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Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes

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MISSING THE TARGET: HOW PERFORMANCE-ENHANCING
DRUGS GO UNNOTICED AND ENDANGER
THE LIVES OF ATHLETES

I. INTRODUCTION

Sports are a partial reflection of societal norms and values. In that regard, culture and sports have their shortcomings as well as their successes. Although both areas have fallen to the epidemic of drug addiction, the drug problem in the sports community still remains somewhat of a mystery. Amateur and professional athletic organizations implemented drug testing policies to determine which players use illegal drugs and to deter others from trying them. These “doping” policies require taking urine samples throughout the year. Vials of urine are then analyzed for


2. See Richard Pound, Performance-Enhancing Drugs in Sport: Response by the International Sports Community, 55 INT’L J. 485, 485 (2000). Pound identified that any society or activity put together by a series of rules will tempt some members to cheat. See id. To combat these swindlers, athletics and society instituted a series of educational programs and sanctions to force them to comply with the rules. See id.

3. See John C. Martin, Comment, Drug Testing All Students: The Wrong Answer to a Difficult Question, 6 KAN. J.L. & PUB. POL’Y 123, 123 (1997) (noting public concern over drug use by American society). It is speculated that many professional athletes use performance-enhancing drugs to improve their play. See Steve Rosenbloom, Just Off the Tip of His Tongue; Rockies’ Cirillo Takes Stand on Steroids—Almost, CHI. TRIB., Mar. 25, 2001, at C13. The actual number of athletes who use these drugs remains a mystery. See id. While interviewing Jeff Cirillo, the Colorado Rockies third baseman at the time, Rosenbloom stated that Cirillo refused to name any players using performance-enhancing drugs because Cirillo did not “want[ ] to be killed by his own troops.” Id.

4. See Karen E. Crummy, Note, Urine or You’re Out: Student Athletes’ Right to Privacy Stripped in Hill v. NCAA, 29 U.S.F. L. Rev. 197, 198 (1994). The purpose of the National Collegiate Athletic Association (“NCAA”) drug testing policy was to promote fair competition and to care for the health and safety of the student-athletes. See id. (citing Hill v. NCAA, 865 P.2d 633, 659 (Cal. 1994)); see also Martin, supra note 3, at 124 (noting society looks to protect its young people and deter drug use through drug testing policies).

street drugs, and in specific instances, for performance-enhancing drugs.\(^6\)

Drug testing policies, especially those in high schools and in professional sports, are criticized for lenient policy administration and testing too few substances.\(^7\) At the crux of the debate are performance-enhancing drugs that are left completely off the list of tested substances in high school anti-doping schemes.\(^8\) Professional sports organizations like the National Football League ("NFL") and Major League Baseball ("MLB") include performance-enhancing drugs on their lists of banned substances, yet it is debatable whether athletes are tested for these substances and whether athletes' use of them is disclosed adequately to the media.\(^9\) The

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\(^6\) See Oschütz, supra note 5, at 675. Olympic athletes are subject to testing during competitions and also during training, which is known as "out-of-competition" testing. See Betz & Pilgrim, supra note 5, at 212. Olympic athletes are screened for drugs such as heroin and performance-enhancing drugs like anabolic steroids. See World Anti-Doping Agency, List of Prohibited Substances and Methods, at http://www.wada-ama.org/asiakas/003/wada_english.nsf/Home?OpenPage (last visited Sept. 25, 2002) [hereinafter List of Prohibited Substances and Methods]. NCAA lists heroin, marijuana, and THC as street drugs. See NCAA Banned-Drug Classes, at http://www.ncaa.com/sports_sciences/drugtesting/banned_list.html. (last visited Sept. 25, 2002).

\(^7\) See Daniel P. Fox, Comment, Structural Barriers in Antidoping Measures, 8 SPORTS LAW. J. 271, 277 (2001) (stating National Football League conducts drug testing in "sloppy" manner because testing is merely public relations strategy). Fox details how the National Football League will never correctly administer its drug testing policy on its athletes because "exposure of such drug use would directly injure the NFL's own image and income . . . ." Id. at 278.

\(^8\) See, e.g., Bd. of Educ. v. Earls, 122 S. Ct. 2559, 2569 (2002) (extending drug testing beyond athletics to other extracurricular athletics); Miller v. Wilkes, 172 F.3d 574, 576 (8th Cir. 1999), vacated as moot sub nom., Miller ex rel. Miller v. Wilkes, No. 98-3227, 1999 U.S. App. LEXIS 13289, at *1 (8th Cir. June 15, 1999) (upholding testing policy requiring students who desired to participate in extracurricular activities to submit to urine testing that tested only for illegal drugs and alcohol); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095, 1110 (Colo. 1998) (ruling unconstitutional drug testing policy of high school students that tested for illegal drugs); see also Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 650-51 (1995) (upholding policy requiring testing of high school students for amphetamines, cocaine, marijuana, and occasionally LSD).

\(^9\) See Fox, supra note 7, at 278. Fox argued that the NFL has a need to cover up any potential doping by its athletes because the NFL as a national organization is entirely dependent on the revenues from the sport. See id. He then stated that the NFL has a structural incentive to condone or even promote the use of performance-enhancing drugs because of its desire to generate revenues. See id. at 277. The issue of performance-enhancing drugs in MLB has been debated because of the recent rise in home runs. See Rosenbloom, supra note 3, at C13. Mark McGwire, the baseball slugger who broke the season-long home-run record in the late 1990s, brought more attention to the subject because of his promotion of substances such as androstenedione and creatine, both of which can be purchased

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The bottom line is, a doping problem exists in all levels of all sports.\textsuperscript{10} The remedy to this problem must extend beyond mandatory drug testing.\textsuperscript{11}

This Comment focuses on the anti-doping policies of different athletic organizations and groups within both the amateur and professional ranks. Section II examines the drug testing policies of assorted athletic settings, using high school athletics, the National Collegiate Athletic Association ("NCAA"), and the World Anti-Doping Agency ("WADA") as examples of amateur sports, as well as the NFL and MLB to contrast the anti-doping policies that exist within the professional sports arena.\textsuperscript{12} Section III discusses the frustrations encountered by these policies, using the field of available performance-enhancing drugs as a gauge for the policies' successes and failures.\textsuperscript{13} Section IV briefly summarizes the shortcomings of contemporary anti-doping policies, and suggests ways organizations can improve their efforts to eradicate the use of performance-enhancing drugs.\textsuperscript{14}

II. Background

The problem of doping in sports pervades both amateur and professional athletic organizations.\textsuperscript{15} The differences in their approaches to combating the use of performance-enhancing drugs are significant and have varied outcomes. The professional sports organizations often have more resources and stricter policies, which can lead to more effective results. On the other hand, amateur organizations, such as high school sports, face unique challenges due to budget constraints and varying levels of drug use.


\textsuperscript{11} See Martin, supra note 3, at 139-40. Martin stated that testing procedures implemented in school systems have taken away the students' presumption of innocence and unreasonably stripped away their right to privacy. See id. Other experts agree, believing that the benefits of urine testing fail to rise to the level needed to justify the infringement on constitutionally protected freedoms. See Greenblatt, supra note 10, at 665 (arguing it is highly questionable whether perceived benefits of drug testing outweigh loss of constitutionally guaranteed protections and freedoms).

\textsuperscript{12} For a discussion of the anti-doping measures taken by a few amateur athletic sections and organizations, as well as the response to the drug problem in the professional arena, see infra notes 23-96 and accompanying text.

\textsuperscript{13} For a discussion of how current drug testing policies are neglecting to correctly combat the problem of performance-enhancing drugs in today's sports world, see infra notes 97-154 and accompanying text.

\textsuperscript{14} For a summary of the critique of contemporary anti-doping policies and a look at new ways in which these measures may be improved, see infra notes 155-80 and accompanying text.

\textsuperscript{15} See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 649 (1995) (noting district court finding that athletes in Vernonia schools were leaders of drug culture); see also Survey: Alarming Number of Youths Use Performance Drugs, ALCOHOLISM AND DRUG ABUSE WKLY., Sept. 10, 2001, at 6 [hereinafter Survey] (finding one in five American youths knew someone taking performance-enhancing drugs to assist him or
approaches have been drastic, with professional sports’ emphasis on counseling and amateur sports’ focus on testing. The regulation of substance policies in professional sports has been limited because the Supreme Court has only evaluated the constitutionality of drug policies under the Fourth Amendment as applied to high school drug testing. Anti-doping measures of other sports levels remain untouched by the courts, and have been amended only through administrative processes and collective bargaining agreements.

Because most athletic institutions have been deemed private actors by the courts, they administer their drug testing mechanisms with more freedom than high school athletic programs. Therefore, many experts have concluded that professional sports and

See Fox, supra note 7, at 271.

16. See Marrazzo, supra note 1, at 79 (noting initial reaction to doping by athletes was drug testing). The NCAA implemented its drug testing policy in 1986 in response to this perception, while the United States Olympic Committee (“USOC”) had done the same a year earlier. See id.

