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Author:

Rees, Jonny H L

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How should Doping be Defined and Regulated in Elite Professional Sport?

A dissertation submitted to the University of Bristol in
accordance with the requirements for award of the degree of
Doctor of Philosophy in the Faculty of Social Sciences and
Law

Jonathan HL Rees

School of Law

May 2021

Author's declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED:J Rees..... DATE:..10/05/2021.....

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Jonathan Rees

May 2021

Abstract

The concept of fairness, often expressed as the requirement that athletes should be able to compete on a ‘level playing field’, is at the heart of elite professional sport. This requirement, in combination with athlete health, is cited as a rationale for the prohibition of doping, but what precisely constitutes doping is contested. The current World Anti-Doping Agency (WADA, the foundation directing global anti-doping efforts) prohibition-based system has been heavily criticised following many prominent regulatory failures, such as the Russian institutionalised doping scandal. This has left faith in anti-doping at a particularly low ebb, with key stakeholders such as the athletes voicing concerns about WADA’s approach. Therefore, commentators have advanced suggestions for how the present system may be improved to make it better able to cope with the urgent demands placed upon it. This thesis builds upon such suggestions.

In order to advance practical policy proposals, the thesis provides analysis of the concept of doping and how it should be defined and regulated in elite professional sport. It uses political-philosophical, bioethical, sports ethics and legal analysis to critically examine current regulatory structures and instruments. It argues that the existing policies are grounded in a contested ideological position – WADA’s ‘spirit of sport’ – which fails to account for the realities of elite professional sport, and furthermore that the regulations are inconsistent and incoherent on their own terms, leading to arbitrary policy determinations. Therefore, to advance a more appropriate ‘spirit of sport’ which can inform a system of morality and ethics for anti-doping regulation, this thesis draws upon the work of philosopher John Rawls to derive principles for sports governance. These principles are then used to inform practical policy proposals for more ethically and legally defensible anti-doping regulation which is appropriate for the demands of elite professional sport in the twenty-first century.

Abbreviations

ABP	Athlete Biological Passport
AIOWF	Association of Winter Olympic Ifs
ANOC	Association of the National Olympic Committees
ASOIF	Association of Summer Olympic Ifs
BSMA	Beyond-Species-Maximum Approach
CAS	Court of Arbitration for Sport
CBA	Collective Bargaining Agreement
DD	Deliberative Democracy
EPO	Erythropoietin
IAAF	International Association of Athletics Federations
ICADIS	International Convention against Doping in Sport
ICAS	International Council of Arbitration for Sport
IOC	International Olympic Committee
IOCMC	IOC Medical Code
IPC	International Paralympic Committee
ISFs	International Sports Federations
ISCCS	International Standard for Code Compliance by Signatories
ISE	International Standard for Education
ISL	The International Standard for Laboratories
ISPPPI	International Standard for the Protection of Privacy and Personal Information
ISRM	International Standard for Results Management
ISTI	International Standard for Testing and Investigations
ISTUE	International Standard for Therapeutic Use Exemptions
JR	Judicial Review
MLB	Major League Baseball
MVP	Most Valuable Player

NADO	National Anti-Doping Organization
NADP	National Anti-Doping Panel
NBA	National Basketball Association
NFL	National Football League
NFLPA	NFL Players Association
NFs	National Federations
NHL	National Hockey League
NOCs	National Olympic Committees
NPCs	National Paralympic Committees
PED	Performance-Enhancing Drug
Policy on PES	Policy on Performance-Enhancing Substances
RADO	Regional Anti-Doping Organization
RFU	Rugby Football Union
TUE	Therapeutic Use Exemption
TAS	Tribunal Arbitral du Sport
UNESCO	United Nations Educational, Scientific and Cultural Organization
UKAD	UK Anti-Doping
WADA	World Anti-Doping Agency
WHO	World Health Organization
WRU	Welsh Rugby Union

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1

Introduction

An Outline Description of the Research Problem

Elite professional sport presents many challenges for those seeking to regulate it.¹ One of the most high-profile and pressing of these challenges is the issue of doping in sport.² Doping frequently makes headlines in the mainstream media as a result of numerous regulatory failures, such as the Russia ‘institutionalised’ doping scandal,³ and Lance Armstrong’s

¹ The issues of doping and corruption in particular frequently attract significant mainstream media and academic coverage. Regarding doping, see, eg, Mike McNamee and Verner Møller, *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives* (Taylor & Francis 2011). Regarding corruption, see, eg, Adam Masters, ‘Corruption in sport: From the playing field to the field of policy’ (2015) 34 *Policy and Society* 111, <<https://doi.org/10.1016/j.polsoc.2015.04.002>>.

² See, eg: Paul Dimeo and Verner Møller, *The Anti-Doping Crisis in Sport: Causes, Consequences, Solutions* (Routledge 2018); Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016); John O’Leary, *Drugs & Doping in Sports* (Routledge 2013). See also, Thomas H Murray, *Good Sport: Why our Games Matter – and How Doping Undermines Them* (OUP 2018).

³ By WADA’s own admission, this scandal was particularly damaging. See, eg: WADA, ‘Progress of the Anti-Doping System in Light of the Russian Doping Crisis, 2 July 2019’, <www.wada-ama.org/sites/default/files/20190122_progress_of_the_anti-doping_system.pdf> 26 August 2019; Richard H McLaren, ‘McLaren Independent Investigation Report – Part I’ (18 July 2016) <www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-i> accessed 24 August 2016; Richard H McLaren, ‘McLaren Independent Investigation Report – Part II’ (9 December 2016) <www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-ii> accessed 5 February 2017.

admission to using banned substances and methods throughout his cycling career.⁴ These particularly visible failures, along with many more which have not attracted such significant media coverage, have led to questions and criticisms of the current World Anti-Doping Agency (WADA) prohibition-based system,⁵ and suggestions of how it might be improved.⁶ This thesis addresses the research question: ‘How should doping be defined and regulated in elite professional sport?’ In so doing, it advances some possible answers to these fundamental policy questions.

The existing scholarship (and broader societal debates on doping) may be characterised as generally falling into two distinct camps: those, such as Thomas Murray⁷ and Mike McNamee,⁸ favouring variations of the status quo, and current trends of stricter, more invasive testing, with the associated commitment of considerable resources; and those, such as Julian

⁴ See further, eg, Paul Dimeo ‘Why Lance Armstrong? Historical Context and Key Turning Points in the “Cleaning Up” of Professional Cycling’ (2014) 31 *The International Journal of the History of Sport* 951, <<https://doi.org/10.1080/09523367.2013.879858>>.

⁵ WADA Code 2015 (with 2019 amendments, hereafter referred to as WADA Code 2019) <www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf> accessed 6 November 2019.

⁶ See, eg, Verner Møller and Paul Dimeo, ‘Anti-doping – the end of sport’ (2014) 6 *International Journal of Sport Policy and Politics* 259, <<https://doi.org/10.1080/19406940.2013.798740>>. See further, Jack Anderson, ‘Doping, sport and the law: time for repeal of prohibition?’ (2013) 9 *International Journal of Law in Context* 135, <<https://doi.org/10.1017/S1744552313000050>>.

⁷ Thomas H Murray, ‘Doping and anti-doping: an inquiry into the meaning of sport’ in Mike McNamee and William J Morgan (eds), *Routledge Handbook of the Philosophy of Sport* (Routledge 2015); Murray, *Good Sport* (n 2).

⁸ Mike McNamee, ‘Doping scandals, Rio, and the future of anti-doping ethics. Or: what’s wrong with Savulescu’s recommendations for the regulation of pharmacological enhancement in sport’ (2016) 10 *Sport, Ethics and Philosophy* 113, <<https://doi.org/10.1080/17511321.2016.1203095>>.

Savulescu⁹ and Jack Anderson,¹⁰ arguing for a ‘liberalising’ change to the current system, which can be either more radical, ie, stopping much of the current testing and ‘legalising’ many currently banned substances and methods,¹¹ or more limited permissive tweaks to the current regulatory approach.¹²

There are a number of central concepts which underpin the very conceptualisation of elite professional sport, and thus define and influence policy. These are invoked from all sides of the debate, and include: fairness (the ‘level playing field’),¹³ the related concept of integrity or the ‘spirit of sport’;¹⁴ and the health of the athletes.¹⁵ They are evident in WADA’s ‘two out of three’ test for inclusion of a substance or method on the Prohibited List (the list of substances

⁹ Julian Savulescu, ‘Doping Scandals, Rio and the future of human enhancement’ (2016) 30 *Bioethics* 300, <<https://doi.org/10.1080/17511321.2016.1203095>>.

¹⁰ Anderson (n 6).

¹¹ Ellis Cashmore. ‘Stop Testing and Legalise the Lot’ *Guardian* (26 October 2003) <www.theguardian.com/sport/2003/oct/26/athletics.theobserver> accessed 1 September 2016.

¹² Dimeo and Møller (n 2).

¹³ WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’. For a different perspective, see Julian Savulescu, ‘Justice, Fairness, and Enhancement’ in William Sims Bainbridge and Mihail C Roco (eds), *Special Issue: Progress in Convergence: Technologies for Human Wellbeing* (vol 1093, Annals of the New York Academy of Sciences 2006).

¹⁴ WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’; MJ McNamee, ‘The spirit of sport and anti-doping policy: an ideal worth fighting for’ (21 February 2013) <www.wada-ama.org/en/media/news/2013-02/the-spirit-of-sport-and-anti-doping-policy-an-ideal-worth-fighting-for> accessed 6 February 2017. For a different perspective, see Vincent Geeraets, ‘Ideology, Doping and the Spirit of Sport’ (2018) 12 *Sport, Ethics and Philosophy* 255, <<https://doi.org/10.1080/17511321.2017.1351483>>.

¹⁵ WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’; J Savulescu, B Foddy and M Clayton, ‘Why we should allow performance enhancing drugs in sport’ (2004) 38 *British Journal of Sports Medicine* 666, <<http://dx.doi.org/10.1136/bjism.2003.005249>>.

and methods prohibited by WADA): ‘the potential to enhance or enhances sport performance; ... actual or potential health risk; ... violates the spirit of sport’.¹⁶ These central concepts have a major bearing on the debate and on regulatory structures and practice, and are therefore addressed in the thesis as essential reference points both for understanding, and potentially changing, practice and regulation.

In examining the research question – ‘How should doping be defined and regulated in elite professional sport?’ – many related sub-questions must also be considered. This overarching question requires some unpacking. First, it is important to establish why – or even whether – we should have anti-doping regulations; what is their purpose? Are they worth pursuing? Why must substances and methods be regulated at all? These initial questions lead to consideration of what exactly doping is and how it is defined currently. Attention must then be given to the question of whether this definition is appropriate and whether (or not) it facilitates effective regulation. These questions also necessitate consideration of the ideological foundations upon which the current WADA regulatory system is based, and whether they are appropriate and fit for purpose.

The current WADA regulatory regime (which is the focus of this thesis) has been heavily criticised:¹⁷ what are the implicit and explicit rationales for these prohibition-based regulations? Are they credible and defensible on their own terms, and in context? Do they provide a sufficient basis for the current strict prohibition-based policies, or a more nuanced approach? Are they supported by relevant stakeholders, and do they reflect their attitudes and

¹⁶ Art 4.3 WADA Code 2019.

¹⁷ See, eg, Møller and Dimeo (n 6). See further, eg: Anderson (n 6); Savulescu, ‘Doping Scandals’ (n 9); Cashmore (n 11).

practices? In this connection, in formulating policy it is important to reach an understanding of which stakeholder group (or groups) in sport should be considered most important, ie, in whose interests should sport be regulated, and why? Once this is established, the next question is whether the current regulatory regime operates, in theory and in practice, in the best interests of these key stakeholders in sport. Do these stakeholders have a meaningful ability to shape policy, and to hold regulators accountable? These – in addition to many further related questions – form the subject matter of this thesis.

There are numerous approaches to examining questions of law, philosophy and policy. Some of these various methodologies are analysed, with a view to advancing an approach likely to be most effective in this specific context. Finally, after considering the questions presented in the paragraph immediately above, this thesis advances ways in which the current regime might be improved, in theory but most importantly in practice. The practical policy recommendations are informed by the preceding theoretical (ie, legal, political-philosophical and bioethical) analysis, and in order to stand the best chance of practical implementation, seek to operate broadly within the confines of the current regulatory regime, for example by utilising existing processes and infrastructure.

In summary, this thesis aims to advance conceptually and ethically robust analysis of these debates, focused both on theoretical discourse and practical regulatory instruments; this approach is designed to help inform policy proposals which would support a more coherent and defensible system of doping regulation for elite professional sport.

Area of Focus

This thesis focuses on elite professional sport, as distinct from amateur or participatory sport and sport involving children.¹⁸ This is because the concerns and demands of the former type of sport are different in significant and meaningful ways from those of the latter. These points are addressed in detail in the bioethical chapters, which make up chapters seven and eight of this thesis. It is noteworthy that the term ‘elite athlete’ has recently been given the following legal definition:

‘elite athlete’ means an individual who—

- (i) derives a living from competing in a sport,
- (ii) is a senior representative nominated by a relevant sporting body,
- (iii) is a member of the senior training squad for a relevant sporting body,
- or (iv) is aged 16 or above and on an elite development pathway.¹⁹

This definition – particularly point (i) – is consistent with how the term is used in this thesis, although as noted above this thesis does not generally consider athletes falling within the definition at point (iv).

This thesis focuses primarily on WADA-regulated sport. As explained in greater detail in chapter three, ‘Regulatory Structure and Framework’, with the notable exception of the four

¹⁸ There are some circumstances where, for example, 16- and 17-year-old athletes can be considered elite professional athletes and subject to WADA regulation. This happens quite frequently in sports such as gymnastics, particularly with athletes competing as women. However, this is not the case in the NFL, where players usually attend university and are generally required to be at least three NFL seasons post-high school. It is also only very exceptionally the case in rugby union. Therefore, the policies advanced later in this thesis are generally designed for adults.

¹⁹ The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No 3) Regulations 2020 SI 2020 No 558, 2.

major US domestic sports (Major League Baseball, the National Hockey League, the National Basketball Association and the National Football League – the NFL) which maintain their own anti-doping and recreational drug/substances of abuse policies, WADA dominates the anti-doping regulatory landscape. Therefore, WADA's structures and policies are considered by this thesis, with practical examples drawn from rugby union in England, which operates under the auspices of WADA. The NFL's 'Policy on Performance-Enhancing Substances' and, to a lesser extent its 'Policy and Program on Substances of Abuse' are also presented and analysed for comparative purposes.

Overall Structure and Chapter Summaries

The structure of the thesis is detailed below, along with the way in which each chapter builds upon the previous one to form a coherent overall position, and therefore substantiate the policy proposals and conclusions provided later in the thesis. The individual chapters are now briefly described to provide an overview of the thesis.

The 'Critical Approach and Methods of Analysis' chapter (chapter two) explains how this thesis identifies and engages with the literature and outlines the academic approach adopted in order to answer the overarching research question and the many related sub-questions. This chapter explains how and why drawing upon 'ideal' theories – notably John Rawls's 'justice as fairness' – is instructive and complements the pragmatic approach taken by this thesis as a whole, which seeks to advance policy proposals that are able to operate within the confines of the status quo. When used in this manner, the ideal is able to serve as a reference point from which to inform our non-ideal world. This pragmatic approach, where solutions must work in the world as it is and not as it ideally should be, is inspired by the work of scholars such as Jonathan Wolff and Erik Parens. The utility of considering wider academic and policy work,

for example the debates regarding drug regulation, and (separately) bioethical literature relating to human enhancement, is elucidated. Finally, the use of the two case study sports – rugby union in England and Wales, and American football in the US – is explained and justified, with reference to how it can inform practical proposals for reform of the existing regulatory regime.

The ‘Regulatory Structure and Framework’ chapter (chapter three) first presents a very short historical overview of the major factors in bringing about the current regulatory system. It then sets out the key regulatory bodies and instruments and describes how they operate; their most important procedures and processes are described and considered, along with their relationship to international conventions and national laws. This presentation is necessarily descriptive but provides essential context which informs the critical analysis that follows. The two sports used for comparative regulatory analysis – rugby union in England and Wales, and America’s NFL – are introduced, with notable differences in regulation highlighted.

The ‘Regulatory Themes and Statements of Values’ chapter (chapter four) examines fundamental themes and questions in regulation, such as the concept of proportionality and the question of whether sports regulators should be regarded as private or public bodies, with a view to examining how they do in reality – and should in theory – influence policy. This analysis of inconsistencies also serves to build a prima facie case to reconsider the existing regulatory approach, given the legal and ethical issues, and problems with practical coherence. The subsequent chapters aim to address these points through legal, philosophical and ethical reasoning.

There are two ‘Morality of Sport’ chapters: in summary the first, ‘Morality of Sport: The Negative Case’ (chapter five) focuses on what this thesis terms the negative case, ie, the ways in which the WADA-dominated morality differs from, and fails to account for, the realities of elite professional sport today. The second, ‘Morality of Sport: The Positive

Alternative (Reconceiving the “Spirit of Sport” (chapter six) advances an alternative account of the morality of sport which is better able to cope with the demands of modern elite professional sport. In greater detail, the first ‘Morality of Sport’ chapter seeks to provide an understanding of the ideological basis on which the current regulatory structures and policies operate. In so doing, it examines elite professional sport’s unique systems of morality and ethics and their relationship to those of wider society. Preserving and promoting WADA’s concept of the ‘spirit of sport’ is arguably the most influential rationale for current anti-doping policy, although this conception is not universally accepted. There are conflicts between different conceptions of the ‘spirit of sport’, particularly the ‘Corinthian Values’ derived spirit evident in WADA’s ideological stance, and the ‘win at all costs’ ethos prevalent amongst elite professional athletes, coaches and their support staff. This conflict presents problems for policy for at least two fundamental reasons, the first of which is addressed by this chapter, which concludes that WADA’s morality and ethics are not credible in context as they are too far removed from the reality of elite professional sport. This problem is elucidated by reference to a number of key concepts and claims; the first of these is an analysis of what sport is today and what it values, and the sources of these values, such as the rules and the prevailing culture, as well as different normative theories of sport. Detailed analysis of what stakeholders in sport value, such as fair competition, and what they should value, serve to inform the determination that WADA’s statements of values are inconsistent both with what elite professional sport does, and should, value. Following this analysis, a modified definition of sport is advanced, which accounts for its purpose and values, and is able to inform a new morality of sport, which is advanced in the second ‘Morality of Sport’ chapter. This explanation and analysis provide the negative case – ie how the WADA-championed ‘Corinthian Values’ approach is unfit for purpose, and other sources of value should therefore be considered. This negative case chapter concludes that the current regulatory regime is based on an outmoded and contested ideological

perspective which does not provide an adequate rationale for the current strict prohibition-based approach, which is backed by the principle of strict liability and by stringent ‘Whereabouts’ requirements for athletes.

Following the demonstration of the fundamental flaws in WADA’s ideological approach (ie, the negative case) in the previous chapter, this second ‘Morality of Sport’ chapter provides a positive alternative system of morality and ethics. In order to do this, areas of agreement between stakeholders and shared values are sought, with a focus on reasonableness and deliberative democracy – rather than contested ideological perspectives – as the basis for a more appropriate and credible morality of sport. The examination of the purpose of sport from different ideological perspectives in the previous chapter helps to identify areas of agreement. These points of consensus are helpful in beginning to formulate the case advanced as a positive alternative to the current regulatory regime. The fundamental elements necessary for a credible morality of sport are presented: the ability to design fair and effective institutions and procedures which reflect the nature and values of elite professional sport today; the ability to engage with – and constrain where necessary (for example in the interests of athlete health, safety and wellbeing) – this new morality and ethos of sport; the ability to account and legislate for the individual sports themselves; and to be accepted as fair and reasonable by key stakeholders. The political philosophy of John Rawls – specifically that advanced in his seminal work *A Theory of Justice* – is introduced as a possible system to inform this new morality of sport. Once a short overview of his theory is presented as it relates to the task at hand, the utility and applicability of Rawlsian political philosophy is then demonstrated with reference to the specific demands of elite professional sport, as identified earlier in this chapter. Rawlsian principles, devices and methods are introduced and then modified for the specific purposes of elite professional sport, which – as noted above – is distinct from amateur or participatory sport. Rawls-derived principles for sport are then formulated and explained to

facilitate better governance. These Rawls-derived principles and the approach they offer are then applied to existing problems in sport, specifically anti-doping policy. The advantages of this system – and how they address pressing current issues – are then summarised. This approach provides a more defensible and ethically robust system, with greater transparency, independence and accountability to key stakeholders, namely the athletes.

There are also two bioethical chapters. Following the analysis of the underpinning moral and ethical theory presented by the two ‘Morality of Sport’ chapters detailed immediately above, these two bioethical chapters examine key themes and terms which influence policy, and consider the coherence and consistency of the existing regulations.

The first bioethical chapter (chapter seven) begins by analysing the concept of health, considering how it should be defined with reference to key theorists. For the purposes of this thesis, health is taken to be a normative concept, with both ‘negative’ and ‘positive’, and both ‘internal’ and ‘external’ dimensions. Second, this chapter then presents and examines the bioethical literature relating to human enhancement; different definitions, with their respective advantages and disadvantages for this specific purpose and their implications are then considered. Following this analysis, a modified broad ‘constructivist’ definition of enhancement, appropriate for the purposes of this thesis, is advanced; importantly, the concept of enhancement itself should not be considered inherently problematic. In the course of considering the bioethical literature relating to enhancement, key dichotomies, such as the treatment-enhancement distinction and the concept of the natural versus the unnatural are detailed and analysed. Consideration of the term enhancement and the relationship it has with these influential concepts and dichotomies is helpful in defining another key term – indeed the most important term for the purposes of this thesis – doping. This thesis defines doping (an inherently pejorative term) as an unfair means or method of enhancement, which will also include unsafe enhancement. Finally, following this conceptual analysis, different

manifestations or sub-categories of enhancement and their relationship to doping are then considered and presented in a table, which details each sub-category or different manifestation of enhancement and WADA's rationales for permitting or proscribing them. This serves to highlight some of the issues with the current WADA regulation and informs the discussion which follows. The table also helps to identify key critical framing devices in regulation which operate as major normative influences, such as the concept of the natural versus the unnatural, the treatment-enhancement distinction and the concept of health. These influential normative guides are then discussed and critiqued in the following chapter.

Building upon the analysis of key themes and normative influences in the previous chapter, the second bioethical chapter (chapter eight) examines the coherence of the WADA rules on their own terms. The different philosophical and bioethical framing devices given as rationales for the current regulatory system, namely fairness (the 'spirit of sport'), health and the concept of enhancement are used to examine the consistency and coherence of the current system. The criteria used by WADA to prohibit specific substances and methods are considered in depth with reference to the anti-doping literature; issues and inconsistencies in WADA's policy are highlighted, and general trends in regulation are also identified. Next, contrasting practical approaches to regulation are briefly considered with reference to the two case study sports: rugby union in England and Wales, and American football in the US. Some major differences – both in their rationales and their practical implications – between the two regulatory approaches are highlighted. For example, the NFL's sanctions are much less severe than those mandated by WADA. This presentation helps to identify salient issues and key themes that can inform the analysis which follows. Finally, practical manifestations of inconsistencies are presented. The idea of fairness, or the 'level playing field', which necessitates distinguishing in a clear and consistent manner between fair and unfair advantages, and methods of athletic enhancement, is highly problematic in current sports governance. At

present, many arbitrary distinctions are made which lack cogent ethical grounding, but nonetheless fundamentally influence policy.

This thesis argues that unfair or unsafe enhancements – i.e. doping – should be banned on the basis of considered judgements. These judgements should be evidence-based; this evidence can come in multiple forms: scientific and empirical data, in addition to reasoned philosophical, ethical, and legal evaluation. Substances and methods should not be prohibited because they fall within a particular category, for example based on their classification as an enhancement. The detailed analysis of anti-doping policy demonstrates that WADA's regulatory approach fails on its own terms, and is therefore unable to provide ethically and legally robust policies.

This thesis begins by setting out and explaining the research problem and the critical approaches adopted to address it, before detailing the regulatory framework and key themes. Next, morality and bioethics critiques of the existing system are provided, in order to advance a positive alternative to the current regulatory approach. This theoretical groundwork provides the basis for the policy proposals which are advanced in chapter nine: the 'Policy Proposals' chapter. The chapter begins by briefly restating the problems with the current approach, summarising its inconsistencies and the gulf between its stated values and the values evident in elite professional sport. Identifying the major shortcomings and advancing appropriate definitions of key terms and phrases such as 'doping', and the 'spirit of sport', helps to define and inform the task of providing credible alternative policy suggestions. Practical policy recommendations are then proposed, based on the conclusions drawn in the preceding chapters. The proposals focus first on how the more general principles for sport ethics derived from Rawlsian political philosophy can be translated into practical policies. For example, an approach characterised by more balance and a focus on reasonableness, derived using a Rawlsian 'overlapping consensus' method for policymaking is suggested, rather than

reactionary ad hoc policies derived from a contested ideological perspective. More specific recommendations are then advanced, such as making athlete health, safety and wellbeing key drivers of policy, a revision of the Prohibited List, and having separate sport-specific policies rather than the current harmonised approach, with sanctions proportionate to the length of the average career in that particular sport. Finally, following the presentation of these and other practical policy reforms, this chapter explains how the proposed changes are able to operate within the confines of the existing regulatory regime, using systems and infrastructure which are already established, such as the Athlete Biological Passport.

In the final chapter, a summary of the research problem is provided, followed by the overall conclusions of the thesis which advances some answers to the overarching research question and the many related sub-questions. The limitations of the scope of the thesis and areas of further study are also considered, before some concluding remarks. This thesis concludes that the extant moral and ethical position championed by the current regulators is no longer appropriate for the demands of elite professional sport. It is too far removed from the day-to-day realities of elite professional sport to be credible, and some of the key values it promotes are no longer the values that this type of sport does – or should – value. The current regulation lacks internal consistency and fails on its own terms, rendering it unable to provide credible and defensible regulation. In light of these points, a reappraisal of anti-doping policy is necessary. This reassessment leads to the presentation of a positive alternative system together with practical policy proposals designed to promote the values of this revised system and provide more effective and appropriate anti-doping regulation.

Critical Approach and Methods of Analysis

Introduction

This chapter presents and explains the critical approach and methods of analysis adopted by the thesis as a whole. This approach draws upon the work of many theorists from different academic disciplines, mainly – but not exclusively – law and philosophy. These two broad categories can be sub-categorised further into subjects such as jurisprudence and regulation for the former, and philosophical bioethics and political philosophy for the latter. This interdisciplinary approach serves to provide answers to the complex and contested questions raised by anti-doping policy. The various different influences and approaches will be discussed, and the approach taken by this thesis explained and justified.

Towards a Theory for Fair Sport

This thesis seeks to provide an overall theory of fair sport which can inform anti-doping policy: in so doing, it aims to contribute to an expanding body of literature that addresses individual athletes, sporting institutions and other stakeholders such as fans and sponsors.¹ It therefore

¹ Many academics have considered these issues. See further, eg: Thomas H Murray, *Good Sport: Why our Games Matter – and How Doping Undermines Them* (OUP 2018); Sigmund Loland, *Fair Play in Sport: A Moral Norm System* (Routledge 2002); Claudio M Tamburrini, *The 'Hand of God'* (University of Gothenburg Press 2000); Walter Thomas Schmid, 'A Kantian Theory of Sport' (2013) 40 *Journal of the Philosophy of Sport* 107, <<https://doi.org/10.1080/00948705.2012.725909>>; Russell W Gough, *Character is Everything: Promoting Ethical Excellence in Sports* (Harcourt Brace 1997); Mike J McNamee, 'Ethics and Sport', *British Philosophy of*

provides a discussion of, and response to, work by prominent academics in this field such as Thomas Murray, Julian Savulescu, Mike McNamee and Paul Dimeo.² It must also work effectively within the contemporary context: one of professionalised, highly commercialised sport; and within the wider social context, taking into account diverse stakeholder groups and their interests. The focus will therefore be on normative and applied ethics, rather than descriptive and meta-ethics. It will consider, in the words of Silvia Camporesi and Paolo Maugeri, a ‘thick description of sport – one that takes into account both its purposes and ends’, in order to derive a credible morality of sport.³

Both the term ‘morality’ and the term ‘ethics’ will be used in this thesis. They will be given their ordinary natural meanings, therefore drawing a distinction – albeit a limited one – between the two terms. To this end, morality will be taken as a foundation of norms, and thus something which comes before ethics. In this context, the ‘spirit of sport’ could be considered an expression of these underpinning values. Ethics can then be taken as a practical system of

Sport Association website <<http://philosophyofsport.org.uk/resources/ethics-sport/>> accessed 25 October 2019; Warren P Fraleigh, *Right Actions in Sport: Ethics for Contestants* (Human Kinetics 1984); MJ McNamee and SJ Parry, particularly the book series ‘Ethics and Sport’ (Routledge 1998). There are over 40 such books: <www.routledge.com/Ethics-and-Sport/book-series/EANDS>.

² See, by way of representative example: Murray, *Good Sport* (n 1); J Savulescu, B Foddy and M Clayton, ‘Why we should allow performance enhancing drugs in sport’ (2004) 38 *British Journal of Sports Medicine* 666; Mike McNamee, ‘Doping scandals, Rio, and the future of anti-doping ethics. Or: what’s wrong with Savulescu’s recommendations for the regulation of pharmacological enhancement in sport’ (2016) 10 *Sport, Ethics and Philosophy* 113, <<https://doi.org/10.1080/17511321.2016.1203095>>; Paul Dimeo and Verner Møller, *The Anti-Doping Crisis in Sport: Causes, Consequences, Solutions* (Routledge 2018).

³ Silvia Camporesi and Paolo Maugeri, ‘Genetic Enhancement in Sports: The Role of Reason and Private Rationalities in the Public Arena’ (2011) 20 *Cambridge Quarterly of Healthcare Ethics* 248, <<https://doi:10.1017/S0963180110000897>>.

rules which follow logically from these underlying values. Therefore, in this construction morality is able to inform ethics by providing a sound foundation from which consistent and coherent practical rules and regulations can flow.

When considering values, it is important to note as a preliminary point that they may be demanding in (at least) two different senses. First it can be demanding for expressions and articulations of values to be universally approved; inevitably there will be disagreement from members of a diverse audience with potentially radically different ideas of what might be appropriate. The amount of disagreement may, however, be reduced if agreement is only sought from a more limited community, such as elite professional sport. Within a limited community of this nature, there is a greater likelihood of identifying shared values and areas of agreement. Second, values can be demanding in what they ask of those subject to them, ie, the burdens and restrictions they place on those subject to them. In this specific context, they will be more demanding in practical terms for professional athletes by definition, because these athletes will be subject to them, and therefore to rules and limitations that will not apply more broadly, ie, to those outside elite professional sport.

It will be argued that elite professional sport has its own unique and discrete (from that of wider society) norms and values;⁴ therefore, justifying everything so that it might be universally acceptable is unduly onerous and challenging. The task at hand is to provide answers to questions relating to the regulation of elite professional sport, a task which is narrower and more self-contained than providing answers for entire political systems, for example. However, in order to be persuasive across elite professional sport, the conclusions drawn by this thesis will need to be justifiable to key stakeholder groups, such as the athletes themselves.

⁴ See 'Morality of Sport: The Negative Case', ch 5 of this thesis.

Philosophical and Bioethical Approach

Philosophical and bioethical analysis represents a fundamental component of this thesis, and serves to inform the policy proposals and conclusions advanced in later chapters. As anti-doping regulation – both WADA’s and the NFL’s – employs moral criteria in determining what is (or is not) permissible, it is therefore necessary to include philosophical and bioethical analysis. When seeking to use academic theory to answer questions of bioethical policy, theorists have employed various different approaches; for example, some abstract their ideas and reasoning from the status quo in order to generate novel solutions to current problems, whilst others utilise philosophical reasoning to facilitate reaching solutions which operate within the confines of existing regulatory systems.⁵ In considering how best to answer bioethical questions relating to human enhancement – a key component of this thesis – this chapter appraises some of these different approaches. As noted in the introductory chapter, this thesis takes the position that in order to have a practical impact, bioethical and philosophical discourse must pay sufficient regard to the status quo and the related prevailing regulations. This necessitates a balance: whilst drawing upon philosophical and bioethical theory, it must engage with the regulatory system, for example, as it is, not just as it ideally should be.⁶ By

⁵ See further, eg: Erik Parens, *Shaping Our Selves* (OUP 2015); Julian Savulescu and Nick Bostrom (eds), *Human Enhancement* (OUP 2009); Daniel Callahan, *In Search of the Good: A Life in Bioethics* (MIT Press 2012); Jonathan Wolff, ‘Harm and hypocrisy: Have we got it wrong on drugs?’ (2007) 14 *Public Policy Research* 126, <<https://doi.org/10.1111/j.1744-540X.2007.00475.x>>.

⁶ Husak, for example, would not agree with this assertion and instead deliberately distances himself from the status quo; this is apparent in his work. See further, eg: Douglas N Husak, ‘Recreational Drugs and Paternalism’ (1989) 8 *Law and Philosophy* 353, <<https://doi.org/10.1007/BF00172032>>; Douglas N Husak, *Drugs and Rights* (CUP 1992).

beginning from this position, we are able to use ideals as reference points and as tools to help us understand more clearly the strengths and weaknesses of the current system, ie, how and why things do, or do not, work, and how to address them. This approach has the further advantage of providing us with clear considered aims and goals. It is also worth noting that the existing framework might, for example, impose certain constraints on potential amendments and provide resistance to any suggested changes.⁷ It can be difficult to think beyond these limitations derived from the status quo; the use of ideal theory can help question these underlying assumptions by working back from the ideal, which does not need to be, and likely will not, be reached in practice. Furthermore, despite this initial use of an abstract or ideal theory approach, the conclusions it elicits are ultimately applied to real-world situations, which goes some way towards addressing concerns about the impractical nature of ideal theory expressed by critics such as Amartya Sen.⁸ This approach is contrasted with focusing solely on the real-world situation, which may unduly handicap more creative methods of problem solving.⁹

However, the approach summarised above can be considered controversial and by no means represents a consensus starting point amongst philosophers and bioethicists.¹⁰ Furthermore, the points raised above assume that the best aim of theory in this context is to

⁷ Wolff (n 5) 132–34.

⁸ See further, Amartya Sen, *The Idea of Justice* (Penguin 2010).

⁹ For an articulation of a notable ‘realist’ theory, see, eg, Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008).

¹⁰ Husak, for example, does not take this approach in his work: see ‘Recreational Drugs and Paternalism’ (n 6). See also: Marcus Düwell, *Bioethics: Methods, Theories, Domains* (Routledge 2013); John D Arras, *Methods in Bioethics: The Way We Reason Now* (eds James F Childress and Matthew Adams, OUP 2017); John McMillan, *Methods of Bioethics: An Essay in Meta-Bioethics* (1st edn, OUP 2018).

influence practice; this assumption may also be questioned. The capacity to influence practice is the ultimate aim of this thesis, so this assumption can, in this case at least however, be made soundly. These observations do not undermine the important role ideal theory may play, nor do they constitute a practical rejection of ideal theory advanced by critics such as Raymond Geuss, who argues that policy questions are best answered by practical policymakers, rather than political philosophers.¹¹ In summary, when following this approach the ideal is the target, and although it may never be hit, it serves as an ultimate reference point from which we may begin and account for the limitations imposed by ‘real-world’ concerns. Although the ultimate ideal is different, this is consistent with the current approach utilised by anti-doping regulators (ie, WADA), who seek to render sport ‘doping-free’.¹² Moreover, this approach provides the added advantage of helping to clarify thinking in a manner similar to so-called ‘thought experiments’, which often limit or remove extraneous information so that one might focus more clearly on the salient points in question.¹³

Although it is acknowledged that Geuss raises many relevant concerns, and further that academic philosophical debate alone will rarely prove decisive, it nonetheless makes a valuable

¹¹ Geuss (n 9).

¹² WADA Code 2015, 11 (with 2019 amendments, hereafter referred to as WADA Code 2019) <www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf> accessed 6 November 2019.

¹³ See, eg, Stephen R Latham, ‘On Some Difficulties for Any Theory of Global Health Justice’ in John Coggon and Swati Gola, *Global Health and International Community: Ethical, Political and Regulatory Challenges* (Bloomsbury Academic 2013). For a detailed explanation of ‘thought experiments’, see, eg, James Robert Brown and Yiftach Fehige, ‘Thought Experiments’, *The Stanford Encyclopedia of Philosophy* (Winter 2019 edn), <<https://plato.stanford.edu/archives/win2019/entries/thought-experiment/>> accessed 20 May 2020.

contribution to the debate which should not be undervalued or overlooked.¹⁴ This is particularly so in the context of anti-doping regulation. A fundamental tenet of the codes of sport, which is explicit in anti-doping policies, is the idea of fairness: a concept underpinned by statements of philosophy and ethics. These codes contain their own necessarily philosophical components, such as for example the ‘spirit of sport’ criterion for the inclusion of a substance or method on the WADA Prohibited List. Furthermore, the influence of prominent bioethicist and philosopher Thomas Murray and other comparable academics is evident in WADA’s policies.¹⁵ These points naturally invite philosophical and ethical analysis, which is valuable in examining coherence and justification. Philosophical questions must be considered by policymakers in order to establish exactly what it is they value about ‘clean’ sport, and why this particular vision of sport should be pursued; these factors demonstrate a clear and fundamentally significant role for philosophers in this regard.

Alternative Approaches

As noted above, there are critics of this type of approach and various alternatives to it have been proposed. For example, Geuss, whilst arguing against the use of ideal theory in a policy context, provides his heavily empirically influenced ‘realist’ alternative.¹⁶ He contends that the

¹⁴ For a more detailed response to the concerns Geuss raises, including a robust and persuasive defence of ideal theory, see further, eg, Geuss, *Philosophy and Real Politics* reviewed by Samuel Freeman (2009) 120 *Ethics* 175.

¹⁵ See, eg, WADA Ethics Panel: Guiding Values in Sport and Anti-Doping June 2016, edited October 2017, <www.wada-ama.org/sites/default/files/resources/files/wada_ethicspanel_setofnorms_oct2017_en.pdf> accessed 20 January 2018. WADA also has an ‘Ethics Expert Group’, <www.wada-ama.org/en/who-we-are/governance/wada-ethics-expert-group> accessed 20 January 2018.

¹⁶ Geuss (n 9).

role of philosophy with its abstract general theories is not of much practical utility; philosophers should engage in debate with other philosophers, and even other academics, but general philosophical foundations, especially when considered out of a real-world context and often in a highly theoretical manner, do not have much bearing on political realities. Politics is best understood as being performed by politicians; ultimately, they are tasked with providing alternatives and solutions – hence the appeal in Geuss’s analysis to Lenin as an effective politician and policymaker, rather than to Rawls as a political philosopher.¹⁷ This appeal in a sports context might, for example, lead us to consider consulting someone currently (or recently) with experience in sports governance and anti-doping regulation, such as current World Athletics (previously known as the International Amateur Athletic Federation and International Association of Athletics Federations, abbreviated to the IAAF in both cases) President Sebastian Coe, or former President of WADA Dick Pound. With Pound’s intricate knowledge of the realities and practicalities of anti-doping regulation, Geuss might argue that he would be a particularly instructive person to consult. By performing the various acts of anti-doping regulation, his experience would provide him with a greater ability to produce practical solutions to the real-world problems of doping. However, whilst this would undoubtedly provide some useful insights, these are not necessarily the insights of the nature we seek here. Geuss maintains that the most instructive approach would be to consider the practical realities of power and the reasons behind actions.¹⁸ This aim can still be achieved, however, without entirely excluding philosophical ideal theory.

Geuss’s approach – with its focus on ‘real politics’, where the answers provided in practice might differ from those in theory – unfortunately fails to offer much assistance for

¹⁷ *ibid*, particularly 7, 21–31.

¹⁸ Geuss (n 9).

philosophers seeking to impact policy. Indeed, Geuss sees very little role for philosophical theories at all, instead believing that credible answers to policy questions will not be forthcoming from the field of philosophy. He is sharply critical of many prominent and highly influential twentieth-century political philosophers, particularly John Rawls¹⁹ and Robert Nozick.²⁰ It is possible, however, to respond to his claim that philosophical theories have no utility to politics. First, philosophers are highly skilled in examining the quality of reasoning, and the use of concepts and analysis. This process provides immensely valuable insight; in this regard, Jonathan Wolff states that ‘the merits of philosophical reasoning in this area are that it forces advocates of a particular position to clarify their arguments, and allows proposals which might otherwise have been regarded as taboo to be introduced to the debate’.²¹ Second, if we adopt an approach of this nature, we are able to account for the status quo and aim to promote particular ideas on the basis of considered ethical commitments which are coherent on their own terms, and in context.²² In light of these advantages, ideal theory is used in this thesis to promote a substantively ethical framework for sports governance, which constitutes a rejection of the approach advanced by Geuss. Moreover, this thesis represents at least a partial rejection of Geuss’s contention regarding the need to present a positive alternative.²³ For the purposes of this thesis, and at least in this limited context of sports ethics, presenting a viable alternative

¹⁹ In the preface to *Philosophy and Real Politics*, Geuss notes that the book is based on a lecture in which he critiques Rawls, entitled ‘Lenin, Rawls, and Political Philosophy’. Throughout the text he cites Rawls as an example of an ‘nonrealist’ theorist. During his discussion of ‘Justice’, particularly at 47–50, and then at 53–61, when he considers fairness and power, Geuss heavily criticises Rawls’s *Theory of Justice*.

²⁰ *ibid*, particularly 44–45, 47.

²¹ Wolff (n 5) 134.

²² Wolff (n 5).

²³ Geuss (n 9) 62–63 on rejection of the need to present a positive alternative.

is extremely helpful, and highly arguably necessary: this is one of the ‘well-defined practical situations’ to which Geuss refers.²⁴

Therefore this thesis takes the position that philosophers, philosophers of law and other social scientists should not engage exclusively in academic dialogue with each other, but also with policymakers and other stakeholders, such as athletes. Although there are some interesting parallels with the ‘real politics’ of sports ethics and practice, especially given that the governance of elite sport has very significant political elements to it, Geuss’s criticisms do not represent an insurmountable hurdle for ideal theory to overcome. In summary, it is prudent to consider and account for Geuss’s concerns, but in so doing we can still reach a place that includes the use of ethical theory.

Rawls and ‘Ideal Theory’

Ideal theory, following the approach advanced by Rawls, is defined in this context as considering an ideal scenario as a reference point, providing something to aspire to from our current ‘non-ideal’ position.²⁵ As noted above, this method is of particular utility for a number of reasons. It can be used to elicit a more comprehensive understanding of the current (non-ideal) situation in several ways, for example by comparing it with an ideal institutional framework and noting key differences. It is also worth noting here that an ideal – preserving and promoting ‘the spirit of sport’ – is given a key goal by the current regulators, adding further support to the use of ideal theory. As well as providing an ultimate goal to pursue, engendering

²⁴ *ibid* 95.

²⁵ See John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) in particular 7–8, 215–16, 308–09.

incremental changes towards the ideal can produce meaningful improvements.²⁶ Moreover, this approach provides further benefits. First, from a fundamental perspective, it is important that the laws and policies put in place to govern within a society are ethical, and therefore have robust ethical foundations which can withstand scrutiny and challenge. If they do not have these characteristics, questions concerning their legitimacy might reasonably be raised, and their chances of being followed significantly reduced; working out an ideal can aid in this process. Second, and specifically for our purposes here, ‘Morality of Sport: The Positive Alternative’ (chapter six) advances ethically robust and defensible foundations designed for elite professional sport based on areas of common agreement, which might help to remedy some of the current problems in the regulation of drugs and doping in sport, which can be attributed to its grounding in a contested ideological position. Meaningful stakeholder consultation would also go some way towards providing an examination of the nature favoured by Geuss, ie, by consulting those actively involved in the ‘real politics’ of sports regulation. Furthermore, with a focus on morality of sport an engagement at some level of this nature is necessary given the terms of debate, and using ideal theory can provide it.

Ideal theory therefore can – and should – be used to inform the debate concerning practical issues; indeed it must be used if, as a system, sports governance seeks to claim ethical legitimacy. It can provide both a coherent moral position and a coherent practical position; ie, it is of both conceptual and normative utility. Furthermore, despite the fact that ethical mandates do (at least in principle) constrain what we can do, the use of ethical and philosophical analysis will also be of significant utility in providing a more comprehensive view of how regulation should work, and in introducing factors which might otherwise be overlooked. It can helpfully highlight – and be used to question – established underlying

²⁶ Sen (n 8).

assumptions which may commonly escape sustained scrutiny, and serve to frame the debate in different ways. When ideas derived using ideal theory are crystallised, they then must be discussed with specific and direct reference to the situation they seek to remedy or defend. Following a line of reasoning advanced notably by Rawls, when employed in this manner, ideal and non-ideal (sometimes known as realist, used here in a broad sense to mean attempting to work within the confines of current debates to improve our non-ideal situations)²⁷ theories might in fact complement each other and enrich philosophical discussion of policy.²⁸ This can, in turn, influence policy. As Wolff opines: ‘Compromise, context and pragmatism are always in the background, and given that the introduction of policies is rarely based on pure principles, it is naive to think that principled reasoning alone will bring about change’.²⁹ There are many similarities between politics and sport; indeed, the governance of sport inevitably involves increasing elements of what would traditionally have been regarded as political skills. Considering and balancing complex competing interests,³⁰ making value judgements, and providing effective leadership are just three examples of many more similarities. Therefore, much of the same (or very similar) reasoning identified in the context of politics and theory also holds true for issues of sport and bioethics. It should be noted that this does not necessarily mean that there is no role at all for what Wolff terms ‘principled reasoning’; the point is simply

²⁷ An approach favoured by Wolff; see further, eg, Wolff (n 5).

²⁸ Rawls also divides non-ideal theory into two distinct theories: ‘partial compliance theory’ and ‘transitional theory’. Extensive discussion is beyond the scope of this chapter; see further, Rawls (n 25) 8, 212–18, 309, 504–05.

²⁹ Wolff (n 5) 80.

³⁰ eg, the idea of ‘fair and sporting play’ versus the ‘win at all costs’ mentality. There can also be tensions between commercial interests and interests of the sport and athletes. Extensive discussion of these competing considerations is beyond the scope of this chapter.

that it should serve the purposes detailed above, ie, that it should be pragmatically applied to the situation, despite possible imperfections and practical limitations.

Wolff, Husak, and the ‘Problem of Perspective’

Wolff also observes that philosophers often face other issues in seeking to influence policy, such as the ‘problem of perspective’, ie, failing to pay the status quo and (its dominant position) sufficient regard, and thus to account for it appropriately in academic philosophical theory.³¹ For example, ostensibly in an attempt to avoid providing the established status quo (in debates regarding the regulation of drugs outside the context of sport) with an advantage, Douglas Husak seeks to distance himself from it.³² Although Husak does provide a welcome element of conceptual coherence in his argument that recreational drug policy (not anti-doping policy) fails to make sense on its own terms, and proceeds to (in the abstract) provide a cogent normative evaluation, ie, claiming that it is problematic that it does not makes sense, this is not enough for present purposes. It should be acknowledged that whilst this approach does have some limited benefits, such as framing the discourse from a fresh perspective which can generate novel solutions, and indeed limiting the advantage of the status quo, it also has a fundamental weakness. It can render the arguments advanced using it less persuasive and therefore less relevant to a debate regarding policy; we have to accept some realities, and

³¹ Wolff (n 5) 133.

³² See further: Husak, ‘Recreational Drugs and Paternalism’ (n 6); Husak, *Drugs and Rights* (n 6); Douglas Husak, *Legalize This! The Case for Decriminalizing Drugs* (Verso 2002); Douglas Husak and Peter de Marneffe, *The Legalization of Drugs* (CUP 2005).

engage with them directly as we find them.³³ It is because it is too abstract and esoteric that it will not lead to effecting change: asking governments (and the mass media) to imagine that drugs are not illicit and start again is simply too much of a conceptual hurdle to overcome. In short, as the arguments advanced from this position do not refer to the reality of the situation, and therefore fail to address the situation as it is in reality, a further, arguably insurmountable hurdle must be overcome before they can be of practical utility: applying them to the world as it actually exists, with all the constraints of the existing framework. Abstract reasoning, without acknowledging or addressing the extant framework can therefore only be of limited utility for those seeking to influence policy. The approach adopted in this thesis seeks to avoid, or at least reduce, the impact of this ‘problem of perspective’, encountered by philosophers and ethicists seeking to operate in the field of public policy.³⁴ In the context of anti-doping in sports, the idea of allowing any and all drugs is widely regarded as anathema;³⁵ therefore, beginning as if from anew and completely abandoning the ‘Prohibited List’³⁶ for example would be highly impractical, and represent too great a departure from the status quo to be a feasible policy.³⁷ It

³³ Criticisms in this regard may equally be levelled at the current regulators; their failure to engage sufficiently with the practical realities of elite professional sport, whilst instead seeking to promote an outmoded ideology, may itself be considered to fall into a Husakian trap. This demonstrated unrealism and failure to account for core values creates problems for policy.

³⁴ Wolff (n 5) 133. See also (n 10).

³⁵ This would run directly against WADA’s statements of value, with doping considered ‘fundamentally contrary to the spirit of sport’, WADA Code 2019, 14.

³⁶ WADA Prohibited List 2020: <www.wada-ama.org/sites/default/files/wada_2020_english_prohibited_list_0.pdf> accessed 5 November 2020.

³⁷ Ellis Cashmore, ‘Sport’s Doping Problem: A Rational Solution—Allow Drugs’ (2014) 49 *Substance Use & Misuse* 1194, <<https://doi.org/10.3109/10826084.2014.904120>>. Parallels might also be drawn between this situation

will not, therefore, be attempted here, despite compelling theoretical reasons for considering this policy.³⁸

Techniques and Devices Utilised to Facilitate Cogent Reasoning

The approach adopted by this thesis first allows for moral objectives to be identified and then considered; this task is undertaken in the ‘Morality of Sport’ chapters (chapters five and six). It is helpful to determine these before addressing the existing regulatory structure and policies in detail, which can then be analysed for internal consistency and coherence in light of the conclusions drawn earlier. This is the task of the two bioethical chapters (chapters seven and eight).

For the reasons considered above, the status quo and its advantages and disadvantages are examined before practical conclusions for improvement within the current framework are considered. With a clear idea of the moral and ethics concerns, bioethical reasoning and theories can be used both to examine the coherence (or otherwise) of the current rules and their basis, and to help advance a theory for how to improve matters. Therefore, a discussion of how key concepts such as enhancement are defined and understood in the bioethical literature helps to provide an understanding of how enhancement might best be defined for the purposes of this thesis, ie, for sports regulation. This task is particularly important, as it helps to distinguish between fair enhancements and unfair enhancements, which is fundamental to the concept of

and that of tobacco regulation, in that the status quo enjoys a significant advantage in both, and any changes are likely to be met with significant resistance.

³⁸ For a well-reasoned and articulate statement of this nature, see Cashmore, *ibid.*

doping. To this end, the arguments advanced from different sides of the debate are evaluated. The ultimate aim is to promote the idea that sport can be governed ethically, with a clear idea of ethics and what this might entail; this will necessitate some reform. In seeking to begin this process of reform, we must acknowledge that it will only be realisable by working within the confines of what currently exists; a context where there are dominant (if potentially incoherent) norms and beliefs regarding what doping is, and why it is unacceptable, perpetuated by those currently involved in sports governance who may have agendas which differ from the aims highlighted above.³⁹

The Rawls-inspired framework detailed in the second ‘Morality of Sport’ chapter (chapter six) helps provide a comprehensive ethical basis for the suggestions made in this chapter and this thesis. Other Rawlsian devices, for example the concept of ‘reflective equilibrium’, are also used to help provide internal consistency and to reach more cogent conclusions.⁴⁰ In addition to the approaches outlined above, the instructive concept of ‘oscillating binocularity’, advanced by Erik Parens, is also utilised here.⁴¹ This way of thinking seeks to gain a deeper understanding of the issues from opposing viewpoints, for example in this case of enhancement, rather than identifying exclusively with one of the two main opposing perspectives (which tend to dominate the debate and how the various issues are framed):

³⁹ See, eg: Paul J Hayes, ‘The Commercial Rationale of the World Anti-Doping Code’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016); J Krieger, “‘Born on the Wings of Commerce’: The World Championships of the International Association of Athletics Federations’ (2016) 33 *The International Journal of the History of Sport* 418, <<https://doi:10.1080/09523367.2016.1159201>>.

⁴⁰ See further, ‘Morality of Sport: The Positive Alternative’, ch 6, and Rawls (n 25) 18–19 42–45.

⁴¹ Parens (n 5).

[M]uch as we achieve visual depth perception by integrating the slightly different information that our two eyes give us, we can aspire to achieve depth of intellectual understanding by integrating the greatly different insights that myriad pairs of conceptual lenses give us.⁴²

In seeking to fully understand an opposition position, one should state it in the strongest, most persuasive terms possible, highlighting strengths and areas of agreement, and ideally advancing a stronger argument than the original.⁴³ By using this approach, we may gain further insight into, and greater appreciation for, the opposing argument. Also – in the process of so doing – any conclusions advanced which contradict will be strengthened and made more persuasive. This technique of creating a ‘steel-man’ argument, as opposed to ‘straw-man’, is utilised here, and throughout this thesis.

This tool is particularly useful for identifying the benefits of each approach and any areas of agreement; in Rawlsian terms any areas of ‘overlapping consensus’. This overall approach,⁴⁴ influenced in particular by the approaches advanced by Wolff, but also academics such as Ashcroft,⁴⁵ Parens,⁴⁶ and Sen,⁴⁷ should facilitate reaching pragmatic compromises

⁴² *ibid* 5.

⁴³ See further, eg, the approach for constructive criticism championed by Daniel C Dennett in *Intuition Pumps and Other Tools for Thinking* (WW Norton & Company 2013), following influential psychologist Anatol Rapoport’s ‘Rules’.

⁴⁴ The overall approach taken in advancing a positive alternative is also considered in depth in ‘Morality of Sport: The Positive Alternative’, ch 6.

⁴⁵ Richard Ashcroft, ‘Fair Process and the Redundancy of Bioethics: A Polemic’ (2008) 1 *Public Health Ethics* 3, <<https://doi.org/10.1093/phe/phn004>>.

⁴⁶ See above (n 5).

⁴⁷ Sen (n 8).

which stand a greater chance of successfully influencing policy whilst seeking to instil intellectual coherence and ethical defensibility.⁴⁸

Key Practical Examples for Analysis: Rugby Union and the NFL

Considering practical examples of regulation can provide insights which may not be forthcoming from purely theoretical or abstract approaches. Insights of this nature may be deemed particularly important when seeking to advance credible policy proposals and practical changes to an existing regulatory regime. Therefore, it is valuable to include consideration of how different regulatory approaches may operate in practice. Consequently in this context, it is instructive to examine the regulatory structures and sanctions of different sports and jurisdictions. However, considering very different sports with significantly different regulatory demands would only be of limited utility. Choosing sports with sufficiently similar regulatory demands is more likely to be useful, as any insights or lessons drawn from one stand a greater chance of being more readily applicable to the other.

Although significant attempts to harmonise anti-doping measures across all countries and sports have been made by WADA, there are nonetheless some prominent examples of leagues that maintain their own regulation. One such example, and a focus of the limited comparative case study conducted in this thesis, is the (American) National Football League (NFL). Rugby union complies with the WADA Code, whereas the NFL, like all the major US

⁴⁸ It is also worth noting that sport can serve as a proxy for other debates, such as, for example, the wider debate on drugs in society, so any conclusions drawn might also have broader applicability. Moreover, in this connection, the unique place, role and visibility of sport in broader society – and therefore the positive impact and contribution an improvement in sports governance could potentially have – should not be underestimated.

domestic sports, has its own anti-doping rules and sanctions. It is evident even at first glance that the approaches are different in many significant ways, despite the similarities between the two sports; this makes for an interesting and productive comparison. They are sufficiently similar in nature to merit drawing comparisons: for example, they are both major professional contact and collision sports with relatively similar demands on players. Both sports also have significant commercial dimensions with large fan bases; successful players in both sports can become well known and thus attract significant media scrutiny and attention. Particularly at the elite professional level, both sports also place enormous pressure on players, coaches and support staff to win. These coaches and support staff play very prominent roles, and there is considerable medical and sports science support provided to these coaches and players in pursuit of success.⁴⁹ These notable and meaningful similarities both on and off the field of play mean that lessons from one are more easily applicable to the other than would be the case if the sports did not share these particularly influential similarities. Despite the many similarities described above, the differences in regulation are sufficiently significant to represent distinct regulatory approaches. One aim of this analysis is to consider some of the reasons for the striking differences: where, why, and how they manifest themselves. Considering these significant differences in policy, and the possible advantages and disadvantages of each, serves to inform the policy proposals which are advanced later in this thesis, in chapter nine.

Conclusion

This chapter has advanced and explained the critical approach taken in this thesis, and the reasons for adopting this approach over others. The next chapter presents and explains the

⁴⁹ This by no means represents an exhaustive list, but rather an example of some key similarities which demonstrate the value in a comparison.

regulatory structure and framework, and in so doing highlights some key differences between rugby union under WADA, and the NFL.

Regulatory Framework and Structure

Introduction

As discussed in the introductory chapter, doping has been ever present in various different forms in competitive sport. The focus in this chapter is on the current WADA regulatory framework and regime; in addition to this, key elements of the NFL's drug regulation – which in some major respects represents a contrasting approach – are also presented and explained. In the early part of the chapter, some historical context will be provided as it facilitates a more comprehensive understanding of the approach pursued today and the reasons for this approach. This chapter is largely descriptive, outlining and explaining the current system, with some critical analysis included particularly when considering the contrasting regulatory approaches. This provides an understanding of the current WADA regulatory regime, and an alternative regulatory approach, and serves to inform the more analytical chapters which follow.

Defining Regulation

Before detailing the current anti-doping regulatory regime, it is instructive to consider what the term 'regulation' means – and should mean – in this specific context. There are many different

definitions of, and approaches to, regulation.¹ Some definitions are much wider and therefore include sources beyond what may traditionally have been considered regulation, especially by lawyers. Given that anti-doping regulation is not simply limited to black letter law, and other methods of regulation such as codes are extremely influential, the term regulation in this context should be defined broadly and should therefore include more than just national or state laws; we must look beyond a narrow legal definition. To this end, Julia Black's influential 'essentialist' definition is helpful:

[R]egulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.²

This definition is appropriate for the purposes of this thesis. It is sufficiently broad to cover both the way in which WADA and other anti-doping organisations would use the term, and the way in which it is used in the positive alternative system advanced in chapter six of this thesis.

Historical Context: Before the Current Regime

Before the establishment of WADA in late 1999, anti-doping efforts were by administered by the International Olympic Committee (IOC) in the case of Olympic sports, and by the

¹ See, eg, in particular, Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) chs 1 and 2; see also, Tony Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (OUP 2010) ch 1.

² Julia Black 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 26.

international governing bodies or federations in the case of other sports. This meant that anti-doping policy was not harmonised across all sports. Although there had been some limited anti-doping policies implemented earlier in the twentieth century,³ the first significant and meaningful attempts to regulate drug use in sport came as a reaction to Knud Jensen's death during an Olympic cycling event in 1960. Initially, the death was linked to drug use, although this later proved to be incorrect;⁴ nevertheless, testing began at the 1968 Olympics. During this period, policymaking was almost exclusively reactive and ad hoc, with policies generally drafted in response to individual incidents deemed unacceptable by the IOC. A notable point here was that doping was – at the time – often considered by sports authorities and 'gentlemen amateur' participants to be 'professional' conduct which was problematic in that it was in conflict with the 'Olympic spirit'.⁵ Attitudes derived from this initial stance are still visible today; for example, academics such as John Gleaves and Paul Dimeo⁶ have highlighted the impact this notion of 'Doped Professionals and Clean Amateurs'⁷ has had on the development of modern anti-doping policy. Indeed, the promotion of certain 'gentleman amateur' or 'Corinthian Values' is evident in much of WADA's ideological positions. These points, and

³ The IOC and IAAF had some policies in the 1920s and 1930s. John Gleaves 'Doped Professionals and Clean Amateurs: Amateurism's Influence on the Modern Philosophy of Anti-Doping' (2011) 38 *Journal of Sport History* 237, 238, <www.muse.jhu.edu/article/477766>.

⁴ See: Paul Dimeo, 'The truth about Knud: revisiting an anti-doping myth' (*Sports Integrity Initiative*, 1 March 2016), <www.sportsintegrityinitiative.com/the-truth-about-knud-revisiting-an-anti-doping-myth/> accessed 17 February 2017; see also Paul Dimeo, *A History of Drug Use in Sport 1876–1976: Beyond Good and Evil* (Routledge 2007).

⁵ *ibid.*

⁶ *ibid* 119.

⁷ Gleaves (n 3).

the influence they maintain today, are revisited in chapters five and six – the ‘Morality of Sport’ chapters of this thesis.

The first attempt at producing a list of banned substances came (in 1971) from the IOC’s Medical Commission. This is an indication of the influence the IOC has had on both anti-doping policy and the public’s understanding of doping, seeking to align the two. The IOC Medical Code (IOCMC) was the first attempt at harmonising anti-doping across countries and sports, and is effectively the precursor to the WADA Code.⁸ It has been suggested by commentators such as Paul Hayes that the IOC were acting in their own interests by creating WADA, as they sought to protect their highly valuable commercial product from being tainted further by doping.⁹

Historical Background to WADA and The Code

Doping in sport is an evocative subject which has attracted enormous mainstream media coverage.¹⁰ Consequently, the regulatory regime tasked with tackling doping has been scrutinised and heavily criticised. Numerous scandals, most notably the Canadian sprinter Ben Johnson’s failed drug test following the Olympic 100 metre final in 1988 which prompted the

⁸ Paul J Hayes, ‘The Commercial Rationale of the World Anti-Doping Code’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016) 276.

