

NOTES

CAUGHT IN THE NET: ATHLETES' RIGHTS AND THE WORLD ANTI-DOPING AGENCY

MATTHEW HARD*

I. INTRODUCTION: WHY WE SHOULD CARE ABOUT DOPING IN SPORTS WHILE PROTECTING ATHLETES' RIGHTS

“Citius, altius, fortius” – Olympic Motto¹

Olympic sports competition holds a unique position in society. At its noblest, Olympism is a “philosophy of life . . . blending sport with culture and education,” which serves the ultimate end of promoting a peaceful society.² Contributing to a collective world narrative, Olympic competition connects cultures through the dramatic spectacle of unexpected success, unexpected failure, and plain luck. Olympic competition also serves as a platform for nationalism, as countries become tremendously invested in the success of their athletes. The elevated position that Olympic competition has in society makes cheating a particularly egregious violation of the Olympic spirit. To protect the integrity of Olympic competition and the health of athletes, cheaters must be caught and punished. However, judicial economy and practical considerations in the fight against doping require certain legal presumptions³ that run against the notions of culpability we traditionally use to label someone a “cheater.”⁴

This Note will analyze current international anti-doping law—which includes the goals, the principles used to justify the goals, the rules, and the sanctions—with an emphasis on athletes’ rights. There is a group of

* JD/MBA Candidate, University of Southern California, 2011; B.A., Georgetown University, 2006. I would like to thank Professor Michael Shapiro for his expertise and guidance. Thank you for focusing the lens through which I approached a daunting subject encompassing sports law, bioethics, human rights, and philosophy. Special thanks to my family: to Bill and Pam for their endless support throughout my entire academic experience; to Katie for providing a model of excellence to aspire to; to Kalle for his earnest curiosity; and to Jamie, for being my favorite outlet.

¹ “Citius: fast not only in the race, but with a quick and vibrant mind as well. Altius: higher, not only toward a coveted goal, but also toward the uplifting of an individual. Fortius: not only more courageous in the struggles on the field of play, but in life, also.” International Olympic Committee, Olympic Charter, July 7, 2007, available at http://multimedia.olympic.org/pdf/en_report_122.pdf [hereinafter IOC, Olympic Charter].

² *Id.* at 11.

³ The linchpin of anti-doping policy is the strict liability standard.

⁴ Merriam-Webster’s Online Dictionary defines the verb “cheat” as (1a) to practice fraud or trickery, or (1b) to violate rules dishonestly, which implies some level of intent. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/cheat> (last visited Mar. 25, 2010).

commentators who argue for the legalization of performance enhancers;⁵ an obvious way to remove the problem of cheating would be to legalize all substances so no rules are broken. However, sport would then become a battle not of talent, but of who is willing to trade more future life expectancy for current glory.⁶ Rather, I assume that there are certain substances and methods that artificially and unfairly enhance ability, and the health risks of which are exacerbated by the culture of competition. A quote from a court decision nicely summarizes the need for anti-doping laws: they are “necessary to protect the right of the athlete, including Mr. (Ben) Johnson, to fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist.”⁷ However, I also assume that intuition alone is not sufficient in defining the offense of “doping,” and this Note will analyze the theoretical underpinnings of anti-doping, which in their current form are overly broad.

Anti-doping law should be assessed for a number of reasons. First, the fight against doping is an important one, which requires tremendous resources,⁸ informal and formal government support,⁹ and international oversight. Logistically, the efficient and effective use of these resources depends on clear goals, since there is little money to waste. Anti-doping policy suffers from a definitional problem—who are we trying to catch? The World Anti Doping Agency (“WADA”) has perhaps bitten off more than it can chew since it has cast a wide net, using broad strokes of “fairness,” “health,” and “spirit of sport” arguments to justify an exhaustive list of banned substances, and a series of sanctions that pay no mind to actual performance enhancement or intent. These goals often make it difficult for WADA to rationalize the inclusion of certain substances and the enforcement of disciplinary sanctions. If anti-doping laws are seen as arbitrary, hypocritical, and over-inclusive they will lose credibility, thus making the burden they place on athletes questionable. For example, in the name of eradicating unfair performance enhancement, the WADA will suspend an athlete for taking supplements that contain steroids on the grounds that it artificially enhances performance, yet we allow Tiger Woods to have laser eye surgery to give him vision that nature did not intend him

⁵ E.g., Matthew Syed, *Let Them Take Drugs—the Safe Ones*, THE TIMES (LONDON), July 19, 2008; Julian Savulescu & Bennett Foddy, *Le Tour and the Failure of Zero Tolerance: Time to Relax Doping Controls*,

http://www.practicaethics.ox.ac.uk/Staff/Director%20Julian%20Savulescu/Publications/BC_Enhance_Tour/Text.pdf (last visited Mar. 25, 2010); Bengt Kayser, et al., *Legalisation of Performance Enhancing Drugs*, 366 THE LANCET, Dec. 17, 2005, at S21.

⁶ Syed, *supra* note 5.

⁷ Gabrielle Kaufman-Kohler & Antonio Rigozzi, *Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes*, Nov. 13, 2007, at 910, http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf (quoting *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201 29 (Can.)).

⁸ The World Anti-Doping Agency has prepared a helpful document to capture the costs associated with laboratories and testing. World Anti-Doping Agency [WADA] *Report of the WADA Working Group on Anti-Doping Costs*, Nov. 19, 2006, http://www.wada-ama.org/rtecontent/document/Report_WG_Costs_231106_en.pdf.

⁹ An example of formal government support is the New York Convention, the parties to which must recognize and enforce foreign arbitration awards, such as anti-doping sanctions. 9 U.S.C. §§ 201–07; *Convention on the Recognition and Enforcement of Foreign Arbitral Award*, Jun. 10, 1958, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

to have.¹⁰ While it is difficult to rationalize the difference between what we allow and what we ban, a rigorous analysis is necessary to retain the support of stakeholders, and to justify the burdens placed on athletes. It is also important to consider how these policies can run against what society expects and allows athletes to do to accomplish the superhuman. The goals of anti-doping policy need to be narrowed, as it is apparent that WADA does more than punish cheaters in the traditional sense of the word.

Second, anti-doping policies should be examined because sports governing bodies “hold a monopolistic ‘quasi-public’ position in their relation with the athletes under their jurisdiction.”¹¹ Additionally, the spotlight that sports enjoy in society makes doping a highly charged discussion, where aggressive anti-doping policies can lead to overzealous prosecution.¹² Journalists have noted the hysteria that surrounds doping allegations, leading some to call it a witch hunt.¹³ The three ideals used by anti-doping laws to justify bans and sanctions—fairness (“leveling the playing field”), protecting the health of the athlete, and maintaining the “spirit of sport”—have the potential to run against traditional notions of fairness to the accused and proportionality of punishment. For example, the often reckless rhetoric of anti-doping authorities tends to conflate the “war on doping” with the “war on drugs.”¹⁴ While the distribution of rights in doping law comes from contract law,¹⁵ when an athlete tests positive, we do not consider them in breach: rather, we say they are guilty. The impact of a doping charge is tremendous, resulting in public condemnation, loss of sponsorships, forfeited titles, disqualification, and suspension. For athletes competing in endurance sports, a false positive and two year suspension could be the equivalent of a lifetime ban. This risk is even more pronounced for sports such as gymnastics, where the age range for competing athletes is smaller than other sports.¹⁶ Additionally, the International Olympic Committee (“IOC”) itself considers the practice of sport to be a human right,¹⁷ making consideration of athletes’ rights all the more important.

¹⁰ Woods Has Second Laser Eye Surgery, GOLF.COM, May 15, 2007, http://www.golf.com/golf/tours_news/article/0,28136,1621439,00.html.

¹¹ Kaufman-Kohler & Rigozzi, *supra* note 7, at 27.

¹² “[WADA President] Pound shoots at everything that moves,” complained Hein Verbruggen, president of the International Cycling Union.” Michael Hiltzik, *Presumed Guilty: Athletes See Doping Case Appeals as Futile Exercise*, L.A. TIMES, Dec. 11, 2006 [hereinafter Hiltzik, *Doping Case Appeals Futile*].

¹³ See Michael Hiltzik, *Presumed Guilty: Athletes’ Unbeatable Foe*, L.A. TIMES, Dec. 10, 2006 [hereinafter Hiltzik, *Athletes’ Unbeatable Foe*]; Hiltzik, *Doping Case Appeals Futile*, *supra* note 12; Martin Gillingham, *It is Time to Stop this Witch Hunt Against Chambers*, Mar. 18, 2009, <http://www.insidethegames.com/blogs.php?id=13>.

¹⁴ Bengt Kayser & Aaron C.T. Smith, *Globalization of Anti-Doping: The Reverse Side of the Medal*, BRIT. MED. J., July 4, 2008, at 2008;337:a584.

¹⁵ As a condition of participation, athletes bind themselves to the rules, eligibility requirements, and arbitration procedure of the athletic governing body. “When they join a sports federation and take part in sport competitions that are subject to the rules of international sports federations, athletes place themselves, de facto, in this legal situation.” Claude Roullier, *Legal Opinion* (transl.), Oct. 25, 2005, http://www.wada-ama.org/rtecontent/document/Article_10_2_WADC_Swiss_Law.pdf.

¹⁶ The average age of the Women’s Team All-Around gold medal champions for the 1996, 2000, 2004, and 2008 Olympics was 17, with no member being older than 20. See Sports Reference Online, *Gymnastics Women’s Team All-Around Medalists*, <http://www.sports-reference.com/olympics/sports/GYM/womens-team-all-around.html>.

¹⁷ IOC, Olympic Charter, *supra* note 1, at 11.

Third, international doping law should be examined because athletes can expect little relief from their respective domestic courts if the established arbitration process proves inadequate. There are few appeals an athlete can make to a domestic authority, so the checks on doping law remain with the international athletic organizations and challenges under international law. It has been explicitly held that American athletes have limited recourse to federal law, as courts lack jurisdiction over sports federation contracts and arbitration decisions,¹⁸ and will intervene in only the most extraordinary circumstances.¹⁹ Since doping law operates in the sphere of contract law and arbitration, athletes do not have the same procedural protections as they have in the criminal judicial arena,²⁰ and disputes between sports organizations and their members are governed by private law.²¹ Challenges to the legitimacy of WADA or its rules are often made using Swiss law²² and various European and transnational documents.²³ The major rights at stake are the right to personal liberty, to equal treatment, to a fair hearing, the right to work, and competition-oriented rights.²⁴ As the opinion in *Johnson v. Athletic Canada and IAAF* states, “there is a growing understanding among legal commentators that sports governing bodies can no longer ignore fundamental right issues, at least if they intend to avoid governmental intervention.”²⁵

This Note will examine WADA’s policy, which reaches all levels of Olympic competition. Part II will start with an overview of the history of doping in modern sport and the pressures that led to the creation of the WADA. Part III will focus on the WADA, its scope of authority and overall mission. Part IV will analyze the theoretical underpinnings of doping law, as the legitimacy of the burdens on athletes will depend on the soundness

¹⁸ *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994) (Track athlete Reynolds was suspended by Track and Field’s international governing body, and brought tort and contract claims against the body. The Sixth Circuit held that due process did not permit assertion of personal jurisdiction over federation.).

¹⁹ *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 595 (7th Cir. 2001) (Track and field athlete whose urine test had indicated possible blood doping violation, and who was found in foreign arbitration proceeding before tribunal of international athletics sanctioning body to have committed doping violation, brought suit against international body, and United States Olympic Committee. Arbitration award was affirmed.).

²⁰ *Id.* at 592 (“Nevertheless, parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena.”).

²¹ Kaufman-Kohler & Rigozzi, *supra* note 7, ¶¶ 38–39.

²² *Id.* ¶ 39. Swiss law is pivotal in anti-doping disputes because the vast majority of the international federations that have implemented the Code are incorporated in Switzerland. Disputes between athletes, the IFs, and WADA are appealed exclusively to the Court of Arbitration in Sport (CAS), and the applicable law in CAS hearings is Swiss Law. WADA, World Anti-Doping Code, 2009, at 80 art. 13.2.1 [hereinafter WADC], available at http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf; Court of Arbitration for Sport, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, at S1, R58, <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf>.

