3, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL, 1991-91, at 120; see also Roth, *Sports Policies Toward the Use of Drugs by Players*, 31 BOSTON B.J. 28 (July 1987); Ayers, *Random Urinalysis: Violating the Athlete's Individual Rights?*, 30 HOWARD L.J. 93 (1987); Meredith, *The NCAA Declares War: Student Athletes Battle the Mandatory Drug Test*, 16 CAP. U.L. REV. 673 (1987); Scanlan, *Playing the Drug Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument*, 62 IND. L.J. 863 (1986-87); and Johnson & Ritter, *The Legality of Testing Student Athletes for Drugs and the Unique Issue of Consent*, 66 OR. L. REV. 895 (1987).

10. See generally Covell & Gibbs, *Drug Testing and the College Athlete*, 23 CREIGHTON L. REV. 1 (1989-90); *Recent Developments — Playing by the Rules? A Legal Analysis of the U.S.O.C. — Soviet Olympic Committee Doping Control Agreement*, 25 STAN. J. INTL. L. 611 (1989); Rose & Girard, *Drug Testing in Professional and College Sports*, 36 KAN. L. REV. 387 (1988); Note, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights*, 16 PEPPERDINE L. REV. 45 (1988); and Brock & McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505 (1988).

11. W. CHAMPION, FUNDAMENTALS OF SPORTS LAW 380 (1990).

12. Lindberg, *Drug Tests: Bane or Benefit? SWC Program Excels*, Houston Chron., May 13, 1990, at 24B.

13. BYLAW art. 14, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL, 1991-92, at 117; Bartimole, *Q & A with Dick Schultz: The Executive Director of the NCAA Sounds Off on a Variety of Timely Subjects*, Touchdown Illustrated (Univ. of Houston) n.p. (Oct. 13, 1990) (discussing N.C.A.A. drug policy).

### III. THE GREAT LOYALTY OATH CRUSADE

It appears that the NCAA, the colleges, and the conferences are consumed in a frenzy of out-doing the other with the number, intensity, strength, and fervor of their respective drug testing programs. It is forgotten, of course, that the phrase a "drug-free America," is an oxymoron. America has never been "drug-free." If booze is categorized as a drug, then probably no college student is drug-free (at least none that I remember). It seems illogical to penalize the college athlete unless *every* college student is tested. Any student involved in an extracurricular activity should expect to be tested.

Another important point is that current NCAA drug testing does not test impairment at the point of testing; instead, it measures the history of usage. The focus should be on whether the athlete is impaired directly before the game, as opposed to whether he smoked a joint eight weeks ago. Drug testing should be used to protect both the player and his opponent from possible injuries due to that athlete's impairment. The object should not be to monitor every aspect of an athlete's life.

The NCAA is not Big Brother. We are not living in an Orwellian 1984. There is a Constitution out there somewhere. How much intrusion into a student's privacy must we allow in an attempt to transform athletes into saints? Even though they're both from Kansas, the NCAA is not the Wizard of Oz. Only when we test Phi Beta Kappas, would it make sense to test athletes. Certainly, one group is no more of an inspiration to America's youth than the other. Why should athletes be penalized for using their brains and brawn to succeed as opposed to those who only use their brains? In short, test everyone or test no one.

The NCAA's new drug testing program emanated from its somewhat rocky annual convention in January, 1990.<sup>14</sup> Basically, the NCAA approved harsh penalties for drug use, especially steroids, and launched year-round testing of athletes. This year-round program will begin by testing football players at every Division I school for steroids and masking agents. Under these measures, first-time offenders could lose an entire year's eligibility. Those who test positive a second time for street drugs (*e.g.*, cocaine, marijuana, etc.) will lose another year of eligibility, but athletes caught using steroids twice will be banned from college sports for life.

At least in football, mandatory year-round drug testing is now

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14. *NCAA Ok's Harsh Drug-Abuse Penalties*, Houston Chron., Jan. 11, 1990, at 4B.

a reality. Dick Schultz, the NCAA's executive director, put it this way:

This is designed to eliminate any athletes who may, for instance, be cycling anabolic steroids with water-based steroids. Under the current system, anyone who knows far enough in advance when a drug test is to occur can make [sure] certain traces of steroids are cleared from his or her system. Though we've had a low incidence of positive results in our drug-testing program, I sometimes think we're catching only the dumb ones. The ongoing, mandatory testing should help us to eliminate this and any abuse of anabolic steroids.<sup>15</sup>

Since the NCAA does not catch many athletes, they automatically assume that the reason behind their low catch rate is that they are out-smarted, rather than the more logical conclusion that athletes do not abuse drugs.

