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The International War Against Doping: Limiting the Collateral Damage from Strict Liability

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NOTES

The International War Against Doping: Limiting the Collateral Damage from Strict Liability

ABSTRACT

The World Anti-Doping Agency (WADA) and the World Anti-Doping Code are largely considered the model for an effective and well-coordinated antidoping regime. This model has allowed numerous sports and various countries to secure the same rules for domestic and international athletes. Within this regime, strict liability for prohibited substances stands as the “cornerstone.” Strict liability has allowed antidoping officials to prosecute doping violations through an effective testing regime. However, this principle occasionally implicates innocent athletes with no intention of performance enhancement. This Note proposes that WADA modify its criteria for including substances on the Prohibited List and suspend strict liability in certain exceptional cases in order to better serve the policies behind preventing doping in sports. These reforms will allow WADA to continue to serve as the model for combating doping in sports.

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I. INTRODUCTION

On September 31, 2000, well-wishers greeted Andreea Raducan with a bitter welcome back to her home country of Romania.¹ Raducan, a sixteen-year-old gymnast, had been stripped of the gold medal she won for the Women's Individual All-Around Event at the 2000 Olympic Games, the most prized gold medal for gymnastic events.² The reason was cold medicine.³ The team doctor had administered to her a standard cold remedy containing pseudoephedrine, a banned substance for which she subsequently tested positive.⁴ Despite the clear evidence of lack of fault, Raducan was unsuccessful in her fight to keep her gold medal.⁵

Although Raducan's case was certainly extreme, avoiding positive tests might be more difficult than one might initially think for athletes who are regulated by the World Anti-Doping Code (the Code). Medicines,⁶ recreational drugs,⁷ and contaminated supplements⁸ can all lead to positive drug tests and are not necessarily taken for performance-enhancing purposes. The strict liability principle has forced athletes to be constantly vigilant about what substances enter

1. *Sydney 2000: Notebook; Sobbing Mother Greets Romania's 'Golden Girl'*, N.Y. TIMES (Oct. 1, 2000), <http://www.nytimes.com/2000/10/01/sports/sydney-2000-notebook-sobbing-mother-greets-romania-s-golden-girl.html?ref=andreearaducan>.

2. Raducan v. Int'l Olympic Comm., Case No. OG 2000/011, at 3 (CAS 2000). *E.g.*, Liz Clarke, *Gymnast Gabby Douglas Soars to Women's All-Around Gold*, WASH. POST (Aug. 2, 2012), http://articles.washingtonpost.com/2012-08-02/sports/35490387_1_raisman-aliya-mustafina-mihai-brestyan (referring to the medal as the sport's most prestigious title).

3. Raducan, Case No. OG 2000/011, at 2.

4. *Id.*

5. *Id.* ¶ 29, at 8–9.

6. *Id.*; Baxter v. Int'l Olympic Comm., Case No. 2002/A/376, at 2 (CAS 2002), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/376.pdf> (noting that Baxter's use of a Vicks inhaler led to a positive doping test).

7. See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE: THE 2012 PROHIBITED LIST 7–9 (2012), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2012/WADA_Prohibited_List_2012_EN.pdf [hereinafter PROHIBITED LIST] (prohibiting cocaine, methamphetamine, and cannabinoids).

8. See, e.g., Pieter A. Cohen, *American Roulette: Contaminated Dietary Supplements*, 361 NEW ENG. J. MED. 1523, 1523 (2009) (noting that dietary supplements “contain a wide variety of undeclared active pharmaceutical ingredients”).

their body. Failure to do so can result in forfeiture of competition results and lengthy suspensions.⁹

On the opposite end of the spectrum are those athletes that intentionally take substances to improve their results. The multitude of cases demonstrates that there is no shortage of athletes that are willing to subvert doping controls in order to gain the upper hand in competition.¹⁰ Modern science has aided these athletes by constantly creating more sophisticated doping techniques.¹¹ For example, in 2007, Barry Bonds broke Hank Aaron's legendary home-run record with the help of a designer steroid known as tetrahydrogestrinone (THG), which was completely unknown and not tested for until after 2003.¹² More recently, international cycling has garnered attention with the use of erythropoietin (EPO) and autologous blood transfusions.¹³ The World Anti-Doping Agency (WADA) and the International Court of Arbitration for Sport (CAS) have been at the center of the fight against these performance-enhancing techniques.

Ever since its inception in 1999, WADA has been remarkably effective at combating doping in sports and promulgating uniform rules to govern the detection and punishment of violations.¹⁴ CAS has reinforced the legitimacy of the international antidoping regime by resolving disputed cases and developing case law that creates a framework of international law.¹⁵ At the center of WADA is the Code, which has been signed by numerous government agencies and endorsed by international sports organizations ranging from *Fédération Internationale de Football Association* (FIFA) to the

9. See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 10, at 51–60 (2009), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf [hereinafter THE CODE] (describing sanctions for individuals).

10. See *Rule Violation Statistics*, UNITED STATES ANTI-DOPING AGENCY, <http://www.usada.org/rule-violation-statistics/> (last visited Dec. 13, 2013) (showing thirty-seven positive tests for the year 2012 in the United States).

11. See Press Release, United States Anti-Doping Agency, Members of the United States Postal Service Pro-Cycling Team Doping Conspiracy, Dr. Garcia Del Moral, Dr. Ferrari and Trainer Marti Receive Lifetime Bans for Doping Violations (July 10, 2012), available at <http://www.usada.org/media/sanction-usps7102012> (describing doping methods used in the U.S. Postal Service cycling team case).

12. See MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS 171–75, 272 (2006) (describing Bonds' association with BALCO and THG); Jill Lieber Steeg, *Catlin Has Made a Career Out of Busting Juicers*, USA TODAY (Feb. 28, 2007, 6:38 PM), http://usatoday30.usatoday.com/sports/olympics/2007-02-28-catlin-drug-lab_N.htm (describing the laboratory that developed the test for THG).

13. Press Release, United States Anti-Doping Agency, *supra* note 11.

14. See, e.g., *id.* (outlining one of the more recent success stories in uncovering the U.S. Postal Service cycling team's doping violations).

15. See Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1327 (2011) (noting CAS case law's harmonizing effect on global sports law).

International Olympic Committee (IOC).¹⁶ Antidoping efforts have reached an unprecedented level of coordination and uniformity: the same basic procedures now largely govern testing across sports, and the same substances are banned in most international competitions under the Code.¹⁷

The fight against doping, however, has not been without its costs. It has burdened international athletes for the sake of the integrity of international competition. According to WADA's whereabouts requirement, top-level athletes must constantly be available for random tests and must provide information on where they will be for an hour of every day so that random tests can be given during that hour.¹⁸ Athletes are also subject to strict liability for any substance found in their body that is on the Prohibited List.¹⁹ CAS has repeatedly upheld these two provisions provided for in the Code, citing them as necessary for fair competition.²⁰ Considered in light of the fact that athletes have little bargaining power in making the rules that govern them, these strict controls seem to undermine what they also promote: the athlete. Given these stakes, this Note will analyze the rationales behind the Code and how the Code's rigid measures serve its purposes.

Part II of this Note will examine the background of WADA and CAS along with the specialized issues these institutions address within the area of antidoping. Part III will examine the implementation of the Code through two unique cases that were appealed to CAS. Part IV will analyze the rationales behind strict liability, how it relates to the various scientific issues that arise in antidoping efforts, and the use of culpability in penalizing athletes. Part V will suggest a revision of the strict liability principle and the

16. See *Olympic Movement*, WORLD ANTI-DOPING AGENCY (last updated Feb. 2013), <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Acceptance/Olympic-Movement/> (listing the twenty-eight members of the Association of Summer Olympic International Federations and the twelve Multi-Sport Organizations and Events of the Olympic movement).

17. See *id.* (showing the multiple international sports organizations that have signed the Code and are bound by its rules); THE CODE, *supra* note 9, at pt. 1 (stating that the provisions of the Code are mandatory for signatories and must be followed and implemented at their competitions).

18. See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE: INTERNATIONAL STANDARD FOR TESTING art. 11.1, at 41 (2012), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/2012/WADA_IST_2012_EN.pdf [hereinafter INTERNATIONAL STANDARD] (outlining the whereabouts requirement).

19. See THE CODE, *supra* note 9, art. 2.2.1, at 21 (outlining the strict liability standard).

20. *Union Cycliste Internationale v. Rasmussen*, Case No. 2011/A/2671, at 21–22 (CAS 2012) (enforcing the whereabouts requirement); *Raducan v. Int'l Olympic Comm.*, Case No. OG 2000/011, at 1 (CAS 2000) (enforcing the strict liability principle).

criteria used for adding substances to the Prohibited List, which will better serve the underlying rationales of the Code.

II. STRUCTURE OF THE CURRENT INTERNATIONAL SYSTEM

The current antidoping regime developed as part of the Olympic movement, which led to its widespread adoption by international bodies.²¹ The IOC holds the rights to the current Olympic Games,²² and any International Federation that wishes to participate in the Olympics must abide by the rules of the Olympic Charter.²³ International Federations are nongovernmental organizations that govern one or more sports at a global level, such as FIFA and *Union Cycliste Internationale* (UCI).²⁴ Given that the IOC holds the keys to the Olympics, the IOC's efforts to implement doping controls has encouraged the International Federations to generally adopt this stance. Although the IOC was largely the impetus for the creation of WADA and CAS, these two bodies now largely operate independently of the IOC, and their reach extends beyond just Olympic sports.

A. World Anti-Doping Agency

In 1998, the IOC was prompted to act when French authorities discovered a stash of performance-enhancing drugs (PEDs)²⁵ at the Tour de France.²⁶ The "Tour of Shame," in which only about half of the riders that began the race finished, led to the creation of WADA approximately a year later at the First World Conference on Doping in Sport.²⁷ WADA was designed to be an independent agency that

21. See Richard H. McLaren, *The Court of Arbitration for Sport*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 32, 32–34 (James A.R. Nafziger & Stephen F. Ross eds., 2011) (describing the IOC's vision for an independent forum); Richard W. Pound & Kerwin Clarke, *Doping in Sport*, in HANDBOOK ON INTERNATIONAL SPORTS LAW, *supra* at 135 (describing the IOC and International Federations' support for the creation of WADA).

22. David B. Mack, Note, *Reynolds v. International Amateur Athletic Federation: The Need for an Independent Tribunal in International Athletic Disputes*, 10 CONN. J. INT'L L. 653, 656 (1995).

23. *Id.*

24. *Anti-Doping Glossary*, WORLD ANTI-DOPING AGENCY (last updated Oct. 2011), <http://www.wada-ama.org/en/Resources/Anti-doping-glossary/> (giving the definition for *International Federation*).