²³ Advisory opinions have assessed WADA’s regulations with respect to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights of the United Nations, International Covenant on Economic, Social and Cultural Rights of the United Nations, and the European Human Rights Convention. Gabrielle Kaufman-Kohler & Giorgio Malinverni, *Legal Opinion on the Conformity of Certain Provisions of the Draft of the World Anti-Doping Code with Commonly Accepted Principle of International Law*, Feb. 6, 2003, at 15, <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf> [hereinafter *International Law*]; Kaufman-Kohler & Rigozzi, *supra* note 7, ¶ 25.

²⁴ *International Law*, *supra* note 23, ¶¶ 41–61.

²⁵ Kaufman-Kohler & Rigozzi, *supra* note 7, ¶ 27 (footnotes omitted).

of the principles in whose name athletes are punished. Part V will then discuss the specific burdens placed on athletes, specifically those brought on by WADA's "Prohibited List." Part VI will explore the justifications WADA uses to defend those burdens and the reforms promised by the WADA to address the concerns of athletes and stakeholders. Part VII concludes with recommendations for change both within and outside WADA.

II. OVERVIEW OF DOPING²⁶ IN OLYMPIC SPORT:²⁷ THE NEED FOR AN INTERNATIONAL DOPING AGENCY

"The only difference between me and him was that I couldn't afford his pharmacy bill. Now I can. When I hit Munich next year, I'll weigh in about 340, maybe 350. Then we'll see which are better—his steroids or mine."²⁸ – Ken Patera, 1972 Olympic Weightlifter

Official testing during Olympic competition did not begin until 1968, a year after the IOC officially banned certain substances.²⁹ Coordinated testing outside the Olympic Games did not begin until the Sydney 2000 Olympics with the establishment of the WADA.³⁰ The trend towards formal testing was pushed by the mid-competition death of Danish cyclist Knut Jensen in the 1960 Rome Olympics,³¹ where amphetamines were found in his blood after he fell and fractured his skull.³² In 1967, a British cyclist died during a televised leg of the Tour de France; amphetamines and cognac were found in his blood.³³

It is important to note that some historical studies have documented that the use of performance-enhancing substances has a long history of acceptance.³⁴ Ethical objections to doping did not exist in the beginning of the high-performance era, in part because leveraging scientific advantages seemed the natural solution in the battle between the body and fatigue.³⁵ Author Terry Todd believes that doping in sports became inevitable because

²⁶ "Doping" refers collectively to in and out of competition use of stimulants (such as amphetamine and adrenaline), anabolic steroids (both exogenous and endogenous), beta blockers, hormones, cannabinoids, narcotics, and hemoglobin enhancement techniques (traditional "blood doping", and EPO). This Note will be discussing the need to narrow the definition of doping.

²⁷ The scope of this Note is doping policy for athletes within the "Olympic Movement." These are the sports federations recognized by the International Olympic Committee. Doping policy applies during both Olympic competition and any competition falling within the jurisdiction of an IOC recognized sport. IOC, Olympic Charter, *supra* note 1, at 16; WADC, *supra* note 22, at 16–18.

²⁸ Cynthia Crossen, *Using Drugs in Sports Used to Be Considered Just Part of the Game*, WALL ST. J., Aug. 7, 2006.

²⁹ FRED C. PAMPEL, *DRUG AND SPORTS* 14 (2007).

³⁰ Michelle Verroken & David R. Mottram, *Doping Control in Sports*, in *DRUGS IN SPORT* 309, 312 (David R. Mottram ed., 2005).

³¹ Author David Maraniss refers to the 1960 Games as the "Olympics that Changed the World," in part because it was the scene of the first Olympic doping scandal. DAVID MARANISS, *ROME 1960: THE OLYMPICS THAT CHANGED THE WORLD* (2008).

³² Jan Todd & Terry Todd, *Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999*, in *DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT* 65, 67 (Wayne Wilson & Edward Derse eds., Human Kinetics 2001).

³³ *Id.* at 68.

³⁴ ROB BEAMISH & IAN RITCHIE, *FASTEST, HIGHEST, STRONGEST* 109 (2006).

³⁵ Crossen, *supra* note 28.

of two cultural phenomena. First, athletes growing up then were taught that “science could make their lives—their athletic quests—easier.”³⁶ Second, there was a “significant subculture in which the use of illegal substances was not only permissible but a badge of honor.”³⁷

Nonetheless, at some point in the 1970s, society collectively decided that this form of enhancement was unethical and dangerous.³⁸ In the 1970s and 1980s, drug use in sports began to take on what some have referred to as epidemic proportions.³⁹ Jurisdictional issues in international sporting competition, pharmaceutical development, and ineffective testing gave cheating athletes the confidence to get away with it.⁴⁰

A. JURISDICTIONAL ISSUES

The fabric and dynamic of international sports law contributed to the malaise in doping policy. The players in international sports law are the IOC,⁴¹ International Sports Federations (“IFs”),⁴² National Sports Governing Bodies (“NGBs”),⁴³ and National Olympic Committees (“NOCs”).⁴⁴ An athlete competing in an Olympic sport answers to all these organizations. In the 1960s, the IOC was reluctant to take on the responsibility of drug testing, instead passing the duty to the NOCs and IFs.⁴⁵ Policy development was fragmented, with IFs developing different test standards, different prohibited substances lists, and different sanctions. By the 1990s, anti-doping policy was fragmented and highly variable from sport to sport. There was also tension between the IFs who competed over talented sports people, government sponsorship, television revenue, and commercial sponsorship,⁴⁶ making cooperation on doping policy capricious. Any attempt by the IOC to harmonize doping policy among the IFs was met with dragging feet.⁴⁷ Additionally, individual sports bodies were presented with a conflict of interest: entering clean athletes and

³⁶ *Id.*

³⁷ *Id.*

³⁸ BEAMISH & RITCHIE, *supra* note 34, at 107–11.

³⁹ WILLIAM N. TAYLOR, *MACHO MEDICINE: A HISTORY OF THE ANABOLIC STEROID EPIDEMIC 1* (1991).

⁴⁰ ROBERT O. VOY & KIRK D. DETER, *DRUGS, SPORTS AND POLITICS* 79 (1991).

⁴¹ A non-governmental organization established by the Congress of Paris in 1894, charged with the promotion and maintenance of the Olympic Games. See OLYMPIC CHARTER, *supra* note 1, at Preamble, Arts. 2, 15.

⁴² An IF is the non-governmental worldwide body for a particular sport. It must be recognized by the IOC, which requires it to be in conformity with the Olympic Charter. Once approved by the IOC Executive Board, an IF is the sole independent and autonomous governing body for the sport; an IF establishes rules for eligibility, selects judges/referees/umpires, and establishes a process for internal dispute resolution. MATTHEW J. MITTEN, ET AL. *SPORTS LAW AND REGULATION* 288 (2005).

⁴³ An NGB is a particular country’s governing body for a sport. The NGB serves as the country’s representative to the sport’s IF. *Id.* at 289.

⁴⁴ NOCs must be recognized by the IOC, and are responsible for recognizing NGBs, developing sport opportunity within the country, and have the sole authority to determine representation of the country at the Olympics. *Id.* at 289.

⁴⁵ Verroken & Mottram, *Doping Control in Sport*, in *DRUGS IN SPORT*, *supra* note 30, at 308–09 (quoting an IOC newsletter of August 1968).

⁴⁶ BARRIE HOULIHAN, *DYING TO WIN*, 195 (2nd ed., Council of Europe Publishing 2002).

⁴⁷ A study commissioned by the Council of Europe highlighted the weakness of anti-doping policies and the lack of harmonization amongst the IFs. Among other things, the report found that “only 12 of the federations have incorporated the IOC recommended sanctions, while at the same time 11 international sports governing bodies don’t seem to apply any sanctions at all! The remaining 31 international sports governing bodies have sanctions different from the IOC recommended ones.” *Id.* at 201.

avoiding international embarrassment versus entering the most competitive field as possible.⁴⁸ This conflict was exacerbated by the fact that government funding of NGBs is often dependent on Olympic success.⁴⁹ Additionally, as the economic value of the Olympics increased, the IOC-IF relationship became more antagonistic as revenue distributions were disputed, disrupting policy harmonization.⁵⁰ As the bodies squabbled, athletes continued to dope.

B. PHARMACEUTICAL INNOVATIONS AND THE TROUBLE WITH TESTING

“When they get a test for that one, we’ll find something else. It’s like cops and robbers.” – Anonymous U.S. weightlifter, responding to the 1968 IOC ban.⁵¹

The evolution of doping substances and techniques has been tremendous. What began as “cocktails” comprised of heroin, cocaine, alcohol, and nitroglycerin, has evolved to designer steroids, gene therapy, and sophisticated masking techniques. The rise of doping coincided with pharmaceutical developments following the Second World War.⁵² Athletes soon discovered the physical benefits of substances originally intended for restorative medical purposes, such as human growth hormone (“HGH,” used to treat patients with deficient pituitary glands and lacking growth hormone) and erythropoietin (“EPO,” used to treat kidney disease and anemia). Athletes weighed the potential impact a substance may have had on health against the impact it would have had on performance and made a calculated decision.⁵³

During the second half of the twentieth century, testing technologies struggled to keep up with the host of new doping substances. Much is stacked against anti-doping authorities with regards to testing. First, tests for doping agents are often steps behind the athletes, since authorities have to first determine what athletes are using before effective tests can be developed.⁵⁴ Steroid testing did not begin until the 1973, for the simple reason that there was no test to detect them.⁵⁵ Additionally, in 1989 recombinant DNA techniques gave rise to a new form of synthetic “blood boosting” in the form of EPO;⁵⁶ a test for that did not exist until 2000, the effectiveness of which is still questioned.⁵⁷ Whether or not there is a test for human growth hormone is contested.⁵⁸ According to one commentator,

⁴⁸ *Id.* at 149.

⁴⁹ *Id.* at 163.

⁵⁰ *Id.* at 196.

⁵¹ Bil Gilbert, *Problems in a Turned-on World*, SPORTS ILLUSTRATED, June 23, 1969, at 64 available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1082543/index.htm>.

⁵² HOULIHAN, *supra* note 46, at 57.

⁵³ BEAMISH & RITCHIE, *supra* note 34, at 130–31.

⁵⁴ Malcolm Gladwell, *Drugstore Athlete*, 77 THE NEW YORKER 26, Sept. 10, 2001, at 52.

⁵⁵ PAMPEL, *supra* note 29, at 114.

⁵⁶ DANIEL M. ROSEN, DOPE: A HISTORY OF PERFORMANCE ENHANCEMENT IN SPORTS FROM THE NINETEENTH CENTURY TO TODAY, 75 (2008).

⁵⁷ *The Validity of EPO Testing For Athletes*, SCI. DAILY, June 28, 2008, available at <http://www.sciencedaily.com/releases/2008/06/080626100921.htm>.

⁵⁸ While WADA claims it has a test, it has been done only a few hundred times, and no athlete has been sanctioned based on the test. Lynn Zinser, *New Stars Say Drug Testing Closes Credibility Gap*, NEW

cheating athletes—well aware of testing technologies—had to be either “incredibly sloppy, incredibly stupid, or both” to get caught.⁵⁹

Second, the reliability in testing technologies varies, making prosecution precarious. While narcotic and stimulant tests became very reliable, the tests for steroids and hormones that are produced endogenously can be problematic.⁶⁰ The uncertainty of testing was compounded by poor lab standards—such as improper sample chain-of-custody procedures—which led to false negatives and false positives.⁶¹ These problems still persist despite WADA’s attempts: in 2003 Bernard Lagat was charged with an EPO violation, but evidence established that his specimen had been grossly mishandled—transported at temperatures reaching one hundred degrees. Additionally, before an agency can comfortably prosecute doping violations under a new testing procedure, it must pass legal scrutiny according to the highest court in sports—the Court of Arbitration in Sport (“CAS”).⁶²

Today, the legitimacy of tests is still questioned on the grounds that those creating the tests do not publish or open their methods to scientific scrutiny: “Drug testing should not be exempt from the scientific principles and standards that apply to other biomedical sciences, such as disease diagnostics.”⁶³ Recently, the tests for steroids were declared by Swiss researchers as “woefully off the mark” and “all but useless” because the tests fail to account for a key genetic variation that hugely affects levels of testosterone found in samples.⁶⁴ The current test compares testosterone to epitestosterone, with the threshold ratio being 4:1. The researchers offered calibrated ratios organized by race, which reflected the genetic variation: with the exception of Asian men, the ratio was at least 5.6:1.⁶⁵ The key implication is that men who have naturally high testosterone levels are more susceptible to testing over 4:1, and some athletes could pump their bodies with steroids and the tests would never show it.