⁹ *ibid* 278.

¹⁰ eg, the phrase ‘doping in sport’ yields approximately 44,600,000 results using a regular Google search and 7,450,000 results using Google’s ‘news’ search function.

Dubin Inquiry,¹¹ and the 1998 Festina affair at the Tour de France,¹² were the two key factors in engendering the current anti-doping regulatory regime centred around WADA. Ostensibly as a reaction to such events, the IOC set up a conference from which came the Lausanne Declaration on Doping in Sport.¹³ This declaration led to the creation of the World Anti-Doping Agency (WADA). WADA, a private foundation under Swiss law, was founded on 10 November 1999 ‘to promote and coordinate the fight against doping in sport internationally’.¹⁴

It characterises itself

as an international independent agency composed and funded equally by the sport movement and governments of the world. Its key activities include scientific research, education, development of anti-doping capacities, and monitoring of the World Anti-Doping Code (Code) – the document harmonizing anti-doping policies in all sports and all countries.¹⁵

It is composed of representatives from both the Olympic Movement and public authorities, often current or former government ministers.¹⁶ Currently, it is funded in equal part by world governments and by the Olympic Movement (the IOC); the latter provided WADA’s initial

¹¹ Charles L Dubin, Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (Canadian Government Publishing Centre 1990).

¹² BBC Special Report on 1998 Tour de France ‘Tour tarnished by drugs scandal’, 3 August 1998, <http://news.bbc.co.uk/1/hi/special_report/1998/07/98/tour_de_france/144326.stm> accessed 6 November 2019.

¹³ Lausanne Declaration on Doping in Sport, adopted by the World Conference on Doping in Sport, 4 February 1999, Lausanne, Switzerland, <www.wada-ama.org/sites/default/files/resources/files/lausanne_declaration_on_doping_in_sport.pdf> accessed 6 November 2019.

¹⁴ WADA, ‘Who We Are’, <www.wada-ama.org/en/who-we-are> accessed 6 November 2019.

¹⁵ *ibid.*

¹⁶ WADA, ‘Foundation Board’, <www.wada-ama.org/en/foundation-board> accessed 6 November 2019.

funding before funding from national governments was agreed,¹⁷ which again provides an indication of its influence over WADA. National governments signed the Copenhagen Declaration, which recognises and supports WADA.¹⁸

The key regulatory instrument advanced by WADA is the WADA Code, which is considered to be ‘a mix of public and private regulation’¹⁹ and came into effect on 1 January 2004.²⁰ As noted above, one of WADA’s key aims is to harmonise anti-doping policy across all countries and all sports; it has been largely – but not entirely – successful in this aim, with the major US domestic sports resisting and maintaining their own anti-doping (and recreational or substances of abuse) policies. This chapter considers in detail one such sport: America’s National Football League (NFL), which has separate anti-doping and recreational drug policies which are quite distinct from those advanced by WADA. It also considers the approach adopted by World Rugby (the world governing body and International Federation of rugby union), which is a signatory to the WADA Code and therefore conducts its policies under the auspices of WADA.

The key anti-doping document for rugby union is the WADA Code. WADA explains the Code as follows:

¹⁷ WADA, ‘Funding’, <www.wada-ama.org/en/funding> accessed 6 November 2019.

¹⁸ Copenhagen Declaration on Anti-Doping in Sport, March 2003, <www.wada-ama.org/sites/default/files/resources/files/WADA_Copenhagen_Declaration_EN.pdf> accessed 6 November 2019.

¹⁹ Deborah Healey, ‘The Myth of the Level Playing Field in Sport’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016) 11.

²⁰ WADA, ‘What We Do – The Code’, <www.wada-ama.org/en/what-we-do/the-code> accessed 6 November 2019.

The Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The Code has been drafted giving consideration to the principles of proportionality and human rights.²¹

As noted above, nation states have supported the anti-doping effort, with for example the International Convention against Doping in Sport (ICADIS) adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO).²² This has been described as a form of

suppression convention, identifying a mischief and obliging states parties individually and collectively to take steps to eliminate it through prohibition backed by sanctions, in this case through endorsing the Code, which in effect requires prohibitions to be incorporated into contracts and disciplinary sanctions imposed under those contractual arrangements.²³

Despite the ICADIS, most of WADA (and the Code's) power is largely rooted in private law, specifically contract law, rather than human rights law²⁴ or public international law, although

²¹ WADA Code 2015 (with 2019 amendments, hereafter referred to as WADA Code 2019) 11, <www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf> accessed 6 November 2019.

²² ICADIS, <<http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/>> accessed 6 November 2019.

²³ Andrew Byrnes, 'Human Rights and the Anti-Doping *Lex Sportiva*—The Relationship of Public and Private International Law, "Law Beyond the State" and the Laws of Nation States' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016) 88.

²⁴ *ibid* 87.

these have some impact and relevance, particularly for nation states. It is also worth noting that, as observed by James Nafziger: ‘The Code, however, is not an integral part of the Convention, nor does it create binding obligations under international law for States Parties except as specifically provided in the cooperative terms of the Convention’.²⁵ This difference, between the Convention and the key anti-doping regulatory document – the WADA Code – is notable, and can (correctly) be considered to undermine the power and legitimacy of the Code.

Basic Anti-Doping Organisational Structure

At the apex of the Olympic/WADA anti-doping regime sits WADA and its Code. Immediately below in this anti-doping hierarchy are national governments, the IOC,²⁶ the International Paralympic Committee (IPC),²⁷ and International Sports Federations, sometimes referred to just as International Federations (ISFs and IFs respectively). The IOC, IPC and individual ISFs are responsible for conducting testing and issuing sanctions in accordance with WADA’s Code and related provisions. World Rugby is the ISF for rugby union.²⁸ Implementing the Code is a multi-stage process for the ISF with three key elements: first, the ISF must agree to WADA’s provisions and to be bound by them, ie, by the Code. Second, it must adopt these provisions as its own anti-doping provisions; according to WADA’s requirements, this necessitates changing

²⁵ James AR Nafziger, *Transnational Law of Sports* (Elgar Research Reviews in Law 2013).

²⁶ IOC, ‘Who We Are’, <www.olympic.org/about-ioc-olympic-movement> accessed 15 November 2019.

²⁷ IPC, ‘Who We Are’, <www.paralympic.org/ipc/who-we-are> accessed 15 November 2019.

²⁸ World Rugby, ‘About Us’, <www.world.rugby/organisation/about-us> accessed 15 November 2019.

‘its rules and policies to include the Code’s mandatory articles and principles’.²⁹ In practice, World Rugby’s anti-doping regulations mirror the Code. Third, these policies must be enforced in line with the Code, ie, with the sanctions outlined in it. The ISF must also provide anti-doping education to athletes and other relevant stakeholders.

National governments have many duties and responsibilities in this anti-doping framework. One controversial point here concerns whether national governments should be bound by the Code – which is essentially a private regulatory instrument advanced by a private Swiss foundation, and not an international convention which would be expected to bind signatories.³⁰ Nonetheless, via the ICADIS and backed by UNESCO, national governments adopt the Code into domestic law, although the manner of this adoption can vary quite significantly.³¹ In some countries, such as France and Italy, doping can constitute a criminal offence.³² In others, such as Australia, the National Anti-Doping Organization (NADO) wields what are effectively criminal coercive powers.³³ The UK has not taken steps in this direction,

²⁹ WADA, ‘Global Anti-Doping Organization Chart’, <www.wada-ama.org/sites/default/files/resources/files/WADA_PK_Global_ADO_Chart_200901_EN.pdf> accessed 6 November 2019.

³⁰ See further, eg, Byrnes (n 23).

³¹ The UK ratified ICADIS on 25 April 2006: ICADIS, <https://en.wikipedia.org/wiki/International_Convention_against_Doping_in_Sport#:~:text=%20%20%20Type%20%20%20Doping%20in,1%20February%202007%20%204%20more%20rows%20> accessed 15 November 2019.

³² See further, J Anderson, ‘The Juridification and Criminalisation of Doping: Time to Revive the Spirit of Sport?’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016).

³³ By virtue of the Australian Sports Anti-Doping Authority Amendment Act 2013. For insightful analysis, see: Thomas Hickie, “Do What I Say, Not What I Do”: Is This the “Play True” Reality of the World Anti-Doping Code?’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016).

despite some suggestions that this route should be considered.³⁴ In the US, some doping agents, for example anabolic steroids, are subject to the criminal law,³⁵ but this is not as a result of WADA but rather from domestic pressures, such as the drug (mainly anabolic steroid) scandals which have rocked Major League Baseball (MLB).³⁶ As explained in detail below, the NFL conducts its own anti-doping regime; it is not a signatory to WADA and therefore has no obligation to – and does not – comply with the Code.

National Olympic Committees (NOCs), National Paralympic Committees (NPCs) and National Federations (NFs) must also comply with the Code. The NF or governing body in the case of rugby union is the Rugby Football Union (RFU) in England,³⁷ and the Welsh Rugby Union (WRU) in Wales.³⁸ It is the NF which is subject to the rules of the IF (World Rugby), which has implemented the Code. There are also National Anti-Doping Organizations (NADOs) and Regional Anti-Doping Organizations (RADOs). The NADO for the UK is UK Anti-Doping. At the foundation of the organisational structure come the athletes or players and their support personnel. These groups are bound by and therefore must comply with the Code

³⁴ See, eg, C Sumner, 'The spirit of sport: the case for criminalisation of doping in the UK' (2017) 16 *The International Sports Law Journal* 217, <<https://doi.org/10.1007/s40318-016-0103-2>>.

³⁵ Anabolic Steroid Control Act 1990; Anabolic Steroid Control Act 2004; Designer Anabolic Steroid Control Act 2014.

³⁶ Report to the Commissioner of Baseball of an Independent Investigation into the illegal use of steroids and other performance enhancing substances by players in Major League Baseball (Mitchell Report), <<http://files.mlb.com/mitchrpt.pdf>> accessed 14 January 2020. See also, Tim Elfrink and Gus Garcia-Roberts, *Blood Sport: A-Rod and the Quest to End Baseball's Steroid Era* (Penguin Group LLC 2014).

³⁷ RFU, also more recently known simply as England Rugby, 'About the RFU', <www.englandrugby.com/about-rfu> accessed 15 November 2019.

³⁸ WRU, <www.wru.co.uk/> accessed 15 November 2019.

and its 'strict liability' provisions in several ways, but chiefly by virtue of their participation in sport. The support personnel are also subject to its strict anti-doping controls and sanctions.

WADA and its Structure

As noted above, WADA is a private, non-profit foundation 'under the supervision of the Federal Department of the Interior', ie, subject to the Swiss Civil Code (Swiss law).³⁹ It is composed of the Foundation Board, the Executive Committee and a number of other committees for specific advisory purposes, such as the Education Committee. The Foundation Board is the key decision-maker, and is to 'be composed of at least ten members. This number may be increased to a total of no more than 40 members'.⁴⁰ At present, there are 38 representatives: 50 per cent from the Olympic Movement and 50 per cent from national governments.⁴¹ This equality is maintained if equal funding from the Olympic Movement and national governments continues; if it does not, then the party contributing less will be entitled to fewer representatives.⁴² Four from the Olympic Movement are to be athletes. The Executive Committee is responsible for operations and is also made up of representatives from the Olympic Movement and national governments on the same 50/50 basis.

The elected position of chairman (and vice chairman, the term used in WADA's Article 7, but more commonly the former is called the president) comes from either the Olympic

³⁹ Art 1 – Designation of the Constitutive Instrument of Foundation of the Agence Mondiale Antidopage – World Anti-Doping Agency, <www.wada-ama.org/sites/default/files/resources/files/new_statutes_-_modified_november_2016_approved_dec_2017.pdf> accessed 15 November 2019.

⁴⁰ Art 6 – Foundation Board.

⁴¹ WADA, 'Governance', <www.wada-ama.org/en/governance> accessed 6 November 2019.

⁴² Art 6.6.

Movement or from national governments, and ‘the position of chairman alternates between the Olympic Movement and public authorities, and that in particular this occurs after two three-year terms, unless no alternative nomination is made’.⁴³ These positions can be drawn from inside or outside WADA, with the chairman to be elected first (by absolute majority), before the vice chairman but on the same basis; upon election they take up their positions immediately, but do not participate in elections concerning their term(s), or of their eventual replacements. If the chairman is nominated by the Olympic Movement, the vice chairman must be nominated by the Public Authorities and vice versa.⁴⁴

The Executive Committee is the key policymaker and operating body. It is composed ‘of twelve members, the majority chosen from amongst the Foundation Board members’.⁴⁵ The chairman and vice chairman of the Foundation Board also hold the same positions on the Executive Board.⁴⁶

Evaluating WADA’s Structure

WADA’s structure has, quite legitimately, been criticised on several different fronts.⁴⁷ One key criticism which can be levelled at WADA is that it does not have sufficient independence from the IOC. Hayes highlights issues with the structure of WADA, and the IOC’s entrenched

⁴³ Art 7 – Organization of the Foundation Board.

⁴⁴ *ibid.*

⁴⁵ Art 11 – Executive Committee.

⁴⁶ *ibid.*

⁴⁷ See, eg, Marina Nehme and Catherine Ordway, ‘Governance and Anti-Doping: Beyond the Fox and the Hen House’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016).

dominant position.⁴⁸ There are numerous reasons for this dominance, such as: WADA's location (in Switzerland), in close physical proximity to the IOC; WADA's composition, the fact that many members are also IOC members; and the overlap in interests and incentives of WADA and the IOC's members.⁴⁹ These present problems, both actual and perceived, for claims of WADA's independence. Furthermore, the Olympic Movement has an advantage in being united advancing their agenda (ie, that of the IOC), whereas governments will often have differing agendas; this affords the IOC greater power in practice.⁵⁰

Moreover, Hayes observes that certain sports, despite being subject to WADA regulation, are not represented on the board: for example sports such as cricket and rugby union are not as they are not Olympic sports.⁵¹ These observations can lead to troubling conclusions: it can be contended that WADA is more concerned with maintaining the perception and appearance of equality and equal representation, rather than genuine equality. The preservation of the so-called 'Olympic brand' means that WADA (and the IOC) are arguably more concerned with perceptions and representations, as opposed to effecting meaningful change. Indeed, it may be observed that the driving factor behind the introduction of the WADA system was the threat of losing commercial revenue and the perception of 'pure sport', rather than safeguarding the health of the athletes or the 'spirit of sport'. The financial influence of transnational corporations over the IOC, and the resulting expression of these interests on anti-doping policy via WADA, is also a major concern.⁵² Finally, it is noteworthy that, as observed by Hayes: 'Unlike other professional sport, Olympic sport differentiates itself on the Corinthian

⁴⁸ Hayes (n 8).

⁴⁹ *ibid* 281–85. Hayes provides a thorough and detailed analysis of these points.

⁵⁰ *ibid* 283.

⁵¹ *ibid* 284.

⁵² See Hayes (n 8) generally.

ideal of “pure” sport’.⁵³ This is apparent in the WADA Code and is considered further below, and in depth, in the ‘Morality of Sport’ chapters of this thesis.

Key WADA Regime Anti-Doping Dispute Resolution Bodies and Procedures

It is instructive to present and explain these anti-doping dispute resolution bodies and procedures with reference to a specific sport. Given the focus on rugby union in this thesis, this sport and this jurisdiction will be used. In the first instance in England, anti-doping disputes will be dealt with under RFU Regulation 20 (Anti-Doping)⁵⁴ by a panel.⁵⁵ Under Regulation 20.13.3, United Kingdom Anti-Doping (UKAD) will determine whether ‘the Player, Player Support Personnel or other person has a case to answer’.⁵⁶ If it is determined that this is the position, Regulation 20.13.4 states the following:

Where a charge is brought, the RFU shall, subject to Regulation 20.18, instruct the National Anti-Doping Panel (‘NADP’) to appoint an independent Panel to hear the case. The Player, Player Support Personnel or other person charged shall be sent a notification of the hearing. All hearings in such a case shall be carried out in accordance with (i) the procedural guidelines set out in World Rugby Regulation 21.8.2.6, and (ii) the NADP Procedural Rules (except if inconsistent with any provision of World Rugby Regulation 21, in which case that Regulation shall prevail).⁵⁷

⁵³ *ibid.*

⁵⁴ See: <www.englandrugby.com/dxdam/f4/f489f622-3ce9-46e4-8c4d-5673902a383c/Handbook%202019-20.pdf> accessed 26 August 2020 . This provision is required by World Rugby Regulation 21, which makes rugby union compliant with the WADA Code.

⁵⁵ RFU Reg 19 – Discipline stipulates the generally disciplinary procedures and the jurisdiction a panel. Reg 20.13 provides the specific procedures as they relate to suspect anti-doping violations.

⁵⁶ RFU Reg 20.13.3.

⁵⁷ RFU Reg 20.13.4.

In a quasi-judicial process, the panel will hear the case and provide a decision (and a sanction if the decision requires it). It is also worth noting here that the NADP draws its funding from the Department for Digital, Culture, Media & and Sport, signifying the government's commitment to anti-doping. Under RFU Regulation 20.14, there is an avenue of appeal to an NADP Appeal Panel, but only in limited circumstances where cases do not involve international players or competition. Otherwise, RFU Regulation 20.15 provides for a route of appeal from the NADP directly to the Court of Arbitration for Sport (CAS), which is also sometimes called the Tribunal Arbitral du Sport (TAS).

CAS is the key appellate venue for WADA-related anti-doping challenges. Its seat is in Lausanne, Switzerland but its headquarters are in Montreal and also operate in New York and Sydney. It operates under the auspices of the International Council of Arbitration for Sport (ICAS), and due to its location, like WADA it is also subject to Swiss law. Following the case of *Gundel*,⁵⁸ in which the Swiss Federal Tribunal questioned CAS's independence from the IOC, the manner in which appointments to CAS were made was changed, and ICAS was created in pursuit of this aim, ie, to improve its independence from the IOC.⁵⁹ ICAS is now responsible for making appointments to CAS. ICAS is made up of 20 members described as 'experienced jurists', chosen by the International Olympic Committee (IOC), the Association of the National Olympic Committees (ANOC), the Association of Summer Olympic IFs (ASOIF), the Association of Winter Olympic IFs (AIOWF) from inside or outside their

⁵⁸ *Gundel v FEI* Decision 4P.217/1992, ATF 119 II 271.

⁵⁹ Johan Lindholm, 'CAS: An Overview' in Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Enquiry into Lex Sportiva* (ASSER International Sports Law Series, TMC Asser Press 2019) 32.

membership.⁶⁰ Despite this reform, concerns have been expressed regarding the independence of CAS,⁶¹ and whether its processes are sufficient to provide a fair trial.⁶²

CAS has its own Code – the Code of Sports-related Arbitration – which together with the Swiss Private International Law Act of 1987⁶³ provide the statutory footing upon which CAS rests. Theoretically, the Swiss Federal Supreme Court can annul decisions made by CAS,⁶⁴ but this does not happen often,⁶⁵ making CAS at least the de facto final arbiter of anti-doping disputes. CAS’s decisions have effect under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, usually referred to as either the ‘New York Arbitration Convention’ or simply the ‘New York Convention’;⁶⁶ this has several important implications. First, Article 3 of the Convention means that CAS’s judgments are recognised by – and can be enforced in – all of the Convention’s contracting states. Second, under Article 2.3, national courts will refer the parties to arbitration rather than hearing disputes themselves. Although there are limited exceptions⁶⁷ to this where national courts can refuse to recognise or

⁶⁰ s 4 CAS/ICAS Code, <www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf> accessed 26 August 2019.

⁶¹ Detailed analysis of questions surrounding the CAS’s independence are beyond the scope of this chapter and this thesis. They could be, and indeed have been, the subject of their own PhD thesis which later became a book. See, eg, Andrew Vaitiekunas, *The Court of Arbitration for Sport: Law-making and the Question of Independence* (Stämpfli 2014).

⁶² Byrnes (n 23).

⁶³ Art 176(1) Private International Law Act 1987.

⁶⁴ *ibid* Art 191(2).

⁶⁵ Lindholm (n 59) 34.

⁶⁶ See: <www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> accessed 15 February 2019.

⁶⁷ Art 5 New York Convention, <www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> accessed 15 February 2019.

enforce CAS's decisions on both procedural⁶⁸ and public policy grounds,⁶⁹ this is in practice unlikely – although not unheard of – in anti-doping matters.⁷⁰ CAS offers three different arbitration procedures: the Ordinary Arbitration Procedure, the Appeals Arbitration Procedure, and a first-instance anti-doping procedure. Finally, CAS offers a mediation procedure.

Key Regulatory Instruments

In WADA's regime, the two most influential regulatory instruments are the WADA Code⁷¹ and the Prohibited List.⁷² WADA characterises the Code as follows:

The World Anti-Doping Code (Code) is the core document that harmonizes anti-doping policies, rules and regulations within sport organizations and among public authorities around the world. It works in conjunction with six International Standards which aim to foster consistency among anti-doping organizations in various areas.

These Standards are:

The International Standard for Testing and Investigations (ISTI)

The International Standard for Laboratories (ISL)

The International Standard for Therapeutic Use Exemptions (ISTUE)

The International Standard for the Prohibited List (The List)

The International Standard for the Protection of Privacy and Personal Information (ISPPPI)

⁶⁸ Art 5.1.

⁶⁹ Art 5.2(b).

⁷⁰ This has happened, for example, in the *Pechstein* case, which was eventually heard by the Grand Chamber of the European Court of Human Rights: *Affaire Mutu et Pechstein v Switzerland* App nos 40575/10 and 67474/10 (ECtHR, 2 October 2018)

⁷¹ WADA Code 2019.

⁷² Prohibited List 2020, <www.wada-ama.org/sites/default/files/wada_2020_english_prohibited_list_0.pdf> accessed 28 February 2020.

The International Standard for Code Compliance by Signatories (ISCCS)

In addition to the above Standards, two new International Standards are set to come into force on 1 January 2021 alongside the 2021 World Anti-Doping Code and related suite of Standards. These are:

The International Standard for Education (ISE)

The International Standard for Results Management (ISRM).⁷³

Out of these International Standards, the two most important for present purposes relate to the Prohibited List (often abbreviated as simply ‘The List’ or the ‘PL’), and to Therapeutic Use Exemptions (TUEs). The Prohibited List,⁷⁴ as the name implies, details the substances and methods which are prohibited both during and out of competition.⁷⁵ In essence, the TUE policy⁷⁶ allows an athlete to take a substance (or use a method) on the Prohibited List in order to treat a recognised medical condition. The Code provides the definitive statement of WADA’s values and the rationales for its policies.⁷⁷ Given their importance, and that they are analysed in depth in the coming chapters, they are now presented in their original form in this chapter; this is useful both for clarity and ease of reference.

WADA’s key aims:

PURPOSE, SCOPE AND ORGANIZATION OF THE WORLD ANTI-DOPING PROGRAM AND THE CODE

The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are:

⁷³ WADA, ‘What We Do – The Code’.

⁷⁴ Prohibited List 2020.

⁷⁵ This can also vary by sport, and is discussed in greater detail in the bioethical and policy proposal chapters of this thesis; therefore it will not be discussed here.

⁷⁶ ISTUE Policy 2019, <www.wada-ama.org/sites/default/files/resources/files/istue_2019_en_new.pdf> accessed 20 February 2019.

⁷⁷ This presentation is not designed to be exhaustive, but rather a general overview of key provisions.

- To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide, and
- To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.⁷⁸

The following represents WADA's key motivations for its strict prohibition-based anti-doping policies:

FUNDAMENTAL RATIONALE FOR THE WORLD ANTI-DOPING CODE

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as 'the spirit of sport'. It is the essence of Olympism, the pursuit of human excellence through the dedicated perfection of each person's natural talents. It is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including:

- 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
- Community and solidarity

Doping is fundamentally contrary to the spirit of sport. To fight doping by promoting the spirit of sport, the Code requires each Anti-Doping Organization to develop and implement education and prevention programs for Athletes, including youth, and Athlete Support Personnel.⁷⁹

⁷⁸ WADA Code 2019, 11.

⁷⁹ WADA Code 2019, 14.

Anti-doping offences, detailed by Article 2, which effectively define doping as the occurrence of one of the following:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.3 Evading, Refusing or Failing to Submit to Sample Collection

2.4 Whereabouts Failures

2.5 Tampering or Attempted Tampering with any part of Doping Control

2.6 Possession of a Prohibited Substance or a Prohibited Method

2.7 Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method

2.8 Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition

2.9 Complicity

2.10 Prohibited Association.⁸⁰

It is noteworthy that under 2.1.1 of the Code, WADA expressly acknowledges that this gives rise to the principle of 'strict liability', where the concept of an athlete's fault is not relevant in establishing whether there has been an anti-doping violation.⁸¹ This is controversial as it removes the general legal presumption of innocence until guilt is proven. The proof required is outlined in the following terms:

ARTICLE 3 PROOF OF DOPING

3.1 Burdens and Standards of Proof

⁸⁰ WADA Code 2019, 18–24.

⁸¹ WADA Code 2019.

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.⁸²

The rationales for inclusion of substances or methods on the Prohibited List are as follows:

4.3 Criteria for Including Substances and Methods on the Prohibited List

WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List:

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA, in its sole discretion, determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;

4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the introduction to the Code.

4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.

4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List, the classification of substances into categories on the Prohibited List, and the classification of a substance as prohibited at all times or In-Competition only, is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.⁸³

⁸² WADA Code 2019, 25.

⁸³ WADA Code 2019, 30–31.

This is one of the key provisions of the Code, and as such it is considered extensively in the chapters which follow.

WADA states the following regarding hearings for those accused of anti-doping offences:

ARTICLE 8 RIGHT TO A FAIR HEARING AND NOTICE OF HEARING DECISION

8.1 Fair Hearings For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be Publicly Disclosed as provided in Article 14.3.⁸⁴

The policies regarding sanctions are detailed and complex, with multiple possible permutations. However, the two most influential basic sanctions for first offences in the Code are as follows:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the antidoping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.⁸⁵

The Code also mandates heavier sanctions for second and third offences:

10.7 Multiple Violations

10.7.1 For an Athlete or other Person's second antidoping rule violation, the period of Ineligibility shall be the greater of: (a) six months; (b) one-half of the period of

⁸⁴ WADA Code 2019, 30–31, 57.

⁸⁵ WADA Code 2019, 61.

Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or (c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6. The period of Ineligibility established above may then be further reduced by the application of Article 10.6.

10.7.2 A third anti-doping rule violation will always result in a lifetime period of Ineligibility, except if the third violation fulfills the condition for elimination or reduction of the period of Ineligibility under Article 10.4 or 10.5, or involves a violation of Article 2.4. In these particular cases, the period of Ineligibility shall be from eight years to lifetime Ineligibility.⁸⁶

One final piece of WADA regulation which warrants particular consideration is the concept of ‘Whereabouts’ information, which allows anti-doping officials to administer tests without any notice. These requirements are set out in Annex 1 of the International Standard for Testing and Investigations (ISTI)⁸⁷ and relate to Article 2.4 of the Code.⁸⁸ The ISTI states the following:

I.1.1 An Athlete who is in a Registered Testing Pool is required:

a) to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete’s whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary, so that he/she can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing, as specified in Article I.3. A failure to do so may be declared a Filing Failure; and

b) to specify in his/her Whereabouts Filings, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specific location for Testing, as specified in Article I.4. This does not limit in any way the Athlete’s Code Article 5.2 obligation to submit to Testing at any time and place upon request by an Anti-Doping Organization with Testing Authority over him/her. Nor does it limit his/her obligation to provide the information specified in Article I.3 as to his/her whereabouts outside that 60-minute time slot. However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, that failure may be declared a Missed Test.

⁸⁶ WADA Code 2019, 70.

⁸⁷ International Standard for Testing and Investigations (ISTI) March 2020, 77, <www.wada-ama.org/sites/default/files/resources/files/isti_march2020_0.pdf> accessed 3 April 2020.

⁸⁸ WADA Code 2019, 21.

NFL Anti-Doping Policies and Procedures

As explained in chapter two, it is useful by way of contrast to consider a sport which shares many practical similarities with rugby union, but does not come under WADA's regulatory regime and has significant and noteworthy differences in regulation. When considering questions of regulation it is useful to consider the advantages and disadvantages of these contrasting regulatory approaches.

America's National Football League (the NFL – American football) maintains its own anti-doping and recreational drug policies. Interestingly, this approach is taken by all the major domestic sports in the US: Major League Baseball (MLB), the National Hockey League (NHL) and the National Basketball Association (NBA), although with the exception of the NFL, these will not be considered in detail. Something which is immediately apparent in the NFL's approach is the meaningful separation between substances of abuse (ie, recreational drugs) from performance-enhancing substances. The NFL therefore maintains two discrete policies: the 'Policy on Performance-Enhancing Substances' (Policy on PES)⁸⁹ and the 'Policy and Program on Substances of Abuse'.⁹⁰ The policies are brought about by collective bargaining between the NFL Players Association (NFLPA) and the NFL's Management Council. This process allows for a meaningful negotiation between NFLPA and the League; this more

⁸⁹ NFL, Policy on Performance-Enhancing Substances 2020, <<https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2020-Policy-on-Performance-Enhancing-Substances.pdf>> accessed 3 April 2020.

⁹⁰ NFL, Policy and Program on Substances of Abuse 2020, <<https://nflpaweb.blob.core.windows.net/website/2020-Policy-and-Program-on-Substances-of-Abuse.pdf>> accessed 3 April 2020.

collaborative approach – where there is less of a discrepancy in bargaining power than between WADA and the athletes – goes some way towards preventing policies from unduly favouring one side over the other and helps to ensure more balanced policies. These negotiated policies are then incorporated into the NFL’s Collective Bargaining Agreement (CBA) under Article 39, section 9: Players’ Rights to Medical Care and Treatment.⁹¹ This is also detailed in the Policy on PES⁹² and the Policy and Program on Substances of Abuse.⁹³

It is worth considering these policies – particularly the latter – in greater detail. It is interesting to note, according to the CBA, that these policies come under the heading ‘medical care and treatment’, which is different from WADA’s policy stance, which is more focused on punishment of those found to be doping. The Policy and Program on Substances of Abuse states the following:

The primary purpose of this Policy is to assist Players who misuse Substances of Abuse. As a result, the implementation and application of the terms of this Policy should first be directed toward ensuring evaluation and treatment.⁹⁴

The NFL’s ‘General Statement of Policy’ reads as follows:

The National Football League Management Council and NFL Players Association (‘NFLPA’) (collectively, the ‘Parties’) have jointly developed this Policy on

⁹¹ CBA 2020, press release 15 March 2020, 220,

<<https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>> accessed 3 April 2020.

⁹² NFL Policy on Performance-Enhancing Substances (n 89) 1.

⁹³ NFL, Policy and Program on Substances of Abuse (n 90) 1.

⁹⁴ *ibid* 2.

Performance-Enhancing Substances (the ‘Policy’) to prohibit and prevent the use of anabolic/androgenic steroids (including exogenous testosterone), stimulants, human or animal growth hormones, whether natural or synthetic, and related or similar substances. For convenience, these substances, as well as masking agents or diuretics used to hide their presence, will be referred to as “Prohibited Substances.”⁹⁵

This has many similarities with WADA, but it is noteworthy that in contrast to WADA’s mention of ‘the natural’ in its ‘Fundamental Rationale for the World Anti-Doping Code’⁹⁶ the NFL policy expressly disregards the natural versus artificial distinction. The NFL’s policy identifies three key reasons for its PES policy:

First, these substances threaten the fairness and integrity of the athletic competition on the playing field. Players may use these substances for the purpose of becoming bigger, stronger, and faster than they otherwise would be. As a result, their use threatens to distort the results of games and League standings. Moreover, Players who do not wish to use these substances may feel forced to do so in order to compete effectively with those who do. This is obviously unfair to those Players and provides sufficient reason to prohibit their use.

Second, the Parties are concerned with the adverse health effects of using Prohibited Substances. Although research is continuing, steroid use has been linked to a number of physiological, psychological, orthopedic, reproductive, and other serious health problems, including heart disease, liver cancer, musculoskeletal growth defects, strokes, and infertility.

Third, the use of Prohibited Substances by Players sends the wrong message to young people who may be tempted to use them. NFL Players should not by their own conduct suggest that such use is either acceptable or safe, whether in the context of sports or otherwise.⁹⁷

These arguments can be summarised as falling within three main categories:

⁹⁵ NFL Policy on Performance-Enhancing Substances (n 89) 1.

⁹⁶ WADA Code 2019, 14.

⁹⁷ NFL Policy on Performance-Enhancing Substances (n 89) 1.

1. The fairness/level playing field and tacit coercion arguments.
2. The health argument.
3. The role model and public policy implication argument.

The ‘spirit of sport’-related provision which is so influential in the WADA regime is not present in the NFL’s policy, although it may be argued that a limited and weaker version of it is implicit, with mentions of integrity, for example. Regarding the idea of the natural, it may also be argued that elements of it might be implied, although plainly it is less influential than in WADA’s policies. For example, the NFL policy continues as follows:

The NFL Player Contract specifically prohibits the use of drugs in an effort to alter or enhance performance. The NFL Player Contract and the League’s Constitution and Bylaws require each Player to avoid conduct detrimental to the NFL and professional football or to public confidence in the game or its Players. The use of Prohibited Substances violates both these provisions. In addition, the Commissioner is authorized to protect the integrity of and public confidence in the game. This authorization includes the authority to forbid use of the substances prohibited by this Policy. The Parties recognize that maintaining competitive balance among NFL clubs requires that all NFL Players be subject to the same rules and procedures regarding drug testing.⁹⁸

The first sentence of the paragraph above can be interpreted as a weak and less influential version of WADA’s ‘potential to enhance performance’ criterion.

Article 2 of the NFL’s policy requires that an ‘independent administrator’ is responsible for the policy, which comes under the purview of the NFL Management Council.

Article 3 covers the types of testing, and states the following:

Urine testing will take place under the following circumstances:

⁹⁸ *ibid* 1–2.

Pre-Employment: Pre-employment tests may be administered to free agent Players (whether rookies or veterans). In addition, testing will be conducted at the annual scouting combines.

Annual: All Players will be tested for Prohibited Substances at least once per League Year. Such testing will occur at training camp prior to the Club's first preseason game or whenever the Player reports thereafter, and will be deemed a part of his preseason physical.

Preseason/Regular Season: Each week during the preseason and regular season, ten (10) Players on every Club will be tested. By means of a computer program, the Independent Administrator will randomly select the Players to be tested from the Club's active roster, practice squad list, and reserve list who are not otherwise subject to ongoing reasonable cause testing for performance enhancing substances. The number of Players selected for testing on a particular day will be determined in advance on a uniform basis. Players will be required to provide a specimen whenever they are selected, without regard to the number of times they have previously been tested consistent with the limits set forth in the Policy.

Postseason: Ten (10) Players on every Club qualifying for the playoffs will be tested weekly so long as the Club remains active in the postseason. Players to be tested during the postseason will be selected on the same basis as during the regular season.

Off-Season: Players under contract who are not otherwise subject to reasonable cause testing may be tested during the off-season months at the discretion of the Independent Administrator, subject to the collectively bargained maximum of six (including blood tests) off-season tests. Players to be tested in the off-season will be selected on the same basis as during the regular season, irrespective of their off-season locations. Any Player selected for testing during the off-season will be required to furnish a urine specimen at a convenient location acceptable to the Independent Administrator, subject to the qualification set forth in Section 3.2 for specimen collections occurring away from the Club facility. Only Players who advise in writing that they have retired from the NFL will be removed from the testing pool. If, however, a Player thereafter signs a contract with a Club, he will be placed back in the testing pool.⁹⁹

This appears less stringent than WADA's policies. There is, however, a further element in the testing regime which may be applicable to some players: the 'Reasonable Cause Testing For Players With Prior Positive Tests Or Under Other Circumstance'.¹⁰⁰ This exposes the players to greater scrutiny than the regular testing, and affords the 'Independent Administrator' (of the overall PES policy) with significant discretion concerning the extent of the testing.

⁹⁹ *ibid* 4-5.

¹⁰⁰ *ibid* 5.

Blood testing is covered by Section 7 of the Policy. The key section states:

All Players shall be eligible to be tested for growth hormones through serum (blood) analysis. Players who are not in reasonable cause testing shall not be subject to more than six blood tests per calendar year.

Blood testing will take place under the following circumstances:

Annual: The Independent Administrator will, by means of a computer program, randomly assign twenty percent (20%) of each Club's Players selected for Annual Testing under Section 3.1 to receive serum testing in addition to urine testing.

Preseason/Regular Season: Each week during the preseason and regular season, by means of a computer program, two (2) Players from each Club who are selected for Preseason/Regular Season Testing under Section 3.1 will receive serum testing in addition to urine testing. Players will be required to submit to testing whenever they are selected, without regard to the number of times they have previously been tested consistent with the limits set in this Policy.

Postseason: Five (5) of the ten (10) Players selected for testing under Section 3.1 on every Club qualifying for the playoffs will receive serum testing in addition to urine testing as long as the Club remains active in the postseason.

Off-Season: By means of a computer program, the Independent Administrator will randomly assign ten percent (10%) of each Club's Players selected for Off-Season Testing under Section 3.1 to receive serum testing. Such testing may be in lieu of urine testing at the Independent Administrator's discretion.

Pre-Employment: Pre-employment tests may be administered to free agent Players (whether rookies or veterans). In addition, serum testing (in addition to urine testing) will be conducted at the League's annual scouting combines.

Reasonable Cause Testing: Any Player subject to Reasonable Cause Testing pursuant to Section 3.1 shall be eligible for serum testing at the discretion of the Independent Administrator (subject to the collectively-bargained maximum of 24 urine and/or blood tests per Player per year).¹⁰¹

Arbitrators presiding over appeals must be 'third-party arbitrators not affiliated with the NFL, NFLPA or Clubs. The Parties shall jointly select and be equally responsible for compensating one or more arbitrators to act as hearing officers for appeals under Section 6 of this Policy'.¹⁰²

¹⁰¹ *ibid* 10–11.

¹⁰² *ibid* Art 9.

Another area – as noted above – in which the NFL’s policies are notably less severe concerns the sanctions for doping offences. Section 6 reads as follows:

Players who violate the Policy will be subject to discipline by the Commissioner as outlined below.

Step One: The first time a Player violates this Policy by testing positive for a Prohibited Substance; attempting to substitute, dilute or adulterate a specimen; or manipulating a test result, he will be suspended without pay pursuant to the following schedule: Positive Test Result for Stimulant, Diuretic or Masking Agent – two regular and/or postseason games. Positive Test Result for Anabolic Agent – six regular and/or postseason games. Positive Test Result for Prohibited Substance plus Diuretic or Masking Agent/Attempt to Substitute, Dilute or Adulterate Specimen/Attempt to Manipulate Test Result/Violation of Section 5 – eight regular and/or postseason games. In addition, the Player will be subject to evaluation and counseling if, in the opinion of the Independent Administrator, such assistance is warranted.

Step Two: The second time a Player violates this Policy by testing positive for an Anabolic Agent; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of Section 5, he will be suspended without pay for sixteen regular and/or postseason games. The second time a Player violates this Policy by testing positive for a Stimulant, Diuretic or Masking Agent, he will be suspended without pay for five regular and/or postseason games.

Step Three: The third time a Player violates the Policy by testing positive for a Prohibited Substance; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of Section 5, he will be banished from the NFL for a period of at least two seasons, subject to any appeal. Such a Player may petition the Commissioner for reinstatement after 24 months. Reinstatement, and any terms and conditions thereof, shall be matters solely within the Commissioner’s sound discretion.¹⁰³

Section 10 describes the procedure for appeals, with ‘Due Process Appeals’ available in limited circumstances.¹⁰⁴

Section 11 states the ‘burdens and standards of proof’:

In any case involving an alleged violation due to a Positive Test, the Management Council shall have the burden of establishing the Positive Test Result and that it

¹⁰³ NFL Policy on Performance-Enhancing Substances (n 89) 8–9.

¹⁰⁴ *ibid* 12–14.

was obtained pursuant to a test authorized under the Policy and was conducted in accordance with the Collection Vendor's specimen collection procedures ('Collection Procedures') and the Testing Laboratory's testing and analytical protocols ('Laboratory Procedures'). The Management Council is not required to otherwise establish intent, negligence or knowing use of a Prohibited Substance on the Player's part.¹⁰⁵

This strict liability provision shares similarities with WADA policy regarding the need for intent (in criminal law terms, *mens rea*), although WADA's policy includes a 'no significant fault or negligence' provision with a sanctions on a scale, from no ban up to a two year ban.¹⁰⁶

Article 12 of the NFL's policy provides the following regarding confidentiality:

Except as allowed in this Policy or otherwise agreed to by the Parties, public disclosure, directly or indirectly, of information concerning positive tests, appeals or other violations of this Policy is not permitted.¹⁰⁷

Disclosure is permitted in some circumstances, for example to remedy incorrect information about the policy or when disclosures are made by another source.¹⁰⁸

This general position lies in contrast to WADA, which has mandatory reporting requirements under Article 14.3.2, except in certain circumstances, for example if the violation involves a minor.¹⁰⁹

¹⁰⁵ *ibid* 14.

¹⁰⁶ WADA Code 2019, 10.5.1.

¹⁰⁷ NFL Policy on Performance-Enhancing Substances (n 89) 16.

¹⁰⁸ *ibid* Art 12.1.

¹⁰⁹ WADA Code 2019, 14.

It is noteworthy that, under section 15, athletes suspended by other leagues or sports are able to play in the NFL, but are placed in the ‘reasonable cause’ testing programme.¹¹⁰

Section 16 – ‘Unless otherwise agreed by the Parties, the testing laboratories will ensure the destruction of negative specimens 90 days following analysis and positive specimens 30 days following final adjudication of a Player’s discipline’.¹¹¹ This is significantly different from WADA, where athletes are subject to a 10-year statute of limitation under Article 17.¹¹² Finally, Appendix A (to this document presented above) provides the list of prohibited substances and methods.¹¹³

TUE Policies: WADA

The International Standard for Therapeutic Use Exemptions (ISTUE) is a relatively lengthy and complex document, which operates in concert with the Code. Therefore, only the key provisions for comparison with the NFL’s policies will be considered here. WADA, in the ISTUE, defines the term ‘therapeutic’ as follows: ‘Therapeutic: Of or relating to the treatment of a medical condition by remedial agents or methods; or providing or assisting in a cure’.¹¹⁴ The process via which a TUE may be granted is detailed by Article 4 of the policy, which reads as follows:

¹¹⁰ NFL Policy on Performance-Enhancing Substances (n 89) 17.

¹¹¹ *ibid.*

¹¹² WADA Code 2019, 95.

¹¹³ NFL Policy on Performance-Enhancing Substances (n 89) 18–23.

¹¹⁴ ISTUE Policy 2019 (n 76) 3.3.

4.1 An Athlete may be granted a TUE if (and only if) he/she can show, by a balance of probability, that each of the following conditions is met:

- a. The Prohibited Substance or Prohibited Method in question is needed to treat an acute or chronic medical condition, such that the Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld.
- b. The Therapeutic Use of the Prohibited Substance or Prohibited Method is highly unlikely to produce any additional enhancement of performance beyond what might be anticipated by a return to the Athlete's normal state of health following the treatment of the acute or chronic medical condition.
- c. There is no reasonable Therapeutic alternative to the Use of the Prohibited Substance or Prohibited Method.
- d. The necessity for the Use of the Prohibited Substance or Prohibited Method is not a consequence, wholly or in part, of the prior Use (without a TUE) of a substance or method which was prohibited at the time of such Use.¹¹⁵

These points demonstrate WADA's commitment to the notion that therapy is permissible, but enhancement is problematic. This distinction between treatment or therapy and enhancement has a major influence on policy, despite elements of incoherence; these are analysed in the bioethical chapters (chapters seven and eight) of this thesis and therefore will not be considered in depth here.

TUE Policies: The NFL

In contrast to WADA, the NFL details specific TUE policies for different conditions; for example, it has separate policies for TUEs concerning high blood pressure, ADD/ADHD and hypogonadism. It does, however, have general TUE guidelines, as follows:

¹¹⁵ *ibid* 11.

The following general requirements apply to all TUE requests: 1. The medication must be necessary and indicated for treatment of the specific medical problem for which it has been requested; 2. Acceptable alternative treatments with medications that are not prohibited were attempted but failed, or reasons for not prescribing these alternative treatments have been presented; 3. Appropriate evaluation has been completed and all medical records documenting the diagnosis have been submitted for review; and 4. The applicant may not begin use of the prohibited substance until after the TUE is granted.¹¹⁶

Differences in Attitudes

There are many notable differences between the two policies, and the policies and points highlighted above do not represent an exhaustive list. With this in mind, reference to a practical example which highlights key elements of – and differences between – policies can be illustrative and illuminating: the case of Julian Edelman, who was given the accolade of the Super Bowl’s ‘Most Valuable Player’ (MVP) for his performance against the Los Angeles Rams in February 2019. By all accounts his on-field performance was thoroughly deserving of the award; however, Edelman was banned for the first four games of the NFL season for a first violation of the Performance-Enhancing Substances Policy.¹¹⁷ In sports subject to WADA’s regulation, this would (most likely) have resulted in a four-year ban under Article 10.2.1 and an enormous amount of negative media attention. This was generally not the case in America, at least not within the NFL, although some limited members of the media highlighted the

¹¹⁶ NFL Policy on Performance-Enhancing Substances (n 89) 34.

¹¹⁷ Mike Reiss, ‘Julian Edelman accepts responsibility for 4-game suspension’ (*ESPN*, 28 July 2018), <www.espn.com/nfl/story/_/id/24219013/julian-edelman-new-england-patriots-accepts-responsibility-four-game-suspension> accessed 6 February 2019.

difference in sanction and treatment and speculated about the possible reasons for it.¹¹⁸ By way of contrast, the negative treatment athletes subject to WADA regulation often receive can be illustrated for example by the labelling of another American athlete – Justin Gatlin – as a ‘drug cheat’.¹¹⁹ Gatlin was vilified unfairly by the media, particularly in the run up to the World Championships in 2015 where some commentators feared he may beat his long-term rival Usain Bolt. This competition was characterised as, to take one notable example, a contest of ‘good versus evil’, with Gatlin cast as evil.¹²⁰ These examples provided by Edelman and Gatlin offer an indication of the differences in attitudes brought about, at least in part, by the relevant anti-doping regulation.

The 2021 WADA Code and Related Rules

On 6 August 2020 United Kingdom Anti-Doping (UKAD) published the UK Anti-doping rules which will be in force from 1 January 2021.¹²¹ These rules essentially mirror the 2021 WADA

¹¹⁸ Nancy Armour, ‘Opinion: Super Bowl MVP Julian Edelman shouldn’t even have been playing in the game’ *USA Today* (4 February 2019), <<https://eu.usatoday.com/story/sports/columnist/nancy-armour/2019/02/03/super-bowl-2019-mvp-julian-edelman-suspension/2765697002/>> accessed 6 February 2019; Hunter Felt, ‘Julian Edelman’s Super Bowl MVP reveals the NFL’s selective morality’ *Guardian* (5 February 2019), <www.theguardian.com/sport/2019/feb/05/julian-edelmans-super-bowl-mvp-award-ped-suspension> accessed 6 February 2019.

¹¹⁹ For insightful analysis of this, see Mike Morgan, ‘Demonising Justin Gatlin’ (*Sports Integrity Initiative*, 13 September 2015), <www.morgansl.com/application/files/3115/3423/8426/Demonising_Justin_Gatlin.pdf> accessed 14 September 2016.

¹²⁰ ‘BOLT VS GATLIN: A symbolic struggle of good vs evil, light vs dark’ *Jamaica Observer* (23 August 2015), <www.jamaicaobserver.com/sport/BOLT-VS-GATLIN_19225235> accessed 14 September 2016.

¹²¹ See: <www.ukad.org.uk/2021Code> accessed 26 August 2020.

Code.¹²² There are some limited changes between the current provisions presented here and the 2021 WADA Code. On the whole, they do not represent a major departure, in theory or in practice, from the current Code. Furthermore, as they are not in force at the time of writing they will not be considered at length here, although a couple of notable changes are highlighted for illustrative purposes.¹²³ The first of these is the considerable reduction in sanction for violations involving ‘Substances of Abuse’ (as contrasted with substances that would more traditionally be considered doping) where the use is ‘unrelated to sport performance’.¹²⁴ Under Article 10.2.4.1 the period of ineligibility is reduced significantly to three months (or potentially one month if the offender ‘satisfactorily completes a Substance of Abuse treatment program’).¹²⁵ Second, there are also ways in which the Code is harsher; for example, under Article 10.4 there are longer bans in cases concerning ‘aggravating circumstances’,¹²⁶ and new offences relating to the protection of whistleblowers.¹²⁷ Overall, the framing of – and approach to – doping remains largely the same. It is highly likely that the general effect of the Code will be very similar to previous iterations.

¹²² WADA Code 2021, <www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf> accessed 26 August 2020.

¹²³ For a short overview of key changes, see the UKAD press release of 6 August 2020, ‘UKAD publishes new UK Anti-Doping Rules for 2021 following new World Anti-Doping Code’, <www.ukad.org.uk/news/ukad-publishes-new-uk-anti-doping-rules-2021-following-new-world-anti-doping-code> accessed 26 August 2020.

¹²⁴ WADA Code 2021, Art 10.2.4.1, 66.

¹²⁵ *ibid.*

¹²⁶ *ibid* Art 10.4, 69.

¹²⁷ *ibid* Art 2.11, 25–26.

Conclusion

This chapter has provided an overview of the anti-doping regulatory structure and the key regulatory instruments. It began by describing the historical context and background to WADA and the Code. It then detailed the basic anti-doping organisational structure, before presenting and analysing WADA and its composition. Next, the key anti-doping dispute resolution bodies and their procedures were explained, together with the key regulatory instruments they implement, the most important and influential of which being the WADA Code. Then, by way of comparison, the NFL's policies were presented with some influential differences, and the impact these differences can have on athletes, highlighted with reference to practical examples. This necessarily more descriptive chapter serves to inform the more analytical chapters which follow. The next chapter builds upon the observations made here by examining statements of WADA's values in greater detail in order to provide a more comprehensive understanding of the current anti-doping regulatory regime.

Regulatory Themes and Statements of Values

Introduction

This chapter provides a general overview of WADA's statements of values. The values espoused by WADA are evident in key anti-doping regulatory instruments, such as the Code and the Prohibited List, and therefore have enormous influence over anti-doping policy. Given WADA's dominant position in the anti-doping regulatory landscape, as well as shaping policy their values and attitudes also frame how doping is viewed more widely. Consequently, it is instructive to consider these statements of values, beginning with the WADA Ethics Panel document (revised in October 2017 and, at the time of writing, currently in force) entitled 'Guiding Values in Sport and Anti-Doping'.¹ It provides useful insight into WADA's underlying philosophical and ethical position, which drives its policymaking. Consideration of these statements of values also serves to highlight problematic areas and inconsistencies in policy. Many of the themes and issues examined in this chapter are revisited in depth in later chapters of this thesis, with the exception of proportionality (which is considered in depth later in this chapter); the remainder of this chapter is designed to provide a general overview of key themes and issues in regulation. Proportionality – as a key concept in both law and ethics – warrants detailed consideration and therefore it is considered in greater depth under the separate 'Proportionality' heading below.

¹ WADA Ethics Panel, 'Guiding Values in Sport and Anti-Doping', <www.wada-ama.org/en/resources/general-anti-doping-information/wada-ethics-panel-guiding-values-in-sport-and-anti-doping> accessed 20 January 2018.

Statements of Values Presented and Examined

The idea of fairness – sometimes referred to as the ‘level playing field’ – is an extremely important and influential concept and one of the key rationales for anti-doping policy.² The related concept of justice is also highly relevant to policy. Considering what WADA takes these terms to mean is helpful to the task of analysing the current regulatory regime:

Fairness and Justice: Although individuals are fundamentally different and not equal, and the circumstances under which athletes might have to train are not the same (e.g. due to differences in resources), efforts should be made in sport to provide equal opportunity and to facilitate fair competition. WADA considers drug-enhanced performance incompatible with athletic (and human) excellence. Doping exposes athletes to unacceptable health risks.³

This assertion – that ‘efforts should be made to provide equal opportunity’ – does not apply to every possible manifestation of inequality, and instead only extends to certain factors, for example to the substances an athlete can take in pursuit of an improvement in performance. This in itself is not unreasonable or problematic, and is perfectly defensible. However, the process by which WADA makes policy decisions can be criticised, in that it is seemingly content to pick and choose in a rather ad hoc manner which inequalities it seeks to ameliorate. For example, the appetite for addressing the perceived problem of drugs in sport has been made artificially higher by various isolated but high-profile scandals;⁴ WADA is very keen to be seen

² WADA’s express rationales are presented in ch 3 of this thesis.

³ WADA Ethics Panel, ‘Guiding Values in Sport and Anti-Doping’ (n 1).

⁴ See generally, Anne Amos ‘Anti-Doping Policy: Rationale or Rationalisation?’ (PhD thesis, Faculty of Law, University of Sydney 2008), <<https://core.ac.uk/download/pdf/41233660.pdf>> accessed 31 July 2019. For a

as hard on drugs in sport, but this rhetoric does not necessarily appear to be reflected in its actions. For example, WADA and bodies operating under its auspices such as United Kingdom Anti-Doping (UKAD) certainly reach for the low-hanging fruit in order to provide some specious and somewhat misleading statistics, but may not be prepared or able to take steps to combat doping in those more difficult to catch.⁵

Moreover, arguably it has not taken some steps which would have the most meaningful impact on athlete health and wellbeing, such as addressing the extensive use of various analgesics in many sports (mainly anti-inflammatory drugs and opioid-based painkillers), despite concerns being expressed from the medical community and by other commentators over a number of years.⁶ This may also be due to the inappropriate governance structures in

description of more recent scandals, see Julian Savulescu, 'Doping Scandals, Rio and the future of human enhancement' (2016) 30 *Bioethics* 300, <<https://doi.org/10.1080/17511321.2016.1203095>>.

⁵ eg, as a whole in the UK rugby union accounts for more anti-doping bans than any other sport by an order of magnitude, but almost all of these bans are below the first and second tiers of the sport, with only two professional players receiving bans. It has also been revealed that Premiership players may play entire seasons without facing a doping test. See further, RFU Anti-Doping Advisory Group Report 2017–2018, <[www.englandrugby.com/mm/Document/General/General/01/33/33/08/RFUAntiDopingIllicitDrugsAnnualReport2017-](http://www.englandrugby.com/mm/Document/General/General/01/33/33/08/RFUAntiDopingIllicitDrugsAnnualReport2017-18_English.pdf?spMailingID=5789277&spUserID=MjEyMDE4MzQ2MDc0S0&spJobID=1251940435&spReportId=MTI1MTk0MDQzNQs2)

[18_English.pdf?spMailingID=5789277&spUserID=MjEyMDE4MzQ2MDc0S0&spJobID=1251940435&spReportId=MTI1MTk0MDQzNQs2](http://www.englandrugby.com/mm/Document/General/General/01/33/33/08/RFUAntiDopingIllicitDrugsAnnualReport2017-18_English.pdf?spMailingID=5789277&spUserID=MjEyMDE4MzQ2MDc0S0&spJobID=1251940435&spReportId=MTI1MTk0MDQzNQs2)> accessed 19 July 2019. Also see Jack de Menezes 'Premiership rugby players still able to go all season without taking a drugs test, RFU Anti-Doping report reveals' *Independent* (23 April 2019), <www.independent.co.uk/sport/rugby/rugby-union/news-comment/rfu-anti-doping-report-2017-18-drugs-test-premiership-rugby-players-failed-a8882901.html> accessed 23 April 2019.

⁶ Martin Vaso and others, 'Use and abuse of medication during 2014 FIFA World Cup Brazil: a retrospective survey (2015) 5 *BMJ Open*, <<http://doi:10.1136/bmjopen-2015-007608>> accessed 19 April 2019. See also, 'International footballers "play on painkillers"', NHS website, 8 June 2012, <[http://International footballers 'play on painkillers'](http://International footballers 'play on painkillers' - NHS (www.nhs.uk)) – <[NHS \(www.nhs.uk\)](http://www.nhs.uk)> accessed 3 April 2019; 'High usage of painkillers threatens players' long-

elite professional sport, which create clear conflicts of interest with sports governing bodies acting in their own self-interest.⁷ The subsequent chapters of this thesis seek to provide some answers to these issues by offering suggestions for more ethical and effective anti-doping regulation, with a focus on harm reduction and greater accountability to those regulated, namely the athletes.

The concept of reducing the risk of harm to athletes is addressed expressly by WADA:

Risk of Harm: The WADA Code mentions health as an important value. Although it is clear that elite sport might expose athletes to health risks, it doesn't remove the necessity of considering the significant risks of harms that might be the consequence of the use of performance-enhancing substances.⁸

The argument advanced here can cut both ways: as some sports are inherently dangerous, we do not want to make them (potentially) more dangerous by condoning drug use and opening athletes up to further foreseeable and unforeseeable harms. It has also been suggested that allowing performance-enhancing drugs (PEDs) would create a sort of 'arms race', with athletes

term health – Fifa' *Guardian* (6 June 2012), <www.theguardian.com/sport/2012/jun/06/usage-painkillers-health-fifa> accessed 3 April 2019; John W Orchard and others, 'Long-term safety of using local anesthetic injections in professional rugby league' (2010) 38 *The American Journal of Sports Medicine* 2259, <<https://doi:10.1177/0363546510372796>>.

⁷ This is discussed in 'Regulatory Structure and Framework' ch 3 of this thesis. For insightful further comment, see the following: Marina Nehme and Catherine Ordway (2016). 'Governance and Anti-Doping: Beyond the Fox and the Hen House' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016); Paul J Hayes, 'The Commercial Rationale of the World Anti-Doping Code' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016).

⁸ WADA Ethics Panel, 'Guiding Values in Sport and Anti-Doping' (n 1).

taking more drugs in ever increasing quantities.⁹ Conversely, given that some sports are inherently dangerous, this (potentially) makes the use of some currently illicit drugs de minimis, ie, in comparison to the other risks directly from competing in the sport, PEDs represent too small a risk to justify a paternalistic prohibition-based policy, and other options would be more appropriate.¹⁰ This undermines the conceptual coherence of WADA's harmonised approach, whilst lending support to the collectively bargained individualised approach to anti-doping regulation adopted by leagues such as the National Football League (NFL). Furthermore, the former approach can be criticised as unduly quasi-legally moralistic and potentially paternalistic when considered in context, given the risks athletes consent to in the sports mentioned above.¹¹ Many sports, particularly contact and collision sports like rugby union and American football expose athletes to very significant harms¹² which athletes are able

⁹ This is a particular prevalent concern in the mainstream media, but has also been raised by some academics. See, eg, Rhonda Orr, 'Rio 2016 was just the latest round in the long-running doping arms race', University of Sydney opinion piece, 25 August 2016, <<https://sydney.edu.au/news-opinion/news/2016/08/25/rio-2016-was-just-the-latest-round-in-the-long-running-doping-ar.html>> accessed 3 April 2019.

¹⁰ Julian Savulescu and colleagues consider briefly the implications here for 'inherently dangerous' sport. See J Savulescu, B Foddy and M Clayton, 'Why we should allow performance enhancing drugs in sport' (2004) 38 *British Journal of Sports Medicine* 666, 669, <<http://dx.doi.org/10.1136/bjism.2003.005249>>. Savulescu expresses this specific point in an interview: Regan Penaluna, 'Head to Head: Should We Allow a Doping Free-for-All? Two philosophers debate the ethics of performance enhancement.' *Nautilus* Issue 039 'Sport' 18 August 2016, <http://nautil.us/issue/39/sport/head-to-head-should-we-allow-a-doping-free_for_all> accessed 24 September 2017.

¹¹ See further, eg, Gerald Dworkin, 'Paternalism', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2019), <https://plato.stanford.edu/search/r?entry=/entries/paternalism/&page=1&total_hits=60&pagesize=10&archive=fall2019&rank=0&query=Paternalism> accessed 20 January 2020.

¹² For detailed research and analysis of the impact of American football on health, see generally, eg, 'The Football Players Health Study at Harvard University', <<https://footballplayershealth.harvard.edu/>> accessed 5 May 2020.

to consent to.¹³ For example, in *R v Barnes*¹⁴ the Criminal Division of the Court of Appeal noted that in the context of contact sports such as football (Association Football (soccer), not American football), participants consented to some risk of harm simply by playing the sport. Finally, there are many arguments from the wider literature on drug use and abuse which suggest that if at least some of the currently prohibited drugs were to be regulated instead, this could also reduce the risk of harm.

WADA purports to advance evidence-based anti-doping policies:

Science-based: Any decision, recommendation or policy should be based on the best available scientific evidence.¹⁵

Taken at face value this statement is difficult to dispute. It may be possible to find scientific and/or empirical evidence in support of a maintenance of the status quo, and also indeed for changes to regulatory policy, both radical (ie, a complete repeal of the prohibition-based system) and minor (ie, differences in the length of sanctions). However, it can be argued that the current policy exists due to an initial value judgement, based on a specific morality and system of sports ethics (discussed at length in chapter five, the first ‘Morality of Sport’ chapter), as opposed to hard scientific evidence. It is, as WADA notes under the ‘Education/Public/Athlete Engagement’ heading below, ‘a normative position based on concern for the health and welfare of athletes and for the ideals of sport (ie, the spirit of sport)’. This might be considered a tacit acknowledgement that the scientific and empirical evidence alone is insufficient to justify the status quo, and that recourse must be made to ethical claims

¹³ There are, however, general exceptions to this consent, as provided for in *R v Brown* [1994] 1 AC 212.

¹⁴ [2005] 1 WLR 910. This case concerned criminal liability for a tackle during a football match.