25. For the sake of simplicity, PEDs as used in this Note will refer to prohibited techniques such as blood doping in addition to drugs.

26. William Fotheringham, *Ten Years on from the Tour of Shame that Blew the Lid off Organised Doping*, THE GUARDIAN, July 9, 2008, at S6, available at <http://www.theguardian.com/sport/2008/jul/10/tourdefrance.cycling>.

27. See *id.* (describing the Festina scandal as leading to the creation of WADA). While EPO recombinant could not be tested for in 1998, subsequent testing of samples that were held onto from the 1998 Tour de France showed that many riders were using EPO recombinant. Alexandria Sage, *French Senate Lays Bare Doping in 1998 Tour de*

would coordinate with the IOC and other private and public organizations to battle doping in sports.²⁸ With its constitution ratified in 1999, WADA was operational for the 2000 Olympic Games in Sydney, Australia.²⁹ The 2000 Olympic Games marked the first time WADA conducted tests and employed its independent observer program to oversee testing at the games.³⁰

In 2003, the Second World Conference on Doping in Sport was held in Copenhagen, Denmark, where the Code was ratified.³¹ This enabled all Olympic organizations to adopt the Code before the 2004 Olympic Games in Athens, Greece.³² Later in 2007, the United Nations Educational, Scientific and Cultural Organization International Convention against Doping in Sport allowed national governments to become signatories of the Code.³³ Thus, both private and public entities can become bound by the Code, which has further bolstered doping controls.

The Code governs the implementation of antidoping practices by its signatories.³⁴ Two of the more important international standards incorporated into the Code are the Prohibited List and the International Standard for Testing.³⁵ The Prohibited List is updated every year by WADA and names all of the substances that are prohibited both in competition and out of competition.³⁶ The International Standard for Testing provides requirements for test distribution planning, notification of athletes, preparing for and conducting sample collection, post-test administration, and transport

France, REUTERS (July 24, 2013, 12:43 PM), <http://www.reuters.com/article/2013/07/24/us-doping-cycling-france-idUSBRE96N0PA20130724>.

28. See Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. The Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 165 (2006) (describing WADA's mission to coordinate the fight against doping).

29. See Arne Ljungqvist, *The International Anti-Doping Policy and Its Implementation*, in GENETIC TECHNOLOGY AND SPORT: ETHICAL QUESTIONS 13, 17 (Claudio Tamburrini & Torbjörn Tännsjö eds., 2005) (stating that WADA gradually started to become operational in 2000).

30. See WORLD ANTI-DOPING AGENCY, WADA INDEPENDENT OBSERVER REPORT 1 (2000), available at http://www.wada-ama.org/Documents/Anti-Doping_Community/Ind-Observer_Reports/WADA_IO_Report_Olympic_Games_2000.pdf (describing the initial creation and objectives of the independent observer).

31. See Connolly, *supra* note 28, at 165 (describing the Code's adoption in Copenhagen).

32. *Id.*

33. See United Nations Educational, Scientific and Cultural Organization, International Convention Against Doping in Sport art. 3, Oct. 19, 2005, available at <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf#page=2> (noting the "need to build the capacity of States Parties to implement anti-doping programmes").

34. See THE CODE, *supra* note 9, at 16–17 (discussing the implementation expectations shared by the Code's member organizations).

35. See *id.* at 30, 38 (incorporating the Prohibited List and International Standard for Testing as part of the Code).

36. THE CODE, *supra* note 9, art. 4, at 29–30.

of samples; it also requires national antidoping organizations to conduct regular testing.³⁷ It also provides the “whereabouts requirement” for athletes in certain testing pools.³⁸ The Code and the international standards that it references bind all signatories.³⁹

B. Court of Arbitration for Sport

CAS, much like WADA, was also created by the IOC to quickly and cost effectively settle sports-related disputes.⁴⁰ At first, CAS was fully funded and managed by the IOC, but an independent entity was created in 1994 to oversee it.⁴¹ Today, CAS is operated by the International Council for Arbitration for Sport and consists of a pool of approximately 275 arbitrators that are legally trained and familiar with sports law.⁴² CAS is headquartered in Lausanne, Switzerland, but it also has courts located in New York and Sydney.⁴³

The disputes that CAS settles are purely contractual in nature.⁴⁴ Athletes generally agree to abide by an International Federation’s rules when they compete in a competition or sign a license agreement.⁴⁵ The IOC, national Olympic committees, and almost all International Federations have bylaws and statutes that refer disputed eligibility cases to CAS.⁴⁶ In addition, Article R47 of CAS’s code allows arbitration clauses to be included in governing bodies’ statutes or regulations.⁴⁷ Accordingly, CAS has jurisdiction over the

37. INTERNATIONAL STANDARD, *supra* note 18, art. 1.0, at 6.

38. *See id.* art. 11.1, at 41 (detailing the athlete whereabouts requirements).

39. *See* THE CODE, *supra* note 9, at 11–12 (noting that the International Standards are mandatory for signatories).

40. *See History of the CAS: Origins*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/history> (last visited Dec. 17, 2013) (noting the importance of having a flexible, quick, and inexpensive resolution procedure).

41. *See* Connolly, *supra* note 28, at 165 (describing the CAS management functions carried out by the independent entity).

42. McLaren, *supra* note 21, at 35; *History of the CAS: Organisation and Structure of the ICAS and CAS*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0> (last visited Dec. 17, 2013).

43. *The Decentralized CAS Offices and the Ad Hoc Divisions*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/infogenerales.asp/4-3-240-1011-4-1-1/5-0-1011-3-0-0/> (last visited Dec. 17, 2013).

44. *See* Connolly, *supra* note 28, at 164 (“[N]early all athletes that compete within the Olympic Movement have agreed by their participation . . . that CAS will be the final arbiter of disputes regarding sanctions imposed by their governing bodies.”).

45. *Id.*

46. *See* Frank Oschütz, *Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARQ. SPORTS L. REV. 675, 677 (2002) (describing arbitration agreements between organizations and athletes).

47. *Id.*; *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*, COURT OF ARBITRATION FOR SPORT (Jan. 1, 2012), http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_en_2001.01.pdf.

overwhelming majority of international doping cases.⁴⁸ For example, Lance Armstrong agreed to abide by USA Cycling's rules when he signed international cycling license applications.⁴⁹ USA Cycling's rules incorporated the protocols of the U.S. Anti-Doping Agency (USADA), which is a signatory of the Code.⁵⁰ USADA's protocols contained a provision that all doping violations must be submitted to arbitration.⁵¹ As a result, when Armstrong asked a U.S. federal court for an injunction against his lifetime ban, his only claim was that CAS did not provide due process, which the court later rejected.⁵² Armstrong's only recourse would have been to proceed through the arbitration process up to CAS, an avenue he did not pursue.⁵³

Additionally, CAS awards are generally enforceable through the New York Convention, which allows for enforcement of arbitral awards across international boundaries.⁵⁴ CAS has jurisdiction over antidoping cases in more than twenty-eight different sports across the globe,⁵⁵ and its awards are enforceable in 149 different countries.⁵⁶ Any decision that is promulgated by a National Anti-Doping Organization or International Federation can be appealed to CAS by WADA.⁵⁷ This combination of a wide swath of CAS jurisdiction with the general enforceability of CAS awards has enabled CAS to essentially become the "world's supreme court of sport."⁵⁸

48. See THE CODE, *supra* note 9, art. 13.2.1, at 80 (providing for an appeal exclusively to CAS for international events and international-level athletes).

49. See *Armstrong v. Tygart*, 886 F. Supp. 2d 572, 588–89 (W.D. Tex. 2012) (describing the multiple times that Armstrong effectively agreed to USA Cycling's rules).

50. *Id.* at 589.

51. See *id.* at 588 (noting that the initial question of whether the dispute is arbitrable must also be submitted to arbitration).

52. *Id.* at 580–81.

53. Armstrong later admitted to using performance-enhancing substances and illegal techniques. Sage, *supra* note 27.

54. Connolly, *supra* note 28, at 164. The New York Convention, also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, currently has 149 parties. *Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf> (last visited Dec. 17, 2013).

55. See *List of IFs*, WORLD ANTI-DOPING AGENCY (last updated May 2012), <http://www.wada-ama.org/en/Anti-Doping-Community/IFs/List-of-IFs/> (showing twenty-eight "ASOIF MEMBERS").

56. *Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 54, at 1.

57. See THE CODE, *supra* note 9, art. 13.1, at 78 (noting that decisions under the Code or under rules adopted pursuant to the Code may be appealed to CAS).

58. Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 MARQ. SPORTS L. REV. 305, 305 (2010).

III. APPLICATION OF THE CODE: TWO UNIQUE CASES

Although the Code is supposed to be applied uniformly in every country and by every federation that adopts it,⁵⁹ this does not always happen. Enforcement is largely the responsibility of the International Federations and the National Anti-Doping Organizations, which are signatories of the Code.⁶⁰ Each organization is responsible for testing athletes at the competitions it hosts.⁶¹ For example, USADA is responsible for testing cyclists that are competing in national competitions, while the IOC is responsible for testing athletes at the Olympics. Two particular cases demonstrate how CAS and WADA utilize the appeals process to bring various organizations into conformity with the Code. These cases also demonstrate the unique issues that confront CAS.

A. *The Case of Alberto Contador*

Alberto Contador was a Spanish cyclist who was one of only five riders to win the “grand tours” of France, Italy, and Spain.⁶² Contador’s reputation was further solidified when he won the Tour de France consecutively in 2009 and 2010.⁶³ Contador, however, became the center of a controversy after he announced he tested positive for clenbuterol during the 2010 Tour.⁶⁴ Clenbuterol was placed on the Prohibited List because it can be used as a fat-metabolizing agent, which can boost the ratio of fat to muscle in an athlete’s body.⁶⁵ At the time of the announcement, Contador attributed the positive test to his consumption of contaminated meat.⁶⁶

59. See THE CODE, *supra* note 9, arts. 20.3, 20.5, at 106, 110 (requiring conformity by International Federations and National Anti-Doping Organizations).

60. *Id.*

61. See INTERNATIONAL STANDARD, *supra* note 18, art. 4, at 23 (requiring the antidoping organization to provide testing plans for sports under their jurisdiction).

62. See Ian Austen, *2010 Tour de France Winner Found Guilty of Doping*, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/sports/cycling/alberto-contador-found-guilty-of-doping.html?_r=0 (chronicling Contador’s wins and subsequent doping infraction).