C. MOUNTING PRESSURE FROM GOVERNMENT AND NGO STAKEHOLDERS

In the last quarter century, high-profile doping incidents threatened to permanently tarnish the image of international Olympic competition and

YORK TIMES, June 22, 2006, at D3. See also Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 167 n. 25.

⁵⁹ Michael Bamberger & Don Yaegar, *Over the Edge*, 86 SPORTS ILLUSTRATED, April 14 1997, at 60–64.

⁶⁰ A.T. Cawley et al., *Catching the Cheats: Advances in the Detection of Endogenous Steroid Abuse in Sport*, CHEMISTRY IN AUSTRALIA, March 2006, available at <http://www.raci.org.au/chemaust/docs/pdf/2006/CiAMarch2006p3.pdf>.

⁶¹ Chain of custody issues are the procedural elements of a prosecution most often challenged by athletes. Richard H. McLaren, *WADA Drug Testing Standard*, 18 MARQ. SPORTS L. REVIEW 1, 3 and 7.

⁶² The cases probing the legal validity of new EPO tests offer insight into the legal standards for new tests. In *USADA v. Bergman*, CAS held that the Panel had to be satisfied that the risk of a false positive was at an acceptably low level so as to establish a doping offense. *USADA v. Bergman*, CAS 2004/O/679, at 12.

⁶³ Editorial, *A Level Playing Field?*, 454 NATURE 667, July 7, 2008, available at <http://www.nature.com/nature/journal/v454/n7205/full/454667a.html>.

⁶⁴ *Doping: Time to Scrap Steroid Test*, TIMES OF INDIA, Mar. 12, 2009, available at <http://timesofindia.indiatimes.com/Health--Science/Doping-Time-to-scrap-steroid-test/articleshow/4254245.cms>.

⁶⁵ *Id.*

underscored the need for an international body for doping. The government sponsored doping programs of East Germany in the 1960s, the track and field busts—and cover-ups—of the 1980s,⁶⁶ the Chinese women's swim team "dynasty" of the early nineties, and the 1998 Tour de France busts⁶⁷ all directed public attention to the problem of doping, and revealed that while the prevalence of doping was uncertain, there were participants who were engaging in systematic, and perhaps institutionally-sponsored cheating.

These scandals and focus of public attention coincided with the increased economic values of the Olympics to its host country,⁶⁸ the IOC, corporate sponsors, and the athletes themselves. As coverage became more in-depth, the Olympics became a potential public relations goldmine for host countries,⁶⁹ and often used as a vehicle for economic development. Host countries invest tremendous amounts of money as the whole world watches the drama unfold: it is estimated that the Chinese government spent \$40 billion on venues and infrastructure,⁷⁰ and Neilson estimates that 4.7 billion viewers worldwide tuned into the 2008 Olympics.⁷¹ As the owner of the Olympic brand, the IOC collects a handsome sum for broadcasting rights: it sold the broadcasting rights for the Turin and Beijing Olympics for \$2.5 billion.⁷² Corporate sponsors of the Games themselves pay significant sums to associate their brand with the five rings: in 2008, the top twelve sponsors spent \$866 million to sponsor the games.⁷³ While the reaction of corporate entities to doping violations tends to be reactive and not proactive, sponsors of the Games and individual athletes have a lot riding on the "clean" image of the Olympics.⁷⁴ Some broadcasters are even including doping "opt-out" clauses that give them the right to void contracts if they feel sports associations are committing fraud by not effectively fighting doping.⁷⁵ A threat to the integrity of the games has a corresponding dollar amount of harm.

The various scandals and pressures culminated in 1999; the IOC convened the World Conference on Doping, and produced the Lausanne

⁶⁶ Perhaps the most significant event to turn the public's eye towards doping was Canadian Ben Johnson's disqualification in the 1988 Seoul Olympics for anabolic steroids. The fallout in Canada was tremendous, and the bust is considered by one author to be "the marker event that set off the drug testing trend still evident today." McLaren, *supra* note 61, at 2.

⁶⁷ Some suggest that the busts threatened to collapse the entire event and ruin the sport. Savulescu & Foddy, *supra* note 5, at 1.

⁶⁸ See PRICEWATERHOUSECOOPERS LLP, OLYMPIC GAMES IMPACT STUDY (2005) available at <http://www.culture.gov.uk/images/publications/OlympicGamesImpactStudy.pdf>.

⁶⁹ Olympic Brand: True Measure of Olympic Fitness, Brand Strategy, November 10, 2008, at 48.

⁷⁰ Jason Simpkins, *Beijing's \$40 Billion Olympic Investment: How Investors Can Take Home the Gold*, MONEY MORNING, Mar. 30, 2008, <http://www.moneymorning.com/2008/03/30/beijings-40-billion-olympic-investment-how-investors-can-take-home-the-gold>.

⁷¹ *Beijing Olympics Attracts Record 4.7 Billion TV Viewers*, CHINA DAILY, Sept. 6, 2008, available at http://www.chinadaily.com.cn/olympics/2008-09/06/content_7005208.htm.

⁷² *Beijing expects four billion TV viewers for '08 Games*, REUTERS, Jun. 13, 2007, available at <http://www.reuters.com/article/sportsNews/idUSPEK13174420070613>.

⁷³ Louisa Lim, *Many Ask if Olympic Sponsorship is Worth Cost*, NAT'L PUB. RADIO, August 7, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=93389797>.

⁷⁴ Jennifer Abramsohn, *Sponsors Follow Own Path in Fight Against Doping*, DEUTSCHE WELLE, Jan 2, 2007, available at <http://www.dw-world.de/dw/article/0,2144,2333055,00.html>.

⁷⁵ Scott Roxborough, *German B'casters Seek Anti-Doping Insurance*, THE HOLLYWOOD REPORTER, Aug. 25, 2006, available at <http://www.allbusiness.com/services/motion-pictures/4920414-1.html>.

Declaration on Doping in Sport, which provided for the creation of an international anti-doping agency—the World Anti-Doping Agency.⁷⁶ It is the international independent organization created to promote, coordinate, and monitor the fight against doping in all forms of sport.⁷⁷

III. THE WORLD ANTI-DOPING AGENCY: SCOPE OF AUTHORITY & MISSION

The tremendous scope and influence of the WADA colors the discussion of the implications of its rules. It is important to note that WADA's Code applies not only to the Olympic Games, but to any competition within an IF's or NF's jurisdiction.⁷⁸ This includes the Tour de France, the World Cup, and any national or world championship for any sport whose governing body is a signatory of the WADA.

WADA's relationship with the IOC is the principal force behind the almost unanimous acceptance of WADA's rules—promulgated in its Code. To date, the following organizations implement the Code: all twenty eight IFs that participate in the Summer Olympics, all seven IFs that participate in the Winter Olympics, all 205 NOCs, 112 national anti-doping organizations, and thirty-one IFs that do not compete in the Olympics but are recognized by the IOC (e.g. bowling, chess, golf, water-skiing).⁷⁹

The mechanics of the Code and the fabric of international sports law created an immediate trickle-down effect from the IOC to the other sports governing bodies. From the perspective of an athlete, in order to compete in an event governed by the IOC, two “tracks” must be satisfied. In track one, the athlete must be a member of the NGB of his sport, the NGB must be a member of the IF governing the sport, and the IF must be recognized by the IOC. In the second track, the athlete must also be a member of the NOC through his NGB, and the NOC must be recognized by the IOC.⁸⁰ A break in this chain could prevent an athlete, an entire sports-class of athletes, or even an entire country of athletes from competing in Olympic competition. Outside of this sports governance paradigm are professional sports leagues in the United States (NFL, NBA, NHL, and MLB); since they operate independently within the United States and are not part of the Olympic Movement, the most WADA can do is encourage these leagues to reform their doping programs.⁸¹

⁷⁶ LAUSANNE DECLARATION ON DOPING IN SPORT, Feb. 4, 1999, available at <http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1999/OREXXVI25/OREX XVI25g.pdf>.

⁷⁷ *Constitutive Instrument of Foundation of the World Anti-Doping Agency* (Trans.), art. 4, available at http://www.wada-ama.org/rtecontent/document/constitutive_instrument_foundation.pdf.

⁷⁸ WADC, *supra* note 22, at Appendix 1 (Definition of “International Event” and “Major Events Organization.”).

⁷⁹ World Anti-Doping Agency, CODE ACCEPTANCE, available at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270>.

⁸⁰ David B. Mack, *Reynolds v. International Amateur Athletic Federation: The Need for an Independent Tribunal in International Athletic Disputes*, 10 CONN. J. INT'L L. 653, 664 (1995).

⁸¹ WADA is quite vocal in its disapproval of these league's anti-doping policies. E.g., Juliet Macur, *Doping Officials Question Drug Policy in Baseball*, NEW YORK TIMES, Nov. 17, 2007.

With this paradigm in place, once the IOC signed onto the Code, acceptance by all constituents was inevitable, as continued membership in the IOC was made contingent on Code acceptance.⁸² Not only does the WADA Code compel the IOC to require IFs, NGBs, and NOCs to be compliant, but the Olympic Charter itself has been amended to require adoption of the Code for all members of the Olympic Movement.⁸³ The Charter specifically references the Code, providing for penalties if IFs are non-compliant, ranging from withdrawal of event participation to withdrawal of IOC recognition.⁸⁴ Not only must the IFs' policies be in compliance, but the IFs must ensure its member NFs are in compliance.⁸⁵ The IFs derive the power to determine membership from the broad authority it is given under the Olympic Charter.⁸⁶ Additionally, a NOC must ensure its recognized NGBs are in compliance,⁸⁷ otherwise the NOC will not be recognized by the IOC, and therefore the country will be ineligible for the Olympics.

To be compliant, a Code signatory must complete three steps: acceptance, enforcement, and implementation.⁸⁸ Implementation requires promulgating the Code within the organization's regulations, and WADA makes clear that the "meat" of the Code is non-negotiable. The following articles must be implemented for compliance to be satisfied: the definition of doping, what constitutes a violation, the standard of proof of doping, those substances that may require a mitigated sentence, WADA's determination of the "Prohibited List," automatic disqualification for an adverse finding, individual sanctions, appeals, statute of limitations, and interpretation of the Code.⁸⁹ IFs who try to write around these mandatory provisions risk falling out of favor with WADA, and as a corollary, losing their sports' standing with the IOC. In 2006, FIFA and WADA had a standoff over provisions in FIFA's anti-doping code that did not mirror the WADA's Code.⁹⁰ WADA prevailed, furthering its position as the foremost authority on doping.

The reach of WADA's Code goes beyond the athletes and their governing bodies. In 2005, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") adopted the International Convention

⁸² OLYMPIC CHARTER, art. 26.

⁸³ *Id.* at R. 44.

⁸⁴ *Id.* at R. 23, ¶ 1.2.

⁸⁵ WADC, *supra* note 22, at art. 20.3.2.

⁸⁶ See OLYMPIC CHARTER, *supra* note 1, at art. 29.

⁸⁷ WADC, *supra* note 22, at art. 20.4.2. The NFs have pressure from both their parent IF and their country's NOC to comply with the Code. Being in non-compliance with either compromises the eligibility of the NF's athletes to compete. The relationship between NFs and IFs is so close that the Sixth Circuit has found this relationship to be an agency relationship. See Reynolds, *supra* note 18, at 1118.

⁸⁸ WADA, *Global Anti-Doping Organization Chart*, Jan. 2009, available at http://www.wada-ama.org/rtecontent/document/pk_Global_anti_doping_Organization_Chart_January_2009_en.pdf.