17. See Vernonia, 515 U.S. at 664-65 (holding drug testing policy that tested students participating in extracurricular athletic activities to be reasonable and constitutional). The Supreme Court has issued decisions on anti-doping or drug testing policies in the area of employment, another arena in which the government has tried to deter the use of illegal drugs. See, e.g., Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 634 (1989) (ruling Fourth Amendment allowed drug testing policy due to higher government interest in safety and lower individual expectation of privacy).

18. See Long v. NFL, 870 F. Supp. 101, 105 (W.D. Pa. 1994) (holding NFL was not state actor and therefore not subject to Fourth and Fourteenth Amendments). Terry Long, then a player for the Pittsburgh Steelers, tested positive for anabolic steroids. See id. at 103. He argued that the drug testing policy of the NFL violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution. See id. The NFL sought to dismiss the action through a 12(b)(6) motion, arguing that it was not a state actor. See id. The court agreed, and ultimately ruled for the NFL, finding an insufficient nexus between the state and the NFL. See id. at 105. The NCAA has also been deemed a private actor, and therefore free from the constraints of the Constitution. See NCAA v. Tarkanian, 488 U.S. 179, 198-99 (1988) (ruling university’s action in accordance with policies of NCAA did not make NCAA state actor).

19. See Crummy, supra note 4, at 217 (noting NCAA’s vast control over collegiate athletics (citing Hill v. NCAA, 865 P.2d 633, 660 (Cal. 1994))). Crummy argued that such unilateral control in this area by the NCAA should give courts more incentive to find a violation of a student-athlete’s right against unreasonable searches and seizures. See id. In Hill, the California Supreme Court found that the NCAA was not a state actor, and the California Constitution afforded the athletes some right to privacy against private organizations. See id. at 211 (citing Hill, 865 P.2d at 644). The court concluded, however, that the policy was constitutional because the athletes’ lower expectation of privacy was outweighed by the NCAA’s objectives in testing. See Hill, 865 P.2d at 637.
some amateur athletic organizations manipulate the amount of exposure that doping problems receive. Furthermore, some drug tests have failed to identify correctly past drug use by an athlete. In response to these criticisms, athletic organizations have attempted to enact anti-doping programs that address these concerns.

A. Amateur Athletics

1. Drug Testing Policies at the High School Level

Educational institutions have become a focal point for American culture and public growth. In Elkins v. United States, the Court held that the Search and Seizure Clause of the Fourth Amendment applied to states through the Fourteenth Amendment. In T.L.O. v. New Jersey, the Court held that the Fourth Amendment applied to school officials because they "act as representatives of the State, not merely as surrogates for parents . . . ."

No matter how important the societal function, the Court has always sought to balance the students' interests against the state's

20. See Notebook: U.S. Accused of Encouraging Drug Use; Sydney 2000: Summer Olympics Special Section, ATLANTA J. & CONST., Oct. 1, 2000, at 5D [hereinafter Notebook]. Quoting the USOC's former medical chief, Dr. Robert Voy, the article stated that the USOC has covered up positive drug results by its athletes and that such practices would likely continue in the future. See id.

21. See Greenblatt, supra note 10, at 660 (noting person can stop taking drugs weeks before administration of test and pass). The author believed that the NCAA and the International Olympic Committee ("IOC") used urine testing under a false premise that anabolic steroids were dangerous enough to warrant infringement on an athlete's privacy. See id. at 665-66.

22. See Pound, supra note 2, at 487 (noting in Olympic movement, IOC Medical Commission was created after concern for athletes' health relating to performance-enhancing drugs arose).

23. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661-63 (noting states have compelling interest in educating children). The Vernonia Court determined that the state's need for drug testing was compelling because drugs can disrupt the educational process and cause potential health problems to children. See id.


25. See id. at 223. The Fourth Amendment provides that the Federal Government shall not violate "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. The Fourteenth Amendment mandates that "[n]o State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.


27. Id. at 336. In holding that public school officials were state actors, the Court rejected the notion that they act in similar capacity as parents. See id.
goals under the Fourth Amendment. For students to receive protection, there must be an intrusion on an expectation of privacy "society is 'prepared to recognize as legitimate.'" This interest is weighed against the government's interest in educating children.

According to the Supreme Court, drug testing through urine is a search and seizure because it "intrudes upon expectations of privacy that society has long recognized as reasonable . . . ." Normally, the Fourth Amendment requires that officials obtain a warrant through probable cause before conducting any kind of search, but the Court applied the less exacting "special needs" doctrine in the public school setting because the probable cause requirement would hinder educational needs. In Vernonia School District v. Acton, the Court alleviated the need for the school to obtain a warrant before testing student-athletes for drugs because athletes have a diminished expectation of privacy.

After the ruling in Acton, school boards acted quickly to implement similar drug testing programs. Drug testing and policies

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28. See Vernonia, 515 U.S. at 652-53 (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)). In Vernonia, the Court stated that the overall Fourth Amendment inquiry was whether the search was "reasonable," but also noted that it would not forget the custodial nature inherent in a school system. See id. at 656.

29. See T.L.O., 469 U.S. at 338 (citing Hudson v. Palmer, 468 U.S. 517, 526 (1984)). In T.L.O., the Court held that the Fourth Amendment applied to school officials. See id. at 341.

30. See Vernonia, 515 U.S. at 660-61 (finding government interest to be "compelling" in deterring drug use and educating students); see also Bd. of Educ. v. Earls, 122 S. Ct. 2559, 2569 (2002) (reaffirming principles dictated in Vernonia for testing students participating in extracurricular activities).

31. Skinner, 489 U.S. at 617 (holding urine testing of railroad employees constitutes search under Fourth Amendment).

32. See T.L.O., 469 U.S. at 332 n.2. In T.L.O., a local high school teacher "discovered two girls smoking in a lavatory," which violated school policy. See id. at 328. The girls were taken to the principal's office, where the plaintiff denied that she was smoking. See id. The assistant vice principal opened the girl's purse, where he found cigarettes and rolling papers commonly associated with marijuana. See id. Further investigation revealed a "small amount of marijuana, a pipe" and other accessories implicating the plaintiff for the possible distribution of drugs. See id. The plaintiff challenged the search by the school official on Fourth Amendment grounds, but the Court upheld the search, ruling the usual probable cause requirement would hinder proper education administration. See id. at 340-41. The Court therefore determined that "school officials need not obtain a warrant before searching a student who is under their authority." Id. at 340. The special needs of the school environment require assessment of the legality of such searches against a standard less exacting than probable cause. See id. at 332 n.2.


34. See id. at 653 (applying T.L.O. principles to suspicionless searches and seizures of student-athletes through drug testing).

35. See, e.g., Miller v. Wilkes, 172 F.3d 574, 576 (8th Cir. 1999), vacated as moot sub nom., Miller ex rel. Miller v. Wilkes, No. 98-3227, 1999 U.S. App. LEXIS 13289,
prohibiting the consumption of alcohol were deemed to protect adequately the health and safety of the student-athlete.36 The Supreme Court in *Vernonia* ruled that considerations such as the health and safety of the students were valid and "perhaps compelling" government concerns.37

The Court further elaborated its desire for eradicating drug problems in *Board of Education v. Earls.*38 The Court's ruling in *Earls* extended the principles of *Vernonia* to include students who participate in non-athletic extracurricular activities.39 The policy instituted by the school district tested for illegal street drugs, but not for

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36. *See Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1116 (E.D. Wis. 2001) (ruling school training code unconstitutional because it denied student due process under Fourteenth Amendment). Oak Creek High School's Training Code did not allow students who participated in athletics to consume or possess "alcoholic beverages or controlled substances; [to violate] any criminal law or local ordinance; and [to gather] where minors are partaking of alcohol or drugs." *Id.* at 1107. Butler was found in violation of the Training Code several times for possession of drugs, attendance at a function where alcohol was being served to minors, and violation of a local ordinance, resulting in a twelve-month athletic suspension. *See id.* at 1107-08. Butler challenged the ruling dependant on the violation of the local ordinances, stating that he was deprived due process under the training code. *See id.* at 1107. The ordinances related to unlawful possession of intoxicants, unlawful possession of fireworks, and disorderly conduct. *See id.* The district court found a possible deprivation of rights because the person who recommended the suspension, the athletic director of the school, also participated in the hearing that reviewed the disciplinary decision. *See id.* at 1116. Under the Fourteenth Amendment, "the government official charged with recommending a particular decision must not participate in making the actual decision, and the official who makes an initial decision must not participate in making the final decision." *Id.* at 1115. The court, therefore, vacated the decision of the "Coaches' Council." *See id.* at 1127.

37. *See Vernonia*, 515 U.S. at 661. The Court stated the government interest may rise to the level of compelling because drugs pose such a risk to the students' physical capabilities, and they put other athletes who are playing against the drug users at a serious risk. *See id.* at 662.


