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Paul Porvaznik

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WHEN DRUG TESTING VIOLATES THE STUDENT ATHLETE'S RIGHT TO PRIVACY

INTRODUCTION

As drug testing in high school and college athletic programs becomes more prevalent, so does the amount of litigation challenging the constitutionality of these testing schemes. While these lawsuits sound in the varying claims of Equal Protection, Due Process, and Fourth Amendment encroachments, a constant among these actions is that they all allege an invasion of privacy.

Using the recent case of *Hill v NCAA*[1] as a starting point, this article will address the level of scrutiny courts apply to drug testing programs in the high school and college athletic context, and assess which programs will pass constitutional muster. More specifically, this article will focus on both the substantive and procedural elements of a given testing scheme as well as the private or governmental nature of the entity administering the testing program, and how this affects the court's determination of the appropriate level of scrutiny.

I. HILL V. NCAA: A WATERSHED IN PRIVACY JURISPRUDENCE

The *Hill* controversy arose when students at Stanford University sued the National Collegiate Athletic Association (NCAA).[2] The students contended that NCAA's drug testing program, which involved monitoring of urination, testing of urine samples, and inquiries into a student athlete's medical history, violated their right to privacy secured by article I, section 1 of the California Constitution.[3] Stanford intervened in the suit and adopted the plaintiff students' position.[4] The superior court found the challenged testing provisions an invasion of privacy and permanently enjoined their enforcement.[5] The court of appeals upheld the injunction.[6] The Supreme Court reversed the lower courts' holding and upheld the NCAA's drug testing policy.[7] By sustaining the constitutional validity of the program, the court implemented a new level of scrutiny for private testing entities, thereby developing the law of privacy as it applies to actions by private, nongovernmental entities. The *Hill* court however, left untouched the level of scrutiny courts have applied to testing procedures conducted by state/government actors. In light of the *Hill* court's focus on what level of scrutiny a private

1. 865 P.2d 633 (Cal. 1994).
2. *Id.*
3. *Id.* at 637
4. *Id.*
5. Santa Clara County Superior Court, Case No. 619209.
6. 18 Cal. App. 4th 1290 (Cal. Ct. App. 1990).
7. *Hill*, 865 P.2d. at 633.

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actor's drug testing procedure must survive to pass constitutional muster, the multiple cases which address the level of scrutiny to be applied when a government entity is administering a given testing program, supplement rather than clash with the novel standard enunciated in *Hill*. After *Hill*, the public or private nature of the actor administering a drug testing scheme to student athletes becomes a threshold question for the courts when determining whether the program can survive constitutional scrutiny.[8]

II. THE HILL INTERMEDIATE SCRUTINY STANDARD

In *Hill*, the California Supreme Court addressed three questions of first impression: (1) Does the state Privacy Initiative govern conduct of private, nongovernmental entities such as the NCAA?; (2) If yes, what legal standard is to be applied in addressing alleged invasions of privacy?; (3) Under this standard, is the NCAA's drug testing program a violation of the state constitutional right to privacy?[9] After answering the first question in the affirmative, the court turned to the issue of what level of scrutiny should be applied to the allegedly intrusive conduct of private entities.[10]

The *Hill* court first established that the NCAA is a private organization, not a government agency, and that the "relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action.[11] In adopting a more relaxed standard of scrutiny for private entity intrusions, the court cited the pervasiveness and wide-ranging effect of government intrusion, the existence of a greater range of choices and alternatives that confront an individual when dealing with private actors, and the protected associational interest a private citizen or organization has in choosing with whom she or it will deal.[12] These factors together led the *Hill* court to apply a less exacting standard than the "compelling interest" test applied by both the lower court and courts in privacy actions brought against state universities.[13]

III. INFORMATION AND AUTONOMY INTERESTS

Aside from adopting a lower level of scrutiny for private action, *Hill's* significance also lies in its bifurcation of a student athlete's privacy interest. The *Hill* court analyzed the plaintiff's "autonomy privacy" and "informational privacy" interests and how those interests were affected by the NCAA's testing scheme before upholding it against the students' constitutional attack.[14] The court defined the autonomy privacy interest as an interest in freedom from obser-

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8. *Id.* at 641.

9. *Id.*

10. *Id.* at 642.

11. *Id.* at 655; *see* Brooks v. E. Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 762 (S.D. Tex. 1989).