⁸⁹ WADC, *supra* note 22, art. 23.2.2.

⁹⁰ FIFA's suspension rules gave the IF more discretion than the Code permits. FIFA athletes would be suspended for six months to two years, whereas WADA calls for an automatic two year suspension. Alan Abrahamson, *FIFA Doping Rules at Issue*, L.A. TIMES, Apr. 25, 2006 at D7.

Against Doping in Sports.⁹¹ The adoption aims to ensure the effectiveness of the Code in international law, creating obligations on nations to be in compliance. Without the UNESCO adoption, governments could not be legally bound to a NGO document.⁹² Accordingly, the IOC will only accept Olympic hosting bids from countries who have accepted the UNESCO Convention and whose NOC and National Anti-Doping Organization are in compliance. This applies not only to the Olympic bids, but includes major events, such as a sport's world championship.⁹³ The UNESCO Convention went into effect in 2007, and sanctions will be in effect for nonsignatory countries by 2010. The inclusion of governments is partially motivated by a desire to shift the cost of testing to governments.⁹⁴ Now that governments are a party to the Code, it seems only a matter a time before the WADA pressures the United States to reform the sports which are not currently within WADA's jurisdiction: the NBA, NHL, NFL, and MLB.

The reach of the WADA and its Code is considerable, not only informing but comprising the rules of every Olympic sport organization in the world. The IOC's acceptance of the Code and amendments to the Olympic Charter is critical to the success of WADA and is a major check on WADA's rules; without the threat of Olympic exclusion, WADA would almost certainly be powerless. For now, the IOC and WADA are in lock-step when it comes to framing and prosecuting the issue.⁹⁵

WADA's Constitutive Instrument of Foundation lays out the principles which inform its policies.⁹⁶ The broad rationale for the WADA is (1) to ensure a level playing field, (2) to ensure the protection of the athletes' health, (3) to ensure the social and economic standing of sport, and (4) to provide role models.⁹⁷ To this end, the Code attempts to harmonize the mechanisms of anti-doping regulation: testing and laboratory standards, therapeutic use exemptions ("TUEs"), the list of prohibited substances and methods, standards of proof, and sanctions. The discussion on the theoretical underpinnings of anti-doping is important because these inform the aim of the WADA; in turn, the legitimacy of the aim of the WADA is crucial in assessing the proportionality of the means adopted to pursue the aim. The value of harmonization is a key factor, as this is the major justification for fixed sanctions.

⁹¹ Gen. Conference of the U.N. Educ., Sci. and Cultural Org., Oct. 3–21, 2005, *International Convention Against Doping in Sport*, (Oct. 19, 2005), available at http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁹² WADA, Overview of UNESCO, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273>.

⁹³ WADC, *supra* note 22 arts. 20.3.1, 20.6.6. Hypothetically, a country's NGB could be in compliance with the Code, but if the country's government has not ratified the UNESCO convention, an IF or Major Events organization will not award the country with the event.

⁹⁴ Michael A. Hiltzik, *WADA Doesn't Mind Being Overshadowed*, L.A. TIMES, November 16, 2007, at D5.

⁹⁵ The president of the WADA speaks about its relationship with the IOC: "The IOC was instrumental in WADA's inception in 1999 and, under President Rogge's leadership, has always shown tremendous support to WADA and an unwavering commitment to the fight against doping in sport. President Rogge assured me of his full and continued support to WADA's work." Press Release, WADA, IOC and WADA Presidents Hold First Official Meeting (Jan. 24, 2008), available at <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115574>.

⁹⁶ *Constitutive Instrument*, *supra* note 77, at art. 4.

⁹⁷ Kaufman-Kohler & Rigozzi, *supra* note 7, at ¶ 18.

IV. THEORETICAL UNDERPINNINGS OF THE “WAR ON DOPING”

“Doping is everything that, firstly, is harmful to an athlete’s health and, secondly, artificially augments his performance. If it’s the second case, for me, that’s not doping. If it’s the first case, it is.” – IOC President Juan Antonio Samaranch⁹⁸

Spectators may scratch their heads at Mr. Samaranch’s comment, which demonstrates the difficulty defining the problem. As I will discuss, accurately defining doping is perhaps the single most important element in ensuring proportionality between sanction and offense; the narrower the definition, the less we have to worry about innocents caught in the net of anti-doping. The purpose of this section is to demonstrate that the justifications for the current regime are on uncertain ground.

Defining the offense is vexing, and analyzing the principles of anti-doping law reveals that current law does not account for the reality of modern sport and casts too wide a net in its efforts to eradicate doping. As I will discuss, the burdens placed on athletes are tremendous. The WADA is the embodiment of current anti-doping logic, and the validity of the burden it places on athletes turns on the soundness of its logic. Specifically, the “Prohibited List” is a window into the logic of anti-doping: a substance or method’s inclusion sheds light on what exactly WADA is fighting against.

A substance or method’s inclusion is based on a combination of any two of following three criteria: (1) the *potential* to enhance performance; (2) the substance or method is contrary to the *spirit of sport*; and (3) it represents a *health risk* to the athlete.⁹⁹ The obvious implication is that an athlete can be sanctioned for a substance that has no performance enhancing effects, such as marijuana. This has drawn the scorn of some domestic anti-doping authorities, such as New Zealand anti-doping agency head Graeme Steele, who feel that scant resources are used to chase athletes accused of using recreational drugs.¹⁰⁰ The inclusion of these non-performance enhancing drugs indicates that “catching cheaters”¹⁰¹ on its own cannot explain current anti-doping policies.

A. POTENTIAL TO ENHANCE PERFORMANCE

Certainly not all performance enhancing methods are banned, because not all performance enhancement risks health, or violates the *spirit of sport*.¹⁰² The objection that performance enhancement is in itself cheating is false.¹⁰² The spectrum of performance enhancement ranges from basic training and diet on one end to the use of synthetic steroids on the other. With regard to exogenous advancement, we have a high tolerance for enhancement, no

⁹⁸ Editorial, *A Call for Doping Changes*, NEW YORK TIMES, July 27, 1998, at C2.

⁹⁹ WADC, *supra* note 22, at art. 4.1

¹⁰⁰ Michael A. Hiltzik, *WADA Doesn’t Mind Being Overshadowed*, L.A. TIMES, November 16, 2007.

¹⁰¹ “Cheating” as is traditionally understood. See MERRIAM-WEBSTER, *supra* note 4. However, if one defines cheating as breaking the rules, then the inclusion of marijuana in the List makes a smoker a cheater. This line of reasoning is circular.

¹⁰² Savulescu & Foddy, *supra* note 5, at 7.

matter how much the sport is changed; we tolerate increasingly sophisticated running spikes, graphite tennis rackets that makes games shorter, and fiber-glass pole vaults to reach new heights. We also tolerate a degree of enhancement to our bodies, such as laser eye surgery, medleys of concentrated and engineered vitamins, and altitude training. It is clear the potential to enhance performance is not enough to rationalize the “Prohibited List,” and must rely on the second and third criteria.

B. THE SPIRIT OF SPORT

The *spirit of sport* is a loaded and useful phrase for anti-doping authorities, and the one element that is not testable in a lab. The WADA draws on the Olympic Charter¹⁰³ to delineate the spirit of sport: Ethics, fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants, courage, and community and solidarity. The *spirit of sport* element rests on three premises: that (1) there exists a transhistorical entity of “sport”; (2) which rests on a fair and level playing field; and (3) embodies “healthy, ennobling, and virile activity.”¹⁰⁴ I will discuss the third premise in the “protecting the health of athletes” section, which will also speak to this idea of *spirit of sport*. Note that the premises underlying the *spirit of sport* element conflate with the other two elements, so potentially anything that compromises the *spirit of sport* could compromise one of the two other elements. This would not be an issue if those ideals of “spirit” did not directly inform the policies that regulate athletes. For example, some anabolics are banned from all sports even though there would be no performance enhancement. WADA’s reasoning rests on the existence of a “sportsman” ideal: “The premise . . . is that there are certain basic doping agents which anyone who chooses to call himself or herself an Athlete should not take.”¹⁰⁵

Anti-doping policies must begin with the real world of elite performance sport, and the *spirit of sport* detracts from a frank and open discussion of doping.¹⁰⁶ There is a gap between the reality of modern sports preparation, and the ideals touted by the authorities regulating it. Rod Beamish and Ian Ritchie track the enormous resources invested in athletes by countries hoping to benefit from the political and ideological rewards associated with Olympic gold.¹⁰⁷ The stakes of high-performance sport has unavoidably led to “instrumentally rational, systematic, scientifically and technologically assisted enhancement of athletic performance.”¹⁰⁸ The last sixty years have seen athletes and their entourages leverage professionals in biomechanics, exercise physiology, psychology, and coaching. The reality

¹⁰³ OLYMPIC CHARTER, *supra* note 1, at 11.

¹⁰⁴ BEAMISH & RITCHIE, *supra* note 34, at 111–12.

¹⁰⁵ WADC, *supra* note 22, at Comment to art. 4.2.1.

¹⁰⁶ BEAMISH & RITCHIE, *supra* note 34, at 140.

¹⁰⁷ *Id.* at 109.

¹⁰⁸ *Id.* at 137.

of high-performance sport is that athletes must perfect their bodies to perform at the outer limits of human potential.

An example of the confluence of corporate interest, science, and patriotism is the informally labeled the “Oregon Project,” led by former marathon world record holder Alberto Salazar, and financed by Nike. Frustrated with the lack of American success in distance running—only one American has medaled in an Olympic event over 1500 meters in thirty years¹⁰⁹—the multi-million dollar¹¹⁰ training regime aims to reinvigorate distance running using cutting edge technology and a holistic approach to training. Runners live in a hermetically sealed house that simulates oxygen levels found at 12,000 feet;¹¹¹ their bodies respond by releasing natural EPO and growing more blood cells, thus increasing their oxygen efficiency.¹¹² They are “boosting” their blood in a legal way, although WADA has considered banning the practice and is very clear that it disapproves of the technology, labeling it “tacky.”¹¹³ Additionally, the runners leverage oxygen and blood testing technology to monitor lactate thresholds; vibrating platforms to increase leg power; “Omega Wave Technology” that monitor’s the stress on the runner’s heart, lungs, brain, liver and kidneys; and pressurized hyperbaric chambers to accelerate recovery from tears, sprains, bruises and other injuries.¹¹⁴ Examples like the Oregon Project show that the idea of “pure” sport is anachronistic, and the preparation necessary to compete is the logical outcome of applied research aimed at pushing back limits of human performance, one that is mirrored by organizations around the world.¹¹⁵

The second premise underlying the *spirit of sport*, that sports rest on a fair and level playing field- is a useful rhetorical tool for anti-doping authorities, but does not account for the fact that sport is an inherently unequal endeavor. Often, it is overcoming this inequality that gives Olympic sports its dramatic appeal.¹¹⁶ There are different types of inequality. There is inequality of natural endowments: cyclist Lance Armstrong has a naturally high VO₂ max,¹¹⁷ runner Steve Prefontaine had an unusually high pain threshold,¹¹⁸ and the bodies of those born and raised

¹⁰⁹ *United States Athletics* SPORTS REFERENCE ONLINE, <http://www.sports-reference.com/olympics/countries/USA/summer/ATH/> (last visited Jan. 26, 2010) (following men’s 1,500 meters, 5,000 meters, men’s marathon, and men’s 3,000 meter steeplechase).

¹¹⁰ Andrew Tilin, *The Ultimate Running Machine*, WIRED, Aug. 2002, available at <http://www.wired.com/wired/archive/10.08/nike.html>

¹¹¹ *Id.*

¹¹² Savulescu & Foddy, *supra* note 5.

¹¹³ Shira Springer, *WADA Has its Doubts*, The Boston Globe, Oct. 19, 2007, available at http://www.boston.com/sports/other_sports/articles/2007/10/19/wada_has_its_doubts/; “Tents” May go on Banned List, FOX SPORTS, Sept. 15, 2006, available at <http://www.foxsports.com.au/story/0,8659,20415937-23218,00.html>.