¹⁵ WADA Ethics Panel, ‘Guiding Values in Sport and Anti-Doping’ (n 1).

in order to justify existing policies. This is not a criticism of the use of ethical judgement in anti-doping policy but merely an observation; indeed, it is plainly both necessary and valuable. The scrutiny provided by including this type of analysis is particularly important when evaluating a normative position, and policies which seek to advance this initial value judgement; these points are explained and justified in detail in ‘Critical Approach and Methods of Analysis’ (chapter two).

Given the rhetoric surrounding the notion of doping and the stigma of being labelled a ‘doper’, in addition to the amount of resources and regulation dedicated to the ‘fight’ against doping, it is unlikely that we would see a fundamental switch away from a prohibition-based policy. The idea of Path Dependency Theory, sometimes expressed more directly as the concept ‘history matters’ is relevant here:¹⁶

The notion of path dependence is generally used to support a few key claims: Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively ‘small’ or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse; and consequently, political development is often punctuated by critical moments or junctures that shape the basic contours of social life.¹⁷

Relating this to the landscape of anti-doping regulation, it has been observed that anti-doping policy may not be an entirely rational reaction to isolated events, such as, for example, Ben

¹⁶ Paul Pierson, ‘Increasing Returns, Path Dependence, and the Study of Politics’ (2000) 94 *The American Political Science Review* 251, <[https://doi:10.2307/2586011](https://doi.org/10.2307/2586011)>. It should also be noted that some theorists are less convinced by the concept. See further, eg, Stan Liebowitz and Stephen E Margolis, ‘Policy and Path Dependence: From Qwerty to Windows 95’ (1995) 18 *Regulation* 33, <www.cato.org/sites/cato.org/files/serials/files/regulation/1995/7/v18n3-4.pdf>.

¹⁷ Pierson (n 16) 251 (references omitted).

Johnson's test failure after the 1988 Olympic 100-metre final.¹⁸ There have been other 'critical moments' such as the Festina affair at the 1998 Tour De France which was one of the key factors in the creation of WADA.¹⁹ Once these steps had been taken, with for example international treaties obliging states to act, it would be very difficult for other options to be pursued.²⁰ This manifests itself in the reluctance to consider anything but a prohibition-based policy, despite its numerous often high-profile failures, and despite the advantages a harm reduction-based policy might have over the former type of policy. It is possible that more recent events such as the Russian institutionalised doping scandal²¹ may make the anti-doping community more receptive to meaningful change, although it could well also lead to a 'doubling down' on current approaches.

¹⁸ See, eg, Amos (n 4).

¹⁹ See, eg, BBC Special Report on 1998 Tour de France 'Tour tarnished by drugs scandal', 3 August 1998 <http://news.bbc.co.uk/1/hi/special_report/1998/07/98/tour_de_france/144326.stm> accessed 6 November 2019
See also, ch 3 of this thesis.

²⁰ For more detail on this see the 'Regulatory Structure and Framework' chapter of this thesis.

²¹ WADA, 'Progress of the Anti-Doping System in Light of the Russian Doping Crisis, 2 July 2019', <www.wada-ama.org/sites/default/files/20190_122_progress_of_the_anti-doping_system.pdf> accessed 26 August 2019.
Richard H McLaren, 'McLaren Independent Investigation Report – Part I' (18 July 2016) <www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-i> accessed 24 August 2016; Richard H McLaren, 'McLaren Independent Investigation Report – Part II' (9 December 2016) <www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-ii> accessed 23 February 2017.

In light of the repeated failures which naturally lead to questions concerning WADA's effectiveness as a regulator, faith in anti-doping policy is at a low point.²² Values WADA stresses, such as transparency, are important in restoring some confidence in anti-doping:

Transparency: In order to promote open dialogue, public trust and integrity, the rationale and process for any decision, as well as ensuing policy recommendations should be as transparent as practicable. This goal should be balanced against other interests, including the privacy rights of the athletes.²³

There are, however, ways in which transparency and the related values may potentially be improved, for example by making the decisions of anti-doping dispute resolution bodies available to members of the public. On one hand transparency of this nature may be beneficial in (re)building trust in anti-doping, but on the other anti-doping and other drug-related disputes will often necessitate discussion of athletes' private medical information. This is a particular concern when considering substances of abuse, for example, but can also apply to doping violations. WADA has been accused of failing to safeguard the privacy rights of athletes²⁴ – with for example the Fancy Bears hack exposing enormous amounts of highly confidential data

²² See, eg, White House summit, 'The Washington Anti-Doping Summit Declaration report', 31 October 2018, <www.usada.org/the-washington-anti-doping-summit/> accessed 28 February 2019. See also BBC News, 'White House summit says Wada has put "politics over principle" and needs reform', 31 October 2018, <www.bbc.co.uk/sport/46051024> accessed 27 February 2019.

²³ WADA Ethics Panel, 'Guiding Values in Sport and Anti-Doping' (n 1).

²⁴ See further, eg, Marcel Scharf, Nils Zurawski and Tom Ruthenberg, 'Negotiating Privacy. Athletes' Assessment and Knowledge of the ADAMS' (2018) 6 Performance Enhancement & Health 59 <<https://doi:10.1016/j.peh.2018.07.002>>.

such as medical records relating to athletes.²⁵ This naturally raises questions about WADA's cyber security protocols.

WADA has also been criticised for lacking transparency.²⁶ It may be concluded that WADA has much to improve in both these regards (transparency and privacy), despite the idea that these may be considered competing values, with less transparency theoretically possibly facilitating an increase in privacy. It is worth noting here that some of the decisions made by the Court of Arbitration for Sport (CAS) remain confidential, although this may not be the type of privacy breach which would be most concerning to athletes. After all, if they have appealed a case to CAS, this will be in the knowledge that the facts and the decision may well ultimately be made public, and any public decision could also work in an athlete's favour by helping to restore a damaged reputation. Therefore, there is an element of choice, although this choice may not be very meaningful as there is no alternative to this process in the appeal of a purported doping violation.

WADA cites values such as athlete education and engagement, but does not act to promote them as effectively as it could:

Education/Public/Athlete Engagement: Anti-doping is a normative position based on concern for the health and welfare of athletes and for the ideals of sport (ie, the spirit of sport). Whenever possible, WADA should put effort into the

²⁵ Andy Brown, 'Fancy Bears hack now involves 66 athletes from 16 countries' (*Sports Integrity Initiative*, 19 September 2016), <www.sportsintegrityinitiative.com/fancy-bears-hack-now-involves-66-athletes-from-16-countries/> accessed 20 July 2018.

²⁶ See further, eg, Cathal Kelly, 'Leaked records prove a key flaw for WADA is transparency' *The Globe and Mail* (Toronto, 19 September 2016), <www.theglobeandmail.com/sports/olympics/kelly-leaked-records-prove-a-key-flaw-for-wada-is-transparency/article31961455/> accessed 20 September 2019. See also examples of concerns in this regard expressed by Nehme and Ordway (n 7) 221.

education of athletes and the public. The long-term success of anti-doping depends upon the cultivation and strengthening of anti-doping attitudes and the practice of healthy and fair sport.²⁷

As this thesis argues, a more robust and appropriate ‘spirit of sport’ (as developed in ‘Morality of Sport: Positive Case’ chapter six and subsequent chapters), combined with more meaningful athlete engagement, such as that seen in the NFL with its collectively bargained anti-doping and fully separate substance abuse policy, would better serve this aim than current WADA approaches to policy. At present, confidence in the relevant authorities (namely WADA) to deliver effective anti-doping measures is at a low point.²⁸ As noted particularly in chapters five and six, education is an important element of any anti-doping regime. However, this education should not be viewed as a tool through which to advance a specific agenda based on a contested ideological position. This could be criticised correctly as sharing more similarities with a process of indoctrination and propaganda rather than genuine education. As far as possible, any education should be evidence based and remain free of contested ideological positions, allowing athletes to make fully informed decisions.

The Public/Private Question

Sport, both participatory and elite, occupies a unique place in society. It represents a major part of the lives of many people. There are many benefits to participating in sport in some capacity, and many ways in which one might participate, not limited to simply playing the sport. For example, as a spectator, sponsor or administrator. It can be argued that sport is immensely

²⁷ WADA Ethics Panel, ‘Guiding Values in Sport and Anti-Doping’ (n 1).

²⁸ See, eg, White House summit (n 22). See also, BBC News, ‘White House summit says Wada has put “politics over principle” and needs reform’ (n 22).

valuable to society: its functions are diverse, such as providing a sense of community, and providing a means of exercise; both elicit significant public health benefits. Furthermore, sport can reduce crime rates, improve ‘educational outcomes’, wellbeing, and improve population health.²⁹ These observations have implications for the internal morality of sport. However, this internal morality may not be the same for all types of sport; one meaningful difference is evident between amateur/participatory sport and elite professional sport. As will be demonstrated in the two ‘Morality of Sport’ chapters (chapters five and six), the internal morality of the latter focuses very much on winning. Although winning is an important element of other forms of sport, it is not necessarily of such fundamental importance. These factors will impact how sport should be governed.

Given the value, significance and prominence of sport in modern society, a question arises, especially when considering the ‘public good’ sport can have: are sports bodies public or private? This distinction can prove to be of consequence; how a private body may act can be quite distinct from how a public body, or the state, may. It should also be noted here that private bodies can fulfil public functions, as indeed they often appear to do in sport. This public/private distinction in sport can be consequential and could itself provide the subject of a PhD thesis, but for these purposes suffice it to say the status given to the various institutions of sports governance must be carefully considered.³⁰ In examining how governing bodies

²⁹ Peter Taylor and others, ‘A review of the Social Impacts of Culture and Sport’ The Culture and Sport Evidence (CASE) programme, (2015).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/416279/A_review_of_the_Social_Impacts_of_Culture_and_Sport.pdf> accessed 3 April 2019.

³⁰ For discussion of this point from a philosophical perspective, see further, eg, Claudio Tamburrini ‘What’s Wrong With JS Mill’s “Harm-to-Others”-Principle?’ (2011) 38 *Journal of the Philosophy of Sport* 1, 13, <<https://doi:10.1080/00948705.2011.9714546>>.

should be classified, and the implications this classification can have, it is instructive to consider the landmark *Datafin* case.³¹ In the UK, this case significantly extended the purview of judicial review (JR) in the context of bodies purporting to be self-regulating. In summary, *Datafin* concerned the Panel on Takeovers and Mergers in the City, and established that as it was discharging public duties, it was subject to the jurisdiction of the High Court, and also to the relevant public law, ie, to JR. Sir John Donaldson MR (at 818):

There are three ways of testing the existence of a public law duty: (i) the aforementioned ‘source’ test; (ii) the ‘consequences’ test: where the decision is made under a system which has a public law character by reason of the fact that it has consequences in the field of public law including, for example, the fact that measures to secure compliance with the rules of the system include measures taken in the exercise of public law powers; (iii) the ‘function’ test: where the system under which the decision is made performs the functions of a public law system.

This has implications for sports bodies in the UK: *Datafin* potentially opens the door to the JR of sports governing bodies as they could be deemed sufficiently similar in nature to the Panel on Takeovers and Mergers. However, cases such as *R v Disciplinary Committee of the Jockey Club, ex p The Aga Khan*³² have not followed the lead *Datafin* has provided: in the UK decisions of sports governing bodies are not subject to JR. Prominent academics such as Professor Jack Anderson have questioned this policy and provided persuasive reasons to reconsider it.³³ Anderson notes:

³¹ R v Panel on Takeovers and Mergers Ex p Datafin Plc [1987] QB 815.

³² [1992] EWCA Civ 7.

³³ Jack Anderson, ‘An Accident of History: Why the Decisions of Sports Governing Bodies Are Not Amenable to Judicial Review’ (2006) 35 Common Law World Review 173, <<https://doi:10.1350/clwr.2006.35.3.173>>.

The argument is predicated on a court being convinced that certain sports bodies are necessarily governmental in operation because they have power over a not insubstantial area of economic activity, they have private power that affects the livelihoods of many individuals and they receive significant levels of public funding.³⁴

The funding structure of bodies such as WADA is relevant here: it is funded by the Olympic Movement and by governments.³⁵ At a basic level, it can be argued that as it is funded by (in part) by government, this (potentially) leads to an argument that it should be subject to JR. It can be claimed that government has delegated this responsibility to bodies such as WADA, or in the case of rugby union in the UK, to the Rugby Football Union (RFU). There are also jurisdiction-related issues here. *Datafin* is an English case, and therefore applies in England and Wales, but not outside this jurisdiction. Other jurisdictions have adopted different approaches. Scotland,³⁶ South Africa,³⁷ Australia,³⁸ and New Zealand³⁹ are four such jurisdictions. Finally, Section 6 of the Human Rights Act 1998, specifically the definition of what may qualify as a ‘public authority: 3b – any person certain of whose functions are functions of a public nature’, may also provide a basis for the application of JR.⁴⁰

³⁴ *ibid* 174.

³⁵ WADA, ‘Funding’, <<https://www.wada-ama.org/en/funding>>. See also, ch 3 of this thesis.

³⁶ See *St Johnston FC v Scottish Football Association* [1965] SLT 171.

³⁷ See *Jockey Club of South Africa v Forbes* (1993) (1) SA 649 (A).

³⁸ See *Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242.

³⁹ See s 3, Judicature Amendment Act 1972; *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159; (No 2) [1985] 2 NZLR 181; (No 3) [1985] 2 NZLR 190. Also see J Caldwell, ‘Judicial Review of Sports Bodies in New Zealand’ in Elizabeth Toomey (ed), *Keeping the Score: Essays in Law and Sport* (University of Canterbury Press 2005) 49.

⁴⁰ See: <www.legislation.gov.uk/ukpga/1998/42/section/6>.

Plainly if sports bodies are found to be public, or if their function is considered public or governmental, then the concept of the public interest becomes pivotal in their operation and decision-making processes. This is not so for private bodies – the concept of the public interest is less relevant and does not impact their behaviour to the same degree – and thus they are able to focus on promoting their own interests, and will not be subject to the same standards and restrictions.

There is a problematic lack of clarity concerning the classification of sports bodies: the NFL, for example, is considered a trade association of its privately owned profit generating teams (with the exception of one team – the Green Bay Packers – which operates as a non-profit organisation).⁴¹ The RFU characterises itself with the following words:

The RFU endeavours to operate to PLC standards but it is neither a company nor a charity. It is registered under the Industrial & Provident Societies Acts 1965–78 and is, in layman’s terms, a ‘Friendly Society’. This means that the RFU is owned by its member clubs and aims to make a profit to reinvest in rugby union in England.⁴²

Conversely, the Welsh Rugby Union (WRU) is a company limited by guarantee.⁴³ When seeking to provide an ethically coherent system of sports governance, more consistency in this regard (especially within the same sport and jurisdiction) would be helpful. For example,

⁴¹ See further, Duff Wilson, ‘NFL Executives Hope to Keep Salaries Secret’ *New York Times* (11 August 2008), <www.nytimes.com/2008/08/12/sports/football/12nfltax.html?_r=0> accessed 29 August 2016; Constitution and Bylaws of the National Football League, <http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf> accessed 29 August 2016.

⁴² ‘About the RFU’, <<http://web.archive.org/web/20110715181351/http://rfu.com/abouttherfu>> accessed 3 April 2020.

⁴³ WRU Article of Association, <<https://community.wru.wales/club/club-resources/documents-and-regulations/>> accessed 3 April 2020.

without consistency of this nature, WADA's stated aim of harmonising anti-doping regulation across countries and sports is made more difficult. Even if harmonisation is not pursued, consistency would be beneficial and would help to ensure the complex demands of sports governance are able to be met; furthermore, the spirit of sport is linked to the public interest.

It might well be claimed that big sports bodies, for example the International Olympic Committee, are at least quasi-public bodies, especially given the amount of people their decisions are likely to impact, and their pre-eminent positions within the sector. However, we have seen in the context of sport that these factors are not decisive.⁴⁴ There are also parallels to be drawn here between other large organisations such as Google and British Petroleum (BP) whose decisions impact enormous numbers of people but are not subject to JR. Their status is not directly influenced by the number of people their decisions might impact, and although there is an element of stakeholder consultation in companies such as BP,⁴⁵ this does not compare to the scrutiny and oversight engendered by, for example, JR.

If sports-related bodies are to be deemed public, particularly under or in any new framework or infrastructure designed to address morality and ethics in sport, then the concept of 'legitimate expectation' would become relevant, and their decisions might (in the UK at least) be subject to JR. By way of explanation, under UK law:

The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which

⁴⁴ R v Football Association Ltd, ex parte Football League Ltd; Football Association Ltd v Football League Ltd [1993] 2 All ER 833.

⁴⁵ BP Governance Report 2018, <www.bp.com/en/global/corporate/investors/governance/governance-report.html> accessed 26 June 2019.

would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority.⁴⁶

There are persuasive reasons that sports governing bodies should be subject to JR;⁴⁷ one of these reasons is fairness. In order to promote fairness, measures designed to ensure fair process might very well be incorporated within a reformulated morality of sport, as it provides avenues for review and further safeguards on decisions. Furthermore, the duty to be ‘fair’ is especially salient for sport, given the emphasis on fairness which has already been observed. The type of fairness, and what exactly this demands in practice, is discussed in greater detail later in this thesis, particularly with reference to how Rawls’s principles might be modified to fit the demands of elite professional sport.⁴⁸ Finally, the issues raised by the prospect of sports governing themselves and potentially therefore operating in their own self-interests, as opposed to what might more objectively be considered ‘fair’, are considered in the subsequent chapters.

Proportionality

WADA’s Ethics Panel states the following regarding the concept of proportionality:

Proportionality: The proportionality principle exists in both law and ethics. It is a rational and coherent approach that tries to balance various principles and values (eg, using the least intrusive strategy necessary to achieve a particular policy goal). In analyzing whether a certain policy option is proportional, one might evaluate: (1) whether the relationship between the means used to achieve that policy and its goals is proportional; (2) whether other means could be used to achieve the same goal; (3)

⁴⁶ R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 (Laws LJ).

⁴⁷ See further, eg, Ben Cisneros, ‘Challenging the call: Should sports governing bodies be subject to judicial review?’ (2020) 20 *The International Sports Law Journal* 18, <<https://doi.org/10.1007/s40318-020-00165-9>>.

⁴⁸ See ch 6 of this thesis.

whether the policy causes any harm to the individual; (4) whether alternative options might lead to less harm; and (5) how to balance anti-doping objectives with the other rights of individuals (eg, right to privacy; nondiscrimination; etc).⁴⁹

This mention of proportionality can be criticised as giving lip service to the concept, rather than genuine regard; these considerations are not reflected sufficiently in the substance of the policies and their enforcement. The concept of proportionality can be interpreted in different ways, depending upon numerous factors such as the context, the specific right and the jurisdiction in question. However, a memorable phrase which neatly encapsulates the fundamental thrust of the concept in England and Wales was provided by Lord Diplock in *R v Goldstein*, where he advised against using a ‘steam hammer to crack a nut, if a nutcracker would do’.⁵⁰ As this chapter demonstrates, WADA’s concept of proportionality is too far removed from the concept it presents above, particularly the legal concept which it expressly acknowledges and relates its policy to.

WADA’s approach can be criticised using the evaluations highlighted by each one of these five points presented above; some of the policies pursued by the anti-doping authorities may be criticised as inconsistent with this general concept of proportionality. In this connection, Rivers summarises that: ‘The doctrine of proportionality in the wide sense is the name given to the set of tests used to establish whether a limitation of rights is justifiable’.⁵¹ Although it is accepted that certain rights, sometimes described as ‘qualified’ rights, will be limited in certain circumstances, and must be subject to the general doctrine of proportionality,⁵² and furthermore that the concept of proportionality will vary between

⁴⁹ WADA Ethics Panel, ‘Guiding Values in Sport and Anti-Doping’ (n 1).

⁵⁰ *R v Goldstein* [1983] 1 WLR 151, 155.

⁵¹ Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 Cambridge Law Journal 174, 174.

⁵² For detailed discussion of these points, see further, eg, Rivers, *ibid*.

jurisdictions, the limits and infringements seen in this context are highly arguably not proportionate.

Given its potential impact, it is useful to consider the concept in greater detail, particularly as it applies in this jurisdiction. The doctrine of proportionality is derived from European law and first became a part of UK law by virtue of the European Communities Act 1972. It then became more influential following the introduction of the Human Rights Act 1998. Arguably the leading case in England and Wales is *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,⁵³ which provides the legal test for proportionality:

In determining whether a limitation is arbitrary or excessive he said that the court would ask itself:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.⁵⁴

Some years later, in *Huang v Secretary of State for the Home Department*,⁵⁵ a fourth question was introduced to the test, concerning ‘the need to balance the interests of society with those of individuals and groups’.⁵⁶

George Letsas provides further explanation of proportionality as follows:

⁵³ [1999] 1 AC 69.

⁵⁴ *ibid* 80.

⁵⁵ [2007] 2 AC 167.

⁵⁶ [2007] 2 AC 167 [19] (Lord Bingham of Cornhill).

According to the orthodox understanding of this legal doctrine, state interference with non-absolute human rights (such as privacy, freedom of religion or expression) is lawful, if it is proportionate to a legitimate aim in pursuit of which the state acted. In its standard form the test consists of two main stages. First, courts will ask whether there has been an interference with a liberty or interest that falls within the scope of a right protected in the relevant convention or constitution (the scope or definitional stage). Second, the court will ask whether that interference was justified or ‘necessary in a democratic society’ (the justification or limitation stage). The limitation will be deemed justified, if it was prescribed by law and was proportionate to a legitimate aim in pursuit of which the government acted.⁵⁷

Applying this to anti-doping, the first point to observe is that doping testing would, at least prima facie, pass what Letsas calls the ‘scope or definitional stage’, in that concerns about athletes’ private life and dignity are unambiguously established human rights concerns, although whether this should be so is considered below. The next stage – Letsas’s ‘justification or limitation stage’ concerns the necessity element, ie, is the anti-doping test necessary in the (theoretically democratic) society that is elite professional sport? As it is set out in the relevant codes, ie, sport’s internal ‘laws’, this arguably satisfies the first component; it has been deemed necessary and mandated by various legal instruments, although the manner in which anti-doping is conducted may be challenged. Perhaps the key question we must ask is whether the drug testing policies are ‘proportionate to a legitimate aim’. Is the aim – prohibiting substances and catching those using these prohibited substances – legitimate? Plainly this is an ethical and philosophical question, as well as a legal one. The first ‘Morality of Sport’ chapter (the ‘Negative Case’ chapter 5) in particular questions whether this underlying aim is legitimate. If it is deemed legitimate in principle, one can still question whether the particular means of achieving the provision’s aim could be improved whilst maintaining the same function. Furthermore, although it is effectively ‘prescribed by law’, one can nonetheless question

⁵⁷ George Letsas, ‘Rescuing Proportionality’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 316.

whether this particular ‘law’ (code provision) is ethically justified and human rights compliant; draconian provisions must be thoroughly scrutinised, which can and should lead to potential revisions being considered. Finally, if we assume for the sake of argument (although not the position taken in this thesis),⁵⁸ that it can be justified, the next consideration is whether this aim could be achieved by other, less controversial and invasive means; if so, this raises proportionality concerns.

Therefore, much here hangs on the concept of proportionality. In considering whether the anti-doping policies are proportionate, the degree of infringement, specifically for example on privacy, must be relevant. It is worth noting here that even if employing a purely legal understanding of proportionality these measures may be acceptable, within the context of sports governance the concept of proportionality may present problems, and be difficult to justify from an ethical perspective. Given the highly invasive nature of the ‘Whereabouts’ rules where athletes have to state a location where they will be available for testing 365 days a year to allow for testing without notice in advance,⁵⁹ the actual urine sample collection procedure itself which under WADA regulations must be witnessed,⁶⁰ and the use of Athlete Biological Passport (ABP) data, the fundamental rationale for the policy must be strong. These general observations concerning how the concept is stretched in the context are helpful; as noted above, the doctrine of proportionality raises several specific concerns when applied to anti-doping

⁵⁸ See the ‘Morality of Sport’ chapters (5 and 6) for analysis of this point.

⁵⁹ See further UKAD, ‘Whereabouts and ADAMS’, <www.ukad.org.uk/athletes/whereabouts-and-adams> accessed 3 April 2020.

⁶⁰ ISTI, Urine Sample Collection Guidelines (2014), 2.2 and 2.3, <www.wada-ama.org/sites/default/files/resources/files/wada_guidelines_urine_sample_collection_2014_v1.0_en.pdf> accessed 1 July 2017.

regulations.⁶¹ One major concern is the question of athletes' voluntariness (or lack thereof) in participating in anti-doping measures. It may be argued that athletes expressly consent to much of this, although the nature of this consent can be questioned, in that they must either accept the rules or forfeit the right to compete, and in the case of professional sport, earn a living through sport. Contracts athletes must sign to compete can thus be criticised as contracts of adhesion, ie, as expressed in the colloquial, contracts offered on a 'take it or leave it' basis which cannot be modified. However, in many cases sport may be the only avenue through which they can earn a living (certainly a comparable living); as a consequence of the amount of time and dedication required to rise to the elite professional level in most sports, often opportunity for development in other areas is limited, or even absent entirely. Therefore other skills may not be developed. It can be argued that this does not constitute a meaningful choice, as there is no reasonable second option (for example, an alternative league subject to less demanding anti-doping regulation), or ability to negotiate the terms of participation.

⁶¹ See further, eg, Søren Holm, 'The 36th Meeting of the Pay and Conditions Committee of the Union of Philosophers, Sages and Other Luminaries (UK University Branch) or Doping and Proportionality' (2011) 3 *International Journal of Sport Policy and Politics* 225, <<https://doi.org/10.1080/19406940.2011.579143>>. Regarding sanctions, see, eg: Jan Exner, 'Anti-doping and athletes' rights under EU law: four-year period of ineligibility as disproportionate sanction?' (2018) 17 *The International Sports Law Journal* 128, <<https://doi.org/10.1007/s40318-018-0119-x>>; Jan Exner, 'Fixed sanction frameworks in the World Anti-Doping Codes 2015 and 2021: Can hearing panels go below the limits in the pursuit of proportionate punishments?' (2020) 20 *The International Sports Law Journal* 126, <<https://doi.org/10.1007/s40318-020-00173-9>>; Aynur Nuriev, 2019. 'Non-intentional anti-doping rule violations: Does a new trend in evidence provision suffice?' (2019) 19 *The International Sports Law Journal* 222, <<https://doi.org/10.1007/s40318-019-00158-3>>. For analysis relating to strict liability offences see, eg, Daniel Goldsworthy, 'Athletes' rights under the World Anti-Doping Code: A legitimate public interest?' (2018) 43 *Alternative Law Journal* 197, <<https://doi.org/10.1177%2F1037969X18783292>>.

Furthermore, many of these decisions are made when athletes are very young, ie some substantial distance from adulthood before other skills can be developed, and will be heavily influenced by others, and heavily based on the promise of future rewards. In addition to this, athletes may not fully understand and appreciate the contractual obligations they are undertaking. For example, remaining compliant with the WADA Code necessitates adopting behaviour, such as, for example, the thorough checking of all medications for banned ingredients that is very onerous, particularly if the athlete is unwell enough to need medical intervention. Moreover, these checks can be made more difficult still with athletes competing in foreign countries, often therefore necessitating negotiation of a language barrier under difficult circumstances. There is also the concern that anti-doping policies are becoming stricter and increasingly invasive over time,⁶² such that the initial consent may be rendered insufficient as time passes. Overall, the consent here may not be sufficiently meaningful. Plainly, these factors undermine free and informed consent.

The fact that athletes do not have a sufficiently meaningful choice is problematic; they are placed in the unenviable position of either acquiescing to the intrusive demands of anti-doping policies, or not competing in an elite or professional capacity at all. The governing body (for example, the RFU in rugby union in England) may therefore be considered to have ‘monopolistic powers’.⁶³ It is also worth noting that comparable demands are arguably not made of those working in other professions; the intrusion is seemingly unique to athletes, as other professions will generally have more than one option to utilise their professional

⁶² This was observed in 2011, and this trend has not only continued, but arguably accelerated. See Holm, *ibid*, 231.

⁶³ Michael J Beloff and Tim Kerr, ‘Why Aga Khan is Wrong’ (1996) 1 *Judicial Review* 30, 31, point 9.

capabilities. In considering the nature of agreement to arbitration clauses in sport, the European Court of Human Rights (ECtHR) recently observed the following:

114. Having regard to the restriction that non-acceptance of the arbitration clause would have entailed for her professional life, it cannot be asserted that she had accepted that clause freely and unequivocally.

115. The Court thus concludes that, even though it had not been imposed by law but by the ISU regulations, the acceptance of CAS jurisdiction by the second applicant must be regarded as ‘compulsory’ arbitration within the meaning of its case-law (contrast *Tabbane*, cited above, § 29). The arbitration proceedings therefore had to afford the safeguards secured by Article 6 § 1 of the Convention (see paragraph 95 above).⁶⁴

Plainly this undermines the notion of voluntariness, with the pressure to compete amplified in the professional era as athletes rely upon sport for their livelihoods, and generally lack a viable alternative to competing under WADA’s disproportionate policies. In summary, as athletes generally have no influence over or practical ability to challenge the contracts which govern their participation, the issue of their consent can be called into question.

Another major concern relates to athletes’ privacy – particularly the ‘Whereabouts’ testing protocols described above.⁶⁵ This may, for example, be inconsistent with an athlete’s ‘Right to respect for private and family life’ under Article 8 of the European Convention on Human Rights 1950 (ECHR).⁶⁶ Even taken in context, this invasion of athletes’ privacy is problematic from an ethical perspective and has been subject to legal challenge. Concerns expressed in this latter regard have, however, so far not been considered sufficiently persuasive. For example, in early 2018 the ECtHR rejected a challenge to the ‘Whereabouts’ requirements

⁶⁴ *Mutu and Pechstein v Switzerland* App nos 40575/10 and 67474/10, 114–15 (ECtHR, 2 October 2018).

⁶⁵ See further, UKAD, ‘Whereabouts and ADAMS’ (n 59).

⁶⁶ ECHR, <www.echr.coe.int/documents/convention_eng.pdf> accessed 20 June 2019.

for athletes.⁶⁷ A large group of athletes from the Fédération Nationale des associations et des syndicats Sportifs (FNASS), the Syndicat National des Joueurs de Rugby (Provale), the Union Nationale des Footballeurs Professionnels (UNFP), the Association des Joueurs Professionnels de Handball (AJPH) and the Syndicat National des Basketteurs (SNB), in addition to 99 other professional players from these sports, brought a case under Article 8 of the ECHR. The seven judges found that, although the ‘Whereabouts’ testing regime did interfere with the athletes’ private lives, this was justified on ‘public interest grounds’. In summary:

[T]he reduction or removal of the relevant obligations would lead to an increase in the dangers of doping for the health of sports professionals and of all those who practise sports, and would be at odds with the European and international consensus on the need for unannounced testing as part of doping control.⁶⁸

This case provides several points which warrant further comment. First, the ECtHR characterised the French Anti-Doping Authority (AFLD) as a ‘public authority’; indeed, the AFLD also characterises itself in this way.⁶⁹ This status is likely to have had a material impact on the judges’ decision, and supports the argument that sports governing bodies should be considered public.⁷⁰ Second, the ECtHR placed a major emphasis on the necessity of the measure for protecting public health with athletes considered to be role models, particularly for children and young adults. Third, reference was made to the UNESCO International Convention against Doping in Sport and the fact that states (in this case, France) expressly

⁶⁷ Fédération Nationale des Syndicats Sportifs (FNASS) and Others v France App nos 48151/11 and 77769/13 (ECtHR, 18 January 2018).

⁶⁸ ECtHR, ‘Doping control: whereabouts requirement does not breach Convention’ (judgment issued only in French) issued by the Registrar of the Court, ECtHR 018 (2017) 18 January 2018.

⁶⁹ As self-described on their website: <<https://en.afld.fr/>> accessed 20 July 2018.

⁷⁰ See the public/private classification discussion in this chapter.

agree to the obligations it places on them to combat the perceived threat of doping and safeguard fair competition.

This decision lends credibility to WADA's position as a matter of law, although it has been noted that the decision of the ECtHR did not adequately consider potential alternatives to the 'Whereabouts' system.⁷¹ If a viable alternative to the 'Whereabouts' requirements could be agreed, this would undermine many of the points in the judgment detailed above. For example, the Privacy-enhancing And Reliable Anti-Doping Integrated Service Environment (known as the Paradise Project), which uses a wearable GPS device to provide an approximate location, but not a precise location until just before the doping test, might represent a viable alternative option which could be offered to athletes unhappy with the current regulations.⁷² Further such options are explored in the 'Policy Proposals' (chapter nine) of this thesis.

Regarding WADA's proportionality points two, three, four and five above, it can be argued that, more broadly, WADA has failed to consider alternatives which may be more proportionate than the current prohibition-based policy, such as those based on harm

⁷¹ See, eg, Andy Brown, 'ECHR judgment fails to consider alternatives to "whereabouts"' (*Sports Integrity Initiative*, 22 January 2018), <www.sportsintegrityinitiative.com/echr-judgment-fails-consider-alternatives-whereabouts/> accessed 20 July 2018.

⁷² See Project Paradise (in original German language), <<https://privacy-paradise.de/>> accessed 20 July 2018. For a detailed explanation, see Andy Brown, 'ADAMS & EVES: Jonas Plass & his quest for anti-doping to embrace new technology' (*Sports Integrity Initiative*, 2 November 2017), <www.sportsintegrityinitiative.com/adams-eves-jonas-plass-quest-anti-doping-embrace-new-technology/>; and Andy Brown, 'NADA Germany to suggest athlete GPS tracking as ADAMS replacement' (*Sports Integrity Initiative*, 9 March 2017), <www.sportsintegrityinitiative.com/nada-germany-suggest-athlete-gps-tracking-adams-replacement/> accessed 20 July 2018.

reduction.⁷³ Indeed, it could even be contended that WADA has a duty to actively seek out less invasive measures which do not raise such significant proportionality concerns. Moreover, at a basic level, by overstating the threat to health posed by performance-enhancing drugs and failing to provide adequate context, WADA makes it more difficult to draw reasoned and rational policy conclusions. There is a material and meaningful difference between the perceived threat and the actual threat, but this difference works in WADA's favour.

Separately, the penalties for positive tests, and the length of time samples can be retained and retested, arguably all undermine principles of proportionality and human rights; for example, in the US and in many countries in Europe there are statutes limiting the time in which criminal proceedings can be brought. Moreover, when considered in this context (the criminal law of most Western democracies), it is worth observing that only very serious crimes would lead to this degree of scrutiny years later; anti-doping violations are not and should not be considered to be directly comparable to such serious criminal offences. These concerns are intensified given that the majority of substances prohibited in sport are not illegal, and even in countries such as the US where some are,⁷⁴ athletes who use them are not subject to such harsh penalties within sport; this approach therefore requires very strong justification (which is apparently lacking) in order to be ethically viable.

Further, the manner in which samples are collected, ie, specifically 'the DCO's/Chaperone's clear, unobstructed view of Sample provision'⁷⁵ raises similar concerns,

⁷³ Such as, eg, the well-reasoned option advanced here: Bengt Kayser and Jan Tolleneer, 'Ethics of a relaxed antidoping rule accompanied by harm-reduction measures' (2017) 43 *Journal of Medical Ethics* 282, <<https://doi.org/10.1136/medethics-2015-102659>>.

⁷⁴ See, eg, the Anabolic Steroids Control Act 1990.

⁷⁵ ISTI (n 60) 28.

and can also be considered an infringement of an athlete's dignity. Stephen Riley opines the following about the complex and sometimes misunderstood concept of human dignity:

My conclusion is that human dignity is a principle, but one distinct from our normal characterisation of legal principles. It generates decisions, or is given determination, when our normative orders – ie, law, morality, and politics –are in dispute.⁷⁶

It is distinct from law, but must have a place in legal thinking. It is a principle in law, but not a legal principle. It requires the rule of law, but its meaning is not exhausted by the rule of law ... More completely, human dignity is a sui generis status principle whose paradigmatic function is in interstitial contexts.⁷⁷

Anti-doping may be regarded as one of these contexts. There are some particular concerns in this regard to female athletes with the requirement that the provision of urine sample must be witnessed, and even greater concerns where a minor is being tested. These infringements on dignity further undermine the argument that these anti-doping policies are proportionate. Therefore, in summary, it can be argued that WADA is not satisfying its own conception of proportionality.

Conclusion

This chapter builds upon the previous 'Regulatory Structure and Framework' chapter by examining statements and manifestations of the values espoused by WADA, and key themes in current anti-doping regulation. These values and themes – which have a major influence on regulatory policy – have been presented and discussed with some notable problems and

⁷⁶ Stephen Riley, 'Human Dignity as a Sui Generis Principle' (2019) 32 Ratio Juris 439, 439, <<https://doi.org/10.1111/raju.12258>>

⁷⁷ *ibid* 452.

inconsistencies highlighted. This initial appraisal provides an understanding of the current anti-doping system and an introduction to some of its most pressing issues. These observations lead to the conclusion that the current approach – even following this examination at face value – is inconsistent and problematic, and thus requires reconsideration. The subsequent chapters of this thesis provide further analysis of the current anti-doping system, beginning in the next chapter with a detailed analysis of WADA’s underlying system of morality and ethics.

Morality of Sport: The Negative Case

Introduction

Elite professional sport possesses its own unique system of morality and ethics, which although influenced by that of wider society, ie, general societal ethics, remains distinct from it. As noted in earlier chapters, the ethics and morality of this type of sport will also differ from amateur and participatory sport. Robert Simon has suggested, referring to ‘competitive sport’ but which could equally apply to elite professional sport, that rather than being derived from society, sport’s values ‘are internal in that they arise from the core character of competitive sport and are not mere reflections of wider social values, which can in principle and sometimes in practice diverge significantly from those found in competitive sport’.¹ At present, a conflict exists between the ‘Corinthian Values’ derived spirit of sport generally championed by the regulators,² and the ‘win at all costs’ ethos which is prevalent amongst athletes (and athlete-

¹ Robert L Simon, *Fair Play: The Ethics of Sport* (2nd edn, Westview Press 2014) 203.

² It is evident from an examination of the ‘Fundamental Rationale for the World Anti-Doping Code’, characterising that the ‘spirit of sport is the celebration of the human spirit, body and mind’, and its references to ‘fun and joy’, ‘character and education’, and ‘respect for rules and laws’ that their vision of sport has more in common with the ‘Corinthian Values’ than with the win at all costs ethos. WADA Code 2015, 14 (with 2019 amendments, hereafter referred to as WADA Code 2019), <www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf> accessed 6 November 2019.

related personnel) in elite professional sport.³ This tension, with regulators continuing to pursue what can be termed the pretence of a ‘Corinthian Value’ derived spirit of sport, has significant implications for anti-doping policy and practice.⁴ This value system fundamentally influences the World Anti-Doping Agency’s (WADA) conception of doping.⁵ It is argued in this chapter and the following chapters that the approach adopted particularly by WADA and WADA-affiliated bodies to understanding and regulating doping in sport is problematic for (at least) two distinct, and formally separable, types of reason. First, the system of ethics and morality espoused is not credible in the context of elite professional sport, failing to reflect the reality of this type of sport and dogmatically seeking to promote an outmoded and untenable ideological position. Second, the approach taken is inconsistent and incoherent on its own terms, failing to provide cogent and systematic policy determinations using its own framework. Independently these reasons provide persuasive rationales to reconsider and reformulate both the current regulations and regulatory structures; taken together the argument becomes

³ eg, Deborah Healey expressly acknowledges and explains the pressure to ‘win at all costs’ – ‘The Myth of the Level Playing Field in Sport’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016) 10. For other examples of the acknowledgements of the ‘win at all costs’ mentality, see eg: Joshua H Whitman, ‘Winning at All Costs: Using Law and Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports’ (2008) 1 *University of Illinois Law Review* 459; Yanbing Chen, Conor Buggy and Seamus Kelly, ‘Winning at All Costs: A Review of Risk-Taking Behaviour and Sporting Injury from an Occupational Safety and Health Perspective’ *Sports Medicine – Open* (2019) 5(5) 1, <<https://doi:10.1186/s40798-019-0189-9>>; Ellis Cashmore ‘Sport’s Doping Problem: A Rational Solution—Allow Drugs’ (2014) 49 *Substance Use & Misuse* 1194, <<https://doi:10.3109/10826084.2014.904120>>, accessed 1 September 2016.

⁴ The WADA Code is a paradigmatic example of such a code; see, in particular, ‘Fundamental Rationale for the World Anti-Doping Code’ 14 (n 2) and also throughout: WADA Code 2019.

⁵ See chs 3 and 4 of this thesis.

particularly compelling. These factors invite a credible re-evaluation of anti-doping policy, which can allow a reconstruction of how doping in elite professional sport should be conceived and governed.

These two ‘Morality of Sport’ chapters (and the following bioethical chapters), together constitute the core theoretical basis of this thesis; they will respectively address each of the two points of critical concern identified above.⁶ This chapter focuses initially on the overall framing of the morality of sport and the underpinning ideologies from which the regulations emanate.

First it will be demonstrated that WADA’s definition of doping is problematic, in that it means anti-doping regulation is conducted within a particular ethical philosophy and framework, derived from a concept of sport which espouses an inappropriate outmoded morality of elite twenty-first century professional sport (elite professional sport being the practical focus of this thesis). Following detailed examination and analysis, this chapter concludes that the ‘Corinthian Value’ derived spirit of sport is untenable and unfit for purpose. In order to reach this position, the present chapter examines critically the underlying philosophy, which necessitates an understanding of the spirit and morality of this specific (ie, elite professional) type of sport. The spirit will inevitably dictate, at least to an extent, the morality of sport. Following from this analysis, a more appropriate and effective system of morality for elite professional sport is advanced in the next chapter, derived in part using the political philosophy of John Rawls.

This current chapter thus focuses on the negative case, before the positive alternative is presented in the next chapter. Rather than simply describing and examining the problems raised by the current approach to anti-doping (the negative), an alternative theory grounded in a more

⁶ The bioethical chapters address this second concern.

credible spirit of sport is advanced (the positive), from which practical policy solutions may be derived. Practical policy solutions are unlikely to be forthcoming by focusing exclusively on the negative. In order to accomplish this task, we must have a way of understanding what an appropriate morality of sport would look like. To do this, first the contemporary system and regulations are considered in detail, critiquing and highlighting their limitations and inconsistencies.

The WADA Position: (The Status Quo)

As we are seeking to find a morality of sport which underpins and informs a system of sports ethics, it is instructive to begin by outlining the position on doping adopted by the current regulation, ie, WADA, which can be summarised as follows:

A substance or method shall be considered for inclusion on the Prohibited List if WADA, in its sole discretion, determines that the substance or method meets any two of the following three criteria.⁷

WADA elaborates on this as follows:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;

4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the introduction to the Code.⁸

⁷ Art 4.3.1 WADA Code 2019, 30.

⁸ *ibid.*

The related ‘spirit of sport’ is characterised (albeit ambiguously and imprecisely) in the ‘Fundamental Rationale for the World Anti-Doping Code’ as follows:

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as ‘the spirit of sport’. It is the essence of Olympism, the pursuit of human excellence through the dedicated perfection of each person’s natural talents. It is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including:

- 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
- Community and solidarity

Doping is fundamentally contrary to the spirit of sport. To fight doping by promoting the spirit of sport, the Code requires each Anti-Doping Organization to develop and implement education and prevention programs for Athletes, including youth, and Athlete Support Personnel.⁹

One notable preliminary observation which can be made here relates to the significance of the ‘two out of three’ approach for inclusion on the Prohibited List. This highlights the importance

⁹ WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’ 14. These provisions are presented in detail in ch 3 of this thesis.

of the spirit of sport and the role it can (and often does) play in policy and regulation.¹⁰ It has also been observed that the role the ‘spirit of sport’ plays in relation to the Prohibited List can be considered inherently contradictory, in that it is ‘both fundamental and optional’.¹¹ Olivier de Hon highlights:

The decision to ban certain substances and methods is an ethical decision in itself, and this ethical judgement is already at the core of all anti-doping policies. It is superfluous to use the same ethical argument in the practical process of determining what should be banned and what should not be banned.¹²

Notably, according to WADA’s provisions, for a substance to be prohibited it does not need to pose a health risk to the athlete. Therefore, doping is not simply a question of harm or a matter for scientific enquiry. For WADA, doping plainly has a significant ethical and philosophical component; ie, it represents a specific (and controversial) ideological contention, which has a major influence on policy.¹³ A measure which does not pose a health risk and which is available to all (thus attenuating fairness or ‘level playing field’ type concerns), but which enhances performance may still be banned as doping because it conflicts with WADA’s ideological

¹⁰ See further, eg: Vincent Geeraets, ‘Ideology, Doping and the Spirit of Sport’ (2018) 12 *Sport, Ethics and Philosophy* 255, <<https://doi.org/10.1080/17511321.2017.1351483>>; Sigmund Loland and Hans Hoppeler, ‘Justifying anti-doping: The fair opportunity principle and the biology of performance enhancement’ (2012) 12 *European Journal of Sport Science* 347, <<https://doi.org/10.1080/17461391.2011.566374>>. See also, Olivier de Hon, ‘The redundancy of the concept of ‘spirit of sport’ in discussions on the prohibited list of doping substances’ (2017) 9 *International Journal of Sport Policy and Politics* 667, <<https://doi.org/10.1080/19406940.2017.1348380>>.

¹¹ de Hon, *ibid*, 667.

¹² *ibid* 674.

¹³ See, eg: Ian Ritchie, ‘The construction of a policy: The World Anti-Doping Code’s “spirit of sport” clause’ (2013) 2 *Performance Enhancement & Health* 194; Geeraets (n 10).

perspective. WADA also places an emphasis on the quality of the act, ie, whether it is unfair in the sense of creating an undesirable inequality, as opposed to, for example, simply focusing on its consequences: the means used to achieve a certain outcome matter, as well as the ultimate outcome. As highlighted above, the ‘spirit of sport’ concept is a major factor in WADA’s jurisprudence.¹⁴ Given this significance, it is necessary to attempt to understand exactly what is meant by it. This point necessitates an examination of the ‘morality of sport’, its underlying rationales, and by extension its suitability as a framing device for questions of ethics concerning doping and anti-doping. First, some conceptual clarity can be provided by considering precisely what is meant by ‘sport’ in this context.

What is Sport? Basic Definitions and Normative Theories

In order to reach a well-reasoned definition of sport which is able to inform sports ethics, it is instructive to consider different definitions of sport; the implications, advantages and disadvantages of each are considered, before a final definition is advanced. The *Cambridge English Dictionary* provides the following two definitions of sport: (i) ‘a game, competition, or activity needing physical effort and skill that is played or done according to rules, for enjoyment and/or as a job’; and (ii) ‘all types of physical activity that people do to keep healthy or for enjoyment’.¹⁵ The first of these definitions (and in particular the second part of it) is more appropriate to elite professional sport today, and therefore for the purposes of this thesis. The second definition, however, might very well be applicable to the amateur ethos and so-

¹⁴ For a discussion of WADA and CAS, see ch 3. The position WADA takes regarding the role of the ‘spirit of sport’ is arguably problematic, as mentioned above. See further, de Hon (n 10).

¹⁵ The Cambridge English Dictionary’s definition of the word ‘sport’: *Cambridge English Dictionary*, <<http://dictionary.cambridge.org/dictionary/english/sport>> accessed 1 September 2016.

called ‘Corinthian Values’ (considered in greater depth below) which were instrumental in the development of sports ethics generally, and for example the current anti-doping regime specifically.¹⁶ These values still retain considerable influence and are evident in the status quo, remaining entrenched within the current sports governance structures and policies.¹⁷

This thesis will now consider normative – as opposed to descriptive – theories of sport; as the task of this chapter (and particularly the next) is to advance a cogent theory of sports ethics and anti-doping regulation, it is instructive to focus on theories which go beyond simply describing sport’s characteristics, and instead provide normative guidance. In this connection, Devine and Lopez Frias assert that normative theories of sport may generally be categorised as either ‘externalist’ or ‘internalist’.¹⁸ In basic terms, ‘externalist’ theories argue that sport’s values are simply derived from those of wider society, whilst ‘internalist’ theories contend that sport has its own unique ethics and values. Within these two basic categorisations we find many

¹⁶ By way of illustrative example, the International Association of Athletics Federations, which was until 2001 the International Amateur Athletic Federation, did not relax their rules regarding athlete remuneration until the 1980s. Also see, particularly on the change in values, DJ Taylor, *On The Corinthian Spirit: The Decline of Amateurism in Sport* (Vintage Digital 2010). See also, specifically, Lord Moynihan, ‘Fair Play – Is there still room for the Corinthian Spirit in sport?’ Inaugural Edward Grayson Memorial Lecture on 13 May 2009 (2011) 19(2/3) *BASL Sport and the Law Journal* 69, 72. Moynihan proposes a minor reformulation of ‘Corinthianism’ for the modern age ‘which seeks to preserve its timeless and essential values of teamwork, of sportsmanship, of fair play and fair-mindedness’ (at 80). This reformulation is not, however, evident or persuasive in the context of elite professional sport today. This journal issue centres on Edward Grayson and the ‘Corinthian Values’ which he espoused both eloquently and, in some circles, persuasively.

¹⁷ See, eg, WADA’s reference to ‘fun and joy’ etc below. Also see World Rugby Regulation 21.

¹⁸ John William Devine and Francisco Javier Lopez Frias, ‘Philosophy of Sport’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2020), <<https://plato.stanford.edu/archives/fall2020/entries/sport/>> accessed 4 November 2020.

normative theories of sport,¹⁹ but this thesis will focus now on ‘internalist’ theories for two reasons. First, this thesis takes the position (and demonstrates that) sport – particularly elite professional sport – has its own unique system of morality and ethics which differs from that of wider society. An ‘externalist’ theory is unable to account for this by focusing exclusively on values from wider society and thus fails to provide sufficient recognition of the unique characteristics of elite professional sport. The specific values within sport should inform a normative theory of sport. This leads to a practical rejection of ‘externalist’ theories and a focus on ‘internalist’ theory. Therefore, discussion of – and responses to – other ‘internalist’ theories is instructive in developing this position. Second, although ‘externalist’ theories undoubtedly retain some influence, much of the scholarship is focused on advancing cogent ‘internalist’ theories; this necessitates engagement with these theories which dominate the literature and current anti-doping regulation. For example, WADA’s normative theory can be characterised as ‘internalist’. Furthermore, it has been observed that: ‘A central task within the philosophy of sport has been to develop an adequate internalist normative theory of sport’.²⁰

Within the general philosophy of sport literature, arguably the most influential (given the amount of discussion his work in this area has garnered) definition of what a game is comes from Bernard Suits.²¹ It should also be noted that the word ‘game’ (rather than ‘sport’) is given

¹⁹ For a useful overview of normative theories of sport which includes a brief presentation of key ‘externalist’ theories and a short overview of sports philosophy, see, eg, Devine and Lopez Frias, *ibid*.

²⁰ *ibid*.

²¹ Filip Kobiela, Francisco Javier Lopez Frias and Jose Luis Perez Trivino, ‘Bernard Suits’ Legacy: New Inspirations and Interpretations’ (2019) *Sport, Ethics and Philosophy* 271, <<https://doi.org/10.1080/17511321.2019.1610489>>. This piece forms part of a 13-article special issue entitled ‘Bernard Suits’ Legacy: New Inspirations and Interpretations’; this provides an indication of his considerable influence in the field.

in the definition of sport above, thus providing an initial rationale for its discussion. However, it may be argued that not all sports are games: for example, a 100-metre sprint might be characterised as a competition or a performance, and therefore discussion of the word ‘game’ may not be sufficiently broad to encompass all sports.²² Although this may be a valid observation, the definitions above and below would also be appropriate for the example of a 100-metre sprint. Furthermore, following the *ordinary, natural meaning* or dictionary definition above, for present purposes we can consider the term ‘game’ to be sufficiently similar to the term ‘sport’. Suits defines the word sport as follows, with reference to his more comprehensive and influential definitions of games: ‘games of physical skill.’²³ Suits defining the word ‘game’ advances the following:

To play a game is to attempt to achieve a specific state of affairs [prelusory goal], using only means permitted by rules [lusory means], where the rules prohibit use of more efficient in favour of less efficient means [constitutive rules], and where the rules are accepted just because they make possible such activity [lusory attitude].²⁴

This may be considered a highly influential ‘formalist’ definition; formalism represents one of a number of competing ‘internalist’ theories of sport.²⁵ Imbrišević defines formalism as the position that ‘the formal rules of a game are its most important element’.²⁶ ‘Informalism’

²² See, eg, Bernard Suits, ‘Tricky Triad: Games, Play, and Sport’ (1988) 15 *Journal of the Philosophy of Sport* 1, <<https://doi.org/10.1080/00948705.1988.9714457>>.

²³ *ibid* 2.

²⁴ Bernard Suits, *The Grasshopper: Games, Life and Utopia* (University of Toronto Press 1978) 41.

²⁵ For an overview of normative theories of sport see, eg, Devine and Lopez Frias (n 18).

²⁶ Miroslav Imbrišević, ‘Suits on Strategic Fouling’ (2019) 13 *Sport, Ethics and Philosophy* 307, <<https://doi.org/10.1080/17511321.2019.1584827>>. There are other definitions, such as ‘broad internalism’ and ‘conventionalism’; for discussion of these points in the context of rules in sport, see, eg, Daniel T Durbin,

describes a broad class of theories which offer a response to ‘formalism’, seeking to address its perceived shortcomings. There are a number of theories within this broad classification, such as ‘broad internalism/interpretism’,²⁷ ‘interpretive broad internalism’,²⁸ ‘shallow conventionalism’²⁹ and ‘deep conventionalism’.³⁰ In order to understand and examine the spirit of sport, some consideration of these normative theories of sport is instructive. However, before any detailed discussion regarding the merits of ‘informalist’ theories, a key preliminary observation should be made: sport needs rules to function, regardless of what they permit, prescribe and proscribe. ‘Formalism’ expressly acknowledges and embraces this; something which is regarded even by critics as an advantage.³¹ However, it can be criticised as being too focused on rules and therefore providing insufficient normative guidance for numerous

‘Unwritten Rules and the Press of Social Conventions’ (2018) 12 *Sport, Ethics and Philosophy* 416 <<https://doi.org/10.1080/17511321.2018.1497080>>.

²⁷ See, eg: Robert L Simon, ‘Internalism and Internal Values in Sport’ (2000) 27 *Journal of the Philosophy of Sport* 1, <<https://doi.org/10.1080/00948705.2000.9714586>>; JS Russell, ‘Broad internalism and the moral foundations of sport’ in William J Morgan (ed), *Ethics in Sport* (2nd edn, Human Kinetics 2007).

²⁸ Eric Moore, ‘Against deep conventionalism’ (2018) 45 *Journal of the Philosophy of Sport* 228, <<https://doi.org/10.1080/00948705.2018.1497513>>.

²⁹ Fred D’Agostino, ‘The ethos of games’ (1981) 8 *Journal of the Philosophy of Sport* 7, <<https://doi.org/10.1080/00948705.1981.9714372>>.

³⁰ William Morgan, ‘Conventionalism defended: a reply to Moore’ (2019) 46 *Journal of the Philosophy of Sport* 98, <<https://doi.org/10.1080/00948705.2019.1571924>>.

³¹ See, eg, William J Morgan, ‘Broad Internalism, Deep Conventions, Moral Entrepreneurs, and Sport’ (2012) 39 *Journal of the Philosophy of Sport* 65, <<https://doi.org/10.1080/00948705.2012.675069>>.

considerations beyond the level of the formal rules. Thus, theories which appeal to overarching norms, referred to as ‘meta-norms’ by Eylon and Horowitz, are considered.³²

‘Internalists’, for example Russell, contend that ‘rules should be interpreted in such a manner that the excellences embodied in achieving the lusory goal of the game are not undermined but maintained and fostered’.³³ As indicated by the name, the key claim here is that sport is not simply defined by its written rules – instead key principles and values which should be promoted come from inside sport. There are different internalist approaches here; for example, in the thesis offered by Russell, these values can also be found both inside and outside sport.³⁴ In Simon’s internalist theory, they cannot.³⁵ These theories necessitate an appeal to the spirit of sport, with reference to what we are seeking to promote, such as the concept of excellence.

Conventionalist theories, such as the ‘shallow conventionalism’ advanced by D’Agostino,³⁶ and ‘deep conventionalism’ advanced by Morgan,³⁷ appeal to conventions as a major normative force. There is also a theory of ‘practiceism’, which seeks to address what its proponents view as ‘the incompatibility problem’, but only applies to deliberate rule-breaking.³⁸

³² Yuval Eylon and Amir Horowitz, ‘Games, Rules, and Practices’ (2018) 12 *Sport, Ethics and Philosophy* 241, <<https://doi.org/10.1080/17511321.2017.1334696>>.

³³ JS Russell, ‘Are Rules All an Umpire Has to Work With?’ (1999) 26 *Journal of the Philosophy of Sport* 27, 35, <<https://doi.org/10.1080/00948705.1999.9714577>>.

³⁴ See, eg, Russell, ‘Broad internalism and the moral foundations of sport’ (n 27) 52.

³⁵ Simon, ‘Internalism and internal values in sport’ (n 27).

³⁶ D’Agostino (n 29).

³⁷ Morgan, ‘Broad Internalism, Deep Conventions’ (n 31).

³⁸ Eylon and Horowitz (n 32).

These normative theories will be discussed below as they relate to the spirit of sport. At this juncture, as sport by definition needs at least some rules to function, detailed discussion of these rules in sport is instructive.

The Rules of Sport

As noted in the previous section concerning definitions of sport, one of the defining characteristics of sport is the presence of ‘rules’ which govern participation. Sport needs these rules to operate; if there are no rules, then the activity cannot be classed as sport. In this connection, an argument can be made that if the rules are violated fundamentally, then the activity ceases to be sporting; this view is consistent with formalist theories. Rules are therefore a key component of sport, the importance of which should not be underestimated. In considering whether (or not) an activity is sporting it is necessary to consider the rules from several perspectives: the actual rules governing what conduct is or is not permitted, and thus characterised as proper participation, the type of breach, and the implications when these rules are breached, ie, the penalties for breaching these rules.

The concept of rules has been considered extensively in the sports philosophy and sports ethics literature.³⁹ Considering the numerous different approaches to rules helps to provide a more comprehensive understanding of what sport may value, and thus the ‘spirit’ and ‘morality’ of sport. One preliminary distinction should be drawn here between codified and uncoded rules. In the case of the former, a further distinction can be drawn between constitutive and regulative rules. Durbin explains, following Meier and Suits: ‘constitutive rules are those rules which establish the pre-lusory goals of sport and, hence, define the sport

³⁹ The literature concerning rules in sport is vast. Many articles consider the major competing normative theories and provide responses to them, eg, Eylon and Horowitz (n 32).

while regulative rules specify penalties to be applied when constitutive rules are broken and, hence, regulate play'.⁴⁰ It is also worth noting that there are many 'custom and practice' type considerations here, especially in the context of tolerated rule-breaking, and the concept of the 'professional foul' – 'conventionalist' theorists, for example, believe these custom and practice considerations form part of a broader structure of rules. Taking an example from rugby union, 'killing the ball',⁴¹ ie, in basic terms preventing an opposing player from competing for possession of the ball, would be considered a 'professional foul'. Suits contends that he is able to account for this type of breach within his 'formalist' theory:

To break a rule of skill is usually to fail, at least to that extent, to play the game well, but to break a constitutive rule is to fail (at least in that respect) to play the game at all. (There is a third kind of rule in some games which appears to be unlike either of these. It is the kind of rule whose violation results in a fixed penalty, so that violating the rule is neither to fail to play the game nor [necessarily] to fail to play the game well, since it is sometimes tactically correct to incur such a penalty [eg in hockey] for the sake of the advantage gained. But these rules and the lusory consequences of their violations are established by the constitutive rules and are simply extensions of them.)⁴²

However, 'conventionalist' theories do not accept this, and appeal to convention, context and history as normative devices beyond the formal written rules. These are major factors in influencing behaviour which cannot be disregarded, and indeed should be welcomed. Context, and identifying areas of overlapping agreement are therefore important to conventionalists.

⁴⁰ Durbin (n 26).

⁴¹ BBC Sport Academy, 'Killing the ball', <http://news.bbc.co.uk/sportacademy/hi/sa/rugby_union/rules/referee_signals/newsid_4030000/4030149.stm> accessed 20 July 2020.

⁴² Suits, *The Grasshopper* (n 24) 38.

Within obedience of and respect for rules, and in examining different sorts of breaches, we can distinguish rules-breaches that defy convention, practice and the spirit of sport, and those that do not. For example, if the infringement is comparatively minor, such as an accidental forward pass in rugby, this does not suggest that the offending player is engaged in a materially different activity, but rather that the player has made an error whilst playing the sport. The consequence of this error, as dictated by the formal written rules, is a scrum where the opposing team has the advantage of putting the ball in and is thus more likely to gain possession from the scrum. A breach of the rules of this nature generally does not undermine the point or spirit of the sport assuming it is not deliberate and repeated, and the penalty in this case takes place on the pitch and during the game, as opposed to off the field of play and after the game. Moreover, it is accepted that this can and will happen; it is a part of the game, not a deliberate violation of its purpose or spirit, but often rather an accidental consequence of playing the sport or game. This example is meaningfully different from, for example to borrow from Murray, a cyclist using a motor to ascend a steep hill.⁴³ This is not part of the sport, cannot happen accidentally, and would arguably constitute a different sport entirely (motorbike racing), or at least not the same sport as it is for those following the rules. A breach of this nature may be considered to undermine the purpose and value of the sport, ie, its spirit. It will thus attract a significant punishment as a deterrent. This punishment generally does not only take place contemporaneously; whilst it will likely result in instant disqualification, there may also be a further hearing concerning the appropriate sanction. Rules are an integral part of sport, and the fundamental basis for these rules is therefore significant, thus warranting further examination.⁴⁴

⁴³ Thomas H Murray, *Good Sport: Why our Games Matter – and How Doping Undermines Them* (OUP 2018) 55.