63. *Id.*

64. *Id.*

65. See PROHIBITED LIST, *supra* note 7, at S1.2 (showing clenbuterol as a prohibited anabolic agent); Gordon S. Lynch, *Beta-2 Agonists*, in PERFORMANCE ENHANCING SUBSTANCES IN SPORT AND EXERCISE 47, 51 (Michael S. Bahrke & Charles E. Yesalis eds., 2002) (discussing athletes that use clenbuterol for its anabolic and lipolytic effects).

66. Juliet Macur, *2nd Failed Test Puts Heat on Contador*, N.Y. TIMES (Oct. 4, 2010), <http://www.nytimes.com/2010/10/05/sports/cycling/05cycling.html>. Farmers have been known to use clenbuterol on animals for its growth-promoting properties. See, e.g., *Skinny Pigs, Poison Pork: China Battles Farm Drugs*, FOX NEWS (Jan. 24, 2011), <http://www.foxnews.com/world/2011/01/24/skinny-pigs-poison-pork-china-battles-farm-drugs/>. Given the current sophistication of clenbuterol tests, small amounts have become relatively easy to detect in blood and urine. DR. DOUWE DE BOER, EXPERT

Contador's positive testing for clenbuterol was confirmed by both the A and B samples that were taken according to WADA's standardized testing procedures.⁶⁷ Each time a test is administered by WADA, it collects two samples and tests only the A sample. The B sample is then stored,⁶⁸ and if the A sample tests positive, the athlete can request testing of the B sample to confirm the positive result.⁶⁹ Since clenbuterol does not have a threshold limit for tests, the Code bans any amount of it.⁷⁰ As a result of the positive test, Contador was provisionally suspended, and the Spanish Cycling Federation or *Real Federación Española de Ciclismo* (RFEC) initiated disciplinary proceedings against him.⁷¹

Initially, the RFEC ruled that Contador had committed a doping violation but that he was without significant fault or negligence.⁷² Given this determination, the RFEC proposed a one-year suspension of Contador, as well as stripping him of his Tour de France title, instead of the remedy provided for in the Code—disqualification of his Tour de France result and a two-year suspension.⁷³ Contador, however, refused the proposal made by the RFEC and was subsequently acquitted of the doping violation, retaining his Tour de France title.⁷⁴ The RFEC had apparently accepted Contador's contaminated-meat explanation.⁷⁵ The RFEC, however, had ignored the Code's provision that disqualifies athletes from an event when they test positive regardless of fault or negligence.⁷⁶ Contador never disputed the validity of the test, just the source of the prohibited

OPINION ON THE ORIGIN OF THE UNEXPECTED PRESENCE OF CLENBUTEROL IN BIOLOGICAL SAMPLES 6 (Sept. 3, 2010), available at <http://www.elconfidencial.com/fotos/2010093012ContadorClenbuterol.pdf>. The sample in Contador's urine was fifty trillionths of a gram. *Id.* at 7.

67. Union Cycliste Internationale v. Contador, Case No. 2011/A/2384, at 4 (CAS 2012).

68. See INTERNATIONAL STANDARD, *supra* note 18, E.4.2, at 83 (noting the requirements for having an A and B sample).

69. THE CODE, *supra* note 9, art. 7.2, at 41–42.

70. See WADA Statement on Clenbuterol, WORLD ANTI-DOPING AGENCY (June 15, 2011), <http://www.wada-ama.org/en/media-center/archives/articles/wada-statement-on-clenbuterol/> (stating that there is no threshold for clenbuterol).

71. Contador, Case No. 2011/A/2384, ¶¶ 12, 19, at 5–6.

72. *Id.* ¶ 25, at 6.

73. *Id.*; THE CODE, *supra* note 9, at art. 10.2.

74. Contador, Case No. 2011/A/2384, ¶ 27, at 7.

75. See *id.* ¶ 28 (finding that no significant fault or negligence was committed and that there was a great probability that “the positive test was a consequence of eating contaminated food,” which cannot be considered negligent).

76. THE CODE, *supra* note 9, art. 9, at cmt. (“When an Athlete wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other Athletes in that Competition regardless of whether the gold medalist was at fault in any way.”).

substance.⁷⁷ According to the Code, any athlete who competes with a prohibited substance in their system should be disqualified.⁷⁸

WADA and the UCI both quickly appealed the decision made by the RFEC, as provided for in the Code.⁷⁹ WADA and the UCI both argued that Contador had not met his burden of proof in showing that the positive clenbuterol test more likely originated from contaminated meat than from some other source, mainly a blood transfusion or a contaminated food supplement.⁸⁰ Contador maintained his contaminated-meat defense and was left with the task of circumventing strict liability by demonstrating that he was not significantly at fault for the positive test.⁸¹ Contador also forfeited any chance of retaining his Tour de France title due to the disqualification provisions of the Code.⁸²

CAS handed down a decision that was significantly at odds with that of the RFEC.⁸³ CAS found that Contador had not sufficiently proved that contaminated meat was more likely than other sources from which the clenbuterol could have originated.⁸⁴ CAS also held that identifying the source of the prohibited substance by a balance of the probabilities, equivalent to the preponderance of the evidence standard, was a prerequisite to showing that the athlete was not significantly at fault.⁸⁵ Since clenbuterol was banned for use on livestock in Europe and contamination cases were rare, the court found it unlikely that contaminated meat was the source.⁸⁶ Further, Contador was unable to produce evidence that the supplier of the beef actually administered clenbuterol to its animals.⁸⁷ Without a stronger showing, Contador could not place his case into the exceptional category that offers reduced suspensions under the Code.⁸⁸ The

77. See *Contador*, Case No. 2011/A/2384, ¶ 135, at 28 (summarizing Contador's argument that the sample was the result of contaminated meat).

78. THE CODE, *supra* note 9, at art. 9 ("Only a 'clean' Athlete should be allowed to benefit from his or her competitive results.").

79. See *id.* at art. 13.2.3 (allowing International Federations and WADA to appeal to CAS for cases under the national-reviewing body).

80. See *Contador*, Case No. 2011/A/2384, ¶¶ 130, 132, at 19–22, 23–26 (arguing that a contaminated supplement or a blood transfusion were both likely sources).

81. *Id.* ¶ 135, at 28–29.

82. See THE CODE, *supra* note 9, at art. 9 (providing for automatic disqualification).

83. See *Contador*, Case No. 2011/A/2384, ¶ 512, at 97 (providing for two years of ineligibility).

84. See *id.* ¶ 487, at 92–93 (finding that Contador took supplements in considerable amounts).

85. *Id.* ¶ 215, at 47.

86. *Id.* ¶ 331, at 70.

87. *Id.* ¶¶ 328–29, at 60. Contador pointed to two consecutive days in which he ate meat—July 20 and 21, 2010—and blamed his positive test on one of those two occasions. *Id.* ¶¶ 268–71, at 57–58. The positive result came from a test administered on July 21, 2010. *Id.* ¶ 8.

88. See *id.* ¶ 493, at 93 (finding none of the conditions for reducing sanctions applicable).

Spanish cyclist was not only stripped of his title but also became ineligible for the standard two-year period associated with first-time doping offenses.⁸⁹ Because Contador continued racing after he was acquitted by the RFEC, he was also divested of twelve other wins.⁹⁰

B. *The British Olympic Association's Lifetime-Ban Rule*

Prior to the 2012 London Olympics, Dwain Chambers sparked contention when he decided to appeal his lifetime ban from representing Britain in the Olympics. The British Olympic Association (BOA) had a bylaw prohibiting any athlete convicted of a doping offense from representing Great Britain in the Olympics.⁹¹ The BOA bylaw was similar to a prior IOC rule that mandated a lifetime ban from the Olympics for any athlete who had been suspended for more than six months as a result of a doping infraction.⁹² That IOC regulation had been struck down by a CAS decision for changing the sanctions provided for in the Code.⁹³ With the IOC regulation invalidated, the same fate seemed likely for the BOA lifetime ban.⁹⁴

Dwain Chambers, the appellant in the CAS case, was a British sprinter who had posted the fastest time by a European in the hundred-meter dash in Sydney.⁹⁵ Three years later, Chambers was implicated in the Bay Area Laboratory Cooperative (BALCO) scandal when he tested positive for the new designer steroid THG.⁹⁶ With his positive test, Chambers was added to the list of athletes tainted by

89. See *id.* ¶ 512, at 96–97 (“[A] two year period of ineligibility shall be imposed upon the Athlete, running as of 25 January 2011 . . .”).

90. See Austen, *supra* note 62 (explaining that Contador was stripped of his 2010 Tour de France win along with twelve other wins).

91. British Olympic Ass. (BOA) v. World Anti-Doping Agency (WADA), Case No. 2011/A/2658, ¶¶ 2.1–2 (CAS 2012); see British Olympic Ass’n, *Statement from the British Olympic Association*, TEAM GB (Nov. 16 2011, 12:00 PM), <http://www.teamgb.com/news/statement-british-olympic-association> (“There is no clearer expression of the commitment British athletes have made to upholding the values of fair play and clean competition than the British Olympic Association’s (BOA’s) selection policy, which sets out the parameters under which an athlete may earn the ultimate honour of representing Team GB in the Olympic Games.”).

92. See *British Olympic Ass. (BOA)*, Case No. 2011/A/2658, ¶¶ 2.1–2 (describing the BOA rule and the IOC rule).

93. See *id.* ¶ 2.2 (describing the prior IOC case).

94. See *id.* ¶ 2.3 (citing the finding of noncompliance for BOA).

95. See Dwain Chambers, *Dwain Chambers: The Cops Knew What They Were Looking For, I Was a Walking Junkie*, MAIL ONLINE (Mar. 2, 2009), available at <http://www.dailymail.co.uk/sport/othersports/article-1158339/DWAIN-CHAMBERS-EXCLUSIVE-The-cops-knew-lookingI-walking-junkie.html> (“The 2000 Sydney Olympics marked Britain’s Dwain Chambers as the fastest man in Europe.”); Daniel Gandert, *The Battle Before the Games: The British Olympic Association Attempts to Keep Its Lifetime Ban for Athletes with Doping Offenses*, 32 NW. J. INT’L L. & BUS. 53–54 (2012).