12. *Hill*, 865 P.2d at 656.

13. *See, e.g.*, Derdeyn v. Univ. of Colo., 832 P.2d 1031 (Colo. App. 1991).

14. *Hill*, 865 P.2d at 657.

vation in performing a function recognized by social norms as private.[15] The informational privacy interest was defined as an interest in limiting disclosure of confidential information about bodily condition.[16] The court held that the NCAA's testing program implicated both types of privacy interests and would therefore have to withstand constitutional scrutiny on both the autonomy and informational level.[17]

IV. ELEMENTS OF A PRIVACY CLAIM

While other cases have analyzed privacy actions directed against testing procedure on Fourth Amendment illegal search grounds[18], the *Hill* court instead focused on the elements that a privacy claimant had to satisfy under the state Privacy Initiative. The Privacy Initiative to the California Constitution was adopted by the voters of California on November 7, 1972.[19] This amendment supplemented article I, section 1 of the state constitution by adding privacy to the section's catalog of inalienable rights.[20] The court held that in stating a cognizable privacy claim, a litigant must show the following: (1) A legally recognized privacy interest; (2) a reasonable expectation of privacy; and (3) a serious intrusion into that privacy interest.[21] Once a claimant satisfied these elements, a defendant could still prevail either by negating any of the three elements or by pleading and proving, as an affirmative defense, that the invasion is justified because it substantively furthers one or more countervailing interests.[22]

The *Hill* court held that the NCAA's direct monitoring of an athlete's urination infringed upon a legally protected privacy interest.[23] The athlete's right was infringed both autonomously and informationally because direct monitoring intruded on a human bodily function that by law, and social custom, was generally performed in private and without observers.[24] The court similarly held that questioning a student athlete on medication that he/she is currently ingesting or has taken in the past sufficiently impeded a student athlete's informational privacy interest.[25] After establishing that plaintiffs had asserted a legally protected privacy interest, the court examined the remaining elements as they impacted both the plaintiffs' autonomy and informational privacy interests.[26] In addressing the plaintiff's autonomy interest, the court held that while an athlete did have

15. *Id.* at 657.
16. *Id.*
17. *Id.*
18. *See, e.g.*, Schaill v. Tippecanoe, 864 F.2d 1309 (7th Cir. 1988).
19. CAL. CONST. art. 1, § 1.
20. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety happiness, *and privacy*." CAL. CONST. art I, § 1 (emphasis added).
21. *Hill*, 865 P.2d at 656.
22. *Id.* at 657.
23. *Id.* (*citing* Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602 (1989)).
24. *Id.*
25. *Id.*
26. *Id.*

a reasonable expectation of privacy in not being watched while urinating, this expectation of privacy was greatly compromised in the context of intercollegiate athletics.[27] The *Hill* court also held that a plaintiff's informational privacy interest was similarly diminished in the context of intercollegiate athletics.[28] The court stated that while a plaintiff's interest in the privacy of medical treatment and medical information was indeed a protectible interest under the Privacy Initiative, this interest was greatly relaxed in this context because organized and supervised athletic competition presupposed a continuing exchange of otherwise confidential information about the physical and medical condition of athletes.[29] The court bolstered its holding of a lessened informational privacy interest by citing the fact that coaches, trainers, and team physicians all learn intimate details concerning a student athlete's bodily condition including bodily illnesses and any medications ingested by the student athlete.[30] In making the determination that athletes have a diminished expectation of both informational and autonomy privacy, the court cited the climate of "close regulation and scrutiny of the physical fitness and bodily condition of student athletes."[31] Further support for this contention is found in cases addressing privacy claims in the high school athletic drug testing context.[32] The crux of the diminished expectation of privacy claim then is that given the frequent and intense monitoring of an athlete's internal and external condition, some intrusion into otherwise inviolable areas comes with the territory.[33]

V. Autonomy Privacy

The California Supreme Court held that the NCAA's challenged testing scheme compromised an athlete's autonomy privacy interest in not being subject to unduly intrusive testing procedures.[34] The Court determined that in spite of the diminished expectation of privacy inherent in the athletic context, the NCAA's procedure of directly monitoring a student athlete was acutely intrusive and the NCAA's concomitant probing the student for information relating to ingested medications satisfied the serious invasion of privacy element.[35] Having recognized that the claimants had satisfied the reasonable expectation test (albeit a relaxed one) and the serious intrusion test, the burden shifted to the NCAA to show that its actions were justified by one or more countervailing interests. As the court explained, legitimate competing interests derive from the "legally authorized and socially beneficial activities of government and private entities . . .