39. *See id.* The Supreme Court once again balanced the government interest against the concerns of the students. *See id.* When judging the immediacy of the concern, it relied more heavily on the general drug problem among all students rather than the actual drug problem at the school. *See id.* at 2562-63. The Court ruled that the school district had shown some evidence of a substance abuse problem to justify the testing. *See id.* at 2568-69.
performance-enhancing drugs. Consequently, the decision allowed school districts to update their policies to combat the developing drug situation among students. Only one case has involved a challenge to a drug testing policy that detected the presence of both performance-enhancing drugs and street drugs. This is because most school districts limit their anti-doping policies to street drugs to adhere to the Fourth and Fourteenth Amendment standards.

2. NCAA's Anti-Doping Policy

The NCAA has been an innovator in the fight against drug use by athletes in detecting the intake of both street drugs and performance-enhancing substances. The organization has dealt only with state constitutional and First Amendment challenges to the policy, and not with opposition based on the Search and Seizure Clause of the Fourth Amendment. If the actions of the state and private

40. See id. The policy tested for marijuana, cocaine, amphetamines, opiates, and barbiturates. See id. at 2563.

41. See id. at 2568-69. The Court specifically noted that the drug problem had not abated since Vernonia, as it had hoped. See id. at 2567. High school policies, therefore, could test for performance-enhancing drugs for purely preventative measures without demonstrating a serious doping problem. See id. at 2568 (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 673 (1989)).

42. See Miller v. Wilkes, 172 F.3d 574, 582 (8th Cir. 1999), vacated as moot sub nom., Miller ex rel. Miller v. Wilkes, No. 98-3227, 1999 U.S. App. LEXIS 13289, at *1 (8th Cir. June 15, 1999) (holding that drug testing policy that included testing for "misused prescription drugs" was constitutional). It does not appear, however, that this policy was intended to reach performance-enhancing drugs. See id. It was aimed at the misuse of "street drugs" because the policy was directed at all extra-curricular activities, not just athletics. See id. at 577. But see Schul v. Sherard, 102 F. Supp. 2d 877, 891 (S.D. Ohio 2000) (dismissing suit by former track coach challenging dismissal for advocating caffeine to athletes as performance-enhancing drug). Schul challenged his dismissal under the First, Fourth, and Fourteenth Amendments, but the district court dismissed all of the claims. See id. at 887, 891.

43. See Martin, supra note 3, at 123 (suggesting high costs and uncertain law have deterred most high schools from enacting drug testing policies). Martin concluded, however, that recent case law may provide clearer legal guidance for testing. See id.

44. See Crummy, supra note 4, at 198 (noting NCAA adopted first drug testing policy in 1986). The NCAA is "an organization through which the nation's colleges and universities speak and act on athletics matters at the national level. It is a voluntary association of approximately 1,200 institutions, conferences, organizations and individuals devoted to the sound administration of intercollegiate athletics." What is the NCAA?, at http://www.ncaa.com/about/what_is_the_ncaa.html (last visited Sept. 25, 2002). The original intent of the NCAA's anti-doping policy was to "ensure fair competition and protect the health and safety of student-athletes." Crummy, supra note 4, at 198 (citing Hill v. NCAA, 865 P.2d 633, 659 (Cal. 1994)).

45. See NCAA v. Tarkanian, 488 U.S. 179, 199 (1988) (ruling NCAA was not state actor when it imposed sanctions on University of Nevada-Las Vegas). In the
party are so intertwined and indistinguishable that they become joint participants, the private party is considered a state actor.\footnote{See Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-25 (1961). Burton involved a leasing arrangement between a private restaurant and a public parking facility. See id. at 724. The restaurant was deemed a state actor and violated the Fourteenth Amendment for discriminatory practices. See id. at 725. State action can also be found if the state delegates authority for the act to a private party. See Tarkanian, 488 U.S. at 195.}

The NCAA has not been deemed a state actor for purposes of imposing its policies on member colleges and universities, and therefore has evaded Fourth Amendment constraint.\footnote{See Tarkanian, 488 U.S. at 199 (holding NCAA was not state actor in recommending sanctions against basketball coach); see also Hill, 865 P.2d at 643 (finding state constitution applied to private, nongovernmental organizations, but only privacy rights were enforceable).}

The NCAA refined its anti-doping procedure, making athletes consent to the policy by signing a release allowing random testing.\footnote{See NCAA Drug Testing Program Book, at http://www.ncaa.com/library/sports_science/drug_testing_program/2002-03/drugTestingProgram.pdf (last visited Sept. 25, 2002) [hereinafter Program Book]. The consent statement must be signed before the athlete begins the intercollegiate season, or else he or she is not permitted to compete for that season. See id. Drug testing usually occurs at NCAA Championships for the particular sport, and the NCAA has implemented more stringent testing in some areas, such as subjecting Division I-A, I-AA, and II football players to year-round testing. See id. Many critics of the NCAA drug testing policy have noted that the consent form amounts to coercion because the athlete will be prohibited from playing in any intercollegiate sport if he or she fails to sign the form. See Crummy, supra note 4, at 221. This may jeopardize the athlete’s scholarship, if he or she has one. See id.}


The collected urine samples are checked for an

*Hill* decision, the California Supreme Court determined that the NCAA was a private actor, and therefore only had to prove a compelling need for its drug test that outweighed the students’ right to privacy. See *Hill*, 865 P.2d at 637. *Hill* involved Stanford University athletes who refused to consent to drug testing before the season began. See Crummy, supra note 4, at 207-08. After the trial court and the court of appeals found for the plaintiff athletes, the California Supreme Court reversed and found for the NCAA. See id. at 209-10. The drug-testing scheme was not an invasion of privacy because the NCAA’s interest in conducting the testing overcame the student athlete’s limited expectation of privacy. See *Hill*, 865 P.2d at 637. Therefore, the defendant did not commit a serious invasion of privacy under state law. See id. at 637, 657.

46. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-25 (1961). Burton involved a leasing arrangement between a private restaurant and a public parking facility. See id. at 724. The restaurant was deemed a state actor and violated the Fourteenth Amendment for discriminatory practices. See id. at 725. State action can also be found if the state delegates authority for the act to a private party. See Tarkanian, 488 U.S. at 195.

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48. See *Hill*, at http://www.ncaa.com/library/sports_science/drug_testing_program/2002-03/drugTestingProgram.pdf (last visited Sept. 25, 2002) [hereinafter Program Book]. The consent statement must be signed before the athlete begins the intercollegiate season, or else he or she is not permitted to compete for that season. See id. Drug testing usually occurs at NCAA Championships for the particular sport, and the NCAA has implemented more stringent testing in some areas, such as subjecting Division I-A, I-AA, and II football players to year-round testing. See id. Many critics of the NCAA drug testing policy have noted that the consent form amounts to coercion because the athlete will be prohibited from playing in any intercollegiate sport if he or she fails to sign the form. See Crummy, supra note 4, at 221. This may jeopardize the athlete’s scholarship, if he or she has one. See id.


50. See id. The NCAA procedures also provide that the student-athlete, when called upon to be tested, must produce a full specimen (greater than eighty-five milliliters), or else the athlete will be required to produce a new specimen. See Program Book, supra note 48, at 6.0. The specimen is split into two "vials," one labeled "A" and the other "B." See id. If the athlete has to leave the collection
extensive list of banned substances such as anabolic steroids and diuretics. 51

A positive test result for any of the substances renders the athlete ineligible for any further contests until he or she obtains a negative test. 52 If there is a second positive finding, the student is allowed an institutional appeal, which must be submitted in writing within forty-eight hours of notification. 53 If the athlete’s request for eligibility is denied, he or she may be reinstated only after producing a negative test sample. 54

The main purpose of the NCAA anti-doping policy has been to “protect[] the health and safety of intercollegiate athletes.” 55 Many of the tested drugs have serious side effects known to the medical community. 56 The public has become aware of the possible pernicious effects of anabolic agents, such as serious contribution to liver damage in steroid users. 57 Therefore, the NCAA has

station (after approval by the crew-chief), then upon return, he or she must produce an entire specimen again and the first specimen is discarded. See id. 51. See Crummy, supra note 4, at 206. This list of banned substances includes stimulants, anabolic agents, diuretics, street drugs, peptide hormones, and analogues, but does not strictly regulate nutrition supplements. See Drug-Testing Program: NCAA Banned Drug-Classes, at http://www.ncaa.com/sports_sciences/drug_testing/banned_list.html (last visited Oct. 21, 2002) [hereinafter NCAA Banned Drug-Classes]. Anabolic agents, such as anabolic steroids, “are a series of compounds closely related in structure to the naturally occurring hormone, cortisone.” Greenblatt, supra note 10, at 662. Anabolic steroids help the development of new tissue, thereby increasing body weight and muscle mass. See id. 52. See Program Book, supra note 48. If after thirty days of providing of the specimen by the athlete, he or she has not received the results, the drug test is assumed to be negative. See id. at 8.0. If the first test is positive, the athletic director and the student-athlete are given notice, and “vial B” is tested, with the student-athlete’s option to attend this further procedure. See id. 53. See id. at 8.2.2.B.1. The appeal is conducted over the telephone, and the athlete’s participation is mandatory. See id. 54. See id. at 9.0. The protocol states that a drug test must take place even before the student is considered for eligibility reinstatement. See id. 55. Eric N. Miller, Comment, Suspicionless Drug Testing of High School and College Athletes After Acton: Similarities and Differences, 45 U. KAN. L. REV. 301, 323 (1996) (citing Univ. of Colo. v. Derdeyn, 863 P.2d 929, 943 (Colo. 1993)). Other rationales for the NCAA drug testing program include promoting the integrity of athletics, deterring drug use by other students, and ensuring fair competition. See id. The health of the athlete is at risk because use of sports products can “adversely affect the body and pose significant danger to consumers.” Jennifer J. Spokes, Note, Confusion in Dietary Supplement Regulation: The Sports Products Irony, 77 B.U. L. REV. 181, 194 (1997). Products such as creatine, an over-the-counter supplement, may lead to the development of kidney stones. See Kolb, supra note 9, at B1. This product cannot be distributed or ingested under NCAA rules. See id. 56. See Kolb, supra note 9, at B1 (stating side-effects of androstenodione, or andro, include heart disease, acne, and mood swings). 57. See Greenblatt, supra note 10, at 663-64. Other side effects include increased aggressiveness, dysfunctions in sexual activity, muscle cramps, breast enlargement, and possible fertility complications. See id. As the author notes,
kept drug testing in its athletic program to ensure that intercollegiate athletics remain steroid-free. 58