96. Gandert, *supra* note 95, at 54.

the scandal, alongside Barry Bonds, Marion Jones, and Jason Giambi.⁹⁷ Chambers was subsequently banned from competition for two years and was also banned from the Olympics for life, according to both the IOC rule and the BOA bylaw.⁹⁸ As a result of Chamber's ban and other athletes' bans going into the 2012 Olympics, WADA issued a letter of noncompliance to BOA, and BOA subsequently appealed that finding to CAS.⁹⁹

On its face, BOA's bylaw conflicted with the Code's provision for a two-year suspension. In contrast to the Contador case where the governing body implemented a less stringent sanction, BOA had implemented a more stringent rule in an effort to defend the interests of clean athletes representing Britain at the Olympics.¹⁰⁰ In addition, the prior IOC case overturning a similar bylaw made the continued implementation of such a ban a dubious proposition within the framework of the Code.¹⁰¹ That case demonstrated that substantive changes implemented by a governing body's bylaws were clearly inconsistent with the purposes of the Code in having a uniform framework.¹⁰² Although BOA tried to frame its bylaw as a selection policy in its appeal to CAS, the arbitration panel was unconvinced and held that the bylaw was effectively a double sanction.¹⁰³ The arbitration panel looked beyond the language of the regulation and found that it had the same effect as the Code's period of ineligibility.¹⁰⁴ As such, the bylaw could not preempt the uniformly adopted code in the punishment and ineligibility requirements for doping offenses.¹⁰⁵

97. See *What Is the Balco Scandal?*, TELEGRAPH (Mar. 21, 2011), <http://www.telegraph.co.uk/sport/othersports/drugsinsport/8396065/What-is-the-Balco-scandal.html> (describing the BALCO scandal and the athletes implicated).

98. See *British Olympic Association (BOA)*, Case No. 2011/A/2658, ¶¶ 2.1, 2.7 n.4 (describing the rule and Chambers' unsuccessful appeal against it in 2008).

99. *Id.* ¶¶ 2.11, 3.1.

100. See *British Olympic Ass. (BOA)*, Case No. 2011/A/2658, ¶¶ 2.1–.2 (defending the bylaw ardently).

101. See *United States Olympic Comm. v. Int'l Olympic Comm.*, Case No. 2011/O/2422, ¶ 8.37, at 32 (CAS 2011) (holding that the IOC regulation prohibiting athletes who have been suspended for more than six months for antidoping violations from participating in the next Olympic Games following the expiration of the suspension was not in compliance with the Code).

102. See *British Olympic Ass. (BOA)*, Case No. 2011/A/2658, ¶ 8.40, at 32 (labeling the bylaw a double sanction); THE CODE, *supra* note 9, at art. 23.2.2 (providing that antidoping rules must be implemented by signatories without substantive change).

103. *British Olympic Ass. (BOA)*, Case No. 2011/A/2658, ¶ 8.40, at 32.

104. See *id.* ¶ 8.4, at 25 (“The essence of both provisions is disbarment from participation.”).

105. See *id.* ¶¶ 8.12–.13, at 26–27 (stating that signatories have limited their autonomy by agreeing to the Code and that the Code requires consistency).

IV. THE STRICT LIABILITY PRINCIPLE: THE "CORNERSTONE"

The principle of strict liability for doping infractions stands as the cornerstone of the complicated procedural and substantive framework of the Code.¹⁰⁶ Strict liability, simply defined, is liability without fault.¹⁰⁷ In doping cases, disqualification does not depend on any guilty intent of the athlete in taking the substance or having it in their body.¹⁰⁸ Disqualification is automatic once the sample is proven to contain a prohibited substance.¹⁰⁹

Although strict liability is a legal standard, it is intricately related to some of the more complicated scientific and procedural issues that confront antidoping enforcement.¹¹⁰ This Part will address the rationales behind the strict liability principle, its relationship to these other scientific and procedural antidoping issues, and how culpability affects sanctions for athletes.

A. Rationale for Strict Liability

For an effective antidoping regime to exist, there must be a legal principle that allows that regime to efficiently operate and punish athletes that engage in prohibited conduct. Adherence to a negligence standard would likely prove unworkable for antidoping officials.¹¹¹ In addition to scientifically proving that a specific prohibited substance was present in an athlete's body, antidoping officials would also have the burden of proving that the athlete was negligent in allowing that substance to enter his or her body.¹¹² Such evidence is rarely available in antidoping cases, and the best proof of any antidoping infraction is the blood or urine sample taken by antidoping

106. See, e.g., Andy Gray, *Doping Control: The National Governing Body Perspective*, in *DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES* 11, 14 (John O'Leary ed., 2001) ("It is the fundamental cornerstone of the doping control rules of the overwhelming majority of sports that doping is strictly forbidden – so called 'absolute', or strict, liability.").

107. BLACK'S LAW DICTIONARY 998 (9th ed. 2009) (defining *strict liability* as "liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe").

108. See Peter Charlish, *The Biological Passport: Closing the Net on Doping*, 22 *MARQ. SPORTS L. REV.* 61, 63–64 (2011) (discussing two separate cases that emphasized that doping does not depend on guilty intent).

109. *Id.*

110. Connolly, *supra* note 28, at 166–74 (citing scientific and procedural issues that complicate the strict liability scheme).

111. See Gray, *supra* note 106, at 14–15 ("['I]ntent' would have a significant detrimental effect on the efficacy of doping control programmes."); Connolly, *supra* note 28, at 184 ("Any such standard would increase the probability that cheating athletes would be able to slip past anti-doping regulations.").

112. See Connolly, *supra* note 28 at 182 ("Critics of the strict liability principle point to the fact that the athlete is not required to display any culpable negligence in order to be punished . . .").

authorities.¹¹³ For an effective antidoping regime to exist then, these samples must be the essential element for proving guilt. This is the stance that the Code takes in applying strict liability to positive tests and then giving athletes the opportunity to reduce their sanctions if they can prove no significant fault.¹¹⁴

All of this assumes that an antidoping framework is needed, an assumption that is often considered intuitive.¹¹⁵ However, beyond intuition, some very important rationales support the existence of such a framework. Two of the rationales most commonly cited for the existence of WADA and the Code are maintaining the integrity of competition and protecting the health of the athletes.¹¹⁶

The first foundation of antidoping relates to the concept of fair play, and the ingestion of PEDs is often viewed as cheating or providing an unfair advantage.¹¹⁷ However, if using these drugs were not against the rules, then it could no longer be said that using them would be cheating per se because all athletes could benefit from their use. Consequently, a broader principle must exist relating to competition generally, rather than the relative equality of athletes within the game.¹¹⁸ One argument is that steroids and other PEDs are unnatural and cause an artificial level of performance unsustainable without the aid of such substances.¹¹⁹ Consequently,

113. See, e.g., Richard H. McLaren, *An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports*, 16 MARQ. SPORTS L. REV. 193, 200–01 (2006) (discussing the difficulty of proving doping in the Mark French case without the benefit of a positive analytical test).

114. THE CODE, *supra* note 9, art. 2.1.1, at cmt. (“Under the strict liability principle, an Athlete is responsible, and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete’s Sample. . . . However, the Athlete then has the possibility to avoid or reduce sanctions if the Athlete can demonstrate that he or she was not at fault or significant fault . . .”).

115. See, e.g., Chuck Klosterman, *There Are No Sound Moral Arguments Against Performance-Enhancing Drugs*, N.Y. TIMES MAG., Aug. 30, 2013, at MM14, available at http://www.nytimes.com/2013/09/01/magazine/there-are-no-sound-moral-arguments-against-performance-enhancing-drugs.html?_r=1& (“[W]e’ve collectively agreed it’s O.K. for an injured football player to take a shot of Toradol to help ignore an injury, but not a shot of testosterone to help that injury heal faster.”).

116. See ROBERT L. SIMON, FAIR PLAY: THE ETHICS OF SPORT 77–78, 83–84 (3d ed. 2010) (analyzing the health rationale as a paternalistic goal and the fairness of steroid use absent their prohibition); see THE CODE, *supra* note 9 (citing the Code’s purpose in promoting health, fairness, and equality for athletes worldwide in the “Purpose, Scope and Organization” section).

117. See SIMON, *supra* note 116, at 84 (“Many of us share the feeling that the use of performance enhancers provides an unfair advantage . . .”); Bengt Kayser, Alexandre Mauron & Andy Miah, *Current Anti-Doping Policy: A Critical Appraisal*, 8 BMC MED. ETHICS 2, 2 (2007) (discussing the ethical foundation of antidoping as rooted in the idea of fair play).

118. See SIMON, *supra* note 116, at 84 (likening the use of steroids to enhanced golf balls that would allow golfers to avoid one of the major challenges of the game).

119. See Lewis Kurlantzick, *Is There a Steroids Problem? The Problematic Character of the Case for Regulation*, 40 NEW ENG. L. REV. 789, 790 (2006) (“There appears to be no moral distinction between the various ‘natural’ and ‘unnatural’ assists

competitive results produced by PEDs lack a certain authenticity whereas competition without these drugs appears more credible.¹²⁰ Further, allowing PEDs might compel athletes that do not wish to alter their bodies with PEDs to make an unwilling decision for the sake of remaining competitive against their peers.¹²¹ Within all of these justifications lies a concern for preserving competition as it exists without PEDs, due to the possibility of unfairness or unwanted changes in the nature of competition.¹²²

However, these rationales for preserving the integrity of sports are open to several counterarguments. With regard to the unfairness of enhancement via substances, many changes in technology, such as new equipment, new training techniques, and the availability of certain dietary supplements, have allowed athletes to “enhance” their competitive results in modern times.¹²³ Additionally, certain immutable genetic characteristics, such as the ability to transport oxygen, make certain athletes more likely to excel in competition than other competitors that do not possess these traits.¹²⁴ These variables are generally accepted in competitive sports today, while PEDs are not.¹²⁵ The challenge facing the “unfairness” argument against PEDs is determining where to draw the line between acceptable and unacceptable means of enhancing an athlete’s performance.

Perhaps the best justification for banning PEDs for competitive reasons is their ability to transform the nature of competition.¹²⁶ Most legal performance enhancers in sports simply cure defects that existed in that sport or allow only minor changes in the nature of competition.¹²⁷ Further, PEDs are not the only performance enhancers that are prohibited.¹²⁸ Two notable examples are the use of the Specialized Shiv bicycle in cycling, which the UCI banned,¹²⁹ and

to performance.”); David M. Wachutka, *Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies*, 8 PEPP. DISP. RESOL. L.J. 147, 149–50 (2007) (commenting on the expressed rationales underlying antidoping policies).

120. See, e.g., Wachutka, *supra* note 119, at 150 (discussing baseball fans’ rejection of Bonds’ home-run record).

121. See SIMON, *supra* note 116, at 82–83 (discussing the coercion argument).

122. *Id.*; Kurlantzick, *supra* note 119 at 790–91 (questioning the alleged justifications for regulating steroids).