⁴⁴ As noted above, the literature on rules in sport is enormous, and much of it is beyond the scope of this thesis.

In summary, there is more to the notion of rules in sport that might be assumed initially. There are many different and often conflicting ideas regarding (dis)obedience and breaches of these rules and the material relevance of these breaches. In some cases breaches may be considered as an accepted part of the game, and in other cases they may be regarded as literal game changers and deemed unacceptable. It is important that these factors are accounted for sufficiently in a credible morality of sport, as they have a major impact on the spirit of sport; ie, to understand the spirit of sport we must look beyond the formal written rules to how they operate in reality. A ‘broad internalist’ perspective, which makes use of both rules and conventions, but also includes ‘underlying principles that might be embedded in overall theories or accounts of sport as a practice’⁴⁵ provides the most effective normative theory of sport for understanding rules and their operation. Using this theory, we are able to account for – and gain a more comprehensive understanding of – the spirit of sport and its composition.

A Modified Definition of Sport to Inform a New Morality of Sport

The general dictionary definition has been introduced already, as has an influential definition provided by Suits. However, for the purposes of this thesis it is instructive to provide a more specific and appropriate definition which can inform a new morality of sport. To this end, the following more detailed and specific definition is advanced from the influential sports philosopher Warren Fraleigh:

[A] sports contest (is) an agreed-upon event in which two or more humans oppose one another in attempting to better the other's performance on the same test of

⁴⁵ Simon, ‘Internalism and Internal Values in Sport’ (n 27) 7.

moving mass in space and time by means of bodily moves which exhibit developed motor skills, physiological endurance, and socially approved tactics and strategy.⁴⁶

This is a comprehensive and detailed definition, which offers more for our purposes than, for example, the basic dictionary definition provided above, although the dictionary definition helps us to understand what is commonly meant by the word ‘sport’, ie, its ordinary, natural meaning. It is worth establishing this basic position before considering more specialist and esoteric definitions. Fraleigh’s definition can, however, benefit from some modifications for our purposes; therefore, some amendments will be considered.

The rules of sport mean that the ‘event’ is essentially ‘agreed upon’, at least in theory, in that there are formal prescriptions in the form of rules of the game which must be followed, ie, constitutive rules, and also regulative rules. However, as we have seen from the analysis above, rules on paper and rules in practice can, and frequently do, differ. Certain rules may be broken or bent, and some penalties often simply viewed as costs one must pay.⁴⁷ In the context of elite professional sport, with its emphasis on winning, rules may be viewed differently from how they are viewed in amateur sports – this has implications for the conception and ethos of sport.⁴⁸ As highlighted above, one important and relevant example of how certain rules can be breached is that of the ‘professional foul’, for example the defending team ‘killing’ the ball, or slowing the ball down for the next phase of attack in rugby union (thus giving themselves longer to regroup, and making it harder for their opponents to score), and time-wasting tactics,

⁴⁶ Warren P Fraleigh, ‘Why the Good Foul Is Not Good’ in William J Morgan and Klaus V Meier (eds), *Philosophic Inquiry in Sport* (Human Kinetics 1992) 267.

⁴⁷ See further, eg, Eylon and Horowitz (n 32).

⁴⁸ For comment on this issue, see, eg, Morgan, ‘Broad Internalism, Deep Conventions’ (n 31).

such as ‘taking a knee’ in sports such as American football, which limits the time in which the opponents can score points.

In light of these points, a second potential amendment to Fraleigh’s definition given above may be necessary: ‘the same test’ might be supplemented with the words ‘or similar’; different tactics can mean playing in a very different way (for example, playing very defensively or very aggressively) so it might not be precisely the same test, but will obviously be highly similar as points will be scored in the same way, and generally the aim will remain to get the most points etc, and these types of tactics could be employed by both parties or teams. These considerations are important because they may not be accurately reflected simply by studying the rules on paper but are nonetheless highly relevant and should be accounted for within the wider ethic of sport; they are essential to the nature of sport, and therefore by extension its norms, spirit and morality.

In addition to ‘physiological endurance’, it might be argued that most sports also require, to a greater or lesser extent, some psychological strength and endurance. Indeed, this ‘winning mentality’ has attracted much interest and significant media coverage, including many popular books.⁴⁹ For example, it has been observed that:

An athletic event is a struggle for supremacy in which every coach and athlete seeks to emerge victorious. The common notion in sports thus equates success with

⁴⁹ See, amongst others, those by Clive Woodward, the England Rugby 2003 World Cup winning coach, and Dave Alred (Jonny Wilkinson’s mental performance coach): Clive Woodward, *Winning*; Dave Alred, *The Pressure Principle*.

winning (ie, scoring more points, runs, or goals than the opponent) and failure with losing.⁵⁰

Finally, the ‘socially approved’ element might also be questioned; not all tactics deployed are socially approved. In order to consider this point, first we must establish what ‘socially approved’ means in this context, and from whom approval might be sought. Some situations are more clear cut: for example, the ‘Bloodgate’ scandal involving Harlequins rugby union team provides an example of an activity which was not socially acceptable, and for which the team was heavily sanctioned.⁵¹ In short, in the last five minutes of a European Cup quarter final, a player was instructed to – and duly used – a fake blood capsule in order to feign a blood injury and be substituted in favour of a kicker; this was a tactical decision from the coach to provide the team with a much needed kicking option, and therefore a chance of winning a very close and significant game with a kick. The point here is that some violations are clearly socially unacceptable and should not form part of sport; this also demonstrates the impact that this ‘social acceptability’ consideration can have, especially in the context of highly commercialised sport where unacceptability could lead to losses in revenue.⁵² However, it is acknowledged that social acceptability can and does evolve over time; some of the tactics routinely used today (and tacitly condoned) such as ‘killing the ball’ in rugby union and ‘taking a knee’ in American football are relatively recent developments. This suggests that the idea of

⁵⁰ Sean P Cumming and others, ‘Is Winning Everything? The Relative Contributions of Motivational Climate and Won-Lost Percentage in Youth Sports’ (2007) 19 *Journal of Applied Sport Psychology* 322, <<https://doi.org/10.1080/10413200701342640>>.

⁵¹ Mick Cleary, ‘Bloodgate: How the scandal unfolded when Harlequins met Leinster in April 2009’ *Daily Telegraph* (5 December 2014), <<https://www.telegraph.co.uk/sport/rugby-union/2014/12/05/bloodgate-how-the-scandal-unfolded-when-harlequins-met-leinster-in-april-2009/>> accessed 1 September 2016.

⁵² Society can be considered to be a stakeholder within the Rawls-influenced framework for sports ethics outlined later in this chapter.

social acceptability is necessarily partial and contingent, rather than fixed and universal. It can form part of the equation, but it is only one factor amongst many others. Whilst some practices begin as socially unacceptable but gradually become more accepted over time, the ‘Bloodgate’ example is an occasion on which the rules were unequivocally broken in a manner unlikely to ever become ‘socially approved’. The ‘Bloodgate’ incident is also an example of the ‘win at all costs’ mentality, but differs materially from the examples above, such as the ‘professional foul’. Factors such as the nature (using an urgent medical incident) and level of deceit differentiate it from some of the other tactics detailed above which are employed routinely. It is important that a cogent theory of sports ethics can establish how and why this should be prohibited whilst the others may not be, ie, where ethically defensible lines may be drawn. Furthermore, there may be practices which are not socially accepted, but are not necessarily directly prohibited by the rules – for example, ‘parking the bus’ in football (soccer), ie, putting all 11 players behind the ball in order to defend rather than attack and prevent the opposing team from scoring a goal, without seeking to score themselves.⁵³

Moreover, we must also consider to whom the practice should be socially acceptable; is it to the distinct, to borrow a term used by academics such as Jones ‘practice community’,⁵⁴ or something broader encompassing other stakeholders, or even society as a whole? There may be instances where it might be necessary to make determinations that contradict the general view held in society. Therefore, the latter may well be too demanding, but the acceptability to stakeholders, particularly key stakeholders, is a more promising – although not necessarily

⁵³ See: <<https://idioms.thefreedictionary.com/parking+the+bus>> accessed 20 November 2020.

⁵⁴ Carwyn Jones, ‘Doping in Cycling: Realism, Antirealism and Ethical Deliberation’ (2010) 37 *Journal of the Philosophy of Sport*, <<http://dx.doi.org/10.1080/00948705.2010.9714768>>.

definitive – measure. This point is developed later in this chapter and the next, in the course of detailing an approach to sports ethics derived from the work of John Rawls.

Therefore, we may reformulate Fraleigh’s definition for our purposes, making the following amendments (emphasis added for ease of reference):

[A] sports contest (is) a **theoretically** agreed-upon event in which two or more humans oppose one another in attempting to better the other’s performance on the same **or similar rule-governed** test of moving mass in space and time by means of bodily moves which exhibit developed motor skills, **psychological and** physiological endurance, and **targeted** tactics and strategy.

This provides a clear definition of what a ‘sports contest’ is, which can help to inform the spirit of sport. However, the question of how we might define the ‘spirit of sport’ requires further consideration. First it may be highlighted that sport generally, and a ‘sports contest’ might be different in that there is more to sport than simply competing; for example, training and recovery are integral to both the ‘sports contest’ and the spirit of sport. Although the act of competing may be considered salient and definitive, in elite professional sport it would not be possible without training and recovery. The ‘agreed upon’ element of the definition above is useful; identifying areas of agreement is helpful to the process of providing alternative solutions, which are advanced in the following chapter. The winning mentality, ie, the importance of, and premium placed on winning (as contrasted with simply taking part) suggests a specific ‘spirit’ of sport – one in which this prevailing ethos is recognised and accounted for; one such conception of the spirit of sport advanced in the next chapter.

Finally, in order to develop a credible morality of sport, the purpose (or purposes) of elite professional sport, as contrasted for example with amateur or participatory sport, must

also be considered. There have been suggestions that sport can be beneficial for society,⁵⁵ for example by promoting ‘national pride’,⁵⁶ ‘social integration’ and ‘happiness’.⁵⁷ These elements can, together with others examined in the next section, be considered to be part of its purpose.

The Purpose(s) of Elite Professional Sport

The examination of different definitions of sport above has served to provide an understanding of its formal components as an activity, informed by reference to practical understandings, such as how the ‘rules’ of games work in practice and relate to wider societal consideration. In order to establish the spirit of sport, we must go beyond simply understanding it as a practical pursuit – we must consider its purpose. However, defining its purpose (and indeed its spirit) are not straightforward tasks, with competing ideological perspectives evident in both. This polarised disagreement can be illustrated with reference to the work of two prominent academics: Thomas Murray⁵⁸ and Julian Savulescu.⁵⁹

For Murray, one of the fundamental purposes of sport can be elucidated as follows: ‘excellent performance as the joint product of natural talents and the dedication required to

⁵⁵ See, eg, Moynihan (n 16) 77; see also, discussion of the Olympics in London in 2012.

⁵⁶ Jan Haut and others, ‘Heroes at Home, Suspects Abroad? National and International Perceptions of Elite-Sports Success’ (2019) 37 *Sociology of Sport Journal* 133, <<https://doi.org/10.1123/ssj.2018-0157>>.

⁵⁷ Kirstin Hallmann, Christoph Breuer and Benedikt Kühnreich, ‘Happiness, pride and elite sporting success: What population segments gain most from national athletic achievements?’ (2013) 16 *Sport Management Review* 226.

⁵⁸ See, eg, Thomas H Murray, ‘Doping and anti-doping: An inquiry into the meaning of sport’ in Mike McNamee and William J Morgan (eds), *Routledge Handbook of the Philosophy of Sport* (Routledge 2015).

⁵⁹ See, eg, Julian Savulescu, ‘Doping Scandals, Rio and the future of human enhancement’ (2016) 30 *Bioethics* 300, <<https://doi.org/10.1080/17511321.2016.1203095>>.

perfect those talents'.⁶⁰ Murray contends that sport is about improving what we have (ie, our innate abilities) in certain specific ways, for example via extensive training in its various forms both physical and mental, and diligent attention to nutrition and other recovery methods. The normative concept of 'virtue' is relevant here, with some methods of improving performance (such as training and nutrition) deemed virtuous and therefore acceptable, and others (such as anabolic steroids) which are not generally deemed impermissible. As we can see, this normative position has a major bearing on the spirit of sport. Many practices or techniques which are not considered 'virtuous' will be inconsistent with Murray's view of the spirit of sport. Consequently, the idea of enhancement (as contrasted for example with treatment or therapy) is viewed with scepticism, with only certain limited forms being allowed.⁶¹ Indeed, the concept of enhancement and specifically what should fall into this broad category is also contested. Some forms of what is commonly referred to as enhancement, such as the nutritional supplement creatine are deemed permissible by regulators (both WADA and the NFL, and by commentators such as Murray), whereas exogenous hormones taken to enhance (as opposed to treat within certain tightly controlled parameters) are not.⁶² Generally, broad classes of enhancement, such as pharmacological enhancements are prohibited.⁶³ For Murray, therefore, the purpose of sport is to perform as well as possible within certain constraints, such as the innate abilities we are born with, and not to seek to transcend them.

As noted above, this ideological position and view of the spirit of sport is not, however, universally accepted. From an opposing ideological perspective, for Savulescu and colleagues: 'Performance enhancement is not against the spirit of sport; it is the spirit of sport. To choose

⁶⁰ Murray, *Good Sport* (n 43) 149.

⁶¹ See also the treatment versus enhancement discussions in the bioethical chapters of this thesis.

⁶² Questions raised by these inconsistencies are examined in the bioethical chapters of this thesis.

⁶³ WADA Code 2019, Prohibited List.

to be better is to be human'.⁶⁴ Savulescu and colleagues do not accept that we should be limited by the 'natural', and believe that a more creative role can be played by athletes (and by extension their support staff). The purpose of sport is to perform as well as possible, and using enhancements is perfectly legitimate; indeed, the spirit of sport requires athletes to enhance themselves in many ways in pursuit of this performance. Performance can be enhanced in a myriad of ways, provided the risks are reasonable and in keeping with the nature of the sport. A major purpose of sport is to push the limits of performance to new heights.

These points will be revisited in the following bioethical chapters, in the course of analysing the intellectual coherence of key distinctions and dichotomies, such as the treatment versus enhancement distinction. It is essential to appreciate the tensions between these competing ideological perspectives as they play a pivotal role in identifying and understanding competing versions of the spirit of sport, and the different values each seeks to promote.

Sporting Values: An Introduction

Identifying and enumerating different statements of sport's purpose helps to provide an understanding of its values. However, providing a definitive list of sport's values is not a straightforward task. Murray correctly highlights that 'There is no single, authoritative list of sporting values'.⁶⁵ This statement is hard to dispute, as consensus on sporting values has not been, and likely will not be, reached. There are numerous reasons for this, and the following

⁶⁴ J Savulescu, B Foddy and M Clayton, 'Why we should allow performance enhancing drugs in sport' (2004) 38 *British Journal of Sports Medicine* 666, <<http://dx.doi.org/10.1136/bjism.2003.005249>>.

⁶⁵ T Murray, 'Preserving Sporting Values and Ethics: The relationship between anti-doping and sport values and ethics' IOC paper (2010) <<http://unesdoc.unesco.org/images/0018/001884/188404e.pdf>> accessed 24 August 2016.

does not represent an exhaustive list, but merely some of the most evident reasons for the lack of consensus. First, there are many different sports and varieties of sport, and what may be appropriate for one may not be appropriate for another.⁶⁶ Different sports can be very different from one another, and thus test and value different qualities, yet still fall within the broad classification of the word ‘sport’. Second, even within the same or similar sports there is significant ethical disagreement concerning what, for example, we should value about it, its purpose, what is (or is not) socially acceptable to stakeholders, and what sort of behaviour should be promoted.⁶⁷ Third, the fact sport exists across continents and countries with different cultures and different values makes the task of providing one definitive set of harmonised values yet more difficult.⁶⁸ Fourth, sport exists across changing times; as times change, values must be able to evolve. A policy which was appropriate 20 years ago may not be appropriate today.

There have, however, been some attempts at formulating lists of sporting values, and it is instructive to find areas of consensus within these different articulations of sporting values. In this connection, UNESCO, for example, in the (November 2015 Revised) International Charter of Physical Education, Physical Activity and Sport (1978) provides an extensive account of the values it seeks to promote, ‘values such as fair play, equality, honesty, excellence, commitment, courage, teamwork, respect for rules and laws, respect for self and

⁶⁶ See, eg, Julian Savulescu, ‘A Doping Manifesto’ (*aeon*, 11 June 2014), <<https://aeon.co/essays/why-we-should-legalise-most-doping-in-sport>> accessed 13 September 2018.

⁶⁷ For an illustrative example, see the discussion above in ‘The Purpose(s) of Elite Professional Sport’ concerning the disagreements between leading sports doping academics Murray and Savulescu.

⁶⁸ For observations regarding these difficulties, see Dag Vidar Hanstad, Eivind Å Skille and Sigmund Loland (2010). ‘Harmonization of anti-doping work: myth or reality?’ (2010) 13 *Sport in Society* 418, <<https://doi.org/10.1080/17430431003588036>>.

others, community spirit and solidarity, as well as fun and enjoyment'.⁶⁹ This definition has clearly been influential in WADA's jurisprudence; it is strikingly similar to the rationales for anti-doping policies WADA provides.⁷⁰ It is also worth noting that this statement from UNESCO may be considered to be targeted at sport in general, ie, both amateur or participatory sport, and also elite professional sport, in contrast to this thesis which focuses on the latter. Moreover, as noted above (for example in the discussion of rules) some of these values are not immediately evident in today's elite professional sport. For example, much of the 'respect', be it for 'rules and laws', or 'others', is not apparent in this context, but rather the reverse, ie, it is often the case (as demonstrated above in the rules section of this chapter) that some rules are regarded merely as inconvenient hurdles to be negotiated which are sometimes necessary to bend or break in the pursuit of success.⁷¹ The examples given above, such as the 'professional foul' in rugby, and specifically in the context of anti-doping, the way in which Therapeutic Use Exemptions (TUEs) may be used to demonstrate this point.⁷² However, following David Hume, just because things happen to be this way in reality, and the rules are viewed in this manner, it does not follow that they should be.⁷³ The relationship between facts and values – is and ought

⁶⁹ See: <http://portal.unesco.org/en/ev.php-URL_ID=13150&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 16 September 2016.

⁷⁰ See the 'Regulatory Structure and Framework' chapter, and the 'Regulatory Themes and Statements of Values' chapter in this thesis.

⁷¹ See, eg: Eylon and Horowitz (n 32); Durbin (n 26). These points are discussed later in the thesis in ch 8, under the heading of 'Performance-Enhancing Drugs (PEDs)'.

⁷² See also, eg, Paul Dimeo and Verner Møller, *The Anti-Doping Crisis in Sport: Causes, Consequences, Solutions* (Routledge 2018) 153–54. It has been noted that the TUE process has been prone to abuse. See also ch 8 under the heading of 'Performance-Enhancing Drugs (PEDs)'.

⁷³ See, David Hume, *A Treatise of Human Nature: A Critical Edition* (eds DF Norton and MJ Norton) (Clarendon Press 2007).

– can be questioned. We cannot necessarily derive what *ought* to be from what *is* – more reasoning is required to reach this position. These points raise (at least) two key questions for our purposes: what are the appropriate values for elite sport, and how can we promote and regulate them effectively?

One possible source of these values might be found in the Olympic Charter, specifically its ‘Fundamental Principles of Olympism’.⁷⁴ Equality and fair play are emphasised, and indeed figure prominently in almost every delineation of sports ethics, although they are generally left as vague concepts and not defined precisely, or even at all, which may or may not be considered problematic.⁷⁵ However, if some can be defined with sufficient precision, they might represent consensus (or near consensus) among key stakeholders, and may therefore help to establish some initial building blocks for an ethically robust morality of sport.

Essentially, a version of what Savulescu and colleagues term the ‘old naturalistic Athenian vision of sport’, or the ‘Corinthian Value’ derived spirit of sport is championed by WADA and by academics such as Murray.⁷⁶ This ideological position is entrenched in the current regulatory system. Indeed, Murray’s words are incorporated into the WADA Code: ‘the pursuit of human excellence through the dedicated perfection of each person’s natural talents’.⁷⁷ Although academics such as Mike McNamee suggest that WADA do not attempt to

⁷⁴ See: <https://stillmed.olympic.org/Documents/olympic_charter_en.pdf> accessed 12 September 2016.

⁷⁵ For analysis of this approach, see further, eg, Mike McNamee, ‘Doping scandals, Rio, and the future of anti-doping ethics. Or: what’s wrong with Savulescu’s recommendations for the regulation of pharmacological enhancement in sport’ (2016) 10 *Sport, Ethics and Philosophy* 113, <<https://doi.org/10.1080/17511321.2016.1203095>>.

⁷⁶ Murray, *Good Sport* (n 43).

⁷⁷ WADA Code 2019.

define (expressly) the spirit of sport,⁷⁸ this statement regarding the purpose of sport, and by extension its values, is a reasonable interpretation of WADA's vision of sport and what it represents. McNamee is critical of 'the position of excessive plasticity or conceptual vagueness of the spirit of sport',⁷⁹ as the 'concept's openness or under-determination allows for misreadings',⁸⁰ as for example he believes is the case with Savulescu and colleagues. McNamee is correct to criticise this ambiguity from WADA, and to note that it is unnecessary, despite the potential advantage (in the form of flexibility) WADA might gain from the defeasibility-based approach.⁸¹ However, this does not mean that the meaning inferred by Savulescu and colleagues is incorrect.

To explain their position, Savulescu and colleagues initially draw a distinction between human sport and sport involving animals:

The goal of a horse race is to find the fastest horse. Horses are lined up and flogged. The winner is the one with the best combination of biology, training, and rider. Basically, this is a test of biological potential. This was the old naturalistic Athenian vision of sport: find the strongest, fastest, or most skilled man.⁸²

For WADA and academics such as Murray, elite professional sport can be viewed, at least in part, as a 'test of biological potential', ie, the influence of natural talents, and their pivotal role in sporting success. This leads to a more restrictive vision than that outlined by Savulescu and

⁷⁸ McNamee, 'Doping scandals' (n 75).

⁷⁹ *ibid* 114.

⁸⁰ Mike McNamee, 'The Spirit of Sport and the Medicalisation of Anti-Doping: Empirical and Normative Ethics' (2012) 4 *Asian Bioethics Review* 374, 379.

⁸¹ See also, WADA Code 2019.

⁸² Savulescu, Foddy and Clayton (n 64).

colleagues, who place emphasis on creativity and autonomy as important additional sporting values which should be promoted:⁸³

Training aims to bring out this potential. Drugs that improve our natural potential are against the spirit of this model of sport. But this is not the only view of sport. Humans are not horses or dogs. We make choices and exercise our own judgment. We choose what kind of training to use and how to run our race. We can display courage, determination, and wisdom. We are not flogged by a jockey on our back but drive ourselves. It is this judgment that competitors exercise when they choose diet, training, and whether to take drugs. We can choose what kind of competitor to be, not just through training, but through biological manipulation. Human sport is different from animal sport because it is creative. Far from being against the spirit of sport, biological manipulation embodies the human spirit – the capacity to improve ourselves on the basis of reason and judgment. When we exercise our reason, we do what only humans do.

The result will be that the winner is not the person who was born with the best genetic potential to be strongest. Sport would be less of a genetic lottery. The winner will be the person with a combination of the genetic potential, training, psychology, and judgment. Olympic performance would be the result of human creativity and choice, not a very expensive horse race.⁸⁴

The concept of ‘excellence’ is frequently referenced in debates about sporting values; it is a prominent theme on opposing sides of the debate. John William Devine, following the virtue-based conception of sports ethics advanced by academics such as McNamee,⁸⁵ is concerned with the ‘balance of excellences’.⁸⁶ The argument here is that using performance-enhancing drugs in the manner outlined by Savulescu and colleagues (Devine’s article is seemingly written in direct response to it), would disrupt this ‘balance of excellences’, potentially

⁸³ Issues of this nature, such as creativity and gratitude, are also addressed in depth in the following bioethical chapters.

⁸⁴ Savulescu, Foddy and Clayton (n 64).

⁸⁵ See, eg, Léa Cléret and Mike McNamee, ‘Olympism, The Values Of Sport, and the will to Power: De Coubertin and Nietzsche Meet Eugenio Monti’ (2012) 6 *Sport, Ethics and Philosophy* 183.

⁸⁶ John William Devine, ‘Doping is a threat to sporting excellence’ (2011) 45 *British Journal of Sports Medicine* 637, <<http://doi:10.1136/bjism.2009.070862>>.

undermining the purpose of sport, and therefore failing to reward the values the sport is seeking to promote. Prominent academics such as Michael Sandel are also cautious about disrupting this balance.⁸⁷ Sandel expresses some anxieties about a loss of athletes' agency, but in direct contrast to Savulescu and colleagues is more concerned about the prospect of 'hyperagency', ie, the drive to shape nature how we see fit, and the resultant loss in gratitude at what we have been given.

These debates demonstrate some of the difficulties in identifying the purpose of sport, the factors integral to success, and the values it seeks to promote. However, establishing this is necessary as it serves to inform questions of regulation. The most influential source of values – the so-called 'Corinthian Values' are now examined in the context of elite professional sport.

Are the 'Corinthian Values' Appropriate for Elite Professional Sport Today?

In order to provide a 'thick' substantive definition of sport, we must consider different accounts of sporting values. There is a tension between the underpinning values of the so-called Olympic brand⁸⁸ which is evident in the somewhat contradictory statements concerning Olympic aims

⁸⁷ See: Michael J Sandel, *The Case Against Perfection: Ethics in the Age of Genetic Engineering* (The Belknap Press of Harvard University Press 2007); Michael J Sandel, 'The Case against Perfection: What's Wrong with Designer Children, Bionic Athletes, and Genetic Engineering?' (1993) 292(3) *Atlantic Monthly* 50, <<https://www.theatlantic.com/magazine/archive/2004/04/the-case-against-perfection/302927/>>.

⁸⁸ See, eg: the 'Fundamental Principles of Olympism', Olympic Charter, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.268459313.1995601088.1566432374-672450083.1524859143> accessed 12 September 2016; Simon Chadwick, 'To clean up the Olympic brand, the IOC must restore trust' (*The Conversation*, 4 August 2016), <<http://theconversation.com/to-clean-up-the-olympic-brand-the-ioc-must-restore-trust-63305>> accessed 24 August 2016.

and values. The frequently quoted words of Pierre de Coubertin, founder of the International Olympic Committee (IOC), and the man credited with the achievement of creating the modern Olympic Games provide an indication of this tension: ‘The most important thing in the Olympic Games is not winning but taking part; the essential thing in life is not conquering but fighting well’.⁸⁹ This, and the closely related ‘Corinthian Values’ championed by those such as Edward Grayson,⁹⁰ are seemingly at odds with the current ‘win at all costs’ mentality of elite sport, characterised by professionalism, the perpetual quest for winning, and associated constant drive for performance improvement.⁹¹ The influence of de Coubertin is evident in the work of one prominent philosopher of sport: Robert L Simon. Simon advances a theory of sport characterised by a ‘Mutual Quest for Excellence’ (the MQE theory or thesis), which can be summarised as follows:

The principal value of athletic competition lies not in winning but in overcoming the challenge presented by a worthy opponent. On this view, good competition presupposes a cooperative effort by competitors to generate the best possible challenge to each other.⁹²

⁸⁹ BBC, ‘Ethics in Sport’, <<http://www.bbc.co.uk/ethics/sport/overview/introduction.shtml>> accessed 13 September 2017.

⁹⁰ See further, eg, Edward Grayson, ‘Sport and the Law: A Return to Corinthian Values?’ (2011) 19(2/3) *BASL Sport and the Law* 53.

⁹¹ See, eg, Ask Vest Christiansen, Christiansen “‘We are not sportsmen, we are professionals’: Professionalism, doping and deviance in elite sport’ (2010) 7 *International Journal of Sport Management and Marketing* 91, <<https://doi.org/10.1504/IJSMM.2010.029714>>. There are numerous further practical examples of this. As a representative example, Team Sky’s highly successful ‘marginal gains’ system: William Fotheringham, ‘Tour de France: how Team Sky climbed to the top and stayed there’ *Guardian* (21 July 2013), <<https://www.theguardian.com/sport/2013/jul/21/tour-de-france-team-sky-froome>> accessed 14 November 2016.

⁹² Simon, *Fair Play* (n 1) 27.

There are many prominent examples of this in sport – for example the many closely fought tennis matches between Rafael Nadal and Roger Federer. Cleret and McNamee consider this line of reasoning in the context of the philosophy of de Coubertin, highlighting some key differences between it and current elite professional sport. They note that, in contrast with de Coubertin’s concept of excellence characterised as ‘Hellenistic perfectionism’:

In today’s world of Olympic sport competition, the focus of the entire system is on victory. What is important is to finish first, no matter how one achieves this with regard to excellence. The one who will get the medal, the sponsors, the media attention, the future selection in teams and squads and events and competition will be the one who wins, and not necessarily the one who is excellent.⁹³

Considering Simon’s MQE theory raises (at least) two significant points: first, that Simon views sports competition on a contractual, specifically a social contractual basis, which (if we assume Simon is correct) lends support to the idea of using a contract-based theory to develop a credible morality of sport; this point is explored in greater detail in the next chapter in the course of presenting an alternative morality. Second, that he believes winning is not the primary objective – an assumption which may be doubted given the importance of winning and success in modern elite professional sport.

What Precisely are the ‘Corinthian Values’?

The term ‘Corinthian Values’⁹⁴ is used throughout this thesis, and refers to amateur ideals and values which place little emphasis on winning, but focus instead on the ‘gentleman amateur’

⁹³ Cléret and McNamee (n 85).

⁹⁴ Also see further related terms, eg, ‘Corinthian Spirit’ *Oxford Reference*, <<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095639366>> accessed 31 March 2021.

taking part in sport for recreation, and as a means of instilling notions of fair play and good character amongst those involved, and also in society more broadly.

One cogent elucidation of the term ‘Corinthian Values’ as used in this thesis reads as follows:

[T]eams could behave like the Corinthians used to do, back in the 1900s. They were the totally amateur, public-school, Oxbridge team that put fair play and moral values above such sordid, vulgar things as winning. They never argued with the ref or entered any competition where there was a prize. If by chance the other team lost a man, either sent off or through injury, they immediately and voluntarily sent off one of their own men, just to keep things even.⁹⁵

These amateur ideals are – by definition – at odds within the dominant ethos of elite professional sport today, in which sport is not a hobby or a pastime designed with the main aim of inculcating socially appropriate values, but a highly commercialised industry with its own unique systems of values and governance. In this type of sport, a premium is placed on winning; indeed, this ethos can be characterised (perhaps rather too simplistically and reductively) as a ‘win at all costs’ mentality.⁹⁶

In summary, ‘Corinthian Values’ may be considered amateur ideals, focused on Victorian notions of fair play, with sport as recreation in which the outcome of the match or contest is much less important than the manner or spirit in which it is played. This can be contrasted with modern elite professional sport with its characteristic focus on winning and the continual drive to improve performance. However, despite this radical disconnect the ‘Corinthian Values’ remain highly influential. Their influence is evident in contemporary

⁹⁵ Hunter Davies, ‘The fan – Hunter Davies yearns for the Corinthian spirit’ *New Statesman* (28 March 2005), <<https://www.newstatesman.com/node/161818>> accessed 31 March 2021.

⁹⁶ See further analysis of this point, and discussion on the constraints which should be imposed on this mentality in ch 6.

articulations of sporting values, such as the ‘Fundamental Rationale for the World Anti-Doping Code’,⁹⁷ and serves as one of the rationales for the prohibition-regulatory system.

Given the reliance placed on them by the current regulators – namely WADA – they have significant normative power, despite their clear inability in practice to provide a coherent and persuasive source of normative guidance for elite professional sport. This thesis argues, therefore, that this should not be the position, and that other – more appropriate – sources of normative guidance should be sought.

It is clear that the ‘Corinthian Values’ have historically been considered fundamental foundations of sport. However, it is equally clear that there is a radical disconnect between the expression of these theoretical core values, and the reality of the present situation as evidenced by the practice and dominant understanding of what professional sport is.⁹⁸ Therefore, the next question here is whether in place of ‘Corinthian Values’ a ‘win at all costs’ ethos is ethically defensible, and something which should be condoned and actively promoted. It is one thing to acknowledge the prevailing ethos, but this does not necessarily mean we should advance a morality which seeks to promote it. In order to address these concerns, it is helpful to consider the sources of these values.

Sources of Non-Corinthian Values in Sport

There are questions regarding the relationship between the values and morals of elite professional sport and those of society more broadly, ie, societal morality, and the degree of

⁹⁷ WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’ 14.

⁹⁸ See above n 3.

influence one might have over the other.⁹⁹ One strong indication which supports the notion that sport has its own unique morality is that sport has its own systems and institutions that do not apply in society generally, ie, its own internal governance structures and disciplinary bodies applying its own codes which dictate athletes' conduct (such as anti-doping regulations). Therefore, it can be concluded that elite professional sport constitutes its own normative system, distinct from other forms of sport, such as amateur or participatory sport, and society generally. These factors contribute to a distinct system of ethics. However, sport can indeed be influenced by, and used as a means of influencing, wider society.¹⁰⁰

In this connection, it might be observed that much of Western society now appears more closely aligned with a 'win at all costs' mentality than, for example, the 'Corinthian Values'. We can see this, for example, in moves away from the welfare state particularly by political leaders such as Margaret Thatcher and Ronald Reagan, and more recently with the current Conservative government in the UK, and Republican administration in the US.¹⁰¹ This shift to the political right, with its characteristic importance placed on winning and financial success in competitive markets, is also visible in sport.¹⁰² It is clear that elements of elite professional sport are now a branch of big business; in basic terms, teams and athletes are more valuable if

⁹⁹ This is also briefly considered above in the context of 'internalist' and 'externalist' normative theories of sport.

¹⁰⁰ eg, societal norms will also apply to athletes. Players can be banned from competing in sport due to their off-field actions, which may be thought to damage the public perception of the sport. See, eg, 'Ben Stokes & Alex Hales fined over Bristol fight' (*BBC Sport*, 7 December 2018) <<https://www.bbc.co.uk/sport/cricket/46486977>> accessed 28 December 2018. See also, Simon, *Fair Play* (n 1) 203.

¹⁰¹ Extensive discussion of the wider political climate is beyond the scope of this thesis, but see generally, eg, Jacob S Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer— And Turned Its Back on the Middle Class* (Simon & Schuster 2010).

¹⁰² See, eg, Trevor Slack (ed), *The Commercialisation of Sport* (1st edn, Routledge 2003).

they win, and the incentives (both financial and in terms of prestige) to do so are enormous. This culture is very different from the ‘Corinthian Value’ derived culture, and the ‘gentleman amateur’ competing for recreation. Moreover, these incentives can lead to a greater propensity to take risks. This can be seen, for example, in the willingness of athletes and related personnel to break the rules of sport to gain advantage and win. This trend may in part be influenced by wider societal factors; sport does not exist in a vacuum. In this connection, there are numerous examples of wider society’s impact on sport.¹⁰³ For example, legislation can influence sport in many ways, from regulating sports stadiums,¹⁰⁴ to criminalising sports doping in countries such as Germany.¹⁰⁵

International sport exists, by its very nature, across different nations, and therefore across different societies with different ideologies, which raises questions concerning whether a disputed ideological position should be so influential in formulating the current system of sport ethics. There have been value system clashes which have been influential in shaping reactionary (as opposed to measured and reasonable) policy; for example, the institutionalised and routine doping of children by East German¹⁰⁶ sports scientists plainly conflicts with almost universal values emphasising the protection of children. Shocking revelations of this nature have provoked outrage, which in turn has led to policies which can be considered knee-jerk

¹⁰³ Also see the example at n 107 below.

¹⁰⁴ See, eg, the Safety of Sports Grounds Act 1975.

¹⁰⁵ See s 263, German Criminal Code.

¹⁰⁶ See, eg, Mike Dennis and Jonathan Grix, *Sport Under Communism: Behind the East German ‘Miracle’* (Global Culture and Sport Series, Palgrave Macmillan 2012).

and reactionary, rather than proportionate, balanced and measured.¹⁰⁷ Given the element of crossover between sports ethics and those of wider society, and in light of these observations we must consider sport's place in, and relationship to, society, and the influence this can have on sport.

McFee suggests that due to its internal rule-based structure, sport should be considered 'in isolation from other human practices'.¹⁰⁸ This can be questioned: many academics such as Lindfelt, for example, do not agree entirely with this idea.¹⁰⁹ The existence of 'gamesmanship', the 'win at all costs' mentality and the focus on winning, which were seemingly less influential earlier in the twentieth century than they are in modern sport, due (at least in part) to the preeminent position of the 'Corinthian Values' during that period, have become more prevalent in elite professional sport in the last 50 years.¹¹⁰ This shift has been fuelled by the increasing influence of professionalism and social contexts of commercialisation,¹¹¹ together with the rise of neoliberal political ideologies. As noted above, modern sport at the elite professional level

¹⁰⁷ See, eg, Ian Ritchie and Greg Jackson, 'Politics and "shock": reactionary anti-doping policy objectives in Canadian and international sport' (2014) 6 *International Journal of Sport Policy and Politics* 195, <<https://doi.org/10.1080/19406940.2013.773358>>.

¹⁰⁸ G McFee, 'Are there philosophical issues with respect to sport (other than ethical ones)?' in MJ McNamee and SJ Parry (eds), *Ethics and Sport* (Routledge 1998) 9.

¹⁰⁹ Mikael Lindfelt, 'Sport and ethics: how far can you go?' (2005) 47(4) *World Leisure Journal* 41, 44, <<https://doi.org/10.1080/04419057.2005.9674415>>.

¹¹⁰ For analysis of the IAAF in this respect, see, eg, Jörg Krieger, 'No Struggle, No Progress: The Historical Significance of the Governance Structure Reform of the International Association of Athletics Federation' (2019) 4 *Journal of Global Sport Management* 61, 66, <<https://doi.org/10.1080/24704067.2018.1477522>>.

¹¹¹ See, eg, Jörg Krieger, "'Born on the Wings of Commerce": The World Championships of the International Association of Athletics Federations' (2016) 33 *The International Journal of the History of Sport* 418, <<https://doi.org/10.1080/09523367.2016.1159201>>.

is often big business, generating significant revenue for those involved; for them at least, it is by definition, work or ‘business’, as opposed to simply recreation. The revenue generated by sport is enormous, with PriceWaterhouseCoopers estimating it at over US\$145 billion in 2015, up from US\$121 billion in 2010.¹¹² The trend of increased commercialisation in sport is evident, from the professionalisation of rugby union in the mid-1990s, to the increase in NFL players’ salaries.¹¹³

Therefore, the question is not whether (or not) sport is influenced by outside factors (ie, wider society), but rather one of how much practical impact these outside factors can – and should – have on the purpose, morality and spirit of sport. Holowchak considers values in different contexts and their relationship to those in sport in his critique of Simon’s 2004 book *Fair Play: The Ethics of Sport*, persuasively claiming that Simon’s suggestion – ie, that sport has some unique inner morality – falls into the very reductionist trap he seeks to avoid.¹¹⁴ This can be considered somewhat of an oversimplification; much evidence exists to suggested that

¹¹² PWC, ‘Changing the Game: Outlook for the global sports market to 2015’ <<https://www.pwc.com/gx/en/hospitality-leisure/pdf/changing-the-game-outlook-for-the-global-sports-market-to-2015.pdf>> accessed 12 August 2017.

¹¹³ Regarding NFL salaries, see further, Kurt Badenhausen, ‘The NFL’s Highest-Paid Players 2018: Aaron Rodgers Leads With \$76 Million’ (*Forbes*, 20 September 2018), <<https://www.forbes.com/sites/kurtbadenhausen/2018/09/20/the-nfls-highest-paid-players-2018-aaron-rodgers-leads-with-76-million/#404b985117bd>> accessed. Regarding rugby, see, ‘Rugby professionalism timeline’ (*BBC News*, 31 March 2005), <http://news.bbc.co.uk/sport2/hi/rugby_union/4392795.stm> accessed 17 September 2017.

¹¹⁴ Discussion of this point is beyond the scope of this thesis. See further, M Andrew Holowchak, ‘Fair Play: The Ethics of Sport, By Robert L Simon. Published 2004 by Westview Press, Boulder, CO’ (3004) 31 *Journal of the Philosophy of Sport* 245, 246 <<https://doi:10.1080/00948705.2004.9714663>>.

sport does have its own unique morality, especially given its extensive and developed internal values and systems of governance.

The key point to note here is that the values evident in the social context of elite professional sport are fundamentally different from the ‘Corinthian Values’ represented by the ‘gentleman amateur’ playing sport for recreation (as distinct from work) with less of a focus on winning. Professional sport, by definition, is not a hobby or a pastime; it does not include the ‘gentleman amateur’. Sport has, over time, tacitly acknowledged this point: for example, the International Association of Athletics Federations, changed its name in 2001 from the International Amateur Athletics Federation, presumably to reflect the nature of elite professional athletics.¹¹⁵ It had already made significant changes during the 1970s and 1980s to commercialise sport and bring in revenue, in addition to, for example, relaxing their rules regarding athlete remuneration. In a move which distances itself further from its past, it has changed its name again, to ‘World Athletics’.¹¹⁶ If this indication holds true more broadly – and it is argued that it does – it can be questioned whether these values should retain such influence if even bodies like World Athletics are tacitly abandoning them.

The decline in influence of the ‘Corinthian Values’ within sport itself, and sport in its socio-economic context, together with the rise of other values, such as the paramount importance of winning, and the idea of excellence in preparation and performance, is underlined by the importance – and indeed success – of initiatives such as the ‘Marginal gains’ regime: the term given to the approach where numerous minor improvements add up to make

¹¹⁵ IAAF, ‘Heritage’, <<https://www.iaaf.org/heritage/history>> accessed 24 August 2019.

¹¹⁶ ‘IAAF unveils new name and logo’, World Athletics/IAAF press release of 9 June 2019, <<https://www.worldathletics.org/news/press-releases/iaaf-unveils-new-name-and-logo>> accessed 24 August 2019.

larger – and potentially decisive – improvements,¹¹⁷ notably for example in the 2012 and 2016 Olympics. This provides one indication of modern attitudes surrounding elite sport; the use of TUEs for performance advantage provides another.¹¹⁸ These factors indicate the significant departure from the so-called ‘Corinthian Values’,¹¹⁹ and the evolution of professional elite sport. However, a more appropriate expression of today’s values might be found in the Olympic motto: ‘Citius, Altius, Fortius’,¹²⁰ translated as ‘Faster, Higher, Stronger’. This, which as noted above conflicts with other values espoused by the Olympic Movement, appears very much in keeping with the ethos of modern elite professional sport. It acknowledges its highly competitive nature and focus on constant improvement, as opposed to simply taking part in sport, with less emphasis on performance, competition, and the end result. It is also consistent with the thesis advanced by Savulescu and colleagues.¹²¹

The Practical Nature of Elite Professional Sport Today

Former NFL player, now attorney and athletic director at the University of Illinois, Josh Whitman, provides further insight on elite professional sport from his unique position:

¹¹⁷ Eben Harrell, ‘How 1% Performance Improvements Led to Olympic Gold’ (*Harvard Business Review*, 30 October 2015), <<https://hbr.org/2015/10/how-1-performance-improvements-led-to-olympic-gold>> accessed 13 September 2017; Matthew Syed, ‘Viewpoint: Should we all be looking for marginal gains?’ (*BBC Sport*, 14 September 2015), <<https://www.bbc.co.uk/news/magazine-34247629>> accessed 22 August 2017.

¹¹⁸ This is discussed in detail in the bioethical chapters.

¹¹⁹ See further, eg, Tom Hamilton, ‘Revealed – the secrets behind Team GB’s Olympic track cycling success’ (*ESPN*, 16 August 2016) <http://www.espn.co.uk/olympics/story/_/id/17319527/revealed-secrets-team-gb-olympic-track-cycling-success> accessed 22 August 2017.

¹²⁰ Olympic Charter (n 88) 23.

¹²¹ See, eg, Savulescu, Foddy and Clayton (n 64).

For professional athletes, success in athletics can provide a high just as potent and addictive as any achieved using narcotics. In professional sports, pursuit of this high-standing victorious over a defeated opponent-consumes the world's fiercest competitors. Residual notions of fair play, espoused by youth league coaches and well-meaning parents during the athletes' formative years, are replaced by the overriding pursuit of the fruits of victory. Professional sports are driven by the desire, the need, to win.

I know this because for four years I toiled as a player in the National Football League. While playing, I judged every choice – from what to eat to how much to sleep – by the effect it would have on my gridiron career. I was not an aberration. This fervent pursuit of victory compromises, to some extent, virtually every professional athlete's decision-making ability.¹²²

These observations highlight further the realities of elite professional sport, and the need to reassess the underlying philosophical and ethical framework of the current regulatory system. This need has been recognised, with calls to reconsider the current system from scholars with diverse backgrounds such as philosophy,¹²³ sports science¹²⁴ and law.¹²⁵ Many of these concerns are raised as a logical response to the changing contexts and motivations considered above.

By definition, elite sport is extremely exclusive; reaching (and remaining at) the professional elite level in most mainstream sports is extremely difficult both physically and mentally, and therefore only a select will few manage it. This is not so with participatory sport,

¹²² Whitman (n 3).

¹²³ See, eg, Savulescu, Foddy and Clayton (n 64).

¹²⁴ See, eg: Dimeo and Møller (n 72); Millan Aguilar and others, 'Thirteen years of the fight against doping in figures' (2017) *Drug Testing and Analysis* 866, <<https://doi.org/10.1002/dta.2168>>; See also, Sandy Fleming, 'Expert Comment: WADA at a crossroads' (*University of Kent*, 1 November 2018), <www.kent.ac.uk/news/science/19785/expert-comment-wada-at-a-crossroads> accessed 22 November 2018.

¹²⁵ See, eg, Jack Anderson, 'Doping, sport and the law: time for repeal of prohibition?' (2013) 9 *International Journal of Law in Context* 135, <<https://doi.org/10.1017/S1744552313000050>>.

which is open to all and does not require unusually high levels of skill or ability in order to participate. Inclusion, taking part, forming friendships, recreation and escaping from the demands of working life are some of the hallmarks of amateur or participatory sport, and may all fall within the broad heading of ‘Corinthian Values’, but are not in keeping with the ethos of modern professional sport. These values have much to commend them – particularly in the context of amateur or participatory sport – but they do not reflect the key motivating values of elite professional sport. Participation, rather than elite performance and winning, is the main purpose of this type of sport. This key difference invites a difference in policy; these fundamentally different types of sport should not be subject to the same regulation.

In this context, in reasoning from *is* to *ought*, it is important to highlight why elite professional sport *ought* to abandon the ‘Corinthian Values’, and adopt a new system of morality and ethics. It does not follow that because the ‘win at all costs’ type mentality *is* so prevalent in this type of sport, that it necessarily *ought* to be so, or that it should be accepted and promoted. Therefore, we must provide reasons why a new system should be preferred, which go beyond simply the current *is*. This new system and its potential benefits will be explained in depth in the following chapter (chapter 6), but in short – a new system could promote the ethical governance of sport. There are persuasive reasons for this independent of the current system, ie, the current *is*. If, for example, the rules and related regulatory frameworks were grounded in areas of broad agreement, such as fairness and athlete health (as opposed to more contested ideological perspectives, namely the ‘Corinthian Values’ derived approach), and also were able to engage directly with the day-to-day realities of those subject to them, they would have significantly greater ethical credibility. A revised system should be able to promote the values rationally and reasonably agreed by stakeholders. Policy determinations and decisions could be justified by reference to fundamental concerns and concepts upon which key stakeholders generally agree, such as fairness and health. This should,

in turn, promote effective regulation, with greater prospects for compliance. Furthermore, the meaningful focus on key values such as transparency, proportionality, independence and accountability would also help to provide an ethically and legally robust system, allowing for coherent and consistent policies and decisions. Therefore, these advantages characteristic of a new system of morality and ethics provide a basis for a new *ought* to be generated. Sport *ought* to be governed in an ethically and legally robust manner; this is justifiable independent of the current *is*.

Conclusion: Beyond the ‘Corinthian Values’

This chapter has examined different definitions of sport, considering sport’s rules and competing normative theories, before advancing a modified definition for the purposes of this thesis. Next, competing accounts of sport’s purpose were presented and discussed, which led in turn to questions of sport’s values. As this chapter demonstrates, there are conflicting value systems in elite professional sport, namely the ‘Corinthian Values’ championed by regulators such as WADA, and the ‘win at all costs’ value system, with its characteristic focus on success and continual performance improvement which is evident in the practice of elite professional sport.

It is concluded that the ‘Corinthian Values’ constitute a separate system of ethics and morality which is untenable in elite professional sport, given its specific nature and value system. Moreover, factors such as the commercial interests, and the rewards which go to the winners, can change why (and how) athletes compete. On this basis, the incentive to improve

performance and to ‘win at all costs’ is overwhelming.¹²⁶ The mentality of elite professional athletes today does not reflect the ‘Corinthian Values’. The values of elite sport are not ‘Corinthian’ – elite sport has evolved from a hobby or a pastime of those wealthy enough to be able to afford to play it, to providing a career and a means of supporting oneself. It is therefore a profession, not a pastime, with its own morality distinct from amateur or participatory sport. Furthermore, its status as a profession might well lend itself to different codes of conduct from that of amateur or participatory sport. This will influence concepts of fairness, and what may be permissible in elite professional sport may not be in amateur or participatory sport.

All of the points highlighted above serve to underline how sport has moved on from the era of the ‘Corinthian Values’ which characterised attitudes to much of sport particularly in the early to mid-twentieth century. At present, those in power in sport cling to such values,¹²⁷ but they are the product of a bygone era and are therefore not applicable to the demands of sport today, no matter how attractive and laudable their sentiments might be. Sport as a commercialised profession presents challenges which are different from those faced by policymakers in sport in the early and mid-twentieth century. This change in nature makes the amateur or ‘Corinthian’ values untenable and leads to positions which negatively impact both sport and other stakeholders, namely the athletes, particularly regarding anti-doping policy.¹²⁸ Simply stated, amateur ideals are not appropriate for professional sport – they are not fit for

¹²⁶ See, eg, H Striegel, G Vollkommer and HH Dickhuth, ‘Combating drug use in competitive sports: an analysis from the athletes’ perspective’ (2002) 42 *Journal of Sports Medicine and Physical Fitness* 354. See also, n 3 above regarding the pressure to ‘win at all costs’.

¹²⁷ The WADA Code 2019 and the Olympic Charter are two documents which express such values.

¹²⁸ This has led to urgent calls by athletes for fundamental anti-doping reform: ‘Reforming WADA’s Governance for a new Anti-Doping Age’ (*The Alternative*, 9 October 2018), <<http://athletesforcleansport.com/wp-content/uploads/2018/10/The-Alternative-Detailed-Paper.pdf>> accessed 24 November 2018.

purpose. As these values fail to acknowledge and reflect the realities of elite professional sport, they are unable to provide an appropriate basis for effective regulation. By perpetuating an outmoded ideology, they fail to define the issues which need to be addressed, instead focusing more on perception and image. However, following Hume to go from *is* to *ought*, we need a further step in the reasoning. The observation that sport has moved on does not necessarily, in and of itself, tell us what we should do, ie, that it is right that it should have done so.

It is, however, evident that anti-doping regulation is not working satisfactorily from the perspective of any group: athletes,¹²⁹ regulators,¹³⁰ sponsors,¹³¹ fans¹³² and other stakeholders. This naturally invites consideration of alternatives to the current approach. Failures are also apparent in other areas of regulation, for example in match fixing and corruption.¹³³ These

¹²⁹ *ibid.*

¹³⁰ eg, concerns of this nature were raised at the White House summit, ‘The Washington Anti-Doping Summit Declaration report’, 31 October 2018, <www.usada.org/the-washington-anti-doping-summit/> accessed 28 February 2019. See also, eg, Sean Ingle ‘Wada lifts Russia’s three-year doping suspension and faces its biggest crisis’ *Guardian* (20 September 2018), <www.theguardian.com/sport/2018/sep/20/wada-crisis-lifts-russia-suspension-anti-doping> accessed 23 September 2018.

¹³¹ See, eg, Nick Butler, ‘Adidas to end sponsorship of German National Anti-Doping Agency’ (*Inside the games*, 26 October 2016), <www.insidethegames.biz/articles/1043035/adidas-to-end-sponsorship-of-german-national-anti-doping-agency> accessed 14 November 2018.

¹³² See, eg, Martha Kelna, ‘General public is losing faith in scandal-ridden sports, survey claims’ *Guardian* (5 July 2017), <www.theguardian.com/sport/2017/jul/05/public-faith-sport-low-corruption-doping-sacndals-survey> accessed 13 September 2018.

¹³³ There are numerous examples of this. See, eg: Adam Masters, ‘Corruption in sport: From the playing field to the field of policy’ (2015) 34 *Policy and Society* 111, <<https://doi.org/10.1016/j.polsoc.2015.04.002>>; Andrew Aloia, ‘Corruption in sport: Researchers look into impact scandals are having on UK society’ (*BBC Sport*, 27 April 2018), <<https://www.bbc.co.uk/sport/43898870>> accessed 13 September 2018; Andy Brown, ‘Spider’s web: French prosecutors further widen IAAF probe’, *Sports Integrity Initiative*, 28 August 2018),

examples suggest that a regulatory ‘tipping point’ may have been reached, with confidence in structures of sports governance, particularly in the context of anti-doping, at an all-time low.¹³⁴ This might be seen, rather than as a difficult hurdle, as an excellent opportunity to re-examine the morality of sport and advance some potential amendments. Thus, following Hume, now we must consider a new *ought* – ie, an alternative to the current system, derived from a different underlying morality independent of the current *is*, and one which is defensible and consistent on its own terms. This task is undertaken in the next chapter.

<<https://www.sportsintegrityinitiative.com/spiders-web-french-prosecutors-further-widen-iaaf-probe/>> accessed 4 September 2018.

¹³⁴ There have been numerous calls for reform of WADA and related structures. Most recently, see, eg, ‘Reforming WADA’s Governance for a new Anti-Doping Age’ (n 128); ‘Jared Tallent: Australian Olympic champion backs calls for “far-reaching reform” of Wada’ (*BBC Sport*, 23 October 2018), <<https://www.bbc.co.uk/sport/45953993>> accessed 19 February 2019.

Morality of Sport: The Positive Alternative (Reconceiving the Spirit of Sport)

Introduction

The ‘spirit of sport’ provides a moral and ethical reference point from which anti-doping policy can be derived. It is important that this ‘spirit of sport’ should therefore be fit for purpose, and thus able to provide a consistent and coherent basis upon which policy decisions can be made. Given the significant changes and challenges outlined in the previous chapter, it is argued that we need an updated spirit of elite professional sport which is able to account for how sporting values have developed into the values evident in today’s elite professional sport. It must be able to constrain the ‘win at all costs’ mentality where necessary, and still promote fairness for those involved (ie, the athletes), whilst engendering confidence in other important stakeholders, such as fans and sponsors. Fairness is a key factor any construction of a morality of sport should seek to advance and represents – at least in a broad, general and abstract sense – an area of agreement amongst stakeholders. It is an extremely important component of the ‘spirit of sport’ and a necessary component of meaningful and interesting competition. However, reference to a vague and therefore potentially contested concept is not sufficient; fairness may well mean different things to different stakeholders.¹ There are (at least) two concerns here which must

¹ eg, what might be considered fair by Julian Savulescu (see Julian Savulescu, ‘Doping Scandals, Rio and the future of human enhancement’ (2016) 30 *Bioethics* 300, <<https://doi.org/10.1080/17511321.2016.1203095>>) may not be by Thomas Murray (Thomas H Murray, *Good Sport: Why our Games Matter – and How Doping Undermines Them* (OUP 2018)). The same could equally be said of Paul Dimeo (Paul Dimeo and Verner Møller,

be accounted for. First, it is important to establish what fairness should mean in this specific context, ie, to find a reasonable definition. Second, once a satisfactory definition of fairness is reached, the next task is to understand what this fairness requirement requires in practice. Providing answers to these questions should also facilitate a more appropriate definition of the ‘spirit of sport’, and in turn a better understanding of what should be defined and understood as doping.

The emphasis in this chapter therefore will move from the negative case presented in the previous chapter, ie, explaining the ‘Corinthian Values’, their impact and why they do not work, to the positive case, ie, to proposing a viable alternative. Although it is apparent that the ‘win at all costs’ mentality is dominant in elite professional sport, it should not be taken literally; some constraints on it should be considered and imposed, namely athlete health and safety, and fairness. The athletes should be considered the most important stakeholder group; therefore, their interests should be promoted. From a practical perspective, this means taking steps to safeguard their health and to provide conditions which allow them to compete on equal terms where possible. These concepts will be explained and developed during this chapter; the foundations for this positive case are derived using the work and methods of John Rawls.

Advancing a Positive Alternative: Finding Balance and Agreement

In political philosophy there is often a tension between the theoretical philosophical level, ie, the broad overarching principles, and the political level, ie, how – or even whether – these

The Anti-Doping Crisis in Sport: Causes, Consequences, Solutions (Routledge 2018); and Mike McNamee (Mike McNamee, ‘Doping scandals, Rio, and the future of anti-doping ethics. Or: what’s wrong with Savulescu’s recommendations for the regulation of pharmacological enhancement in sport’ (2016) 10 *Sport, Ethics and Philosophy* 113, <<https://doi.org/10.1080/17511321.2016.1203095>>).

overarching principles should be accounted for and applied in practical terms.² Reconciling these two levels can present a major challenge. This tension, between the philosophical and political, is also evident in sport; an appropriate balance must be struck between the two.

Philosophical perspectives are undoubtedly useful, but often produce conflicting accounts, many of which may be reasoned and rational, but do not provide answers for the political, ie, they fail to meet the policy and governance requirements, in that they are not able to provide effective real world solutions.³ For example, there are well-reasoned calls from within the academic sports ethics community to allow previously banned performance-enhancing drugs (PEDs).⁴ Although this position can be supported by cogent and highly persuasive philosophical argument, there is a further practical requirement here: policy changes must be sufficiently realistic, engaging with the system as it is and not as it should ideally be, to stand a realistic chance of influencing policy.⁵ Different philosophical positions will render

² Geuss, for example, would question whether they should be accounted for: Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008). The approach adopted in this thesis is more in line with the work of Jonathan Wolff: Jonathan Wolff, ‘Harm and hypocrisy: Have we got it wrong on drugs?’ (2007) 14 *Public Policy Research* 126, <<https://doi.org/10.1111/j.1744-540X.2007.00475.x>>. See also ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

³ See, eg, the analysis of Husak’s work, and Geuss’s criticisms of philosophy in ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

⁴ See, eg: Ellis Cashmore, ‘Sport’s Doping Problem: A Rational Solution—Allow Drugs’ (2014) 49 *Substance Use & Misuse* 1194, <<https://doi:10.3109/10826084.2014.904120>> accessed 1 September 2016; Ellis Cashmore, ‘Stop Testing and Legalise the Lot’ *Guardian* (26 October 2003) <www.theguardian.com/sport/2003/oct/26/athletics.theobserver> accessed 1 September 2016. See also, more generally, Ellis Cashmore, *Making Sense of Sports* (5th edn, Routledge 2010).

⁵ For detailed explanation of the reasoning here, see ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

different – and conflicting – political positions. This is particularly the case in sports ethics. A possible remedy to this can be found by seeking areas where, following a process of consideration and debate, there is some consensus, albeit often only limited consensus. For example, in the context of genetic enhancement in sport, Camporesi and Maugeri suggest ‘a process of public reason giving in the spirit of ‘deliberative democracy’, as defined by Gutmann and Thompson’.⁶ Gutmann and Thompson explain ‘deliberative democracy’ in the following terms:

Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return

...

Its first and most important characteristic, then, is its reason-giving requirement.⁷

Camporesi and Maugeri see ‘deliberative democracy’ as an effective means of providing practical policy answers in situations where there are competing justifiable philosophical positions.⁸ There are some important practical considerations to note from the words of Gutmann and Thompson. The first point is explained in the quotation above – that decisions must be carefully reasoned and justified. Gutmann and Thompson explain three further defining elements of ‘deliberative democracy’. The second of these stipulates that reasons

⁶ Silvia Camporesi and Paolo Maugeri, ‘Genetic Enhancement in Sports: The Role of Reason and Private Rationalities in the Public Arena’ (2011) 20 *Cambridge Quarterly of Healthcare Ethics* 248, 255 <<https://doi.org/10.1017/S0963180110000897>>. See also Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004).

⁷ Gutmann and Thompson, *ibid*, 3.

⁸ Camporesi and Maugeri (n 6) 256. See also the analysis under ‘Advancing a Positive Alternative: Finding Balance and Agreement’ in this chapter.

should be intelligible to those governed by them.⁹ Third, they should have a practical impact and influence policy.¹⁰ Finally, they should be subject to revision as necessary.¹¹ These considerations provide a highly effective framework for answering questions of policy, and specifically for those relating to sports ethics. The related idea of ‘overlapping consensus’, which is generally attributed to John Rawls, and which forms a key part of the analysis that follows, has been considered to have utility in the context of sports ethics by Loland and McNamee.¹² It provides an effective basis on which decisions may be justified, and promotes stability,¹³ and is thus utilised for present purposes.

