

THE NEW WADA CODE AND THE SEARCH FOR A POLICY JUSTIFICATION FOR ANTI-DOPING RULES

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I. INTRODUCTION

It is one of the unfortunate realities of modern sport that an Olympic year brings with it not only the prospect of memorable sporting moments, but also the near-certainty that positive drug tests will, in due course, taint many of these triumphs.

So it was with Athens 2004. However, the Athens games, despite providing the usual doping villains, suggested that

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the world's sporting authorities are at last beginning to address the doping issue in an efficient and professional manner. That is not to say that the governing bodies are winning their oft-proclaimed war against drugs. However, the farcical circumstances in which two leading Greek sprinters were forced to withdraw from the Games, following the successful discovery of Victor Conte's illegal BALCO operation in 2003, provided the World Anti-Doping Agency (WADA) with concrete examples of credible testing success.

The emergence of WADA as the global authority in this area has allowed the development of a strategic approach to doping issues across all sports. WADA enabled the creation and adoption of a single authoritative list of banned substances, as well as standard testing procedures. The Athens Olympics were the first major sporting event where all federations had adopted the same body of anti-doping rules. The benefits of this consistent and uniform approach were immediately obvious.

Several leading legal figures have identified the logical inconsistencies inherent in many of the arguments traditionally put forward by sporting bodies in support of their opposition to doping. The English case of Chelsea FC's Adrian Mutu demonstrates the theoretical indeterminacy at the heart of our sporting rules.¹

The new WADA Code is the agency's first attempt to provide a rationale for its opposition to drugs in sport. Its proffered justifications, however, are open to criticism on a number of grounds. This article identifies the weaknesses inherent in WADA's position and draws attention to the difficulties involved in the articulation of a viable defense for an anti-doping regime. It then goes on to propose a number of grounds on which the prohibition of such substances can be justified.

Identifying a convincing rationale for anti-doping rules would allow those charged with the fight against doping to approach this issue in a logical and coherent manner. WADA's recent successes clearly demonstrate the benefit of a strategic approach in this area. If the prohibition on performance-enhancing substances can be placed on a secure

1. In that case, the relevant governing bodies seemed unsure of the appropriate response to a positive test for a prohibited but non-performance-enhancing substance.

policy footing, it will ensure that the authorities' anti-doping activities at future Olympic Games proceed along clear, consistent and rationally-defensible lines.

II. THE NEED FOR A COHERENT POLICY

The *bete noire* of sporting officials and enthusiasts across the globe, drug use in sport is commonly decried as an unsightly blemish on the sporting landscape. Deplored as despicable, yet accepted as universal, the apparent prevalence of such practices has undermined, perhaps forever, traditional notions of sporting excellence in the eyes of a skeptical public. Nandrolone, stanozolol, THG – it is a roll call of sporting shame, each an epithet for the seedy underbelly of the sporting world.

Sport, however, was never supposed to be like this. The oft-quoted Corinthian ideals enshrined in de Coubertin's charter were intended as a modern incarnation of the spiritual values² that the ancient Olympians espoused. Drug use by athletes is instinctively, intuitively and almost universally abhorred as an affront to these still-venerated ideals. The public revulsion that invariably follows another sporting drug scandal bears strong testimony to the influence such laudable aims continue to exert on the public consciousness. This influence underpins the common consensus that such behavior constitutes cheating of the lowest ethical order.

However, while public opinion remains remarkably monolithic as to the desirability of anti-doping rules, there exists no such unanimity of opinion as to the principles supporting such regulations. Academics have long since identified the inconsistencies inherent in the bewildering array of explanations advanced by governing bodies to justify their anti-doping stance. Straddling a range of policy standpoints, the occasional incongruity of the objectives which they variously seek to achieve has been the subject of much adverse comment. This presents sporting organizations with a

2. Baron de Coubertin, an historian of ancient Greece sought to propagate "a secular belief of fraternity and universality" to reflect "the foundation which surrounded the Ancient Games: pure moral victory in the name of fair play and good competition among individuals." C. Christine Ansley, *International Dispute Resolution: Tarnishing the Olympic Dream*, 12 ARIZ. J. INT'L & COMP. LAW 277, 280 (1995).

thorny theoretical issue which they have traditionally proved unable, or unwilling, to address.

This contemporaneous co-existence of sporadically conflicting justifications for doping controls poses several problems for sporting federations, in both philosophical and legal terms. While calls for the legalization of performance-enhancing drugs have yet to command anything more than negligible support amongst the general sporting public, several leading academics have articulated a somewhat convincing case for such a radical reform.³ Advocates of legalization insist that it would both enhance athlete protection, by allowing proper medical supervision of the administration of these substances,⁴ as well as encourage equality of opportunity in competition by removing the current covert advantage of drug-using athletes. These commentators have been emboldened in their efforts by the absence of any unified and coherent countervailing response from the sporting authorities.

More practically, the policy justifications advanced for the prohibition of performance-enhancing drugs are of considerable significance to the choice of means to be adopted in pursuit of the ultimate aim. Houlihan comments, "the policy instruments selected will, to a very large extent, be determined by the formulation of the basis on which doping is opposed".⁵ The end may justify the means but the means are of equal importance in shaping the nature of the end ultimately achieved. The theoretical justification for the prohibition of performance-enhancing drugs serves as the principled centerpiece around which the entire anti-doping edifice is established. Without a clear idea of the foundations upon which the entire structure rests, the risk remains that the regime will eventually come crashing down about the ears of the governing authorities.

Adrian Mutu's positive test result and the ensuing

3. See John O'Leary, *Doping Solutions and the Problem with Problems*, in *DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES* 255 (John O. Leary ed., Cavendish 2001), at 266.

4. See *id.*

5. BARRIE HOULIHAN, *DYING TO WIN: DOPING IN SPORT AND THE DEVELOPMENT OF ANTI-DOPING POLICY* 107 (Council of Europe, Strasbourg 1999). See also Neville Cox, *Victory with Honour or Victory at all Costs? Towards principled justification for anti-doping rules in Sport*, 22 *DUBLIN UNIV. L. J.* 1, 19-49 (2000).

controversy demonstrate quite clearly the problems posed by the absence of a clear and authoritative foundation for anti-doping rules. Mutu tested positive for a substance, widely reported to be cocaine,⁶ which would not have had a beneficial impact on his on-field activities. That Mutu had not attempted to illegally improve his sporting performance was, for some, a significant mitigating factor in this case.⁷ Others, like the English Sports Minister Richard Caborn, refused to draw a distinction between recreational and performance-enhancing drugs. Caborn commented that he “would expect the governing body of any sport to do what they agreed when they signed up to the (WADA) code and that means two years and a ban for life if repeated. That’s non-negotiable.”⁸

These varying responses to the Mutu case illustrate the prevailing uncertainty which surrounds the question of why drugs are prohibited in the first place. Do we prohibit doping out of concern for the health of competing athletes? Are they banned, as some would suggest, because they tend to provide an unfair advantage to those who take them? Or, do we proscribe these substances in the hope that our leading sports stars will thereby provide a good example to the impressionable young? Are anti-doping rules an attempt to impose private moral values on those competing in the public sporting arena, and if so, is this justifiable?

This case is but the latest illustration of the pressing need for the adoption of a clear and coherent policy basis for our anti-doping rules. Until there is an agreed or authoritative rationale for the prohibition of specified substances, confusion and controversy over the relative culpability of particular individuals appears inevitable. This is true not only from a moral or normative standpoint, but also, crucially, from a legal perspective. Without a logically consistent and defensible justification for such sanctions, the courts may be

6. Mutu denied this, claiming he had taken a substance to improve his sexual performance. See Russell Kempson, *Chelsea law down the law on drugs as Mutu is shown the door*, THE TIMES, October 30, 2004, available at <http://www.timesonline.co.uk/article/0,,283-1336789,00.html>.

7. PFA spokesman Gordon Taylor felt this justified a more lenient approach to his case. Other commentators agreed. See *infra* at note 61.

8. Jim Van Wijk, *FA must throw the book at Mutu, demands Caborn*, THE GUARDIAN, October 26, 2004, available at http://football.guardian.co.uk/News_Story/0,1563,1336163,00.html.

reluctant to allow sporting bodies to interfere with the valuable rights and economic entitlements of an impugned athlete.

III. POLICY JUSTIFICATIONS AND THE NEW WADA CODE

In order to ensure access to the commercial milk and honey on offer in the promised land of Olympic competition, international federations were obliged to accept and implement the WADA Code before the start of the Athens Games. The adverse consequences of being barred from the Olympic party forced even the recalcitrant football authority, FIFA, to finally accept WADA's rules on doping after two years of stubbornly refusing to do so. Thus, as the newly-accepted global guide to anti-doping provisions, the WADA code provides the obvious starting point for any analysis of the existing rules of practice.

The WADA code was established to advance the values of "friendship, solidarity and fair play" outlined in De Coubertin's Olympic Charter.⁹ WADA is committed to "reinforc[ing] . . . ethical principles for the practice of doping free sport and to help protect the health of the athletes."¹⁰ This dual justification of ethical and health concerns is reiterated in the organization's new Anti-Doping Code. The Code goes further, however, and refers to a number of additional grounds in support of WADA's actions. The Code protects "[a]thletes' fundamental right to participate in doping free sport" and, in so doing, "to promote health, fairness and equality for athletes worldwide."¹¹

Furthermore, the Code stirringly defends its anti-doping program as a valiant attempt to preserve the "spirit of sport," a value that it somewhat nebulously defines as the "celebration of the human spirit, mind and body" which is "the essence of Olympism [sic]" [and] "how we play true."

9. Olympic Charter, available at

http://www.olympic.org/uk/organisation/missions/charter_uk.asp.

10. World Anti-Doping Agency, Foundation in Lausanne, *Constitutive Instrument of Foundation of the World Anti-Doping Agency*, art. 4.2, available at http://www.wada-ama.org/rtecontent/document/constitutive_instrument_foundation.pdf.

11. See The Purpose, Scope and Organization of the World Anti-Doping Programme and the Code, available at

http://www.wada-ama.org/docs/web/standards_harmonization/code/code_v3.pdf.

The Code thus advances four chief justifications for prohibiting the use of the specified substances in the sporting sphere. Anti-doping rules seek to:

- (i) Ensure equality of competition,
- (ii) Ensure fairness in sport,
- (iii) Protect the 'spirit of sport', and to
- (iv) Protect and promote health.¹²

This article shall now examine each of these arguments in turn.