3. The Olympic Movement and Anti-Doping

Performance-enhancing drugs have plagued the Olympics since their inception in ancient Greece. 59 The extent of the doping problem in the Olympics, however, was not actually realized until the 1950s and 1960s. 60 Because "the side effects of the substances used were unclear," the International Olympic Committee ("IOC") created a Medical Commission, which developed the initial list of banned substances. 61 To fully prohibit the use of banned substances, the IOC asked international federations such as the United States Olympic Committee ("USOC") to test for performance-enhancing drugs during non-competition. 62 however, most of these side effects are reversible if the user stops taking anabolic agents. See id. at 664.

58. See Crummy, supra note 4, at 226 (noting Hill court found drug testing to be deterrent to others considering drug use). Although some experts have stated that drug testing is a deterrent, this conclusion has not been proven successfully. See id. at 226-27. Furthermore, some have advocated that drug testing is the wrong method to stop drug use in sports. See Greenblatt, supra note 10, at 659 (arguing that highly accurate gas chromatography/mass spectroscopy (GC-MS) test, albeit expensive and infrequently used, is only way to properly administer drug testing). Education about performance-enhancing drugs has not been received well either. See Crummy, supra note 4, at 229 (noting Hill court did not see education as viable alternative to drug testing). The NCAA recommends drug education along with its other programs, but this is not mandatory for the institutions. See Drug-testing Q&A, supra note 49. High school students know very little about the serious effects of performance-enhancing drugs. See Survey, supra note 15, at 6. It is unlikely that college athletes understand the side effects of performance-enhancing drugs because education programs are not a mandatory part of anti-doping policies. See id. (finding seventy percent of students and fifty percent of parents could not recall single side effect of performance-enhancing drugs when asked).

59. See George Diaz, Citius, Altius, Fortius; Swiftier, Higher, Stronger; Olympic Athletes Such as Merion Jones Inspire Awe but the Incredible Performances of Many Athletes Leave Doubts as to How They Became So Good, ORLANDO SENTINEL, Sept. 15, 2000, at G3 (observing at inaugural Olympics, athletes consumed testicles of dogs and sheep to achieve better results).

60. See Pound, supra note 2, at 486. The drug problem was exposed in the 1950s when weightlifters used testosterone to increase muscle mass, and in 1960 when a Danish cyclist died from the use of stimulants. See id.

61. Id. at 487. The Commission noted, however, that once it banned these substances, the use of any performance-enhancing drug would go strictly underground. See id.

62. See id. The IOC urged international federations, national Olympic committees, and national federations to adopt its anti-doping policy, which most have done. See id. at 488. Whether these similar policies are enforced as strictly as the IOC enforces its own policy remains a mystery. See Notebook, supra note 20, at 5D (stating USOC encouraged use of performance-enhancing drugs in program). USA Track and Field, however, has the right to randomly administer "out of com-
The Olympic movement has been eager to coordinate a coherent drug testing structure for its athletes. In 1999, the IOC called a conference, now known as the Lausanne Declaration, to draw support for one body of code overseeing all of the anti-doping movement for Olympic athletes. This conference created the Olympic Movement Anti-Doping Code, enforced by the newly formed World Anti-Doping Agency ("WADA"), which "applie[d] to all athletes, coaches, instructors, officials, and to all medical and . . . [other] staff working with athletes . . . ." The WADA has taken an independent observer role at the Olympic Games, seeking to ensure that testing is implemented in a correct and impartial manner.

petition" drug testing, usually not giving the athlete advance notice of when the testing occurs. See Betz & Pilgrim, supra note 5, at 212.

63. See Richard M. McLaren, The Court of Arbitration for Sport: An Independent Arena for the World’s Sports Disputes, 35 VAL. U. L. REV. 379, 380-81 (2001) (arguing Court of Arbitration for Sport, established by IOC in 1983, which reinforces goals of World Anti-Doping Agency, should be final appeal of athlete accused of doping). The Olympic movement consists of "the [IOC], Organising Committees of the Olympic Games ('OCOGs'), the National Olympic Committees ('NOCs'), the International Federations ('IFs'), the national associations, clubs and the athletes." Who Is the Olympic Movement, at http://www.olympic.org/uk/organisation/index_uk.asp (last visited Sept. 25, 2002). The IOC and other international sports agencies do not have to deal with Fourth Amendment issues because the Court has deemed them to be private actors. See S.F. Arts & Athletics, Inc. v. United States. 483 U.S. 522, 547 (1987) (ruling USOC was not government actor and therefore right to enforce exclusive use of word "Olympic" was not unconstitutionally discriminatory). In that case, the Supreme Court examined the implementation of the Amateur Sports Act, which gave the USOC the exclusive right to use the word "Olympic" and any symbols associated with it. See id. at 526. The USOC sued for an injunction to stop the defendant from using the word "Olympic" in its games. See id. at 527. The defendant argued that the Act was discriminatory under the Fifth Amendment, but the Court disagreed, ruling that the USOC was not a government actor. See id. at 542, 547.

64. See Pound, supra note 2, at 487. The code was supposed to represent all "six constituencies," the IOC, the National Olympic Committees, the international federations, athletes, governmental agencies, and experts. See id. The IOC accepted the contention, but the governments would have to pay for half of the costs of the agency, and thus the six constituencies were not equally represented. See id. The Lausanne Declaration provided for an independent anti-doping agency by the 2000 Olympic Games in Sydney. See WADA, About WADA: History, at http://www.wada-ama.org/asiakas/003/wada_english.nsf/Home?OpenPage (last visited Sept. 3, 2002). The international agency was created to "promote and coordinate at the international level the fight against doping in sport . . . ." Id. Because the timing of the conference seemed ill-fated, however, the governments represented at the conference demanded they and the Olympic movement organizations share the same weight of authority over the agency and the code enforcement. See Pound, supra note 2, at 487.

65. Id. at 488. The Code and the WADA were in force during the Sydney Olympics held in the summer of 2000. See id.

66. See WADA, Independent Observers Program, at http://www.wada-ama.org/asiakas/003/wada_english.nsf/Home?OpenPage (last visited Sept. 25, 2002). The WADA not only observes at the Games, but also goes to various sports' champion-
The WADA and the Olympic Movement Anti-Doping Code have created a vast list of banned substances for which athletes are tested at various times throughout their careers. An athlete can be tested at any time regardless of whether the games are in session. If asked to produce a sample, the athlete is accompanied by a monitor of the same sex. The anti-doping effort was not unified until the emergence of WADA, so it may take time before all the organizations have the identical policy. The WADA, therefore, must wait before all the WADA doping policies are encoded and are uniformly enforced at every single event.

B. Professional Sports

1. The National Football League’s Drug Policy

The NFL has been touted for its steroid testing policy, but criticized for the policy’s results. The NFL drug testing policy was established through collective bargaining with the NFL Players Associations to oversee their drug testing procedures and to make sure everything is implemented properly. See id.

67. See List of Prohibited Substances and Methods, supra note 6. The WADA and the Anti-Doping Code prohibit all use of street drugs, anabolic steroids, beta-blockers, and diuretics by the athletes under their control, as well as the use of blood doping. See FAQ About Doping, supra note 5. Blood doping “involves the intravenous administration of blood, red blood cells and related blood products to raise the blood’s oxygen-carrying capacity, thus enhancing aerobic athletic performance.” Id. Since the 2000 Sydney Olympics, the drug erythropoietin, or EPO, has been a tested banned substance for many of the summer and winter sports. See Thorpe Attacks FINA Stance on Testing, at http://sportsillustrated.cnn.com/more/news/2001/07/24/worlds_drugs_ap/ (July 24, 2001) [hereinafter Thorpe Attacks]. EPO boosts production of oxygen-carrying red blood cells and assists the athlete’s endurance in competition. See id. EPO, which can only be detected through blood samples, is now tested through the new IOC testing policy, which involves a blood-urine combination. See id.