27. *Id.* at 658.
28. *Id.*
29. *Id.* at 664.
30. *Id.* at 664-65.
31. *Id.*
32. *See, e.g.*, Schaill v. Tippecanoe, 864 F.2d 1309, 1318 (7th Cir. 1988) (discussing the "communal undress" nature of athletics).
33. *Hill*, 865 P.2d at 637.
34. *Id.* at 633.
35. *Id.* at 659.

[t]heir relative importance is determined by their proximity to the central functions of a particular public or private enterprise."[36] The asserted countervailing interests in *Hill* were: (1) safeguarding the integrity of intercollegiate athletic competition; and (2) protecting the health and safety of student athletes.[37]

In analyzing whether the NCAA's asserted interests trumped the plaintiffs' privacy claims, the court first noted that since neither Congress nor the Legislature had seen fit to interfere with the NCAA's rule-making authority, they were compelled to view the NCAA's motives and objectives with presumptive validity.[38] Noting that the central purpose of the NCAA was to promote competitive athletic events conducted pursuant to its rules enacted by its membership, the court applied a type of rational basis scrutiny.[39] The court held that the NCAA's asserted interest in ensuring a "level playing field" was sufficient justification for the intrusive testing procedure.[40] The court's holding on this issue was further bolstered by extensive expert testimony which evidenced a causal link between drug use and artificially enhanced performance in those athletes using drugs, particularly steroids.[41] In validating the NCAA's asserted interest in promoting the health and safety of its member athletes, the court stated that since the NCAA effectively created athletic-related risks by sponsoring intercollegiate athletics, they had an affirmative duty to protect those participating in intercollegiate athletics.[42] The court found added impetus for this holding in the fact that the NCAA's interest in safety existed not only for the benefit of the drug using athlete but also for the innocent athlete and anyone else who might be injured by a drug user.[43] Just as the court enunciated no clear standard of scrutiny when passing on the NCAA's fair competition interest, they were equally cryptic with regard to the health/safety interest stating, "the NCAA has a *significant* interest in conducting a testing program"[44] However, what is clear is that the level of scrutiny employed did not rise to the level of a compelling interest or strict scrutiny standard.

VI. INFORMATIONAL PRIVACY

The *Hill* court also upheld the NCAA testing scheme against the informational privacy interest implicated by the scheme.[45] In addressing the reasonable expectation claim, the court stated that because athletes regularly share their medical

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 659.
40. *Id.* "[T]he NCAA's decision to enforce a ban on the use of drugs by means of a drug testing program is *reasonably* calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition." *Id.* at 660 (emphasis added).
41. *Id.*
42. *Id.* at 661.
43. *Id.*
44. *Id.* at 662 (emphasis added).
45. *Id.* at 665.

conditions with coaches, trainers, and team physicians, the plaintiffs failed to demonstrate that sharing similar information with the NCAA presents any greater risk to privacy interests.[46] The *Hill* court also held that the athlete's diminished expectation of privacy with respect to revealing medical data engendered an analogous intrusion into that privacy interest.[47] The court reasoned that since questions relating to medications are routinely asked of student athletes, the information which the NCAA sought to elicit here could hardly be regarded as a serious intrusion.[48] Finally, the court applied what appeared to be a rational basis test in upholding the NCAA's competing interest of ensuring accurate drug test results as justification for its information-gathering procedures.[49]

The *Hill* court noted that a prime source of error in both the plaintiffs pleadings and the trial court's ruling was imposing on the NCAA the burden of showing that there were no less invasive alternatives than the testing program employed.[50] The court summarily disposed of this contention by stating that a defendant only has the burden of proving no less intrusive alternatives in situations which involve "clear invasions of central, autonomy-based privacy rights, particularly in the areas of free expression and association, procreation, or government-provided benefits in areas of basic human need"; or where a privacy action is directed against intrusive government conduct rather than private voluntary organizations.[51]

Hill is instructive in that it addresses the interest necessary to justify the invasive procedure of direct monitoring of an athlete's urinating habits.[52] This process of direct monitoring survived the court's scrutiny because the NCAA adduced evidence that urine samples were subject to tampering and in fact had been tampered with by athletes in the past and no evidence was brought by plaintiff to suggest that any less intrusive procedure could ensure the same level of testing accuracy as direct monitoring.[53]