IV. POSSIBLE POLICY JUSTIFICATIONS FOR ANTI-DOPING RULES

A. Inequality in Sport

At first glance, equality appears to be an obvious principle on which to attack the use of performance-enhancing drugs. Such behavior generates significant inequalities between competing athletes. Athletes obeying the existing anti-doping rules are put at an insurmountable disadvantage to their pharmacologically-enhanced rivals. Costly performance enhancing drugs also exacerbate the inequities between rich and poor athletes, who may not have equal access to these substances. The abolition of drugs from the sporting arena would seem to remove these inequalities.

The success of this argument rests, however, on the questionable assumption that equality is a value consistent with the world of sport. In fact, the opposite is true. Elite athletes represent inequality at its most refined, revered by the public not for their normalcy but rather for their ability to achieve that which the ordinary athlete, let alone the average citizen, cannot. In many ways, such competitors are physiological freaks of nature, inheriting athletic capabilities at birth that elevate their abilities to a standard forever out of the reach of lesser mortals. These talents surely represent inequality of the highest order and yet it is rarely, if ever, suggested that these athletes be handicapped so as to compensate others for the comparative disadvantages of their birth.

12. World Anti-Doping Code, *available at* [http://www.wada-ama.org/en/dynamic.ch2?page Category.id=250](http://www.wada-ama.org/en/dynamic.ch2?page%20Category.id=250).

These natural inconsistencies are not the only inequalities evident in the world of sport. In fact, they are probably its least objectionable. A divergence in physical abilities is unavoidable, as are certain environmental and genetic impediments. The same is not the case, however, with those disparities that are the product of economic happenstance or class-based social coincidences. Inequalities abound in terms of the standard and availability of training techniques, advanced equipment, scientific information, coaching skills, dietary advice and so on. There are even considerable discrepancies regarding the degree of financial support available to facilitate athletes in dedicating themselves to the achievement of athletic excellence.

This problem is widely recognized and acknowledged by commentators, federations and the sporting public alike, but few question the validity of victories in international events by those favored by birth, social, environmental and economic circumstances. Certain federations do attempt to develop sporting facilities and structures in areas without the tradition or financial ability to do so themselves, but such efforts are often poorly-funded and irregularly-organized. Certainly none have the scale of resources or rhetoric devoted to them as anti-doping efforts do. For those in charge of sport to support their anti-doping structures on egalitarian grounds is at best theoretically inconsistent and at worst simply hypocritical. To decry drug abuse as an attack on the cherished ideal of equality (and thus elevate it as a value to a position of pre-eminence) while overlooking the existing economic and social inequalities, as well as ignoring those physical inequalities which constitute the very essence of elite international sport, is an untenable position.

A further difficulty associated with using the concept of equality in support of legislative or judicial action in general, is that it operates in a moral and ethical vacuum, dictating merely the form rather than the substance or direction of the appropriate reform. The concept of equality depends on value judgments made by its masters. For the concept to be properly employed, the authorities must have a pre-existing position that they are seeking to further or defend in their enactments. The fact that the relevant body has had to commit to such a position of necessity means that it has adopted a moral or normative standpoint on which to base its

legislative policy. This precludes the use of equality as an *a priori* justification for its actions. As Westen explained:

[E]quality is entirely circular. It tells us to treat like people alike, but when we ask who 'like people' are, we are told that they are 'people who should be treated alike'. Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.¹³

Thus, equality is just as capable – in theory at least – of supporting a leveling-down of standards by the legalization of performance-enhancing drugs, as authorizing the existence of a strict anti-doping regime.¹⁴ The value-free nature of equality as a concept does, however, fatally undermine any attempts to employ it as an *a priori* basis for the proscription of drug use in sport. In this context, its 'empty vessel' characteristics ensure its indeterminacy, thereby depriving the principle of theoretical legitimacy.

B. Doping as a Form of Unfair Competition

The WADA code also relies on the popular and oft-invoked depiction of doping as an assault on the sporting ideal of fair competition. Lambasted by the Dubin Inquiry as "the antithesis of sport,"¹⁵ such unlawful conduct has been condemned as a particularly objectionable form of cheating by the general public, sporting commentators, governmental bodies, international institutions and countless newspaper editorials. Confirmed users are vitriolically reviled for their actions, finding themselves the targets of widespread public opprobrium. Why does this behavior provoke such a strong reaction?

13. Peter Westen, *The Empty Idea of Equality*, HARV. L. REV. 537, 547 (1982). See also S. Fredman, *Less Equal Than Others – Equality and Women's Rights*, in UNDERSTANDING HUMAN RIGHTS 197, 202 (Conor Gearty & Adam Tomkins eds., Mansell 1996).

14. Given the current illegality of such conduct, this argument could not be advanced in defense of those alleged to have infringed the existing anti-doping code. After all "the low ethical standards of others provides no justification for lowering one's own". See HOULIHAN, *supra* note 5 at 119.

15. Dubin Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (Canadian Government Publishing 1990).

On a superficial level, such athletes have resorted to extra-legal means in an attempt to obtain an advantage not available to those who observe the rules. Obviously, this is a form of cheating. At the same time, there is something disconcerting about being forced to rely on such a circular form of logic, asking us, as it does, to dogmatically accept the initial veracity of the rules of which these athletes have tread afoul. Sporting bodies are certainly entitled to outline the principles of practice by which competitors will be asked to abide. Without explanation of the objectives inspiring such rules, they by their very existence should command the respect and observance of participants.

However, the typical intensity of the public reaction to those who infringe anti-doping rules suggest that more powerful principles of fairness are at work in the anti-doping controversy. The severity of the punishments meted out to drug offenders, as well as the level of criticism directed at them, go far beyond that of a simple breach of sporting rules. It would be disingenuous to treat anti-doping provisions as simple sporting rules. The prohibition on performance-enhancing substances cannot be compared to the golf requirement that players correctly sign their cards, or to the rules stipulating, for example, the number of players on a team.

From a legal point of view, it is especially important that the sporting authorities articulate convincing reasons for the severity of these sanctions, given the possibility that they may be challenged in the courts. The financial consequences of a two-year suspension (the automatic sanction) for professional sportspeople, make judges unlikely to indulge the argument that the penalty is justified for infringement of an arbitrarily adopted sporting rule. Some deeper, more normative principle must be at stake.

Reliance on the mere existence of these rules does not advance our understanding of the principled origins of anti-doping provisions, or of public opposition to the use of performance-enhancing drugs as unfair. The amelioratory effects they confer upon athletes cannot be the sole source of objection to their use. After all, "the mere seeking of an advantage is not implicitly unfair, nor is the gaining of an

advantage implicitly unfair.”¹⁶ In fact, this pursuit of better methods of performance improvement is, in many ways, the very object of sport itself. “[T]he social role of many sports . . . suggests that they are instrumentally valuable for precisely the purpose . . . of instilling and honing an ethic of self-improvement”.¹⁷ Advanced training techniques, dietary aids, and, most significantly, the use of technologically-superior equipment, are all methods of such self-improvement, acknowledged and upheld by sporting authorities as perfectly acceptable.

Drug use, on the contrary, is often decried as a means of unnatural improvement. Its effects are critically contrasted with improvement in performance produced by the classical values of commitment, dedication and physical effort. Beloff has described how drug abuse infringes such values:

The essence of a sporting contest is that it should be fairly conducted, with the competitor’s success or failure being the result of *natural* talents: speed, skill, endurance, tactical awareness . . . The use of drugs violates all such notions . . . the drug taker starts with an unfair advantage. Success becomes the product of the test tube, not the training track.¹⁸

Doping represents a two-pronged threat to the notion of paradigmatic sporting success. The victorious athlete is traditionally celebrated as the embodiment of the individual values that sport seeks to endorse, reward and encourage. Athletes are expected to conform to this ideal of dedicated self-improvement. From a societal point of view, victory for the doped athlete undermines these values by defeating those who conform to the traditional ideal. Further, from the athlete’s own perspective, it calls into question not only the personal nature of his achievement, but also the merit of the achievement itself. Is not victory in a contest celebrating values which the individual personally opposes a peculiarly hollow and empty prize?

These comments are also relevant to WADA’s notion of the

16. N.C. Fost, *Ethical and Sporting Issues in Anti-Doping Strategies*, in SPORT...THE THIRD MILLENNIUM 479, 481 (F. Landry et al. eds., Les Presses de l’Universite de Laval 1991).

17. Michael Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 60 (1991).

18. Michael J. Beloff, *Drugs, Laws and Versapaks*, in DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES, *supra* note 3 at 39 (emphasis added).

“spirit of sport,” and will subsequently be re-examined in that context. However, from the point of view of sporting fairness, they provide the principled foundation for the official opposition to performance-enhancing drugs. Predicated on the support and espousal of these principles, doping is rejected as an attempt to procure an advantage by subversive means. Those who continue to commit to traditional ideals are put at an unfair disadvantage.

There is, however, an obvious weakness in this analysis. It is perfectly acceptable in the abstract for sporting authorities to prohibit performance-enhancing drugs. They are a threat to the natural process of self-improvement which they regard as the essence of sport. The competence of sporting bodies to act in defense of what they see as a central sporting concept has been repeatedly affirmed by the courts.¹⁹ The difficulty arises in defining just what constitutes natural means. What should be the touchstone of sporting illegality? The notion of a natural process is evidently too vague to operate as a practical tool for the definition and delimitation of prohibited practices. Modern sport, with its determinedly scientific approach, is a far cry from the traditional Corinthian attitude that naturalness, as an idea, culturally connotes. Some more concrete criterion is required.

The emphasis traditionally attached in sport to the improvement, of the self, by the self, dictates that any improvement must be the product of internal processes. External sources of enhancement are deemed to violate the essentially personal nature of the notion of sporting achievement. “Our victories are not ours because they are not caused by ourselves.”²⁰ Gardner explains that:

Gaining enhancement through certain substances is unacceptable because it threatens a sport's integrity. The substance in the end is more responsible for the gained advantage than is the athlete, and hence we are no longer testing the athlete but the substance.²¹

Anything that endangers the human nature of sporting

19. See, e.g., *Gasser v. Stinson*, Unreported, Queen's Bench Division (Scott J.), June 15, 1988.

20. Shapiro, *supra* note 17 at 56.

21. Roger Gardner, *On Performance Enhancing Substances and the Unfair Advantage Argument*, 16 J. PHIL. SPORT 59, 69 (1989). Gardner in fact goes on to criticize this argument.

success threatens the essential ethos of the activity. External sources of self-improvement call into question not only who we are to regard as responsible – and thus reward – for sporting success, but what values our entire notion of sporting success seek to celebrate. Externality thus appears to represent, philosophically at least, a potential solution to this problem. Those relying on external sources of self-improvement undermine WADA's "spirit of sport," thereby gaining an unfair advantage over those who remain true to the traditional sporting ideal.