123. See SIMON, *supra* note 116, at 90 (discussing equipment innovations and carbohydrate loading).

124. See Kayser, Mauron & Miah, *supra* note 117 (discussing a family that possessed unique oxygen-carrying abilities).

125. See PROHIBITED LIST, *supra* note 7 (prohibiting various substances and techniques, such as blood doping).

126. SIMON, *supra* note 116, at 89–90.

127. See *id.* at 89 (discussing wooden golf shafts and their potential to warp).

128. See *id.* (discussing certain golf clubs and swimsuits that are prohibited).

129. See Andrew Hood, *Contador Unhappy About UCI Decision to Ban Bike*, VELO NEWS (Feb. 20, 2010), <http://velonews.competitor.com/2010/02/news/contador->

the use of anchoring in golf that will be disallowed starting in 2016.¹³⁰ The UCI's ban of the Shiv comported with an exacting set of rules designed to control the aerodynamics of a rider's bicycle and limit the impact of equipment upon a rider's performance.¹³¹ Similarly, the proposed ban on anchoring putters arose out of a belief that it was easier to use such a putter than to use a putter the golfer had to hold away from his body.¹³² Consequently, PEDs can be viewed similarly to these other technologies, which distance competition from the skills of the athlete and put the focus on the equipment and technology used.¹³³ The argument is not simply that these prohibited substances are performance enhancing: it is that they are so performance enhancing as to reduce the challenge of the game to an unacceptable extent.¹³⁴ Although this may not be a completely satisfying reason for the complex regulatory framework around antidoping, it is at least a defensible one, and one that can be applied to the rules established by WADA.

In addition to preserving competition, the adverse health risks of using PEDs are often discussed as a reason for banning them.¹³⁵ The use of anabolic steroids has been associated with deleterious effects on the reproductive system, elevated blood pressure, hazardous

unhappy-about-uci-decision-to-ban-bike_105666 (reporting on Contador's unhappiness with the UCI's decision to ban his Specialized Shiv time trial bike).

130. Anchoring is the practice of holding the putter to the chest while putting in golf. United States Golf Association & Rules and Amateur Status, *The R&A and USGA Announced Proposed Rules Change to Prohibit Anchored Strokes*, UNITED STATES GOLF ASS'N (Nov. 28, 2012), <http://www.usga.org/news/2012/November/Proposed-Rules-Change-to-Prohibit-Anchoring/>. Mike Stachura, *PGA Tour Agrees to USGA Anchoring Ban*, GOLF DIGEST (July 1, 2013), <http://www.golfdigest.com/golf-equipment/blogs/hotlist365/2013/07/pga-tour-agrees-to-usga-anchor.html>. The Specialized Shiv contained a questionable aerodynamic nosecone that may have not been a necessary structure for the frame of the bicycle.

131. See Julien Carron, Union Cycliste Internationale, *Check of the Equipment and Position in Competition*, USA CYCLING, <http://www.usacycling.org/forms/uci/UCI-Equipment-and-Position-Controls.pdf> (last visited Dec. 18, 2013) (noting that the enforcement of the bicycle rules improves the fairness and safety of the races).

132. See Karen Crouse, *A Golf Club to Divide Them: Notable Wins with Long Putters Fuel Debate on Possible Ban*, N.Y. TIMES, Nov. 17, 2012, at SP1 (discussing how anchoring puts might cure the effect of shaky hands); Adam Schupak, *How Ernie Els Got the Belief Back*, N.Y. TIMES (July 17, 2012), available at <http://www.nytimes.com/2012/07/18/sports/golf/18iht-srboels18.html?pagewanted=all> ("As long as it's legal, I'll keep cheating like the rest of them . . .").

133. See SIMON, *supra* note 116, at 90 (discussing how PEDs could change the winner of a competition from the best athlete to the one most responsive to those drugs).

134. *Id.* at 91–92.

135. See Fred Hartgens & Harm Kuipers, *Effects of Androgenic-Anabolic Steroids in Athletes*, 34 SPORTS MED. 513, 535–43 (2004) (discussing studies and data on the adverse effects of androgenic-anabolic steroids in athletes); S. Leigh-Smith, *Blood Boosting*, 38 BRIT. J. SPORTS MED. 99, 100 (2004) (discussing the adverse effects of blood boosting).

effects upon the liver, and mood disturbances.¹³⁶ EPO use has been associated with hyperviscosity, a thickening of the blood, and is rumored to have caused the sudden death of eighteen cyclists.¹³⁷ Many of these adverse health effects are still uncertain given the lack of studies available at high dosages.¹³⁸ However, the effects that have been observed in scientific studies may actually be underestimated based on this same fact as well.¹³⁹ Athletes, though, are not protected from every health risk present within their particular sport, begging the question—Why should this particular health risk be mitigated?¹⁴⁰ The answer lies in the dilemma presented to athletes when PEDs are allowed in their particular sport.¹⁴¹

The argument proceeds that if ergogenic drugs such as steroids and EPO are suddenly legalized in sports, then many athletes at the highest level could be faced with the quandary of taking PEDs or dropping out of their sport.¹⁴² If athletes take performance enhancers, then they risk the adverse health consequences.¹⁴³ If athletes abstain from PEDs, then they could risk losing their competitive edge.¹⁴⁴ Scholars have described this situation as presenting athletes with a prisoner's dilemma¹⁴⁵ because the payoff for using PEDs is greater regardless of whether the other athletes in the game choose to use them.¹⁴⁶ If the other athletes choose to use steroids, then also using steroids has a higher payout because of the ability to remain

136. See Hartgens & Kuipers, *supra* note 135, at 535–43 (discussing the various deleterious effects associated with steroids).

137. See Leigh-Smith, *supra* note 135, at 100 (characterizing the deaths as unexplained and possibly the result of hyperviscosity); William Fotheringham, *Inquiry into Belgian Cyclist's Death Raises New Fears over EPO*, THE GUARDIAN (February 15, 2004, 8:02 PM), <http://www.theguardian.com/sport/2004/feb/16/cycling.cycling1> (highlighting the eight cyclists that died of heart attacks).

138. See Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS. L.J. 93, 103 (1990) (“The amount [of steroids] used by the athletes far exceeds the amount that any physician could ethically administer to a controlled study group. This lack of conclusive medical data has undercut the medical community's warnings and credibility with the athletes . . .”) (internal citations omitted).

139. See Hartgens & Kuipers, *supra* note 135, at 518–19 (stating that the available literature “may underestimate the untoward effects” of anabolic steroids).

140. See Geoffrey Rapp, *Blue Sky Steroids*, 99 J. CRIM. L. & CRIMINOLOGY 599, 607 (2009) (discussing how sports authorities fail to regulate sexual promiscuity, tobacco use, or the position of offensive lineman in football).

141. See SIMON, *supra* note 116, at 82–83 (discussing how athletes are put in a position to choose between staying competitive and adverse health effects).

142. *Id.*

143. Hartgens & Kuipers, *supra* note 135; Leigh-Smith, *supra* note 135 (discussing the side effects of blood boosting).

144. See SIMON, *supra* note 116, at 82–83 (discussing the detrimental effects on competitive athletes' performances when abstaining from PEDs, especially when competing against players who are actively using such supplements).

145. See J.C. BRADBURY, *THE BASEBALL ECONOMIST: THE REAL GAME EXPOSED* 114–16 (2007) (presenting the introduction and use of steroids through game theory); Rapp, *supra* note 140, at 606.

146. BRADBURY, *supra* note 145, at 114–16.

competitive as opposed to being surpassed in athletic ability.¹⁴⁷ If the other athletes choose not to use steroids, then using steroids has an even greater payout because of the ability to gain a competitive advantage over them.¹⁴⁸ Thus, banning steroids and other PEDs corrects the prisoner's dilemma and a decision that is individually rational but collectively irrational.¹⁴⁹

Considering the arguments above, the rationales behind antidoping are most applicable when dealing with drugs that actually enhance performance. The health rationale behind banning PEDs stems from the fact that the drugs provide an advantage in the first place, and this advantage is what encourages athletes to use them.¹⁵⁰ For example, one athlete's use of cocaine does not encourage other athletes to use it in the same way EPO or steroids might. As a result, the advantages conferred upon athletes by particular substances should be the target of the framework with the health of the athletes being viewed as a corollary benefit.

B. *Scientific Issues Within Antidoping*

Understanding the current framework also requires comprehending another major pillar of the system: scientific testing. Strict liability within the antidoping framework assumes that scientific testing for prohibited substances is effective.¹⁵¹ Though it has been questioned whether testing technology can actually keep up with the doping technology used by athletes,¹⁵² several promising developments over the last few years have decreased the opportunities for athletes willing to skirt the current system. In 2004, a test was developed to detect the use of human growth hormone (HGH).¹⁵³ This test was severely limited as it only had a two-day detection window.¹⁵⁴ A new test was implemented during the 2012

147. *Id.*

148. *Id.*

149. See SIMON, *supra* note 116, at 86 (discussing how a ban on PEDs solves the prisoner's dilemma).

150. See *supra* text accompanying notes 141–44.

151. See Charlish, *supra* note 108, at 65 (“If a sporting authority does not have an effective test for a performance-enhancing substance, then strict liability becomes irrelevant.”).

152. See Rapp, *supra* note 140, at 604 (describing how the science of drug creation advances quicker than that of drug testing).

153. See David Epstein, *New HGH Test in Place for Olympics*, SPORTS ILLUSTRATED (July 27, 2012, 11:18 AM), http://sportsillustrated.cnn.com/2012/olympics/2012/writers/david_epstein/07/27/london-olympics-drug-testing/index.html (discussing the new test to detect HGH in competitive athletes).

154. *Id.*; Paul Kelso, *UK Anti-Doping's First Positive Test for Human Growth Hormone a Boost for London 2012*, THE TELEGRAPH (Feb. 22, 2010, 8:02 AM), <http://www.telegraph.co.uk/sport/othersports/drugsinsport/7293877/UK-Anti-Dopings-first-positive-test-for-human-growth-hormone-a-boost-for-London-2012.html>

London Olympics that could detect HGH use within a window of a week or possibly longer.¹⁵⁵ In addition, new testing methods, such as the biological passport, indicate that indirect detection of doping may add another tool to the arsenal of WADA.¹⁵⁶ The quick development and implementation of new tests like these discourage athletes from cheating.¹⁵⁷ At the same time, a false positive from these new tests could have severely damaging consequences to antidoping programs,¹⁵⁸ presenting somewhat of a paradox to antidoping authorities. Without tests that can actually detect doping, the strict liability principle has no use. Conversely, unreliable tests that detect cheaters but produce false positives will undermine the use of strict liability and weaken the current regulatory system.¹⁵⁹ This saddles WADA and CAS with the difficult task of quickly finding reliable tests for substances while providing assurance that there is little or no possibility of false positives.¹⁶⁰

The biological passport, one of the newer innovations in antidoping, branches outside of the traditional paradigm for proving doping.¹⁶¹ In the traditional doping case, an athlete's blood or urine sample is tested for specific prohibited substances, and detection of one of these specific substances leads to sanctions.¹⁶² The biological passport detects doping not by looking for specific substances but by measuring an athlete against himself.¹⁶³ The passport consists of an individual electronic record of different blood and urine tests taken over an extended period of time.¹⁶⁴ These different tests are used to create a biological profile of that athlete's various levels and establish parameters around this profile.¹⁶⁵ In the current passport program, hematological and steroidal profiles have been approved for the detection of doping with the hope of establishing an endocrinological

(highlighting the fact that there was not a single case of a positive test for HGH from an athlete until 2009).