VII. Post-Hill Privacy Actions

Any attempt at forecasting how privacy jurisprudence will evolve in the wake of *Hill* is mere speculation. *Hill* does however seem to firmly establish that when a private entity is imposing a testing procedure which implicates privacy interests, the court will apply a lower level of scrutiny than the strict standard applied

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 666. The court stated that, "[t]he NCAA's information-gathering procedure is a method *reasonably* calculated to further its interests in enforcing a ban on the ingestion of specified substances in order to secure fair competition and the health and safety of athletes participating in its programs." *Id.* (emphasis added).
50. *Id.* at 663.
51. *Id.*
52. The court explained that "[t]he closest question presented by this case concerns the method used by the NCAA to monitor athletes as they provide urine samples." *Id.* at 664.
53. *Id.*

against state/public actors.[54] A court will also note the volitional nature of the activity at issue as well as whether or not a claimant was provided notice of the manner in which the testing scheme would be administered. If the notice and voluntariness tests are met and the private entity can assert "legitimate" or "important" interests as justification for their allegedly intrusive conduct, then a plaintiff's prospects of enjoining the private actor's conduct are negligible.[55]

VIII. Drug Testing in Public High School Athletics

While *Hill* is arguably a watershed decision in privacy law as applied to private actors, the decision has little effect on drug testing in the high school context. An important case addressing drug testing in the high school athletic context is *Schaill v. Tippecanoe*.[56] In *Schaill*, the 7th Circuit Court of Appeals upheld against a Fourth Amendment claim a school's requirement that interscholastic athletes consent to random urinalysis testing to be eligible to compete in interscholastic sports.[57] Although the court never specifically said which level of scrutiny they were applying, inferences reasonably drawn from the opinion show that a stricter level of scrutiny than that applied in *Hill* was used. The *Schaill* court first noted that in the athletic context, there is a diminished expectation of privacy.[58] From that premise the court held that the government interest in the program must still be "weighty" and that less intrusive options for serving the government's ends had been exhausted.[59] In holding that the testing procedure at issue was constitutionally sound, the court pointed to the fact that the school system's testing program involved no direct monitoring of urination.[60] Thus, by implication the court seemed to be suggesting that if direct monitoring of urination were used as part of the testing program, it likely would have intensified the court's scrutiny of the school's testing program. The *Schaill* court also pointed to the consent form which students had to sign informing them of the program.[61] The court felt that this consent form fully notified the student athletes of what was going to transpire and further mitigated the intrusiveness of the school's testing program.[62]

If *Schaill* left open the question of what level of scrutiny should be employed in a high school drug testing context, *Acton v. Vernonia*[63] unequivocally an-

54. *See Derdeyn*, 832 P.2d at 1034 (The court enjoined a public university from continuing its mandatory drug testing program on the ground that the university's interest in securing a drug-free athletic program was not a compelling state interest which justified its collection and testing of urine as part of its drug testing program).

55. *Hill*, 865 P.2d at 667.

56. *Schaill*, 864 F.2d at 1309.

57. *Id.*

58. *Id.* at 1318.

59. *Id.*

60. *Id.* The court stated that "[t]he invasion of privacy is therefore not nearly as severe as would be the case if the monitor were required to observe the subject in the act of urination." *Id.*

61. *Id.*

62. *Id.* at 1320.

63. 796 F. Supp. 1354 (D. Ore. 1992).

swered the question by adopting a "compelling need" standard. In *Vernonia*, the court upheld a school district's drug testing policy of student athletes against a Fourth Amendment illegal search claim.[64] The court held that since the district had no individualized suspicion for testing the students, they had to demonstrate a compelling need to justify the program.[65] There were several factors which influenced the court's decision to sustain the program against constitutional attack. One factor was the evidence cited by the school board which convincingly showed a link between drug use and concomitant danger to the athlete.[66] Another important consideration which influenced the court's holding was the fact that the school board administering the testing program did not undertake direct monitoring of urination.[67] Again, this implies that direct observation of urination in the public high school athletic context is unlikely to survive constitutional scrutiny. A final factor in the court's analysis was the evidence showing that alternatives to random testing like education had been attempted unsuccessfully.[68] Finally, the court held that substantial deference should be given to school administrators in matters relating to safety and discipline.[69]