All this is very upsetting. Picture in the not too distant future a long line of athletes: one group urinating, another signing consent forms, yet another chanting the Nancy Reagan Pledge. All this before they can collect their helmets and enter the playing field.

This tableau is shockingly reminiscent of *Catch-22's* Great Loyalty Oath Crusade, where at every turn in his existence, the poor soldier had to prove and re-prove his loyalty:

[t]he more loyalty oaths a person signed, the more loyal he was . . . .

'The important thing is to keep them pledging' . . . It doesn't matter whether they mean it or not. That's why they make little kids pledge allegiance even before they know what "pledge" and "allegiance" mean.'

To Captain Pitchard and Captain Wren, the Glorious Loyalty Oath Crusade was a glorious pain in the ass, since it complicated their task of organizing the crews for each combat mission. Men were tied up all over the squadron signing, pledging, and singing, and the missions took hours longer to get under way.<sup>16</sup>

The only difference between the above and today's testing

15. Bartimole, *Q & A with Dick Schultz: The Executive Director of the NCAA Sounds Off on a Variety of Timely Subjects*, Touchdown Illustrated (Univ. of Houston) n.p. (Oct. 13, 1990).

16. J. Heller, *Catch-22* 113-14 (1955).

mania is that the athlete now must pledge and re-pledge his drug-free purity in a never-ending and non-achievable attempt to please the NCAA drug czars.

#### IV. CALIFORNIA HERE WE COME

The NCAA's drug testing program has been described as an "Orwellian theater of paranoia."<sup>17</sup> This paranoia, coupled with the NCAA's victory in *Tarkanian*,<sup>18</sup> in which the NCAA's actions were categorized as not state action, have strengthened the NCAA's power, position, and prestige.<sup>19</sup>

However, in the last three years there has been a beacon of light from California in the form of an unpublished opinion that has been faxed (in a brown paper cover) from one ACLU office to another.<sup>20</sup> This opinion, *Hill v. NCAA*,<sup>21</sup> written by Judge Conrad Rushing of Santa Clara County Superior Court, permanently enjoined the NCAA from requiring athletes at Stanford University to participate in their mandatory drug testing program during post-season play. Judge Rushing decided that this program violated the student's privacy rights by requiring them to reveal potentially sensitive medical information and to be tested while being watched by an NCAA official.<sup>22</sup>

Good stuff, but a California lower court opinion just does not carry much weight. The NCAA did not pause more than a second. Instead, the NCAA pushed forward on its appeal and strengthened its testing program.<sup>23</sup> However, on September 25, 1990, the California Court of Appeals affirmed Judge Rushing's decision and found that the NCAA's drug testing program violated the student's right of privacy.<sup>24</sup> This is big news that will certainly get the

17. *The NCAA goes after drugs*, SPORTS ILLUSTRATED, Oct. 6, 1986, at 75.

18. *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

19. See generally Sullivan, *Hounds Corner Tarkanian: NCAA Ready to Bring Down UNLV Coach*, Houston Chron., Nov. 18, 1990, at 1B (discussing the NCAA pursuit of University of Nevada-Las Vegas coach Jerry Tarkanian).

20. *Hill v. NCAA*, No. 619209, slip op. (Cal. Super. Ct., Aug. 10, 1988).

21. *Id.*

22. *Id.* See also Evans, *The NCAA Drug Program: Out of Bounds But Still in Play*, 19 J.L. & EDUC. 161 (1990); Lederman, *NCAA's Drug Tests of Athletes at Stanford U. Barred by Cal. Judge*, CHRON. HIGHER ED., Sept. 1, 1988, at A30; and *The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy?*, 23 U.S.F. L. REV. 253 (1989).

23. See *NCAA Ok's Harsh Drug-Abuse Penalties*, Houston Chron., Jan. 11, 1990, at 4B; and Bartimole, *Q & A with Dick Schultz: The Executive Director of the NCAA Sounds Off on a Variety of Timely Subjects*, Touchdown Illustrated (Univ. of Houston) n.p. (Oct. 13, 1990). The NCAA's current object of abuse appears to be to eradicate the usage of anabolic steroids by collegiate athletes.

24. *Hill v. NCAA*, 223 Cal. App. 3d 1642, 273 Cal. Rptr. 402 (1990). Rehearing of this case has been granted by the California Supreme Court. 276 Cal. Rptr. 319, 801 P.2d 1070

attention of the NCAA.

