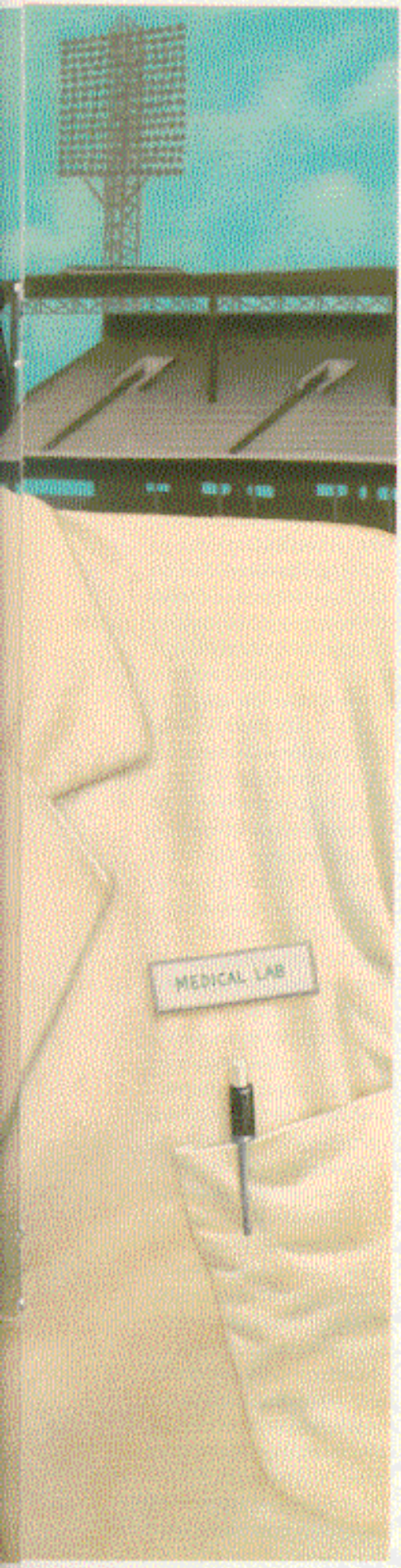
Illustrator: Mark Robison



TO TEST OR NOT TO TEST

Mandatory drug testing of athletes—An ACLU official calls it un-American; a BYU law professor contends it's within our legal tradition.

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THE RIGHT TO PRIVACY IS A BASIC PRINCIPLE

By Ira Glasser, Executive Director, American Civil Liberties Union

Bob Stanley pitches for the Boston Red Sox. As if that were not punishment enough, now his employers want him to submit to periodic urine tests. Stanley's reaction was swift and to the point. "I don't take drugs," he said, "and I don't believe I have to prove I don't."

With that statement, Stanley aligned himself squarely with one of America's oldest traditional values, the idea that general searches of innocent people are unfair and unreasonable.

The tradition began in colonial America when King George's redcoats had the intrusive habit of searching everyone indiscriminately in order to uncover those few who were violating the Stamp Act or otherwise committing offenses against the Crown. Indeed, it is not an exaggeration to say that those general searches were deeply hated by the early Americans and were a leading cause of the resentment that fueled the Revolution.

After the war for independence was won, there was a government to build. Fresh from the experience of the unfairness of general searches, but sensitive to the need to enforce the law against criminal conduct, the founders wrote, and the people ratified, the Fourth Amendment to the Constitution. It struck a reasonable balance between privacy and law enforcement. The police would be permitted to search people in their homes, but only if there was good reason to believe that a particular individual was involved in a crime or possessed evidence of a crime In other words, before you search a particular individual or place, you have to have some evidence against that person to justify your suspicions.

The key requirement of the warrant procedure established by the Fourth Amendment is particularized suspicion. You can't search everyone, innocent and guilty alike, to find the few who are guilty. This basic American principle has been abandoned by those who advocate urine tests for everyone Bob Stanley was right Why should he be searched because a few others have used drugs?

Compulsory blood tests and urine tests are bodily searches. In 1966 the United States Supreme Court said so. It ruled that the Fourth Amendment applied to such searches and that a compulsory blood test could be conducted only if there is "a clear indication that in fact . evidence will be found." In other words, there has to be a specific reason a particular person is suspected of using drugs before such a test can be compelled.

One of America's oldest traditional values [is] the idea that general searches of innocent people are unfair and unreasonable.