From a practical point of view, however, the use of externality as the touchstone of a technique's validity is not without difficulties. Athletes, in their unending quest for even the smallest advantage, have not been slow in turning to technology in a bid to enhance their existing abilities. Advances in aerodynamics and ergonomics have, for example, allowed swimmers, cyclists, racing drivers, rowers and even track athletes to refine existing equipment, reducing wind or water resistance in order to improve their level of performances. Ultra-light running shoes, grooved football boots capable of producing greater speed and swerve, synthetic tennis racquets allowing players to hit the ball at ever-higher speeds – all are accepted aspects of the use of technology in modern sport. Yet each equally is a form of aid external to the athlete's body that increases their chances of success.

Of course, none are as visibly and intuitively objectionable as the injection of chemical compounds into the body, but the manner of ingestion of a substance surely cannot be the key to its illegality. Could there really be a convincing case made for an asserted distinction between the oral ingestion of legal vitamin supplements, or even natural but rare substances like the Chinese athletes' infamous turtle soup,²² and, on the other hand, the taking by injection, of illicit substances? What would then be the authorities stance over orally ingested drugs such as amphetamines, or alternatively, pain-killing

22. The phenomenal success of female Chinese middle and long distance athletes at the 1993 World Championships was attributed by their coach Ma Jungren, in part, to their special diet of turtle soup, blood and fungus. These claims met with much scepticism in the world media. See, e.g., Duncan Mackay, *Hopes raised for war on drugs as Ma's army beats a retreat*, THE GUARDIAN, September 7, 2000, available at <http://www.guardian.co.uk/sydney/story/0,7369,365472,00.html>.

injections that allow injured athletes to continue with their competitions? How can a distinction be justifiably drawn between legal dietary supplements, regarded by elite athletes as an essential aid to performance,²³ and other substances, similarly ingested, but stigmatized as an illegal form of cheating? After all, do such legal substances not also risk replacing ideas of success based on endeavor with notions of “access to athletic heroics via a pill or powder,”²⁴ thereby representing an equally dangerous threat to the ideals which underpin the external/internal distinction under discussion here? In many ways doping techniques – especially those such as blood doping, or EPO (which harness and enhance the body’s natural processes) are merely ways of refining and improving the efficacy of the human body, the underlying objective of all forms of athletic endeavor.

These techniques do not obviate the need for continued commitment to an intensive training regime. Rather they simply allow the user to improve their capacity to improve, facilitating an increase in the level of training – and not producing artificial levels of increased performance independent of any form of athletic effort. Thus, these substances can plausibly be argued to represent neither an affront to the values of hard work and dedication celebrated as important elements of the Corinthian ideal, nor an aid any more external to the athlete, or unnatural *per se* than many other forms of legal technological training techniques.

The arbitrariness these arguments identify in existing notions of externality or unnaturalness has convinced some academics to abandon this line of defense, looking instead for other elements to justify the common public position that performance enhancing drugs are an unfair form of externally produced advantage. Perry seeks to start from a position whereby external aids are *prima facie* questionable, allowing their use only if they aim to either eliminate a deleterious

23. The market in dietary supplements in the United States is now estimated to be worth \$15 billion, registering an annual growth rate of over 20 percent. Demand for these products is in part fueled by an increasing desire for physical perfection, and the widespread acknowledgement by sports stars of their use to achieve such ends. See Jennifer K. Braman, *Food for Sport or Faustian Bargain: Regulating Performance Enhancing Dietary Supplements*, 47 *CLVLDND. ST. L. REV.* 417, 435 (1999).

24. Jeffrey Crossman, *Sparing Cain: Executive Clemency in Capital Cases; Mark McGwire does it, so why can't I?*, 28 *CAP. UNIV. L. REV.* 617, 628 (2000).

effect, or to remove a barrier to improved performance. To these, Houlihan seeks to add the criteria of general access and availability.²⁵ Yet none of these grounds are conclusively convincing. Drugs arguably allow improved performance by the removal of the natural boundaries of ability, while certain existing acceptable aids – grooved football boots for example – can only be tenuously argued to achieve either objective.

This situation may therefore be one where authorities feel inclined to draw a line, even if it will produce arbitrary results in places. The common consensus is that drug use is a form of cheating, a usurpation of the ideals of sporting fairness. Unfortunately however, none of the arguments advanced in support of the distinction between doping and other forms of external enhancement determine the question conclusively. That nitrogen tents²⁶ are tolerated by authorities, who at the same time prohibit EPO (which produces identical effects), illustrates the enormous theoretical inconsistency in this area. WADA cannot hope to rely on the notion of fair competition in support of its anti-doping regime when it is itself unable to convincingly distinguish fair techniques from foul.

C. Protecting the Spirit of Sport

A further long-standing justification for the prohibition of performance-enhancing substances rests on the extent to which they are said to undermine the ethos or spirit of sport. The concept of the spirit of sport has often been academically criticized as a vague and amorphous ideal, too indeterminate and uncertain to act as the foundation for an anti-doping regime. The new WADA Code thus seeks to define the essence and ethos of sporting competition. The Code declares that doping is “fundamentally contrary to the spirit of sport,”

25. See HOULIHAN, *supra* note 5 at 11, for a more expansive treatment of Perry’s arguments.

26. Nitrogen is pumped into the buildings, forcing the athletes’ bodies to produce greater amounts of oxygen. The effect is similar to that produced by training at high altitudes, but has caused controversy, with some suggesting that it represents an unethical short-cut for athletes. The technique has not been outlawed however and high-profile athletes who have used it include Paula Radcliffe and Lance Armstrong. See Christopher Clarey, *If Doping is Banned, Should Sleeping in Altitude Tents be Allowed?*, INT’L HERALD TRIBUNE, December 7, 2001 at 21.

which it defines as embodying “the following values:”²⁷

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.²⁸

WADA’s choice of values reflects the idea of sport as a social good. This, perhaps, represented a deliberate attempt to define the public interest involved in the maintenance of a drug-free sporting world. This would obviously be a very relevant factor in any legal challenge to the anti-doping rules. The enumeration of these values draws attention to the important – and crucially beneficial – position of sport in society.

Sport is a social construct, as such reflecting the views and values which society at large envisages it as epitomizing. Beyond that however, sport also embodies certain ideals and attributes which society strives to encourage and support, thereby influencing how a society perceives itself. The extent of the adulation afforded to sporting idols reflects the widespread social acceptance of sport as a worthwhile social institution. Thus sport would seem to be generally regarded as exerting a positive influence upon society.

It has already been noted that traditionally, athletic excellence – as the product of extraordinary levels of effort, commitment and dedication – was applauded as an example to be aped by all. Athletic excellence is a demonstration of the human capacity for self-improvement, given proper application.²⁹ Sport thus provides a framework within which

27. World Anti-Doping Code, *available at* <http://www.wada-ama.org/en/dynamic.ch2?page.Category.id=250>.

28. *Id.*

29. Baron de Coubertin reflected this view in his comments that the Olympic

society could reward those Stakanhovite qualities it considered to be particularly commendable. Sport expresses the desirability of the development and display of such qualities, and in so doing affirms its own particular identity – performing what has been termed a “normative-systemic” role.

Normative-systemic arguments first point to the existence of norms of right conduct. They then urge that to vindicate these norms we should try to increase the incidence of right actions and decrease the incidence of wrong ones. A major mechanism for doing so is to reinforce attitudes important in the genesis of right actions ... This can be done in part by pursuing and observing certain social practices and appropriately endorsing them ... The arguments, in short, recommend programs for learning, in particular through the construction of community institutions.³⁰

If sport is accepted as one of the most powerful examples of such a “community institution,” aiming at the encouragement of certain norms of social conduct – physical forbearance, discipline, a dedicated commitment to self-improvement by internal means – it is evident that allowing the use of performance enhancing drugs would profoundly affect its ability to effectively perform the task of social pedagogy.

Permitting athletes to opt for pharmacological means of improvement over conventional training techniques provides an example to the public of success achieved not by athletic endeavor alone. Instead sporting excellence is assisted by, and indeed dependent upon, artificial chemical compounds. Sport is supposed to epitomize man’s improvement of himself by means of athletic endeavor. Performance enhancing drugs negate both the methodology and the autonomy of the individual which society, through sport, seeks to encourage. “Self-improvement is . . . central to personhood, yet pursuing that improvement by technological means may compromise that personhood. Trying to better ourselves in those ways thus makes us lesser”.³¹

Games prized “not the triumph but the struggle. The essential thing is not to have conquered but to have fought well”. See DAVID SHAW, *OVER THE EDGE* (Spintex 1997), excerpt available at

<http://www-rohan.sdsu.edu/dept/coachsci/swimming/drugs/shaw.htm>.

30. Shapiro, *supra* note 17 at 52.

31. *Id.* at 33.

The use of performance enhancing substances not only inhibits the ability of sport to achieve its purpose as a community institution but could, in fact, prove counter-productive to its aims. Developed as a mechanism to propagate characteristics extolled by the Corinthian ideal, sport – were it to embrace pharmacologically enhanced athletes – could ultimately end up espousing the short-cut route to success. Of course, many doping methods at present do not offer instant improvement, requiring the user still to persevere with traditional training techniques. Nonetheless they still import into the concept of sport the notion of undeserved improvement, of the effective purchase of physical excellence at a reduced price, “thus weaken[ing] ideals of effort and diligence.”³²

Society is, of course, entitled to use the sporting arena to encourage such ideals. Social constructs have no essential normative content, merely affirming whatever philosophy prevails amongst the wider community. The depth of public opposition to performance enhancing drugs indicates however, a continued commitment to the traditional values and beliefs upon which sport has been developed. The conduct and practices of our games ought to be regarded, not simply as “the result of historical accident, but [rather] of a desire, *not always conscious*, to shape preferences and promote values.”³³ Thus, although the public may not be always capable of clearly articulating its concerns, the almost universal anti-doping stance that it adopts suggests that the values traditionally emphasized in sport – which approximate to ideas of a sporting ethic – retain their attraction.