155. Epstein, *supra* note 153.

156. See Charlish, *supra* note 108, at 68 (discussing the methodology behind the biological passport and its usefulness in fighting doping in sports).

157. Connolly, *supra* note 28, at 169.

158. *Id.* at 168.

159. *Id.*

160. See *id.* at 169 ("Sport authorities must ensure that the possibility of a false positive is virtually nonexistent.").

161. See Charlish, *supra* note 108, at 67 ("The individualized nature of the profiles increases the sensitivity of the passport, effectively using the athlete's own physiology as a base rather than population norms, as is the case with conventional drug tests.").

162. See *id.* at 69 (contrasting the biological passport with traditional direct detection of doping).

163. See *id.* at 67 (discussing how the biological passport creates an individual hematological profile that detects variations in an athlete's levels over time).

164. *Id.*

165. *Id.*

profile in the near future.¹⁶⁶ The effectiveness of these types of profiles is based upon the stability of human physiology over time and the presence of certain biomarkers that can remain in the body longer than the drugs themselves.¹⁶⁷ As the hematological profile currently stands, levels of hemoglobin, reticulocytes, and various red blood cell indices are measured and analyzed to detect blood doping.¹⁶⁸

The advantage of this methodology is that new toxicology tests are not required for each new designer drug that is developed¹⁶⁹ and that an athlete's own physiology serves as the baseline rather than population norms.¹⁷⁰ This approach allows for detection of doping techniques such as autologous blood transfusions, which use the athlete's own blood and are difficult to detect using traditional testing techniques.¹⁷¹ Such technology brings hope that scandals, which arise from designer drugs like THG, will be avoided in the future through indirect detection.¹⁷² The athlete's biological passport can also account for other heterogeneous factors such as age, sex, and genotype while also accounting for confounding factors like altitude exposure.¹⁷³

However, the institution of the biological passport as a means of sifting out dopers has not been without criticism. One criticism is that the statistical model upon which the biological passport is based cannot definitively prove doping but can only point to a likelihood of doping.¹⁷⁴ However, this criticism can be leveled at any system that requires a showing below absolute certainty to exact punishment. The 99.9 percent confidence interval used in analyzing hematological

166. See Pierre-Edouard Sottas et al., *The Athlete Biological Passport*, 57 CLINICAL CHEMISTRY 969, 971 (2011) (discussing the approved hematological profile used to detect blood doping); *Athlete Biological Passport Operating Guidelines*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/science-medicine/athlete-biological-passport/operating-guidelines/> (last updated Dec. 2013) (describing how the steroidal module launched on January 1, 2014).

167. See *id.* at 970 (discussing the effectiveness of using profiles to detect blood doping).

168. See Torben Pottgiesser et al., *Hemoglobin Mass and Biological Passport for the Detection of Autologous Blood Doping*, 44 MED. & SCI. IN SPORTS & EXERCISE 835, 835 (2012) (describing the hematological profile currently in place).

169. *Id.*

170. Charlish, *supra* note 108, at 67.

171. See Pottgiesser et al., *supra* note 168 (examining the detection of doping in athletes that use doping methods that are notoriously difficult to detect).

172. See *Athlete Biological Passport*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/Resources/Q-and-A/Athlete-Biological-Passport/> (“[N]ew substances or modifications of prohibited substances (e.g. designer drugs) may be difficult to detect by conventional analytical means.”).

173. Sottas et al., *supra* note 166, at 972.

174. See Nicholas Hailey, *A False Start in the Race Against Doping in Sport: Concerns with Cycling's Biological Passport*, 61 DUKE L.J. 393, 420 (2011) (examining the concern that the doping of athletes cannot be proven using current profiles).

levels has also been criticized as overly simplistic and flawed.¹⁷⁵ This argument is not convincing because CAS does not require doping to be definitively proven, rather doping must be proven to a comfortable satisfaction—a standard somewhat above a balance of the probabilities but below reasonable doubt.¹⁷⁶ Another important consideration is that meeting this standard of proof requires considering the reliability of the parameters used in the statistical analysis, as well as any other possible causes of the abnormal level detected.¹⁷⁷ Lastly, objections have been made regarding the use of a panel of three experts to review the suspicious levels after a computer model has flagged them.¹⁷⁸ The fear is that this injects a subjective element into an otherwise objective process.¹⁷⁹ This fear seems overblown given the high confidence interval required by the computer model when flagging a profile.

One issue with the current use of the biological passport is that it stretches the use of the strict liability principle. The Code defines an antidoping violation as the presence of a prohibited substance or its metabolites or markers.¹⁸⁰ Strict liability is applied when one of these three things is found.¹⁸¹ The core of the biological passport is its ability to find markers for prohibited substances or at least other substances that behave and have the same effects as prohibited substances.¹⁸² By placing the emphasis on certain biological landmarks, the biological passport provides strict liability for the pharmacological effects of the substances that athletes take rather than just the substances themselves.¹⁸³ The problem with this mechanism of liability is that it takes the emphasis off the actual

175. Nicolaas (Klaas) M. Faber & Bernard G.M. Vandeginste, *Flawed Science 'Legalized' in the Fight Against Doping: The Example of the Biological Passport*, 15 ACCREDITATION & QUALITY ASSURANCE 373, 373 (2010).

176. Pechstein v. Int'l Skating Union, Case No. 2009/A/1912, ¶ 123 (CAS 2009).

177. *Id.*

178. See Hailey, *supra* note 174, at 423 (examining some of the objections made to the use of the three-expert-panel system).

179. *Id.*

180. Article 2.1.2 of the Code states:

Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

THE CODE, *supra* note 9, at art. 2.1.2.

181. *Id.* at art. 2.1.1.

182. See Charlsh, *supra* note 108, at 67 ("The principle behind the passport is that certain drugs have an impact on these parameters, either raising them or lowering them, and therefore making it possible to detect doping without the necessity of a failed drug test.")

183. *Id.*; THE CODE, *supra* note 9, at art. 2.1.

substances that are prohibited and could potentially find athletes guilty without sufficient notice.¹⁸⁴ It is hard to maintain an effective regime that prevents the use of unwanted substances if the athletes are unaware of which substances are banned or those that cause the test to return a positive result.¹⁸⁵ Although the current Prohibited List is fairly expansive in banning all anabolic agents and artificial enhancers of oxygen uptake,¹⁸⁶ no clear guidance is available to athletes wishing to know exactly which substances they should avoid.

One counter to this argument is that the Code requires athletes to act with the utmost caution in allowing substances to enter their bodies.¹⁸⁷ Even though the Prohibited List acts as a guide, athletes should not let any substance enter their bodies if they do not know exactly what it is. In Chambers' case, he should have been aware that using THG was against the rules even though it was not identified on the Prohibited List: THG was an unknown substance not approved for use in any country.¹⁸⁸ WADA's continual addition of items on the Prohibited List, however, may deter athletes because they can find the substance on the Prohibited List and know unquestionably that the substance is banned.¹⁸⁹ Given this possible deterrence value, the biological passport should not shift the focus from discovering new prohibited substances and giving athletes notice of exactly which substances are banned.

Another issue important to the future of antidoping efforts is the use and detection of gene doping.¹⁹⁰ Gene doping refers to the use of somatic gene cell transfers to enhance athletic performance.¹⁹¹ Gene doping could be used to increase oxygen-carrying capacity through an EPO-like mechanism or increase muscle mass in certain areas of the body.¹⁹² The prospect of gene doping is a difficult one for antidoping

184. For example, Chambers knew that THG was not on the Prohibited List when he began taking it. See Chambers, *supra* note 95. Even though Chambers should have known the substance was illegal since it was not approved for pharmacological use in any country, its presence on the Prohibited List might have provided a clearer deterrent. *Id.*

185. See generally Maria Luisa Calle Williams v. Int'l Olympic Comm., Case No. 2005/A/726 (CAS 2005) (establishing that there is some uncertainty as to which substances are on the Prohibited List).

186. See PROHIBITED LIST, *supra* note 7 (providing a list of banned agents and enhancers).

187. See generally THE CODE, *supra* note 9 (establishing strict liability as the standard for doping).

188. PROHIBITED LIST, *supra* note 7.

189. See *supra* text accompanying note 184.

190. See Joe Fore, *Moving Beyond "Gene Doping": Preparing for Genetic Modification in Sport*, 15 VA. J.L. & TECH. 76, 78 (2010) ("However, the real allure of gene doping is that it is currently all but undetectable.").

191. *Id.*

192. See *id.* at 79 (discussing the ways in which doping contributes to better athletic performance).

authorities because of the complex nature of its detection.¹⁹³ Current biological passport techniques could be effectively used in detecting gene doping that increased EPO production if the gene had not been present prior to developing that athlete's hematological profile.¹⁹⁴ However, the biological passport would probably be ineffective at detecting gene doping if the gene was inserted prior to the establishment of the hematological profile.¹⁹⁵ This is due to the permanent nature of gene doping and the lack of irregularity that would exist in the various blood levels that are normally associated with blood doping.¹⁹⁶ In addition to detection, gene doping also raises serious health concerns for athletes who are willing to risk unproven technology.¹⁹⁷ As with past technological developments, such as recombinant EPO and HGH, genetic modification will likely present the next major hurdle for antidoping authorities.

C. Culpability

The last major issue in understanding the Code is analyzing how culpability functions within the framework. Although the Code and CAS currently use a strict liability regime, the fault of the athlete is still considered when determining sanctions.¹⁹⁸ The current rules provide for an automatic suspension from the competition or the event when a doping infraction is found.¹⁹⁹ Once a doping infraction is proven, the athlete is responsible for establishing no fault or no significant fault in order to have the penalty reduced.²⁰⁰ As an initial matter, this task is difficult for athletes because they are presumed responsible for all of the substances that enter their bodies.²⁰¹

193. *Id.* at 81.

194. *See id.* (explaining the circumstances under which gene doping may be detected using current biological passport techniques).

195. *See id.* (highlighting the current limitations of available biological passport techniques).

196. *Id.*

197. *See* Alex C. Madrigal, *By the Next Olympics, Athletes May Be Getting Routine Gene Doping Test*, THE ATLANTIC (Aug. 3, 2012, 5:14 PM), <http://www.theatlantic.com/technology/archive/2012/08/by-the-next-olympics-athletes-may-be-getting-routine-gene-doping-tests/260700/> (discussing an experiment with gene therapy that caused a monkey to lose its EPO-making ability).