The NCAA's drug testing program demanded that each student sign a consent form. Testing during post-season play is conducted like this:

Subjects are required to disrobe from the area of their armpits to their knees, exposing their genitals, and to produce a urine specimen of at least 100 milliliters while under visual observation. If a subject is unable to 'fill the beaker,' he or she is given fluids and required to remain under the observation of the NCAA validator until successful.<sup>25</sup>

Not surprisingly, the *Hill* plaintiffs grounded their claims on the right of privacy as explicitly guaranteed by the California Constitution.<sup>26</sup>

The *Hill* court averred that the California Constitution was intended to reach both governmental and nongovernmental conduct.<sup>27</sup> And even though the NCAA is a voluntary, private association, "privacy is protected not merely against state action, [but] it is considered an inalienable right which may not be violated by anyone."<sup>28</sup>

Since urine is subject to protection, and since the tests are an intrusion into a student's privacy, the next step is to decide whether the NCAA has a compelling interest in conducting and maintaining these drug tests.<sup>29</sup> The test must be judged by balancing the intrusion on an athlete's fourth amendment freedom against the NCAA's so-called compelling interests.<sup>30</sup>

The NCAA could not prove that athletes use drugs more than non-athletes,<sup>31</sup> and, in fact, "they actually use drugs less during the

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(Cal. 1990). The rehearing has not yet occurred as of the publication of this article, so the issue remains open.

25. *Hill*, 273 Cal. Rptr. at 405. The NCAA's list of banned drugs include some substances that occur naturally in food, in legal prescriptions, and over-the-counter medications, as well as illegal drugs. *Id.* Students are asked to declare the menu of substances that they have consumed during the two weeks prior to the test. *Id.* One then is forced to disclose the use of such mundane necessities as birth control pills, herbal tea, Visine Eye Drops, Sudafed, nose spray, and Vicks Inhaler. *Id.*

26. *Id.* at 406. See CAL. CONST. art 1, § 1.

27. *Hill* 273 Cal. Rptr. at 408 (citing *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1041-43, 264 Cal. Rptr. 194, 200 (1989)).

28. *Hill*, 273 Cal. Rptr. at 408 (quoting *Porter v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976)).

29. *Hill*, 273 Cal. Rptr. at 408, 409.

30. *Id.* at 409. See also *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

31. *Hill*, 273 Cal. Rptr. at 413.



athletic season than their peers."<sup>32</sup> There also were problems regarding the accuracy of the test procedure, "[s]tarting with the urine collection and chain of custody procedures."<sup>33</sup> Moreover, "technician error is always a possibility and could cause a false positive."<sup>34</sup> Another caveat is that "[t]here is a point at which presence of an anabolic steroid becomes judgment or guesswork, and the NCAA labs do not have independent lab confirmation of the test results."<sup>35</sup>

Article I, section 1 of the California Constitution protects the privacy interests associated with the collection and testing of an individual's urine.<sup>36</sup> Let's face it, there really is nothing more "private than the passing of urine."<sup>37</sup> Keeping one's medical records private (*e.g.*, a co-ed's birth control history)<sup>38</sup> is also protected by the California Constitution.<sup>39</sup> Therefore, an athlete's right to privacy should only be abridged when there is a compelling public interest.<sup>40</sup>

"Since the NCAA program invades a protected constitutional interest, the NCAA must show that the utility of imposing the program manifestly outweighs any resulting impairment of the constitutional right."<sup>41</sup> The NCAA manufactured two reasons: one to protect the health and safety of the student-athletes, and the other

32. *Id.* Even with NCAA statistics, little drug use was discovered. The trial court stated:

Secondly, as to male students, in 1986-87 NCAA drug testing, 3,511 were tested and only 34, less than 1 percent, were declared ineligible. 31 of the 34 ineligible were football players and 25 of those tested positive for anabolic steroids; that is, 2.5 percent (25 out of 1,008). The only other ineligible were in track and field (1 steroid out of 528) and basketball (2 cocaines out of 320).

In the 1987-1988 NCAA testing, 1,589 athletes were tested and 21 of those (1.3%) were declared ineligible. Seven sports were tested, but the only positive findings were in football. Out of 1,425 football players tested, 21 (1.4%) were declared ineligible. One student was responsible for two of the positives, probably one of the cocaine and one of the marijuana. Even assuming the 21 positives represent 21 different players, only 7 football players were ineligible for steroids (0.5%) . . . and 5 for cocaine (0.3%).

*Id.*

33. *Id.* at 415.

34. *Id.*

35. *Id.*

36. *Hill*, 273 Cal. Rptr. at 416 (citing *Luck v. Southern Pacific Transp. Co.*, 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (1990)).