¹¹⁴ BEAMISH & RITCHIE, *supra* note 34, at 105.

¹¹⁵ *Id.* at 106.

¹¹⁶ Australian Alisa Camplin’s gold medal victory in the aerials was one of the highlights of the 2002 Salt Lake Games, in part because Australia is the land of “cricket, rugby, and swimming.” Associated Press, *Camplin’s Aerials Win Gives Aussies Second Gold*, ESPN ONLINE, Feb. 18, 2002, <http://sports.espn.go.com/oly/winter02/freestyle/news?id=1336030>.

¹¹⁷ Elizabeth Quinn, *What is VO₂ Max?*, ABOUT.COM: SPORTS MEDICINE (updated June 9, 2008), http://sportsmedicine.about.com/od/anatomyandphysiology/a/VO2_max.htm.

¹¹⁸ Oregon Blue Book, *Notable Oregonians: Steve Prefontaine*, <http://bluebook.state.or.us/notable/notprefontaine.htm>

in higher altitudes are more oxygen efficient. Even with enhancement, these inequalities are difficult to overcome; studies show that those who train at altitude or simulate altitude will never be as completely adapted as someone lucky enough to be born at altitude.¹¹⁹ There is also inequality of opportunity. Members of the Oregon Project have access to multi-million dollar technology. Rich countries have more swimming pools, and gymnastic and track facilities than poor countries have,¹²⁰ and Ethiopians, as well as NCAA runners at Colorado and Arizona, train at a higher altitude.

In many discussions of “leveling the playing field,” it is assumed that the inequalities produced by performance enhancing substances are substantially different than the inequalities of opportunity and nature,¹²¹ yet society has a tolerance for artificial enhancement outside of sport. Speaking to the inherent inequality of sports, one commentator notes that one of the principal contributions of the twentieth century is the “insistence that advantages derived from artificial and extraordinary intervention are no less legitimate than the advantages of nature.”¹²² Discussions also ignore the fact that substances and methods are the mechanisms used to level the playing field with regards to natural dispositions. Exercise physiologists first developed blood boosting techniques in the years leading up to the Mexico City Olympics, concerned that athletes in aerobic events would be disadvantaged when competing at high altitudes.¹²³ At the same time, we tolerate the use of hyperbolic tents that simulate altitude, a method which brings the same result as the much demonized method of blood boosting,¹²⁴ and perhaps equalize oxygen utilization amongst unequal athletes.

C. PROTECTING THE HEALTH OF ATHLETES:

“Competitive sport begins where healthy sport ends.” — Bertolt Brecht¹²⁵

Protecting the health of athletes is one of the longstanding justifications for the proscription of certain substances.¹²⁶ While “protecting the health of athletes” smacks of paternalism, some paternalistic regulation is justified when “one’s behavior or actions are not fully voluntary because they are not fully informed, or because one is not fully competent or is in some relevant way coerced.”¹²⁷ WADA would be strained to justify health protection on the grounds of competence, since the Code expects athletes to be hyper vigilant as to what is in their bodies and aware of the contents of

¹¹⁹ David J. Armstrong & Thomas Reilly, *Blood Boosting and Sport*, in *DRUGS IN SPORT*, *supra* note 30, at 210.

¹²⁰ BEAMISH & RITCHIE, *supra* note 34, at 116.

¹²¹ *Id.* at 117.

¹²² Gladwell, *supra* note 54.

¹²³ BEAMISH & RITCHIE, *supra* note 34, at 109.

¹²⁴ Savulescu & Foddy, *supra* note 5, at 4.

¹²⁵ Gladwell, *supra* note 54 (quoting poet Bertolt Brecht).

¹²⁶ BEAMISH & RITCHIE, *supra* note 34, at 122.

¹²⁷ W.M. Brown, *Paternalism, Drugs, and the Nature of Sports*, 11 *JOURNAL OF PHILOSOPHY OF SPORT* 14, 15 (1985).

the list at all times. The relevant coercion would be athletes' apprehension that performance enhancement is the only way to stay competitive: "[Olympian] Angella wasn't losing ground because of a talent gap, 'she was losing because of a drug gap, and it was widening by the day.'"¹²⁸ The reality of modern high performance is that athletes make choices about, and give consent to, high risk decisions oriented towards driving their bodies to the limits of physical capacity, which warrants some level of paternalism.¹²⁹ The pressure to perform is exacerbated "when an athlete sees the rewards available to winners and the obscurity of the losers."¹³⁰

However, arguments which premise "health" and "sport" as two sides of the same coin warrant inspection.¹³¹ If "sport" is "health," then it should follow that all things unhealthy are the antithesis of "sport" and should be proscribed. This ignores the reality of modern sport and the evidence of injury and long-term effects of chronic training regimes on athletes' bodies.¹³² As one Tour de France rider opined, "[t]he riders reckon that a good Tour takes one year off your life, and when you finish in a bad state, they reckon three years."¹³³ Risk and danger are such ingrained aspects of modern sport that the appropriate care and treatment of injuries—such as using supplements and other artificial recovery accelerators—are taken for granted.¹³⁴ It follows that restricting substances in the name of "protecting health" may have the deleterious effect of preventing athletes from taking substances that address the occupational hazards of high performance sport: traumatic injuries, stress injuries, inflammation and immunosuppression.¹³⁵

Nonetheless, protecting the health of athletes is a very useful frame for defining the offense of doping, and helps explain why we should and do allow some performance enhancers but ban others. For example, caffeine and creatine are two substances which have the potential to enhance performance,¹³⁶ yet they are allowed because they are safe. Some properly suggest that we should apply this standard to all performance enhancing drugs that are capable of safe administration, including EPO and steroids; this suggestion is even more attractive to those who feel the dangers of performance-enhancing substances have been consistently overstated and misrepresented.¹³⁷ An orientation towards health would be helpful for two reasons: first, it would narrow the list of banned substances to those that pose actual risks; second, it would provide clear criteria for establishing the violation threshold levels. Athletes are already incentivized to hug the threshold levels set by WADA, so adjusting these levels to reflect health hazards would add more transparency and legitimacy to the rules.

¹²⁸ Gladwell, *supra* note 54 (quoting track coach Charlie Francis).

¹²⁹ Robert L. Simon, *Good Competition and Drug-Enhancing Performance*, 11 JOURNAL OF PHILOSOPHY OF SPORT 6, 8 (1985).

¹³⁰ Mark McClusky, *The Righteous Fury of Dick Pound*, 15.01 WIRED, Jan. 2007, available at <http://www.wired.com/wired/archive/15.01/pound.html>.

¹³¹ BEAMISH & RITCHIE, *supra* note 34, at 122.

¹³² *Id.*

¹³³ Hugh Dauncey & Geoff Hare, *A National Epic on Wheels*, TIMES HIGHER EDUC., May 23, 2003, available at <http://www.timeshighereducation.co.uk/story.asp?storyCode=176971§ioncode=26>.

¹³⁴ BEAMISH & RITCHIE, *supra* note 34, at 125.

¹³⁵ Savulescu & Foddy, *supra* note 5, at 7.

¹³⁶ *Id.*

¹³⁷ *Id.*

One could argue that determining those levels would be unduly burdensome and capricious because of individual variance. However, WADA is already moving in the direction of creating a database of personalized body chemistry profiles, which will catch variance in an athlete's chemistry.¹³⁸ A system like this could serve as a model for more individualized testing geared towards health.

V. THE BURDEN OF THE PROHIBITED LIST¹³⁹

For an athlete, the problematic aspects of the "Prohibited List" are that (1) it is determined solely by WADA, and (2) the inclusion of a substance is not challengeable by an athlete. The "Prohibited List" serves as notice to all athletes, and ignorance is no excuse. The List is published annually, and athletes have three months before the changes go into effect.¹⁴⁰ While IFs, NGBs, and Anti-Doping agencies are charged with distributing the contents of the List,¹⁴¹ athletes are ultimately responsible for knowing the full content.

While governments, Code Signatories, and other interested parties are encouraged to provide comments on the List, the WADA Executive Committee makes the ultimate decision of a substance's inclusion based on a combination of any two of the following three criteria: (1) the potential to enhance performance; (2) whether it represents a potential health risk; or (3) whether it is contrary to the spirit of sport.¹⁴² The process through which a substance or method makes the List contributes to the procedural burden placed on athletes: the inclusion of a substance in the List is not challengeable.¹⁴³ CAS has held that the contents of the List are outside its jurisdiction, so the art of persuasion is the only means of changing the List.¹⁴⁴ Additionally, it is unclear how threshold levels are determined; whether they are determined with an eye towards health or performance enhancement speaks to the priorities of the organization. The only guidance is that the decision will be based on "medical or other scientific evidence, pharmacological effect or experience" that the substance implicates one of the three criteria.¹⁴⁵ The test for testosterone uses a T:E ratio of 4:1—is this the level at which elevated testosterone is a health risk or is this is the level at which performance is enhanced? In either case, the threshold levels are one-sized-fits-all, taking no consideration of individual genetic or chemical variations. The aforementioned findings by Swiss researchers cast serious

¹³⁸ Gordon Farquhar, *WADA Close to 'Athlete Passport'*, BBC SPORT, Feb. 24, 2009, available at http://news.bbc.co.uk/sport2/hi/front_page/7908777.stm.

¹³⁹ The full document is available at http://www.wada-ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf.

¹⁴⁰ WADC, *supra* note 22, at art. 4.1.

¹⁴¹ *Id.* The United State Anti-Doping Agency has a helpful website where an athlete can enter a medication, and a database will run the ingredients against the List. USADA, *Drug Reference Online*, <http://www.usantidoping.org/dro/search/terms.aspx>.

¹⁴² WADC, *supra* note 22, at Comment to art. 4.3.2.

¹⁴³ WADC, *supra* note 22, at art. 4.3.3.

¹⁴⁴ *World Anti-Doping Agency v. United States Anti-Doping Agency*, USBSF & Lund, CAS OG 06/001, § 4.8, available at http://www.usantidoping.org/files/active/arbitration_rulings/CAS%20Decision_Zach%20Lund_Feb%202006%5B1%5D.pdf.

¹⁴⁵ WADC, *supra* note 22, at art. 4.3.1.

doubt on the effectiveness of these steroid tests,¹⁴⁶ and some argue that “anti-doping authorities have not adequately defined and publicized how they arrived at the criteria used to determine whether or not a test result is positive.”¹⁴⁷ This in turn has “fostered a sporting culture of suspicion, secrecy and fear.”¹⁴⁸ Nonetheless, WADA’s exclusive discretion coupled with the procedural entrenchment of the List makes for quite an exhaustive List, one that will probably only get bigger.

The burden on athletes to ensure that no prohibited substance enters their body is premised on the idea that athletes are best positioned to avoid those substances. This premise breaks down when factors outside their immediate control increase the risk of a doping violation. The food and supplement industry aggravates the efforts of athletes to stay clean. A 2001 IOC study collected 634 non-hormonal nutritional supplements in thirteen countries from 215 suppliers: 14.8% tested positive for nandrolone or testosterone, two banned substances.¹⁴⁹ More importantly, the anabolic agents were not listed on the list of ingredients. More recent studies have found contamination rates as high as 25%.¹⁵⁰ Supplement contamination has been a problem since the passage of the Dietary Supplement Health and Education Act of 1994 (“DSHEA”),¹⁵¹ which shifted the burden of establishing a product’s safety to the FDA. Supplement makers no longer have to prove a product’s safety before offering it for sale; rather, the FDA has to prove a product is unsafe to remove it from shelves.¹⁵²

Numerous cases involve the involuntary ingestion of a banned substance in a contaminated supplement. A truly risk-averse athlete would shun all supplements. However, given the aforementioned realities of modern elite sport, this is incompatible with the demands of training. The next section will discuss the interaction between involuntary ingestion of banned substances and the strict liability standard.

VI. STRICT LIABILITY STANDARD

“Mr. Puerta is not a cheat, and that the fact that he has been found to have been in breach of anti-doping regulations is more the result of bad luck than of any fault or negligence on his part.” – CAS Panel, upon imposing a two-year suspension.¹⁵³

¹⁴⁶ *Doping: Time to Scrap Steroid Test*, *supra* note 64.