68. See FAQ About Doping, supra note 5.

69. See id. (stating to prevent cheating, same-sex “chaperones” accompany athletes when sample is produced). The top four finishers and a randomly chosen athlete from the rest of the field are tested after the event. See 2 Robert C. Berry & Glenn M. Wong, Law and the Business of Sports Industries: Common Issues in Amateur and Professional Sports 475 (Auburn House 1986).

70. See Betz & Pilgrim, supra note 5, at 216 (explaining USOC will oversee testing for events within United States, while other organizations will administer policies for Olympic Games and international events); see also Drug Chief Says IAAF, IOC Should Ban USA Track, at http://sports.espn.go.com/oly/winter02/gen/news?id=1322628 (Feb. 4, 2002) [hereinafter Drug Chief] (reporting officials have pleaded with USA Track to release names of athletes who tested positive before 2000 Olympic Games).

71. See Pound, supra note 2, at 492 (asserting only if every country applies standards consistently will drug use in sports be eradicated).

72. See Fox, supra note 7, at 276-77 (noting that both NFL executives and players want to sell football to public for profit, creating economic incentive for players to use performance-enhancing drugs).
The current collective bargaining agreement between the NFL and the NFLPA was struck in 1998, and has been extended through 2007. The NFL’s banned substances list is one of the most comprehensive of the professional sports associations, including almost as many substances as WADA’s list. The testing, however, is not as frequent as the NCAA’s or WADA’s testing because most players are only tested once during the NFL pre-season. Also, the testing for...
more serious substances is not consistent until the player enters an "intervention stage." Finally, though the NFL's drug policy appears to be tough on performance-enhancing drugs, actual positive tests are not made public because the collective bargaining agreement mandates confidentiality of the results. Thus, the successes and failures of the drug policy are therefore subject to serious speculation.

2. Major League Baseball's View on Doping in Sport

MLB and the MLB Players Association, one of the most powerful professional players' unions, failed in their attempt to institute a drug policy in June of 1984. The program began as a war "almost exclusively against cocaine [abuse], . . . the most serious drug problem." MLB's 1997 drug program expanded the published list of tested substances to include marijuana, opiates, and PCP, but not for performance-enhancing drugs. The Medical Advisor for the
MLB administered testing four times throughout the year, under the supervision of a trained collector. 85

MLB also initiated an educational program termed the Employee Assistance Program or “EAP,” which provided information to the players about drug use and confidential counseling for those with drug problems. 86 This program, which was primarily voluntary, went beyond testing to ensure that players understand the dangers associated with drugs. 87 In the NFL, the Commissioner ensures confidentiality of both test results and counseling. 88 Unlike the NFL, however, MLB formerly tested only for street drugs and not for performance-enhancing drugs. 89 Therefore, it was difficult to determine how many of the MLB players used performance-enhancing drugs on a consistent basis. 90

drug use and were never subjected to random testing in previous years.  See id. Minor league players were subject to random testing for illegal drugs throughout the year, in order to deter drug use early in the player’s career.  See id. Due to a new collective bargaining agreement between the MLB and MLB Players Association (“MLBPA”), a random drug testing policy will be implemented starting in the 2003 season.  See Carroll Rodgers, MLB Steroid Policy Unlikely to Be As Tough As NFL’s, ATL. J. & CONST., Aug. 8, 2002, available at http://www.accessatlanta.com/atc/sports/0802/09drugs.html (stating MLB Commissioner Bud Selig already understands limits of drug testing programs like NFL’s and NBA’s).

85.  See Memorandum from Bud Selig, supra note 84. Players with a history of drug abuse could be tested more than four times over the year.  See id. The specimen produced was “divided into two containers, sealed against tampering, coded to protect the anonymity of the individual involved and secured for transport to the laboratory. Once at the laboratory, one sample would be analyzed and the other stored for conformity testing.”  Id.

86.  See id. The purposes of the EAP are: 1) to “provide basic education information to players and personnel about the dangers of drug abuse,” and 2) “[t]o be a means of providing confidential, independent, and expert counseling . . . .”  Id. This program is in place for both the minor and major league baseball players.  See id.

87.  See id. (stating EAP is “backbone” of [MLB’s] effort).

88.  See Memorandum from Bud Selig, supra note 84. The policy provides for confidentiality to the “maximum extent possible and as required by law,” and anyone found breaking this code is subject to fines.  Id. The policy notes, however, that any media attention to the problem is beyond the control of MLB.  See id.; see also WEILER & ROBERTS, supra note 83, at 42-46 (detailing disciplinary actions taken against several MLB players found to be using drugs).

89.  See Memorandum from Bud Selig, supra note 84 (noting only controlled substances tested for are cocaine, marijuana, PCP, opiates, and amphetamines). MLB may test for other substances, but only with prior notice given to the players.  See id. It is extremely likely, however, that a more “legitimate” steroid policy that randomly tests all MLB players will be in place by the 2003 season.  See Rodgers, supra note 84, at http://www.accessatlanta.com/atc/sports/0802/09drugs.html.

90.  See Rosenbloom, supra note 3, at C13 (finding Colorado Rockies player was not going to jeopardize reputation by naming players who use performance-enhancing drugs). Rosenbloom stated that the Rockies player might have said more about what could be “baseball’s dirty little secret,” but he was warned by a coach not to say anything.  See id. Former St. Louis Cardinals player Mark McGwire
MLB's new policy, enacted as part of the 2002 collective bargaining agreement, is the first measure towards banning the use of performance-enhancing drugs in baseball.91 MLB players will be tested for steroids beginning in 2003, followed by more testing after a determination that the use is widespread.92 The agreement declared that MLB would not mark steroids as prohibited substances.93 The testing in 2003 will be administered through two announced tests during the season.94 The program levies fines or suspensions for players who use performance-enhancing substances or illegal street drugs.95 Although MLB's new program is a small stride to reducing drug use in baseball, it is at least progress.96

III. Analysis

The testing procedures implemented by professional and amateur sports were designed to reduce existing drug use among participants and to deter others from beginning use.97 It appears, however, that the testing mechanisms in place for many sports brought creatine and androstenedione, now popular performance-enhancing drugs, to the spotlight when he shattered MLB's home-run mark in the late 1990s. See Kolb, supra note 9, at B1.


92. See id. Testing in the 2003 season determines whether an anti-doping program will be implemented by MLB in 2004. See id. More than five percent of MLB players must test positively for steroids for the testing scheme to be implemented. See id. The program will continue indefinitely until less than a combined two and one-half percent of MLB players test positively during a two-year period. See id. Testing for street drugs, such as marijuana and PCP, can only be administered if a health committee determines there is "just cause." See id. The health committee will consist of members from MLB and MLBPA. See id.

93. See id. The agreement did not ban steroids such as androstenedione, but if more than ten percent of the players test positively for steroid use, the health committee can prohibit its use in the future. See id. The committee would have to vote unanimously to ban any substance. See id.

94. See id. The tests are administered during either spring training or the regular season. See id.

95. See id. Marijuana use or possession results in a $15,000 fine. See id. Steroid use levies a fifteen-day suspension or a fine of up to $10,000. See id. Further positive tests for steroids by individual MLB players result in larger suspensions without pay. See id.

96. See Associated Press, supra note 91, at http://espn.go.com/mlb/news/2002/1002/1440405.html. MLB's new scheme is criticized because it lacks random testing that is analyzed by an independent agency. See id.

97. See Marrazzo, supra note 1, at 79. The benefits of drug testing programs, according to the NCAA, is to "promote safety for the athletes involved; [deter] the...
day are more of a pretense than an actual force against drugs.\textsuperscript{98} The anti-doping policies of athletics, especially professional athletics, resemble a public policy ploy to boost community perception that drugs are not tolerated and that the integrity of play in sports is sound.\textsuperscript{99} The policies presented by amateur and professional sports have several loopholes, however, enabling athletes to cheat testing procedures and excel at the sport using state-of-the-art performance-enhancing drugs.\textsuperscript{100} Serious shortcomings in testing indicate that it should not be relied on so heavily for adequate drug deterrence.\textsuperscript{101} Indeed, many problems exist in testing mechanisms, especially in what the tests probe for, who is tested, and when the testing takes place.\textsuperscript{102}

\textbf{A. Most Testing Does Not Include Performance-Enhancing Drugs}

Drug testing of athletes is most crucial in high school and professional sports, yet neither seems to test for performance-enhancing drugs.\textsuperscript{103} High school, where adolescents learn educational amount of drug use by the athletes; educat[e] . . . the dangers of drug use; and maintain[ ] the integrity of the university . . . ." \textit{Id.}

\textsuperscript{98} See Kolb, supra note 9, at B1 (finding many athletes undaunted in efforts to gain advantage over field and will use performance-enhancing drugs to achieve goal). Studies have dictated that around 750,000 high school and junior high school students have used anabolic steroids, mostly to appear "buff." \textit{See id.} A major concern also exists for new drugs that are being sold over-the-counter, which have unknown problems and side effects. \textit{See id.}

\textsuperscript{99} See Fox, supra note 7, at 277 (stating NFL must fight public perception that its players are using performance-enhancing drugs to maintain market share). Because the NFL directly benefits from the success of the league and the teams that are playing well, it is logical to conclude that the NFL ignores successful players' use of performance-enhancing drugs if the players produce revenue. \textit{See id.} at 276-77. Ultimately, there is a strong "incentive for the NFL to cover-up doping in the game." \textit{Id.} at 278.