If sport is considered to be private in nature, justifying policy positions with reference to contested philosophical positions is less problematic. However, it has been argued in this thesis that elite professional sport is at least quasi-public in nature, which means that rather than adhering to a niche ideological position, reaching positions derived using public reason, or something similar in nature, is important for legitimacy and respect.¹⁴ It is worth noting here that the concept of public reason is easier to satisfy in the defined and limited context that is

⁹ Gutmann and Thompson (n 6) 4.

¹⁰ *ibid* 5.

¹¹ *ibid* 6, and generally 3–7.

¹² Sigmund Loland and Michael J McNamee, ‘The “spirit of sport”, WADA’s code review, and the search for an overlapping consensus’ (2019) 11 *International Journal of Sport Policy and Politics* 325, <<https://doi.org/10.1080/19406940.2019.1581646>>.

¹³ Regarding stability, see further John Rawls, *A Theory of Justice* (rev edn, OUP 1999) 154–58. See also, eg, for comment, Leif Wenar, ‘John Rawls’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2017), <<http://plato.stanford.edu/entries/rawls/>> accessed 21 August 2017.

¹⁴ Rawls, *ibid*, 156–58.

elite professional sport than it is in the context of an entire political system.¹⁵ There are fewer considerations to address, and a level of basic agreement is likely to be more forthcoming. For example, the generally agreed upon and relatively settled codified rules of sport provide a helpful starting point in this regard.

In summary, these concerns should be accounted for when designing a reformulated system of sports ethics. An emphasis on reasonableness and balance, generated by identifying areas of broad agreement, is helpful in answering contested questions of policy. A reformulated system should also incorporate greater scrutiny (especially from key stakeholder groups, such as the athletes), transparency and oversight, potentially judicial in nature and subject to general principles of public law.¹⁶ The processes of sports dispute resolution bodies should be modified to include a focus on, in the words of Camporesi and Maugeri ‘a process of public reason giving in the spirit of deliberative democracy’.¹⁷ This would provide a more robust basis for decisions to be made, grounded in areas of consensus rather than contested ideology.

¹⁵ eg, concerns expressed by critics such as Geuss (see ‘Critical Approach and Methods’, ch 2 of this thesis) that Rawls’s work is too abstract for politics would therefore not necessarily be applicable in this context.

¹⁶ Although sports governing bodies are not subject to Judicial Review (JR) in England and Wales, they are in other jurisdictions. There are compelling reasons to suggest they should be subject to JR in this jurisdiction. See, eg: Jack Anderson, ‘An Accident of History: Why the Decisions of Sports Governing Bodies Are Not Amenable to Judicial Review’ (2006) 35 *Common Law World Review* 173, <<https://doi.org/10.1350/clwr.2006.35.3.173>>; Ben Cisneros, ‘Challenging the call: Should sports governing bodies be subject to judicial review?’ (2020) 20 *The International Sports Law Journal* 18, <<https://doi.org/10.1007/s40318-020-00165-9>>.

¹⁷ Camporesi and Maugeri (n 6) 256.

Towards a Fair and Credible Morality of Sport

As we have seen, finding areas of agreement is essential in providing foundational values upon which a system of sports ethics may be built. Lindfelt deftly summarises some areas of agreement between the various positions adopted by philosophers of sport:

(1) the autonomy of sport, (2) equality or at least a striving for equality and (3) the necessary competitiveness. The first aspect is constructed by the process of rule governance, while the second aspect is carried out with and through the rules that constitute the activity. The third aspect differs from the other two in this respect, because necessary competitiveness is tacit in the sense that it cannot be conceptually located at the level of rules. Instead, this aspect has to be traced *beyond* the level of rules. Or even more precisely, it has to form the *basis of a fundamental agreement* on which certain rules can be constructed.¹⁸

This summary warrants detailed consideration; it serves as a very helpful starting point, neatly delineating the task at hand: providing an overarching theory of fair sport. Lindfelt's first point lends further support to the notion that elite sport constitutes its own separate normative system, and thus has its own unique system of ethics and morality, which is related to – but remains distinct from – wider society.¹⁹ The second point – equality – is perhaps the most important. First, we must establish precisely the sort of equality we are seeking to create; we might begin from the perspective of promoting equality of opportunity (as contrasted with equality of outcome which plainly is antithetical to the concept of competition in sport), with each competitor competing on the same (as far as is reasonably practicable at the level of the rules) basis, so that the sport-specific factors we choose can prove decisive, rather than external or unrelated factors. Certain forced equalities are important, as well as – to use the term favoured

¹⁸ Mikael Lindfelt, 'Sport and ethics: how far can you go?' (2005) 47(4) World Leisure Journal 41, 46, <<https://doi.org/10.1080/04419057.2005.9674415>>.

¹⁹ See the 'Morality of Sport: Negative Case' chapter, in particular the Introduction.

by proponents of the status quo – ‘celebrating’ certain natural differences. For example, Thomas Murray argues that:

The achievements of athletes, from the fumbling beginner to the most polished Olympian or pro, find their meaning and value in the celebration of whatever natural talents those persons bring to their sport, and how well they perfect those talents.²⁰

The ways in which these talents may be ‘perfected’ is the subject of much debate and is influenced significantly by the ‘spirit of sport’. Defining the ‘spirit of sport’ might serve to address Lindfelt’s third point, and can underpin the rules and laws which govern sport. Murray notes that there is a ‘relentless competitive dynamic of sport’.²¹ This observation from Murray, a former chair of WADA’s Ethics Panel, and a highly influential figure in the current anti-doping regime, encapsulates a major element of the ‘spirit of sport’. This phrase appears more consistent with a ‘win at all costs’ morality than one derived from the ‘Corinthian Values’. As demonstrated by the analysis in the previous chapter, competition, winning and excellence in performance are some of the defining characteristics of elite professional sport. Therefore, any credible system of ethics for elite professional sport must be able to account for them.

Keenan suggests that in sport we ‘seek to prove inequality of ability and the game exists as a vehicle to assist this purpose’.²² Continuing with this logic, it might be argued that it is necessary that other conditions be equal, or at least as equal as reasonably practicable, so that the ability to play or compete in the sport might be the definitive factor in sporting success.

²⁰ Murray, *Good Sport* (n 1) 56.

²¹ Thomas H Murray (President Emeritus), “‘Natural’ Talents and Dedication—Meanings and Values in Sport” (2018) 18(6) *The American Journal of Bioethics* 1,

²² Francis W Keenan, ‘Justice and Sport’ (1975) 2 *Journal of the Philosophy of Sport* 111, <<http://dx.doi.org/10.1080/00948705.1975.10654103>>.

This raises the question: how do we begin to create a system which achieves this, given the numerous and varied challenges to this stated aim? In establishing which conditions need parity, Rawls's theory of justice – as this chapter will demonstrate – can be adopted and applied in order to provide some ethically cogent answers.

To summarise the points made so far: a positive alternative (to the current system) theory of sports ethics should, in order to be credible and ethically rigorous, as a minimum meet the following requirements. First, it must be able to account for the design of institutions and procedures of regulation and governance which reflect and promote the values we seek to promote for elite professional sport as it is today, as contrasted with the values of amateur sport in the early to mid-twentieth century, typified by the 'gentleman amateur' or 'Corinthian Values'. This historical source of values is inappropriate for sport today, as there is a radical disconnect between the values espoused by the regulators, and the values evident in athletes and related personnel. This disconnect invites an alternative theory which is better able to cope with the demands of regulating elite professional sport. Second, it must also be able to engage with current issues, and as necessary produce constraints within which elite professional sport can operate. For example, the 'win at all costs' mentality needs some limits, for example limits that can promote athlete health and safety. Third, it must be able to account for the design and practice of the sports themselves, with their own internal formal rules and regulations, and specific customs, internal practices and conventions. This necessitates an understanding of the 'spirit of sport' and factors beyond formal written rules. Fourth, both the institutions themselves, and the regulatory instruments they use to govern sport, should be agreed by – and justified to – relevant stakeholders; these stakeholders should recognise them as fair. This fourth requirement may be termed a form of 'reasonableness requirement'. With these requirements for a positive alternative established, we can then consider how Rawlsian political philosophy might facilitate the creation of such a system.

Rawlsian Political Philosophy

We have seen that balancing the philosophical and the political can be a challenging task. Political philosophy is helpful in bridging the gap between the different levels of analysis, highlighted here by Camporesi and Maugeri, ie, ‘between a philosophical level of analysis, in which evidence and arguments in support of any claim must be put forth, and the political level of analysis, in which people’s moral views need to be taken into account’.²³ Rawls offers, I will argue, an excellent theory which can be used to derive an appropriate morality of sport.²⁴ It should be noted that a number of commentators have made use of Rawls, albeit somewhat differently from how his work is used in this chapter and this thesis.²⁵ Effective policy necessitates a balancing of the tensions between the philosophical and the political; both words are given their ordinary natural meanings. Therefore, the ‘philosophical’ will be taken to mean ‘the use of reason in understanding such things as the nature of the real world and existence, the use and limits of knowledge, and the principles of moral judgment’.²⁶ ‘Political’ is taken to mean ‘the activities of the government, members of law-making organizations, or people

²³ Camporesi and Maugeri (n 6) 251.

²⁴ See generally, Rawls, *A Theory of Justice* (n 13).

²⁵ eg, Loland and McNamee (n 12), and (separately) Murray, *Good Sport* (n 1) have made limited use of Rawls. Other authors have found influence in Rawls’s work in a sports context; regarding human rights and strict liability offences, see Daniel Goldsworthy, ‘Athletes’ rights under the World Anti-Doping Code: A legitimate public interest?’ (2018) 43 *Alternative Law Journal* 197, <<https://doi.org/10.1177%2F1037969X18783292>>. Uses of Rawls in sports philosophy are also considered further below under ‘An application of Rawls to Sport Ethics’.

²⁶ Definition of the word ‘philosophy’, *Cambridge English Dictionary*, <<https://dictionary.cambridge.org/dictionary/english/philosophy>> accessed 1 September 2016.

who try to influence the way a country is governed'.²⁷ However, this second basic definition needs to be modified for our purposes: rather than a country, the aim here is to influence the way elite professional sport is governed. To this end, non-governmental and other organisations which perform public or quasi-public functions in this context, such as WADA, and even bodies such as CAS which influence sports governance, are the dominant actors. Rawls advances some elegant solutions to the challenges operating in a political arena present, thus making his work particularly instructive for the purposes of this chapter and this thesis.

It is argued that Rawls's work (although there is some engagement with other moral, political and legal philosophers) is the most applicable, and provides the most effective normative guidance for – and thus facilitates a theory of – fair sport for at least seven reasons, summarised below.

First, Rawls prioritises fairness in his theory of justice, and as we have seen from the analysis above, this is a fundamental tenet in any construction of sports morality upon which there is near-universal agreement, albeit only in the abstract; there is no consensus over the precise details, so its specific meaning and application in this context must be determined. However, this broad agreement on the concept of fairness can still provide a reasonable starting point from which we can reach a more specific understanding of fairness in this context, and what it demands in practice.

Second, he provides a credible framework which promotes the basic conditions necessary for fairness and equality of opportunity (rather than outcomes). This framework will

²⁷ Definition of the word 'politics', *Cambridge English Dictionary*, <<https://dictionary.cambridge.org/dictionary/english/politics>> accessed 1 September 2016.

help create institutions to promote the values which it can be rationally agreed that sport should champion.

Third, his theories benefit from his numerous revisions following extended scrutiny from many other notable scholars, such as his Harvard colleague Robert Nozick,²⁸ and the renowned legal theorist HLA Hart,²⁹ which significantly enhance their coherence and credibility. This process also demonstrates another benefit: his acknowledgement that revision should always be carefully considered, and that constructive criticism can prove to be a very useful catalyst for change; theories can and should be subject to revision, and not dogmatically maintained if they are no longer appropriate and effective.

Fourth, Rawls provides a number of devices which are extremely helpful in reaching rational and internally consistent decisions; for example, his concept of ‘reflective equilibrium’³⁰ and his ‘original position’³¹ (both of which are explained in greater detail below). Even if they do not quite provide an Archimedean point³² as Rawls hopes,³³ ie, a perspective which is aware of, but entirely removed from, the debate – and crucially –

²⁸ Rawls, writing in 1971 in his ‘Preface’ for *A Theory of Justice* expresses his gratitude to Nozick. See also, Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

²⁹ Rawls, writing in 1990 in his ‘Preface’ for the revised edition’ of *A Theory of Justice* cites the *Tanner Lectures on Human Values* vol 3 (University of Utah Press 1982) 3–87, republished as ‘Lecture VIII’ in John Rawls, *Political Liberalism* (Columbia University Press 1993). Also see, HLA Hart and others, *The Concept of Law* (3rd edn, Clarendon Law Series, OUP 2012).

³⁰ Rawls, *A Theory of Justice* (n 13) 18–19.

³¹ *ibid* 15–19.

³² S Blackburn, *The Oxford Dictionary of Philosophy* (2nd rev edn, OUP 2008).

³³ Rawls, *A Theory of Justice* (n 1) 230–32, 511.

objective, they nonetheless offer an excellent position from which to consider competing interest, and promote fairness.

Fifth, Rawls focuses on justifications that are not reliant on competing philosophical or other meta-ethical issues, but rather on a ‘deliberative democracy’³⁴ basis, appealing to areas of consensus and justified political values, rather than more controversial ‘comprehensive doctrines’.³⁵ A ‘comprehensive doctrine’ can be defined as ‘a set of beliefs affirmed by citizens concerning a range of values, including moral, metaphysical, and religious commitments, as well as beliefs about personal virtues, and political beliefs about the way society ought to be arranged’.³⁶ Rawls’s approach is further delineated in his construction of ‘public reason’, which becomes more significant if sports bodies are considered to be exercising public, or at least quasi-public functions. It is important for regulation (and regulators) to be accountable to different constituents or stakeholders; this concept of ‘public reason’ can be adapted for the purposes of elite professional sport. As sport is a discrete and (at least partially) contained system from that of wider society, this is a less demanding task than for that of a complete political society. This also means that some of the criticisms levelled at Rawls, for example by Hart and Nozick (highlighted at the third point above) are not necessarily applicable to sports morality and ethics.

Sixth, Rawls’s theory also offers significant guidance in balancing the congeries of competing interests, which may be necessary in any regulatory system: for example, the

³⁴ See further, Gutmann and Thompson (n 6).

³⁵ See further: John Rawls, *Political Liberalism* (expanded edn, Columbia Classics in Philosophy, Columbia University Press 2005) 13–15, 441; John Rawls, ‘Justice as Fairness: Political not Metaphysical’ (1985) 14 *Philosophy & Public Affairs* 223, 250.

³⁶ Paul Voice, ‘Comprehensive Doctrine’ in Jon Mandle and David A Reidy (eds), *The Cambridge Rawls Lexicon* (CUP 2014) 126.

interests of athletes may differ from other stakeholders, such as regulators or sponsors. In the second of his two ‘principles of justice’, Rawls also considers how inequalities might be considered and justified, which is also very useful in this context.³⁷

Finally, Rawls provides a method for designing effective systems and institutions which, as will be shown, can be modified and applied to sport. Each of these seven points, together with their application to elite professional sport, will now be considered in greater depth.

1. Fairness

The word ‘fairness’ is used often, but as noted above, consideration must be given to exactly what it means (and should mean) in the context of elite professional sport. Ensuring athletes are subject to the same rules, and the uniformity of application of these rules are two initial components which might be necessary for fairness here. Furthermore, the ability to compete on what is commonly described as a ‘level playing field’, ie, to compete on an even footing with other athletes and teams, so that the rules internal to the game and how it is played are the key determinants of the outcome, rather than factors outside sport, is a key component of fairness. The (theoretical) notion of a ‘level playing field’ has a special significance in sport.³⁸ Indeed, promoting it appears to be one area on which there is almost universal consensus between stakeholders, ie, it might, therefore, be considered a universal value within the normative system that is sport, although clearly commentators will interpret fairness

³⁷ Rawls, *A Theory of Justice* (n 1) 72.

³⁸ For discussion of this point, see further, Deborah Healey, ‘The Myth of the Level Playing Field’ in Sport in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016). See also, Murray, *Good Sport* (n 1).

requirements differently.³⁹ Moreover, it may be argued that the actual game itself must be fair in order for it to have meaning and value: the value of fairness is integral to the spirit of sport, as discussed earlier in this chapter.

Elite professional sport has many different (potential) inequalities, some of which will lead to unfairness, and some of which not, or at least not to the sorts of inequalities we should seek to remedy. Numerous factors can cause unfairness: for example, there can be, and indeed are, myriad advantages in preparation, resources, etc which can potentially lead to unfairness in competition.⁴⁰ However, some inequalities can and should remain; if the outcome were determined beyond any doubt before the game, then the value of that game is vitally and fundamentally damaged. So, building upon the analysis above, we must determine what characterises inequality here.

First, competing teams or individuals must be subject to the same rules, before, during and after the contest, interpreted and enforced in precisely the same way. Second, and perhaps more fundamentally, these rules should facilitate a fair outcome, ie, one which can be justified with reference to the agreed rules, both codified and uncoded; the latter may take many forms, such as conventions, customs and practices. Of course, the overall fairness of the outcome cannot be guaranteed, and sometimes a team or individual can perform better but not win. For example, a team can win due to luck, such as the unpredictable bounce of a ball leading to points scoring after a closely fought game in which one side performed marginally better but ultimately ends up losing. In rugby union or American football, for example, the ball is shaped this way, and thus prone to unpredictable bounces; this is part of the game and therefore internal

³⁹ By way of representative example, see the differences in approach between Murray and Savulescu highlighted in the previous chapter.

⁴⁰ For detailed analysis of this point, please see the bioethical chapters of this thesis.

to the sport. As such, a result influenced by an unpredictably bouncing ball might be considered at some level to be unfair, but we would not want to address this unfairness as it is part of the game, both on the basis of the (agreed) rules (which stipulate the kind of ball to be used), and at the ‘spirit’ or internal morality level. The fundamental factor remains unchanged: the result should be brought about by factors internal to the sport, as opposed to outside factors. The rules of the sport, and thus how it is played, combined with the ‘spirit’ of sport, should (ideally) be the decisive factors in defining success. As described above, the rules of sport can produce unexpected, and arguably unfair, results. However, as the potential for this to happen exists equally for both teams or competitors, it does not reduce equality of opportunity. In this connection, it is noteworthy that Rawls observes the following:

[A]fter a game one often says that the losing side deserved to win. Here one does not mean that the victors are not entitled to claim the championship, or whatever spoils go to the winner. One means instead that the losing team displayed to a higher degree the skills and qualities that the game calls forth, and the exercise of which gives the sport its appeal. Therefore the losers truly deserved to win but lost out as a result of bad luck, or from other contingencies that caused the contest to miscarry.⁴¹

These are instances of ‘unfairness’ which are a deliberate and fundamental part of sport, and therefore desirable. We do not want to reduce or eliminate them. More positively, the key point here is that it should be the sport – not outside factors – which prove decisive to success in the sport.

⁴¹ Rawls, *A Theory of Justice* (n 13).

2. Framework and Infrastructure

Rawls's philosophy can provide a credible and ethically sound foundation upon which a modern morality of sport might be custom built, from the ground up. This approach would also address the concerns raised above regarding the unsuitability of the current governance structures and the need for sport to be more accountable to stakeholders – particularly the athletes – and run more democratically. Sport comprises its own discrete society, with its own internal regulatory and governance structures, values and norms. Adapting Rawls's political theories can provide the basic structure and basis for institutions of governance which promote fairness and equality of opportunity in sport. By way of explanation, equality of opportunity in this context centres on the ability to compete on an even footing with other athletes. As this thesis is focused on the regulation of doping and enhancement, as indicated above Rawls's work may be applied to the institutions (and related structures) which address this: bodies such as WADA, CAS, National Anti-Doping organisations and the various doping disciplinary panels, for example those set up by the RFU.

3. Evolution and Revision

Elite professional sport is constantly evolving.⁴² Therefore, a theory of governance must be able to evolve in order to remain appropriate and effective. Improvements in technology, novel tactics and other unforeseen challenges arise; these all demand effective regulation. One criticism (highlighted in the previous chapter) of the current system of sports governance is that it has failed to evolve in line with the changing social, economic and technological conditions. This failure to evolve has caused numerous problems for sport, and this thesis argues that a system must be put in place which is fit to cope with the twenty-first century

⁴² See, eg, Cashmore, 'Sport's Doping Problem' (n 4) 1195.

demands imposed upon it. Morals and values can (and indeed have as noted in the previous chapter) evolved over time, and a Rawls-derived theory is able to recognise and specifically embrace this. Indeed, methods such as ‘reflective equilibrium’ ensure conclusions are constantly subject to scrutiny, and if necessary, revision.⁴³ The evolution from the ‘Corinthian values’ to the current ‘win at all costs’ and ‘marginal gains’ mentality, with sport as big business can be legislated for following principles derived from ‘Justice as Fairness’.

4. Devices and Methods

As noted immediately above at point 3, the concept of ‘reflective equilibrium’ is particularly useful here. Much of the current conceptual ambiguity surrounding the ‘spirit of sport’ might be addressed using this method to formulate a more internally consistent, precise and coherent definition. The process of working towards ‘reflective equilibrium’, ie, working to achieve harmony between beliefs at different levels, is extremely valuable as a tool to produce consistent policy judgements.⁴⁴ The ‘original position’⁴⁵ and the ‘veil of ignorance’,⁴⁶ where factors such as ‘natural fortune or social circumstance’⁴⁷ should not influence decisions are also helpful in this regard, serving to address issues of bias and the advantages enjoyed by the status quo – something which is particularly problematic in the context of anti-doping regulation. By using ideal theory, and then working back to the situation as it exists in reality we are able to reach positions which can be grounded with reference to shared fundamental values. These devices also help to avoid knee-jerk reactionary policies in response to perceived

⁴³ Rawls, *A Theory of Justice* (n 13) 18–19, 42–45.

⁴⁴ *ibid.*

⁴⁵ *ibid* 15–19.

⁴⁶ *ibid* 118–23.

⁴⁷ *ibid* 16.

(and actual) threats to sporting values; this is a criticism which has (fairly) been directed at the current anti-doping regime.⁴⁸

5. Reasonableness and Rationality

The social contract-based theory espoused by Rawls also neatly provides a reasonable and rational basis for the contractual provisions to which we require athletes to adhere, rather than positions rooted in contested ideology. There are major advantages to relying on reasonableness and rationality, as opposed to entrenched ideological positions which are inevitably subject to reasonable disagreement and may be considered inappropriate and unreasonable by many subject to them. Guidance derived using reasonableness and rationality as fundamental principles is more productive for formulating a credible morality of sport. This approach also has the advantage of being far less difficult to achieve than others; sufficient consensus, as contrasted with complete consensus, is all that is necessary. Moreover, stakeholders can maintain their personal philosophies – in Rawlsian parlance their ‘comprehensive doctrines’.⁴⁹ All that is necessary is finding areas of agreement and overlap to produce principles which can be agreed by all stakeholders. Rawls explains: ‘Philosophy as the search for truth about an independent metaphysical and moral order cannot, I believe, provide a workable and shared basis for a political conception of justice in a democratic society’.⁵⁰ This pragmatic approach, attempting to locate areas of consensus, with reasonableness evident as a key theme throughout, provides the most effective answers to the many questions of sports governance. The word ‘effective’ in this context is broadly taken to mean best able to deal with

⁴⁸ See further, Anne Amos ‘Anti-Doping Policy: Rationale or Rationalisation?’ (PhD thesis, Faculty of Law, University of Sydney 2008), <<https://core.ac.uk/download/pdf/41233660.pdf>> 29 August 2019.

⁴⁹ See above (n 35).

⁵⁰ Rawls, ‘Justice as Fairness’ (n 35) 230.

issues of player health and safety, whilst promoting even and level competition. Rawls opines: ‘The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by prior and independent order of object and relations’.⁵¹ This is important, as rather than attempting to find an elusive ‘moral truth’, Rawls grounds his theory with reference to something more tangible and easier to understand, and consequently far less prone to criticism.

Rawls explains his approach:

We collect such settled convictions as the beliefs in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent conception of justice. We can regard these convictions as provisional fixed points which any conception of justice must account for if it is to be reasonable for us. We look, then, to our public political culture itself, including its main institutions and the historical traditions of their interpretation. The hope is that these ideas and principles can be formulated clearly enough to be combined into a conception of political justice congenial to our most firmly held convictions.⁵²

Specifically relating some of Rawls’s ideas to sports governance, we might begin by attempting to find some fundamental values upon which everyone (or as close to everyone as reasonably practicable) can, and should, agree. For the ‘most firmly held convictions’ in this context, we might begin with values such as fairness; the level playing field, and the concept of player safety, health and wellbeing.

6. Balance

⁵¹ John Rawls, ‘Kantian Constructivism in Moral Theory’ (1980) 77 *The Journal of Philosophy* 515, 519, <<https://doi.org/10.2307/2025790>>.

⁵² Rawls, ‘Justice as Fairness’ (n 35) 228.

In creating a credible morality, one must balance competing and opposing ideologies. Rawls is able to neatly sidestep issues such as moral relativism as against moral realism or objectivism with a specific focus on reasonableness, and his ‘original position’. Rawls thus ‘replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine, an order apart and distinct from how we conceive of ourselves’ with the ‘search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society’ and focuses on the ‘most reasonable doctrine for us’.⁵³ Rather than seeking to rely on contested ideological positions to justify policy, instead areas of agreement, using techniques which build upon Rawls’s theory, such as Gutmann and Thompson’s deliberative democracy, can be used to ground policy. In the words of Gutmann and Thompson, we operate on the basis that we must

justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return.⁵⁴

The related Rawlsian concepts of ‘reasonable pluralism’ and ‘public reason’ are particularly valuable in this regard. Meaningful justification of anti-doping policies, particularly to those subject to them (ie, the athletes) is also lacking in the current regulatory regime;⁵⁵ this must be addressed.

⁵³ Rawls, ‘Kantian Constructivism in Moral Theory’ (n 51) 519.

⁵⁴ Gutmann and Thompson (n 6) 3.

⁵⁵ See, eg: ‘Statement by Global Athletes on continued criticism by WADA against the world’s athletes and other anti-doping reformers’ (*Sports Integrity Initiative*, 1 November 2018), <www.sportsintegrityinitiative.com/statement-by-global-athletes-on-continued-criticism-by-wada-against-the-worlds-athletes-and-other-anti-doping-reformers/> accessed 29 August 2019; White House summit, ‘The

7. Systems

As highlighted above, much of Rawls's work specifically considers how to create fair political institutions, and thus promote fairness through their structure and operation. These methods, procedures and tools are instructive for sports governance: the concepts and structures can, with some amendments, be applied to sports governance. There are numerous similarities between political philosophy and sports philosophy, and many of the considerations are strikingly similar.⁵⁶ Furthermore, his focus on institutions can be viewed as a positive for many reasons, such as their ability to shape and drive change and innovation far more effectively and efficiently than individuals, and these changes are able to be retained after the individual(s) responsible leave office. Moreover, at present the institutions of sports governance are a major contributing factor to the current problems faced by sport, and thus require urgent reform. Rawls's concept of pure procedural justice is also helpful here. Reliance on procedure and a system, as contrasted with reliance on individuals on a more ad hoc basis, is likely to provide more consistent and stable results. Reference to the 'institutions' of 'public political culture' is also instructive; as noted under the previous point, there is a pressing need for sport to be governed more democratically, ie, with increased independence, transparency and accountability, particularly to vital stakeholders such as athletes. This has been recognised even by regulators, together with the need to reform the regulatory structures of anti-doping.⁵⁷

Washington Anti-Doping Summit Declaration report', 31 October 2018, <www.usada.org/the-washington-anti-doping-summit/> accessed 29 August 2019; 'Reforming WADA's Governance for a new Anti-Doping Age' (*The Alternative*, 9 October 2018), <<http://athletesforcleansport.com/wp-content/uploads/2018/10/The-Alternative-Detailed-Paper.pdf>> accessed 29 August 2019.

⁵⁶ See, eg, Camporesi and Maugeri (n 6).

⁵⁷ eg, calls of this nature were made following the White House summit (n 55).

Notably some athletes acting as spokespeople have also called for this, with for example Paralympic silver medal winning Ali Jawad, publicly backed by gold medallist Jared Tallent arguing for fundamental reform to WADA.⁵⁸ It is clear that there is an urgent need to reform anti-doping measures with calls from within the anti-doping community,⁵⁹ the academic anti-doping community⁶⁰ and the wider public.⁶¹

The contract-based nature of Rawls's system is also helpful for sports governance. A preliminary distinction should be made here between contracts in the private law sense, for example in this context between a team and a player, and a Rawlsian social contract which is much broader, providing an overarching structural function between a group of individuals and the authorities which govern them, as discussed above. Both are relevant for our purposes. Regarding the former, professional athletes are generally employees operating under employment contracts with their respective teams or clubs, as well as many other contracts for endorsing products etc. Professional sport has significant commercial dimensions and therefore the regulation must be appropriate for this task; given the reliance on forms of contract, a

⁵⁸ 'Reforming WADA's Governance for a new Anti-Doping Age' (n 55).

⁵⁹ See above (n 55).

⁶⁰ There are numerous examples, including: Dimeo and Moller (n 1); J Savulescu, B Foddy and M Clayton, 'Why we should allow performance enhancing drugs in sport' (2004) 38 *British Journal of Sports Medicine* 666, <<http://dx.doi.org/10.1136/bjism.2003.005249>>.

⁶¹ Martina Hyde, 'Let us simplify this for Sir Craig Reedie: Wada is not doing its job' *Guardian* (31 October 2018), <www.theguardian.com/sport/2018/oct/31/sir-craig-reedie-wada-president-russia-reinstated> accessed 29 August 2019; Sean Ingle, 'How far has fight against doping really come since "dirtiest race in history"?' *Guardian* (24 September 2018), <www.theguardian.com/sport/blog/2018/sep/24/fight-against-doping-dirtiest-race-in-history> accessed 29 August 2019.

contractarian theory is an appropriate choice.⁶² Contracts are a well-established part of elite professional sport and something with which athletes are familiar. These narrower, more specific contracts which make up the individual agreements in sport fit within the wider Rawls-derived social contract; they should be consistent with its overarching aims and duties. In summary, a number of Rawls's key ideas and concepts have been introduced; they will be explained and examined in greater detail below. They will then be adapted for the demands of sports governance. Using these steps, we can create a Rawls-derived foundation upon which a sound morality of sport might be built – ie, the 'positive' case.

An Application of Rawls to Sports Ethics

Using a Rawlsian approach helps us to identify some of the failings of the current system and provide a comprehensive framework to address them. This framework and approach do not seek to rely on controversial ideological positions for their validity, acceptance and adoption. However, this does not mean that we must rely exclusively on following appropriate procedure to determine policy; the framework and approach outlined in this thesis are not purely procedural; following the logic of academics such as Ashcroft, it seeks to provide concrete answers to question of policy.⁶³

⁶² See, eg, Paul J Hayes, 'The Commercial Rationale of the World Anti-Doping Code' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016).

⁶³ For more on this reasoning, see, Richard Ashcroft, 'Fair Process and the Redundancy of Bioethics: A Polemic' (2008) 1 Public Health Ethics 3, <<https://doi.org/10.1093/phe/phn004>>. See also, 'Critical Approach and Methods of Analysis', ch 2 of this thesis.

Rawls has been considered, at least in passing, by many sports ethicists and philosophers, such as: Keenan,⁶⁴ McNamee and Loland,⁶⁵ Murray,⁶⁶ Lenk,⁶⁷ and Corlett.⁶⁸ However, their use of Rawls has been significantly more limited; although they have used elements of his work, none of these academics has sought to use Rawls to derive a credible system of morality and ethics for sport, which is the aim of this chapter and this thesis. A brief summary of how these theorists use Rawls is provided in order to demonstrate the significant differences between their uses and how this thesis utilises his work. Keenan, a physical education academic writing in 1975, does not endorse Rawls's theory, but looks at the institutions of sport through a Rawlsian 'justice as fairness' lens to consider their effectiveness, but many of the issues he raises in 1975 are not so applicable almost 50 years later. McNamee and Loland champion the Rawlsian concept of 'overlapping consensus' as a tool for developing more effective anti-doping policy which does not rely on a contested and controversial ideological perspective. They engage with other theorists and do not use Rawlsian principles to develop a fully articulated theory, or a more comprehensive system, as this thesis does. Murray utilises an approach inspired by the Rawlsian tool of 'reflective equilibrium' to reach more coherent and persuasive ethical positions, as well as using Rawls's specific musings on sport – particularly baseball – in his book *Good Sport: Why Our Games Matter – and How Doping Undermines Them* to illustrate the intricate balances in sport, specifically baseball.

⁶⁴ Keenan (n 22).

⁶⁵ See, eg, Loland and McNamee (n 12).

⁶⁶ Murray, *Good Sport* (n 1).

⁶⁷ Christian Lenk, 'Is enhancement in sport really unfair? Arguments on the concept of competition and equality of opportunities' (2007) 1 *Sport, Ethics and Philosophy* 218, <<https://doi.org/10.1080/17511320701425157>>.

⁶⁸ J Angelo Corlett, 'Doping: Just Do It?' (2013) 7 *Sport, Ethics and Philosophy* 430, <<https://doi.org/10.1080/17511321.2013.851731>>.

Lenk argues for ‘equality of opportunities’ in sport, drawing a parallel between sport and resource allocation and mentioning Rawls’s *Theory of Justice* as a general rationale for this position, and for a maintenance of the current anti-doping approaches. Corlett references Rawls in more general terms as an authority on concepts such as punishment when discussing penalties for those found to be doping, as he argues against lifting any ban on doping and in favour of a strengthening of the current system and its punitive sanctions. As highlighted above, these uses are much more limited and do not seek to provide a complete Rawlsian system of sports ethics to inform anti-doping policy.

Using a Rawls-inspired approach can remedy the most pressing problems evident in the current anti-doping regulatory system. As demonstrated in the previous chapter, one criticism that may be levelled at the status quo is that the principles it espouses rely on a flawed and untenable philosophical/ideological doctrine(s), ie, the ‘Corinthian Values’. As observed by Geeraets, the ideological nature of WADA’s policies creates problems,⁶⁹ as these values are not shared by many important stakeholder groups, namely athletes/players, coaches and support staff. In Rawlsian terms, this heavy reliance on ‘comprehensive doctrines’,⁷⁰ as opposed to adopting an approach which rests more on an ‘overlapping consensus’,⁷¹ creates numerous problems for sports ethics. Utilising a more fully articulated approach derived from Rawls leads to a more appropriate reformulation of the ‘spirit of sport’, and to a system of sports ethics which can better be applied to (anti)-doping regulation.

⁶⁹ V Geeraets, ‘Ideology, Doping and the Spirit of Sport’ (2018) 12 *Sport, Ethics and Philosophy* 255, <<https://doi.org/10.1080/17511321.2017.1351483>>.

⁷⁰ See, in particular, Rawls, ‘Justice as Fairness’ (n 35) 250.

⁷¹ See further, Rawls, *A Theory of Justice* (n 13) 340.

The current approach, ie, that which espouses the ‘Corinthian Values’, is both problematic from a Rawlsian perspective, and problematic for our practical purposes; problematic for Rawls in that this is not an appropriate basis for principles or regulations to be justified as it relies on a controversial ideological perspective which cannot provide ‘overlapping consensus’; problematic for our practical purposes in that it plainly is not working effectively.⁷² One answer is to justify decisions with reference to something else upon which there might be more agreement, and which is more independent of disputed ideological and philosophical values, as detailed below.

In *A Theory of Justice* Rawls provides a comprehensive framework for a liberal political system and society. Rawls explains:

[T]he guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.⁷³

Pogge explains the key thought behind the theory Rawls advances:

We citizens of a modern democratic society should design its basic rules in accordance with a public criterion of justice that purely prudential representatives of prospective citizens would agree upon behind a veil of ignorance.⁷⁴

⁷² See analysis in ch 4 and 5 of this thesis.

⁷³ Rawls, *A Theory of Justice* (n 13) 10.

⁷⁴ Thomas Pogge and Michelle Kosch, *John Rawls: His Life and Theory of Justice* (OUP 2007) 7–8.

As we can see, this is a materially different and more ambitious aim than providing a theory of sports governance. Therefore, Rawls's method will first be explained, and then adapted and developed for sport.

Rawls has a number of tools that will help to construct a modern morality of sport; these tools have been introduced above, but more detail regarding the results of their practical application is necessary to demonstrate their utility for present purposes. The first of these tools is the 'original position'. This is a way in which we might safeguard fairness, and ensure biases are removed – it is a hypothetical concept in which 'we are to imagine ourselves in the position of free and equal persons who jointly agree upon and commit themselves to principles of social and political justice'.⁷⁵ This includes the 'veil of ignorance', which focuses on removing biases and partiality. It achieves this by stripping away knowledge of a person's

place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong.⁷⁶

Rawls sets out stages with each stage building upon the previous, with the 'veil of ignorance' being gradually lifted as each stage is completed. Wenar states:

Through this four-stage sequence, the veil of ignorance that screens out information about society's general features gradually becomes thinner, and the parties use the

⁷⁵ Samuel Freeman, 'Original Position', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2019) <<http://plato.stanford.edu/entries/original-position/>> accessed 29 August 2019.

⁷⁶ Rawls, *A Theory of Justice* (n 13) 118.

new information to decide on progressively more determinate applications of the principles already agreed upon. The parties, that is, progressively fill in the institutional details of what justice requires in the real world.⁷⁷

Including in the debate all stakeholder groups impacted by policies would be an appropriate place to begin. There are many stakeholders in sport whose interests must be considered. The weight of each group's opinion should also be carefully calibrated, ideally with each group's opinion being given equal weight, at least initially. We could then, following Rawlsian thinking,⁷⁸ rank those stakeholders impacted in lexical order, with the interests of the most important stakeholders being afforded primacy. As the regulators directly regulate athletes' conduct, which has an enormous impact on their day-to-day lives and their profession, this provides a persuasive rationale for priority voice to be given to the athletes. The interests of other less important stakeholder groups (regulators, fans, sponsors etc) must also be accounted for, but they should not have the normative force that athletes' demands have. Therefore, in this morality, we would begin with the athletes themselves, and then the interests of other stakeholders such as sponsors, fans etc (not necessarily in that order) with each being addressed in turn, remaining consistent with previous decisions concerning other stakeholders. During the 'thinning' process of the 'veil of ignorance', this could be accounted for, with athletes' voices given priority over other stakeholders. This influence becomes more significant as the stages progress:

At the second stage of the original position, the parties are given more information about society's political culture and economic development, and take on the task of crafting a constitution that realizes the two principles of justice. At the third stage, the parties learn still more about the details of society, and agree to specific legislation that realize the two principles within the constitutional framework decided at the second stage. At the fourth stage, the parties have full information about society, and reason as judges and administrators to apply the previously-

⁷⁷ Wenar (n 13).

⁷⁸ Rawls, *A Theory of Justice* (n 1) 37–39.

agreed legislation to particular cases. When the four stages are complete, the principles of justice as fairness are fully articulated for society's political life.⁷⁹

As noted above, during the latter stages priority voice may be given to the athletes, and also concerns about the 'ideal' nature of the theory can be addressed practically, using the ideal as a reference point from which informed judgements can be made about 'real world' issues.

Adopting a version of this comprehensive approach and adapting it for sports would ensure that a morality of sport can be formulated with all the relevant information, and also grounded in reason independent from extraneous factors, and therefore unbiased. This represents, expressed in the colloquial, a 'best of both worlds' approach. Although (as noted earlier) the task of designing social and political institutions and policy is more demanding than the aims of this thesis, the multi-stage approach outlined by Rawls is nonetheless worth following as it ensures a balanced and well-grounded process, which in turn provides reasoned and coherent conclusions. However, less time at each stage is necessary, simply because there are fewer issues to address. The fourth stage is particularly helpful in testing policy and finding answers to the controversial and contested questions raised by anti-doping issues.

Using a hypothetical 'veil of ignorance', with its multiple stages, can help us develop a more cogent and ethically robust system of sports ethics. We can use this thought experiment to decide what, if anything, should be done to address specific inequalities. Initially, stakeholders would not know whether they were in the most – or least – favourable position, and therefore would not risk unduly favouring one over the other; the gamble simply would not be worth it. On this basis, public reason and fair opportunity are the main drivers of policy, rather than bias or vested interests. This also has the major advantage of removing the status

⁷⁹ Wenar (n 13).

quo from its dominant and deeply entrenched position. Real world decisions can then be made following completion of these earlier foundational stages.

This approach is designed to ameliorate (at least initially) the partisanship that often damages debate on ethics and regulation – something which is particularly apparent in this specific context of anti-doping. As stakeholders do not know, for example, whether they are regulators or regulated, from advantaged or disadvantaged backgrounds, they must rationally create a fair system for all, without unduly favouring one position over another; to continue with the ‘level playing field’ metaphor, the basic structure should not be slanted in favour of one side. Following this approach, policy is based instead on ‘overlapping consensus’, ie, areas of common agreement, which in this context could be values such as the promotion of athlete health and of fair competition. This therefore provides an ‘ideal’ starting point from which to create a new system, with new structures and safeguards.⁸⁰

Clearly it would not be possible to put all the relevant stakeholders in the ‘original position’ behind the ‘veil of ignorance’; this is a hypothetical exercise. We can, however, use this as an extremely useful thought experiment (Rawls intended it to be treated as such) to provide a reference point for theory, and to draw ethically robust practical conclusions regarding how rational stakeholders might act. This ideal can then be used to inform our non-ideal world.

In summary, once the stakeholders are defined and ranked and the basic framework is in place, broader, more general questions of justice can then be addressed. Following this initial stage, as explained above, the ‘veil of ignorance’ is gradually ‘thinned’, with progressively

⁸⁰ ‘Ideal’ is used here in the sense of ‘ideal theory’. This is in contrast to approaches championed by philosophers such as Raymond Geuss and Amartya Sen. Questions of this nature are considered in greater depth in ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

more information being made available to the stakeholders. As noted above, there are compelling reasons to rationally consider the athletes to be a key stakeholder group behind the ‘veil of ignorance’, in that the policies adopted will have the most significant impact on their day-to-day lives: at a basic level, on their health and on their careers and livelihoods. Therefore, during this ‘thinning’ process, the views of athletes will be given greater priority. Interests of wider society and other stakeholders such as sponsors, regulators, fans, owners, the media, must also be addressed, and thus are also represented in the thought experiment.

Rawls focuses on securing basic liberties, such as political liberty. To relate this to our purposes, athletes therefore should be able to influence matters that will impact them, at present something which does not happen consistently and meaningfully, or indeed, in some sports, at all.⁸¹ It is worth highlighting at this juncture that in sports such as American football (NFL) where the players are better represented, and therefore are able to influence policy in a meaningful way, anti-doping policies are significantly less demanding on players and sanctions for breaches of the rules are far less severe.⁸² Furthermore, as one might expect with a bespoke policy (as opposed to one designed to regulate doping in all sports), the policies are more specific and appropriate to the sport. The advantages of this approach are also considered in

⁸¹ WADA has been criticised in this regard. See, eg, call for more athlete influence at the White House summit (n 55).

⁸² The NFL’s policies are a result of collective bargaining between the League and the Players Union. By way of example, for a first PED offence, such as the use of an anabolic steroid, a player is banned for six games (Point 6), NFL Policy on Performance-Enhancing Substances 2020, <<https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2020-Policy-on-Performance-Enhancing-Substances.pdf>> accessed 3 November 2020. This can be contrasted with the WADA position, where a first offence ban can be four years (WADA Code 10.2.1). See also, ‘Regulatory Structure and Framework’, ch 3 of this thesis.

the ‘Policy Proposals’ chapter (chapter nine) of this thesis; they are able to inform our intuitions within the Rawlsian framework advanced in this chapter.

The concept of ‘reflective equilibrium’⁸³ – in summary, the idea that all one’s beliefs should be internally coherent and consistent – is an extremely useful tool which can be readily related to sports ethics. Rawls describes it as follows, aiming to resolve inconsistencies between our broader and more specific beliefs:

We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and confirming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.⁸⁴

Other critics, for example Häyry, have also stressed the importance of one of the key benefits of ‘reflective equilibrium’: internal coherence.⁸⁵ Even though it might be extremely difficult (if not impossible) to achieve ‘reflective equilibrium’ in reality,⁸⁶ the process of attempting to reach it is immensely valuable, and functions as a highly effective safeguard against arbitrary decisions and poorly reasoned ideas. If we can begin to approach a sort of collective ‘reflective equilibrium’ on issues of sports ethics and governance, then this could be an effective solution.

⁸³ Rawls, *A Theory of Justice* (n 13) 18–19, 42–45, 507–08.

⁸⁴ *ibid* 18.

⁸⁵ Matti Häyry, *Rationality and the Genetic Challenge: Making People Better?* (CUP 2010) ch 2. See also, discussion of Murray relating to n 66 above.

⁸⁶ This approach can, for example, be contrasted with that of John Gray. See further, John Gray, *Two Faces of Liberalism* (Polity Press 2000).

Working between broader beliefs and more specific beliefs provides more balanced and well-reasoned conclusions and prevents inconsistent contradictory policies.⁸⁷

However, reaching reflective equilibrium individually, as noted above, is extremely demanding; therefore reaching it collectively is likely to prove impossible. The key point, however, as Rawls acknowledges, is that it is an ideal to strive towards and attempt to reach, not that we actually succeed in reaching it,⁸⁸ much like putting the parties in the ‘original position’ behind the ‘veil of ignorance’, it is a hypothetical endeavour which comprises a vital part of his ideal theory. The benefits of internal coherence and consistency are derived from the reasoning process. Using this approach, any areas of consensus should be built upon, and thus a framework for morality might gradually be constructed. It should also be noted that no beliefs are sacrosanct and all must be thoroughly justified and grounded with reference to public reason. They will also be subject to review and change if relevant new information is presented.⁸⁹ This is helpful for our purposes, as it helps to reduce the influence of preconceived notions, on for example the ‘spirit of sport’, and issues of anti-doping. It also helps to ensure coherence and internal consistency, and as it is always open to revision has advantages over other approaches such as ‘foundationalism’ which lack this ability.⁹⁰

The concept of ‘reflective equilibrium’ can be broken down into narrow and wide reflective equilibrium. Narrow reflective equilibrium comes first as it is less demanding and must be reached before wide reflective equilibrium can be approached. Wide reflective equilibrium, ie, coherence and reasoned consistency across all one’s beliefs, as opposed to, in

⁸⁷ Rawls, *A Theory of Justice* (n 13) 18.

⁸⁸ *ibid* 43.

⁸⁹ *ibid* 18.

⁹⁰ Wenar (n 13).

Wenar's words 'narrow reflective equilibrium: coherence among one's initial beliefs', is enormously demanding and will not be reached in practice, but seeking to get as close as possible is nonetheless an instructive exercise, as articulated above.⁹¹

These approaches demonstrate the extensive use of 'ideal theory' to formulate policy. One criticism which has been made of Rawls's theory as it relates to politics and political and social institutions stems from its ideal or abstract nature.⁹² However, in this context of sports ethics this criticism loses much of its validity. Despite the abstract nature of Rawlsian ideal theory, as elite professional sport can be more clearly constructed and self-contained than political communities, it has a normative system which (as discussed earlier in this thesis)⁹³ is at least partially separate from wider society. Given this unique characteristic, many of the criticisms of the abstract ideal nature of this theory, and the associated concerns regarding its implementation, are attenuated.⁹⁴ Therefore, we are able to derive an effective system for sports morality and ethics using Rawls's theory without addressing concerns relating to wider political and social systems.

Rawls's 'Primary Social Goods' in Sport

A key preliminary task for present purposes is to establish what rational stakeholders would agree (in the 'original position' behind the 'veil of ignorance') as principles to govern sport. Following a Rawlsian approach, one of the first steps in this task is to identify the 'primary

⁹¹ *ibid.*

⁹² See, eg, Geuss (n 2).

⁹³ See the previous chapter in particular.

⁹⁴ This point and other related points are considered in depth in 'Critical Approach and Methods of Analysis', ch 2 of this thesis, and are thus not discussed here.

social goods' in this context, ie, for sport. The concept of 'primary social goods' figures prominently in Rawls's ideas of liberty. He defines them as follows:

Now primary goods, as I have already remarked, are things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less. With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be. The primary social goods, to give them in broad categories, are rights, liberties, and opportunities, and income and wealth.⁹⁵

This is – of course – assuming that Rawls is correct regarding the concept of 'primary social goods'.⁹⁶ In any event concerns of this nature regarding broader Rawlsian political philosophy are limited here, as Rawls's principles are only used to derive principles for sports ethics, and wider questions relating to political philosophy are therefore not necessary to address for this express purpose. It is however noteworthy that, in the context of healthcare scholarship for example, prominent Rawlsian scholar Norman Daniels would include health as a 'primary social good', but again, this is an observation which relates to values in an entire political society, not elite professional sport.⁹⁷ It should be less challenging to establish what might be considered 'primary social goods' for elite professional sport. Health may be one of them, but the principles for sport detailed below are derived by considering different questions, ie, those

⁹⁵ Rawls, *A Theory of Justice* (n 13) 79.

⁹⁶ Other theorists, for example Amartya Sen and Martha Nussbaum, would disagree, focusing instead on capabilities. See further, eg: Amartya Sen, *Development as Freedom* (OUP 1999); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011).

⁹⁷ See further, originally: Norman Daniels, *Just Health Care* (CUP 1985); and more recently, Norman Daniels, *Just Health: Meeting Health Needs Fairly* (CUP 2007).

specific to the nature of sport, and this inclusion of health does not necessarily represent a shortcoming in Rawls's theory or an endorsement of Daniels's conclusion.

Following Rawlsian thinking, the question here is what the primary goods should be for our purposes, ie, in the system of morality and ethics to inform elite professional sport. In answer to this question, the first three – 'rights, liberties and opportunities' – may be considered the 'primary social goods' to focus on, although some clarification and modification is necessary. Here the 'rights, liberties and opportunities' refer not to the basis on which one might for example run for and hold office, but the ability to compete on an equal basis with other athletes or players, as detailed above. Moreover, income and wealth may have some relevance and so should be considered, but they are not first order considerations in comparison with the other three. We are concerned with social and financial inequalities only insofar as they impact upon sport, namely athletes' health and ability to compete on a fair basis.

As noted above, the requirement of fairness must be an underpinning principle for any sound morality of sport. It has both an intuitive superficial, and a deeper, more fundamental appeal. It is also a central theme of Rawls's work. Questions may arise regarding how far this fairness requirement should be taken and which inequalities should be remedied in the pursuit of fairness.⁹⁸ These questions are considered below.

⁹⁸ How to remedy significant financial inequalities between competing sports clubs, for example, is an interesting question, but beyond the scope of this thesis.

Rawls-Derived Principles for Sports Governance

Let us now consider how Rawls's two fundamental principles of justice as fairness might be effectively related to our task. It is instructive to begin by setting out the two principles in their original form:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.⁹⁹

Rawls then states the 'Difference Principle':

Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.¹⁰⁰

As mentioned above, the principles are in lexical order, which means that the first principle must be satisfied before the second, and the second before the 'Difference Principle'; essentially, they are placed in descending order of importance. This approach ensures that the second principle cannot be used to justify infringements on the first.

As explained in the preceding section Rawls is, of course, seeking to address questions which are much broader in nature than sports ethics, ie, with individuals' rights and liberties within a just political society. Therefore, he advances governmental mandates to address socio-economic disadvantage and inequality. As highlighted earlier, these aims and principles are more ambitious and wide-reaching than what is necessary to provide a system of sports

⁹⁹ Rawls, *A Theory of Justice* (n 13) 53.

¹⁰⁰ *ibid* 72.

morality, and therefore much of this goes beyond what is required for the task at hand. However, the general method and related devices through which he provides these broader conclusions can be applied to our purposes: ie, to establish a concept of fairness in sport. This morality – or spirit – of sport can then be used to derive a system of sports ethics.

In order to use this general approach and apply it to sports ethics, consideration must be given to what might constitute fundamental principles in this context, ie, the values rational stakeholders behind the ‘veil of ignorance’ would agree on and apply to sport. Based on the analysis detailed in the previous section, fairness may be considered the first of these values; this raises questions regarding what the concept of fairness in sport might demand in practice. The first requirement here could be to provide athletes with equal terms of participation. This necessitates rules, and consideration of how these rules should be applied in practice. To this end, we must consider the codified rules, but also further uncodified rules, customs and practices which influence their application.¹⁰¹ Behind the ‘veil of ignorance’ stakeholders do not know their positions regarding the rules, and thus rationally would seek to ensure they are applied equally to all stakeholders to provide equal terms of participation for athletes, both during and outside competition. These rules should be scrutinised thoroughly to ensure they are clear, consistent and justified, ie, ethically and legally robust. This would provide theoretical conditions of fair competition. Furthermore, these rules should be applied by independent and transparent regulatory structures and processes in order to prevent bias and partiality, both actual and perceived.

Second, and relating to competition, stakeholders do not know about their abilities and advantages, but must consider what, if anything, should constrain this competition. This leads

¹⁰¹ See also the earlier discussion in the previous chapter under ‘The Rules of Sport’.

to examining why athletes might compete in sport, ie, what sport's purpose is.¹⁰² Perhaps the most obvious reason for competition – particularly at the elite professional level – is to establish which athlete (or team) can, following the rules, produce the best performance in order to win. Winning, and to a lesser extent performance, may then be considered fundamental aims of sport which can inform its values.¹⁰³ The next question is whether this competition and pursuit of victory should be untrammelled, or whether constraints should be imposed upon it. From the analysis above, athlete health, safety and wellbeing might be three such constraints. Furthermore, as stakeholders do not know their position, such as for example their access to resources which could provide advantage, they may rationally seek to ensure that such resources relating to performance and competition would be equally available to all, at least theoretically at the level of the codified rules.

Third, as the policies formulated from behind the 'veil of ignorance' would be focused on regulating the athletes' conduct, these policies must be justifiable to them, relying on an 'overlapping consensus' (such as athlete health and safety) rather than controversial and contested ideologies. They are also on equal bargaining terms with one another, which allows for fair compromise between the regulators and the regulated and prevents one group's interests being unduly favoured over another's. Athletes' interests should be represented, with the ability to meaningfully shape the policies which govern them.

In light of these considerations, the following principles can therefore be advanced for sports ethics:

¹⁰² See discussion in the previous chapter regarding the purpose of sport under 'The Purpose(s) of Elite Professional Sport'.

¹⁰³ See the discussion of sporting values in the previous chapter under 'Sporting Values: An Introduction'.

First – athletes should compete under uniformly applied rules that mandate equal terms of participation, applicable both inside and outside competition.

Second – factors to impact athletes’ athletic abilities and advantage must be (a) focused on – and constrained by – athlete health, safety and wellbeing, and (b) equally available to all.

Meaningful influence/governance principle: athletes should be able to inform and shape the policies which govern them. This necessitates a particular focus on (a) accountability to athletes, and (b) transparency and independence in regulation and regulatory structures.

Using these principles, we can now set out some potential options for a system of sports ethics. It is worth stating explicitly what these principles will be seeking to achieve, and the reasoning behind them.

First, effective institutions of sports governance should ensure that each athlete has equal basic conditions so that they might compete on an even footing with one another. This is what, in the context of sport, may be termed the ‘level playing field’ principle and shares some similarities with Rawls’s original principle.¹⁰⁴ For example, relating this to anti-doping, each participant should be subject to the same anti-doping and related enhancement controls both in and out of competition.

¹⁰⁴ This requirement is different from that associated with the ‘luck egalitarian’ level playing field argument, advanced by philosophers such as Ronald Dworkin. For discussions of this point, see, eg, <<https://plato.stanford.edu/entries/equal-opportunity/>> accessed 1 September 2016. Also, regarding equality, see: Ronald Dworkin, ‘What Is Equality? Part 1: Equality of Welfare’ (1981) 10 *Philosophy & Public Affairs* 185; Ronald Dworkin ‘What Is Equality? Part 2: Equality of Resources’ (1981) 10 *Philosophy & Public Affairs* 283.

Second, although some inequalities are unavoidable (and not undesirable given the nature of sport), the basic structure (and therefore the institutions of governance) should promote fair equality of opportunity so that the inequalities we wish to reward are rewarded, and those we wish to minimise are reduced. As highlighted above, for there to be a winner, sport must have some inequalities, but we should seek to exclude some inequalities, ie, those which are deemed unfair and unrelated to the sport, from impacting the sport or game, so that other inequalities (ie, differences in sport performance) may prove decisive.

Third, athlete health, safety and wellbeing should be considered at the level of the rules, with measures taken to promote them. These measures should be in keeping with the culture of the sport or game, and may be balanced against the risks inherent to the sport.¹⁰⁵ For example, we could ban tackling in rugby union or American football, but this would not be in keeping with culture of either sport and would change the nature of what the sport values quite fundamentally. There must be a reasonable and rational trade-off here; for example, banning specific types of tackles such as those targeting the head and neck, and imposing penalties for this type of conduct, rather than banning tackling entirely.¹⁰⁶

Fourth, we must consider what the principle requiring measures which impact athletes' abilities and advantage be equally available to all requires in practice. A distinction may be drawn here between theoretical and realisable advantages and disadvantages. For example, certain training and recovery measures will be available to all in theory, but may in practice not be, generally due to differences in financial resources. Detailed analysis of the questions surrounding what might constitute a fair distribution of wealth is beyond the scope of this

¹⁰⁵ This second point is somewhat contentious, and is therefore also discussed in the 'Regulatory Themes and Statements of Value' chapter and the bioethical chapters of this thesis.

¹⁰⁶ This has to be provided for at the level of the rules in both sports.

thesis, although these questions are discussed in the specific context of doping and enhancement in the bioethical chapters (chapters seven and eight) of this thesis.¹⁰⁷

Finally, values such as accountability, transparency and independence should be promoted at the level of the formal rules. This will provide important checks and balances, helping to ensure no stakeholder group is able to dominate another; regulators should also be accountable to athletes (ie, those regulated). Greater transparency will also invite scrutiny of reasoning and help to reduce conflicts of interest (both perceived and actual) as well as improving legitimacy in decision-making.

On a closely related topic, Wenar notes that two of Rawls's key considerations when considering how to justify and impose a law (or more often in a sports context, a regulation), particularly one which is applicable across a wide and diverse range of people as a law/regulation governing international sports necessarily would be, are legitimacy and stability.¹⁰⁸ One of the principal requirements for legitimacy is the ability to justify the rule or law to an independent, rather than partisan, standard. 'Now a basis of justification that rests on self – or group – interests alone cannot be stable'.¹⁰⁹ This is arguably the position now, with a lack of stability following numerous scandals (for a scandal unrelated to doping see, for example, the FIFA scandal concerning Sepp Blatter),¹¹⁰ and the present system of anti-doping regulation which lacks independence and transparency, with governing bodies inevitably

¹⁰⁷ See also, eg, Hywel Iorwerth, Paul Tomkins and Graham Riley, 'Financial Doping in the English Premier League' (2018) 12 *Sport, Ethics and Philosophy* 272, <<https://doi.org/10.1080/17511321.2017.1351484>>.

¹⁰⁸ See further Wenar (n 13).

¹⁰⁹ J Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1.

¹¹⁰ eg, numerous reports of corruption in football and lack of transparency: 'Fifa corruption crisis: Key questions answered' (*BBC News*, 21 December 2015), <www.bbc.co.uk/news/world-europe-32897066> accessed 16 September 2016.

acting within their own self-interest.¹¹¹ A Rawls-influenced morality of sport, where the basic structure can be derived from the ‘original position’ behind the ‘veil of ignorance’, with its characteristic focus on designing ‘just institutions’, would help to safeguard much needed independence and transparency.

Procedural Justice

Rawls’s theory places a major emphasis on creating appropriate procedure which can engender aims such as justice and fairness. To this end, he considers three types of procedural justice: pure procedural justice, perfect procedural justice and imperfect procedural justice. Extensive discussion of each theory is not necessary here, although a brief explanation is worthwhile. For Rawls, imperfect procedural justice is best illustrated by reference to a criminal prosecution in a country such as the US or the UK. The procedure is designed to promote the desired outcome – ie, a guilty person being found guilty or an innocent person acquitted – but this may not happen despite the correct procedure being followed. Rawls explains that ‘The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it’.¹¹² Perfect procedural justice can be illustrated by, as described by Rawls, cutting up a cake into equal portions, with the person cutting taking the last piece. The idea here is that the person cutting the cake, knowing that she or he will have to take the last piece, will attempt to ensure that all the pieces are the same size. The key factor here, in Rawls’s words, ‘is that there is an independent

¹¹¹ See, eg, M Daly and C McKay, ‘Lord Coe role in Eugene 2021 Worlds decision questioned’ (*BBC Sport*, 24 December 2015), <www.bbc.co.uk/sport/athletics/34908237> accessed 16 September 2016.

¹¹² Rawls, *A Theory of Justice* (n 13) 75.

standard for deciding which outcome is just and a procedure guaranteed to lead to it'.¹¹³ Pure procedural justice is somewhat harder to describe; the general idea is that the emphasis is on the procedure. Rawls advocates a pure procedural justice approach and highlights that 'A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out; for in these cases there is no independent criterion by reference to which a definite outcome can be known to be just'.¹¹⁴ Therefore, as Rawls notes later in the passage, the importance of fair procedure and just institutions are major features of his theory. Rawls states: 'The aim is to use the notion of pure procedural justice as a basis of theory'.¹¹⁵ This approach is helpful in answering difficult questions; following this theory, provided the procedure is just, a just result should follow. However, drawing upon the work of Wolff¹¹⁶ and Ashcroft¹¹⁷ although it can provide a basis for theory, this thesis seeks (as far as this is possible) to provide concrete answers, ie, in Ashcroft's words 'direct ethical justification on the ground of substantive moral principles'.¹¹⁸ In keeping with the positive nature of attempting to provide answers to policy questions, philosophers and bioethicists generally can provide answers to questions of anti-doping, rather than seeking to rely on 'a "presumption of undecidability" as a strategy for committee work and as an intellectual principle, rather than as an outcome of discussion or basis for pragmatic compromise ex post'.¹¹⁹ Again, it should be emphasised here

¹¹³ *ibid* 74.