A case reaching a different result in the high school drug testing context is *Brooks v. East Chambers Consolidated Independent School District*.[70] In *Brooks*, the district court held unconstitutional a school district's drug testing program which consisted of urinalysis testing without individualized suspicion of students in grades seven through 12 who were not only participating in athletics but also in extra-curricular activities.[71] The *Brooks* court stressed that in the absence of individualized suspicion, the state testing actor would have to justify the program with reference to "special interests."[72] The court held that special interests which would be required to justify this program would include: (1) evidence that participants in extra-curricular activities are more likely to use drugs than non-participants; and (2) evidence that drug use by participants interfered with the school's educational mission more seriously than drug use by non-participants.[73] Since the school district offered no such evidence, the court found an absence of special interests justifying such a program.[74]

Another basis upon which the court struck down the challenged testing scheme in *Brooks* was the fact that it applied to non-athletes who nevertheless sought to engage in extracurricular activity.[75] As the court explained, this com-

64. *Id.*

65. *Id.*

66. *Id.* at 1363.

67. *Id.*

68. *Id.* The court emphasized that "[this] subtle approach not only failed, but seemed to cause further disruptions." *Id.*

69. *Id.*

70. 730 F. Supp. 759 (S.D. Tex. 1989).

71. *Id.*

72. *Id.* at 764.

73. *Id.*

74. *Id.*

75. *Id.*

prised over half the student body.[76] While the program upheld in *Vernonia* involved extensive testing of a large amount of people, the dispositive factor seems to be that students who are not participating in athletics but are involved in other activities, are being tested in *Brooks*. In light of this fact, students whose expectations of privacy are not diminished are still being subjected to this drug testing procedure.

The *Brooks* court also implemented a requirement that the testing program have likely prospects of accomplishing its asserted goals.[77] The court determined that the school district's asserted goals of preventing drug-impaired students from extra-curricular participation and deterrence from drug use were too remote; the lax testing procedures were in no way a measure of present impairment; and the consequences of a positive test result, foregoing extra-curricular activities, was not severe enough to serve as a deterrent to drug use.[78]

CONCLUSION

Both *Hill* and the cases in which public high school drug testing programs have been constitutionally challenged have predictive value for future cases challenging these programs. *Hill* stands for the firm proposition that when a testing body is private rather than public/governmental, the court will apply a relaxed intermediate level of scrutiny even if the challenged scheme severely intrudes into both autonomous and informational spheres of privacy.[79] In contrast, many high school cases are in agreement that the level of court scrutiny which a public high school testing program must survive is strict or compelling.[80] To satisfy this burden, the state actor must show that the objective furthered by the testing program is indeed compelling. *Schaill* and *Vernonia* suggest that the compelling interest standard is met when the goal of a testing program is to ensure the safety of a student athlete and to maintain discipline and order.[81] *Vernonia* also suggests that deference should be given to school officials' determinations concerning discipline and safety.[82] *Brooks* holds that when a testing program subjects to testing non-athletes whose privacy expectations remain intact, the program is likely to be struck down.[83] *Brooks* also adds the requirement that a state testing actor who seeks to test students who do not have a diminished privacy interest, produce evidence which convincingly shows that the challenged program is likely to accomplish its asserted goal(s).[84] In accordance with the compelling scrutiny courts are likely to apply in the high school athletic context, future courts will likely look to whether a state testing body has exhausted all less intrusive meth-

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76. *Id.*
77. *Id.* at 765.
78. *Id.*
79. *Hill*, 865 P.2d at 633.
80. *See, e.g.*, Acton v. Vernonia School District 47J, 796 F. Supp. 1354 (D. Ore. 1992).
81. *See Schaill*, 864 F.2d at 1309; *Vernonia*, 796 F. Supp. at 1354.
82. *Vernonia*, 796 F. Supp. at 1363.
83. *Brooks*, 730 F. Supp. at 764.
84. *Id.* at 765.

ods of achieving its objectives. *Schaill* and *Vernonia* are instructive on this point as both cases imply that direct monitoring of urination will constitute such an egregious invasion into an athlete's sphere of privacy that no countervailing interest will justify the invasion.[85]

Paul Porvaznik

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85. *See Schaill*, 864 F.2d at 1309; *Vernonia*, 796 F. Supp. at 1354.