That seems fair Why subject the many innocent to periodic and intrusive searches in order to find the guilty few? And although the Fourth Amendment only applies to government officials, and does not legally limit the power of private employers, certainly the same principle of fairness ought to apply

Some have argued that the innocent have nothing to fear from such searches. That is not true For one thing, the most commonly used urine test is not by itself very reliable. Sports employers, like Baseball Commissioner Peter Ueberroth, for example, have claimed that urine tests are accurate and reliable. That is not so. Although a negative result almost certainly means the person tested is drug free, a positive result cannot by itself be used to infer impaired ability to perform, drug addiction, or even recent intoxication. Moreover, the most commonly used test cannot distinguish among a wide variety of drugs and medications. It will often show a positive result if it detects small amounts of marijuana as well as cocaine or a wide variety of allergy or other medicines available without a prescription. False positives are far from uncommon and can damage the reputations of innocent people.

The most commonly used tests also cannot tell us much about the extent or recency of use. A single positive test result indicates that some chemical substance was used, but it cannot tell us what the substance was, how much was used, or when it was used. Suppose a baseball player smoked a marijuana joint on an off day and tested positive a week later. Does that impair his ability to perform? If not, why is it his employer's business? And if smoking a marijuana joint on an off day is not permitted, why is drinking the night before a game part of the accepted lore of the sport? Indeed, if impairment of ability to function is the issue, why is it permissible for sports executives to have a couple of martinis at lunch, but not permissible for their employees, including ballplayers, to smoke a marijuana joint during a lunch break? It seems to depend on what your drug of choice is.

Surely public image is not an issue, or else sports commissioners would not permit ex-ballplayers and managers and coaches to do beer commercials Nor would they encourage the sale of beer in ball parks, which demonstrably creates and implicitly condones public drunkenness.

There is one legitimate issue: job performance Every employer, including sports employers, has the right to expect their employees not to be drunk or stoned or high on the job But employers do not have the right to monitor their employees' conduct off the job or to subject people to bodily searches who are not

suspected of drug use affecting their performance.

In demanding general searches of all their athletes, sports employers subscribed to the policy that "if you hang 'em all, you'll get the guilty " They do that to satisfy what they perceive as a public-relations problem, and they are willing to sacrifice the rights and interests of the majority of players, who are innocent of any misconduct They are like those prosecutors who defend warrantless wiretapping by suggesting that people shouldn't mind being wiretapped by the government if they've got nothing to hide. But innocent people do have something to hide: their privacy. And they have something to protect. their interest against being recklessly stigmatized and accused as a result of a mistake.

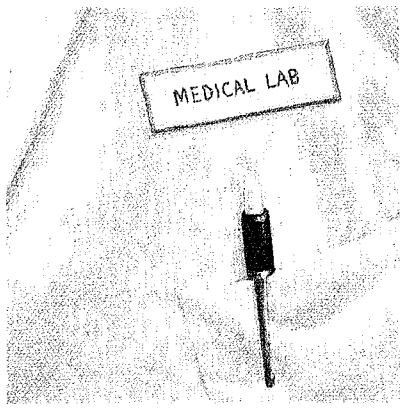
Proposals to conduct periodic body searches of everyone would require the innocent to prove themselves not guilty That is not the American way.

Tests can be useful as part of an overall program, but they should be narrowly limited to those players who are reasonably suspected of using drugs in a way that impairs job performance.

Professional sports may indeed provide role models for society. But one of the things that sports employers ought to think about when they talk about role models is the role model they are providing by abandoning fundamental rules of fairness and subjecting innocent and guilty alike to intrusive procedures.

In that respect, Bob Stanley's reaction provided a better role model for traditional American values than Peter Ueberroth's attempt to coerce the innocent to abandon their rights.

These procedures are far less intrusive than other searches traditionally deemed constitutionally reasonable.



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LAWS PROVIDE FRAMEWORK FOR PROCEDURE

By Michael Goldsmith, Associate Professor of Law, BYU

The availability of reliable scientific procedures for detecting the presence of controlled substances in professional athletes has predictably stirred legal controversy. Initially used to discern illicit means of attaining a competitive edge, the tests are now being adapted to detect the residue of "social drugs" capable of adversely affecting on-field performance and, not infrequently, of destroying lives. Although these procedures have been attacked on privacy grounds, such tests are well within our legal framework.