¹¹⁴ *ibid* 75.

¹¹⁵ *ibid* 118.

¹¹⁶ Wolff (n 2). See also 'Critical Approach and Methods of Analysis', ch 2 of this thesis.

¹¹⁷ Ashcroft (n 63).

¹¹⁸ *ibid*, 'Abstract', 1.

¹¹⁹ Ashcroft (n 63) 3.

that as elite professional sport is much more limited than an entire society, it is less difficult to provide answers to questions of policy.

As noted earlier, there is some debate regarding the merits of ideal theory; creating an ideal theory can involve making a number of assumptions about agents' rationality and motives, which some consider problematic.¹²⁰ However, as above in this specific context – elite professional sport – it is easier to identify stakeholders' motives. This allays some of the concerns raised by the use of an ideal theory approach. Moreover, using an ideal theory provides the key advantage of having a fully articulated theory in place which can inform our decisions in our non-ideal world – a reference point, which works in harmony with other Rawlsian devices such as 'reflective equilibrium'. Following Rawls, we can then relate it to our world, which is not ideal.¹²¹ Thus, it is able to account for practical considerations without losing sight of the ultimate aim and fundamental guiding principles. This approach can produce internally consistent and coherent policy responses to difficult questions of regulation to which answers must be given. Therefore, on balance, for the reasons explained above it remains the best option for creating the basic framework of institutions and procedures necessary in designing a theory of sports ethics from the ground up.

¹²⁰ See 'Critical Approach and Methods of Analysis', ch 2 of this thesis.

¹²¹ This approach does, however, have some drawbacks, as critics such as Sen and Geuss have pointed out (see above, and also the extensive discussion in 'Critical Approach and Methods of Analysis', ch 2 of this thesis).

Transparency and Independence Provided by a New System

As noted above, more independence in regulation is an important goal, especially with sufficient levels conspicuously lacking in the current system. Parties in the ‘original position’, behind the ‘veil of ignorance’ do not know where they would be situated within the regulatory structure, and so would likely welcome independence in regulation as a necessary safeguard against conflicts of interest, and parties acting to further their own interests at the expense of other stakeholder groups. As discussed above, it would not be worth the gamble of favouring one group over another when parties do not know whether or not they would be in this favoured group. Furthermore, recourse to an independent arbiter, available to all early in the dispute process and regardless of financial resources, would also help to provide independence.

This requirement is particularly important given the inherent conflicts of interest faced by sports regulators responsible for sanctioning within their own sport – something which is plainly not appropriate. There have been many examples of potential conflicts of interest, for example, concerning Sebastian Coe’s lucrative contract with the sportswear company Nike.¹²² There have been some positive steps taken to avoid conflicts of interest and promote transparency and independence, with the Court of Arbitration for Sport (CAS) providing an avenue for theoretically independent arbitration or mediation in sports disputes.¹²³ However,

¹²² Matt Majendie, ‘Sebastian Coe: IAAF president steps down as Nike ambassador amid conflict of interest claims’ *Independent* (26 November 2015), <www.independent.co.uk/sport/general/athletics/sebastian-coe-iaaf-president-steps-down-as-nike-ambassador-amid-conflict-of-interest-claims-a6750566.html> accessed 10 September 2016.

¹²³ See ‘Regulatory Structure and Framework’, ch 3 of this thesis.

more still needs to be done, and earlier in the dispute resolution process: CAS is generally viewed as more of a last resort, with comparatively few cases being heard by it.¹²⁴

Another key factor which has been identified by sports regulators to be of fundamental importance – but which is seemingly lacking in the current structures of sports governance – is transparency.¹²⁵ This might be linked with the public/private question raised in the ‘Regulatory Themes and Statements of Values’ chapter, in that decisions taken by public bodies are likely to be scrutinised more closely, with more comprehensive checks and balances, and more avenues available to challenge outcomes perceived to be unjust or unfair. Using a Rawlsian model of sports ethics, greater transparency would be incorporated within the institutions, with clearly defined roles for each institution in order to avoid actual – or perceived – conflicts of interest.

The hypothetical ‘veil of ignorance’ can provide several advantages in this regard. Transparency is an important value and something which sports governance and regulation is criticised as lacking for many reasons, particularly for example in the context of sports governing bodies regulating anti-doping within their sports.¹²⁶ One of the temptations here – and often the perception – is that too frequently the governing bodies seek to avoid damaging

¹²⁴ See, eg, Paul David, ‘Hearing Anti-Doping Cases in New Zealand’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016) 128.

¹²⁵ See, eg: UK Sport, A Code for Sports Governance, <www.uk-sport.gov.uk/resources/governance-code> accessed 5 November 2019; The Sport and Recreation Alliance, ‘The Principles of Good Governance for Sport and Recreation’, <<http://sramedia.s3.amazonaws.com/media/documents/9bb47d57-7523-4966-8839-707377f94148.pdf>> accessed 5 November 2019. See also: numerous reports of corruption in football and lack of transparency: ‘Fifa corruption crisis (n 110); Daly and McKay (n 111).

¹²⁶ See: Majendie (n 122); Daly and McKay (n 111).

the image and reputation of their sport(s) with, for example, doping scandals.¹²⁷ This aim can manifest itself in different ways, such as banning some lower-profile athletes from competing in an attempt to be viewed as strict on doping, whilst apparently turning a blind eye to the more high-profile offenders.¹²⁸ This is of particular concern given the commercial dimensions of many sports and the ability of sport to generate significant revenue for those involved, provided they maintain an attractive commercial product. By placing stakeholders in the ‘original position’ and thus removing knowledge of their particular positions, and designing policies behind the ‘veil of ignorance’ where biases and other factors likely to cloud the judgement of policymakers are taken out of the equation, this problem can be addressed. This approach might also serve to eliminate the (actual or perceived) conflict of interest issues that are often raised in this context. It would remove the ability of certain powerful parties to advance their particular agendas (or to be perceived to be advancing their agendas), ostensibly at the expense of the less powerful and their interests; this has been a criticism levelled at sport on occasions too numerous to list in recent years. Two of the most prominent examples concern former FIFA president Sepp Blatter’s ejection from office and eight-year suspension¹²⁹ (reduced on appeal)

¹²⁷ See further, eg: Marina Nehme and Catherine Ordway, ‘Governance and Anti-Doping: Beyond the Fox and the Hen House’ in U Haas and D Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016); Hayes (n 62).

¹²⁸ It may be argued that this is the position in rugby union in England and Wales. According to the *Guardian*: ‘rugby union is the most sanctioned sport by UK Anti-Doping. Of the 66 bans on its current list, rugby union accounts for 23, with league second on 11 – no other sport has more than seven’. Despite this, only two were in the professional game. Gerard Meagher, ‘Premiership in denial despite four players testing positive for cocaine’ *Guardian* (23 April 2019), <www.theguardian.com/sport/2019/apr/23/four-premiership-rugby-players-tested-positive-cocaine> accessed 3 November 2020.

¹²⁹ See further John A Fortunato, ‘The FIFA Crisis: Examining Sponsor Response Options’ (2017) 25 *Journal of Contingencies & Crisis Management* 68, <<https://doi.org/10.1111/1468-5973.12125>>.

from any future interactions with FIFA, and the alleged extensive corruption of Lamine Diack (former International Association of Athletics Federations (IAAF) president).¹³⁰

As demonstrated by the analysis above, the lack of transparency, accountability and independence has fundamentally undermined faith in sports governance. This faith must be restored, particularly in key stakeholder groups such as the athletes. This loss of faith is particularly apparent in the context of anti-doping regulation, something which has enormous impact on the day-to-day lives of athletes, and which can fundamentally impact their ability to compete. It is therefore important to consider how faith might be restored.

Wenar notes: ‘It is a deep thesis in Rawls’s understanding of moral psychology that people will become attached to people and institutions that they see benefitting them and those close to them’.¹³¹ As we have seen, at present many athletes question whether their regulators act in ways to promote their – ie, the athletes’ – benefit, and have sought more influence over policy. Moreover, providing a more inclusive and collaborative approach has some key benefits over and above improving the prevailing culture. Simply put, if one has faith in a system and recognises its benefits and advantages, one is more likely to adhere to its rules and regulations. This is not the position now; again, with numerous high-profile anti-doping failures fundamentally undermining faith in the status quo. In addition, there may be a synergistic effect: if stakeholders have been actively involved in designing these institutions for their own (collective) benefit, their attachment to (and faith in) them may well be increased, which may have benefits for compliance.

¹³⁰ eg, the *Guardian* has a page dedicated to Lamine Diack and the related allegations: <www.theguardian.com/sport/lamine-diack> accessed 3 November 2020.

¹³¹ Wenar (n 13).

Some Key Advantages of the Rawlsian Process for Sports Morality and Ethics

Rawls, as discussed above, provides comprehensive action guidance for creating the institutions and procedures necessary for a more appropriate, ethically robust and effective morality of sport. One of the many advantages in this approach is that expert guidance can be sought and incorporated from the beginning. Therefore, experts from different fields including, but not necessarily limited to, medicine, law and science and, to take up helpful suggestions advanced by commentators such as McNamee, philosophy, should be involved in creating, (and eventually administering) an ethically sound system.¹³² Each of these ‘expert groups’ can provide authoritative and evidence-based policy contributions, in addition to those provided by other stakeholders directly impacted.

Given that the importance of athlete health is an area of ‘overlapping consensus’ upon which there is near universal agreement, medical doctors must be consulted to ensure this aspect of policy in particular – safeguarding and instituting measures promoting the health and wellbeing of the athletes – is designed optimally. Lawyers, both practitioners and academics, should also be consulted. It is important that the policies are proportionate, balanced and well-drafted in order to be legitimate. Although they will not (and plainly should not) be immune to challenge, it is important that they should be legally sound, with adequate safeguards against arbitrary uses of power, and consistent with general principles of law – particularly public law – and major conventions, such as for example, the European Convention on Human Rights. Although sports regulators are not traditionally viewed (by themselves or by outsiders) as governmental or public organisations, and therefore questions can be raised regarding whether these standards should be applicable, there are persuasive reasons that at least some of the

¹³² See further, Mike McNamee, ‘The Spirit of Sport and the Medicalisation of Anti-Doping: Empirical and Normative Ethics’ (2012) 4 *Asian Bioethics Review* 374.

safeguards these standards provide should be extended to sports regulators. It is also noteworthy here that regulators such as WADA claim that their policies pay sufficient regard to, for example, key concepts such as proportionality, although this claim is contested.¹³³

Safeguards provided by mechanisms such as judicial review¹³⁴ and by principles of human rights law are helpful for several reasons, such as ensuring athletes' rights are not undermined, providing avenues through which decisions might be challenged, and ensuring that where rights may be curtailed, this is both necessary and proportionate. These checks and balances on power are sorely needed but lacking in the current system.¹³⁵ Whilst remaining subject to scrutiny and review, policies must also be interpreted consistently enough to promote stability. Scientists from various disciplines can provide necessary empirical evidence which will be used to inform policy positions. Philosophers and bioethicists are able to scrutinise arguments and rules effectively, drawing upon related areas of scholarship, such as human enhancement, which will help to promote coherence, consistency and ensure policies are ethically robust and able to account for this updated 'spirit of sport'.

Although in WADA-governed sport athletes do not have sufficient meaningful power to shape policy, this is not the case in all sports. For example, in the US the Players Unions and collective bargaining agreements mean that players (and their representatives) have significant

¹³³ See 'Regulatory Themes and Statements of Values' ch 4 of this thesis. See also Andrew Byrnes, 'Human Rights and the Anti-Doping Lex Sportiva—The Relationship of Public and Private International Law, "Law Beyond the State" and the Laws of Nation States' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016).

¹³⁴ For a cogent argument in favour of making sports governing bodies amenable to judicial review, see eg, Ben Cisneros, 'Challenging the call: Should sports governing bodies be subject to judicial review?' (2020) 20 *International Sports Law Journal* 18, <<https://doi.org/10.1007/s40318-020-00165-9>>.

¹³⁵ See, eg, Byrnes (n 133).

power to influence policy in their respective sports.¹³⁶ This is not mirrored, at least not to the same extent, by the equivalent organisations in the UK (under the auspices of WADA), which lack the resources and often fail to provide the athletes with comparable levels of support. This issue can be illustrated with reference to one particularly important duty: to educate athletes, by way of example regarding supplements, as suggested by anti-doping practitioner and academic Gregory Ioannidis.¹³⁷ This also highlights a broader concern: athletes often suffer from a lack of information and education on important matters which can materially impact them. This also undermines the consent they give, as it may not be fully informed. Ioannidis suggests that part of the solution to this problem is for the governing bodies of sport to take more of a share of this responsibility. We can include these sorts of suggestions within the new framework; indeed, empowering athletes and improving their education and access to information should be prioritised given their pre-eminent position within a Rawls-derived morality of sport. This could be addressed within a new framework, allocating more resources expressly for this purpose. As noted above, this would also help to create more of a collaborative approach, and less of a perception of ‘us versus them’, thus improving the perception of anti-doping measures amongst those directly regulated by them.

Institutions of Sports Governance

Institutions under a Rawlsian system would also go a significant way towards safeguarding the rights of individuals and ensuring both justice and fairness. Practical steps for reform of sports

¹³⁶ Also see ‘Regulatory Structure and Framework’, ch 3 of this thesis.

¹³⁷ Gregory Ioannidis, ‘Nutritional Supplements in Sport: Improving, Enhancing or Endangering Performance?’, 12 November 2014, <<https://www.linkedin.com/pulse/20141112131238-55498583-nutritional-supplements-in-sport-improving-enhancing-or-endangering-performance>> accessed 4 September 2016.

governance institutions, derived from the theoretical underpinnings advanced in this chapter, will be considered in the ‘Policy Proposals’ chapter of this thesis; they will be discussed now as they relate to the Rawls-derived morality of sport.

A series of independent and transparent institutions can and should be set up to govern sport. Stakeholders behind the ‘veil of ignorance’ would be unlikely to allow institutions such as WADA and World Athletics the enormous power to create and administer policy without meaningful consultation that they currently enjoy. The ‘veil of ignorance’ would prevent such imbalances of power emerging, and the arbitrary exercise of it characteristic of the current system.

It is important, particularly (as indicated above) in the current climate, to address problems of appearance. The increase in transparency in a Rawls-derived morality of sport would help to remedy some of the problems endemic in the current system. For example, there are numerous examples of problems the extent of which had initially been downplayed before eventually being fully revealed: two obvious instances are doping in athletics (with Russian track and field athletes being banned from the Olympics in 2016 due to institutionalised doping issues),¹³⁸ and corruption in FIFA (as discussed above).

In order to provide balanced analysis, it is important to acknowledge the positive elements of the current system which should be incorporated within a revised system. As

¹³⁸ The WADA Annual Report 2016 describes it as ‘one of the most destabilizing incidents for sports in recent memory’, 5 <www.wada-ama.org/sites/default/files/resources/files/wada_annual_report_2016_en.pdf> accessed 10 September 2016.

briefly considered earlier in chapter three, CAS, created in 1984, in principle represents one such positive.¹³⁹ It describes itself as:

[A]n institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.¹⁴⁰

It has introduced a necessary element of scrutiny and a degree of independence; although some of its lower level decisions often remain private, many of its decisions are published, which also helps to improve transparency.¹⁴¹ The decisions themselves – and the associated reasoning – offer some insight into its philosophical underpinnings. Given the need for transparency and accountability, stakeholders in a Rawls-derived morality may stipulate that the default position for any adjudicating body should be that decisions are made public rather than kept confidential. This would, however, have to be balanced with concerns about athletes’ privacy. Both being genuinely independent and transparent, as well as being seen as fair and independent, are necessary for restoring public confidence, which lies at (arguably) an all-time low. A specifically designed framework (with accompanying procedures) would be much better able to cope with the significant demands placed on regulatory structures by modern sport, rather than continuing to develop institutions and procedures in the rather ad hoc and

¹³⁹ Despite this improvement in principles, concerns have been expressed about CAS. See ‘Regulatory Structure and Framework’, ch 3 of this thesis, for more detail.

¹⁴⁰ CAS FAQs, <www.tas-cas.org/en/general-information/frequently-asked-questions.html> accessed 10 September 2016. Also see ‘Regulatory Structure and Framework’, ch 3 of this thesis, for further detail on CAS.

¹⁴¹ See CAS website, FAQ Section, ‘Are the arbitration proceedings confidential?’, <www.tas-cas.org/en/general-information/frequently-asked-questions.html#c199> accessed 10 September 2016.

very reactive (as opposed to proactive) manner that has been evident over the past several decades.

How a Rawlsian Approach Can Address Pressing Current Issues

As we have seen, the key stakeholder group – the athletes – have often been very critical of the rules to which they are expected to adhere. This represents a major problem from both a theoretical perspective and also from a practical perspective, for example by reducing prospects for compliance. We can directly address this by adopting a Rawlsian ‘public reason’ approach.

As Quong explains:

Because we make moral and political demands of each other, if we are to comply with the ideal of public reason, we must refrain from advocating or supporting rules that cannot be justified to those on whom the rules would be imposed.¹⁴²

This alone would represent a major improvement on the current situation. We can, however, as indicated above take this one step further: rather than just having the aim of making the policies justifiable to athletes, we can directly involve the athletes themselves in the decision-making process, allowing them to meaningfully shape the policies which govern their participation. This step would improve the justifiability of policies to the athletes. As the ‘veil of ignorance’ is ‘thinned’, athlete voice is afforded priority over other voices, and thus greater influence in policy and decision-making.

In this connection, considered one of the basic liberties by Rawls – political liberty – dictates that athletes should be able to vote on matters that will impact them. Including athletes

¹⁴² Jonathan Quong, ‘Public Reason’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018) <<http://plato.stanford.edu/entries/public-reason/>> accessed 29 August 2019.

in a ‘deliberative democracy’, following Rawls’s concept of ‘public reason’ is worthwhile here for a number of reasons. If athletes can help to shape and therefore take ownership of the policies that impact them, rather than being passive as policies they may seek to dispute are imposed on them, this would have numerous benefits for compliance: athletes are far more likely to adhere to rules they have helped to create and are thus in their eyes fair and reasonable. Rather than an inherently problematic ‘us versus them’ situation, it would become more akin to a collaborative project (as noted above). Debate which incorporates all stakeholders is an important element of Rawlsian theory. WADA’s consultation processes are inadequate in this regard, with very limited ability for athletes to meaningfully influence policy.

Paul Dimeo explains the current position specifically regarding doping and suggests what might be done to remedy it:

Yet, there is no platform for this debate, and no mechanism for re-orienting the direction of travel WADA has pursued since it was formed. The only real solution is a multi-stakeholder, open and transparent debate that comes to conclusions that WADA is obliged to accept and deliver.¹⁴³

This quote is particularly incisive and telling as it highlights some of the key failings of the status quo. As demonstrated above, a Rawls-influenced morality of sport is able to directly address these issues. The first problem Dimeo correctly highlights is the problematic lack of a forum for meaningful debate. A reasoned debate, with key stakeholders at least on a roughly equal footing, can be considered a prerequisite for any credible consideration of policy. The approach outlined above provides this. Dimeo further notes a major issue currently facing anti-

¹⁴³ Paul Dimeo, ‘Black and White Anti-doping Fight Nears Stalemate – How to Break It’ (*Sports Integrity Initiative*, 16 September 2016), <www.sportsintegrityinitiative.com/black-white-anti-doping-fight-nears-stalemate-how-to-break-it/> accessed 17 September 2016.

doping: the predominant position of the status quo (ie, in this case WADA) and the fact that despite the numerous, public and highly damaging failings there has not been a meaningful change in policy. This is, in part, due to the governance structures and the inability to challenge the status quo, and in part due to the perpetuation of an outmoded ethic (the ‘Corinthian Values’) by those in power, when, as we have seen, it is plainly inconsistent with the ‘win at all costs’ ethos of modern elite professional sport. Finally, the power WADA possesses to create and implement policy, and its criticism of athletes’ conduct when it has failed repeatedly to address their concerns¹⁴⁴ and those of other stakeholders, is a major problem which needs to be remedied urgently.

Rawls’s approach of using the ‘original position’ would also address the significant inequality of bargaining power which currently exists between the players/athletes and the institutions governing them. As detailed above, in his ideal theory, those negotiating behind the ‘veil of ignorance’ do not know which category they would fall into, and would therefore be more likely to reach mutually acceptable agreements which would not unduly favour one group or another. Rawls states: ‘set up a fair procedure so that any principles agreed to will be just.’¹⁴⁵ The key here is establishing an appropriate procedure; from this procedure, justice is far more likely to be forthcoming. This ‘fair procedure’ includes a platform for debate on policies, committed to a democratic process, as outlined in the ‘original position’ by Rawls. Following Ashcroft, this procedure should facilitate, rather than represent an impediment to, concrete policy determinations.¹⁴⁶

¹⁴⁴ ‘Statement by Global Athletes’ (n 55).

¹⁴⁵ Rawls, *Theory of Justice* (n 13) 118.

¹⁴⁶ Ashcroft (n 63).

Conclusion

The previous 'Morality of Sport' chapter began by considering the system of morality and ethics which is unique to sport. The tension between different value systems, for example the 'Corinthian Values' system favoured by WADA, contrasted with competing moralities which place winning as a fundamental value (often referred to as the 'win at all costs' mentality) were then discussed. The various sources and reasons for these different values were then examined.

The previous chapter presented the negative case (ie, the failures of the status quo), explaining the inadequacy of the underlying system of morality and ethics promoted by the current regulatory regime. This chapter has advanced a positive case outlining a more effective and credible system which does not seek to rely upon a disputed ideological position. In order to advance this alternative, it was first necessary to provide an account of morality which underpins and informs this regulatory system. To this end, different definitions of precisely what elite professional sport is were analysed, along with statements and systems of its purpose and value (for example 'Corinthian' versus 'non-Corinthian') and the related considerations regarding the rules (both codified and uncodified) of sport. This facilitated a modified definition of sport for these purposes, able to account for the nature and purpose of elite professional sport.

It is noteworthy that commentators on both sides of the anti-doping debate agree that a change in governance is necessary. Furthermore, the primacy of athlete welfare is also accepted on both sides – ie, it is an area of 'overlapping consensus'. The position is efficiently summarised by Thomas Murray, a highly influential and preeminent supporter of the general thrust of current anti-doping regulation:

International sport needs a revolution in governance. The organizations that oversee Olympic sports must be accountable and should serve the interests and welfare of

athletes, not the greater glory and the bank accounts of those entrusted with running them.¹⁴⁷

As discussed above, the current anti-doping policies are grounded in an outmoded ideology: the so-called ‘Corinthian Values’. This is problematic for numerous reasons. Many stakeholders do not share this ideology; the values of elite professional sport – particularly highly commercialised sports such as rugby union and American football – can be more appropriately characterised with the phrase ‘win at all costs’. This mentality is evident amongst elite athlete and related support personnel. There is, therefore, a failure of the foundation(s) of policy to reflect the world as it *is*, which has played a major role in bringing about the current governance and anti-doping crises in elite professional sport. Indeed, the ideology espoused by the current regulators may never have been an accurate reflection of elite professional sporting values. Even if it may have been at one time, these ideological convictions have led to highly reactionary policies which may be well intentioned, but are nonetheless damaging and ethically untenable. In any event, this outmoded ideological basis does not provide an adequate foundation from which to answer the many difficult and pressing questions raised by the use of licit or illicit performance enhancers.

Therefore, following Rawls, a hypothetical thought experiment for sports ethics was proposed in this chapter. This involved considering the principles, structure and institutions rational stakeholders deprived of certain key facts relating to their position within the society, and other extraneous information which might lead to bias or partiality, would rationally agree. This theoretical process utilising Rawls’s ‘original position’ can be used to derive cogent policies and institutions which facilitate effective sports governance, and specifically anti-doping regulation. Areas of agreement between the different sides were then identified in order

¹⁴⁷ Murray, *Good Sport* (n 1) 157.

that a Rawlsian ‘overlapping consensus’ approach could be advanced, with reference to the ‘principles of public reason’, ie, rational and reasonable positions reached via open and transparent debate between all stakeholders, with certain groups eventually being given priority voice during the latter, more advanced stages of the thought experiment. As the ‘veil of ignorance’ is ‘thinned’, priority voice is given to the athletes. Utilising concepts such as Rawlsian fairness and devices such as ‘reflective equilibrium’ strengthen these conclusions further, ensuring balance and consistency between macro and micro values and beliefs.

Rawls’s two principles of justice, taken in lexical order and modified for the purposes of elite professional sport, inform how the agreed institutions administer the agreed rules. The model, derived from Rawls’s political philosophy and applied to sports governance, leads to a more credible morality of sport which espouses principles consistent with its fundamental nature and purpose and the values it seeks to promote. Important concepts, such as fairness (ie, the frequently invoked idea of the ‘level playing field’), transparency and accountability can be safeguarded by effective institutions and a modified version of Rawls-influenced ‘procedural justice’.

In summary, using the principles and methods advanced by Rawls in his political philosophy, we can identify values which represent areas of agreement concerning how elite professional sport should be governed; values such as fair and equal competition, and athlete health. Therefore, in concert with the principles outlined above, the following can be used as a summary of guiding principles for a Rawls-derived morality of sport:

1. Uniform application of thoroughly and continually scrutinised ethically and legally sound rules, enforced both inside and outside competition.
2. Independence and transparency in regulation, regulatory structures and mechanisms.

3. Equality of access to training, recovery and ‘enhancement’ methods.
4. A specific focus on improving athlete safety, health and wellbeing, and the use of these considerations as key drivers of policy which can constrain (and thus account for) the ‘win at all costs’ ideology.
5. Meaningful athlete representation and voice, and thus the ability to shape the policies which govern them.

For the sake of clarity it should be noted that point 3 above refers to formal or theoretical equality of access. In keeping with the principles of ideal theory, this is an ideal to strive towards but one which may prove unduly demanding and therefore will not necessarily be realised in practice. Theoretical equality of access should be safeguarded at the level of the rules, and this should be enforced transparently by the relevant independent structures.

As acknowledged by point 4, the ‘win at all costs’ nature of elite professional sport should have (at least) one key constraint imposed upon it: it should seek to improve athlete health and safety. These principles expressly account for this and provide the ability to maintain one of, if not *the* fundamental and defining value of this type of sport – winning – whilst also seeking to provide a renewed focus on improving the welfare of the most important stakeholder group, the athletes. The current approach to this, ie, to ineffectually and dogmatically ignore this reality, damages credibility and leads to untenable policy decisions.

These points lead to the following Rawls-derived principles to inform anti-doping regulation:

First – athletes should compete under uniformly applied rules that mandate equal terms of participation, applicable both inside and outside competition.

Second – factors to impact athletes’ athletic abilities and advantage must be (a) focused on – and constrained by – athlete health, safety and wellbeing, and (b) equally available to all.

Meaningful influence/governance principle: athletes should be able to inform and shape the policies which govern them. This necessitates a particular focus on (a) accountability to athletes, and (b) transparency and independence in regulation and regulatory structures.

The next two chapters consider key bioethical questions raised by the current anti-doping system and highlight issues of consistency and coherence of the existing regulations on their own terms. This process begins in the next chapter with a detailed analysis of the highly influential concept of enhancement and its relationship to characterisations of doping.

Bioethics, Health, and Enhancement

Introduction

This chapter presents and considers key bioethical themes and concepts which influence anti-doping regulation, before advancing some definitions of fundamental terms for the purposes of this thesis, ie, to distinguish between what should, and should not, be defined and regulated as doping. It is structured as follows: first, the concept of health, how it can be defined, and the implications this has for the debate are considered, before a definition of health for the purposes of this thesis is advanced. Second, the term ‘enhancement’ is considered, and a working definition advanced. Questions of what can and should constitute enhancement are examined with reference to the bioethical and philosophical literature, as well as to practical examples of enhancement. Third, analysis of influential distinctions such as the treatment/enhancement distinction is offered in order to provide an understanding of how they influence policy. Fourth, enhancements and the relationship they have to doping are considered. Finally, the most common athletic enhancements are tabulated to facilitate an examination of the coherence and defensibility of the current rules and regulations.

The Concept of Health and How it is Defined

Health is a fundamental concept in anti-doping. Health risk is cited by WADA as one of the ‘two out of three criteria’ for inclusion of a substance or method on the Prohibited List:

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete.¹

The concept of health features in the ‘Fundamental Rationale for the World Anti-Doping code’.² It is also a rationale and key component of the NFL’s drug policies.³ Furthermore, it is argued in this thesis that health should be one of the guiding principles to inform a credible spirit and morality of sport, and system of ethics. Given this preeminent position in the WADA jurisprudence (and in the NFL’s drug policies), and the importance placed on the concept of health by this thesis, it is important to understand what the term may be taken to mean, and how it may be used. It is also relevant to the concept of enhancement and the treatment/enhancement distinction. An understanding of health will serve to inform discussions of enhancement and doping and help to distinguish between enhancements which should be permitted and those which should proscribed. Therefore, it is instructive to consider different definitions of health, before providing a definition for purposes of this thesis.

There are numerous definitions of health, and therefore the term will be subject to many different meanings and interpretations. At present, it does not necessarily inform anti-doping policy in a consistent manner. It is important, therefore, to establish a coherent concept of health

¹ WADA Code 2015 (with 2019 amendments, hereafter referred to as WADA Code 2019) 30, <www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf> accessed 6 November 2019.

² WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’.

³ NFL, Policy on Performance-Enhancing Substances 2020, 1 <<https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2020-Policy-on-Performance-Enhancing-Substances.pdf>> accessed 3 April 2020.

and reach an appropriate definition which can inform anti-doping policy and regulations. In order to gain a deeper understanding of health in this specific context, consideration of the broader scholarship on the concept is instructive. In this connection, John Coggon elucidates ‘three dichotomies’⁴ which generally frame debates about the concept of health. He observes:

Before engaging with health as it features in policy or argument, it is necessary to recognise that it may be used as a ‘normativist’ or ‘naturalist’ concept; that it may be ‘negative’ or ‘positive’; and that assessments of health may be made from ‘internal’ or ‘external’ perspectives. It is important also to emphasise that the first dichotomy represents a mutually exclusive pairing; the latter two can coherently be employed simultaneously.⁵

Precisely what is meant by the concept of health requires some unpacking, as how it is defined can have a major impact on key concepts and rationales in anti-doping policy. Therefore, each of the ‘three dichotomies’ will be considered in turn. The first of these – ‘normative versus naturalist’ – is a fundamentally important consideration; as Coggon notes, the two concepts cannot coexist, and therefore in advancing a definition of health a firm position must be taken. First, if a concept is normative this means that it is in some sense an expression of values. The sources of these values, or this ‘good’, can and will vary. By contrast, if a ‘naturalist’ position is adopted, this can (at least in theory) be free from values, ie, it can be neutral and objective. This appeal to objectivity and to what is demonstrable empirically can be attractive, particularly as it seeks to sidestep potentially contested and controversial judgements of what we should value, and avoids unduly favouring one source of values over another and the resultant allegations of cultural imperialism and ethnocentrism. This may be of particular concern for WADA, especially given its stated aim

⁴ John Coggon, ‘Health, normativity, and politics’ in John Coggon, *What Makes Health Public? A Critical Evaluation of Moral, Legal, and Political Claims in Public Health* (CUP 2012) 11.

⁵ *ibid* 12.

of harmonising anti-doping regulation across all countries and sports.⁶ Arguably, the most prominent proponent of this ‘naturalist’ position (in the broader health-related literature) is Christopher Boorse, whose central claim is that ‘the medical conception of health as absence of disease is a value-free theoretical notion. Its main elements are biological function and statistical normality, in contrast to various other ideas prominent in the literature on health’.⁷ In order to understand fully this ‘biostatistical’ account, it is worth stating its four key assertions in their original form, as articulated by Boorse:

1. The reference class is a natural class of organisms of uniform functional design; specifically, an age group of a sex of a species.
2. A normal function of a part or process within members of the reference class is a statistically typical contribution by it to their individual survival and reproduction.
3. Health in a member of the reference class is normal functional ability: the readiness of each internal part to perform all its normal functions on typical occasions with at least typical efficiency.
4. A disease is a type of internal state which impairs health, ie, reduces one or more functional abilities below typical efficiency.⁸

Although this is *prima facie* attractive, especially in the context of anti-doping where contested ideological positions are so influential, critics such as Coggon⁹ and Hesslow¹⁰ highlight a fundamental problem with this approach, which holds both generally and for the

⁶ WADA Code 2019, 11.

⁷ Christopher Boorse, ‘Health as a theoretical concept’ (1977) 44 *Philosophy of Science* 542.

⁸ *ibid* 555.

⁹ Coggon, *What Makes Health Public?* (4) ch 1.

¹⁰ Germund Hesslow, ‘Do we need a concept of disease?’ (1993) 14 *Theoretical Medicine* 1, <<https://doi.org/10.1007/BF00993984>>.

specific purposes of this thesis: it offers no normative guidance for policy. Daniel Callahan explains a critical failing of ‘biostatistical’ theories such as that championed by Boorse:

The problem is that any notion of a statistical norm will be superintended by some kind of ideal. Why, in the first place, should anyone care at all how his organs are functioning, much less how well they do so? There must be some reason for that, a reason which goes beyond theoretical interest in statistical distributions. Could it possibly be because certain departures from the norm carry with them unpleasant states, which few are likely to call ‘good’: pain, discrimination, unhappiness?¹¹

Therefore, what makes this value-neutral approach attractive also logically has a key drawback: it is not as helpful in discerning whether an enhancement is fair or unfair.

Following this logic, it can be concluded correctly that we cannot escape the normative implications, however appealing this might be, and thus ‘naturalist’ conceptions of health are fundamentally flawed. Coggon makes a further point which is particularly compelling in the context of elite professional sport

noting, for example, a general correlation between species atypicality and bad conditions for people in society seems misleading. Whilst it is apparent that there is a correlation between atypical functioning and undesirable states, it is far from clear that we can infer that a majority of statistical aberrances are undesirable; in other words, even if it is generally true that undesirable states are also unusual, it does not follow that the reverse is true. It is fallacy to suppose that because undesirable often equates with atypical, atypical will often equate with undesirable.¹²

Elite professional athletes, as discussed above, will often be atypical with regard to their physical gifts, and yet would consider this state to be highly desirable and even necessary as a prerequisite for success. In many cases if they were not atypical, ie, with capacities far above

¹¹ Daniel Callahan, ‘The WHO definition of health’ (1973) 1 *The Hastings Center Studies* 77, 86 <<https://doi.org/10.2307/3527467>>.

¹² Coggon, *What Makes Health Public?* (n 4) 26–26.

species typical, they would not be elite athletes, and it is this deviation from ‘species typical’ which is so valued, with the emphasis on perfecting natural talents evident in the WADA Code, and in the work of preeminent proponents such as Thomas Murray.¹³ Although Boorse is more concerned with those falling below rather than above species-typical, the general point remains. It may also be that athletes are below species-typical functioning in some capacities. These observations represent major shortcomings which mean that this ‘naturalist’ conception of health is not persuasive.¹⁴ Therefore, any justification for a substance or method’s permissibility based on the concept of health employs a value judgement. In light of these points, health will be taken to be a normative concept. It therefore provides a source of values which can and should inform policy.

The next point, according to Coggon’s ‘three dichotomies’, is whether health should be considered to be a negative or a positive concept. This has implications for the treatment-enhancement dichotomy, with a negative conception of health providing prima facie support for maintaining the distinction, ie, the dominant WADA position. The idea that health is negative, ie, in basic terms that it is simply the absence of disease, although intuitively appealing for its simplicity is not necessarily sufficient for present purposes. As Callahan notes, a negative conception of health promotes a ‘dualist’ understanding, where one’s mind and body are considered separate.¹⁵ In this philosophy popularised by Descartes, there is a focus on the

¹³ WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’, 14; Thomas H Murray, *Good Sport: Why our Games Matter – and How Doping Undermines Them* (OUP 2018) 56.

¹⁴ Norman Daniels advances a less strict version of it which make some use of the basic distinction, and may be more appealing. However, this approach is not appropriate for the purposes of this thesis as it utilises a different notions of key concepts such as health and other related concepts from those advanced by this thesis. For more on Daniels’ approach, see Norman Daniels, *Just Health: Meeting Health Needs Fairly* (CUP 2008) 37–42.

¹⁵ Callahan (n 11) 77.

state of the body, and a resultant reduction in the importance of the mind as it relates to health.¹⁶ This is not, however, in keeping with the general ethos of elite professional sport, where the mind and body must work in harmony with each other in order to be successful.¹⁷ Another shortcoming identified by Callahan is that a negative definition of health renders the concept in some sense redundant, that is to say, it is a ‘tautological proposition that health is the absence of non-health’.¹⁸ There are value judgements inherent to this tautological position, for example, with the concept of Therapeutic Use Exemptions (TUEs). Simply not having a diagnosable medical problem does not appear to be enough for present purposes. Indeed, WADA and other organisations with interests in athlete health would be unlikely to be prepared to limit their definition in this manner.

Health as a positive concept encompasses more than just this absence of illness or infirmity, illustrated for example by the World Health Organization (WHO) in its highly influential and ambitious definition, where the positive essentially includes the negative: ‘Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’.¹⁹ Although this definition has been criticised on many fronts, for example for its breadth and its tendency to define all sorts of problems as health problems

¹⁶ Neeta Mehta, ‘Mind-body Dualism: A Critique from a Health Perspective’ in AR Singh and SA Singh (eds), *Brain, Mind and Consciousness: An International, Interdisciplinary Perspective* (MSM 2011) 202–09.

¹⁷ The importance of mind to sport is evidenced by, for example, the importance placed on mental preparation, and the use of sports psychologists, psychiatrists and mental performance coaches. See, eg, Steve Peters, *The Chimp Paradox* (Vermilion 2012).

¹⁸ Callahan (n 11) 85.

¹⁹ Preamble to the Constitution of WHO as adopted by the International Health Conference, (New York, 19 June–22 July 1946); signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948 (Official Records of WHO, no 2, 100), <www.who.int/about/who-we-are/frequently-asked-questions> accessed 21 April 2020.

which can lead to a resultant increase in issues coming potentially under the purview of medicine,²⁰ this seems more in keeping with how the term is understood in the context of elite professional sport. For example, we have seen that the NFL favours a more positive conception of health with a specific focus on the promotion of wellness.²¹ One advantage of this definition is that it is consistent with the promotion of health and wellbeing advocated in the previous ‘Morality of Sport: The Positive Alternative’ chapter of this thesis. The WHO’s definition may be considered to represent an ideal to strive for, even if it cannot ultimately be reached; this is in keeping with the use of ideal theory as a reference point to inform our non-ideal world.²² This aspirational definition can inform the reconceived ‘spirit of sport’ outlined in the previous chapter, which champions athlete health as one of the key drivers of policy. This vision of health should go beyond the mere absence of disease (the negative), and strive to promote a condition as close as possible to complete wellness (the positive). Furthermore, some of the criticisms levelled at the WHO’s definition lose their sting when considered in the context of elite professional sport as opposed to society more broadly. It is important, therefore, to account for and include both a positive conception of health (and wellbeing), and the more limited negative conception, ie, the absences of disease.

Following Coggon, the final consideration is whether health should be considered from an internal or external viewpoint, or indeed from a combination of both these perspectives. As Amartya Sen explains, ‘there is a conceptual contrast between the “internal” view of health, as seen by the person in question, and “external” views that others may take of the person’s state

²⁰ Callahan (n 11) 87.

²¹ See, eg, its ‘Total Wellness’ programme: <<https://operations.nfl.com/the-players/nfl-total-wellness/>> accessed 3 April 2020.

²² See chs 2, 5 and 6 of this thesis for further details of this approach.

of health'.²³ A preliminary observation here: from a regulatory perspective, and particularly in the current anti-doping regulatory climate, there must be an element of externality. If this did not exist, an athlete could simply rely on his or her internal view of health in order to, for example, gain a TUE, although this position could be remedied by removing the provision for TUEs.²⁴ These points do not, however, mean that the internal view of health should be disregarded entirely; there is value in incorporating both perspectives. As Coggon observes, an element of subjectivity is important: for example, where an individual is in pain²⁵ this needs to be recognised (and potentially treated) – something which would be more difficult if relying exclusively on an external conception of health. It would not necessarily be impossible, however: the feeling of pain may be demonstrated objectively, and there may be reasons to address it even if the subject is prepared to tolerate it and does not seek a remedy. Furthermore, although it could be criticised as callous, it may be argued that addressing pain should not be considered a major factor in policy. However, there are persuasive reasons to reject this position, and it may be regarded as a particularly important consideration for current anti-doping regulation, given the issues surrounding painkiller use in sport.

Therefore, in summary for the purposes of this thesis, ie, to distinguish between what should be permissible from what should be impermissible, health will be taken to be a

²³ Amartya Sen, 'Health Achievement and Equity: External and Internal Perspectives' in A Sudhir, F Peter and A Sen (eds), *Public Health, Ethics, and Equity* (OUP 2004) 263.

²⁴ Some theorists, for example Paul Dimeo and Verner Møller, have suggested this as an option. See further: *The Anti-Doping Crisis in Sport: Causes, Consequences, Solutions* (Routledge 2018); 'Elite sport: time to scrap the therapeutic exemption system of banned medicines' (*The Conversation*, 18 December 2017), <<https://theconversation.com/elite-sport-time-to-scrap-the-therapeutic-exemption-system-of-banned-medicines-89252>> accessed 6 November 2018.

²⁵ Coggon (n 4) 26.

normative concept, with both ‘negative’ and ‘positive’, and both ‘internal’ and ‘external’ dimensions. This conception of health is useful as a tool to establish whether an enhancement should be permitted; as a normative concept, it can account for the values we seek to promote. Including both ‘internal’ and ‘external’ dimensions allows it to engage with the status quo, for example, the treatment-enhancement distinction, whilst also promoting a broader notion of health. Finally, including both ‘internal’ and ‘external’ elements is helpful; it is important to account for how athletes feel – the ‘internal’, whilst an element of externality is necessary for practical regulatory purposes. When defined in this manner, the concept of health can – and should – be used as a rationale for establishing whether an enhancement should be permitted or proscribed, and considered to be doping.

Enhancement

Over the past decade, a great deal of focus within philosophical bioethics has been given to the question of enhancement: when, why and how might it (not) be permissible, or even obligatory, to effect changes to improve – however that term might be understood – persons. Within the constraints of one normative system – morality – we may find a series of answers to that.²⁶ To ask what law and regulation should do is to open a separate set of normative

²⁶ We find many opposing answers here. For an edited collection containing various perspectives, see, Julian Savulescu and Nick Bostrom (eds), *Human Enhancement* (OUP 2009). For a perspective often defined as ‘Bioconservative’, and broadly in favour of the current regulatory regime, see, President’s Council on Bioethics, as seen in its report *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (October 2003): <<https://bioethicsarchive.georgetown.edu/pcbe/reports/beyondtherapy/>> accessed 12 July 2016. For a perceptive critique of the current system, see further, eg, Bengt Kayser, Alexandre Mauron and Andy Miah, ‘Current anti-doping policy: a critical appraisal’ (2007) 8 *BMC Medical Ethics* 2, <<https://doi.org/10.1186/1472-6939-8-2>>. See also, in particular, ‘Morality of Sport: The Positive Alternative’, ch 6 of this thesis.

questions, and further such questions are raised within the subject matter of this section: the use of enhancements within regulated elite professional sport.²⁷ The concept of enhancement and its application are particularly consequential in this context; WADA states the following as one of its ‘two out of three’ criteria for inclusion of a substance on the Prohibited List:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance.²⁸

This chapter has already considered the second of these criteria, which relates to athlete health.²⁹ The two previous chapters focused on the ‘spirit of sport’, the third of these criteria for inclusion of a substance on the Prohibited List.³⁰

Of necessity, competitive athletes are in the business of trying to enhance their performance and gain any possible advantage they legitimately can. Some enhancements (chemical or otherwise) are deemed by sports regulators as necessary to ban, but are nonetheless knowingly (certainly to athletes and their support personnel, and arguably to regulators), and deliberately, used by athletes.³¹ This leads to numerous questions concerning

²⁷ See also earlier chapters of this thesis for framing of questions concerning law and regulation (the ‘Regulatory Structure and Framework’, ch 3), and morality and ethics (the two ‘Morality of Sport’ chapters, particularly the negative case, ch 5).

²⁸ WADA Code 2019, 30.

²⁹ See Art 4.3.1.2 WADA Code 2019.

³⁰ Art 4.3.1.3 WADA Code 2019. The ‘spirit of sport’ is also an overarching rationale for WADA’s anti-doping policy generally.

³¹ See, eg: Werner Pitsch and Eike Emrich, ‘The frequency of doping in elite sport: Results of a replication study’ (2012) 47 *International Review for the Sociology of Sport* 559, <<https://doi.org/10.1177%2F1012690211413969>>; Gerhard P Baumann, ‘Growth Hormone Doping in Sports: A

how and why we distinguish licit and illicit enhancements and enhancement techniques, and also necessitates consideration of a number of broader bioethical issues, such as the vexed treatment/enhancement distinction.³² There are also some substances commonly referred to as ‘enhancements’ which are permissible, such as, for example, nutritional supplements, and some which are permissible only in limited circumstances as exemptions to the general prohibition, ie, with a TUE.

A Systematic Defining of Enhancements

This section provides analysis of the different definitions of enhancement, with their respective advantages and disadvantages for present purposes, before adopting a broad definition to inform anti-doping policy.

It is instructive to begin by considering how the term ‘enhancement’ has commonly been defined in the wider bioethical literature.³³ Analysis of the term is helpful for conceptual

Critical Review of Use and Detection Strategies’ (2012) 33 *Endocrine Reviews* 155, <<https://doi.org/10.1210/er.2011-1035>>.

³² See further, eg: Norman Daniels, ‘Normal Functioning and the Treatment-Enhancement Distinction’ (2000) 9(3) *Cambridge Quarterly of Healthcare Ethics* 309, <<https://doi.org/10.1017/S0963180100903037>>; William J Morgan, ‘Athletic Perfection, Performance-Enhancing Drugs, and the Treatment-Enhancement Distinction’ (2009) 36 (*Journal of the Philosophy of Sport* 162, <<https://doi.org/10.1080/00948705.2009.9714755>>; MJ Sandel, ‘The Case Against Perfection: What’s wrong with designer children, bionic athletes and genetic engineering’; F Kamm, ‘What Is and Is Not Wrong With Enhancement?’ both in J Savulescu and N Bostrom, *Human Enhancement* (OUP 2009).

³³ For an excellent discussion of this point, see Chris Gyngell and Michael J Selgelid, ‘Challenging Human Enhancement: Conceptual Clarity and Moral Significance’ in S Clarke and others (eds), *The Ethics of Human Enhancement: Understanding the Debate* (OUP 2016).

and normative purposes to inform an understanding of the coherence and validity (or otherwise) of doping regulations. There are multiple definitions of the word ‘enhancement’, with commentators often using the same word as a general ‘catch-all’ or umbrella term to describe different interventions. Critics such as Erik Parens have suggested that the term is so nebulous that it might be best abandoned: ‘the term enhancement is so freighted with erroneous assumptions and so ripe for abuse that we ought not even to use it’.³⁴ This observation highlights some of the problems one encounters when attempting to reach a satisfactory definition. Fortunately, for the purposes of this thesis, reaching a definition which can cover all possible situations is unnecessary. The task here is to understand enhancement as it relates to elite professional sport, a regulatory environment which permits some enhancements and proscribes others, and ultimately to inform analysis of the rationales, coherence and strength of the grounds on which these determinations are made.

Despite detailing seven different definitions of enhancement, theorists Chris Gyngell and Michael Selgelid have a more optimistic view concerning the general utility of the term, provided it is carefully and consistently defined by the user.³⁵ These seven definitions: the ‘Constructivist Approach, Normal Functioning Approach, Beyond-Species-Typical Approach, Beyond-Species-Maximum Maximum Approach, Welfarist Conception, Modified Welfarist Approach, Functional Approach’³⁶ are helpfully tabulated by the authors, and all have points in their favour. The simple fact that there are at least seven viable and credible definitions of the word demonstrates the difficulty in using it as a normative tool without explaining precisely how one is using the term. Therefore, the key point to draw from this is that providing a

³⁴ Erik Parens, ‘Is Better Always Good? The Enhancement Project’ (1998) 28(1) *The Hastings Center Report* (Special Supplement) S1, <<https://doi.org/10.2307/3527981>>.

³⁵ Gyngell and Selgelid (n 33).

³⁶ *ibid* 120.

consistent and clear definition of both enhancement and doping is important for the ethical governance of sport, and therefore for the purposes of this thesis.

Given the multiple definitions, one of the issues here is the role the word is expected to play. For example, Eric Juengst and Daniel Moseley note that: ‘When it is used as a medical boundary concept, enhancement, like futility, plays both descriptive and normative roles’.³⁷ The term ‘enhancement’, when used in this manner, is therefore expected to perform a significant amount of bioethical work. It can be queried whether it should correctly serve both these purposes, ie, whether it should be conceived in a thick, or thin, sense. There are advantages and disadvantages to using enhancement as both as descriptive and normative tool.

The general bioethical literature on enhancement (as contrasted with treatment) is instructive for many reasons, not least because much of the debate – particularly in sports ethics – is currently framed in treatment versus enhancement terms,³⁸ with the former generally being considered permissible, and the latter generally being viewed with suspicion and attracting further scrutiny, as evinced by WADA’s inclusion of enhancement as a criterion for prohibition of a substance or method.³⁹ However, this framing is not necessarily appropriate or coherent. As noted above, athletes are, at least in a general sense, perpetually enhancing themselves in

³⁷ Eric Juengst and Daniel Moseley, ‘Human Enhancement’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2016), <<https://plato.stanford.edu/archives/spr2016/entries/enhancement/>> accessed 14 April 2017.

³⁸ See further, eg, *Beyond Therapy* (n 26) ch 3, ‘Superior Performance’ <<https://bioethicsarchive.georgetown.edu/pcbe/reports/beyondtherapy/chapter3.html>>. See also Thomas H Murray, ‘Sports Enhancement’ in Mary Crowley (ed), *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns* (The Hastings Center 2008) 153. Separately, the existence of TUEs lends weight to the assertion that the debate is framed in treatment/therapy versus enhancement terms.

³⁹ Art 4.3.1.1 WADA Code 2019.

myriad ways. Some of the approaches they use are universally accepted without question or scrutiny, and some are not. There is also a further problem, particularly in the context of anti-doping: sometimes the term ‘enhancement’ is loosely defined, and effectively used (imprecisely and incorrectly) interchangeably with the word ‘doping’.⁴⁰ Despite this, as the ultimate aim of this thesis is to influence policy, it must therefore engage with the debate as it is, not as it ideally should be.⁴¹ This chapter therefore seeks to provide a coherent basis from which to draw distinctions between fair enhancements, and unfair enhancements, with doping taken as falling within the broad category of unfair (or unsafe) enhancement. The broader enhancement literature also helps to clarify many of the issues germane to doping in sport and provides some tools to evaluate whether the different measures used by athletes (and their support personnel) should be permissible (fair enhancements), or impermissible (unfair enhancements, or doping). For a credible concept of doping, we need to be able to rationalise the idea of illegitimate enhancements and seek to have conceptual coherence in regulation, and thus for any sanctions imposed to be sufficiently justified.

John Harris and Sarah Chan provide the following broad definition of enhancement: ‘a procedure that improves our functioning: any intervention which increases our general capabilities for human flourishing’.⁴² Under this definition, wearing glasses, for example, could be considered an enhancement. This has some advantages, for example defining enhancement in this manner serves to neutralise some of the negative connotations the word might elicit in

⁴⁰ See, eg, Thomas Douglas, ‘Enhancement in Sport, and Enhancement outside Sport’ (2007) 1 *Studies in Ethics Law and Technology* ukpmcpa2293.

⁴¹ See ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis, for justification of this position, and discussion of the utility of Jonathan Wolff’s work in particular.

⁴² Sarah Chan and John Harris, ‘In Support of Human Enhancement’ (2007) 1 *Studies in Ethics, Law, and Technology*, Article 10, <<https://doi.org/10.2202/1941-6008.1007>>.

some circles, and invites scrutiny of interventions based on their individual merits and characteristics, as opposed to relying on broad and general classifications to determine permissibility. This approach also usefully makes it a descriptive term, albeit with clear normative connotations. These are important factors for reaching ethically coherent and defensible conclusions; simply because something ‘enhances’ does not necessarily mean it should be viewed as problematic. It is necessary to examine the ethical coherence of different enhancements that might be banned: if one of two comparable enhancements is banned and the other is not, this can potentially represent a problem which should be addressed. There are, however, bioethicists such as Leon Kass and others on George W Bush’s President’s Council on Bioethics⁴³ with significant influence on policy who would not agree with this definition of enhancement from Harris and Chan, and would favour defining it in a different manner; therefore other such definitions are considered below.

In their insightful analysis Juengst and Moseley utilise a definition of enhancement advanced by Parens as a ‘working definition’ of the concept which contradicts the definition by Harris and Chan above: ‘[B]iomedical interventions that are used to improve human form or functioning beyond what is necessary to restore or sustain health’. Juengst and Moseley characterise this as a ‘broad definition [which] flows from and reflects the foundational literature in this area’.⁴⁴ This ‘constructivist’ style or ‘normal functioning approach’ represents a reasonable option, not least because it reflects how the term is often used to frame anti-doping debates, and what the term is broadly understood to mean more generally.

As noted above, there are, of course, numerous other definitions of enhancement, some of which are extremely broad, where ‘*all* technology can be viewed as an enhancement of our

⁴³ See *Beyond Therapy* (n 26).

⁴⁴ Juengst and Moseley (n 37).

native human capacities’, as could ‘all learning’.⁴⁵ This is certainly a valid perspective, although it is almost too broad to be of any significant utility for present purposes as it fails to offer sufficient normative guidance for anti-doping policy and is too far removed from what the term is generally understood to mean in this context, ie, by WADA. In the context of anti-doping, some enhancements, ie, those which are deemed unfair, will probably need to be banned, but on the basis of their individual merits rather than because they fall within an extremely broad definition of enhancement which is removed from the way in which the term is generally used in this context. Conceptions of enhancement can also, for numerous reasons, be too narrow for present purposes: for example, the radical Beyond-Species-Maximum Approach (BSMA) outlined by Nicholas Agar.⁴⁶ Within this definition of enhancement, only measures which would take an individual beyond the perceived maximum of the species would be considered enhancements. Also, in the context of elite sport, this conception of enhancement is problematic in that world records are examples of achievements which by definition go ‘beyond-species-maximum’ and thus this method does not facilitate effective line drawing and policy conclusions particularly for present purposes. A BSMA does not offer much assistance in this regard either, as elite professional athletes are likely to be far beyond what is typically found already, otherwise they would not be elite professional athletes.

The term ‘enhancement’ has been considered more recently by Brian Earp and others: ‘The Welfarist Approach to Enhancement: “Enhancement” should be defined to mean any change in the biology or psychology of a person which increases the chances of leading a good

⁴⁵ Savulescu and Bostrom (n 26) 2, 3.

⁴⁶ Nicholas Agar, *Humanity’s End: Why We Should Reject Radical Enhancement* (MIT Press 2010).

life in a given set of circumstances”⁴⁷. This is a coherent definition with much to commend it. It can be context-specific, which is helpful for our purposes. It also removes some of the stigma surrounding the concept of enhancement, as many currently permissible interventions would be deemed enhancements following this definition. However, this benefit comes at a cost. This definition is very broad and does not recognise the treatment versus enhancement distinction, which is problematic if the aim is to engage with the rules as they currently exist and operate within existing frameworks.⁴⁸ This leads us to consider the ‘Modified Welfarist’ definition, which introduces the notion of ‘abnormal biological functioning’.⁴⁹ This modification can make this approach less broad than a standard ‘Welfarist’ approach, and it also can be constructed to observe the treatment versus enhancement distinction which is helpful for present purposes, although arguably not to the extent that the current framing of the debate necessitates. For the purposes of this analysis, both represent too much of a departure from how the term ‘enhancement’ is generally used, particularly in the context of elite professional sport, and are therefore of less utility here. The significant normative dimension, and conceptions of what, for example, a ‘good life’ might be, also make it harder to reach a consensus on what might be viewed as an enhancement, although the ‘good life’ and the idea of human flourishing can be defined tightly and clearly especially in a specific context, which might go some way towards remedying some concerns about ambiguity.

⁴⁷ Brian D Earp and others, ‘When is diminishment a form of enhancement? Rethinking the enhancement debate in biomedical ethics’ (2014) 8 *Frontiers in Systems Neuroscience* 12, <<https://doi.org/10.3389/fnsys.2014.00012>>.

⁴⁸ See above, particularly the discussion of Jonathan Wolff’s work: ‘Wolff, Husak, and the ‘Problem of Perspective’ (ch 2).

⁴⁹ Gyngell and Selgelid (n 33) 118.

There are several notable differences between the various concepts of enhancement: for example, whether they are universal or subjective. Another such difference, as Gyngell and Selgelid note, is whether they are ‘scalar’ or ‘binary’.⁵⁰ These sorts of questions will have a bearing on whether they are likely to support or undermine egalitarian principles, namely equality of opportunity, something which is important as an ethically defensible morality of sport should seek to promote equality of opportunity.⁵¹ Gyngell and Selgelid explain:

[I]ntervention at the treatment end of the spectrum (ie, aimed at restoring health in someone who is clearly (very) diseased) will tend to be equality-promoting, whereas an intervention at the enhancement end of the spectrum (improving the traits of someone who is clearly (very) healthy) will tend to increase inequality.⁵²

A further complication which must be considered here is raised by the nature of elite professional sport. The ‘spectrum’ referred to above considers interventions which are relative to the mean; this is potentially problematic as by definition elite athletes are likely to be significantly above the mean already in the ways which may provide them advantage in their sport. For example, elite professional basketball players may well be far above mean adult height, and rugby players generally above average strength and weight. One possible answer here is taking the mean from within this unique and discrete sub-group of the wider population, ie, elite athletes competing in a particular sport, rather than applying broader societal standards and metrics. On this basis the concept of the mean may still be used; it will just be specific to that specific community.

⁵⁰ Gyngell and Selgelid (n 33).

⁵¹ See further the ‘Morality of Sport’ chapters of this thesis.

⁵² See further, Gyngell and Selgelid (n 33) 123.

In analysing policy, it is also necessary to examine the characteristics of the specific enhancement in question. Any approach using a binary measure is likely to offer certainty, but can potentially be too rigid and lead to arbitrary distinctions. There are also important questions regarding whether the key factor here is the means or the outcome, ie, it is necessary to establish whether we are concerned about the method via which the (purported) enhancement is achieved, or the end result. The notion of a sliding scale, rather than a blunt binary tool, might be of greater utility, although it can be criticised as ambiguous and uncertain.⁵³ However, as the sports doping debate is generally (and necessarily given the need for a determination to be made) framed in binary terms, this idea will not be pursued here; eventually, a decision must be made: to permit or to proscribe. The use of TUEs complicates the general binary position and introduces a scalar element to the policy. It should, however, be noted that this is the exception to the general position, and that TUEs can – and do – still ultimately allow for a binary determination. Indeed, there are many instances outside sport in which this occurs – ie, a scalar approach is employed in conjunction with sharp lines being drawn: for example, speed limits on roads, mental capacity laws, and pass marks in exams. They do, however, add a further element of uncertainty and can be prone to abuse because the judgement of which side of the line something falls can be different, and in some cases reasonably criticised as arbitrary. In this context, athletes are different, ie, athletes have different physiologies, and what might be impermissible (under the current rules) for one, might be permissible for another.

It might be questioned – especially given the two points made directly above – whether we are asking the right questions regarding enhancement, and indeed whether the debate is

⁵³ This can potentially conflict with the principle of certainty in law. For more on this principle see, eg, J Mance, ‘Should the law be certain?’ The Oxford Shrieval lecture (11 October 2011), UK Supreme Court website: <https://www.supremecourt.uk/docs/speech_111011.pdf> accessed 3 September 2018.

framed in the most appropriate way. There are many considerations here: for example, in defining what should constitute an enhancement; one consideration, put forward notably by Parens and which is prominent in some definitions of enhancement, is whether it promotes human flourishing.⁵⁴ This concept is influential in the wider bioethical literature and therefore warrants some consideration here. It is conceivable that an enhancement might improve performance at a given task, for example, but actually not contribute to human flourishing, as understood by Parens, who takes flourishing to mean ‘what human beings want – not for the sake of something else (in the way that we want, say, money), but for the sake of itself’.⁵⁵ For example, in a sports context, putting springs in a high jumper’s shoes would likely not promote human flourishing, at least not for those interested in the challenge the sport of high jump presents.⁵⁶ It would undermine the purpose of the sport, and thus its spirit. Therefore, spirit of sport concerns can account for concerns about human flourishing in this specific context.⁵⁷

Following the discussion above, it is instructive to consider some key elements for the definition of enhancement. For the reasons outlined above and in the ‘Critical Approach and Methods of Analysis’ chapter of this thesis, the definition used should be able to engage with how the term ‘enhancement’ is generally used in the world of elite professional sport, and not be too far removed from it. This should not, however, be viewed as an endorsement of the status quo, or a point in support of the sharp distinction between treatment and enhancement; it is merely an acknowledgement that, in this specific context (and arguably more broadly if seeking to influence policy), this is the reality of the situation, and therefore this is how

⁵⁴ Erik Parens, *Shaping Our Selves* (OUP 2015).

⁵⁵ *ibid* 94. Also, for an excellent discussion regarding ‘true enhancement’ see Erik Parens, ‘Nobody’s against True Enhancement’ in Erik Parens, *Shaping Our Selves* (OUP 2015).

⁵⁶ It may be interesting to some, and indeed constitute a new sport.