Public opposition to performance enhancing drugs thus proceeds from concerns regarding the identity, ethos and underlying belief system of society – ensuring the existence of a wider community interest in preserving the drugs-free status of sport. As Fairchild remarks:

The steroid user or the doper is now understood as more than just a simple cheat. He is a threat to the established symbolic order, to various aspects and components of our self-understanding and to prevailing ideas of competitive sport. By literally casting out the abject, we reaffirm our individual differences from him, and

32. *Id.* at 112.

33. Shapiro, *supra* note 17 at 94.

thereby concretize the foundation of a new order.³⁴

There are, however, a number of well-rehearsed arguments as to the unsuitability of the sporting ethic as a foundation for anti-doping rules. These proceed on the basis that these ideals are too vague, amorphous and uncertain to support punitive provisions, especially where such sanctions impact upon the legally-protected interests of the individual athlete.

The WADA Code has gone some way to addressing such concerns. However, the qualities it chooses to cite in support of its anti-doping stand are themselves inherently vague. Notions of “fun and joy” or “community and solidarity” do not lend themselves to legal scrutiny. Furthermore, the veneration of these values could be argued to amount only to the forced introduction of private moral values into an important area of public activity.

The case law in this area does provide some support for a characterization of sporting matters as primarily private affairs. Vice-Chancellor Megarry typified this attitude when he declared that:

[T]he courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is even so where those bodies are concerned with the means of livelihood of those who take part in those activities.³⁵

Justice Scott similarly agreed that “the courts should be slow to interfere with the manner in which an association governing a particular branch of sport administers the sport,”³⁶ even where that association’s decisions could have an adverse impact on the athlete’s level of income. The possibility that this judicial deference to sporting authorities may become less common in the future will be considered below, but the fact remains that the law, as it stands at present, has been traditionally opposed to an interventionist approach to this area. On this analysis at least, WADA is

34. Fairchild, *Sport Abjection: Steroids and the Uglification of the Athlete*, 16 J. PHIL. SPORT 74, 83 (1989).

35. *McInnes v. Onslow-Fane*, [1978] 1 W.L.R. 1520, 1535.

36. *Gasser v. Stinson*, Unreported, Queen’s Bench Division (Scott J.), June 15, 1988.

perfectly entitled to rely on its perception of doping as a breach of the ethical basis of sport.

Furthermore, many of the arguments advanced in favor of the legalization of performance enhancing drugs seek to equate legal and sporting rules in a manner which is not at all appropriate. Sport is a cultural institution and social construct, and as such need not conform to the same rigid theoretical rules as does the criminal code.³⁷

Some would see a solution to this issue in the essential arbitrariness of sporting rules of practice. This solution regards doping controls simply as an example of sports federations acting to regulate the conduct of their particular sporting activity.³⁸ Like the number of holes in golf, for example, or the permitted number of players on a soccer team, it could be maintained that anti-doping rules are merely the result of the arbitrary choices of the relevant authorities, and are thus without need of justification.

As punitive provisions however, it has already been noted that this approach is not open to defendants of the existing anti-doping regime. Sanctions imposed for doping offenses can, for example, imperil a professional athlete's ability to earn a livelihood, putting an individual's economic interests at serious risk. Sporting punishments may not be so severe as to merit identification with the sanctions imposed for infringements of the criminal legislative code, but neither are they sufficiently innocuous to be blithely disregarded as the arbitrary offspring of the haphazard actions of governing bodies.

Rather they fall into a distinct category of offenses in their own right. The consequences occasioned by the commission of these "sporting offenses" are serious enough to demand some form of rational foundation for their existence, but they do not however need to be subject to the rigorous levels of scrutiny afforded to criminal charges. Thus, they do not demand the same exacting standard of definition as is required by

37. This argument would tally with John Stuart Mill's work on the appropriate use of the criminal code. Whilst he argued strongly against the use of criminal laws to enforce notions of social morality, he did also insist that citizens should be encouraged to act in a positive way by a society's non-criminal rules and practices. See JOHN STUART MILL, *ON LIBERTY* (Yale University Press 2003) (1859).

38. This argument is described as "attractive" by Houlihan. See HOULIHAN, *supra* note 5 at 121.

criminal law.

Almost all sports have, for example, a rule proscribing the offense of bringing the game into disrepute, an inherently vague charge that allows the association to impose a punishment purely based on its own view of what is harmful to the sport. Once the association's view of the damage incurred is reasonably based and objectively justified, dissenting voices are rarely raised. Offenses such as "ungentlemanly conduct," or an infringement of "sporting dignity and decorum,"³⁹ afford similar to officials through the laxity of the language they employ. All vest in the sporting authorities penal powers to be deployed as required – in their view – to defend the integrity of their sport.

That is not to say, of course, that the existence of one vague sporting offense justifies the adoption of other amorphous grounds of sanction. Rather, it illustrates the inherent competence of governing bodies to regulate and protect the integrity of their sport, as accepted by Vice Chancellor Megarry in *McInnes*.⁴⁰ The courts have clearly affirmed the entitlement of sporting bodies to take action in defense of this ethic, though there are some who continue to maintain that the notion of a sporting ethic is no more than "an oxymoron,"⁴¹ devoid of legal value. The ubiquity of the idea must surely, however, undermine such dissent. As Gough has remarked, the sporting community "can fall into a trap of focusing so much on our disagreements that we lose sight of just how much we actually agree on, when it comes to ethics."⁴²

WADA's definition of the spirit of sport represents a considerable advance in this area. It demonstrates not only the value of sport to society as a whole, but also, crucially, the way in which doping is regarded as an infringement of this

39. This was the offense the Spanish football authorities charged Sevilla's Francisco Gallardo with after his bizarre biting of his teammate's genitalia as part of a goal-scoring celebration in 2001. The charge was subsequently dropped. See Guillem Balague, *Reyes is Gunning for glory*, THE OBSERVER, Feb. 1, 2004, available at <http://football.guardian.co.uk/comment/story/0,9753,1136334,00.html>.

40. See *McInnes v. Onslow-Fane*, [1978] 1 W.L.R. 1520, 1535.

41. Michael J. Mondello, Ph. D., *Sports Ethics: Application for Fair Play*, 9 MARQ. SPORTS L. J. 495 (1999).

42. RUSSELL W. GOUGH, CHARACTER IS EVERYTHING: PROMOTING ETHICAL EXCELLENCE IN SPORTS 25 (Harcourt Brace College Publishers 1997).

sporting ethos. Justice Scott in *Gasser v. Stinson* had already acknowledged the existence of a public interest in ensuring that “the practice of doping [is] . . . firmly dealt with” by the relevant sporting authorities.⁴³ That WADA has now, within the confines of its competence, expressly articulated a basis for this belief should preclude any future attempt to impugn the anti-doping regime’s policy foundations as unacceptably vague.

Sporting bodies thus appear to have a perfectly rational foundation for, and justifiable interest in, the proscribing of these substances. Their efforts to combat drug use among athletes are simply an exercise of their responsibilities to protect the sport over which they preside. Sporting federations are charged with the vigorous defense of the ethics, welfare and integrity of their sports, a responsibility that includes their anti-doping efforts. The courts should prove reluctant to entertain a substantive legal challenge on this point, provided the federations define this ethos in a clear and comprehensible way, as the new WADA code attempts to do.

D. Protecting Athletes’ Health

The classic alternative argument advanced in defense of anti-doping rules relies not on the ideals of fair and equal competition, or indeed of sporting integrity, but on the protection of the health of individual athletes. WADA’s code unsurprisingly echoes this theme. Concerns have been expressed, however, about the acceptability of such openly paternalistic provisions, especially in light of the broadly liberal democratic thrust of our society. The law, for example, is clear that it cannot compel individual citizens to undergo necessary medical treatment, to desist from potentially damaging behavior, or to demand that one individual come to the aid of another,⁴⁴ thereby underlining the importance

43. *Gasser v. Stinson*, (June 15, 1988) Unreported, Queen’s Bench Division (Scott J.).

44. See, e.g., *St. George’s Healthcare Trust v. S.* (1998) 2 FCR 685, 698. On the absence of a general duty to act to prevent damaging behavior, see, *inter alia*, *Airedale NHS Trust v. Bland* (1993) A.C. 789, 865; GP FLETHCHER, *RETHINKING CRIMINAL LAW* 601 (Little, Brown & Co., 1978); and Andrew Ashworth, *The Scope of Criminal Liability for Omissions* (1989) 105 L.Q.R. 424, 425-26.

attached by the courts to the individual's autonomy. Should not athletes therefore be at liberty to make similar decisions for themselves? Why should they be denied the freedom to enter into a "Faustian bargain"⁴⁵ with the demon of sporting greed?

One universal objection to the health-based justification of anti-doping rules is the arguable inconsistency in the governing bodies approach to this issue. Just as equality-based arguments were undermined by the failure of sporting federations to apply the ideal to non-doping areas, the consistency of the sporting authorities' commitment to the protection of the health of athletes is questionable as well.

If health concerns are to bear upon the organizations' regulatory actions, immediate issues arise with regard to the existence of a prohibition on substances without medically proven side-effects. The continued acceptance of dangerous sporting practices must also be questioned. Maintaining that a relaxation of doping regulations is a required reform, O'Leary casts doubt on the depth of organizing bodies' commitment to competitors' welfare:

If the governing bodies genuinely wished to protect the health of sportsmen and women, however, they would introduce a provision which forbade a competitor competing whilst injured. Women's gymnastics would also need to be reviewed, bearing in mind the incidence of arthritis and other diseases of the joints suffered by competitors in later life. There are also a number of contact sports which, by the very nature of that activity, are likely to cause injury.⁴⁶

This position seems to overlook, however, the degree to which the danger referred to is inherent in participation in the particular sport. Many sporting organizations do in fact demonstrate a concern for the protection of participants' physical welfare, but side-step the related but separate issue of whether dangerous sports ought to be allowed in the first place.⁴⁷

45. Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L. J. 93, 94 (1990). See also Braman, *supra* note 23, at 418 (1999) (discussing how "scores of athletes [seem] to cast fate and future to the wind in a seductive courtship with performance enhancing drugs").

46. See O'Leary, *supra* note 3, at 263.

47. This is essentially an issue for government as it is unrealistic to expect a sporting federation to unilaterally outlaw the activity over which they exercise

The acceptance of risk, however, is invariably influenced by an accompanying desire to preserve those elements regarded as essential to the character of the individual sport. The Australian courts have legitimized this position, noting that “[a]ccepting risk, sometimes to a high degree, is part of many sports ... Sporting activities of a kind that sometimes result in physical injury are not only permitted; they are encouraged.”⁴⁸ For example, Formula 1 racing may be dangerous, but the spirit of the sport – competition between drivers and cars to complete the course in the quickest time – demands that participants push their machines to the highest possible speeds. Similarly, body tackling may carry with it a risk of serious injury, but both rugby and football would be emasculated were it to be outlawed, deprived of one of the most enduring and instantly recognizable aspects of their games. So it is with other sporting activities as well.