\textsuperscript{100} See Diaz, supra note 59, at G3 (noting Olympic athletes are cheating to win medals). Diaz detailed performance-enhancing substances such as human growth hormone, which assists the growth of muscle tissue and cannot be detected under the IOC's drug testing policy at the Olympics. \textit{See id.} Furthermore, athletes have become craftier in their use of such drugs, while the testing that seeks to detect them has failed to keep pace. \textit{See id.} (quoting Interview with Brent Rushall, Exercise Scientist, San Diego State University (Sept. 15, 2000)).

\textsuperscript{101} See Greenblatt, supra note 10, at 657 (stating urine samples can easily be doctored to produce false negatives).

\textsuperscript{102} See id. at 659-61. Athletes use performance-enhancing drugs to gain a competitive advantage. \textit{See Kolb, supra note 9, at B1.} To curtail performance-enhancing drug use in sports completely, athletes must learn that the problems associated with the drugs heavily outweigh their slight benefits. \textit{See id.} at B6.

\textsuperscript{103} See Kolb, supra note 9, at B6 (noting in states such as New Mexico, only small amount of schools test for performance-enhancing drugs). The Olympic athletes and the NCAA, however, do test for performance-enhancing drugs such as
disciplines and grow into adults, should be the first place for administrators to ensure that students do not use stimulants or anabolic agents. 104 The Supreme Court has declared the safety of students to be a valid government interest that outweighs the students’ constitutional protection from unreasonable searches and seizures. 105 It would be logical, therefore, for the Supreme Court to authorize testing in high schools for performance-enhancing drugs, as long as the privacy and safety of the students are considered. 106

Televised sports like the Olympics and MLB, are also to blame for the rise in students’ use of performance-enhancing drugs. 107 Because neither of the organizations has regulated performance-enhancing drugs successfully, fans have taken these supplements, see NCAA Banned Drug-Classes, supra note 51 (prohibiting anabolic steroids, stimulants, and diuretics in NCAA); List of Prohibited Substances and Methods, supra note 6 (signifying same).

104. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661 (1995) (noting youth is “time when physical, psychological, and addictive effects of drugs are most severe”). The testing in Vernonia, however, only concerned street drugs and one performance-enhancing drug, the stimulant amphetamine, which can also be a street drug. See id. at 650. LSD, which is known for its harm to students, was tested only upon request of the school district. See id. at 650-51. But see Survey, supra note 15, at 6 (finding that one in five youths know of someone taking performance-enhancing drugs).

105. See Vernonia, 515 U.S. at 661, 664-65. The Court stated the nature of the government concern was “important - indeed, perhaps compelling . . . .” See id. at 661. It hardly can be doubted that testing already administered to students for street drugs would be any more intrusive if it was examined for other drugs that are not promoting any health benefits for students. See id. at 658 (observing privacy concerns during testing are “negligible”). In Vernonia, the Court permitted suspicionless testing of student athletes, and reasoned the testing was constitutional due in part to the limited intrusion on the students’ privacy. See id. Because the testing at issue only probed for illegal drugs, it did not disclose information that would be intrusive. See id. Vernonia’s principles were extended to drug testing of students who participate in extracurricular activities apart from athletics in Board of Education v. Earls. See Bd. of Educ. v. Earls, 122 S. Ct. 2559, 2569 (2002). The Court in Earls determined the testing was not significantly intrusive, and maybe even less problematic than the testing in Vernonia. See id. at 2566. The testing in Earls, unlike in Vernonia, allowed male students to produce their samples “behind a closed stall.” See id.

106. See Vernonia, 515 U.S. at 664-65 (holding search through drug testing reasonable because government interest in student safety outweighed minimal intrusion on students’ privacy).

107. Compare Kolb, supra note 9, at B1 (noting professional baseball player Mark McGwire was promoting creatine, a performance-enhancer, during home-run chase in late 1990s), with Survey, supra note 15, at 6 (finding that creatine was cited fifty-eight percent of time by students as drug used by person they knew taking performance-enhancing drugs). Professional athletes are societal role models and are emulated constantly by fans who want to be like them. See Marrazzo, supra note 1, at 75.
desiring to appear and perform like professional athletes. The WADA, for example, prohibits the use of human growth hormone, but at the 2000 Olympic Games in Sydney, it had no way of testing the substance’s presence in athletes’ bodies. With this knowledge, athletes can use performance-enhancing drugs to help them succeed without detection through anti-doping tests. The testing does not detect all banned substances, and therefore, athletes constantly gain an unfair advantage over other participants because it is clear that “the candy store remains open.”

MLB also has serious hurdles to overcome regarding testing for performance-enhancing substances. In reality, because of the strength of the players’ union, baseball players are never subject to random testing outside the four announced tests throughout the year. MLB’s new testing program does not ban performance-enhancing drugs. Players in professional baseball, therefore, have

108. See Kolb, supra note 9, at B1; cf. Vernonia, 515 U.S. at 662-63 (upholding finding of district court that student athletes were source of drug use increase at Vernonia School District).


110. See id. (citing 1995 poll that found most Olympic athletes would take performance-enhancing drugs if they could win and not be caught). When the same athletes were polled about whether they would continue to take such substances even if they would die but keep winning for the next five years, half of them said they would. See id.

111. See id. But see Baranova Tests Positive for EPO, at http://sports.espn.go.com/oly/winter02/xcountry/news?id=1324203 (Feb. 6, 2002) (stating all endurance athletes in 2002 Winter Olympics will be tested for popular performance-enhancing drug EPO). Even though sports such as cross-country skiing would be tested for EPO at the 2002 Winter Games, no indication had been made that athletes in other sports would be tested. See id. Moreover, even if a urine test for EPO is negative, the benefits of EPO to the human body on the athlete can last for weeks after the test is administered. See Diaz, supra note 59, at G3.

112. See Berry & Wong, supra note 69, at 475 (noting MLB had difficulties implementing drug policy because of strong opposition by the MLBPA). The drug policy of the MLB was originally enacted to deter and detect use of cocaine, a drug that has plagued MLB for the last several decades. See id.

113. See Memorandum from Bud Selig, supra note 84. Baseball, however, does have a system where players can come forward voluntarily with their substance abuse problems and receive help. See id. In addition, if a player that is suspected of drug use is asked to undergo examination and refuses, he is subject to testing or sanctions as determined by a review counsel. See Berry & Wong, supra note 69, at 475. The new policy for steroid testing will not test randomly either, but will test twice during the year after players are given a one week notice. See Associated Press, supra note 91, at http://espn.go.com/mlb/news/2002/1002/1440405.html.

114. See Associated Press, supra note 91, at http://espn.go.com/mlb/news/2002/1002/1440405.html (stating only health committee can ban substances through unanimous vote); see also Memorandum from Bud Selig, supra note 84 (explaining old testing was conducted only for drugs like marijuana, PCP, opiates, and cocaine). The NCAA, WADA, and NFL programs also detect the presence of
virtually no deterrent from abstaining from the use of performance-enhancing drugs.\textsuperscript{115} MLB players may use such substances more openly than in other sports, although their effects may be questionable.\textsuperscript{116} Whether it helps or hurts a baseball player’s performance, the mere use of such substances conveys a message to younger players across the nation that cheating to win is acceptable as long as the player is not caught.\textsuperscript{117} For this reason alone, anti-doping policies need to be strengthened to test every substance known to enhance performance, and educational programs need to be implemented to uncover the dangers associated with the use of such substances.\textsuperscript{118}

B. Athletes Are Not Tested Often Enough to Fully Detect Drug Use

Most professional and amateur sports subject their players to random testing throughout the season, and sometimes in the off-season.\textsuperscript{119} This testing scheme, however, does not ensure that players will be deterred from using stimulants or anabolic agents during
the season or off-season. The NFL, for example, always tests during the pre-season and then randomly through the regular and post-season. The problem with this scheme is that players have an extremely low probability of being tested after the initial instance in the pre-season. The NFL does not test for performance-enhancing drugs often enough to dissuade drug use throughout the season. Therefore, players in the NFL could start taking performance-enhancing drugs after their first test in the pre-season because of the low probability that they will be tested again. The testing procedures offered by the NFL could be deemed a façade because the NFL would never unveil a huge doping scandal in its sport. A public view that NFL players abuse substances regularly would harm the players directly, and subsequently, the NFL would lose television ratings and profits.