¹⁴⁷ Editorial, *supra* note 63.

¹⁴⁸ *Id.*

¹⁴⁹ Wilhelm Schänzer, *Analysis of Non-Hormonal Nutritional Supplements for Anabolic-Androgenic Steroids: An International Study*, GERMAN SPORT UNIVERSITY: INSTITUTE OF BIOCHEMISTRY, available at http://multimedia.olympic.org/pdf/en_report_324.pdf.

¹⁵⁰ Howard Jacobs, *Taking Matters into Their Own Hands*, 25 ENT. & SPORTS LAW 1, 37 (Winter 2008), available at

<http://www.athleteslawyer.com/documents/Winter2008ABAEntertainmentandSportsLawyer.pdf>.

¹⁵¹ 21 U.S.C. §342(f) (2005).

¹⁵² Jacobs, *supra* note 150, at 36–37.

¹⁵³ *Puerta v. Int’l Tennis Fed’n*, CAS 2006/A/1025, § 11.7.2, available at http://www.itftennis.com/shared/medialibrary/pdf/original/IO_21476_original.PDF.

Perhaps the most scrutinized feature, and the hallmark of the Code, is the strict liability standard. An athlete is fully responsible for any prohibited substance found in his body, regardless of the circumstances; the disciplinary body need not establish intent, fault, negligence or knowing use in order to establish a doping violation.¹⁵⁴ International judicial opinion holds unequivocally that criminal procedure does not apply.¹⁵⁵ It is generally recognized that some form of strict liability is necessary, as establishing a requirement of intent would “cripple federations . . . in their fight against doping.”¹⁵⁶

However, one should not conflate the defense of a legal standard with the defense of the ensuing punishment.¹⁵⁷ Few dispute the Code’s provision¹⁵⁸ for automatic disqualification,¹⁵⁹ as the purpose is not to punish the athlete, nor does it reflect a moral judgment.¹⁶⁰ The immediate unfairness to other competitors overrides any unfairness to a non-negligent athlete: “Just as the competition will not be postponed to await the athlete’s recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption.”¹⁶¹ In contrast, the suspension provisions are substantial, punitive, and meant to deter. I will focus on the two year suspension provision, although the Code calls for longer bans under “aggravating circumstances.”¹⁶²

The Code calls for a two year period of ineligibility for the first violation.¹⁶³ Recognizing the need for balance between the goals of anti-doping and athletes’ rights,¹⁶⁴ WADA offers a chance to reduce the period of ineligibility based on exceptional circumstances under Article 10.5. These circumstances must show that the athlete either has (1) no fault or negligence,¹⁶⁵ in which case the ineligibility period will be eliminated, or (2) no *significant* fault or negligence,¹⁶⁶ in which case the ineligibility

¹⁵⁴ WADC, *supra* note 22, at art. 2.1.1.

¹⁵⁵ Kaufman-Kohler & Malinverni, *supra* note 23, at ¶ 72 (“ . . . according to the prevailing contemporary judicial practice, human rights, and in particular the specific procedural guarantees in criminal matters, are not applicable to doping disputes before private sports governing bodies.”). See also Swiss Federal Tribunal, Gundel v. FEI, Decision of 15 March 1993, *quoted in* Kaufman-Kohler & Rigozzi, *supra* note 7, at n.36 (“the current approach of the Swiss Federal Tribunal is that doping proceedings concern issues of private law that do not need to be considered ‘in the light of notions proper to criminal law, such as the presumption of innocence and the principle *in dubio pro reo* . . .”).

¹⁵⁶ USA Shooting & Quigley v. Int’l Shooting Union, CAS 94/129, *reprinted in* MITTEN, ET AL., *supra* note 42, at 337.

¹⁵⁷ Kaufman-Kohler & Malinverni, *supra* note 23, at ¶ 116 (“[O]ne must clearly differentiate between a sport governing body’s imposition of a sanction and the mere disqualification of an athlete from the competition in which the doping offense occurred.”).

¹⁵⁸ WADC, *supra* note 22, at art. 10.1.

¹⁵⁹ Kaufman-Kohler & Malinverni, *supra* note 23, at ¶ 102.

¹⁶⁰ *Id.*

¹⁶¹ Quigley, *supra* note 156, at 337.

¹⁶² WADC, *supra* note 22, at art. 10.6.

¹⁶³ *Id.* at art. 10.2.

¹⁶⁴ *Id.* at 56 “Comment to Articles 10.5.1 and 10.5.2”.

¹⁶⁵ The Code defines No Fault or Negligence as follows: “The *Athlete’s* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method*.” WADC, *supra* note 22, at 131.

¹⁶⁶ The Code defines No Significant Fault or Negligence as follows: “The *Athlete’s* establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation.” *Id.*

period can be reduced to no less than one-half the period of original ineligibility (at most one year). The Code is clear that 10.5 is meant to “have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.”¹⁶⁷ This provision is intended to harmonize the doctrine of proportionality across sports, a doctrine which in its pure form would allow individual IFs to adjust penalties on a case-by-case basis; arbitration panels cannot apply the doctrine of proportionality except as provided by the Code.¹⁶⁸

A. STRICT LIABILITY IN ACTION

The reality of the strict liability standard in practice can be lost when discussing lofty concepts such as proportionality and fundamental rights. Any strict liability standard will invariably capture instances with low levels of culpability, so presenting cases will color the following discussion on athletes’ rights. The issue of proportionality rests on a characterization of the offense and the effect of the sanction relative to the objective of the regulation; presenting cases that cannot be characterized as instances of cheating will be useful in assessing how well international courts have accounted for accidental violations.

Cases often arise from unknowingly ingesting contaminated supplements and medications. During the 2002 Winter Olympics, Scottish skier Alain Baxter failed a drug test because he used a Vicks Vapor Inhaler made in the United States, which unlike U.K. brands has a mild relative of a banned stimulant. He was suspended for three months, a mild penalty.¹⁶⁹ In the 1999 World Cup for swimming, two athletes tested positive for nandrolone in amounts slightly over the allowed limit. The athletes claimed they had unknowingly ingested the anabolic when eating uncastrated boar meat, a claim supported by a scientific study; they were unable to meet the standard of proof that the nandrolone had entered their systems through boar meat,¹⁷⁰ but they were given a “break”: the suspension was reduced from four to two years. In 2003, Elmar Lichtenegger also tested positive for nandrolone, due to a contaminated nutritional supplement. An IOC/WADA accredited laboratory described the supplement as free of prohibited substances,¹⁷¹ so the CAS went easy on him with a fifteen-month suspension.

Other cases bring into question the bureaucratic shortcomings of anti-doping and how this risk is placed wholly on athletes. In 2005, NCAA athlete Ricky Harris tested positive for Dexedrine, a medication for attention deficit disorder, while competing in an official USA Track & Field event. Arbitrators agreed he was under the “mistaken belief” that he had provided paperwork for a therapeutic use exemption, but the school

¹⁶⁷ *Id.* at 56 “Comment to Articles 10.5.1 and 10.5.2”.

¹⁶⁸ Richard H. McLaren, *CAS Jurisprudence: What Can We Learn?*, 1 INT’L SPORTS L.J. 4, 18 (2006), available at http://www.wada-ama.org/rtecontent/document/McLaren_learn.pdf.

¹⁶⁹ Hiltzik, *Doping Case Appeals Futile*, *supra* note 12.

¹⁷⁰ McLaren, *supra* note 168, at 17.

¹⁷¹ *Id.*

failed to file it.¹⁷² He was suspended for one year. In 2005, skeleton sled racer Zach Lund tested positive for Finasteride, an ingredient in an anti-balding medication recently added to the List at the time.¹⁷³ Recall that it is ultimately the athlete's responsibility of knowing the contents of the List. The substance itself does not have the potential to enhance performance or pose a health risk, rather it was banned as a possible masking agent for steroids; this was based on a single study by a WADA lab that had not been peer reviewed.¹⁷⁴ Lund disclosed his medication on anti-doping forms at every event, and no official had ever alerted him to the change in Finasteride's status.¹⁷⁵ The USADA, a rigorous prosecution agency, even sided with Lund during arbitration, although it was WADA who appealed the case to CAS.¹⁷⁶ The USADA pointed to errors on the federation's website regarding Finasteride's status, a mistake which "should not be held against Mr. Lund, who is not a 'cheat.'"¹⁷⁷ While acknowledging the lack of performance enhancement, and the shortcomings of the anti-doping organizations,¹⁷⁸ CAS suspended Lund for a year, causing him to miss the 2006 Winter Olympics.

In cases as unsettling as these, one cannot help but wonder how a non-governmental organization can disqualify and suspend an athlete for such trivial violations. Arbitrators in these cases often have "heavy hearts,"¹⁷⁹ yet "regrettably"¹⁸⁰ apply anti-doping law anyway. The following section discusses the challenges made to anti-doping laws with appeals to athletes' rights.

B. THE STATUS OF ATHLETES' RIGHTS IN INTERNATIONAL LAW

The Code has survived in part because it offers athletes an opportunity to offer mitigating circumstances. Before discussing the application of the "exceptional circumstances" provisions, it is necessary to review how the strict liability standard, two-year suspension penalty, and the principle of proportionality have fared under international jurisprudence. How well the Code conforms with international law depends on the analytical framework used by CAS and the European Court of Justice ("ECJ"), which have drawn on international laws, covenants, conventions, and treaties to assess the Code. The arguments available to athletes depend on the extent to which these final arbiters have given substance to the concept of "athletes'

¹⁷² United States Anti-Doping Agency v. Harris, AAA No. 30 190 00111405, ¶ 6.1 (2004), available at http://www.usantidoping.org/files/active/arbitration_rulings/AAA_NACAS%20Decision%20-%20Rickey%20Harris%20_%20May%202006.pdf.

¹⁷³ World Anti-Doping Agency v. United States Anti-Doping Agency, *supra* note 144, at ¶ 1.3.

¹⁷⁴ Hiltzik, *Doping Case Appeals Futile*, *supra* note 12.

¹⁷⁵ *Id.*

¹⁷⁶ WADA has the right to appeal the decision of an anti-doping organization to CAS, without exhausting all remedies. WADC, *supra* note 22, at art. 13.1.1.

¹⁷⁷ World Anti-Doping Agency v. United States Anti-Doping Agency, *supra* note 144, at ¶ 3.10.

¹⁷⁸ *Id.* at ¶ 4.15–4.16 ("The Panel finds this failure [of not alerting Mr. Lund] both surprising and disturbing, and is left with the uneasy feeling that Mr Lund was badly served by the anti-doping organizations.").

¹⁷⁹ *Id.* at ¶ 4.15.

¹⁸⁰ Edwards v. Int'l Ass'n of Athletic Fed'ns, CAS OG 04/003, ¶ 5.14 (2004) ("[R]egrettably, the circumstances [of this case] do not appear to make the threshold for the sort of rare and 'truly exceptional' facts necessary for a reduction of the minimum sanction applicable for a doping offence.").

rights” in relation to the principle of proportionality. This discussion will also elucidate the checks on WADA as a “quasi-governmental” body.

Athletes cannot challenge the Code without reference to their rights. There are four possible fundamental rights of athletes: (1) human rights; (2) fundamental procedural guarantees of criminal law; (3) private law protections of personality rights; and (4) rights based on competition law.¹⁸¹ Challenges have been made on the grounds that anti-doping penalties infringe the human rights of personal liberty¹⁸² and the right to work.¹⁸³ However, the most recent CAS advisory opinion states that human rights do not apply to doping disputes between private sports governing bodies.¹⁸⁴ It seems that the UNESCO Convention’s reference to “instruments relating to human rights,” and the IOC’s sentiment that sports are a human right are misplaced rhetoric. The current approach of the Swiss Federal Tribunal is that doping proceedings concerning issues of private law do not need to be considered “in the light of notions proper to criminal law, such as the presumption of innocence and the principle ‘*in dubio pro reo*’, and corresponding guarantees which feature in the European Convention of Human Rights.”¹⁸⁵ Importantly, the advisory opinion to WADA recognizes a trend toward the application of principles of criminal procedure in doping, a trend that the opinion describes as an undeniably welcome development in the sports arena.¹⁸⁶ Essentially, criminal procedural protections are nice to have, but not necessary to pass muster under international law.