The relevant federations have not, however, been entirely content to accept such risks simply as necessary aspects of their sports. Rather, they have almost universally sought to mitigate the dangers associated with their particular activities. The compulsory nature of protective equipment in amateur boxing, soccer, football, and so on; the prohibition of dangerous forms of tackling in rugby, football, and soccer; the elaborate and expensive safety features required in Formula 1; and the sophisticated medical response systems demanded in horse racing and boxing⁴⁹ are all examples of steps taken by the relevant authorities to safeguard the health and well-being of participating athletes. Federations appear prepared to act toward the goal of protecting the health of the athlete, their efforts tempered only by the necessary countervailing consideration of preserving the essential elements of their sport.⁵⁰

responsibility.

48. See *Agar v. Hyde*, (2000) 74 ALJR 1219.

49. Admittedly adopted in U.K. only in the aftermath of *Watson v British Boxing Bd. of Control*, (2001) 2 W.L.R. 1256.

50. This was accepted as a legitimate consideration by the High Court of Australia in *Agar v. Hyde*, where negligence, arising from a failure to enact laws to make rugby scrums safer, was asserted. The court held that no such duty of care existed. Justice Callinan warned of the risks to a sport's popularity if safety concerns alone were to prevail:

Rugby union is notoriously a dangerous game often of quite violent bodily contact ... Rugby union is not just a game for players. It is also a game for

Inconsistency of commitment on the part of governing bodies does not therefore seem to present significant problems with respect to anti-doping rules. It is impossible to seriously assert that doping constitutes an essential element of any particular sport. Thus, it is a risk to competitors' health that federations are entitled to abolish entirely. Allegations of differential treatment with respect to doping-induced dangers, and those not associated with such substances are superficially attractive. These allegations fail, however, in that they are based on a dubious initial assumption, namely, that the two fundamentally different forms of danger may be logically equated.

More importantly, the suggestion that the prohibition of the use of performance-enhancing substances unduly restricts the liberty of the individual athlete to make his own informed decision overlooks the position of the "clean" athlete against whom the doper is due to compete. Unquestionably, there exists a widespread public perception of rampant drug abuse among elite athletes, particularly because those orchestrating the campaign against their use have declared that a significant problem exists.⁵¹ Thus, it is scarcely surprising to hear some commentators speak of the existence of a "de facto glass ceiling for clean athletes."⁵²

spectators. The very existence and continuation of the international competition might well depend upon their interest and attendance at matches. No doubt many spectators attend because of the vigorous nature of the contest. Furthermore ... there can be no doubt that fit, usually young men are attracted to, and play the game because it involves an opportunity to dominate physically other like young men in circumstances in which injuries of various kinds will be inevitable.

Agar, (2000) 173 ALR 665.

51. De Merode has suggested that 10 percent of medal-winning athletes in the Olympic Games may have been using illegal substances to enhance their performances, while IOC President Jacques Rogge recently admitted that "we will never win the war [against doping] totally." See BBC Online, *Rogge: Drugs here to Stay* (July 19, 2001), http://news.bbc.co.uk/sport1/hi/in_depth/2001/olympic_votes/1447173.stm. German Athletics Federation president Helmut Digel's plan to re-start the athletics world record books from 2000 also provided *de facto* recognition of the extent of the past problem with doping. See David Powell, *Hemery Aims to Question Record Plan*, THE TIMES (LONDON), Dec. 3, 1998, at Sport Section.

52. David Galluzi, *The Doping Crisis in International Athletic Competition: Lessons from the Chinese Doping Scandal in Women's Swimming*, 10 SETON HALL J. SPORT L. 65, 100 (2000). This claim was repeated by the disgraced Irish athlete Cathal Lombard who, after testing positive for EPO on the eve of the Athens Games, claimed that he had wanted only to 'have an equal chance with everyone else'. See Ian O'Riordain,

If that is the perception at present, with governing bodies committed to the fight against doping, what options would the aspiring “clean” athlete have if drugs were legalized? Would it truly be accurate to characterize this catch-twenty-two choice as a free and informed decision to use such potentially dangerous substances? This concern is particularly pertinent in the case of professional athletes, but it would be extremely naïve to discount the extent of the pressure felt by many talented amateur sportspeople.

It has often been suggested that elite athletes, focusing all of their efforts at all times on the single objective of victory, operate under a value system “distorted by ambition, competition and money,”⁵³ which undermines their ability to form rational or reasoned opinions. Grayson and Ioannidis bemoan how “athletes do not, or are not prepared, to realize that the ‘win at all costs’ attitude is catastrophic for them as individuals as well as their sport.”⁵⁴ This opinion is endorsed by O’Leary, who warns that “the competitive instincts of many participants may blind them to the dangers” involved in the use of illicit substances.⁵⁵ Goldman and Klatz note:

The desire to win is so great that people sometimes lose the concept to right and wrong due to being single-minded driven individuals. Sometimes it is very difficult to view life as a whole, as sports goals for the obsessed individual are the only tangible true goal. It can totally dominate your life, and effectively shut out any vision of the world beyond. Mental perceptions of right and wrong may become misty and clouded, and your attempts at experiencing the ethics and fun of sport are so nebulous, that is hardly worth mentioning, let alone planning for in your mind.⁵⁶

The results of Bob Goldman’s famous *Sport Illustrated* survey lend credence to the claims of these authors, revealing that more than half of Olympic-standard athletes were prepared to sacrifice life itself in their pursuit of competitive glory.⁵⁷

Athlete’s excuses win little support, THE IRISH TIMES, Aug. 10, 2004, available at <http://www.ireland.com/newspaper/sport/2004/0810/3471301776SP1LOMBARD.html>.

53. J. Andrews, *The World of Sport: Superhuman Heroes*, THE ECONOMIST, June 4, 1998, at 10-14.

54. Edward Grayson & Gregory Ioannidis, *Drugs, Health and Sporting Values* in DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES, *supra* note 3 at 243.

55. O’Leary, *supra* note 3 at 262.

56. RONALD GOLDMAN & RONALD KLATZ, DEATH IN THE LOCKER ROOM II 23 (Elite Sports Publications Inc. 1992).

57. See Andrews, *supra* note 53.

Taking this evidence into account, there is a very real danger that the legalization of performance-enhancing substances would effectively coerce “clean” athletes into risking their health in pursuit of sporting success. A 2002 survey by *USA Today* found, for example, that fifty percent of major league baseball players felt pressure to use performance-enhancing substances,⁵⁸ and the fall-out from Jose Canseco’s recent book⁵⁹ suggests that this was still true at least up until this past season. The voluntary nature of this choice is necessarily called into question. The Irish courts, for example, have questioned the voluntariness of “a consent motivated by fear, stress or anxiety, or consent or conduct dictated by poverty or other deprivations.”⁶⁰

Athletes may ultimately act of their own accord in full knowledge of the risks they undertake, but the question remains as to whether they are making an entirely free choice. This is especially true for international athletes whose financial well-being depends upon their sporting success. Can the decision to take performance-enhancing drugs in order to compete with suspected users be construed as one “motivated by fear, stress or anxiety?” Would the adverse financial implications of defeat be enough to draw doping within the ambit of “conduct dictated by poverty or other deprivations?” There are some who would certainly be sympathetic to such arguments. Leonard writes:

Swimming athletes and coaches are caught in the vice-grip of a dilemma. Play fair and lose to doped athletes, or cheat and jeopardise your health, your genetic future, and your principles, and contend for the prize of Olympic gold.⁶¹

There must be some recognition of the depth of commitment involved in international competition in the modern era. Elite international athletes spend four years preparing for an Olympic event, training two to four times daily to the exclusion of a family and social life. In addition,

58. Peter Gammons, *Lawyers, Drugs and Money*, Dec. 4, 2004, available at <http://sports.espn.go.com/mlb/gammons/story?id=1938586> (last visited Mar. 2, 2006).

59. See JOSE CANSECO, *JUICED: WILD TIMES, RAMPANT ‘ROID, SMASH HITS, AND HOW BASEBALL GOT BIG* (Regan Books 2005).

60. G. v. An Bord Uchtala, (1980) I.R. 32.

61. John Leonard, *The Last Race*, available at <http://www-rohan.sdsu.edu/dept/coachsci/swimming/drugs/leonard2.htm> (last visited Oct. 1, 2005).

they often face an uncertain financial future without the commercial revenue or government support that sporting success may bring. It would appear grossly simplistic and naïve to suggest that they ought to regard settling for the comparative failure of fourth place as a plausible career choice. This applies as much (if not more) to the amateur rower as it does to the highly paid star of track and field.

To the extent that these factors may undermine assertions of athletes' total freedom of choice, they lend considerable support to the theory that the legalization of performance-enhancing drugs could ultimately compel previously "clean" athletes to turn to such substances, thereby endangering their health against their instincts – a result which would be evidently unjustifiable. In fact, insofar as the system could be regarded as pressuring the athlete to infringe his bodily integrity against his wishes, it could even infringe the European Convention of Human Rights.

E. Protecting and Promoting Health – The Position of Young Athletes

The significance of health-based concerns as a pretext for anti-doping policy is not limited to elite athletes. On the contrary, society's interest in the protection of the young and impressionable has also been argued to provide a compelling case for continuation of the current system.

This argument proceeds on the assumption that sportspeople are role models for the young, a position which has provoked considerable controversy. For every writer who accepts the enormous influence of sporting idols,⁶² there is another equally eminent author who challenges the notion of athlete as role model.⁶³

The contentious role model status of elite athletes would seem to foreclose sporting bodies from demanding adherence to concepts of conventional morality unrelated to issues of

62. Marazzo notes that "we emulate their styles and mannerisms, wear what they wear and drink what they drink." Dante Marazzo, *Athletes and Drug Testing: Why do we Care if Athletes Inhale?*, 8 MARQ. SPORTS L. J. 75 (1997).