198. *See* THE CODE, *supra* note 9, at arts. 9, 10.1.1 (discussing the automatic disqualification of individual results and sanctions on individuals who allege no fault or negligence).

199. *See id.* at art. 10.1 ("An anti-doping rule violation occurring during or in connection with an *Event* may, upon the decision of the ruling body of the *Event*, lead to *Disqualification* of all of the *Athlete's* individual results obtained in that *Event* with all *Consequences*, including forfeiture of all medals, points and prizes . . .").

200. *Id.* at arts. 10.5.1, 10.5.2.

201. *See id.* at art. 2.1.1 ("It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*.").

It has been clearly established that culpability plays no part in determining whether an athlete should be disqualified from an event.²⁰² In *Baxter v. IOC*,²⁰³ a British alpine skier was disqualified from an event after he used an over-the-counter Vicks Vapor inhaler for his longtime nasal congestion.²⁰⁴ Unknown to Alain Baxter, the U.S.-formulated version contained levmetamfetamine, which was listed as a stimulant on WADA's Prohibited List.²⁰⁵ The British version of the inhaler that he normally used did not contain this substance.²⁰⁶ Using the Vicks inhaler caused him to test positive for methamphetamine in a urine sample taken after he medaled in his slalom event.²⁰⁷ Even though CAS recognized that Baxter's fault was minimal in taking the prohibited substance, it upheld the disqualification—stripping him of his bronze medal.²⁰⁸

One explanation for the use of strict liability even when fault is not present is that it is inherently unfair when an athlete wins with a prohibited substance inside his or her body.²⁰⁹ However, cases like *Raducan v. IOC* make this rationale questionable. In *Raducan*, experts testified that the amount of pseudoephedrine in Raducan's body would have served to inhibit her performance rather than enhance it.²¹⁰ The logic that follows from this evidence is that no unfairness has resulted if the substance was not actually performance enhancing because the athlete obtained no benefits from the substance. In essence, the level of competition remained unaffected. Even though this evidence might mitigate the unfairness concern, allowing such evidence would also cause administrative difficulties.²¹¹ This would invite a new defense that would inevitably be presented to CAS and lower tribunals.²¹² It also brings in new scientific issues that would be difficult to resolve because "actual

202. *Baxter v. Int'l Olympic Comm.*, Case No. 2002/A/376, ¶ 36 (CAS 2002).

203. *See generally id.* (denying the appeal and upholding the IOC Executive Board's decision).

204. *Id.* at 1.

205. *Id.*

206. *Id.*

207. *Id.* at 2. The test for methamphetamine is unable to distinguish between levmetamfetamine and methamphetamine—two different substances. Both are banned, however. *See* PROHIBITED LIST, *supra* note 7.

208. *Baxter*, Case No. 2002/A/376, ¶ 36.

209. *See* THE CODE, *supra* note 9, at art. 9 ("Only a 'clean' athlete should be allowed to benefit from his or her competitive results.").

210. *Raducan v. Int'l Olympic Comm.*, Case No. OG 2000/011, ¶ 19 (CAS 2000).

211. *See Connolly*, *supra* note 28, at 182 (examining the administrative concerns inherent in allowing evidence to be presented that indicates that certain supplements may hinder performance rather than enhance it).

212. *See id.* at 182 n.80 (explaining that allowing a defendant to prove "no performance-enhancing effect" would cause "nearly every doping case [to] come down to a battle of experts" and "likely open the floodgates" for athletes accused of doping to use the defense).

performance enhancement is nearly impossible to conclusively prove or disprove.²¹³

In addition to disqualification, an antidoping violation also makes an athlete ineligible for competition for a period of time.²¹⁴ The standard punishment contemplated by the Code is two years of ineligibility for the first offense and a range between eight years and a lifetime ban for the second offense.²¹⁵ This punishment is fairly severe in light of penalties for similar conduct in Major League Baseball of only fifty games (roughly one third of a season)²¹⁶ and in the National Football League of only four games (roughly a quarter of a season).²¹⁷ These penalties are approximately 13 to 16 percent of what the Code requires in standard cases. The Code provides for reductions in these penalties only in exceptional circumstances when no fault or no significant fault is present.²¹⁸

As CAS has currently defined it, the no fault or negligence standard set out in the Code is almost impossible to meet.²¹⁹ In *Puerta v. International Tennis Federation*,²²⁰ Mariano Puerta tested positive for etilefrine after losing to Rafael Nadal in the French Open final.²²¹ Etilefrine was classified as a stimulant on the Prohibited List due to its ability to constrict blood vessels and increase the heart's ability to pump blood.²²² Such minimal effects did not make it the "cheat's choice of drug."²²³ In the International Tennis Federation and CAS proceedings, Puerta attributed the positive test to his wife's premenstrual medicine effortil, which contained the substance.²²⁴ Puerta claimed that the substance entered his body when he drank from his wife's glass in the cafeteria before the final match.²²⁵ Although the arbitration panel found that Puerta had met his burden

213. *Id.*

214. See THE CODE, *supra* note 9, at art. 10.2 (outlining the periods of time an athlete who has violated Article 2.1 will be ineligible based on the type of violation).

215. *Id.* at arts. 10.2, 10.7.

216. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 22, available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf> (last visited Dec. 18, 2013).

217. NATIONAL FOOTBALL LEAGUE, POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 8, available at <http://images.nflplayers.com/mediaResources/files/PDFs/PlayerDevelopment/2010%20Steroid%20Policy.pdf> (last visited Dec. 18, 2013).

218. THE CODE, *supra* note 9, at art. 10.5.

219. See *Puerta v. Int'l Tennis Fed'n*, Case No. 2006/A/1025 (CAS 2006) (finding that an athlete that tested positive for drinking out of his wife's glass was still negligent).

220. *Id.*

221. *Id.* ¶¶ 2.1–2.

222. See A.J. Coleman, W.P. Leary & A.C. Asmal, *The Cardiovascular Effects of Etilefrine*, 8 EUR. J. CLINICAL PHARMACOLOGY 41, 41 (1975) (finding that etilefrine increases the pulse rate, cardiac output, stroke volume, central venous pressure, and mean arterial pressure).

223. *Puerta*, Case No. 2006/A/1025, ¶ 6.15 (internal quotation marks omitted).

224. *Id.* ¶ 11.3.1.

225. *Id.* ¶ 11.3.3.

in establishing that the drug had come from his wife's glass, it still found that Puerta was negligent in allowing the substance to enter his body.²²⁶ The panel defined no fault or negligence as showing that he could not have reasonably suspected, even with the exercise of the utmost caution, that he had used or been administered the prohibited substance.²²⁷ In drinking from an unknown glass and not from his own water bottle, the panel found that he had not exercised the utmost caution.²²⁸

Placing such a heavy burden upon athletes essentially negates the provision for no fault or negligence.²²⁹ In requiring the utmost caution, the negligence standard is more of an extremely-vigilant-athlete standard rather than a reasonable person standard. The comments to Article 10.5.1 of the Code are enlightening in this regard:

[A] sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances . . . (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink).²³⁰

Given such a high standard, the no fault or negligence standard is of minimal value to athletes when fighting sanctions.

The no significant fault or negligence provision in Article 10.5.2 of the Code is the provision most commonly argued by athletes when attempting to reduce sanctions.²³¹ In order for an athlete to demonstrate no significant fault, the athlete must establish how the prohibited substance entered his or her body, and that established method must meet the no significant fault standard.²³² This can introduce a unique evidentiary issue into an athlete's appeal.²³³ Although the actual doping infraction must be established to a comfortable satisfaction with the arbitration panel,²³⁴ the existence of

226. *Id.* ¶¶ 11.3.8, 11.4.13.

227. *Id.* ¶ 11.4.1.

228. *Id.* ¶ 11.4.2.

229. Anne Amos, *Inadvertent Doping and the WADA Code*, 19 BOND L. REV. 1, 7 (2007).

230. THE CODE, *supra* note 9, arts. 10.5.1–10.5.2, cmt., at 56.

231. See Amos, *supra* note 229, at 9 (“[T]his is the provision that has seen the most use so far.”).

232. See THE CODE, *supra* note 9, at art. 10.5.2 (“When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Article 2.1 (Presence of a *Prohibited Substance* or its *Metabolites* or *Markers*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced.”).

233. See *Union Cycliste Internationale v. Contador*, Case No. 2011/A/2384, ¶ 487 (CAS 2011) (referencing the balance of the probabilities standard in regard to negligence); Charlish, *supra* note 108, at 77 (referencing the comfortable satisfaction standard as applied to doping infractions).

234. Charlish, *supra* note 108, at 77.

no fault or no significant fault must be established only to a balance of the probabilities.²³⁵

V. REVISING THE STRICT LIABILITY PRINCIPLE

Taking into consideration the ethical, scientific, and practical considerations behind doping and strict liability, the best employment of the Code and its primary legal principle is toward the Code's most pressing rationale: a fair-playing field. Although many commentators have suggested changes to the antidoping regime ranging from eliminating strict liability²³⁶ to allowing doping while requiring disclosure of any substances used,²³⁷ this Note maintains that the current WADA regime should be preserved to protect clean athletes and uphold the legitimacy of international competition. Additionally, removing the strict liability principle could greatly hinder antidoping officials' ability to deter athletes that intentionally break the rules.²³⁸ Instead, this Note argues that the strict liability principle merely should be modified to sanction only athletes that intentionally use PEDs, rather than punishing athletes that have not used substances to benefit themselves in competition. Subpart A addresses substances that are currently prohibited but do not serve the goals of preserving fair competition in international sports. Subpart B addresses unintentional doping cases and the mitigation of strict liability in those contexts.

A. Performance-Enhancing Substances

One of the most obvious solutions for upholding the credibility of the strict liability regime is to extend the principle to only those drugs that are actually performance enhancing. However, the Code does not limit its reach to only those substances that enhance performance but uses instead three criteria for listing substances on the Prohibited List. In order to prohibit a particular substance, two of the following criteria must be met: (1) the substance has performance-enhancing potential, (2) the substance represents a potential health risk to the

235. *Contador*, Case No. 2011/A/2384, ¶ 487.

236. See Zachary Blumenthal, Note, *The Punishment of All Athletes: The Need for a New World Anti-Doping Code in Sports*, 9 J. INT'L BUS. & L. 201, 228 (2010) (discussing the feasibility of eliminating strict liability from the current antidoping regime).

237. See Rapp, *supra* note 140, at 615 (discussing the feasibility of allowing the doping of athletes in the current antidoping regime so long as the substance used is disclosed to authorities).