37. *Hill*, 273 Cal. Rptr. at 416.

38. *Id.* at 417. Also, since the right to procreative choice is a fundamental right that falls within the other rights of privacy, the requirement that female athletes declare their use of birth control pills would also invade this right. *Id.* (citing *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 162, 219 Cal. Rptr. 387, 707 P.2d 760 (1985)).

39. *Hill*, 273 Cal. Rptr. at 417 (citing *Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 228 Cal. Rptr. 545 (1980)).

40. *Hill*, 273 Cal. Rptr. at 417 (citing *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130, 610 P.2d 436, 439 (1980)).

41. *Hill*, 273 Cal. Rptr. at 417.

to preserve fair and equitable competition.<sup>42</sup> The court countered that there was "no evidence that any college athlete had even been injured in competition as a result of drug use."<sup>43</sup> The court further noted:

The court [below] found that although it was uncontroverted that all the drugs on the NCAA banned list could be harmful to health if misused, that is true for all substances. Aspirin and even water can be dangerous if misused.

Moreover, even if student-athletes were not drug-free, it was undisputed that their drug use was no greater than that of other students and therefore there was no compelling need for drug testing of athletes based on their health.

Furthermore, there was no evidence that any student-athlete had ever injured anyone else as a result of drug use. Unlike pilots and railroad workers, athletes are not responsible for the safety of others.<sup>44</sup>

Another interesting caveat was that since many of the NCAA's banned drugs were over-the-counter or prescribed drugs that are designed to promote health, the banning of these useful medications might even be harmful to the athlete's health and safety.<sup>45</sup>

The *Hill* court also wondered why the NCAA ignores the far greater dangers of alcohol abuse and smoking if their goal is to truly promote the safety of the athletes.<sup>46</sup> Also, the NCAA does not provide any counseling, rehabilitation, or education along with their testing.<sup>47</sup> Identification without treatment will not improve the athlete's health or safety.

As regards the NCAA's second rationale, that of preserving fair and equitable competition, the court found that none of the banned drugs would enhance performance.<sup>48</sup> The court believed that the "NCAA did not establish a compelling need for drug testing."<sup>49</sup> Therefore, it was unfair to single out athletes.<sup>50</sup> Also, the NCAA's program could not even accomplish its stated task, which

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42. *Id.* at 417-18.

43. *Id.*

44. *Hill*, 273 Cal. Rptr. at 418.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Hill*, 273 Cal. Rptr. at 420.

50. *Id.*

was to determine whether banned substances were used in preparation for, or participation in, post-season play.<sup>51</sup>

It is undisputed that the drug testing done by the NCAA is not designed to and cannot determine whether an athlete took a substance in preparation for or participation in an NCAA post-season competition. Neither can the drug testing performed by the NCAA determine whether the athlete's performance was affected by any of the banned substances.

The NCAA drug tests cannot tell when a student-athlete took a banned substance, how much was taken, or even whether it affected that athlete's performance. Unlike blood alcohol testing, testing of urine for drug metabolites does not provide any information about the effect of those drugs on the person or the circumstances of the drug's use.<sup>52</sup>

In short, "[d]rug testing alone, without counseling and rehabilitation, is not an effective deterrent to drug use."<sup>53</sup> The evidence was unassailable; the NCAA's random testing program "is not a scientifically valid method of detecting or deterring drug use."<sup>54</sup> In addition, all this testing occurs without any suspicion of possible drug use by the athlete. Their program is ineffective in achieving the stated goals of "clean and equitable post-season competition and protecting the health and safety of student athletes."<sup>55</sup>

Another failing of the NCAA program is that there are less intrusive alternatives available to serve the stated purpose.<sup>56</sup> Options such as education or impairment testing would be as effective as drug testing and not nearly as intrusive.<sup>57</sup> Effective education which would teach athletes to handle stress and explain the

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51. *Id.*

52. *Id.* The court stated:

For example, the effects of marijuana last only a few hours, but the metabolites remained in the urine much longer. Thus, football players were declared ineligible for marijuana which was almost certainly taken socially, without any relation to postseason competition, because metabolites of the marijuana were in the bodies days or weeks before the competition. There is no way that the marijuana detected from their urine could have had any effect on their performance days or weeks after the urine test.

*Id.*

53. *Id.*

54. *Id.* at 421.