63. See, e.g., Roger Welch, *A Snort and a Puff: Recreational Drugs and Discipline in Professional Sport*, in DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES, *supra* note 3 at 77 ("[T]he extent to which young people look to their sporting heroes as role models in any capacity beyond how the play the game is... questionable.").

sporting performance.⁶⁴ Welch regards it as “questionable why regulatory bodies in sport should have any role to play in acting as moral guardians of society.”⁶⁵ The UK authorities have argued that the use of any illegal drug by athletes severely damages the public image of sport,⁶⁶ but the Football Association’s treatment of Adrian Mutu demonstrates a growing awareness of the theoretical limitations on sanctioning sports stars for failing to conform to an idealized form of behavior. Several commentators at the time of this case proffered this view, opining that “sooner or later, someone with some sense in a sporting world that illustrates little sometimes must surely recognize the difference between performance-enhancing drugs and life-damaging substances.”⁶⁷ The jurisdiction of such bodies to regulate the athlete’s extra-sporting conduct rests on uncertain philosophical and legal foundations. Simply put, the foibles of elite athletes outside the purview of sport do not appear to constitute a legitimate concern.

That is not to deprive the role model argument of all logical validity, however. The Canadian courts seem prepared to accept the importance of athletes as role models for the young, especially in relation to the school and collegiate environment.⁶⁸ It is also cited by some sporting bodies as justification for their anti-doping rules. For example, the NCAA lists the “high visibility of athletes as role models” as one of the four justifications for establishing its controversial drug-testing program.⁶⁹ These examples highlight the concerns of state and private institutions regarding the influence exerted on young athletes by those whose achievements they aspire to emulate. As Justice Caswell

64. Welch argues “where off-field conduct appears to have no impact on a player’s capability to perform to the best of his abilities in a competitive match ... such behaviour is the player’s own concern.” *See id.*

65. *Id.*

66. *Seventh Report of the Select Committee on Culture, Media and Sport*, (House of Commons, 2004) available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmcmds/499/49905.htm>.

67. Ian Ridley, *Losers All Round in Mutu Affair*, THE OBSERVER, October 31, 2004, available at

<http://football.guardian.co.uk/Columnists/Column/0,4284,1340071,00.html>.

68. *See Johnson v. AC & IAAF*, (1997) 73 A.C.W.S. (3d) 5, 17.

69. *See Marazzo*, *supra* note 62 at 80.

remarked, "the elite athlete[s] . . . influence over the young athlete cannot be underestimated."⁷⁰

Young athletes operate at all times under enormous pressure to succeed, particularly within the U.S. collegiate system where valuable scholarships, and ultimately professional contracts, are at stake. The scale of these potential rewards has compelled the courts to intervene in defense of the substantial economic interests of the collegiate athlete imperiled by disciplinary action:

In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, this Court takes judicial notice of the fact that, to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education.⁷¹

If elite athletes were to openly admit to the use of performance-enhancing drugs, it is likely that some vulnerable young athletes would opt to pursue the same approach to success. In this scenario "young athletes may begin to feel that they must participate in doping to progress in their sport."⁷² After all, "[w]hen role models in sport, or in any other endeavour, are seen to cheat and prosper, then it is natural that young people will learn to do the same."⁷³

Some would dismiss such concerns as groundless, but these critics arguably operate under substantial misconceptions about the nature of underage sport. Young athletes in the modern era are notoriously competitive, particularly at the national and international level where a lucrative career as an elite adult athlete beckons. Standard athletic obsession, intellectual and emotional immaturity, and heady notions of fame and fortune combine to form a potent cocktail which can cloud the young athletes' judgment. These influences are augmented by pressure from parents, schools and coaches, by the media's fixation with sporting success and physical perfection, and by a culture that already embraces

70. Johnson v. AC & IAAF, (1997) 73 A.C.W.S. (3d) 5, 17.

71. Cal. State Univ. Hayward v. NCAA, 47 Cal.App.3d 533, 541, 121 Cal.Rptr. 85, 89 (1975).

72. Galluzi, *supra* note 52 at 99.

73. DUBIN COMMISSION OF INQUIRY INTO THE USE OF DRUGS AND BANNED PRACTICES INTENDED TO INCREASE ATHLETIC PERFORMANCE, *supra* note 15.

dietary supplements and the like as vital elements of the short-term route to success.⁷⁴ Performance enhancing drugs are but a short psychological step from performance enhancing vitamin pills and dietary supplements. Statistics suggest that some young athletes, already accustomed to the notion of success achieved via pill or powder,⁷⁵ are prepared to take this step at an early age.⁷⁶ The social status of successful athletes does much to create the demand for athletic success on which the dietary supplements industry in the US is based. The risks to the health of our teenagers, should elite athletes become open advertisements for the use of performance enhancing drugs as a means of meeting the demand they help to create, are therefore obvious. The Mark McGwire incident in the United States demonstrated clearly this potential danger, highlighting as it did the extent to which young athletes ape the example set by their sporting idols.

During the course of McGwire's extraordinary feat of breaking Roger Marris' thirty-seven year old season home-run record, it became known that McGwire had been using androstenedione, at that time a legal supplement, to boost his performance. An enormous amount of media attention was devoted to this controversy, as commentators queried the ethical acceptability of his action. Yet while public figures were considering their attitude toward McGwire's behavior, young athletes did not hesitate in their response. Sales of the product manufactured by Weider Nutrition jumped 45 percent in the two weeks after the story broke.⁷⁷ The influence of the

74. See J. Sobal & L.F. Marquarte, *Vitamin Mineral Supplement use among Athletes - a Review of the Literature*, 4 INTERNATIONAL J. SPORTS NUTRITION 320 (1994).

75. This may be a specific aspect of what Houlihan describes as "the medicalization of life." See HOULIHAN, *supra* note 5 at 100. See also Ivan Waddington, *The Development of Sports Medicine*, 13 SOC. SPORT J. 176 (1996).

76. A 1988 survey of a sample of American high school seniors showed more than 6 percent admitting to drug use to enhance athletic performance. Almost 70 percent of these athletes had started using steroids before the age of 16. See Glenn D. Braunstien, *Anabolic Steroid Use to Enhance Athlete's Performance*, 65 S. CAL. L. REV. 373, 376 (1991).

77. As one commentator noted, "[k]ids see McGwire, the huge muscles, the thick forearms, the barrel chest - and figure, if he does it, why can't they?" Michael Stetz, *A New Supplement Tempts Athletes: Testosterone Booster seen as Dangerous, Especially for Kids*, SAN DIEGO UNION TRIBUNE, AUGUST 27, 1998, cited in Crossman, *supra*, note 24.

baseball hero's example was unquestionable.⁷⁸

Thus, if the example set by elite competitors confirms the existence of a de facto glass ceiling for clean athletes, it seems certain that many aspiring young stars will feel themselves forced to choose between abandoning their sporting dreams, or relying on performance enhancing drugs to bring them to fruition. Of course, it could be argued that the McGwire incident involved a dietary supplement which was merely controversial, neither illegal nor dangerous to health. This however would be to overlook the extensive media coverage of the potential long-term health risks of androstenedione usage. Respected medical sources warned that the substance could have similar side effects to those experienced by steroid-users— liver cancer, ligament damage, and the risk of increased breast tissue amongst teenage male users.⁷⁹ Nonetheless, the sales of the product continued to soar: “Every day it's McGwire, McGwire, McGwire. They say give me some of what the 53-homer man is taking.”⁸⁰ Clearly, many young Americans were willing to risk future liver damage if it would enhance their opportunity to emulate their baseball idol on the field.⁸¹

A paternalistic approach to adult athletes may be criticised by some, but there is a clear and incontrovertible societal interest in the protection of the health of teenage sporting participants, often too young to make critical health-related decisions. As one writer remarked: “[I]f the heroes are seen to use drugs, then the hero-worshipping children will be

78. Crossman, *supra* note 24 at 625. (“McGwire’s admission of use and his team’s approval of it, combined with the intense media attention surrounding his historic feat resulted in a high profile advertisement and de facto endorsement of the use of dietary supplements to get as big and strong as McGwire himself”).

79. See Christine Gorman, *Muscle Madness*, TIME, September 7, 1998, available at http://dwb.unl.edu/Teacher/NSF/C11/C11Links/www.time.com/time/magazine/1998/dom/980907/personal_time.your_heal28.html. See also Ethan Skolnick, *McGwire’s disclosure leads to a run on ‘andro’ pills: The unregulated hormone is flying off shelves but is it putting athletes – and kids – at risk?*, PALM BEACH POST, August 31, 1998, at 1A.

80. Crossman, *supra* note 24 at 81.

81. There is anecdotal evidence of a similar experience in Ireland after Minster for Sport Jim McDaid spoke out against the use of creatine in October 1998, which seemed to have alerted other young players to its existence. A UCD survey estimated that 62 percent of adult rugby players in Ireland use the supplement with a 14 percent consumption rate amongst schoolboy rugby players. See Ian O’Riordian, *Rugby Use Measured at 62 Percent*, THE IRISH TIMES, May 18, 2001, at 17.

tempted to do so as well. That is something which no sporting authority [or indeed society] can afford.”⁸²

V. THE PROBLEM OF PROFESSIONAL ATHLETES

The preceding analysis concludes that the prohibition of performance-enhancing substances can be rationally justified on a number of grounds:

(1) As an aspect of sporting bodies' competence to protect the “spirit of sport,” which doping is universally agreed to infringe, thus also preserving the valuable social role of sport.

(2) To protect the health and bodily integrity of athletes who wish to compete without using drugs.

(3) To protect the health of young athletes.

From a legal point of view, however, the advent of professionalism poses further problems for those attempting to defend and justify the proscription of doping amongst elite athletes.

A. Legally Protecting the Economic Interests of Professionals

The preservation of the “spirit of sport” may have been previously regarded as a matter for individual sporting bodies, but the courts are likely to prove increasingly willing to recognize the financial realities of the modern sporting arena. Although the English courts, in contrast to a number of their common law counterparts, have thus far proved reluctant to extend the ambit of judicial review to include sporting bodies,⁸³ they have expressly recognized the financial implications of an athlete's suspension. Cases such as *Eastham*, *Greig* and *Nagle* found that “in a sport which allows competitors to exploit their ability in the sport for financial gain and which allows that gain to be a direct consequence of participation in competition, a ban on competition is . . . a restraint of trade.”⁸⁴

The understanding of the sports field as a significant

82. Andrews, *supra* note 53.

83. R v. Disciplinary Committee of the Jockey Club, *ex parte* Aga Khan, (1993) 2 All. ER. 853.

84. Gasser v. Stinson, Unreported, (June 15, 1988) Queen's Bench Division (Scott J.).

source of employment, affirmed in *Jones v. WRFU*,⁸⁵ is likely to lead to a greater judicial emphasis on the legal entitlements of the professional athlete, thereby encouraging an increasing number of legal challenges. The option of a court challenge was, for example, publicly considered by Manchester United in the case of Rio Ferdinand's suspension for a missed drug test. Such anti-doping sanctions are open to challenge on several possible grounds: as a restraint of trade, due process/procedural fairness, or as an infringement of the right of professional athletes to earn their livelihood.