Although human rights and criminal protections are equivocally mentioned by courts, the private law protections of rights under Swiss law and EU competition law serve as stronger platforms for challenging anti-doping sanctions. CAS holds that the relationship between an athlete and a governing body must conform to Articles 28 and 69 of the Swiss Civil Code,¹⁸⁷ which protects personality rights.¹⁸⁸ Since a period of ineligibility infringes on the “right of . . . economic liberty” and the “right to personal fulfillment through sporting activities,” such infringement is presumed invalid, unless it is based “either on the person’s consent by a private or public interest, or the law.”¹⁸⁹ Given the monopolistic nature of sports federations, athletes have little choice but to submit to their rules, making “infringement by consent” a dubious justification; the evaluation turns on the “private or public interest” end used to justify the means of suspension.

¹⁸¹ Kaufman-Kohler & Rigozzi, *supra* note 7, at ¶ 23.

¹⁸² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 2003.

¹⁸³ Office of the High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, art. 6, Dec. 16, 1966.

¹⁸⁴ Kaufman-Kohler & Rigozzi, *supra* note 7, at ¶ 26.

¹⁸⁵ *Id.* at n. 36 (quoting Swiss Federal Tribunal, *Gundel v. FEI*, Decision of 15 March 1993).

¹⁸⁶ *Id.* at ¶ 34–35.

¹⁸⁷ *Puerta v. Int’l Tennis Fed’n*, CAS 2006/A/1025, ¶ 11.7.15, available at http://www.itftennis.com/shared/medialibrary/pdf/original/IO_21476_original.PDF.

¹⁸⁸ Article 28 of the Swiss Civil Code reads: “Where anyone suffers an illicit infringement to his personality, he can apply to the judge for his protection against any person participating in the injury.” Kaufman-Kohler & Rigozzi, *supra* note 7, at ¶ 41.

¹⁸⁹ *Puerta v. Int’l Tennis Fed’n*, *supra* note 187, at 11.7.15.

The European Court of Justice addressed the issue of proportionality in relation to European Competition laws in *Meca-Medina*. Although the decision was issued before the Code's adoption, it nonetheless represents a body of cases holding that proportionality is the paramount condition for the validity of restrictions on fundamental rights.¹⁹⁰ *Meca-Medina*¹⁹¹ stands for the proposition that sports federation law is subject to scrutiny under EU competition law, which provides that no association may prevent, restrict, or distort competition.¹⁹² The imposition by a sports-governing body of a period of ineligibility could qualify as a decision limiting the athletes' freedom of action. The Court is sensitive to the fact that the severity and punitive nature of the sanctions could have detrimental effects if the penalties are unjustified. However, such restrictions are legitimate if (1) they pursue a legitimate objective, and (2) the restrictions are strictly limited to what is necessary to pursue the objective.

This is a promising framework that demands proportionality between the ends and the means. However, because determining the legitimacy of an objective is an "eminently political task," courts tend to accept the legitimacy of the measure under scrutiny.¹⁹³ This is quite the assumption, and it incentivizes anti-doping authorities to exaggerate the nature and degree of the problem to justify the means. As this Note has discussed, the nature of the issue and the aims of WADA are not self-evident.

C. DISCUSSION ON THE PROPORTIONALITY OF TWO-YEAR SANCTIONS

So how do courts assess the proportionality of a punishment? The Swiss Federal Supreme Court in *N. et al. v. Fina* sets a difficult and somewhat nebulous standard: proportionality will be an issue only if the sanction constitutes an extremely serious and completely disproportionate infringement in relation to the behavior penalized.¹⁹⁴ CAS advisory opinions provide a helpful three-pronged framework for assessing proportionality:¹⁹⁵ (1) capacity, requiring that restriction be capable of achieving the aim of anti-doping through deterrence; (2) necessity, implying that no less intrusive restrictions are equally suitable to achieve the aim; and (3) proportionality *stricto sensu* (in its strict sense). In short,

¹⁹⁰ *International Law*, *supra* note 23, at 83 ("Proportionality is not only the paramount condition for the validity of restrictions or fundamental rights it is also a general principle of law governing the imposition of sanctions of any disciplinary body . . .").

¹⁹¹ Case C-519/04 P. *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991, 22–23, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C519%2F04+P&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100>.

¹⁹² Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community art. 43, Dec. 29, 2006, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

¹⁹³ *International Law*, *supra* note 23, at 152.

¹⁹⁴ McLaren, *supra* note 168, at 18.

¹⁹⁵ *International Law*, *supra* note 23, at ¶ 80.

the advisory opinion draws on case law to hold that a two year suspension satisfies all three elements.¹⁹⁶

This holding is troubling for several reasons. When addressing the “necessity” of the rules, the opinion makes the gross assumption that those being punished are cheaters: “an effective penalty should ensure that there are greater disadvantages than advantages in cheating.”¹⁹⁷ This is not the issue; a two-year suspension for a cheater probably conforms to international law. The assumption that the Code only punishes cheaters is also far removed from the reality of Code operations, as the above examples show. The problem with this opinion (and the Code) is its orientation, which groups all possible violations into the singular instance of “cheating,” with little acknowledgement of the Code’s mechanisms that punish non-cheaters. Utilizing such a broad orientation will inherently gloss over the troubling instances. It may not even be appropriate to apply this three-pronged approach to the abstract penalty of “two-year sanction,” and the opinion would do well to refer to another advisory opinion: to determine “whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender.”¹⁹⁸ Apply this standard to an unintentional ingestion case and the disproportion is obvious.

Another problem is that the logic for fixed sanctions places much emphasis on the need for complete harmonization, which limits the consideration of individual circumstances in each case. The value of discretion is trumped by the value of consistency. There is a fear that individual sports bodies will take advantage of flexibility to be lenient on high-profile athletes.¹⁹⁹ However, this seems to be an unwarranted assumption, and it is unclear from where the pressure to protect high profile athletes would come. Recent incidents—such as the Alex Rodriguez case—suggest that the public would not accept anything short of the full punishment available to a panel.²⁰⁰ There is also a concern that inconsistent penalties across sport and country will have a “very negative impact on the public’s perception of the consistency and fairness of the anti-doping action.”²⁰¹ This is an ironic justification, since the public is becoming more sensitive to the unfairness of the current program. Additionally, unequal treatment is not inevitable since the same domestic arbitration panel hears appeals from all sports; for American athletes, all appeals are made to the American Arbitration Association (“AAA”), so favoritism seems unlikely.

The opinions also speak of “harmonization” as if it is a single objective, but “harmonization” applies not just to sanctions, but to testing standards, the List, testing administration, and arbitration procedure. It

¹⁹⁶ *Id.* at ¶ 185.

¹⁹⁷ Kaufman-Kohler & Rigozzi, *supra* note 7, at 44 n. 138.

¹⁹⁸ Advisory Opinion Rendered by the Court of Arbitration in Sport, CAS 2005/C/976 & 986, FIFA & WADA, Apr. 21, 2005, ¶ 143, available at http://www.wada-ama.org/rtecontent/document/CAS_Opinion_FIFA.pdf.

¹⁹⁹ *International Law*, *supra* note 23, at ¶ 182.

²⁰⁰ Gillingham, *supra* note 13.

²⁰¹ *International Law*, *supra* note 23, at ¶ 177.

follows that some elements of harmonization may be more important than others in ensuring fairness and effectiveness. In the interest of “fairness” and “equality” it is more important to ensure a standardized list, procedural protections, and testing. The emphasis on the importance of rigid sanctions with limited discretion seems misplaced: will the effectiveness of anti-doping be damaged by allowing a panel to use a sliding scale? If harmonization holds across the other elements of anti-doping, perhaps we can afford the risk of abuse in the interest of allowing more discretion to protect innocent athletes. The concerns of IF discretion abuse are legitimate, but overstated. They do not account for the fact that the IOC, WADA, and the IFs are aligned when it comes to maintaining the public image of sports: ticket sales and participation depend on it. At the very least, the misplaced fears of IF abuse of discretion do not warrant the opinion’s succinct conclusion: “while we did not ignore that in some circumstances a two-year sanction could appear as a very harsh sanction, we considered that this is the ‘price to pay’ to ensure harmonization and effectiveness.”²⁰²

D. THE CODE’S MECHANISMS THAT ALLOW FOR PROPORTIONALITY

The discussion of proportionality is more important than ever because the window to challenge WADA on proportionality grounds may be closing. The Code is now the sole mechanism for reducing or eliminating sanctions, and it is purposefully designed to limit the factors available to arbitration panels in determining reductions: “if some flexibility is required . . . the scope of this flexibility must be carefully defined and limited.”²⁰³ Case law suggests that the Code will eliminate the application of the doctrine of proportionality altogether except as specifically provided by the Code.²⁰⁴ As the *N. et al v. FINA* court held, “the appropriate question is not whether a penalty is proportionate to an offence, but rather whether the athlete is able to produce evidence of mitigating circumstances.”²⁰⁵ Essentially, it may be presumed that the Code is proportional as long as an athlete has an opportunity to reduce the sanction. This brings the mitigating mechanisms to the forefront: the opportunity to reduce ineligibility is central to the advisory opinions holding that the two-year suspension conforms to the principle of proportionality.²⁰⁶

No doubt, the Code allows the opportunity to produce evidence of mitigating circumstances. Whether or not these are meaningful opportunities will require assessing the “No Fault or Negligence” (10.5.1)

²⁰² Kaufman-Kohler & Rigozzi, *supra* note 7, at ¶ 132.

²⁰³ *International Law*, *supra* note 23, at ¶ 184.

²⁰⁴ McLaren, *supra* note 168, at 18.

²⁰⁵ *Puerta*, CAS 2006/A/1025 at ¶ 11.7.9.

²⁰⁶ Gabrielle Kaufman-Kohler & Giorgio Malinverni, *Summary Opinion on the Conformity of Certain Provisions of the Draft of the World Anti-Doping Code with Commonly Accepted Principle of International Law*, available at http://www.wada-ama.org/rtecontent/document/prof_kaufmann_kohler.pdf (“The Code provisions imposing periods of ineligibility comply with international law . . . because the athlete is given the opportunity to eliminate the ineligibility . . . and to reduce the period of ineligibility . . .”).

and “No Significant Fault or Negligence” (10.5.2) provisions, as well as the evidentiary burdens associated with arbitration.

There are few cases where an athlete has established No Fault or Negligence.²⁰⁷ The Code anticipates three circumstances that would tempt an invocation of 10.5.1, and explicitly preempts these claims:²⁰⁸ it does not cover (1) instances of contaminated or mislabeled vitamins or supplements; (2) administration of a substance by a physician without disclosure to the athlete;²⁰⁹ and (3) accidental contamination by a spouse or coach. Examples in the case law that fall short of a 10.5.1 reduction include: the unsuspecting use of a cream to treat a skin affliction,²¹⁰ and the ingestion of a medication that the athlete knew had gone through several hands after being prescribed by a tournament doctor.²¹¹

It seems that nothing short of sabotage can eliminate a sanction.²¹² The 2006 CAS *Puerta* case demonstrates the outer limits of 10.5.1.²¹³ Tennis player Mariano Puerta ingested the banned stimulant etilefrine—odorless, colorless, and tasteless—by accidentally drinking from his wife’s used water glass, which contained the residue of her hypertension medication. Accepting that Puerta did not deliberately dope himself and that there were no performance enhancing effects, the ITF applied the Code and suspended Puerta for eight years. The CAS affirmed ITF’s holding that Puerta had failed to exercise utmost caution, and was therefore denied a 10.5.1 suspension elimination: “Water is ingested just like any other liquid . . . [i]t is not unreasonable to expect Mr. Puerta . . . to be aware also that residue of the substance could be found in a used glass, even if the glass appears empty.”²¹⁴ However, CAS found that Puerta had established a 10.5.2 “No Significant Fault or Negligence” and reduced the ineligibility to two years, stating that if this were a first offense, the suspension would have been reduced to one year under 10.5.2.²¹⁵ Although CAS broke Code protocol by reducing the sanction to two years, the decision leaves something to be desired. An athlete ingested an imperceptible non-performance enhancing substance, with no reason to suspect that his wife had used the glass for her medication, yet the most CAS will do is reduce his suspension to two years.