Poor testing schemes also affect the NCAA, where non-football players are tested at an even lower frequency, making it possible to never be tested during the athlete's four years at college. Professional sports, like MLB, have inferior policies because MLB tells its

120. See Greenblatt, supra note 10, at 660 (stating “programmed abstinence” can produce negative test). A frequent cocaine user “need only abstain for a period of one week or so prior to a scheduled urine test to ensure with reasonable certainty that urine will be negative . . . .” Id. Only if the testing is completely random, so that the athlete has no knowledge when the test will occur, would the result be the most accurate. See id. (noting drinking large amounts of water also helps bring drug concentration levels below prohibited amount).

121. See Testing for Prohibited Substances, supra note 79.

122. See id. (stating “players on every team” will be tested each week; however, “players” include those from practice squads and reserves, who do not play in regular season games).

123. See id. (indicating that during season NFL does not require random testing to include every player).

124. See id. (explaining that during season and post-season players on each team will be tested randomly, but not signifying that every player on each team will be tested throughout season). Even if a player does test positively for a performance-enhancing substance during the season, he might not be disciplined publicly because bad press for the NFL directly hinders gross profits. See Fox, supra note 7, at 277.

125. See Fox, supra note 7, at 277. It should be noted that the author’s whole premise, that the NFL conceals substance abuse by its athletes, rests on one major assumption: “[T]here is as much doping in the [NFL] as there is in professional cycling.” Id. at 272. The author supports this assumption by suggesting that in each sport there is a comparable pressure from outside sources to use performance-enhancing substances. See id.

126. See id. at 277 (calling anti-doping policy of NFL “public relations stratagem”).

127. See Program Book, supra note 48 (noting all athletes in every sport are subject to testing at NCAA or league championships). A player who does not play football, and does not travel to either the league or NCAA championships for his or her sport may never be asked to produce a sample. See id.
The testing method at the Olympic level is also an example of how anti-doping schemes are attractive on their face, yet only meant to prevent public perception of cheating in sports. The IOC, under direction of the WADA, tests only the top three finishers and one randomly chosen athlete during the Olympic Games. This anti-doping policy is effective in ensuring that athletes who win are not cheating, but does little to protect the health of every athlete because it fails to prevent all athletes from using performance-enhancing drugs. Accordingly, the testing only tests as many athletes as necessary to dissuade media criticism of doping in the games.

If athletes play sports as a "consensual activity, entered into by individuals of their own free will," then the IOC and other Olympic organizations should make participation contingent upon mandatory, random testing of every athlete on a frequent basis. Although some may argue this is an invasion of the athlete's pri-


129. See Greenblatt, supra note 10, at 660 (arguing MLB players using cocaine could avert positive test result if they knew when test was to be administered).

130. See McLaren, supra note 63, at 379 (discussing disputes over who should enforce Olympic anti-doping scheme). The USOC has been accused of promoting performance-enhancing drugs to its athletes, and hiding tests that reveal its athletes' drug use. See Notebook, supra note 20, at 5D. This assertion was refuted because it lacked a sufficient factual basis. See id. USA Track & Field was also accused of covering up positive tests by athletes, especially after a major shot-putting star, C.J. Hunter, reportedly failed four different drug tests before the Sydney Olympic Games in 2000. See id.

131. See FAQ About Doping, supra note 5. Testing during other Olympic-related events, such as track and field competitions during non-Olympic years, is administered at random. See Betz & Pilgrim, supra note 5, at 212 (stating random testing occurs based on finish place).

132. See Pound, supra note 2, at 485 (arguing that sports, like life, have plague of cheating). Despite the WADA's testing policy, Richard Pound, now the chairman of the WADA, claimed that the top concern was the health and safety of the Olympic athlete. See id. at 486. This does not seem to hold true today if the primary concern of the WADA's drug testing policy is to prevent winners from cheating. See FAQ About Doping, supra note 5 (stating doping is against Olympic motto of fair competition).

133. See Diaz, supra note 59, at G3 (observing that IOC tests only "during days of competition").

134. Pound, supra note 2, at 485. As Pound suggests, consenting to an activity equates with agreeing to certain rules. See id.
vacy, voluntary consent by the athlete and the significant countervailing interest of protecting the health and safety of all participants should be sufficient to pass any federal or state privacy law. Consequently, the IOC and the WADA would be able to administer an anti-doping policy which would eradicate completely testable drugs, and fulfill its goal of protecting the health and safety of the athlete.

The pursuit of glory and money should never prevail over the health and safety of an athlete. The NFL and USOC should expose fully all scandals they are accused of concealing and prevent them from reoccurring. The life of any athlete, whether he or she is a high school student or a multi-million dollar professional star, is not worth the price that the media and the public put on the individual’s performance on the field. Amateur and professional sports have made strides in anti-doping efforts; however, both need to improve their testing methods to deter athletes fully from using performance-enhancing drugs.

C. Accompanying Drug Testing with Additional Mandatory Procedures May Be Best Tactic to Ensure Drug-Free Sports

Anti-doping policies of professional and amateur sports have relied heavily on drug testing as the major deterrent against using

135. See S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542-47 (1987) (holding Olympic organization was not government actor). Because the IOC is not a government actor, it likely would have to deal only with state privacy laws, such as those the NCAA adddressed in Hill. See Hill v. NCAA, 865 P.2d 633, 657 (Cal. 1994) (stating NCAA as private actor was subject to privacy initiative under California Constitution, although drug testing policy was held not to be invasion of athletes' privacy).

136. See Pound, supra note 2, at 485 (observing initial purpose of drug policy was to protect health of participants).

137. See Díaz, supra note 59, at G3 (stating White House Office of Drug Policy reported that “lure of endorsement contracts . . . makes performance-enhancing drugs too difficult a temptation for athletes to ignore”).

138. See Fox, supra note 7, at 277 (arguing NFL would never uncover doping scandal in sport for fear of hurting image as “tough on drugs” and of “los[ing] market share”); Notebook, supra note 20, at 5D (alleging USOC was hiding tests that showed athletes used performance-enhancing drugs).

139. See Marrazzo, supra note 1, at 81 (commenting on amount of attention given to athletes in contrast to other professions). The author explains that “[p]eople rarely, if ever, pay to watch someone build a car.” Id. Yet, fans “pay dearly” to watch their favorite athletes. See id. Thus, fans demand “greater performances” from these athletes. See id. Some experts believe athletes should not be treated any differently than a normal member of society. See id. at 80-81.

140. See generally Díaz, supra note 59, at G3 (predicting wide-spread drug use at Sydney Games despite IOC’s rigorous drug testing).
performance-enhancing drugs. When considering the inaccuracy of urine testing, it seems logical to devote more energy to deterring drug use before it begins by informing athletes of the dangers associated with drugs that enhance performance and appearance. Educational programs, which teach the hazards and evils associated with all types of drugs, should be integrated with anti-doping policies. Most professional and collegiate sports only offer optional counseling or educational procedures for the athletes. Because the pressures of professional and amateur sports are immense, counseling and educational programs should be mandatory. Students and professional athletes will then learn about the serious risks that result from using performance-enhancing drugs.

141. See Greenblatt, supra note 10, at 652. The pressure by the media and public to find an inexpensive solution to the drug problem gave rise to "[t]he concept of mandatory random testing for drugs in urine . . . to meet that perceived need." Id.

142. See id. at 665-66 (arguing that mandatory testing could create "police state" by infringing upon "constitutionally guaranteed protections and freedoms" for sake of deterrent effect that is "questionable" at best).

143. See id. at 661 (explaining cornerstone of alcoholism prevention is helping person admit to and understand problem through counseling, not drug testing).

144. See Memorandum from Bud Selig, supra note 84. MLB's new policy allows players treatment if they admit voluntarily that they have a drug problem. See Associated Press, supra note 91, at http://espn.go.com/mlb/news/2002/1002/1440405.html.

145. See Crummy, supra note 4, at 229 (arguing drug education would promote health and safety of athletes while dispelling myths that performance-enhancing drugs help athletes in general); see also Marrazzo, supra note 1, at 91 (advocating need for athletes to find role models themselves). But see Hill v. NCAA, 865 P.2d 633, 664 (Cal. 1994) (rejecting drug education as viable alternative to drug testing through urine analysis). Although the Hill court addressed drug use by collegiate athletes within the last decade, it is highly doubtful it imagined the sophistication of the modern performance-enhancing drug market. See Díaz, supra note 59, at G3 (stating "candy store" is available for athletes who crave drugs to boost performance). In light of the current growth of this practice, courts may embrace an anti-doping policy that involves mandatory educational programs. See id.