Such challenges have already occurred. Katrin Krabbe, for example, successfully relied on the German Constitution's proportionality principle to challenge her suspension for a positive doping test.⁸⁶ Although there were procedural faults peculiar to that case, the precedent nonetheless forced the relevant governing bodies to drop proposals for automatic lifetime or four-year bans, lest they be regarded by the courts of any country as unjustified infringements of particular rights.⁸⁷

Obviously, from a United Kingdom perspective, the relevance of the Human Rights Act of 1998 is limited by the fact that the ECHR does not enshrine a specific right to earn a livelihood.⁸⁸ Nor, as the law stands at present, would sporting bodies seem to be regarded as public bodies for the purposes of the Act.⁸⁹

Restraint of trade, on the other hand, has already been relied upon as a basis to challenge to sporting rules with

85. Queen's Bench Division, (Ebsworth J), *THE TIMES*, February 27, 1997, Law 1.

86. ESTELLE DE LA ROCHEFOUCALD, COLLECTION OF SPORTS-RELATED CASE-LAW, § D(a) *Case of Katrin Zimmerman Krabbe v. Deutscher Leichtathletik Verband and IAAF*, available at http://multimedia.olympic.org/pdf/en_report_264.pdf.

87. Paul Kelso, *Ferdinand must fight alone*, *THE GUARDIAN*, December 22, 2003 (reviewing a number of important cases on doping in sports), available at http://football.guardian.co.uk/News_Story/0,1563,1111589,00.html.

88. See *Royden v. Metropolitan Borough of Wirral*, [2002] E.W.H.C. 2484.

89. Human Rights Act, 1998, c. 42 § 6 (Eng.). Section 6 of the Human Rights Act imposes an obligation to act in a manner compatible with the provisions of the European Convention of Human Rights on 'public bodies' only. The English courts have, in the context of judicial review, traditionally regarded sporting associations as private entities. See, e.g., *R v. Disciplinary Committee of the Jockey Club*, ex parte Aga Khan, (1993) 2 All. ER. 853. There have been no indications thus far that the courts intend to adopt a different approach in the context of the new Human Rights Act regime. See, e.g., *Heather v. Leonard Cheshire Foundation* [2002] 2 All E.R. 936.

some degree of success.⁹⁰ The courts in these cases have repeatedly emphasized the fact that a restraint of trade will be unreasonable, and thus unlawful, unless justified in the parties or the public interest.⁹¹ In the professional context, with the livelihood of the participants often at stake, the courts are even less likely to regard such restraints as reasonable. It is vital, therefore, that the federations are in a position to convincingly justify their anti-doping actions, even under the rigors of judicial examination. Mr. Justice Scott may have unquestioningly accepted the IAAF's protestation in *Gasser* that doping rules must obviously be regarded as reasonable but there is no guarantee that a future court would adopt a similarly deferential approach. This is particularly true if the courts are to fully reflect the fact that, as the European Court of First Instance recently admitted, "high-level sport has become, to a great extent, an economic activity."⁹² It must therefore be considered whether the justifications outlined above are equally applicable to the professional arena.

The various survey evidence suggesting that death, let alone the vague ideal of sportsmanship, fails to sufficiently deter many athletes from doping indicates a profound problem with the entire anti-doping movement. Such surveys evince a level of acceptance of the use of performance enhancing substances among athletes far beyond that prevalent in the public at large. Arguments against doping centered on concepts such as equality, protection of the health of the individual, or general sporting justice barely seem to register with the elite athletes who epitomize sporting success. If these stars, standard-bearers for their respective sports on the international stage, accept doping as a valid

90. *Eastham v. Newcastle United*, (1964) 1 Ch. 413; *Greig v. Insole*, (1978) 1 W.L.R 1520.

91. *Eastham v. Newcastle United*, (1964) 1 Ch. 413.

92. *Meca-Medina v. Commission of the European Communities*, September 30, 2004 (holding doping rules to be purely sporting matters), available at [http://curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79959069T19020313&doc=T&ouvert=T&seance=ARRET&where=\(\)](http://curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79959069T19020313&doc=T&ouvert=T&seance=ARRET&where=()). Many of the grounds given were similar to those discussed here but the CFI also relied heavily on the Amsterdam Treaty's recognition of the specificity of sport, as repeated in the Helsinki Report of 1999. This limits the persuasive value of the judgment in other jurisdictions. The judgment is discussed by the author in *Drugs, Competition Law and 'Purely' Sporting Rules* (2005) 23 IRISH LAW TIMES 138.

means to athletic improvement, how then can their federations seek to impose a regime upon them which is the product of an alternative, and essentially alien, value system?

B. The Governmental Interest in Professional Sport

Federations, however, must concern themselves with the demands and requirements of groups other than the enclosed order of elite athletes. The increasing involvement of governments in this area should, for example, be taken into account. Recent decades have witnessed the increasing engagement of state institutions in supporting and shaping the existing sporting structures at both national and supranational levels, with anti-doping issues at the forefront of governmental concerns. Considerable financial support from government organizations has allowed the institution of improved testing procedures, while funding for research into constantly improving testing methods has been made freely available. Over 150 governments have signed the Copenhagen Declaration, committing themselves to the domestic implementation of the WADA code by 2006. The European Union has declared its opposition to doping in sport in similarly strident terms. However, it is in the U.S. that the governmental interest in combating doping in sport has most prominently – and controversially – been asserted.

In support of anti-steroid legislation, Senator Tom Davis recently commented:

A culture of steroid use among professional athletes, while troubling by itself, is also worrisome for its trickle down effect. In the absence of strong testing regimes, pro athletes use performance-enhancing drugs to stay ahead of the competition. College athletes feel pressured to use steroids to get drafted. High school kids believe steroids are the ticket to bigger, faster bodies that will attract the attention of scouts and college coaches, and maybe lead to a scholarship. And the cycle goes on and on and on....⁹³

The hearings of the Senate Committee on Government Reform are but the latest in a series of recent high-profile government forays into the sporting arena. The involvement

93. *Hearing on Bill H.R. 2565 Before the S. Committee on Government Reform*, 109th Cong. (June 15, 2005).

of baseball figures like Barry Bonds in the BALCO scandal provoked an enormous public outcry that led to renewed pressure on sporting federations like Major League Baseball to properly regulate their sports. Political developments followed public opinion, with politicians indirectly asserting the entitlement of government to legislate by warning Major League Baseball of the consequences of a failure to do so.⁹⁴ President Bush alluded to the issue in his 2004 State of the Union address, and introduced an Anabolic Steroids Control Act in October 2004, which called for funding to be allocated to steroid prevention programs in schools.⁹⁵ Baseball responded by announcing the agreement of a new testing procedure in

94. Although the matter deserves fuller analysis elsewhere, it is worth noting in this context that Congress' ability to unilaterally impose a drug testing regime is constitutionally questionable. Mandatory testing procedures were held to escape sanction under the Fourth Amendment in cases where there was a "compelling" governmental interest which outweighed the individual's privacy entitlements. See, e.g., *Skinner v. Railway Labour Executives Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). These early cases concerned situations where there was an immediate risk to public safety. The testing of high school athletes was, however, allowed in *Vernonia School District v. Acton*, 515 U.S. 646 (1995), on the more generalized basis that athletes, as role models, had an important role to play in "detering drug use by our Nation's schoolchildren"—a problem which Justice Scalia somewhat unconvincingly characterised as "an immediate crisis of greater importance than existed in *Skinner*." *Id.* at 661, 663. Obviously, this role-model-reliant claim would apply with equal, if not greater force, to professional athletes. However, the Supreme Court's decision in *Acton* was heavily influenced by athletes' diminished expectations of privacy and, crucially, by the custodial relationship between the government and school-going children – which the Court singled out as the 'most significant element' in their balancing of state interest and individual expectation, adding "[w]e caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 665. That the courts may be more reluctant to entertain such "generalizations of public need" where no such relationship exists is demonstrated by an Arizona decision which refused to allow for the mandatory testing of firefighters where there was no evidence of any immediate danger to the public. See, generally, *Petersen v. City of Mesa*, 83 P.3d 35 (Ariz. 2004). The precedent value of this case could be limited by the court's reliance on the lack of evidence of a drug abuse problem amongst firefighters. See Jessica L. Tom, *Extinguishing Random, Suspicionless Testing of Firefighters*, 47 ARIZ. L. REV. 857 (2005). However, there is also the possibility that, given the difficulties inherent in portraying a lack of testing of elite athletes as an immediate threat to the public, the ability of Congress to enact such a measure could be called into question.

95. The President commented: "To help our children make right choice, they need good examples The use of performance-enhancing drugs like steroids in baseball, football and other sports is dangerous, and it sends the wrong message – that there are shortcuts to accomplishment, and that performance is more important than character". President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>

January 2005.⁹⁶

However, the publication of the Canseco allegations led to a new round of Senate hearings, at which baseball legends like McGwire, Canseco and Sammy Sosa, as well as league figures like Bud Selig and Donald Fehr were called to testify. The hearings were generally regarded as a public-relations disaster for the sport.⁹⁷ The intense criticism levelled at the announced testing policy, and the league's history of inactivity on the issue, led Senator John McCain to argue for government legislation to be introduced. "It just seems to me they can't be trusted" McCain told ABC's *This Week*.⁹⁸ "What do we need to do? It seems to me that we ought to seriously consider . . . a law that says all professional sports have a minimum level of performance-enhancing drug testing."⁹⁹ Echoed by Senator Davis, this declaration seems set to inaugurate a period of even greater government involvement in the regulation of professional sport in the United States.

Although the academic debate persists as to the extent of the government's entitlement to legislate in this traditionally private area of human activity, the baseball debacle has established the government interest in combating doping if not as a constitutional entitlement, then at least as a political imperative. Grounded on the asserted influence of professional players on young aspiring athletes, this view of the State's interest echoes Shapiro's theories of institutions for social learning.

Sport would be debased, and with it a society that takes sport seriously, if sport did not strictly forbid things that blur the distinction between the triumph of character and the triumph of pharmacy.¹⁰⁰

96. Ronald Blum & Bob Baum, *Baseball Gets Tougher on Steroids*, CBS NEWS, January 13, 2005, available at <http://www.cbsnews.com/stories/2005/01/13/entertainment/main666807.shtml>.