⁵⁷ For analysis of the ‘spirit of sport’ see chs 5 and 6 of this thesis.

questions of this nature are framed. Therefore, they must be engaged in this manner to stand the best chance of influencing policy. On this basis, we can reject the ‘functional approach’ as it does not observe the treatment enhancement distinction. As Gyngell and Selgelid highlight, this essentially gives enhancement its basic dictionary definition. They use the definition from the *Shorter Oxford English Dictionary*: ‘To raise in degree, heighten, intensify’.⁵⁸ On its face, this simplicity may seem like a positive, but again this is not how the term is used in the context of anti-doping. Many treatments which are permitted can provide an increase in some capacity. Also, some prohibited (those deemed to be unfair) ‘enhancements’ can also elicit a decrease in something, such as beta blockers to reduce tremor and anxiety in a sport such as archery, which would be beneficial, thus making this definition a poor choice. This definition does not help to identify whether (or not) something is an unfair enhancement, and thus whether it should be classed as doping.

Two options which do use the term as it is commonly employed in the anti-doping context are the ‘Normal Functioning Approach’ and the ‘Constructivist Approach’. Both of these definitions provide a description of enhancement characterised as distinct from therapy or treatment, and thus accurately reflect how the term is generally used in discussions of sports doping. A constructivist approach provides a relativist account of enhancement, with the prevailing values of the society providing the reference point, whereas the ‘Normal Functioning Approach’ seeks to rely on ‘a scientifically objective matter’.⁵⁹ Relying on ‘scientifically objective matter’ has the advantage of greater neutrality and certainty, thus making it harder to question than approaches grounded in more subjective notions. However, even this form of empirical evidence can be questioned, and may be subject to disagreement and challenge.

⁵⁸ *Shorter English Dictionary* (Little, Fowler, and Coulson 1959) 612.

⁵⁹ Gyngell and Selgelid (n 33) 113.

Moreover, the current WADA regulation is not based exclusively on ‘scientifically objective matter’ – and includes an ethical component (the ‘spirit of sport’). It utilises both (more) objective and (more) subjective measures to form policy: the (potential for) performance enhancement criterion, and the (potential to) represent a health risk criterion lend themselves to more objective assessment based on ‘scientifically objective matter’ than the ‘spirit of sport’ criterion. Moreover, it is easier to define and identify elite professional athletes as a particular ‘reference class’;⁶⁰ this is particularly so if we concentrate on one sport, as the NFL’s policy does. This approach can, however, result in a very specific and niche definition of enhancement which may differ quite radically from what the term is considered to mean more generally in anti-doping (ie, by WADA), which can be problematic for our purposes. Furthermore, it conflicts with the definition of health for the purposes of this thesis advanced earlier in this chapter. It is important to remember here that given its defeasibility (two out of three approach) criteria for inclusion on the Prohibited List, WADA does permit certain enhancements it considers fair.

Therefore, in conclusion, the definition for the purposes of this analysis will account for what Gyngell and Selgelid define as the ‘Constructivist Approach’. They opine:

Constructivists about disease believe that classification of conditions as diseases, reflects societies’ norms and values (rather than being an objective matter). Different societies with different norms and values will consider different states to be diseases.⁶¹

As considered earlier, and in the ‘Morality of Sport’ chapters of this thesis, it is argued that elite professional sport represents a distinct society, with its own particular norms and values.

⁶⁰ *ibid* 115.

⁶¹ *ibid* 113.

For example, elite athletes might have to be ‘healthier’ or ‘more well’ than ordinary members of the public in order to cope with the demands of training and competing.

It should also be noted here that the term ‘doping’ is also taken to be constructed. Following this line of reasoning, what may be a ‘disease’ for the purposes of this type of sport – and might thus warrant intervention, with this intervention being classed as a treatment rather than an enhancement – may be different from other contexts.⁶² For example, it may be that for elite professional athletes a sub-clinical deficiency in a hormone, for example testosterone, might be classed as a disease state to be remedied by a treatment, whereas in the general population it would not be.

Although there are undoubtedly problems with this pragmatic approach – and it is far from perfect – it has one major advantage over many of the others: its ubiquity. It most closely reflects the meaning generally given to the term ‘enhancement’ in this context, and therefore operates within the existing framework of the debate on doping and the use of enhancements within regulated sport, rather than from a purely theoretical and academic perspective. It is also able to engage with and account for the ‘spirit of sport’ criterion, which definitions relying exclusively on empirical data may not be able to do so effectively.

Following this definition, the term ““(human) enhancement”” refers to any kind of genetic, biomedical, or pharmaceutical intervention aimed at improving human dispositions, capacities, and well-being, even when there is no pathology to be treated’.⁶³ Taking this definition as the basic starting point is helpful but it can benefit from some limited modification for present purposes, with the inclusion of the words ‘nutritional’, ‘strategic’ and ‘training method’. The modified constructivist definition would therefore read as follows: ‘any kind of

⁶² *ibid.*

⁶³ Gyngell and Selgelid (n 33) 111.

genetic, biomedical, **nutritional, strategic** or pharmaceutical intervention, **or training method** aimed at improving human dispositions, capacities, and well-being, even when there is no pathology to be treated’.

With these modifications it is able to account for the use of nutritional supplements and special diets, training methods, and for the use of coaching and professional advice, all of which are permissible under current regulations and can be considered to be enhancements. It is relatively broad and thus able to account for the many different interventions athletes pursue. It is noteworthy that it does not include equipment or training facilities, which are likely to fall within a different category of enhancement, ie, not direct ‘human enhancement’, but rather under enhancement technologies or adjunct technologies.⁶⁴

The Concept of Treatment as Contrasted with the Concept of Enhancement

Given that the potential to enhance performance is a criterion for the inclusion of a substance on WADA’s Prohibited List,⁶⁵ whether something is classed as a treatment or an enhancement is an important consideration in anti-doping policy. WADA draws a meaningful (and potentially controversial) distinction between treatment and enhancement. This distinction is frequently of great consequence to policymakers; the category into which the practice falls can prove to be a decisive factor in deciding whether or not it should be subject

⁶⁴ Extensive discussion is beyond the scope of this chapter. See further, eg: Steve J Haake, ‘The impact of technology on sporting performance in Olympic sports’ (2009) 27 *Journal of Sports Sciences* 1421, <<https://doi.org/10.1080/02640410903062019>>; Sigmund Loland, ‘The Ethics of Performance-Enhancing Technology’ (2009) 36 *Journal of the Philosophy of Sport* 152, <<https://doi.org/10.1080/00948705.2009.9714754>>.

⁶⁵ Art 4.3.1.1 WADA Code 2019.

to further scrutiny, and indeed ultimately whether (or not) it is deemed permissible.⁶⁶ This line, however, is highly ambiguous, and can be difficult to sustain when examined more closely. There are myriad factors which impact classification here, such as: the specific context in which the purported enhancement occurs, for example whether it occurs ‘naturally’ or in response to some sort of chemical; the enormous amount of variation between individuals and groups – one person’s treatment might be another’s enhancement; the value systems which impact the decision-maker’s judgement, for example how they define the concept of enhancement, and other related concepts. This list is far from exhaustive.

This meaningful distinction between treatment and enhancement is evidenced by, for example, the concept of TUEs.⁶⁷ It is instructive to consider the ‘TUE Guidelines’,⁶⁸ and the formal ‘International Standard for Therapeutic Use Exemptions (ISTUE)’.⁶⁹ The latter states the following:

PART TWO: STANDARDS AND PROCESS FOR GRANTING TUES

4.0 Obtaining a TUE

4.1 An Athlete may be granted a TUE if (and only if) he/she can show, by a balance of probability, that each of the following conditions is met:

⁶⁶ This can be seen as a prevailing theme in the WADA jurisprudence. See, eg, the policy regarding Therapeutic Use Exemptions (TUEs): WADA website, Therapeutic Use Exemptions: <<https://www.wada-ama.org/en/what-we-do/science-medical/therapeutic-use-exemptions>>. See also, ‘Regulatory Structure and Framework’, ch 3 of this thesis.

⁶⁷ See further, WADA, International Standard for Therapeutic Use Exemptions (ISTUE) Policy, <https://www.wada-ama.org/sites/default/files/resources/files/istue_2019_en_new.pdf> accessed 7 November 2019.

⁶⁸ See: <www.wada-ama.org/sites/default/files/resources/files/wada-tue-guidelines-v8.0-en.pdf>.

⁶⁹ See: <www.wada-ama.org/sites/default/files/resources/files/istue_2019_en_new.pdf>.

- a. The Prohibited Substance or Prohibited Method in question is needed to treat an acute or chronic medical condition, such that the Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld.
- b. The Therapeutic Use of the Prohibited Substance or Prohibited Method is highly unlikely to produce any additional enhancement of performance beyond what might be anticipated by a return to the Athlete's normal state of health following the treatment of the acute or chronic medical condition.
- c. There is no reasonable Therapeutic alternative to the Use of the Prohibited Substance or Prohibited Method.
- d. The necessity for the Use of the Prohibited Substance or Prohibited Method is not a consequence, wholly or in part, of the prior Use (without a TUE) of a substance or method which was prohibited at the time of such Use.⁷⁰

A key factor in establishing the distinction between the two uses (enhancement and therapy) is the quantity used: ie, at a certain dosage, the use of the drug may cross from treatment into enhancement. Establishing precisely where this line may be drawn, however, is often contentious, with sensitivity to drugs varying among individuals, making it difficult to have a standardised dose which promotes rather than undermines equality.

A practical example can help to elucidate the current position: two athletes could theoretically take exactly the same drug (detailed on the Prohibited List) in ostensibly the same way – method, quantity, timing, etc. Athlete A is able to do this within the existing rule structure, whereas Athlete B is committing a doping offence. The only difference in this scenario is that Athlete A has a specific TUE, and can therefore take the drug without falling foul of the regulations as his or her use is considered to be a treatment rather than enhancement.⁷¹ The key point here is that medical interventions classed as therapies can be permissible, whereas those classed as enhancements will often be proscribed.

⁷⁰ International Standard for Therapeutic Use Exemptions (ISTUE) (n 67) 11.

⁷¹ *ibid.*

Some theorists contend that the distinction between therapy and enhancement should not, particularly in a broader context beyond issues of sports ethics, be drawn so sharply. Much of this reasoning relating to wider debates on the treatment enhancement distinction is also relevant to the debate on sports doping.⁷² Nick Bostrom and Rebecca Roache provide a systematic dismantling of the ‘therapy-enhancement dichotomy’, highlighting the following six reasons:

1. ‘The therapy–enhancement dichotomy does not map onto any corresponding dichotomy between standard-contemporary-medicine and medicine as-it-could-be-practised-in-the-future’. This means that it is inadequate as a tool to assess emerging technologies and other future challenges. They then provide further persuasive examples in support of this contention, such as, for example, in medicine the existence of plastic surgery which may not be considered therapy, and beyond the medical context taking nutritional supplements to improve mood.
2. Technologies exist, such as vaccinations or other practices, which can ‘reduce the probability of disease and death’; it is not clear how they should be regarded on a treatment versus enhancement binary measure.
3. Third, the significant variation (for example, in their initial starting endowment) between individuals makes classifying an intervention as a treatment or an enhancement difficult; the dichotomy therefore fails to offer sufficient normative guidance.

⁷²Bostrom and Roache raise many pertinent and valid further points in a very comprehensive and cogent analysis with which this author agrees. See further, Nick Bostrom and Rebecca Roache, ‘Ethical Issues in Human Enhancement’ in Jesper Ryberg, Thomas Petersen and Clark Wolf (eds), *New Waves in Applied Ethics* (Palgrave Macmillan 2008).

4. Fourth, the above endowments will change over time; average physical fitness for a 25-year-old person will be very different from average for a 75-year-old person, and thus the age of the person can become a definitive factor, although the rates at which we age can vary and be influenced by many factors.
5. Fifth, to borrow the term used by Bostrom and Roache, the degree to which the intervention is ‘internal’ makes line drawing very difficult; arguably it has to be ‘internal’ to an extent to qualify as an enhancement, but the internal/external line is plainly problematic for the broader distinction between treatments and enhancements, and makes technology a key factor.
6. Finally, questions can be raised regarding whether ‘moral status of enhancements is different from that of other kinds of interventions that modify or increase human capacities to the same effect’. Following Bostrom and Roache’s logic, for example diligent training or a nutritionally sound diet could produce comparable performance benefits to certain enhancements WADA deems impermissible.

The points demonstrate how the distinction can be incoherent, and lead to arbitrary policies which lack sufficient ethical grounding. Despite these issues, there are arguably some limited advantages to drawing conclusions on this basis; it helps us to acknowledge and engage with the world as it is, not as it ideally should be, utilising commonly used terms and expressing counter-arguments in their most persuasive form. For example, treatment is an established medical concept, with which the Western medical profession (and associated professionals) are familiar. In the spirit of ‘oscillating binocularity’ a ‘steel man’ version of this argument can

may be advanced.⁷³ The theory here essentially runs as follows: by delineating the upper bounds of treatment, we are provided with a way in which to determine where unfair enhancement might begin. This, however, might not be quite as simple as it first appears: as we have seen, some enhancements are essentially any improvements (one might point out therefore that these could also be treatments);⁷⁴ for others, enhancements can be distinguished as being over and above a treatment, with important implications for whether they should be permitted or prohibited.⁷⁵ Moreover, treatments or therapies can be considered to be qualitatively distinct from enhancement. Following this logic, they may be subject to alternative evaluative criteria, such as, for example, in the context of debilitating (and therefore undesirable) medically recognised diseases which can change risk calculations. The exercise of drawing a distinct binary line between treatment and enhancement might be one tool to help determine the permissibility of an intervention; this can be helpful, albeit to a limited extent, as the debate regarding doping in sport is currently framed in this treatment versus enhancement manner. As previously noted, engaging in this way is important in following the instructive approach to ethics outlined by academics such as Jonathan Wolff.⁷⁶

The term ‘treatment’ is, broadly, more likely to be viewed positively and does not generally lead to calls for interventions of this nature be prohibited.⁷⁷ For example, there is little by way of painkiller regulation, and an established mechanism to allow treatment which

⁷³ In particular, ‘Techniques and Devices’ (ch 2). See also: Parens, *Shaping Our Selves* (n 54) ch 2; ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

⁷⁴ See, eg, Chan and Harris (n 42).

⁷⁵ See, eg, the work of Leon Kass and others on President George W Bush’s Council on Bioethics (n 26).

⁷⁶ See above (n 48) and ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

⁷⁷ See further, eg, *Beyond Therapy* (n 26) ch 3, ‘Superior Performance’.

would otherwise not be permitted (the TUE system).⁷⁸ Therefore, in the specific context of sport (and indeed more generally), if something is classed as a treatment, the presumption is generally in favour of allowing it, and sometimes even of making it mandatory. How it is characterised, as opposed to the merits of the intervention, can therefore have a material impact on policy. This approach is, however, too simplistic. Arguing that something should be banned (or allowed) merely because of its classification as an enhancement or a treatment does not stand up to sustained scrutiny.

Enhancements and their Relationship to Characterisations of Doping

There is also the issue that the term ‘enhancement’ has developed negative connotations and is therefore used much like the term ‘doping’, particularly in the specific context of WADA regulated sport. It should be noted here that the word ‘doping’ is, by definition, referred to as something perceived to be wrong, ie, it is a pejorative term. In light of this, it is imperative (for WADA and this thesis) to be able to establish what is or is not doping. Following this critical analysis, whatever is deemed to be doping is wrong (by definition) because the term itself is loaded in this negative way. By way of further explanation, an analogy can be drawn between enhancement and doping, and killing and murder, following a similar line of reasoning: killing is not always wrong but murder (much like doping in this context), by definition, is.

Rather unhelpfully, in some circles the words ‘enhancement’ and ‘doping’ are used interchangeably, with many failing to draw an important distinction and assuming all enhancements are illicit, and/or that all non-doping improvements are not enhancements. This

⁷⁸ See further ISTUE (n 67) 3.3.

point can be illustrated by reference to a practical example: weight training or nutritional supplements can lead to both non-doping related improvements and also be categorised as enhancements. Again, these seeming contradictions arise as the definition is not settled or employed consistently. Even within academic debate, among some ‘bioconservatives’⁷⁹ enhancements are generally viewed with a great measure of scepticism, just as among ‘transhumanists’⁸⁰ the term is viewed as something positive and worthwhile.

These observations raise an important conceptual point and a question fundamental to anti-doping theory and practice: the notion of fair enhancements versus unfair enhancements (or doping) and specifically how to draw an ethically sound distinction between the two. As we have seen, the term ‘enhancement’ is, on its own, inadequate as a classification tool. Simply asking whether (or not) something is an enhancement is not enough; for our purposes, the important question is whether (or not) the enhancement is unfair in reality, not whether or not it is an enhancement. In order to do this, the existing structure must be considered: in this case, current WADA policies.

Sub-Categories/Different Manifestations of Enhancements

WADA draws a distinction between prohibited substances and prohibited methods.⁸¹ Both can be categorised as enhancements, and will therefore be considered below. They also

⁷⁹ Such as, eg, Kass and others (n 75).

⁸⁰ See, eg, N Bostrom, ‘Transhumanist Values’: <<https://nickbostrom.com/ethics/values.html>> accessed 14 November 2019.

⁸¹ See WADA Prohibited List 2020, substances 1–5, methods 6: <www.wada-ama.org/sites/default/files/wada_2020_english_prohibited_list_0.pdf> accessed 5 November 2020.

distinguish between substances and methods prohibited at all times, those prohibited during competition, and finally those prohibited in particular sports.⁸² The final category, which includes alcohol and beta blockers, is not directly relevant to rugby union or the NFL, as it would likely decrease performance in these specific (and most other) sports. It may be treated, both in rugby union and the NFL, separately from substances considered performance enhancing, and will therefore not be examined in detail in this chapter. For broadly similar reasons, cannabinoids will not be considered here either.⁸³

This section introduces and examines the enhancement methods commonly used in elite professional sport. It should be emphasised that the categorisation of ‘athletic enhancement’ here does not denote any normative indications about whether the different enhancements should be considered ethically permissible. Following the presentation of this table, the second bioethical chapter analyses the conceptual and normative coherence of the existing rules on these enhancements by reference to WADA’s three dominant framings/rationalisations: enhancement; health; and the ‘spirit of sport’, which takes into account concepts of the natural versus the unnatural. These framings provide the basis on which qualitative distinctions are drawn; as we have seen performance enhancement, health and the ‘spirit of sport’ are three express rationales WADA uses to determine the permissibility of a substance or method, with a violation of just two of these necessary for prohibition. The concept of what is natural is also highly influential in WADA jurisprudence; it is a major component of its ‘spirit of sport’.

⁸² *ibid* 7–9.

⁸³ There may be good reasons to ban, but these are separate from the doping debate, and not based on fairness or equality, and are beyond the scope of this thesis. The NFL, as noted above, has a separate policy for recreational and performance-enhancing drugs, whereas this distinction is not as influential in WADA-governed sports such as rugby union. It may also be argued that Cannabidiol (CBD) may be termed a treatment or an enhancement, especially given its recent rise to popularity.

WADA states: ‘It is the essence of Olympism, the pursuit of human excellence through the dedicated perfection of each person’s natural talents’.⁸⁴ As we have seen from the earlier ‘Regulatory Structure and Framework’ and ‘Morality of Sport’ chapters, there is a certain deference to the concept of the natural evident in WADA’s statements of values and policies. If something occurs naturally, even if it confers major performance advantages, it is generally to be celebrated. In contrast, substances or methods considered to be unnatural are viewed with scepticism; this unnaturalness may violate WADA’s ‘spirit of sport’ and thus potentially provide a rationale for prohibition. Finally, it should be noted that although Table 1 below details the most frequently occurring and scrutinised athletic enhancements, it does not represent an exhaustive list of all the possible athletic enhancements.

Consideration of the types of enhancement germane to sport will help determine the conceptual coherence of the current rationales for declaring methods permissible or impermissible. Systematic analysis will facilitate drawing reasoned conclusions, and serve to underpin any suggested changes to the status quo. Necessarily, other enhancement issues not directly relevant for our purposes will not be considered.⁸⁵ As noted above, the category into which the enhancement (or treatment) falls is often a major factor in whether or not it is ultimately prohibited. There are, however, many enhancements which are deemed permissible under WADA rules (such as caffeine, likely due in part to its ubiquity, and the role of tea/coffee consumption in society generally), whilst some treatments (for example, some hormone replacement therapies) might not be.

⁸⁴ WADA Code 2019, 14.

⁸⁵ For an excellent evaluation of the state of the enhancement debate see, eg, IG Cohen, ‘What (if anything) is wrong with human enhancement? What (if anything) is right with it?’ (2013) 49 *Tulsa Law Review* 645, <<https://digitalcommons.law.utulsa.edu/tlr/vol49/iss3/4>>.

The broad approach to enhancement (provided above) is useful; Table 1 (below) details the range of measures that are reasonably described as athletic enhancements, and explains in summary whether – and why – they are treated as (il)licit. This tabulation of some of the most frequently occurring sub-categories and different manifestations of enhancement serves as a useful reference tool to facilitate examination of the current rules and regulatory positions.⁸⁶

Table 1

Athletic Enhancement	Summary Explanation	Universal Acceptability?	Rationale for (Il)legitimacy
1. Performance-enhancing drugs (PEDs)	Many different drugs purported to improve performance and/or recovery, for example anabolic steroids, which help with strength and recovery	Generally unacceptable without a TUE	<p>Illegitimacy: can provide an unfair advantage, contrary to the ‘spirit of sport’ /cheating, unsafe, ‘unnatural’ , to ensure fairness/eradicate unfair (dis)advantage</p> <p>Legitimacy: acceptable with a valid TUE within specified situations and limits, as a treatment for a recognised and defined specific medical condition</p> <p>☒Against the ‘spirit of sport’ ☒Potential harm to health</p>

⁸⁶ This is not intended to be an exhaustive definition of every conceivable enhancement, but rather the most relevant for present purposes.

Athletic Enhancement	Summary Explanation	Universal Acceptability?	Rationale for (II)legitimacy
<p>2. Performance-enhancing methods</p>	<p>Manipulations of blood and its components, methods for manipulating and circumventing the actual testing process (such as tampering with samples), and also gene doping (considered separately below)</p>	<p>Unacceptable</p>	<p>Illegitimacy: can provide an unfair advantage, contrary to the spirit of sport/cheating, unsafe, ‘unnatural’ , to ensure fairness/eradicate unfair (dis)advantage</p> <p><input checked="" type="checkbox"/>Against the ‘spirit of sport’ <input checked="" type="checkbox"/>Potential harm to health</p>
<p>3. Prosthetics</p>	<p>Generally artificial limbs, commonly used by those who have lost limbs due to injury or disease</p>	<p>Acceptable in specific sports federations, and in some circumstances in able-bodied federations</p>	<p>Illegitimacy: can provide an unfair advantage; could lead to inappropriate use/abuse over time, to ensure fairness/eradicate unfair (dis)advantage, in extreme situation could be contrary to the ‘spirit of sport’ ; can be unfair if unavailable to all</p> <p>Legitimacy: can allow athletes to compete who otherwise would be unable</p> <p><input checked="" type="checkbox"/>Against the ‘spirit of sport’ <input type="checkbox"/>Potential harm to health</p>

Athletic Enhancement	Summary Explanation	Universal Acceptability?	Rationale for (II)legitimacy
4. Nutritional supplements/ergogenic aids	Vitamins, minerals and other substances, for example creatine and caffeine, which can improve performance and/or recovery, either on their own, or by remedying a deficiency	Currently universally acceptable, but to be used with caution due to the potential for contamination with banned substances and thus failed doping tests	<p>Illegitimacy: can be consumed in larger quantities than could be obtained by eating ‘natural’ foods, therefore possibly unnatural; can be unfair if unavailable to all</p> <p>Legitimacy: the nutrients consumed are generally present in the diet, albeit in smaller quantities</p> <p><input type="checkbox"/>Against the ‘spirit of sport’</p> <p><input type="checkbox"/>Potential harm to health</p>
5. Specific dietary strategies	Deliberate consumption of certain foods and/or food groups, for example high-protein diets, which can improve performance and/or recovery either by themselves, or by remedying a deficiency/addressing an increased need	Universally acceptable	<p>Illegitimacy: can be unfair if unavailable to all</p> <p>Legitimacy: food is necessary for life and therefore must be consumed; practical considerations make regulation difficult and impractical</p> <p><input type="checkbox"/>Against the ‘spirit of sport’</p> <p><input type="checkbox"/>Potential harm to health</p>
6. ‘Functional/ Performance/ Regenerative Medicine’ interventions	Facilitating optimal functioning and wellbeing, for example by increasing vitamins, such as vitamin D, above levels needed to avoid clinical	Generally acceptable	<p>Illegitimacy: can be unfair if unavailable to all</p> <p>Legitimacy: remedying deficiencies and optimising wellbeing</p>

Athletic Enhancement	Summary Explanation	Universal Acceptability?	Rationale for (II)legitimacy
	deficiency or for 'normal' function		<p>will improve health, which is generally viewed favourably</p> <p><input type="checkbox"/>Against the 'spirit of sport'</p> <p><input type="checkbox"/>Potential harm to health</p>
7. Gene editing/gene doping	Using gene therapy to edit genes which positively influence performance	Universally unacceptable	<p>Illegitimacy: can provide an unfair advantage, contrary to the 'spirit of sport' /cheating, unsafe, 'unnatural', to ensure fairness/eradicate unfair (dis)advantage; unfair if unavailable to all</p> <p>Legitimacy: may increase equality of opportunity by remedying elements of a 'genetic lottery'</p> <p><input checked="" type="checkbox"/>Against the 'spirit of sport'</p> <p><input checked="" type="checkbox"/>Potential harm to health</p>
8. Coaching/sports psychology	Expert advice and techniques to improve performance	Universally acceptable	<p>Illegitimacy: can reduce athletes' agency and authenticity of performances; can be unfair if unavailable to all</p> <p>Legitimacy: ultimately relies on the athlete to put the advice/techniques into</p>

Athletic Enhancement	Summary Explanation	Universal Acceptability?	Rationale for (II)legitimacy
9. Blood doping			<p>practice to improve performance</p> <p><input type="checkbox"/>Against the ‘spirit of sport’</p> <p><input type="checkbox"/>Potential harm to health</p>
	<p>Methods to improve the amount of red blood cells in the body, which can improve oxygen-carrying capacity, and therefore endurance</p>	<p>Generally unacceptable without a TUE</p>	<p>Illegitimacy: can provide an unfair advantage, contrary to the ‘spirit of sport’ /cheating, unsafe, ‘unnatural’ , to ensure fairness/eradicate unfair (dis)advantage</p> <p>Legitimacy: acceptable with a valid TUE within specified limits, as a treatment for a recognised and defined specific medical condition</p> <p><input checked="" type="checkbox"/>Against the ‘spirit of sport’</p> <p><input checked="" type="checkbox"/>Potential harm to health</p>
10. Equipment	<p>Tools used in training or performance of sport, for example tennis racquets and poles used for pole-vaulting</p>	<p>Generally acceptable, under certain conditions with certain exceptions</p>	<p>Illegitimacy: can provide an unfair advantage, can be considered contrary to the ‘spirit of sport’ , to ensure fairness/eradicate unfair disadvantage; can be unfair if unavailable to all</p> <p>Legitimacy: can make sports safer and more</p>

Athletic Enhancement	Summary Explanation	Universal Acceptability?	Rationale for (II)legitimacy
			<p>enjoyable, for both athletes and spectators</p> <p><input checked="" type="checkbox"/>Against the ‘spirit of sport’</p> <p><input type="checkbox"/>Potential harm to health</p>
11. Facilities	Places/premises used for training and performance, for example indoor training facilities used to continue regular training during bad weather	Generally acceptable	<p>Illegitimacy: can be unfair if unavailable to all</p> <p>Legitimacy: athletes should be able to train where they want/are able to; practical considerations make regulation difficult and impractical</p> <p><input type="checkbox"/>Against the ‘spirit of sport’</p> <p><input type="checkbox"/>Potential harm to health</p>

Analysis of the Strength and Coherence of Rationales for What is Deemed to be Doping in Elite Professional Sport

Introduction

The previous chapter introduced key bioethical concepts and questions. Different definitions of enhancement were then analysed, before a modified ‘constructivist’ definition was adopted, which can account for the key issues and dichotomies evident in anti-doping regulation. Prominent issues such as the treatment versus enhancement distinction, and the relationship between enhancements and doping were also considered. Finally, a table with the most influential ‘athletic enhancements’ was presented as a reference tool in order to facilitate analysis of the internal coherence of the WADA regulations.

In this chapter, the current prohibition-based system and its advantages and disadvantages are analysed, drawing from and relating to the growing bioethical literature in this area. Lessons from the wider debate on drugs in society are also considered, along with the practical impact work of a theoretical and philosophical nature might have, with a view to suggesting how lines may be drawn in a systematic and ethically sustainable manner. The literatures on enhancement, health and the ‘spirit of sport’ are utilised to help reach both conceptual and normative conclusions, in order to better understand the coherence and justifiability of actual and proposed policy. These questions are addressed bioethically and philosophically; the reasons for, and utility of this method of analysis in informing policy and

practice has been presented in ‘Critical Approach and Methods of Analysis’, chapter 2 of this thesis.

The Ethical Coherence of WADA’s Three Criteria for Normative Evaluations

It is useful at this juncture to present (again for ease of reference) the rationales advanced by WADA for prohibiting substances or methods:

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA, in its sole discretion, determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;

4.3.1.3 WADA’s determination that the Use of the substance or method violates the spirit of sport described in the introduction to the Code.¹

These provisions require some unpacking. The first two criteria purport to rely on ‘Medical or other scientific evidence’ and so are (in theory at least) more objective. In contrast, the idea of the ‘spirit of sport’ is a more abstract notion which can be considered by academics from different disciplines such as philosophy, bioethics and law. It can be taken to mean different things by different people, but we can assume that for WADA it is meant to be comprised of

¹ WADA Code 2015 (with 2019 amendments, hereafter referred to as WADA Code 2019) 30, <www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf> accessed 6 November 2019.

all the values listed in its ‘Fundamental Rationale for the World Anti-Doping Code’.² The difficulty with this appeal to values in the context of WADA’s attempts to harmonise anti-doping is elucidated by the words of the Independent Commission set up to investigate allegations of state-sponsored doping in Russia advanced in a German television documentary:

WADA’s challenges are extensive, since its activities must transcend distance, culture, attitudes, customs, beliefs and politics. Code compliance can only be successful when all parties commit to honouring values-based compliance and maintain a strong anti-doping culture that seeks to serve athletes, irrespective of their nationality or federation.³

The defeasibility element of WADA’s approach (outlined above), ie, in the words of Professor (and current member of WADA’s Ethics Committee) Mike McNamee, ‘when only some but not all of the required criteria apply’⁴ has been considered as both a positive and a negative. It might be considered a positive for the anti-doping authorities, in that it provides a significant degree of flexibility, making it easy to adapt as new challenges emerge. However, it has been observed that it is potentially inherently contradictory,⁵ and can be misinterpreted easily. Specifically, the ‘spirit of sport’ criterion is highly problematic in this regard. Mojisola Obasa

² This is also presented in ‘Regulatory Structure and Framework’, ch 3 of this thesis.

³ WADA Independent Commission, ‘The Independent Commission Report #1’, Final Report, published 9 November 2015, 3: <https://www.wada-ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf> accessed 3 January 2016.

⁴ Mike McNamee, ‘and the Medicalisation of Anti-Doping: Empirical and Normative Ethics’ (2012) 4 *Asian Bioethics Review* 374, 378.

⁵ See, eg, criticism from Foddy and Savulescu in Bennett Foddy and Julian Savulescu (2010) ‘Ethics of Performance Enhancement in Sport: Drugs and Gene Doping’ in Richard E Ashcroft and others (eds), *Principles of Health Care Ethics* (2nd edn, John Wiley and Sons Ltd 2007).

and Pascal Borry provide an instructive assessment of this particular criterion, concluding the following:

Our review showed the spirit of sport concept as employed in the WADA Code to be a multivalent concept whose understandings exist on a continuum in the literature. This lack of homogeneity at the level of meanings ultimately results in heterogeneous opinions as to the applicability or not of the concept. We also found nuanced and dissimilar understandings of the spirit of sport as a rationale on one hand and as criterion on the other.⁶

They continue:

Moreover, at the moment, the entire framework of anti-doping policy rests upon the spirit of sport concept. This fundamental fact, thus, makes a thorough apprehension of the concept essential for the purposes of legitimization of anti-doping in general.⁷

This dual role is plainly problematic, and is considered further by Olivier de Hon:

If the concept is fundamental to the prohibition of doping, and it probably is, it is redundant to offer it as a potential one-out-of-three criterion at a later stage. First of all, it is superfluous to repeat the same argument twice (although this is not necessarily problematic in itself) and secondly, this opens the door to formally prohibit substances or methods that are not considered to be in breach of the ‘Spirit of Sport which is strange considering the central role of this concept in the entire WADC.⁸

⁶ Mojisola Obasa and Pascal Borry, ‘The Landscape of the “Spirit of Sport”’ (2019) 16 *Bioethical Inquiry* 443, 452, <<https://doi.org/10.1007/s11673-019-09934-0>>.

⁷ *ibid.*

⁸ Olivier de Hon, ‘The redundancy of the concept of ‘spirit of sport’ in discussions on the prohibited list of doping substances’ (2017) 9 *International Journal of Sport Policy and Politics* 667, 673, <<https://doi.org/10.1080/19406940.2017.1348380>>.

As previously discussed, the notion of the ‘spirit of sport’ is conceptually vague. It is noteworthy that this observation has been made even by proponents of the current regulatory system, such as Mike McNamee,⁹ although he, following notable philosophers such as Ludwig Wittgenstein,¹⁰ believes that this ambiguity is actually advantageous, but this advantage is enjoyed by WADA (and the associated regulators), rather than the athletes. As noted above, the ‘spirit of sport’ criterion can be criticised (absolutely correctly and legitimately) as too subjective, and will thus mean different things to different people, which arguably does not provide a coherent basis for regulation. Given the potential reliance on it, and the implications this reliance can have, this is inappropriate. It has even been discussed that it should be abandoned entirely from the WADA Prohibited List.¹¹ However, abandoning it is not necessary, and is not necessarily desirable. It can be defined so that it is in keeping with the ethos of modern elite professional sport; thus, it can represent a more appropriate basis upon which to classify a purported ‘athletic enhancement’. This more appropriate conception of the ‘spirit of sport’ criterion is outlined in the ‘Morality of Sport: Positive Case’ chapter (chapter six) of this thesis.

Simply satisfying two criteria (of the three), such as the violation of the ‘spirit of sport’, and the ‘potential to enhance sport performance’ can lead to a substance being prohibited, despite the fact it may not be damaging to health. This may be considered problematic: many enhancement methods are permitted, and enhancing performance is the aim of much of what elite professional athletes do. Arguably, enhancing performance is part of the ‘spirit of sport’,

⁹ McNamee (n 4).

¹⁰ See, eg, Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 1953).

¹¹ For discussion, see, de Hon (n 8). For arguments to abandon it, see, Kathryn Henne, Benjamin Koh and Vanessa McDermott, ‘Coherence of drug policy in sports: Illicit inclusions and illegal inconsistencies’ (2013) 2 *Performance Enhancement & Health* 48.

both WADA's 'Corinthian Values' derived spirit, and the spirit evident amongst elite professional athletes. It is also noteworthy that if a substance is deemed to (potentially) enhance and (potentially) damage health, then it can be banned, without any reference to the 'spirit of sport' criterion. As observed above by de Hon, this is incoherent. Protecting the 'spirit of sport' is a fundamental rationale for WADA's anti-doping policies, and yet it is superfluous in certain circumstances. De Hon notes that 'The sentence "Doping is fundamentally contrary to the spirit of sport" borders on circular reasoning (ie, defining the spirit of sport by a call upon "the spirit of sport"), but apparently it is about ethics, values and Olympism'.¹² It underlies the other two criteria, is prior to them and is an inherent part of them. On this basis it is illogical – as de Hon observes correctly – that the 'spirit of sport' criterion is given as one of the three rationales for prohibition, but is described (at least in part) with reference to the two other criteria. Anti-doping policy, which permits and proscribes certain substances and methods is an ethically prior position to adopt, and an expression of the 'spirit of sport' in and of itself.

Moreover, there are also numerous problems with the 'potential to enhance sport performance' criterion. First, it suggests the term 'enhancement' is pejorative and anything which can be categorised as an enhancement should be viewed with suspicion. As demonstrated in the previous chapter, it should not be viewed in this way. Indeed, enhancing performance in certain ways could be construed as part of 'the dedicated perfection of each person's natural talents'.¹³ Second, athletes 'enhance' themselves in a myriad of ways which are permissible, such as training, special diets, vitamin and mineral supplementation and specific lifestyle practices; 'enhancement' (of sports performance) might be considered the

¹² de Hon (n 8) 670.

¹³ WADA Code 2019, 'Fundamental Rationale for the World Anti-Doping Code' 14.

very purpose of these activities which are often applauded by proponents of the current anti-doping regime.

These observations raise fundamental questions regarding the coherence and consistency of the regulation on its own terms. These questions are considered further below, with reference to specific manifestations of enhancement.

Contrasting Regulatory Approaches in Elite Professional Sport

Following the logic advanced in the earlier ‘Critical Approach and Methods of Analysis’ chapter (chapter two) this chapter examines the rules as they operate in reality, as opposed to in the abstract. They are considered with illustrative reference to two sports: rugby union, and the NFL. As rugby union’s regulation comes under the auspices of WADA, the general analysis of WADA’s policies is therefore applicable to rugby union.¹⁴ By contrast, the NFL maintains its own regulation, largely independent from WADA’s efforts to harmonise anti-doping measures across countries and across sports.¹⁵

¹⁴ See further, World Rugby Regulation 21.13. It is, however, noteworthy that rugby union in England, for example, has an illicit drug policy which applies in limited circumstances, ie, outside competition, and only to drugs deemed illicit, although in almost all circumstances given factors such as the length of the season (especially including summer tours etc), it is the WADA regulation which will apply anyway. See: <<https://www.englandrugby.com/governance/anti-doping-and-illicit-drugs/illicit-drugs-programme>>.

¹⁵ NFL Drug Program Resources, NFLPA website: <<https://www.nflpa.com/active-players/drug-policies>>.

The NFL, which Maintains its own Regulation

This section builds upon the observations made in the ‘Regulatory Structure and Framework’ chapter (chapter three) between WADA’s and the NFL’s approaches to regulating substances and methods considered to be doping, by highlighting key differences and the ethical implications of these differences. The NFL’s bespoke policy and approach to the regulation of doping represents a contrast to the approach adopted by WADA (and therefore, by extension, rugby union). As a preliminary point, it is worth noting that in the US, a number of performance-enhancing drugs (such as, for example, anabolic steroids) attract criminal sanctions for use;¹⁶ this is generally not the case in the UK, although doping offences can also be criminal offences in some European countries. In the US, Congress has considered the issue of drugs in baseball,¹⁷ and the issue of drugs in sport has received much mainstream media attention.¹⁸ However, particularly in comparison with the approach adopted by those under the auspices of WADA, this trend of stricter regulation in the criminal law has not been mirrored by the approaches of the domestic sports leagues in the US. In the NFL, for example, the

¹⁶ See further, the Anabolic Steroid Control Acts of 1990 and 2004, and the Designer Anabolic Steroid Control Act 2014.

¹⁷ This led to the Commissioner of Baseball commissioning the Mitchell Report, authored by former Senator GW Mitchell: Report to the Commissioner of Baseball of an Independent Investigation into the illegal use of steroids and other performance enhancing substances by players in Major League Baseball, <<http://files.mlb.com/mitchrpt.pdf>> accessed 14 January 2020>.

¹⁸ See, eg: *Game of Shadows: Barry Bonds, Balco, and the Steroids Scandal That Rocked Professional Sports* (Gotham Books 2007) authored by two renowned investigative reporters, Mark Fainaru-Wada and Lance Williams; and the documentary ‘Bigger, Stronger, Faster’ directed by Mark Bell (2008).

criminal law is not generally utilised as a tool to regulate doping and will therefore not be considered further here.

The NFL highlights three main reasons for its performance-enhancing substances policy:

First, these substances threaten the fairness and integrity of the athletic competition on the playing field;

... the adverse health effects of using Prohibited Substances;

the use of Prohibited Substances by Players sends the wrong message to young people who may be tempted to use them.¹⁹

It is noteworthy that in the NFL's policy the 'spirit of sport' is not expressly mentioned, although this reference to the 'wrong' message might be considered the result of the implicit influence of a version of the 'the spirit of sport' concept which is so prominent and influential in WADA-governed sport. The references to 'fairness' and 'integrity' may also be considered oblique references to the 'spirit of sport', albeit in a more clearly articulated, specific and defensible form, making it easier to defend as a concept, and better able to provide coherent normative determinations.

As we can see, fairness, athlete health, and implications derived from athletes' influential positions as role models, especially to 'young people' are ostensibly the main reasons for the NFL's policy. These clearer, more precise aims are more defensible and easier to justify and rationalise, as they do not rely on numerous ambiguous and contested concepts with

¹⁹ NFL Policy on Performance-Enhancing Substances 2020, 1, <<https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2020-Policy-on-Performance-Enhancing-Substances.pdf>> accessed 3 April 2020.

uncertain and potentially contradictory relationships to each other. For example by way of contrast, we have seen that WADA's 'potential to enhance sport performance' is ambiguous and conflicts with the prevailing norms and attitudes of elite professional athletes.

There are many differences between the NFL's policy and WADA's (as highlighted in the earlier 'Regulatory Structure and Framework' chapter – chapter three) but (at least) three are particularly notable. Perhaps the most immediately striking difference between the regulation of the NFL and rugby union under WADA is the discrepancy in sanctions for doping policy violations, with the NFL's being significantly less severe. A practical example can be used to illustrate the major difference in sanction for essentially the same offence: if an athlete fails a test for the presence of a 'Stimulant or Anabolic Agent', this leads to a ban of six games (recently increased to six under the Collective Bargaining Agreement 2020) for an athlete's first offence in the NFL,²⁰ versus four (or potentially two) years in rugby.²¹ In order to be banned for at least two seasons – arguably an equivalent of half the amount of time to the likely minimum in rugby union – in the NFL, three violations are necessary, although a limited distinction may potentially be drawn between seasons and calendar years. Given that doping bans in the NFL do not – in the first instance at least – prevent players from competing for such extensive periods, this makes the NFL's policies easier to justify from a proportionality perspective. Regarding proportionality, it is also worth noting that the NFL's policies do not

²⁰ *ibid* 6, Suspension and Related Discipline.

²¹ World Rugby Regulation 21.10.2.1.1/RFU Regulation 20, <<https://www.englandrugby.com/dxdam/f4/f489f622-3ce9-46e4-8c4d-5673902a383c/Handbook%202019-20.pdf>>. This policy is derived from World Rugby Regulation 21, <<https://www.world.rugby/handbook/regulations/reg-21/reg-21?lang=en>>. The RFU follows World Rugby's Anti-Doping Rules, which incorporates WADA's regulations.

entail such significant infringements on athletes' privacy;²² these points make the NFL's policy easier to justify ethically.

These significant differences in policy are likely to be due to the role of the Players' Union in drug policy negotiations.²³ This, and the points about consent raised under the 'Proportionality' heading in chapter four, give rise to points discussed at length in the 'Morality of Sport' chapters (chapters five and six): the role of stakeholders – particularly the athletes – to meaningfully participate in the consultation process concerning policies of this nature. WADA has stakeholder (in this case, athlete) consultation processes, but they lack the real power to influence policy that players' unions have in US domestic sport. Whether, if WADA did decide to have more meaningful consultation with athletes, the result would lead to less strict policies, is difficult to assess.²⁴ However, the prevailing attitude among WADA-regulated athletes might be influenced by the general rhetoric of the anti-doping movement, characterised as the 'war on doping',²⁵ which WADA deems necessary as it violates its contested conception of the 'spirit of sport'; this perspective is not evident in the attitudes and approaches adopted by those in the NFL. WADA's 'spirit of sport' leads to a rather unbalanced and hysterical framing of key issues, something which is not conducive to balanced ethical assessment, and leads to ethically incoherent and inconsistent policymaking, as highlighted below.

²² NFL Policy on Performance-Enhancing Substances 2020, Section 3, 4–5.

²³ The collective bargaining agreement between the NFL and the Players' Union (NFLPA) demonstrates that the latter has a much more powerful position than the equivalent under WADA.

²⁴ There are indications of some movement in this direction with the proposed 2021 WADA Code.

²⁵ The media frequently refer to WADA's war on doping. See, eg, 'WADA must stand firm on war on doping' (*The Age*, 12 December 2019), <<https://www.theage.com.au/sport/wada-must-stand-firm-on-war-on-doping-20191212-p53jjd.html>> accessed 14 January 2020.

A second key difference between general WADA regulation and the NFL is that the NFL has a more significant and meaningful separation between its 'Policy and Program on Substances of Abuse' and the 'Policy on Performance-Enhancing Substances' (PES) – the latter being the most relevant for our purposes given the focus of this thesis on issues relating to anti-doping rather than recreational drug use.²⁶ This is more consistent with a focus on athlete health and wellbeing, as opposed to the punitive approach adopted by WADA, and again may serve as a demonstration of the influence of the Players' Union and the collective bargaining process with the League.

A third difference to note concerns the NFL's policy on Therapeutic Use Exemptions (TUEs), which is much more specific than WADA's in that different medical conditions are subject to different evaluations for a TUE to be granted. For example, the TUE for hypertension is different from the applicable TUE for hormonal deficiencies.²⁷ This also highlights an advantage to having a bespoke or sport-specific policy: it is more specific and precise, which makes it less prone to abuse.²⁸

In summary, therefore, the NFL's clearer, more distinctly defined policies grounded in areas more conducive to common agreement amongst stakeholders are more ethically coherent and defensible than the broader less precise policies advanced by WADA, which are prone to different, potentially conflicting interpretations. This interpretive ambiguity can be criticised

²⁶ Some potential changes to this basic position have been advanced in the draft 2021 Code.

²⁷ NFL Policy on Performance-Enhancing Substances 2020 (n 19) 34.

²⁸ See, eg, the analysis of TUEs here: House of Commons Digital, Culture, Media, & Sport Committee, 'Combatting doping in sport', published 5 March 2018, <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/366/366.pdf>> accessed 13 September 2018.

as often serving to favour the agenda of the regulators over athletes and other stakeholders, undermining their legitimacy.

By contrast, the NFL's policies demonstrate a more practical focus on athlete health, perhaps as a consequence of the players' ability to meaningfully influence policy.

In this section, some of the distinct approaches to governance from WADA and the NFL have been highlighted. The next section of this chapter provides more fine-grained analysis of the coherence and justifiability of WADA's policies, with reference to the three criteria used to justify prohibition of a substance or method.

Analysis of the Coherence of WADA's Policies on their Own Terms

The key 'athletic enhancements' described in the table at the end of the previous chapter are now considered with reference to the three criteria WADA uses to make normative judgements: enhancement, health, and the 'spirit of sport', which takes into account the concept of the natural versus the unnatural. The rationales provided are also examined with reference to concepts such as fairness (ie, 'level playing field') in order to establish whether the distinctions made by WADA regarding whether they should be defined as doping (ie, as unfair enhancement and on this basis banned from elite professional sport), or deemed permissible, are credible or arbitrary. There are at least two fundamental considerations here: first, are the rules fair and credible on paper? Second, are these rules fair and credible when applied to real-world situations?

Performance-Enhancing Drugs (PEDs)

The first question here is whether WADA's concept of enhancement provides sufficient basis to support WADA's (theoretical) prohibition on PEDs. An initial observation to make is that given the existence of TUEs, and the acknowledgement of the de facto scalar position this introduces, WADA tolerates (rather than condones) an element of performance enhancement. At least in theory, enhancement alone is not sufficient for a substance or method to be prohibited. However, given the ambiguity and flexibility in WADA's favour provided by the 'spirit of sport' criterion, the determination that something is an enhancement is often salient and definitive. As we have seen, many substances and methods 'enhance'; some of these WADA actively promotes, such as diligent and intensive training, and some WADA does not prohibit expressly but also does not promote, such as nutritional supplements.²⁹ Much of the discussion of treatments as contrasted with enhancement is also relevant here, but will not be reproduced under this heading. It is argued that the first criterion (enhancement) does not provide sufficient normative guidance; any number of substances and methods can potentially enhance performance. Indeed, enhancing performance is the primary objective of many permissible substances (for example, sports supplements such as creatine), and training methods (for example, 'training low and resting high', ie, at altitude, or in a simulated altitude chamber), and therefore using WADA's own logic should not (at least by themselves and without the health criterion) provide a basis for prohibition.

²⁹ H Geyer and others, 'Nutritional Supplements – still a risk of inadvertent doping? an extended WADA follow up study of the international ico study from 2002' (2015), <<https://www.wada-ama.org/en/resources/science-medicine/nutritional-supplements-still-a-risk-of-inadvertent-doping-an-extended>> accessed 15 January 2016; UKAD, 'Managing Supplement Risks', <<https://www.ukad.org.uk/athletes/managing-supplement-risks>> accessed 15 January 2016.

Generally, sport is perceived to promote health, although this perception may be questioned in elite professional sport, which can be criticised as unhealthy in some respects with its extreme demands on the body and dangers inherent in some sports such as rugby union and American football.³⁰ This conflict with health is particularly apparent when the longer-term health consequences of elite sport are considered: this has been particularly well documented, for example, with former NFL players.³¹ Nonetheless, the WADA Code cites health as one of its primary rationales for prohibiting drugs in sport.³² The potential dangers of various performance-enhancing drugs are also well documented;³³ this is particularly so when they are taken in combination without medical supervision.³⁴ These points provide prima facie support for a prohibition based on health grounds.

However, it is argued that despite its rhetoric,³⁵ there are some inconsistencies in WADA's position in this regard, both in theory and in practice, in that the current measures do not safeguard health as effectively as they could. There are also clear problems with the practical implementation of its policies, as evidenced for example by the TUE policy. The 'significant health problems' necessary for a TUE to be granted are worth considering. As

³⁰ See discussion in ch 4 under the 'risk of harm' analysis in 'Statements of Values Presented and Examined'.

³¹ For an excellent overview with links to numerous studies, see, Ellen Barlow, 'After the Game Is Over', The Football Players Health Study at Harvard University (30 January 2020), <<https://footballplayershealth.harvard.edu/about/news/after-the-game-is-over/>> accessed 6 February 2020.

³² WADA Code 2019, 14.

³³ For an accessible summary, see eg, USADA, 'Effects of Performance-Enhancing Drugs' <<https://www.usada.org/athletes/substances/effects-of-performance-enhancing-drugs/>> accessed 18 April 2020.

³⁴ Nimalie J Perera, Katherine S Steinbeck and Nicholas Shackel, 'The Adverse Health Consequences of the Use of Multiple Performance-Enhancing Substances – A Deadly Cocktail' (2013) 92 *Journal of Clinical Endocrinology and Metabolism* 4613, <<https://doi.org/10.1210/jc.2013-2310>>.

³⁵ See, eg, WADA Code 2019, 14.

noted earlier, one related argument here advanced by academics such as Paul Dimeo, is that if an athlete is not well enough to compete without taking a substance which is prohibited, perhaps they should not be competing at all.³⁶ This is one argument he cites in favour of abandoning the current TUE system, and a way in which the current system may not safeguard health as effectively as it could.

Another inconsistency between WADA's stated aim and its policies in this regard can be illustrated with reference to the position WADA takes regarding analgesics (painkillers), which can also be considered to be performance-enhancing drugs.³⁷ WADA's position allows the use of many painkillers such as paracetamol, ibuprofen and even codeine which may, *prima facie*, be inconsistent with their stated aim of promoting (and concept of) health. This position has been considered within the medical community.³⁸ There are major concerns regarding the extensive use of painkillers and the negative impact this can have on athletes' health. There are numerous ways in which painkiller use might be problematic; one of the main arguments here runs as follows, and is similar to Dimeo's argument highlighted above in the context of TUEs: should an athlete be allowed to play if they are unable to train and play without painkillers? From a health perspective this is highly questionable, particularly if painkiller use is on a routine basis, and becomes the norm rather than the exception. Moreover, if an athlete plays

³⁶ Paul Dimeo and Verner Møller, *The Anti-Doping Crisis in Sport: Causes, Consequences, Solutions* (Routledge 2018); Paul Dimeo and Verner Møller, 'Elite sport: time to scrap the therapeutic exemption system of banned medicines' (*The Conversation*, 18 December 2017), <<https://theconversation.com/elite-sport-time-to-scrap-the-therapeutic-exemption-system-of-banned-medicines-89252>> accessed 6 November 2018.

³⁷ Darias Holgado and others, 'Analgesics and Sport Performance: Beyond the Pain-Modulating Effects' (2018) 10 *PM&R* 72, <<https://doi.org/10.1016/j.pmrj.2017.07.068>>.

³⁸ Alan Vernec, Andrew Pipe and Andrew Slack: 'A painful dilemma? Analgesic use in sport and the role of anti-doping' (2017) 51 *British Journal of Sports Medicine* 1243, <<https://doi.org/10.1136/bjsports-2017-097867>>.

whilst under the influence of painkillers, it is possible, even likely, that masking the pain could lead to further damage; again, plainly this would not promote health. The longer-term implications are also troubling: addiction to painkillers which remains after the athlete's career has concluded, which can lead to addiction to more powerful opioids and narcotics. Following this logic, WADA's concept of health could lead to a prohibition on currently licit drugs such as painkillers. Taken in context, this is an inconsistency in the current policy. From a health perspective, there is a powerful rationale for banning painkillers, or at least regulating them more closely via a qualified permission such as a TUE.

Many elite professional athletes benefit from physiological (and psychological) gifts which are far above many in the general population; elite athletes are often outliers – indeed this is one of the factors which makes them elite, and differentiates them from others and provides them with 'natural' (ie, endogenously occurring) advantages. This is also what those such as Thomas Murray and WADA consider to be valuable, and celebrated by sport.³⁹ These natural differences generally manifest themselves in performance, as opposed to health, advantages, although again a clear distinction between the two can be hard to draw. For example, those with naturally occurring higher levels of certain hormones will likely have recovery as well as performance advantages; these recovery advantages could be considered to improve health by reducing the burden of heavy training which can depress the immune system.⁴⁰ Julian Savulescu and others believe that it is appropriate to augment hormones etc to

³⁹ Thomas H Murray, *Good Sport: Why our Games Matter – and How Doping Undermines Them* (OUP 2018) 56; WADA Code 2019; 'Fundamental Rationale for the World Anti-Doping Code'.

⁴⁰ Maree Gleeson and others, 'Developing a multi-component immune model for evaluating the risk of respiratory illness in athletes' (2017) 23 *Exercise Immunology Review* 52; Jana Palmowski and others, 'Managing Immune Health in Sports – a Practical Guide for Athletes and Coaches' (2019) 70(10) *Deutsche Zeitschrift Fur Sportmedizin* 70 219, <<https://doi.org/10.5960/dzsm.2019.389>>; DC Nieman and others, 'Infectious episodes in

safe levels which are comparable to the highest physiologically occurring levels within that sport,⁴¹ even if these levels may be higher than what would be considered necessary outside the specific population. On this basis, athletes would be able ‘to correct for natural inequality’,⁴² thus improving fairness, and potentially health. This approach could attenuate the negative health impact of heavy and sustained training, and thus improve athlete health.

Undoubtedly some of the very high levels illicitly used by athletes without valid TUEs seeking to enhance performance are likely to be damaging to health, as are the experimental, untested and so-called ‘designer’ drugs which athletes take to avoid detection.⁴³ These unknown novel drugs do not appear on WADA’s Prohibited List and are therefore much harder to detect in a doping test; however, they are also potentially more dangerous as these experimental and ‘designer’ drugs have not been through the extensive, lengthy and heavily regulated clinical trials necessary for most drugs and medicines to be sold legitimately. Therefore continuing the current prohibition on them is consistent with prioritising athlete health; ie, given the potential risks to health they present there are compelling health-based reasons to maintain the current ban on them.

As with any debate concerning prohibited drugs, there will always be a harm reduction-based argument to consider, which essentially runs as follows. If the drugs were administered by appropriately qualified medical practitioners operating with all the safeguards more commonly associated with traditional ‘therapy-based’ medicine, this would reduce harms

runners before and after the Los Angeles Marathon’ (1990) 30 *Journal of Sports Medicine and Physical Fitness* 316.

⁴¹ J Savulescu, B Foddy and M Clayton, ‘Why we should allow performance enhancing drugs in sport’ (2004) 38 *British Journal of Sports Medicine* 666, <<http://dx.doi.org/10.1136/bjism.2003.005249>>.

⁴² *ibid* 668.

⁴³ *ibid*.

compared with athletes (and non-medically qualified coaches) administering drugs themselves, particularly those procured from unregulated sources.⁴⁴ In the context of elite professional sport, however, this argument is less persuasive. Many athletes at this level are able to find suitably qualified people to obtain and administer them, and are even using loopholes in the current system such as TUEs to access otherwise prohibited drugs. The Team Sky ‘marginal gains’ regime, and Alberto Salazar’s ‘Nike Oregon’ Project are two notable examples of this.⁴⁵

The validity of many of WADA’s distinctions are difficult to sustain when considered from a philosophy of health perspective. Despite WADA’s theoretical commitment to policies which promote both a positive and negative concept of health, they often fail to account for a ‘positive’ conception of health, and their policies are more characteristic of a ‘negative’ approach, ie, simply remedying established medical issues, rather than seeking to proactively promote health. These inconsistencies provide persuasive reasons to consider alternative options to the current system and policies.

As we have seen, the spirit of sport is integral to WADA’s prohibition-based policies. One key element of the ‘spirit of sport’ is the notion of what the sport is seeking to test. Essentially, if the use of a drug helps an athlete to demonstrate what the sport values, this is potentially problematic and provides a coherent rationale for regulating – or prohibiting – its

⁴⁴ See further, eg: April Henning and others, ‘Risk and Enabling Environments in Sport: Systematic Doping As Harm Reduction’ (2020) *International Journal of Drug Policy* <<https://doi.org/10.1016/j.drugpo.2020.102897>> <doi:10.1016/j.drugpo.2020.102897> accessed 24 August 2020; Ken Kirkwood, ‘Considering Harm Reduction As the Future of Doping Control Policy in International Sport’ (2009) 61 *Quest* 180, <<https://doi.org/10.1080/00336297.2009.10483609>> accessed 14 July 2018. For this general line of reasoning outside the context of sport, see, eg, Patricia G Eriksen and others (eds), *Harm Reduction: A New Direction for Drug Policies and Programs* (University of Toronto Press 2016).

⁴⁵ For analysis, see further, ‘Combatting doping in sport’ (n 28).

use. In this connection, Savulescu considers the concept of ‘mental doping’ to be problematic, and to undermine the spirit of sport; he defines it as follows, when considering Mike Tyson’s use of cocaine before boxing fights: ‘If mental doping is the use of substances to change our willpower, desires, and perception of pain, then using cocaine counts as mental doping’.⁴⁶

Boxing may, for example, be considered to be at least in part a test of will and pain tolerance; this sport values expressions of these qualities and athletes should generally demonstrate them as part of a good performance. Taking a substance – in this case cocaine – which temporarily provides an athlete with them, or with an increase in them reduces his or her agency and may be adjudged problematic, and thus prohibited.⁴⁷ In this connection, it can be argued that the use of painkillers could reduce the authenticity of a performance by preventing athletes from feeling pain as they usually would, which could in turn allow them to push harder and thus enhance performance and be contrary to the ‘spirit of sport’. Concerns about reductions in agency due to drugs have been expressed by ‘bioconservative’ bioethicists, notably for example by The President’s Council on Bioethics in their report entitled *Beyond Therapy: Biotechnology and the Pursuit of Happiness*.⁴⁸ They contend that agency could be undermined by, for example, making ‘the individual’s agency less humanly or experientially intelligible to himself’.⁴⁹ There are concerns here that an athlete’s performance may no longer be attributed to the athlete themselves, but instead to others, such as in the case of PED chemists

⁴⁶ Julian Savulescu, ‘A Doping Manifesto’ (*aeon*, 11 June 2014), <<https://aeon.co/essays/why-we-should-legalise-most-doping-in-sport>> accessed 13 September 2018.

⁴⁷ *ibid.*

⁴⁸ President’s Council on Bioethics, *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (October 2003) ch 3 of the report, particularly in ‘II. Sport and the Superior Athlete’, <<https://bioethicsarchive.georgetown.edu/pcbe/reports/beyondtherapy/chapter3.html>> accessed 12 July 2016.

⁴⁹ *ibid.*

or doctors. It is persuasive that academics from different ideological perspectives to the President's Council such as Savulescu would also contend that this would be a violation of the 'spirit of sport', and should therefore not be permitted.⁵⁰ Using the logic of the current system, they may be considered to be unfair in that reducing the perception of pain can provide an unfair advantage, be unsafe, and also undermine the 'spirit of sport'. These conclusions provide rationales for extending WADA's prohibition to include painkillers, or at least to limiting their use to a qualified permission basis, such as via a TUE.

These pragmatic and persuasive suggestions are not too far removed from how the current TUE system operates in reality, despite the intentions of the regulators. When a TUE is granted, it is granted with certain conditions, such as: the dosage, (medicine), the manner in which it should be taken, etc.⁵¹ However, it can be argued that this creates a situation which is prone to abuse. This debate is illustrated by the recent House of Commons Digital, Culture, Media & Sport Committee report examining doping in sport,⁵² which criticised the unethical use of legitimate medications for the purposes of enhancing performance:

It is clear from the evidence the Committee has considered that the Therapeutic Use Exemption (TUE) system is open to abuse. The assessment of medical need has been based too closely on trying to achieve a peak level of physical condition in the athlete, rather than returning them to a normal state of health. In the period up to 2014, when TUEs could be granted based on the assessment of the team doctor, and

⁵⁰ Savulescu, 'A Doping Manifesto' (n 48).