All employers obviously have strong incentives to take precautionary steps against drug abuse. In addition to diminished productivity, drug-dependent employees file disproportionate numbers of worker compensation claims and endanger the safety of others on the job. But sports employers, in particular, have an inherently stronger motivation to combat drug abuse, because athletic competition is directly dependent upon the physical and mental well-being of its participants. As such, the sports employer has the same right to know about a player's drug problem as he does to know about a knee injury

Under federal and state statutory law, private employers are given broad leeway to control their work force. The obvious rationale is that the workers are there voluntarily and that, either individually or through their union, they have negotiated the terms of their employment. So long as an employer does not violate anyone's civil rights by discriminating on the basis of "race, color, religion, sex or national origin"—plainly not an issue here—he or she may properly undertake measures to insure that employees are operating at optimal efficiency. In addition, drug dependency affecting job performance may legally constitute "just cause" for dismissal.

These statutory principles comport with constitutional doctrine. Admittedly, chemical tests raise privacy concerns, but the legal argument in support of these concerns fails to recognize

distinctions that are fundamental under our system of law. Most obvious—but so often overlooked—is that the Bill of Rights is simply inapplicable to the private sector; its focus and intent was on governmental abuse. This central point settles the privacy issue except in those relatively rare situations, such as boxing, in which testing is sometimes mandated by state law Even so, rather than rest the argument on a technical, albeit critical, point of constitutional law, examination of the privacy principle likewise supports the propriety of drug testing procedures.

From a constitutional perspective, it is useful at first to recognize which legal principles are not relevant to the privacy issue Thus, for example, under prevailing jurisprudence the privilege against self-incrimination is inapplicable because no *testimonial* information is being compelled from the test subject

Likewise, due process concerns are not triggered so long as there is ample opportunity to contest the accuracy and significance of any test result. And equal protection guarantees are not abridged so long as drug testing is rationally based and does not have an unfair impact on any "suspect class" (for example, race or religion).

On the merits, drug tests do not violate either "the right to privacy" or the Fourth Amendment prohibition against "unreasonable searches and seizures " Arguments based on privacy tend to be couched in absolute terms This tendency, however, ignores the qualified nature of both the privacy doctrine and one of its underlying predicates—the Fourth Amendment.

Thus, the Supreme Court has stated that "the privacy right cannot be said to be absolute." Indeed, Justice Brandeis, widely regarded as author of the privacy doctrine, focused his concern only on the "unjustified" or "unwarranted invasion of individual privacy " Moreover, in another context, Justice Brandeis suggested that public figures may be somewhat less deserving of privacy protection.

Similarly, from a Fourth Amendment perspective, only "unreasonable searches and seizures" are prohibited. As such, Justice Frankfurter once cautioned that "to tear 'unreasonable' from the context and history and purpose of the Fourth Amendment . . is to disregard the reason to which reference must be made when a question arises under the Fourth Amendment." With this in mind, whether a search is "unreasonable" has traditionally been resolved by balancing the extent of the intrusion against the nature of the privacy interest involved On this basis, no less a civil libertarian than Justice Brennan has observed that "where the court has found a lesser expectation of privacy or where the search involves a minimal intrusion on privacy interests . . the Fourth Amendment protections are correspondingly less stringent " This line of reasoning has legitimized the use of airport searches and road blocks against drunken drivers as well as a wide variety of other warrantless searches conducted in a nondiscriminatory manner

Applying this analysis to drug testing in professional sports compels a finding of constitutionality At stake is the integrity of professional competition, which is already vulnerable to external corruption. Loss of faith in any sport can have devastating economic and social consequences for owners, players, and many others as well—thousands of people depend upon the viability of sports institutions

Drug testing can promote institutional integrity through reliable procedures that are safe and convenient as well as nondiscriminatory and highly confidential. Significantly, these procedures do not encroach upon traditional privacy concerns: the sanctity of inner thought or intimacy of relationships. The tests are geared specifically for one category of conduct: the use of controlled substances As such, these procedures are far less intrusive than other searches traditionally deemed constitutionally reasonable.

Perhaps a professional athlete has a privacy interest of sorts in his urine, or in what the urinalysis will reveal. But given the interest at stake and the minimal effect of testing on legitimate privacy concerns, the constitutionality of these procedures is manifest. Rather than debate and litigate the propriety of drug testing, professional sports ought to be encouraged in its efforts. Much of what can be accomplished now furthers true rehabilitative goals and can ultimately serve to make far more intrusive procedures—by law enforcement—unnecessary in the future.

Years ago, when a recalcitrant attorney contested the judiciary's authority to police the integrity of the legal bar, Justice Cardozo responded that "in the long run the power . . will make for the health and honor of the profession for the protection of the public If the house is to be clean, it is for those who occupy and govern it, rather than for strangers, to do the noisome work." I have no doubt how Justice Cardozo would have resolved the issue under consideration.

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Michael Goldsmith