97. ESPN's live online coverage of the hearings concluded that they had been "another public relations disaster for the national pastime." Darren Rovell & Wayne Drehs, *Steroid Hearing Scorecard*, ESPN.COM, March 17, 2005, available at <http://sports.espn.go.com/mlb/news/story?id=2014564>.

98. Sally Jenkins, *Hearing is Believing*, THE WASHINGTON POST, March 22, 2005 at D01.

99. Hal Bodley, *MLB to change steroid player-suspension language*, USA TODAY, March 20, 2005, available at http://www.usatoday.com/sports/baseball/2005-03-20-steroid-language_x.htm.

100. George F. Will, *Good Character, Not Good Chemistry*, WASH. POST, September

As the Senate hearings and their aftermath demonstrate, American politicians, if not the American courts, are ahead even of their international counterparts in this area, and seem firmly committed to establishing the government's authority to regulate doping in private sporting leagues.

C. The Public's Interest in Professional Sport

In many ways, in asserting jurisdiction over the doping problem in sport, governments are merely mirroring the views of the populations they purport to serve. The reaction of crowds to suspected dopers such as Olga Yegorova,¹⁰¹ Javier Sotomayor¹⁰² and Merlene Ottey¹⁰³ was a tangible and very public manifestation of the sense of anger and disgust at their alleged behavior, sentiments echoed worldwide in editorial columns, living rooms and letters pages. Such incidents provide clear evidence, not only of a sense of public interest in the exclusion of performance enhancing drugs from the sporting arena,¹⁰⁴ but also of a feeling of public entitlement to dictate the characteristics of sporting success. Houlihan submits that this kind of democratic support for anti-doping rules represents the solution to the search for a defensible

29, 1988, at A21.

101. One of the abiding television images of the 2001 Edmonton World Championships was of British athlete Paula Radcliffe and Hayley Tullet displaying a placard protesting against Yegorova's participation in the 5,000m after she had tested positive for erythropoietin (EPO). The IAAF was forced to allow her to continue after the test was found not to have been properly conducted. See Tom Knight, *Radcliffe's war on cheats*, THE DAILY TELEGRAPH, August 10, 2001 available at <http://www.telegraph.co.uk/core/Content/displayPrintable.jhtml?xml=%2Fsport%2F2001%2F08%2F10%2Fsonite11.xml&site=2>. See also Ian O'Riordain, *Radcliffe Lends Support to Szabo's Cause*, THE IRISH TIMES, August 11, 2001 at 50.

102. "When ... Sotomayor was announced [to the Monaco crowd] ... he was booed. He responded by jumping 2.30m and winning the event, but even on the victory rostrum there were as many boos as cheers." Pat Butcher, *IAAF Running into Trouble over Doping Appeal Hearings*, THE SUNDAY TIMES, August 20, 2000 available at <http://www.times-olympics.co.uk/archive/athleticsst15.html>.

103. Some commentators attributed Ottey's decision to apply for Slovenian citizenship to public opposition in her home country of Jamaica to her selection for the national team following her positive test for nandrolone. See Richard Moore, *Here's to Our Absent Friends*, available at <http://sport.scotsman.com/topics.cfm?tid=492&id=797432002>.

104. The existence of a public interest in the prohibition of such substances was accepted as legitimate in *Johnson v. Athletics Canada*, 73 A.C.W.S. (3d.) 5, 16-17. (Ontario Ct. 1997).

rationale. Describing this argument as dependent upon "middle order justifications . . . derived from social experience," he asserts that while "the various rationales for anti-doping policy [outlined above] . . . take the policy maker only so far along the road to policy implementation . . . it is the addition of the notion of the democratic process that enables the completion of the journey."¹⁰⁵

A reliance on sheer force of numbers carries with it its own perils however, risking as it does an excessive dependency on arbitrary populism, with the future uncertainty that inevitably entails. Yet that is not to say that invocations of public support must necessarily be allied to positions of simple majoritarianism. Certainly, public support is a factor to be referenced by those responsible for the formation of sporting and legislative policy on performance enhancing drugs. Nonetheless, due regard for public opinion does not, of necessity, entail the abdication by the relevant authorities of their position of political control in favor of a form of mob rule. Rather, the challenge for the federations is to find in public opinion on this issue an underlying justification for their actions on anti-doping rules.

Vesting, as this argument does, almost total discretion in the relevant sporting authorities, some may dismiss it as outdated and archaic, a remnant of the mindset of the amateur era, which the courts should reject. To allow governing bodies to penalize, suspend, or even exclude competitors in reliance on vague notions of the ethical welfare and integrity of the sport indeed appears unacceptable at first glance, when professional careers and enormous sums of cash are at stake.

However, professionalism in sport arguably justifies even greater public ownership of the sporting ethos. Commercial sponsorship and television revenues have been described as "the backbone of the modern Olympic movement," critical to the continued well being of elite sporting competition.¹⁰⁶ The salaries, appearance fees, prize money, and endorsements at stake in the case of a suspension for alleged drug abuse are entirely the products of the public popularity of sport, their

105. HOULIHAN, *supra* note 5 at 124-126.

106. Ronald T. Rowan, *AALS Sports Conference Speech: Legal Issues and the Olympic Movement*, 3 VILL. SPORTS & ENT. L.J. 395 (1996).

existence relying on the continuation of such demand in the future. In a very real sense, the wages of professional athletes are paid for by the public demand for their performances, in terms of gate receipts, merchandising, and most notably, the sponsorship deals and TV money offered by companies seeking to cash in on the huge public interest in sport. The public, however, demands that these performances, the displays of athletic prowess which capture the population's imagination, be free from the tainted influence of performance enhancing drugs. If athletes are to accept the fruits of public popularity and support, they must arguably agree to observe the terms and conditions on which public support is offered.

In the amateur era, competitors were perhaps more able to ignore the opinion of the wider public. The advent of professionalism, and the resultant ceding of a large degree of control over the athlete's destiny to the interest of the television constituency dictates that athletes and federations must pay ever more attention to the demands of the paying public.¹⁰⁷ Some have suggested that it is not "clear-cut . . . how many people actually care about the authenticity of what they are seeing" in sport, but this view goes against all available evidence.¹⁰⁸ Those convicted or suspected of doping are often dropped by their corporate sponsors. The legalization of drugs use in sport, besmirching as it would the ideals held dear by that public, would constitute a disastrous own-goal, inevitably leading to a slump in television and advertising revenues. One commentator notes:

If they [sports authorities] make a clean breast about the doping epidemic, the grapes will wither on the sponsors' vines and the value of television right plummet. Consumer product peddlers will flinch from associating their brands with health-threatening, doped sport. It's the Olympic copywriters' nightmare slogan; buy a Coke, pay by Visa, fund the dopers.¹⁰⁹

107. This paradigm was starkly demonstrated by the ITV Digital debacle. The financial collapse of the ITV Digital television company in England put up to 80 lower football league clubs at risk because of the extent of their dependence on the proceeds of the broadcasting deal signed with the company the previous year.

108. Keith Duggan, *Sport is Bigger Than Big-Time Heroes*, THE IRISH TIMES, December 11, 2004, at 10.

109. ANDREW JENNINGS, THE NEW LORDS OF THE RINGS: OLYMPIC CORRUPTION & HOW TO BUY GOLD MEDALS 8 (Simon & Schuster 1996). Shaw agrees, commenting: "The health promoting picture of champion athletes competing valiantly against each

Thus, the actions of professional sporting federations in outlawing these substances need not be justified on some vague and anachronistic ideal of defending sporting ethics. Rather, the objective justification offered in support of the creation and enforcement of this category of sporting offense is a pragmatic concern to protect the public popularity on which the sport's, and thus the athletes' financial welfare, depends.¹¹⁰

D. Fair Play in Professional Sport

From the point of view of practical policy, the need to ensure the continued financial status of a sport is sufficient to justify the involvement of governing bodies in the doping issue. Professional athletes cannot have it both ways, accepting the financial rewards available but refusing to abide by the conditions on which these rewards are offered. Further theoretical justification for professional doping rules can be found in Hart's pre-eminent discussion of the principle of fair play.¹¹¹ It has already been noted that notions of fair play feature prominently in WADA's recent enumeration of the socially benefits of propagating sporting ethics. The concept of fair play, however, benefits not only society, but also the individual professional athlete. Sport, by virtue of its widely esteemed social status, offers competitors the prospect of enormous financial rewards. In return, fairness requires that each athlete respect the rules governing that sport, so that each may benefit from the rule-abiding restraint of others. When this is the case, professional athletes compete on a putative level playing-field with victory and its associated rewards going to the athlete who best reflects the values celebrated by the sporting ideals of talent, dedication

other is less attractive if spectators were exposed to certain training secrets. If these were known, sponsorship would be dramatically reduced, the paying audience would be halved and the whole sporting image ruined forever." See Shaw, *supra* note 29.

110. This was one of the justifications advanced by the IAAF for their anti-doping rules in *Gasser*. Mr. Holt, the general secretary of the IAAF, gave evidence that "[a]ny sport which is infiltrated by drugs and in respect of which it becomes common knowledge that its participants use drugs is likely to suffer substantially in its public image and reputation," an opinion which Justice Scott felt "must be right." *Gasser v. Stinson*, (June 15, 1988) Unreported, Queen's Bench Division (Scott J.).

111. H.L.A. HART ET AL., *THE CONCEPT OF LAW* (Oxford University Press 2d. ed. 1994) (1961).

and fair play.

VI. CONCLUSION

When athletes take performance-enhancing drugs, they endanger their own health, pressure their opponents to do the same, undermine the values espoused by the sporting victory they seek, and risk the financial rewards that they aspire to achieve. All of the benefits associated with sporting success would collapse if performance-enhancing substances were to be openly tolerated by regulatory authorities. It is evidently in the interests of each sport and every participant therein that athletes remain clean. This secures the future and financial status of each sporting activity. Athletes benefit from the publicly clean status of their colleagues. In such a scenario of mutual constraint and accepted benefit, Hart was clear that fair play (regardless of the existence of legal rules) required all to adhere to systematic restraint. Professional athletes who take performance-enhancing drugs ignore these obligations, thereby imperiling the financial rewards and success that they seek to attain. Governing bodies are thus entitled in policy and in principle to apply anti-doping rules to the professional arena just as rigorously as they do to the athletes of the amateur world.