146. See Survey, supra note 15, at 6 (finding seventy percent of young people surveyed could not recall side effect of using performance-enhancing drugs). Ninety-six percent of the individuals surveyed were aware of the potential of health problems arising from taking the drugs. See id. Of the youths surveyed, however, more than seventy percent reported that their sports teams neglected to give them any information on the topic. See id. For instance, anabolic steroids can cause aggressive behavior, breast enlargement, liver complications, and serious side effects on male reproduction. See Greenblatt, supra note 10, at 664. Also, no convincing evidence shows steroids or anabolic agents benefit aerobic activities, such as running. See id. at 663.
Most sports organizations do not make educational programs mandatory for participation in the sport.147 By requiring educational programs as part of the anti-doping program, athletes can achieve an understanding of the serious problems of performance-enhancing drug use before they use.148 An additional benefit of drug education would be the deterrent effect for those athletes who formerly used performance-enhancing drugs.149 Drug education could “be a great improvement to the current program which tempts athletes to merely avoid detection of drug use.”150 Thus, recognizing that drug education programs enhance drug use prevention, heads of anti-doping agencies have contemplated education as a deterrent for drug use in youth sports.151

The best option for athletic organizations would be to combine the current drug testing policies with mandatory educational programs, while still striving for better and swifter methods of detecting drug use.152 Because many sports organizations have created drug testing policies already, it would be foolish to extinguish them.153 Without education, however, many athletes at younger ages will begin to experiment with performance-enhancing drugs that can be purchased easily at stores across the country.154

The current anti-doping policies of amateur and professional sports have substantially evolved since their inceptions, but still must advance considerably before all athletes are drug-free.155 If

147. See Drug-testing Q&A, supra note 49 (making it optional for NCAA institutions to provide educational programs on drug use).
148. See Diaz, supra note 59, at G3 (recalling first Olympics gave money, food, tax exemptions, and other rewards for winning).
149. See Crummy, supra note 4, at 229 (stating athletes could be educated on alternatives to drug use to cope with problems faced). “Athletes often use drugs for a variety of reasons besides enhancing performance, such as . . . coping with stress and dealing with emotional confusion.” Id.
150. Id. at 230.
151. See Kolb, supra note 9, at B6 (noting education is “real key” to deterring drug use). Drug education is urged by many because of the harmful effects stemming from performance-enhancing drugs. See id. Because the Food and Drug Administration does not regulate performance-enhancing drugs, however, there is much speculation as to the real effects on the human body. See id. at B1.
152. See id. at B6 (arguing education might prevent athletes from “fall[ing] victim to scientifically unproven . . . fads”). Effective testing by athletic organizations will also prevent a greater number of athletes from taking drugs. See Thorpe Attacks, supra note 67.
153. See Kolb, supra note 9, at B6 (noting high school athletic director feels drug testing has been deterrent at high school level).
154. See id. at B1 (commenting that concern has grown over performance-enhancing drugs that can be purchased over-the-counter).
155. See Diaz, supra note 59, at G3 (indicating IOC is helpless against sophisticated masking agents that produce false negatives).
the sports world is serious about banishing drug use, steps must be taken to ensure that drug-testing programs are adequate enough to deter athletes from using drugs to enhance performance.\textsuperscript{156} First, anti-doping policies must include performance-enhancing drugs in the list of substances that in fact are tested.\textsuperscript{157} Second, all athletes must be tested consistently.\textsuperscript{158} Finally, anti-doping policies must expand to include drug education and other preventative methods to deter drug use by athletes fully at multiple levels.\textsuperscript{159} For anti-doping efforts to succeed, sports organizations must hold their own players publicly accountable and not conceal their drug use.\textsuperscript{160} Until all these problems are solved, drug use will remain an enormous dilemma within competitive sports.\textsuperscript{161} 

IV. CONCLUSION

Unfortunately, illegal drug use has plagued athletes just as it has the rest of society.\textsuperscript{162} Athletic organizations have made it their goal to combat this problem through anti-doping policies.\textsuperscript{163} These policies focus on drug testing "to deter and detect drug use."\textsuperscript{164} With the exception of high school athletic drug testing programs, sports organizations have been immune from Fourth Amendment

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\item[156.] See id. (arguing athletes everywhere are "cheating to win").
\item[157.] See id. (describing flaws in IOC testing policy, including not testing for certain banned substances); see also Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 650, 664-65 (holding that high school drug testing policy that detected use of street drugs only was constitutional).
\item[158.] See Testing for Prohibited Substances, supra note 79 (observing players will be tested at least "once per league year" in pre-season).
\item[159.] See Kolb, supra note 9, at B6 (stating education is crucial to curbing drug use); Survey, supra note 15, at 6 (finding seventy percent of "young people" could not recall specific side effect of performance-enhancing drugs, yet twenty percent knew person taking substances).
\item[160.] See Drug Chief, supra note 70 (citing WADA chairman Richard Pound's criticism of USA Track and Field officials' refusal to release names of athletes who tested positively for drug use).
\item[161.] See Crummy, supra note 4, at 197 (observing NCAA should be concerned with drug problem in athletics). Although drug testing policies have appeared to improve, "the candy store remains open." See Diaz, supra note 59, at G3.
\item[162.] See Marrazzo, supra note 1, at 78 (noting athletics are "microcosm of society").
\item[163.] See Martin, supra note 3, at 124 (observing drug programs attempt to deter drug use).
\item[164.] See id. at 123.
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principles.\textsuperscript{165} Therefore, many of the anti-doping programs are subject merely to privacy issues and bargaining power.\textsuperscript{166}

Drug testing programs have progressed substantially since their inceptions, yet they still receive heavy criticism for various reasons.\textsuperscript{167} The latest battles focus on whether drug testing policies actually test the appropriate drugs to protect athletes fully and prevent drug abuse.\textsuperscript{168} Consequently, sports organizations such as the WADA and NCAA have enlarged their banned substances lists to include almost every conceivable performance-enhancing drug.\textsuperscript{169} The surge to ban every substance, however, does not mean that every prohibited substance is tested.\textsuperscript{170} Furthermore, even if the substance is banned and tested, it does not follow that every player will be tested for the substance during competition or during the off-season.\textsuperscript{171}

It is necessary to substantially amend the anti-doping policies of many sports organizations.\textsuperscript{172} Too many athletes are taking substances to assist their performance, which is affecting sports of all types.\textsuperscript{173} This produces problems in youth athletic programs because young adults tend to emulate their favorite player to gain a


\textsuperscript{166} See Hill v. NCAA, 865 P.2d 633, 657 (Cal. 1994) (holding NCAA subject to state privacy law under state constitution); see also Weiler & Roberts, supra note 83, at 42 (observing professional leagues and unions disagree on issues involved with drug testing).

\textsuperscript{167} See Martin, supra note 3, at 124 (arguing testing programs are invasion of students' privacy rights); see also Diaz, supra note 59, at G3 (suggesting IOC's drug testing policy has major holes).

\textsuperscript{168} See Kolb, supra note 9, at B1 (noting growth in use of over-the-counter supplements to help athletic performance).

\textsuperscript{169} See Thorpe Attacks, supra note 67 (indicating testing for drug EPO, one of most popular drugs for endurance purposes, was initiated in 2000 Olympics).

\textsuperscript{170} See Diaz, supra note 59, at G3 ("While announcing drug testing methods to be used [at the] Sydney [Olympics], IOC president Juan Antonio Samaranch admitted that some banned substances remain free of testing.").

\textsuperscript{171} See Testing for Prohibited Substances, supra note 79 (stating players are tested at least once during pre-season and randomly during season). Yet, random testing does not ensure that every player is tested at some point during the regular season. See id.

\textsuperscript{172} See Diaz, supra note 59, at G3 (noting athletes are getting smarter at sidestepping testing policies).

\textsuperscript{173} See Fox, supra note 7, at 271 (detailing drug scandal surrounding Tour de France, cycling's most acclaimed event).
Performance-enhancing drugs have become the new battleground in sports, as organizations seek “to redirect sport back to its competitive roots without the influence of unfair advantages and victory without honor.” Furthermore, because performance-enhancing drugs are not subject to the policies of the Food and Drug Administration (“FDA”), conducting more studies is crucial to assess fully the true problems associated with such substances. Congress and the FDA must corral this problem through new, coherent legislation.

The current drug testing scheme is inadequate to fight this war, and much more needs to be done. Mandatory education, especially for youth sports, must become a cornerstone for drug deterrence. Until athletic organizations’ anti-doping policies involve more education and truly efficient testing, athletes of all levels will continue to use performance-enhancing drugs.

E. Tim Walker

174. See Marrazzo, supra note 1, at 75. Professional sports players have become marketing products for many companies who seek to attain the success that creatine has for professional baseball player Mark McGwire. See Kolb, supra note 9, at B1.

175. McLaren, supra note 63, at 380.

176. See Kolb, supra note 9, at B6 (describing reported side effects associated with creatine use).

177. See Spokes, supra note 55, at 194 (proposing regulation should be imposed in interests of consumer safety).

178. See Kolb, supra note 9, at B6 (arguing education is necessary to help eradicate drug problem in high school sports). Even though drug testing schemes are implemented in schools occasionally, estimates show that around 750,000 junior high and high school students have taken anabolic steroids. See id. at B1.

179. See Survey, supra note 15, at 6 (noting forty-five percent of parents did not know enough about performance-enhancing drugs to speak with children); see also Kolb, supra note 9, at B1 (indicating need for more studies).

180. See Diaz, supra note 59, at G3 (stating endorsement contracts for Olympic athletes who win medals are sufficient to continue rise in use of performance-enhancing drugs).