55. *Id.*

56. *Id.*

57. *Id.*

underlying reasons for drug abuse is more appropriate than testing, "which only teaches athletes to 'say no' to drugs only when they believe they may be caught."<sup>58</sup>

The NCAA has neither adequately considered nor used testing based on the reasonable suspicion of drug use. This would be especially effective with the alleged use of anabolic steroids (which the NCAA has proclaimed as their current witch hunt),<sup>59</sup> since abuse there produces discernible side-effects, e.g., "rapid weight gain, a [malodorous] garlicky smell, hair loss, increased aggressiveness, etc."<sup>60</sup>

The program itself is over-inclusive. The NCAA's list includes substances that do not enhance performance; the list is also unnecessarily inclusive, since each category adds the phrase "and related compounds" or "others."<sup>61</sup> The athlete never really knows what drugs are actually prohibited.

The *Hill* court concluded that the NCAA's appeal process was inadequate.<sup>62</sup> The bottom line is this: a California Court of Appeals has finally said "No" to the NCAA's highly intrusive and ultimately ineffective drug testing program. "For these reasons, the NCAA may not require student-athletes to 'waive' their constitutional rights in order to receive the benefit of participation in intercollegiate athletics."<sup>63</sup>

#### IV. IMPAIRMENT TESTING VS. BIG BROTHER

Much was made in *Hill* about the overly intrusive quality of the NCAA and the fact that the forced urination on command was extremely embarrassing and humiliating.<sup>64</sup> The court also mentioned that there were less intrusive methods available: namely, education and testing based on a reasonable suspicion.<sup>65</sup> The current testing program tests the pattern of history of drug use that occurred some time before the big game, as opposed to the impairment of the athlete directly prior to the event.<sup>66</sup> If the goal is to reduce the possibility of injury due to impairment, then one

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58. *Id.*

59. *NCAA Ok's Harsh Drug-Abuse Penalties*, Houston Chron., Jan. 11, 1990, at 4B; Bartimole, *Q & A with Dick Schultz: The Executive Director of the NCAA Sounds Off on a Variety of Timely Subjects, Touchdown Illustrated* (Univ. of Houston) n.p. (Oct. 13, 1990).

60. *Hill*, 273 Cal. Rptr. at 421.

61. *Id.* at 422.

62. *Id.*

63. *Id.*

64. *Id.* at 406.

65. *Hill*, 273 Cal. Rptr. at 421.

66. *Id.* at 414.

would assume that the fairest testing would be to test the impairment of the athlete at the time of the event based on a reasonable suspicion of drug use.

The NCAA's policy of urine testing is inherently intrusive, inconclusive,<sup>67</sup> and poses the spectre of Big Brother peering over your shoulder (literally). A possible alternative might be so-called impairment testing which tests the level of impairment at a specific moment in time based on an analysis of the subject's voicing patterns.<sup>68</sup>

Vocal analysis, or some other impairment-based test, at the time of the game, based on a reasonable suspicion of drug usage, makes a lot more sense than the NCAA's expensive hit-or-miss witch hunt. It is not the job of the NCAA to delve into the past of an athlete. An athlete's prior drug usage is not the issue. It is not the job of the NCAA to moralize, sermonize, or foist anachronistic views on collegiate athletes.

## VI. CONCLUSION

Once again, the misguided paternalism of the NCAA has reared its ugly head. After listening to Nancy Reagan, the NCAA has forced America's college athlete into yet another Great Loyalty Oath Crusade. It is unnecessary, expensive, humiliating, unconstitutional, illogical, counterproductive, and ineffective.

The NCAA, as a voluntary, private association, usually wins in court. After *Tarkanian*, which ruled that its intrusions were not state action, the NCAA was allowed a free rein to trample due process. Still, the California Court of Appeals in *Hill v. NCAA* echoed Nancy Reagan and said, "No," too. But this time the court's negative was used as a means to stop Big Brother's unwarranted intrusions into the privacy of some of America's finest citizens, namely student-athletes. Hopefully, *Hill* will be expanded to include all jurisdictions. It is a very rational approach to an irrational program. *Hill's* message to the NCAA is this, "Stop the madness."

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67. Greenblatt, *Urine Drug Testing: What Does It Test?*, 23 NEW ENG. 651 (1988-89).

68. Hayre, *Speaking on Drugs*, 32 SECURITY MANAGEMENT 98 (April 1988). The program monitors on-the-job fitness by having the subject speak into an ordinary telephone; this voice pattern is then analyzed via computer and an impairment measure is reported within seconds. *Id.*

On a personal note, myself and Ed Fowler, a sports columnist for The Houston Chronicle, under the guise of the advancement of science, subjected ourselves to a vocal analysis after a few cocktails (remember, it was for science) via a telephone call to Impairment Measures, Inc., of Houston, Texas. It works!