While the ruling in the *Puerta* case still leaves Mr. Puerta out of competition for two years, the decision sets a precedent for challenging the Code: the CAS identified Puerta’s sanction as unjust and disproportionate, resulting from “gap or lacuna in the Code,” which should immediately be filled by CAS, and eventually was filled by WADA. The 2009 Amended

²⁰⁷ McLaren, *supra* note 168, at 19.

²⁰⁸ WADC, *supra* note 22, cmt. to 10.5.1 and 10.5.2 at 56.

²⁰⁹ Edwards, CAS OG 04/003, at ¶ 5.12 (“it would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility . . . to someone else.”).

²¹⁰ See Squizzato v/ FINA, CAS 2005/A/830.

²¹¹ See Cañas v/ATP Tour, CAS 2005/A/951.

²¹² WADA gives the only example where a 10.5.1 elimination could occur: “[A]n example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor.” WADC, *supra* note 22, cmt. to 10.5.1 and 10.5.2 at 56.

²¹³ *Puerta*, CAS 2006/A/1025, at ¶ 11.7.21 (“the Panel has concluded that Mr. Puerta fell just short of establishing that he exercised the ‘utmost caution.’”).

²¹⁴ *Id.* at ¶ 11.4.7.

²¹⁵ *Id.*

Code pays heed to *Puerta*²¹⁶ by allowing for more flexibility and closing the gap between offense and sanction. The Code allows an elimination or reduction of a sanction if the substance is a “Specified Substance:”²¹⁷ substances “which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.”²¹⁸ An athlete must establish how the substance entered his or her body, and that it was not intended to enhance performance. Importantly, this inquiry is separate from the 10.5.1 and 10.5.2 fault or negligence determination: the absence of intent must be established to the “comfortable satisfaction” of the panel. This would appear to be an effective mechanism for eliminating sanctions based on credible, non-doping explanations without satisfying the tremendous “exceptional circumstances” burden under 10.5.1 and 10.5.2. However, there are two issues. First, how meaningful the mechanism is will depend on how much evidence it takes for the panel to be “comfortably satisfied.” The Code articulates the standard: the higher the potential for performance enhancement, the higher the burden to establish “no intent.” Second and more importantly, the Specified Substances List does not include substances which account for the most frequent types of unintentional doping cases such as supplement contamination, anabolic agents and the majority of stimulants including amphetamines.²¹⁹

The meaningfulness of the opportunity to reduce sanctions is further implicated because of procedural burdens, which make overturning a positive finding almost insurmountable. With regards to challenging a positive finding, WADA labs are presumed to have conducted the sample analysis in accordance with the established standards.²²⁰ The test is presumed valid, but athletes have the opportunity to rebut the presumption if they can establish—by a balance of probability—that the testing aberration caused the finding.²²¹ The burden is then shifted to WADA, which must establish that the aberration did not cause the finding.²²² The evidence is judged from a lower standard to the comfortable satisfaction of the panel. Gathering this evidence can be precarious, as recent journalistic exposes of anti-doping have found that athletes are “denied routine access to lab data potentially relevant to their defense,” and WADA has “no obligation to provide [athletes] with documentation to rebut these presumptions.”²²³ Additionally, WADA lab experts are not allowed to testify on behalf of either party,²²⁴ and there is a limited pool of

²¹⁶ Charles Russell, *The WADA Code 2009: Lessons for Athletes and Their Teams*, 2, available at http://www.charlesrussell.co.uk/UserFiles/file/pdf/Sport/Briefing_note_-_Sport_-_The_WADA_code_2009_-_Lessons_for_athletes_and_their_teams_-_Mar09.pdf.

²¹⁷ WADC, *supra* note 22, at art. 10.4.

²¹⁸ WADA, 2008 PROHIBITED LIST, 28, available at http://www.wada-ama.org/rtecontent/document/2008_List_Format_en.pdf.

²¹⁹ Interview with Howard Jacobs, Esq. Notes on file with author.

²²⁰ WADC, *supra* note 22, at Comment to art. 3.2.1.

²²¹ *Id.*

²²² WADC, *supra* note 22, at art. 3.2.2.

²²³ Hiltzik, *Doping Case Appeals Futile*, *supra* note 12.

²²⁴ WADA, INTERNATIONAL STANDARDS: LABORATORIES, Jan. 2009, at Annex B: Laboratory Code of Ethics, art. 5.

independent experts.²²⁵ Since the tests are presumed valid this rule mostly affects athletes because the WADA has no need to call an expert unless the athlete rebuts the presumption.

With regards to establishing an accidental ingestion of contaminated supplements, a WADA lab will not analyze supplements unless requested by an anti-doping agency in connection with an investigation.²²⁶ This means that when presenting evidence suggesting contamination it is up to the athlete to bear the cost of testing the supplement, testing that must be performed by a very skilled and specialized lab.²²⁷ Proving contamination is very difficult because an athlete would need to keep empty supplement bottles, which is unlikely given the delay between an adverse finding and notification to the athlete.²²⁸ Even if this is done, contamination varies from bottle to bottle, and pill to pill.²²⁹

The procedural burdens suggest that challenging a positive finding is tremendously difficult: “The rules are designed to make it as easy as possible to convict an athlete.”²³⁰ Since an athlete will most likely not be able to challenge the conviction, the 10.5.1 and 10.5.2 “mitigating circumstances” provisions are the only backstop to a two year sanction.

VII. CONCLUSION AND RECOMMENDATIONS

This Note has given a cursory history of doping in modern elite sport and how it compelled the creation of an international governing body. The rationale and theoretical underpinnings of the fight against doping were helpful in framing the discussion of athletes’ rights, maintaining that current law allows for disproportionate punishment for negligent ingestion of banned substances. I will now offer my recommendations, which involve the big picture of anti-doping, as well as the nuts and bolts of the current Code. We need to make sure that the reality of modern sport, the nature of performance enhancement, and the true impact of sanctions are not lost on those who make the rules, and support them in law.

First, the definition of doping needs to be narrowed—we do not need a mallet to do a razor’s job. If it is inevitable that those lacking intent will be punished, then it should be for levels and substances associated with cheating, and levels which minimize the chances that an accidental ingestion will result in a positive find. We can limit the casualties by narrowing the offense. This Note has made the case that WADA’s definition is overly broad, resulting in sanctions that do not sit well with notions of proportionality. Only by analyzing the theoretical underpinnings of doping can the definition of doping begin to be narrowed. Using the legal framework used by the CAS advisory opinions to assess proportionality, we need to focus on “necessity:” that there are no less intrusive restrictions that

²²⁵Hiltzik, *Doping Case Appeals Futile*, *supra* note 12.

²²⁶INTERNATIONAL STANDARDS, *supra* note 223, at Annex B: Laboratory Code of Ethics, art. 4.4.

²²⁷JACOBS, *supra* note 150, at 37.

²²⁸*Id.*

²²⁹*Id.*

²³⁰Hiltzik, *Athletes’ Unbeatable Foe*, *supra* note 13.

are equally suitable to achieve the aim. The “aim” should be to catch “cheaters,” and while defining the offense is a vexing task, a good starting point is presented by journalist Malcolm Gladwell: “we want the relation between talent and achievement to be transparent, and we worry about the way ability is now so aggressively managed and augmented. Steroids bother us because they violate the honesty of effort: they permit an athlete to train too hard, beyond what seems reasonable.”²³¹ An appropriate orientation is focusing on actual performance enhancement through the lens of health effects. The first question asked should be: does this substance enhance performance? If the answer is no, then it should not be considered. The implication is that unhealthy substances that do not enhance performance should not be on the List (like marijuana). Paternalism is justified only when athletes are being coerced, and these pressures are rooted in the pressure to *perform*. Substances that do not enhance performance have no business being on the List. The levels should then be determined by health considerations—if we allow caffeine and creatine because they are healthy, we should admit that other substances should be allowed because they can be healthy. The movement by WADA to more individual chemistry profiles fits with the orientation towards health, since measuring vitals will indicate if abuse is occurring.

Second, the specific justifications used by WADA need to be audited. In accepting the strict liability standard and two-year sanctions, courts take for granted that a tremendous public interest is at stake and assume the harm that would result from “de-harmonization.” With this orientation, it is not surprising that the means to attain those ends will be judged as appropriate. With regards to the logic and size of the List, we need to ask: how rampant is doping? To what extent has athletes’ health been put at risk by using banned substances? For the issue of harmonization—used to justify fixed sanctions and limiting the mitigating circumstances to the Code’s mechanisms—we need to ask: how often and to what extent did IFs and NGBs abuse the discretion afforded to them by the decentralized anti-doping model? What are the perceptions amongst athletes as to the possibility of more discretion? With regards to the effect on the sanctioned, we need to ask: how often do athletes lose sponsorships? How does training continue during a suspension? What are the emotional costs from the stigma associated with the offense? The answers to these questions will give more substance and legitimacy to the justifications used by WADA. If these answers suggest that the case for anti-doping is overstated, then it must follow that the means must be restricted.

Third, the contents of the List and the tests used should be challengeable by an athlete. It is unfortunate that CAS has held the List to be out of its jurisdiction because any discussion on proportionality must be oriented towards the specific mechanism (the List) used to achieve its aim. The ability to challenge a substance’s inclusion will force WADA to justify its decision based on actual performance enhancement and health consequences, and open its tests to scientific scrutiny. More importantly,

²³¹ Gladwell, *supra* note 54.

the ability to challenge the process through which a substance gets on the List—and the testing methodology used—will answer the call by critics for WADA to be more transparent; by partnering with a broader scientific community, perhaps more effective tests can be developed.

Fourth, I recommend that until the List is narrowed and the threshold levels audited, that steroids and amphetamines be added to the Specified Substances. A “check” on abusing this provision is already built into the Code: the absence of intent must still be established to the comfortable satisfaction of the panel. Yet it allows athletes faced with unintentional ingestion to at least have a chance of eliminating a sanction. As the athletes’ ombudsman of the USOC commented, anti-doping sweeps “two, three, five people every year who are not intentionally cheating.”²³² These are unnecessary casualties that could be avoided by expanding the Specified Substances List.

Lastly, it would be helpful for accused athletes to have the benefit of an insurance product that helps redistribute the risk of an unintentional ingestion of steroids. Financially, the impact of a conviction can be devastating.²³³ Legal costs aside, the norm for sponsors is to put an escape clause in their contract that ends the sponsorship if an athlete is accused or convicted of doping.²³⁴ Until the supplement industry is regulated, athletes fully bear the risk. The product would cover the legal costs associated with arbitration if the violation stems from an unintentional ingestion. This would not create a “moral hazard” and incentivize athletes to become neglectful; rather, an athlete would still have to establish “no significant fault or negligence,” a difficult burden to meet. If it is met, presumably the sanction would be for one year with all legal costs paid. If athletes are as fearful as some journalists suggest, this would be a very attractive product.

We must ensure that our reasons for eradicating doping are clear, rest on sound assumptions, and are fully informed by reality—whether it is the reality of sports preparation, the rates of abuse, the extent of harm, or the true impact of sanctions. With regards to those caught in the net of anti-doping, WADA would do well to recall a CAS opinion:

“There may be innocent victims in wars where bullets fly, but the Panel is not persuaded that the analogy is appropriate nor that it is necessary for there to be undeserving victims in the war against doping. It is a hard war, and to fight it requires eternal vigilance, but no matter how hard the war, it is incumbent on those who wage it to avoid, so far as is possible, exacting unjust and disproportionate retribution.”²³⁵

²³² Hiltzik, *Athletes’ Unbeatable Foe*, *supra* note 13.

²³³ Hiltzik, *Doping Case Appeals Futile*, *supra* note 12 (“It wiped out my life savings and my college savings.”).

²³⁴ Abramssohn, *supra* note 74.

²³⁵ *Puerta*, CAS 2006/A/1025, at ¶ 11.7.18.