⁵¹ 5.4a WADA International Standard for Therapeutic Use Exemptions (ISTUE), 13 <https://www.wada-ama.org/sites/default/files/resources/files/istue_2019_en_new.pdf> accessed 7 November 2019; WADA, Therapeutic Use Exemption (TUE): <<https://www.wada-ama.org/en/questions-answers/therapeutic-use-exemption-tue>> accessed 7 November 2019.

⁵² 'Combatting doping in sport' (n 28).

a single doctor at the World Anti-Doping Agency (WADA), the potential for abuse in the system was even greater.⁵³

This abuse may be considered a reflection of the value system clash between elite professional sport, with its characteristic focus on constant performance improvement and winning, and the ‘Corinthian Values’ derived approach of the regulators. It also serves as an illustration and practical manifestation of WADA’s inability to account for these conflicts in its policies. The abuse of the TUE system can also potentially create further unfairness: for example, amongst athletes not suffering from clinically low levels, but levels which are significantly lower than both those using TUEs, and those with higher endogenously produced levels. This would seem to put these athletes at a disadvantage, which is problematic from a fairness perspective.

The concept of the natural (as contrasted to the unnatural) is also prevalent in WADA’s jurisprudence, and the work of proponents of the status quo, such as Murray.⁵⁴ In the context of sport, Murray opines: ‘When we emphasize something’s naturalness, we are pointing at what we believe is a source of its value’.⁵⁵ Many performance-enhancing drugs occur ‘naturally’, ie, are produced by the body. For example, testosterone is produced by both men and women in varying amounts.⁵⁶ Testosterone (and its many derivatives), are also used as illicit performance

⁵³ *ibid*, 31, point 105.

⁵⁴ See, eg: the reference to ‘natural talents’ in the WADA Code 2019, ‘Fundamental Rationale for the World Anti-Doping Code’ 14; Murray, *Good Sport* (n 39) 56.

⁵⁵ Murray, *ibid*.

⁵⁶ Jordan Cohen and others, ‘Low Testosterone in Adolescents & Young Adults’ (2020) *Frontiers in Endocrinology* <<https://doi.org/10.3389/fendo.2020.00449> doi:10.3389/fendo.2019.00916> accessed 29 August 2020.

enhancers.⁵⁷ As mentioned above, a key difference here is the quantity used, although this is not quite as clear-cut as it might be: some athletes will produce vastly more testosterone than others, which affords them a number of advantages.⁵⁸ For example, higher testosterone levels will help to improve muscle mass and recovery from intense exercise, and improve sports performance.⁵⁹

As academics such as Thomas Murray and Gregory Kaebnick contend, the distinction between what is natural and what is unnatural is not always clear, although this does not mean that they believe it should be abandoned. The concept has some utility, but it does not represent a ‘moral trump’ card.⁶⁰ This source of value has been extremely influential and is evident in WADA’s policies, for example in its ‘Fundamental Rationale for the WADA Code’.⁶¹ Much celebration is made of natural abilities, whereas abilities believed to be gained in an unnatural manner are viewed with suspicion. This is, however, problematic. As Tuija Takala opines: ‘I

⁵⁷ Jake Shelley, Hannah Jayne Moir and Andrea Petróczi, ‘The Use and Misuse of Testosterone in Sport: The Challenges and Opportunities in Doping Control’ in D Bagchi, S Nair and CK Sen (eds), *Nutrition and Enhanced Sports Performance* (2nd edn, Academic Press 2019).

⁵⁸ This point has been debated extensively, particularly in the context of female athletes with hyperandrogenism. Given that this point is considered in depth in other areas of this thesis it will not be considered further here. There is a growing body of empirical research on the point, such as, eg, Stéphane Bermon and Pierre-Yves Garnier, ‘Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes’ (2017) 51 *British Journal of Sports Medicine* 1309, <<http://dx.doi.org/10.1136/bjsports-2017-097792>>.

⁵⁹ See, eg, Ruth I Wood and Steven J Stanton, ‘Testosterone and sport: Current perspectives’ (2012) 61 *Hormones and Behavior* 147, <<https://doi.org/10.1016/j.yhbeh.2011.09.010>>.

⁶⁰ Gregory E Kaebnick, ‘Moral Enhancement, Enhancement, and Sentiment’ in S Clarke and others (eds), *The Ethics of Human Enhancement: Understanding the Debate* (OUP 2016) 232.

⁶¹ WADA Code 2019, 14.

do not think that it is acceptable to tie morality and naturalness together in the way prevalent in semiphilosophical discussions on the ethics of modern biotechnologies and other controversial issues'.⁶² Following Takala's reasoning here, what is natural and what is moral should not be conflated. On this basis it might be suggested that the concept should be more value-neutral and less value-laden, or even abandoned entirely as inappropriate.⁶³ Indeed, critics such as Max Mehlman do not believe that natural talents should be a factor in sport, because they are not 'earned or deserved.'⁶⁴ Given these observations, the concept of the natural should not be a decisive value as it arguably is for WADA. An intervention's naturalness (or lack thereof) does not offer definitive guidance in establishing whether it should be permitted or proscribed. Where the concept of the natural versus the unnatural might become more useful (and can potentially provide an element of normative guidance) is in establishing a line between physiologically occurring levels (ie, levels which occur 'naturally'), and supra-physiological levels which can only be attained through exogenous administration. In the extreme this is relatively straightforward to establish: for example, some performance-enhancing doses of hormones can put athletes hundreds of times above physiologically occurring levels, which can be problematic from a number of perspectives such as athlete health. This argument becomes less compelling and more difficult to sustain if more modest

⁶² Tuija Takala, 'The (Im)Morality of (Un)Naturalness' (2004) 13 *Cambridge Quarterly of Healthcare Ethics* 15, 19, <<https://doi.org/10.1017/S0963180104131046>>.

⁶³ Following Takala's reasoning, for example, may well lead us to abandon the concept entirely in the context of sports doping.

⁶⁴ Maxwell J Mehlman, 'Genetic enhancement in sport: Ethical, legal and policy concerns' 'Genetic enhancement in sport: Ethical, legal and policy concerns' in TH Murray, KJ Maschke and AA Wasunna (eds), *Performance-Enhancing Technologies in Sports: Ethical, Conceptual, and Scientific Issues* (Johns Hopkins University Press 2009) 213.

doses are used, although it is noteworthy that this is already used as an evaluative tool in anti-doping regulation.

Naturalness as a concept indubitably has flaws as a source of normative guidance. For example, many medications would not be considered natural, whereas many medical issues might be, but prohibiting the former on the basis of their ‘unnaturalness’ and failing to address the latter because they occur naturally would be morally and ethically unconscionable and untenable. Many diseased states, from cancer to malaria, are natural, but plainly the simple fact they are natural does not mean that we should discourage treating them as problematic and seek to remedy them. It does, however, call in to question whether something should be permissible simply on the basis that it is natural.

Relating this to WADA policies, pain is natural, but as discussed above many painkillers are permissible under the WADA Code and pain is therefore remedied despite the fact it occurs naturally. Painkilling drugs are almost always to relieve pain surrounding major medical procedures, and other drugs may be used to speed recovery from surgery.⁶⁵ The former use is almost universally accepted, and the latter is also sometimes accepted. In many elite professional sports, and certainly in contact/collision sports like rugby union and American football, players often ‘play through pain’ with the help of painkillers. The NFL has recently received criticism regarding the players’ extensive use of painkillers.⁶⁶ Indeed, many contact

⁶⁵ NHS, Guy’s and St Thomas’ NHS Foundation Trust, ‘Taking painkillers after your surgery’ <www.guysandstthomas.nhs.uk/resources/patient-information/pharmacy/painkillers-after-surgery.pdf> accessed 14 September 2020.

⁶⁶ ‘The Football Players Health Study at Harvard University’, <<https://footballplayershealth.harvard.edu/>> accessed 5 May 2020.

sport players are rarely – if ever – 100 per cent injury free; managing pain is simply a routine part of the sport.⁶⁷

At this juncture it should be observed that harm to health is problematic regardless of whether or not it is natural; ie, if it causes significant harm, this provides a rationale to prohibit quite regardless of whether or not it can be considered natural. Following Savulescu's conception of the spirit of sport, painkillers may be prohibited:

Because analgesics and anti-inflammatory drugs are not naturally occurring in the body, it is technically easier to pick up the use of such exogenous agents in blood or urine tests. So if doping bans were narrowed to focus exclusively on non-physiological agents and practices, they'd be easier to enforce.⁶⁸

Savulescu advances a pragmatic argument utilising a version of the concept of what is natural as a basis for permitting some substances and methods. This is consistent with his version of the 'spirit of sport':

Physiological doping agents used today enhance natural processes and capacities, and can be safely administered, under proper supervision. For example, steroids and EPO harness natural physiological processes. They don't substantially change what people are capable of doing but simply optimise their physiology to achieve it. Nor do they transfer responsibility for the outcome to some external agent, such as a drug company. Steroids enable the athlete to train harder, but she still has to train harder to get a result. And she still has to try just as hard on the day to win. In short, the human element is as prominent as it is in 'clean' sport. Ben Johnson, Carl Lewis, Yohan Blake and other 100-metre champions are not real-life Popeyes: the pill does not create the muscle itself. These athletes have trained as hard, if not harder, than any athlete before them.⁶⁹

⁶⁷ See, eg, Amy Barrette and Katherine Harman, 'Athletes Play Through Pain—What Does That Mean for Rehabilitation Specialists?' (2019) 29 *Journal of Sport Rehabilitation* 640, <<https://doi:10.1123/jsr.2018-0426>>..

⁶⁸ Savulescu, 'A Doping Manifesto' (n 48).

⁶⁹ *ibid.*

The appeal to what is natural by WADA, however, is less consistent, and is often a convenient justification upon which policymakers rely to further their contested ideological stance. The manifest and manifold inconsistencies in WADA's appeal to the natural demonstrate its inability to serve as a coherent normative guide.

In summary the idea, prevalent within the WADA regulations, of the 'virtuous perfection of athletes' natural talents',⁷⁰ or, as stated in the 'Fundamental Rationale for the World Anti-Doping Code', 'the dedicated perfection of each person's natural talents'⁷¹ certainly affords the concept of the natural a prominent position in its 'spirit of sport' and its policy. However, as considered above, this focus on the natural is misplaced, particularly in the context of performance-enhancing substances. The way in which the concept is used by WADA does not provide a consistent rationale for its general prohibition-based policies.

Performance-Enhancing Methods

Certain enhancement methods, such as transfusions of an athlete's own blood taken previously, are prohibited under WADA regulations.⁷² As well as being enhancements, WADA would contend that they violate the 'spirit of sport' and are potentially harmful to health, thereby satisfying all three of its criteria for prohibition. However, as we have seen interventions of this nature may also sometimes be classed as therapies within WADA's own regulatory framework,

⁷⁰ T Murray, 'Preserving Sporting Values and Ethics: The relationship between anti-doping and sport values and ethics' IOC paper (2010) <<http://unesdoc.unesco.org/images/0018/001884/188404e.pdf>> accessed 24 August 2016.

⁷¹ WADA Code 2019, 'Fundamental Rationale for the World Anti-Doping Code' 14.

⁷² WADA Code, Prohibited Methods, Section M1, 6, point 1, <https://www.wada-ama.org/sites/default/files/wada_2020_english_prohibited_list_0.pdf> , accessed 26 September 2020.

(ie, under the TUE system) and permitted. For example, drugs used for blood doping also serving as treatments for anaemia.⁷³ Moreover, blood transfusions can offset the drop in blood cell count brought on by sustained strenuous training and competing, which happens frequently amongst certain groups of athletes, such as elite road cyclists training for and competing in events such as the Tour De France. In competitive athletes, this is considered by WADA to be an unfair enhancement, ie, to be doping.⁷⁴ This method would, however, merely return the athlete to the previous state she or he was in before competing. Interventions of this nature – ie, aimed at returning an athlete to a previous state of ‘health’ – are often more commonly associated with treatment, which would therefore provide a prima facie argument for classifying it as a treatment (as opposed to an enhancement), and therefore following WADA’s logic allowing it. There is an established route for this: the TUE system. If levels were to fall sufficiently to be clinically low, this would warrant medical ‘treatment’ and provide a rationale for allowing it. There is therefore a significant scalar element here.⁷⁵ If they are merely low, but not low enough to constitute a medical problem, treatment is not justified, despite the fact that health could be improved by such an intervention.⁷⁶ This is another possible inconsistency of WADA’s policy on its own terms. A further argument comes from a harm reduction perspective: there may be dangers associated with these sorts of practices, and they should not

⁷³ NICE Treatment Summary: anaemias <[https://bnf.nice.org.uk/treatment-summary/anaemias.html#:~:text=Epoetins%20\(recombinant%20human%20erythropoietins\)%20are%20used%20to%20treat,of%20symptomatic%20anaemia%20in%20patients%20receiving%20cytotoxic%20chemotherapy](https://bnf.nice.org.uk/treatment-summary/anaemias.html#:~:text=Epoetins%20(recombinant%20human%20erythropoietins)%20are%20used%20to%20treat,of%20symptomatic%20anaemia%20in%20patients%20receiving%20cytotoxic%20chemotherapy)> accessed 26 September 2020.

⁷⁴ WADA Code, Prohibited Methods, Section M1, 6, ‘Manipulation of Blood and Blood Components’.

⁷⁵ 4.1 WADA International Standard for Therapeutic Use Exemptions (ISTUE) 11, <https://www.wada-ama.org/sites/default/files/resources/files/istue_2019_en_new.pdf> accessed 7 November 2019.

⁷⁶ *ibid.*

be attempted without appropriate medical supervision. By regulating rather than prohibiting them, safety may be improved and health promoted.⁷⁷

Given that some methods such as transfusions can use the athlete's own blood, one could argue that it is not unnatural, or at least that it is as natural as many other practices WADA allows, such as the use of nutritional supplements. This undermines an argument for prohibition drawing upon the 'spirit of sport' which utilises the concept of the natural in order to make normative determinations. However, given the procedure necessary to reintroduce it to the body may not be considered natural, supporters of the status quo could argue that a naturalness argument may still succeed. Of course it might legitimately be questioned whether the delivery method should have such ethical significance, with the means proving salient rather than the end result. It is also worth noting that athletes pushing themselves for extended periods of training and competing in this manner is arguably not natural, but WADA does not consider it unacceptable; indeed, it might be considered to be virtuous and consistent with its 'spirit of sport'. A prevailing theme which is apparent across WADA's policies is a selective appeal to the natural when expedient in order to promote its ideological position, ie, its 'spirit of sport'. For WADA, the means via which a certain result can be achieved is a relevant factor in determining permissibility. For example, sleeping in an altitude chamber, or living at altitude – both of which will also improve an athlete's oxygen carrying capabilities – are both permissible, but blood doping is not.⁷⁸

Erythropoietin (EPO) is the most commonly used agent for blood doping, although there are other synthetic compounds which are used for the same purpose that are also

⁷⁷ For arguments of this nature, see, eg: Henning and others (n 44); Kirkwood (n 44). For this general line of reasoning outside the context of sport, see Eriksen and others (n 44).

⁷⁸ WADA Code, Prohibited Methods, Section M1, 6, 'Manipulation of Blood and Blood Components' (n 74).

prohibited. As noted above, EPO can be used therapeutically, and is indicated in the treatment of various conditions such as anaemia. It can also be used to enhance performance. As a general rule, the use of EPO is banned by WADA, unless an athlete has a valid TUE, which essentially means that it could (in narrowly defined circumstances) be used for therapeutic purposes, but not for enhancement purposes – ie, a qualified permission for use. Establishing precisely where to draw the line between treatment and enhancement might be more difficult than it would initially appear to be, as sustained strenuous training can significantly reduce red blood cell counts even in those without medical problems, and normal physiological variation is quite significant. Augmenting an athlete's red blood cell count in this 'functional medicine' type manner is currently prohibited, but it might be classed as a treatment, and therefore following WADA's general approach, potentially allowed. Arguing by analogy, one could suggest that it is not qualitatively different (in an ethically meaningful way) from taking creatine (which replenishes the energy necessary for high-intensity muscle contractions);⁷⁹ both restore what is depleted by training and competing, but the former is prohibited and the latter is not. This highlights a potential inconsistency in the WADA regulation. It is also worth noting that EPO is produced endogenously, ie, by the body under normal conditions, to stimulate red blood cell production. Other synthetic compounds designed to achieve the same aim are not. This distinction is not reflected by the regulations, and therefore may represent a potential inconsistency following WADA's appeals to the natural–unnatural distinction as a normative guide.

⁷⁹ See, eg, Robert Cooper and others, 'Creatine supplementation with specific view to exercise/sports performance: an update' (2012) 9 *Journal of the International Society of Sports Nutrition*, Article 33, <<https://doi.org/10.1186/1550-2783-9-33>>.

Nutritional Supplements/Ergogenic Aids

As a general rule, most nutritional supplements are permissible, although organisations such as WADA do not endorse them expressly or encourage their use.⁸⁰ There are a number of practical reasons for this, such as the lack of regulation of nutritional supplements, and therefore the potential for contamination with prohibited substances, which could cause an athlete to inadvertently fail a doping control test.⁸¹ This is a particular concern given the principle of strict liability, where an athlete is held responsible for anything found in his or her body, regardless of intention.

Nutritional supplements (which can describe a very wide range of different products) can be classified as both enhancement and therapy, depending on how they are used. It can, however, be challenging to draw a consistent and coherent line between the two uses; in any event, in terms of WADA's policy drawing this distinction is not necessary, as regardless of their classification, they are generally not prohibited. This is, however, potentially inconsistent. They share many characteristics with substances which are prohibited; for example, they can provide a significant improvement in performance, and may raise similar agency and 'spirit of sport' concerns by providing unearned advantages. Furthermore, some such as caffeine can also be dangerous if large quantities are used without supervision, thus providing a health-based rationale to prohibit them. Therefore, they may be considered to enhance performance and present a health risk, satisfying the 'two out of three' test and therefore theoretically

⁸⁰ WADA, 'Dietary and Nutritional Supplements', <www.wada-ama.org/en/questions-answers/prohibited-list-qa#item-1358> accessed 24 September 2019; Geyer and others (n 29); WADA website <www.wada-ama.org/en/resources/science-medicine/nutritional-supplements-still-a-risk-of-inadvertent-doping-an-extended> accessed 24 September 2019; UKAD 'Managing Supplement Risks (n 29).

⁸¹ Geyer, *ibid*; UKAD 'Managing Supplement Risks' (n 29).

justifying prohibition. However, given WADA's stated aim of promoting health, and the role nutritional supplements can have in maintaining health, it would be hard to justify a blanket prohibition on all nutritional supplements. These points do, however, provide a rationale to regulate their use more closely.

Given their permitted status, generally the intention with which an athlete takes them is not relevant, ie, even if they are taken with the express intention of enhancing performance and gaining an advantage over competitors, which is common. This laissez-faire approach from WADA might be considered inconsistent with much of its general attitudes, but given the nature and ubiquity (discussed below) of nutritional supplements, WADA has little practical choice but to allow, although not condone, their use.

As noted above, simply remedying a deficiency might improve health and by extension, recovery from training and also sports performance. The training demands placed on elite professional athletes might also necessitate an intake of certain vitamins and minerals which is higher than necessary for those not engaged in such strenuous and extensive training; one example here is magnesium.⁸² The required levels of certain minerals might be attainable through food, but achieving this can be difficult (or even impossible), and therefore supplements can be used as a sort of 'nutritional insurance' and for the sake of convenience.

Many of the most effective nutritional supplements – such as creatine and caffeine – occur in commonly consumed foods and drinks; caffeine is found in varying quantities in tea,

⁸² See, eg, FH Nielsen and HC Lukaski, 'Update on the relationship between magnesium and exercise' (2006) 19 *Journal of Magnesium Research* 180.

coffee and chocolate,⁸³ and creatine is found in meats such as beef.⁸⁴ Using creatine as an example, despite the fact it is found in meat, attaining a dose which might qualify as an enhancement would require eating large amounts of beef (somewhere in the region of one pound, or 454 grams, perhaps more depending on the cooking method), as opposed to taking five grams of a nearly flavourless powder which can be made to dissolve in water. As demonstrated by the analysis above, given that both methods are able to achieve the same end, the concept of the natural versus the unnatural in this context is blurred and thus fails to offer much normative guidance; consuming a manmade powder would arguably not fall within what most people would consider natural behaviour, whereas eating beef – even in large quantities – arguably would. If we were to follow what is natural as our ethical guide – as WADA does in its ‘spirit of sport’, the former would likely be prohibited, and the latter permissible, although both would achieve precisely the same thing. Both these approaches serve the same purpose and are permissible under current regulations. This appears to be an example of the selective and utilisation of this concept in current WADA rules. It is unclear, however, whether WADA’s approach is a pragmatic response, ie, they do not prohibit supplementation because it would be an almost impossible Sisyphean task to successfully enforce a ban, or because they have no ideological and conceptual issue with them. If the latter is correct, then this is an inconsistency in its ideology, which has been highlighted by prominent critics such as Savulescu.⁸⁵

⁸³ Mayo Clinic Staff, ‘Caffeine content for coffee, tea, soda and more’, <www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/caffeine/art-20049372> accessed 3 August 2019.

⁸⁴ RW Purchas and others, ‘Concentrations in Beef and Lamb of Taurine, Carnosine, Coenzyme Q 10, and Creatine’ (2004) 66 *Meat Science* 629, <[https://doi:10.1016/S0309-1740\(03\)00181-5](https://doi:10.1016/S0309-1740(03)00181-5)>.

⁸⁵ Julian Savulescu, ‘Doping Scandals, Rio and the future of human enhancement’ (2016) 30 *Bioethics* 300, <<https://doi.org/10.1080/17511321.2016.1203095>>.

Specific Dietary Strategies

The current regulations do not address dietary strategies. Certain dietary strategies such as carb loading before big events and high protein diets for muscle recovery can confer major performance and recovery benefits.⁸⁶ It is also worth noting that the average height and weight of players has increased significantly over time, particularly in certain positions where physical size is a necessity, and being larger than an opponent provides a performance advantage.⁸⁷ This increase in size is likely due at least in part to an improvement in knowledge of sports nutrition, ie, to better diets, and to more effective training.

As with many athletic enhancements, dietary strategies do not fit neatly in established paradigms which WADA uses as normative guides, such as treatment versus enhancement, or natural versus unnatural. By way of brief example, a high protein diet can facilitate recovery from intense training during which significant muscle damage can occur. Protein is fundamental to the recovery process, and eating more (within limits) will speed recovery, allowing an athlete to train harder and with greater frequency.⁸⁸ Failure to eat sufficient protein

⁸⁶ See, eg: Jose Antonio, 'High-Protein Diets in Trained Individuals' (2019) 27 *Research in Sports Medicine* 195, <<https://doi.org/10.1080/15438627.2018.1523167>>; Ronald J Maughan and Susan M Shirreffs, 'Nutrition for Sports Performance: Issues and Opportunities' (2012) 71 *The Proceedings of the Nutrition Society* 112, <<https://doi:10.1017/s0029665111003211>>.

⁸⁷ See, eg, 'Evolution of the NFL Player – Creating an NFL player: from “everyman” to “superman”', <<https://operations.nfl.com/the-players/evolution-of-the-nfl-player/>> accessed 20 August 2020.

⁸⁸ See, eg: Stuart M Phillips, 'Dietary protein requirements and adaptive advantages in athletes' (2012) 108 *British Journal of Sports Medicine* S 158, <<https://doi:10.1017/S0007114512002516>>; Robert W Morton and others, 'A systematic review, meta-analysis and metaregression of the effect of protein supplementation on resistance training-induced gains in muscle mass and strength in healthy adults' (2018) 52 *British Journal of Sports Medicine* 376; DT Thomas, KA Erdman and LM Burke, 'American college of sports medicine joint position statement.

can have many deleterious effects, such as increasing the likelihood of injury and depressing the immune system.⁸⁹ Certain diets may be considered therapeutic in that they can treat diseases, for example a ketogenic diet (very high fat combined with very low carbohydrate to induce ketosis) can be helpful to those suffering from medical conditions such as epilepsy.⁹⁰ Some diets can also provide performance advantages over other diets; for example, if an elite endurance athlete ate only the amount of carbohydrates and calories recommended by government guidelines for someone of their weight, their performance would almost undoubtedly suffer compared with eating an optimal (and therefore much higher) amount of carbohydrates and calories.

Diet is a major component of health. Eating ‘healthily’ is, by definition, generally consistent with the philosophy of health,⁹¹ although both conceptions of health and of healthy diets will vary. Some sports, or certain roles/positions within sports, might require eating a diet

nutrition and athletic performance’ (2016) 48 *Medicine and Science in Sports and Exercise* 543, <<http://doi:10.1249/MSS.0000000000000852>>; Ralf Jäger and others, ‘International society of sports nutrition position stand: protein and exercise’ (2017) 14 *Journal of the International Society of Sports Nutrition* Article 20, <<https://doi:10.1186/s12970-017-0177-8>>.

⁸⁹ Oliver C Witard and others, ‘High dietary protein restores overreaching induced impairments in leukocyte trafficking and reduces the incidence of upper respiratory tract infection in elite cyclists’ (2014) 39 *Brain, Behavior, and Immunity* 211, <<https://doi:10.1016/j.bbi.2013.10.002>>; Vinicius Fernandes Cruzat, Mauricio Krause and Philip Newsholme, ‘Amino acid supplementation and impact on immune function in the context of exercise’ (2014) 11 *Journal of the International Society of Sports Nutrition* 61, <<https://doi:10.1186/s12970-014-0061-8>>.

⁹⁰ See further, eg, Kristin W Barañano and Adam L Hartman, ‘The Ketogenic Diet: Uses in Epilepsy and Other Neurologic Illnesses’ (2008) 10 *Current Treatment Options in Neurology* 410, <<https://doi:10.1007/s11940-008-0043-8>> .

⁹¹ See the earlier discussion of health in ‘Bioethics, Health, and Enhancement’, ch 7 of this thesis.

which may not be conducive to maintaining health. For example, in both American football and rugby union there are positions which necessitate athletes reaching (and maintaining) certain de facto body weights, which may require more calories than the athlete is consistently able to eat through what might be widely considered a ‘healthy’ diet. Therefore, these athletes choose calorie-dense foods and food combinations which may, over time, compromise their health. This is of particular concern if it is sustained for long periods of time, and if it leaves the athletes with difficulty in losing the extra weight after they retire. On this basis, there may be a rationale for prohibiting certain diets which cause players to develop health complications, or for monitoring the body weights of players in order to reduce the negative health outcomes.

Given the enormous variation in diets across different cultures, the concept of the natural versus the unnatural does not offer much guidance for prohibiting or permitting; two diets can both be natural, but share little in common. The current regulation does not address different diets, and it has rarely been discussed, except notably in the context of meat contaminated with banned substances.⁹² Moreover, nutritional habits have changed over time, which would make it more difficult for WADA to establish what a ‘natural’ diet might look like. Therefore it can be concluded that the idea of whether a diet is natural (or not) does not offer a meaningful way of distinguishing whether it should be permitted or proscribed. One final observation relating to the analysis immediately above is the requirement of some athletes in some sports to maintain weights which are well above their ‘natural’ weights. These athletes, particularly props in rugby and linemen in American football, for example, often maintain weights through diet and training which far exceed what they would otherwise weigh. This

⁹² Arbitration CAS 2011/A/2384 *Union Cycliste Internationale (UCI) v Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC)* and CAS 2011/A/2386 *World AntiDoping Agency (WADA) v Alberto Contador Velasco & RFEC*.

raises concerns about health relating to diet, but also related issues from larger and heavier players colliding during training and competing, resulting in more injuries and increased wear and tear on the joints.

Gene Editing

Theoretically, gene editing could have an enormous impact on sports performance, beyond anything currently in use.⁹³ Tools such as CRISPR-Cas9 could provide athletes with a way to manipulate their genes in order to improve performance.⁹⁴ However, discussion of gene editing is very much theoretical at present; in practice it would be very difficult to successfully isolate and modify the specific gene or genes necessary to enhance performance.⁹⁵ Altering one gene may not elicit the desired performance improvement.⁹⁶

WADA characterises gene editing as gene doping,⁹⁷ thus providing a normative judgement, although gene editing has the potential to be used both therapeutically and as an enhancement. As with many athletic enhancements the context and purpose of the intervention may be relevant. As a largely pre-emptive measure, the current WADA regulations prohibit gene editing.⁹⁸

⁹³ Murray, *Good Sport* (n 39) 26–27.

⁹⁴ *ibid* 26–29.

⁹⁵ *ibid* 26–27.

⁹⁶ *ibid*.

⁹⁷ WADA, ‘Gene Doping’, <<https://www.wada-ama.org/en/gene-doping>> accessed 20 November 2019.

⁹⁸ WADA Code, Prohibited Methods (n 72).

Gene editing has been criticised outside sport, particularly by ‘bioconservatives’ and religious groups as ‘playing god’ and being ‘against nature’.⁹⁹ Whilst this may provide a superficial rationale for WADA’s banning of the practice, as with many appeals to what is ‘natural’ it may be considered specious; nature is not necessarily infallible, and appeals to it as a concept should be qualified; simply put, unnatural does not imply unethical. Indeed, the purpose of the gene editing in this context (ie, outside elite professional sport) is to remedy something viewed as disease. However, whilst the risks might be worthwhile for treating serious medical problems, at present allowing gene editing for performance improvements would not be consistent with WADA’s stated aim of safeguarding athlete health.¹⁰⁰ With the technology still in its nascent stages, the risk to health may be significant, and there may unforeseen consequences from editing genes which can be damaging to health, thus providing a coherent rationale for prohibition.

Conclusion

This chapter began by considering the coherence and consistency of key rationales provided by WADA for their prohibition-based anti-doping policies. It then presented some key points of comparison between WADA’s regulations and the NFL’s drug policies, highlighting notable differences in regulation. Finally, it provided analysis of the three key rationales for inclusion of a substance or method on WADA’s Prohibited List, and how they operate in practice: enhancement, health, and the ‘spirit of sport’. Satisfying two of these three criteria is used as

⁹⁹ See generally, eg, President’s Council on Bioethics, as seen in its report *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (n 48).

¹⁰⁰ See, eg, National Institutes of Health (NIH) US Library of Medicine, ‘Is gene therapy safe?’ <<https://ghr.nlm.nih.gov/primer/therapy/safety>> accessed 15 November 2019.

the basis to justify a ban on substances and methods deemed to be doping. This chapter has demonstrated that the ways in which these criteria are used by WADA are not always consistent and coherent, and often can be criticised as arbitrary. These issues with WADA's policies on their own terms invite consideration of options for reform; therefore, suggestions of this nature are offered in the following 'Policy Proposals' chapter.

Policy Proposals

Introduction

This chapter seeks to provide credible policy proposals to address the pressing anti-doping issues in elite professional sport. These issues with the status quo have been elucidated in previous chapters; they invite consideration of alternative policies which are able to cope with the demands of elite professional sport in the twenty-first century. These proposals are designed to be pragmatic and operate within the confines of the current regulatory regime. They aim to be ethically consistent and coherent, and are informed by the conclusions advanced in previous chapters. As demonstrated in detail with reference to practical examples, particularly in chapters three to eight of this thesis, there are numerous problems with the current approach to anti-doping regulation. The ‘Morality of Sport’ chapters (chapters five and six) and the bioethics chapters (chapters seven and eight) address different questions of critical concern. The first ‘Morality of Sport’ chapter (chapter five) demonstrates the clear gulf between WADA’s stated values and the values evident in elite professional sport. The second ‘Morality of Sport’ chapter (chapter six) presents an alternative approach to the current system, with a focus on the most important stakeholder group in sport: the athletes. It also explains how and why there should be a clear focus on the athletes and their interests in policy, and provides the core theoretical basis for the practical proposals presented below. There are also many practical inconsistencies apparent in regulation and how it is applied; these points are considered in the bioethical chapters (chapters seven and eight). These issues create problems for policy, and thus show that WADA fails to produce effective and defensible regulations.

This chapter begins by restating the key values which should shape policy, including a restatement of the principles to inform a revised ‘spirit of sport’. It then details more specific recommendations regarding the regulatory bodies tasked with promoting these values and administering anti-doping regulation. It is extremely important that these bodies are reformed so that they are able to provide effective regulation and begin to restore lost confidence amongst stakeholder groups, particularly the athletes. Next, practical policy recommendations which are designed to improve the two key considerations advanced earlier – athlete health, and fairness (the level playing field) – are presented and explained, before an overall conclusion is provided.

Key Values in Policy

As demonstrated earlier in this thesis, WADA’s contested ideological position does not provide an appropriate basis for effective policymaking.¹ Moreover, the rationales they provide are not coherent or consistent on their own terms.² As explained in the second ‘Morality of Sport’ chapter (chapter six), using a Rawlsian ‘overlapping consensus’ approach to policymaking is suggested, rather than deriving policies from contested ideological positions. Instead of relying heavily upon disputed ideological conceptions of sport, the proposals presented here are grounded in general areas of agreement amongst stakeholders, namely fairness (the ‘level playing field’), and athlete health; using these as the key theoretical and practical drivers of policy produces more ethically robust and credible policies. These more balanced and measured policies, with their characteristic focus on reasonableness rather than the current reactionary ad hoc policymaking (which can be criticised as unbalanced, arbitrary and inconsistent) is more appropriate for modern elite professional sport. As demonstrated in the

¹ See ‘The Morality of Sport: Negative Case’, ch 5 of this thesis.

² See, in particular, ch 8 of this thesis.

‘Morality of Sport: The Negative Case’ chapter (five), sport has moved on from the idea of the ‘gentleman amateur’ competing for recreation, but the anti-doping policies fail to reflect sufficiently – and thus legislate for – this reality. Moreover, the failure to engage meaningfully with current issues combined with the sheer number of both high (and lower) profile anti-doping failures has led to a situation where the most important stakeholder group – the athletes – in addition to other stakeholders, have lost confidence in the current regime. Rather than being viewed as a collaborative effort, it is very much an adversarial ‘us versus them’ situation. A new approach which provides a shared basis for policymaking would have major benefits for confidence and compliance and would attenuate this adversarial situation. The second ‘Morality of Sport: The Positive Alternative’ chapter (six) also considers how to resolve the conflicts between stakeholders which will inevitably emerge; in general terms, priority is given to the athletes on the basis that anti-doping regulations have the most impact on them. This influence afforded to athletes, combined with accountability to them, helps to restore their lost faith in anti-doping.

In order to address the current issues most effectively, more appropriate definitions of key terms and phrases have been provided in the preceding chapters.³ Rather than abandoning the status quo or abstracting away from it, greater clarity and precision concerning existing phrases and terms such as ‘the spirit of sport’, ‘health’, ‘enhancement’⁴ and ‘doping’ help to define the task for regulation more sharply. When defined more appropriately (ie, in the ways detailed in this thesis), they are able to inform policy more effectively than definitions which do not reflect the realities of elite professional sport. Therefore, the term ‘doping’ (which is inherently pejorative) is defined as an unfair means or method of enhancement and will also –

³ Such as, eg, definitions of a ‘sport contest’ in ch 5 of this thesis.

⁴ See ch 7 of this thesis.

importantly – include unsafe enhancement. The term ‘enhancement’ is not pejorative and should not in and of itself provide a rationale for prohibition; a substance or method must be unfair (and thus contravene the ‘spirit of sport’ or unsafe in order to be prohibited). Indeed, the idea of performance enhancement is an integral part of a revised spirit of sport. On this basis, the concept of enhancement itself should not be considered problematic; simply because something ‘enhances’ should not provide a rationale to prohibit it. Enhancing performance – within specific constraints – is a key component of elite professional sport which must be accounted for. Unfair or unsafe enhancements, ie, doping, should be banned on the basis of considered judgements, ie, scientific or empirical evidence and reasoned philosophical/ethical/legal debate, not because they fall within a particular category, ie, because they happen to improve performance, or ‘enhance’. These considered judgements will generally (but not necessarily exclusively) be informed by two key issues: athlete health and wellbeing, and unfairness broadly construed (which relates to the revised spirit of sport).

It is instructive at this juncture to restate the Rawls-derived principles (advanced in chapter six) as they provide the core theoretical underpinnings for the policy proposals which follow. They also help to form the basis of the revised spirit of sport.

First – athletes should compete under uniformly applied rules that mandate equal terms of participation, applicable both inside and outside competition.

Second – factors to impact athletes’ athletic abilities and advantage must be (a) focused on – and constrained by – athlete health, safety and wellbeing, and (b) equally available to all.

Meaningful influence/governance principle: athletes should be able to inform and shape the policies which govern them. This necessitates a particular focus on (a)

accountability to athletes, and (b) transparency and independence in regulation and regulatory structures.

This revised understanding of the spirit of sport is able to account for a culture of performance enhancement whilst imposing constraints where necessary, ie, in the interests of athlete health, and of fair and equal competition.⁵

Equality of Opportunity

The abstract concept of fairness – often described as the level playing field – represents an area of consensus. However, there is not consensus regarding the ways in which this might be promoted. It is instructive to begin here with assertions that are subject to broad agreement, and build from these basic principles towards more specific recommendations. First, athletes should be able to compete on equal terms (both inside and outside competition); this necessitates uniformly applied rules within sports. Equality of opportunity should be promoted as far as practicable, with theoretical equality of opportunity promoted at the level of the rules wherever possible.⁶ Importantly, athletes with more comprehensive support systems should not be able to take advantage of loopholes in the anti-doping system as they do, for example, with the current Therapeutic Use Exemption (TUE) policies;⁷ these advantages should be made equally available to all.

⁵ For more detail, see ‘Morality of Sport: The Positive Alternative’, ch 6 of this thesis.

⁶ As this thesis is specific to doping and enhancement, it will not consider broader related issues such as funding in sport, although this might be an area requiring further study.

⁷ See, eg, observations made on this topic by the House of Commons Digital, Culture, Media & Sport Committee highlighted in the previous chapter.

Athlete Health, Safety and Wellbeing

As noted above, anti-doping policy should be driven by pragmatic and practical ways in which athlete health, safety and wellbeing can be promoted. These aims, combined with fairness, should drive policy as they are the key rationales for anti-doping regulation. It has been demonstrated that athletes should be considered the most important stakeholder group, and therefore that their interests should take priority over others. Furthermore, athlete health, safety and wellbeing also represent an area in which diverse stakeholders agree. This thesis advances a conception of health which has both positive and negative dimensions; this focus on health includes both short- and long-term health, ie, as far as possible it seeks to extend beyond the competing career of the athlete.⁸

Anti-Doping Regulatory Bodies

The current regulatory structure has been criticised on many different grounds and is prone to allegations of conflict, partiality and even corruption. In relation to conflicts of interest, it has been suggested by Nehme and Ordway, borrowing the words of former US President Harry S Truman, that in the current system, the ‘fox is put in charge of guarding the hen house’.⁹ It is clear that these concerns must be addressed. Just as we might question an athlete’s fitness to compete, we might question WADA’s fitness to advance and implement effective anti-doping policies.

⁸ See ch 7 of this thesis.

⁹ Marina Nehme and Catherine Ordway, ‘Governance and Anti-Doping: Beyond the Fox and the Hen House’ in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing 2016) 209. This chapter provides an excellent overview of issues in sports governance generally, and WADA specifically.

Incorporating more transparency in governance structures is necessary to reduce these conflicts of interest (both actual and perceived). One way in which this can be promoted is for regulators to have greater independence from their funding sources. For example, given WADA's reliance on the Olympic Movement for part of their funding, questions can be raised concerning their independence and impartiality from it. There should be a clear separation between policymakers and those enforcing the policies, similar to the separation between executive, legislature and judiciary at the state/national level, for example.¹⁰ This is especially so in the context of disputes concerning professional athletes being banned from sport, ie, their careers, and the way in which they generally earn a living. Greater safeguards derived from public law should also be applicable; the impact on athletes' lives and ability to generate income during their often relatively short careers (especially in comparison to other professions) are essential considerations here. For example, sports governing bodies and anti-doping organisations should be amenable to judicial review in England and Wales, and the safeguards this process provides.¹¹

The structure of the regulatory bodies which administer them must also be addressed. As it has been argued that athletes are the most important stakeholder group, recognition of this should be reflected in the composition of anti-doping bodies. Athletes should have the ability to meaningfully shape the policies which govern their participation. This is particularly critical in remedying current deficiencies, as athletes do not generally have a genuine choice in

¹⁰ Detailed consideration of WADA's internal structure and funding is beyond the scope of this chapter and this thesis, and has been covered in detail elsewhere; one such example is Nehme and Ordway, *ibid*.

¹¹ See, eg, Ben Cisneros, 'Challenging the call: Should sports governing bodies be subject to judicial review?' (2020) 20 *The International Sports Law Journal* 18, <<https://doi.org/10.1007/s40318-020-00165-9>>. See also ch 3 and ch 4 of this thesis for consideration of the public/private debate.

consenting to the policies at present. Therefore, more representation, control and accountability should be provided to athletes; the ‘Meaningful influence/governance principle’ stated above requires this.¹² Anti-doping regulatory bodies should be accountable to the athletes, as well as the reverse which is evident in regulation today. These points would also provide the advantage of producing a more collaborative atmosphere which could improve cooperation, rather than an ‘us versus them’ type situation in which the ‘other’ is regarded with suspicion.

Sport-Specific Policies

Given the enormous differences between sports and what each sport is seeking to test (and arguably therefore its ‘spirit’), it is perhaps surprising that a ‘one-size-fits-all’ approach is generally taken in anti-doping testing. Whilst there are explanations for this, for example at one level it is appealing to have all Olympic sports subject to the same regulation, there are also problems inherent to this approach. Although there are clearly some similarities between sports, they are not sufficiently similar to have one general anti-doping policy. This is particularly apparent when considered in the context of the ‘spirit of sport’. For example, boxing and archery present very different challenges from one another; using beta blockers in a boxing match would be a major disadvantage, whereas in archery it might be considered an advantage. As we can see from this example, one sport’s enhancement can be another’s handicap. The spirit of sport is thus particular to that specific sport, and what may be applicable for one may not be for another. Although they will undoubtedly share some things in common – the basic concept of fairness and equal competition for example – there are key differences which should be accounted for and reflected in anti-doping policy; what may be unfair in one sport may not be unfair in another. WADA’s policies include some limited recognition of this,

¹² See ‘Morality of Sport: The Positive Alternative’, ch 6 of this thesis.

by for example prohibiting beta blockers at all times in some sports such as archery, and in competition in sports such as golf.¹³ This very limited approach should be extended.

Policies should be more sport-specific, such as, for example, the NFL's policies which are distinct from other sports. A basic 'one-size-fits-all' approach is not optimal, despite the conceptual appeal of harmonisation and uniformity, especially for example in the case of major sports competitions such as the Olympics. Following this logic, harmonisation across diverse sports should not be sought; harmonisation within sports should be the key aim. Similar sports, such as rugby and American football will naturally have more similar policies, but even these may not be precisely the same. There should, however, be some areas of convergence, for example on key values, namely fairness within the sport and the promotion of athlete health, safety and wellbeing. These are overarching basic concepts common to all sports, although the precise details of their implementation will be determined by the demands of the specific sport.

Fitness to Compete Tests

As noted above, this focus on athlete health and wellbeing should be the key driver of policy. The emphasis should be placed on maintaining or improving health first and foremost, in part by demonstrating fitness to compete. The existing infrastructure can be repurposed to achieve this aim. For example, the Athlete Biological Passport (ABP) can measure blood values over time; rather than looking exclusively for fluctuations indicative of the use of a prohibited substance or method, it can also be used to monitor markers of health to ensure an athlete continues to maintain sufficient fitness to compete.

¹³ WADA Prohibited List 2020, 9: <https://www.wada-ama.org/sites/default/files/wada_2020_english_prohibited_list_0.pdf> accessed 5 November 2020.

Revision of Prohibited List Criteria

It may be argued that all three of the current criteria for inclusion of a substance on the Prohibited List could benefit from some reform in order to make regulation more coherent and credible. One radical step would be to eliminate the ‘potential to enhance sport performance’ criterion entirely – there are persuasive reasons for considering doing so. It does not fit with the ethic of elite sport; indeed, seeking to enhance performance is an inherent part of modern professional elite sport. As demonstrated in the bioethical chapters (chapters seven and eight), this criterion produces numerous problems for WADA in distinguishing what is fair from what is unfair. The bases on which WADA distinguishes fair from unfair enhancements, whether by reference to rationale or method, is highly problematic. Moreover, it can be criticised as arbitrary and ambiguous, especially given the severe sanctions (and even criminal liability in some jurisdictions) for anti-doping rule violations. The health criterion is both uncontroversial and the most easily defensible criterion upon which there is near universal agreement. Maintaining two of WADA’s criteria (although in a revised format) would represent a compromise approach consistent with the idea of operating within the status quo, as described above in the discussion of Wolff, Husak and Geuss.¹⁴

As noted above, it has been observed, both by proponents and critics of the status quo, that the ‘spirit of sport’ criterion is not defined sufficiently precisely (or arguably even at all); this can and should be remedied. Therefore, the clear reformulated principles outlined in the second ‘Morality of Sport’ chapter (chapter six) should be used to inform policy directly. This updated ‘spirit of sport’ inevitably forms a major part of the theory of sports ethics outlined earlier. Therefore, the ‘spirit of sport’ criterion can be reformulated to make it more consistent with the current ethos of elite professional sport, ie, it can also serve to preserve the values

¹⁴ See ‘Critical Approach and Methods of Analysis’, ch 2 of this thesis.

detailed in the second ‘Morality of Sport’ chapter (chapter six) and restated above. If the underlying ethic were more persuasive, grounded in an ‘overlapping consensus’ amongst key stakeholders, this would help to answer current questions and criticisms relating to the ‘spirit of sport’ (and related regulatory questions) without relying on more contested and arbitrary conceptions.

The ‘potential health risk’ criterion is the most ethically and practically robust and represents an area of ‘overlapping consensus’ upon which those from both sides of the debate are able to agree. It can be established partly (theoretically at least) empirically, which improves objectivity and certainty – highlighting two possible issues with the ‘spirit of sport’ criterion. However, it can be argued that we must be careful to prevent the excessive ‘medicalisation of anti-doping’,¹⁵ and this ‘spirit of sport’ criterion provides a much needed ethical dimension (and therefore scrutiny by philosophers and ethicists) to policies. This suggestion is also consistent with the conception of health advanced in this thesis which does not rely exclusively on the biostatistical, ie, solely on an objective, scientific basis. Therefore, the health criterion, together with the ‘spirit of sport’ criterion (defined more precisely), can provide a coherent basis for a substance or method to be prohibited.

In summary, the ‘potential to enhance performance’ criterion should be removed as a rationale for inclusion of a substance on the Prohibited List. As demonstrated by previous chapters, performance enhancement is a key component of elite professional sport. Therefore only two criteria: ‘spirit of sport’ (ie, of that particular sport or type of sport), and harm to health, should be used for classification of substances or methods as prohibited. On this basis, rather than the current ‘two out of three’ approach, it should only be necessary for a substance

¹⁵ eg, Mike McNamee has expressed concerns of this nature: ‘The Spirit of Sport and the Medicalisation of Anti-Doping: Empirical and Normative Ethics’ (2012) 4 *Asian Bioethics Review* 374.

or method to satisfy one of the two in order to be prohibited. As health is a key driver of policy, anything which may damage it provides a compelling *prima facie* reason for prohibition without recourse to other criteria or rationales. This same logic may also be considered to apply to the revised ‘spirit of sport’ criterion.

Given this emphasis on athlete health and wellbeing, plainly dangerous substances and methods will remain prohibited, but the overall number of substances on the Prohibited List will be reduced in order to improve prospects of ‘success’ – ie, more positive tests for dangerous substances or those which violate the spirit of that *particular* sport. Focus should be placed exclusively on those dangerous to health, and those which undermine the reformulated specific ‘spirit of sport’; by removing the enhancement criterion, this will naturally reduce the overall number of substances on the Prohibited List.

Therefore, some currently banned substances should be permitted, within limits and enforced using the ABP and TUE systems. These systems can be used for athletes to demonstrate their continued fitness to compete. Therefore, an athlete may be prevented from competing if they are unable to demonstrate the requisite fitness to compete. Although this represents a departure from the current regulatory approach, this departure is not as radical as it might appear. In elite professional sport, athletes will often have to undergo numerous medical tests administered by teams or clubs to ensure fitness to compete before they are able to begin their employment.¹⁶ This existing approach can be extended, with athletes having to demonstrate fitness to compete to independent assessors at regular intervals. Given the degree

¹⁶ See, eg, Rob Kemp, ‘What happens in a football medical? How to pass one, and why some players don’t’ (*FourFourTwo*, 17 September 2020), <www.fourfourtwo.com/features/what-happens-football-medical-how-pass-one-why-some-players-dont> accessed 26 September 2020.

of monitoring of various markers of performance in elite athletes which also relate to health, much of this data may already be collected and readily available for analysis.¹⁷

Substances of Abuse

As a general position, substances of abuse (ie, recreational drugs as traditionally contrasted with performance-enhancing drugs) should be treated separately, with a focus on improving health rather than punishing offences. This is already evident in the NFL's policy, and rugby union has made some strides in this direction outside competition. This should be extended to cover tests inside competition, unless the use of a substance violates the spirit of that particular sport. The steps in this direction, with a significant reduction in the period of ineligibility to three months (or potentially one month) in the WADA Code 2021 for positive 'Out-of-Competition' tests for 'Substances of Abuse' should be welcomed.¹⁸

Painkillers

Many of the policy recommendations outlined in this chapter may be considered to be liberal; for example, in allowing some currently prohibited drugs, and in a reduction in the severity of sanctions for anti-doping rule violations. However, this liberalisation is not universal; the revaluation undertaken in this thesis also leads to calls for stricter regulation and greater intervention in some circumstances, such as in the use of painkillers. Although this thesis

¹⁷ TJ Gabbett and others, 'The athlete monitoring cycle: a practical guide to interpreting and applying training monitoring data' (2017) 51 British Journal of Sports Medicine 1451, <<http://dx.doi.org/10.1136/bjsports-2016-097298>>.

¹⁸ Art 10.2.4.1 WADA Code 2021, 66: <www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf> accessed 26 August 2020.

argues that the general prohibition should be lifted (either subject to qualification or absolutely depending on the substance or method in question), analgesics (painkillers) should be regulated much more closely. Indeed, there are numerous health-based arguments for closer regulation of painkillers. This is especially so given the potential for addiction and the harmful effects of heavy painkiller use on health which may continue long after an athlete's career is over. WADA prohibits narcotics and glucocorticoids in competition,¹⁹ but this should be extended.

The use of painkillers can also present problems from a 'spirit of sport' perspective, particularly for example during competition. This may be seen in sports such as cycling and boxing, where the athletes must endure pain in order to be successful; this is effectively a part of what the sport is seeking to test, and therefore by extension what it values and its 'spirit'.²⁰ Concerns of this nature may represent a Rawlsian 'overlapping consensus', in that prominent academics on different sides of the debate – such as Thomas Murray and Julian Savulescu – would share some similar concerns in this regard about the spirit of sport. This should be the position in rugby union and American football, as the perception of pain is an important factor in preventing and limiting injury; this would also improve athlete health and wellbeing.

Sanctions and Suspensions

Just as the regulation of substances and methods should be specific to the sport, so should the sanctions for those caught taking prohibited substances or using prohibited methods. These sanctions should account for factors such as the nature of the offence and the length of the average career, with some sports having longer bans and some shorter, ie, proportionate to length of the average career. This would improve fairness; a two-year ban in some sports may

¹⁹ WADA Prohibited List 2020, 8.

²⁰ See discussion in chs 5 and 6 of this thesis.

amount to half an athlete's career, and/or be tantamount to a lifetime ban in an older athlete. In other sports, this length of ban would have a much more minor impact. On this basis, in for example golf where successful players' careers can often span decades, bans imposed may therefore be longer than in sports like rugby or American football, where this length of career is not generally possible due to the nature and demands of the sport. Therefore, periods of ineligibility should be considered with reference to the percentage of the average career in the specific league or federation where the athlete competes.

Bans should also be proportionate to the seriousness of the offence, and to how many previous violations an athlete has committed; this is already the case under both WADA and NFL regulation. In general terms, doping bans should be more similar in length to those detailed in the NFL's policy,²¹ (ie, in the order of two to eight games in the first instance) with severity increasing in steps for each violation and culminating in bans for entire seasons. Lifetime bans should not generally be pursued save in very exceptional cases.

Temporary suspensions for athletes unable to demonstrate basic fitness to compete should also be incorporated in policy. These are not intended to be punitive and should not be fixed in length; athletes should be able to compete again as soon as they are able to demonstrate the required fitness. The basis for these suspensions is grounded solely in concerns for health, safety and wellbeing.

²¹ Art 6 NFL Policy on Performance-Enhancing Substances 2020
<<https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2020-Policy-on-Performance-Enhancing-Substances.pdf>> accessed 3 November 2020.

Conclusion

This thesis has argued for reform to current anti-doping policy, derived from a reconceptualisation of the ‘spirit of sport’. In this revised ‘spirit of sport’ athletes’ interests should be afforded primacy. Policy should be driven by two key concerns: athlete health and wellbeing, and fairness, which represents a key element of the ‘spirit of sport’. In order to do this, some reform of the current structures, institutions and tools of anti-doping is necessary. To this end, incorporating greater transparency and accountability to key stakeholder groups, namely the athletes, and reducing conflicts of interest, would help to provide a more ethically robust system.

Anti-doping policies should be sport-specific in order to account for specific concepts of the ‘spirit of sport’ and to help ensure policies are more proportionate to the sport in question, for example in the context of sanctions for policy violations. The current Prohibited List should be revised to focus on substances which present a risk to health, or violate the spirit of that particular sport. Whilst these proposals may be correctly characterised in general terms as a liberalisation in policy, there are some respects in which regulation and monitoring may be increased; therefore, some substances would be subject to less regulation, whilst others – such as painkillers – would be subject to an increase in regulation. In addition to testing for substances on this revised Prohibited List, health should also be assessed in the form of fitness to compete tests, with temporary suspensions of athletes until fitness to compete is demonstrated.

Although the policies advanced here may represent a major theoretical departure from existing anti-doping policies, the extent of this departure is – at least in some ways – more significant in theory than in practice. Elite professional athletes benefit from extensive health monitoring and medical supervision which shares some similarities with the policy proposals outlined here.

In summary, these proposals are designed to facilitate ethically robust anti-doping governance, informed by a 'spirit of sport' which is able to account for the realities of elite professional sport, whilst safeguarding the interests of the most important stakeholder group – the athletes – by promoting their health and their ability to compete with each other on fair and equal terms.

Conclusion

Overall Summary

This thesis has addressed the following overarching research question: ‘How should doping be defined and regulated in elite professional sport?’ Following a short introduction to the topic and some of the ways scholars have sought to address questions of this nature, the thesis began by presenting the critical approach adopted, together with an explanation of the reasons for this approach and its utility. Next, the regulatory structure and framework was presented, before key statements of values advanced by the current regulators were examined. The ideological rationale for the current regulations – namely its ‘spirit of sport’ – was then presented and analysed, with reference to the dominant attitudes and characteristics of elite professional sport. This led to the conclusion that the current ideological position championed by the regulators is unfit for purpose, ie, to provide a coherent and consistent basis upon which the current prohibition-based policies can be justified.

Therefore, an alternative conception of the ‘spirit of sport’ was provided, which is able to account for the realities of elite professional sport, characterised by the ‘win at all costs’ mentality evident amongst athletes and their support personnel. In so doing, the values and purpose of this specific type of sport were considered, which serves to inform an understanding of its unique spirit. This ‘spirit of sport’ was then used as a source of values to inform the revised system of morality and ethics derived from the political philosophy of John Rawls, which does not rely so heavily upon contested ideological positions, but rather is grounded in areas of general agreements, namely promoting fair competition and safeguarding the health

and wellbeing of the key stakeholder group in sport: the athletes. This system is more appropriate, and is thus able to account for, constraining where necessary the realities of elite professional sport, with its ‘win at all costs’ type mentality and constant drive for performance improvement.

This thesis then employed bioethical analysis to provide definitions of health, enhancement, and – crucially – doping for the purposes of this thesis. It was concluded that WADA’s concept of enhancement is generally inadequate as a rationale, and is unable to provide coherent normative determinations for policy. Next, further analysis of the rationales provided for current regulation, specifically the ‘two out of three’ criteria for inclusion of a substance or method on the Prohibited List was provided. Key points of comparison with a contrasting regulatory approach – the NFL’s – were presented, which served both to highlight key shortcomings in WADA’s policies, and ultimately to produce more cogent policy proposals for WADA-governed sport. The current WADA rules were then critiqued on their own terms, questioning whether the justifications provided for prohibition are consistent, coherent and defensible. Different enhancements methods were considered in depth, and the manner in which distinctions made by WADA scrutinised. In light of this analysis it was concluded that WADA’s approach fails on its own terms, and leads to policies which lack sufficient ethical foundation. Finally, drawing upon the analysis in previous chapters, some practical policy proposals to reform anti-doping regulation in elite professional sport were advanced. The proposals are designed to operate – where possible – within the confines of the existing regulatory structures, and as such utilise existing infrastructure.

Areas for Further Study

As this thesis has focused exclusively on doping in elite professional sport, many related issues are raised that warrant further investigation which cannot be undertaken here. For example, questions relating to safeguarding equality of opportunity in the context of the enormous inequalities in financial resources between competing sports clubs. Furthermore, questions of fairness and what should be considered doping in other walks of life, for example in competitive academic settings such as schools and universities. Issues concerning the concept of human enhancement outside elite professional sport, and particularly its relationship to the concepts of health and wellbeing, and to wider questions of human flourishing would also be worthy of further exploration.

Limitations

Given the critical approach adopted by this thesis, there are some methodological limitations. For example, questions of how best to safeguard athlete health could benefit from empirical research. Moreover, given that the Rawls-derived principles advanced to inform questions of anti-doping policy are hypothesised, for purposes of practical implementation engagement with actual stakeholders, for example the athletes themselves, would be of particular utility.

As noted previously, this thesis focuses exclusively on elite professional sport. Much of the analysis and argument provided is therefore limited to this type of sport, and may not be appropriate for other types of sport, such as amateur or recreational sport, and sport involving children. These types of sport should be considered separately from elite professional sport. Furthermore, given the focus in the ‘Policy Proposals’ chapter on the idea of sport-specific anti-doping policies, it has not been possible to account for all the many elite professional

sports. Although there would be some general provisions which would likely be applicable across sports, each individual sport would still nonetheless need separate bespoke policies which are able to account for the specific demands of that particular sport. Different sports present different regulatory challenges, and thus warrant policies specific to each task.

Final Thoughts

Sport, and indeed society, changes and evolves over time; this has been a major factor in changing the practical context within which professionalised sport operates. At present, there is a clear failure by the current regulators to engage with the situation as it is. Given the negative consequences which can at least in part be attributed to this failure, it is argued that elite professional sport should be governed in a way that is consistent with, and promotes these updated and defensible, twenty-first century values. Therefore, in the second ‘Morality of Sport’ chapter (chapter six) an updated philosophy of sport has been generated which can inform a ‘spirit’ of sport that can, in turn, provide a morally credible and robust basis for ‘fairness’ in sport.

The potential negative ramifications of changing the status quo do not stand up to sustained scrutiny, especially when considered against the backdrop of elite professional sport today and the numerous regulatory failures. As this thesis demonstrates, many of the lines drawn lack sufficiently sustainable justifications, and some are incoherent on their own terms. It is, however, accepted that by reforming the current regime we might create unforeseen negative consequences, further inequalities, and potentially lose elements of what *some* stakeholders in sport claim to value. In seeking to remedy some inequalities, it is possible that we might inadvertently create others.

At the risk of sounding nihilistic, a change of the nature outlined here might be more significant in theory than reality. That is to say, a change away from prohibition backed by strict liability would not be as radical, and the practical impact would not be as significant, as many would believe. The increased use of TUEs, and myriad other ways in which elite athletes are able to remain within the ‘letter of the law’ but successfully circumvent the ‘spirit’ of it, means that elite professional sport is not what many stakeholders – particularly those not directly connected with sport – hope and claim it to be.

The broadly positive way in which sport is generally perceived is being eroded by repeated anti-doping regulatory failures. These failures have not been addressed adequately by the existing regulators. Medically supervised enhancement (within reasonable limits), which under the current regulatory regime should correctly be classed as ‘doping’ is seemingly already a reality for many athletes, especially those at the very top of their sports, despite the prohibition-based policies. This is a clear regulatory failure. Reform of the current regulatory regime might be able to engender a more ethically robust and egalitarian system, in reality rather than merely in theory. It might also begin to restore lost faith in anti-doping regulation.

The eloquent rhetoric of the anti-doping authorities has, despite continued attempts, failed to achieve sufficient success in influencing the prevailing culture of elite professional sport. Its failure to account for and constrain the ‘win at all costs’ type mentality has led to numerous practical problems and regulatory failures, which fundamentally undermine the credibility of its strict prohibition-based approach, meaning many of its policies can no longer be justified. In light of these points it might be concluded that the current authorities are more concerned with perception – and preserving a lucrative industry – than reality, and in seeking to perpetuate an outmoded vision of elite professional sport which ultimately is detrimental to the key stakeholder group: the athletes. As we have seen, this regulatory approach has led to ad hoc, reactionary and inconsistent policymaking which lacks sufficient moral and ethical

grounding; this urgently needs to be addressed. Therefore, a pragmatic (as opposed to purely ideological) harm-reduction approach, driven primarily by concerns for athlete health and wellbeing, and specific to the nature – or ‘spirit’ – of the particular sport, can engender a fairer and more ethically robust regulatory regime fit for the demands of twenty-first century elite professional sport.

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