238. See *supra* note 111 and accompanying text.

athlete, or (3) the substance violates the “spirit of sport.”²³⁹ The last criterion is a notably nebulous concept that includes “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.”²⁴⁰ Entities regulated by WADA have consistently argued against this standard.²⁴¹ Exacerbating the problem is the fact that WADA does not publicly disclose the scientific reasons for including a substance on the Prohibited List.²⁴²

WADA should revise the standards for including substances on the list to only one standard: any substance that has a potential ergogenic, pharmacological effect or any medical procedure that has a noncurative performance-enhancing effect.²⁴³ This revision provides a clearer standard for both WADA and athletes and aligns more closely to the goal of having specific banned substances and methods in sports.²⁴⁴ One of the comments to Article 4.3.2 of the Code notes that having performance-enhancing potential as the only standard could open up the field to providing sanctions for carbohydrate loading or eating red meat.²⁴⁵ However, limiting the provision to only drugs and medical procedures would allow such activities to remain outside the purview of the Code. In addition, this standard would encompass procedures such as gene transfer technology that might not endanger the health of athletes but could still pose a threat to competition.²⁴⁶

One concern about this standard is that it does not encompass drugs that are mistakenly believed to be performance enhancing but that actually have detrimental health effects. Such drugs invoke the health concern rationale behind PEDs because other athletes might be encouraged or coerced into using a deleterious drug based on a mistaken belief that the competition will surpass them if they

239. THE CODE, *supra* note 9, art. 4.3, at 32–33. It is important to note that the Code also contains a different provision for banning masking agents used to cover up the use of prohibited substances. *Id.* art. 4.3.2, at 32.

240. *See id.* at 14 (defining *spirit of sport* with the aforementioned characteristics).

241. *See generally* 2015 Code Review - First Code Consultation Phase, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/WADA-Code-Review-2015-1st-Consultation-Part-1-Article-04-Prohibited%20List.pdf (listing comments from various entities regulated by WADA regarding the standards used to include drugs on the Prohibited List).

242. Srikumaran Melethil, *Making the WADA Prohibited List: Show Me the Data*, 50 ST. LOUIS U. L.J. 75, 76 (2005).

243. This would still permit current allowable methods of performance enhancement, such as altitude training.

244. *See* discussion *supra* Part IV.A.

245. THE CODE, *supra* note 9, art. 4.3.2 cmt., at 33.

246. *See id.* (discussing how gene transfer technology should be prohibited, even if it is not harmful, because it is contrary to the spirit of sport).

abstain.²⁴⁷ Including these fake performance enhancers on the Prohibited List, however, seems to be the wrong solution given the possible perverse consequence of encouraging the belief that the drug is, in fact, performance enhancing by including it on the list.²⁴⁸ The best solution for WADA would be to simply educate athletes on the danger of such a drug and the fact that it has no performance-enhancing effect. Presumably, rational athletes would not take a substance with no benefits and only adverse health consequences. Although educating athletes on the lack of performance enhancement of a drug may seem antithetical to WADA's mission, this seems like a more effective and less costly solution than banning and testing. These could be easily implemented alongside testing as WADA is constantly in contact with athletes throughout the testing process.²⁴⁹ WADA could include a health seminar for athletes before testing, educating them on the deleterious effects of prohibited substances as well as other substances that are not on the list but might be assumed to be performance enhancing.²⁵⁰ In addition to educating athletes on health, the seminar would also be an extra deterrent for athletes that may possibly use PEDs that have deleterious effects.

There are several drugs on the current Prohibited List that are not performance enhancing or only questionably meet this standard, one of the most conspicuous being a category named Cannabinoids.²⁵¹ This category includes "cannabis, hashish, marijuana," and synthetic tetrahydrocannabinol (THC).²⁵² Although some experts opine that marijuana and THC could have some performance-enhancing effect in specific sports,²⁵³ much of the evidence points toward cannabis actually impairing performance.²⁵⁴ While it has been shown that marijuana has detrimental health effects,²⁵⁵ it is difficult to discern WADA's other reasons for listing it as a banned substance. Its

247. See *supra* notes 141–44 and accompanying text.

248. See Melethil, *supra* note 242, at 87 ("The mere listing of a substance or method in such a list is misinterpreted by most athletes that the substance or method offers an advantage.").

249. See *Rule Violation Statistics*, *supra* note 10 (showing 8,500 tests administered by the USADA in 2012).

250. Melethil points to HGH as possibly being one of the substances that fits the bill of not being performance enhancing but has been commonly used by athletes due to its presence on the Prohibited List. Melethil, *supra* note 242, at 85.

251. PROHIBITED LIST, *supra* note 7, S8, at 8.

252. *Id.*

253. See Kate Kelland, *Performance Enhancing Dope: Should Sport Ban Cannabis?*, REUTERS (Aug. 6, 2012, 6:47 PM), <http://www.reuters.com/article/2012/08/06/us-oly-dop-cannabis-day-idUSBRE87519120120806> (citing experts that believe cannabis could be useful in sports such as golf or shooting).

254. See C. Heather Ashton, *Pharmacology and Effects of Cannabis: A Brief Review*, 178 BRIT. J. PSYCHIATRY 101, 104 (2001) (citing a slowing of reaction time and motor coordination).

255. See *id.* at 104–06 (citing the psychological and systematic effects of cannabis in humans).

performance-enhancing effect presents only a meager argument in support of its inclusion and for only a few sports;²⁵⁶ this standard alone probably does not justify its prohibition. Additionally, its adverse health effects alone do not justify the regulation of cannabis use among athletes given the lack of regulation of alcohol and tobacco use and the fact that many of the sports WADA oversees are in-and-of themselves dangerous.²⁵⁷ Similarly, another prohibited substance that has dubious performance-enhancing qualities is cocaine.²⁵⁸ Although there is a stronger argument for deterring athletes from using cocaine for health reasons,²⁵⁹ this paternalistic goal does not justify putting steroids and recreational drugs under the same strict liability scheme. For these reasons, these two substances should be eliminated from the current Prohibited List.

It is important to note that the Code recognizes that some substances are less likely to be used for performance enhancement in delineating specified and unspecified substances, with specified substances more likely to receive a reduced suspension.²⁶⁰ However, specified substances are still considered performance enhancing and are presumed to have been used for performance enhancement once an adverse analytical finding is determined.²⁶¹ The athlete bears the burden of showing that the drugs were not used for a performance-enhancing purpose.²⁶² Applying this rubric to marijuana and cocaine, however, seems unnecessary because these substances are likely to impair the athlete. It is unlikely that any athlete would take either for such a purpose. Given the fact that cocaine is not even a specified substance, testing positive for it usually leads to at least a one-year suspension and possibly two if the athlete cannot bear the burden of showing that it was not used for performance enhancement.²⁶³ As

256. See Kelland, *supra* note 253 (explaining that marijuana could be helpful in sports like shooting or golf).

257. See John Branch, *New Olympic Sports Have a History with Danger*, N.Y. TIMES (Feb. 14, 2010), available at http://www.nytimes.com/2010/02/14/sports/olympics/15danger.html?_r=0 (discussing the danger of snowboard cross and ski cross).

258. See Lee A. Mancini, Brian D. Busconi & J. Herbert Stevenson, *Sports Pharmacology: Drug Use and Abuse*, in SPORTS MEDICINE 48 (Anthony A. Schepisis & Brian D. Busconi eds., 2006) ("There are no studies that have shown that cocaine has any ergogenic effect.").

259. See *id.* (discussing the short-term and long-term risks of cocaine use).

260. See THE CODE, *supra* note 9, art. 10.4, at 54–55 (providing for the reduction or elimination of an athlete's punishment of ineligibility when the athlete has used a specified substance and can prove that there was no intent to enhance performance).

261. See *id.* art. 10.4 cmt., at 54 ("Specified Substances are not necessarily less serious agents for purposes of sports doping . . .").

262. See *id.* art. 4.2.2 cmt., at 31 ("[T]he Code sanctions should be made more flexible where the Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance . . .").

263. *Id.* art. 10.2, at 52; PROHIBITED LIST, *supra* note 7, S6(a), at 7; Press Release, United States Anti-Doping Agency, Track and Field Athlete Receives One-Year Sanction for Anti-Doping Rule Violation (Feb. 1, 2008), available at http://www.usada.org/files/active/resources/press_releases/Press%20Release%20-%20

such, the current method of distinguishing between specified and unspecified substances might ameliorate the effects upon an athlete of testing positive for cannabis or cocaine, but it is not an adequate remedy.

The Code's current approach—including every drug that might possibly be performance enhancing—is unsatisfactory. The criteria for prohibited substances should be revised to require potential performance enhancement. Additionally, WADA should be required to produce at least some scientific evidence that a substance can enhance performance before including it on the Prohibited List.²⁶⁴ Under this rubric, recreational drugs such as cocaine and marijuana would likely not be banned under the Code. This is not to say that marijuana and cocaine are desirable in sports. However, regulating the health and safety of athletes is an issue that is better left to International Federations and sports' governing bodies rather than WADA. The independent governing bodies could then choose whether or not to implement codes of conduct that penalize such drug use without risking Code noncompliance. This would more accurately recognize recreational drugs with no performance-enhancing qualities as a health and safety issue rather than an issue for antidoping authorities.

B. *More Flexible Culpability Standards*

The current Code takes a rather rigid approach toward unintentional doping cases and the ratcheting down of the period of ineligibility in such cases. As the *Baxter*, *Raducan*, and *Puerta* cases demonstrate, athletes that ingest a prohibited substance unintentionally can incur harsh penalties.²⁶⁵ WADA and CAS should revise the current negligence standards to account for cases where athletes ingested a substance for a legitimate therapeutic purpose, like *Baxter* and *Raducan*, and for extreme circumstances like *Puerta*.

The new standard should allow athletes to keep their competitive results when they can (1) prove that the substance was ingested unintentionally and (2) that the substance had no performance-enhancing effect.²⁶⁶ As highlighted above, the main thrust of antidoping rules is to keep a level playing field and to

Thompson%20-%20February%202008.pdf (announcing an athlete's one-year suspension after testing positive for benzoylecgonine—a metabolite of cocaine on the Prohibited List).

264. See Melethil, *supra* note 242, at 88 (recommending that WADA enlist a panel of scientific and medical experts and use a set of criteria to reconsider substances' inclusion on the prohibited list).

265. See discussion *supra* Part IV.C.

266. Amos, *supra* note 229, at 23; Paul A. Czarnota, *The World Anti-Doping Code, the Athlete's Duty of "Utmost Caution," and the Elimination of Cheating*, 23 MARQ. SPORTS L. REV. 45, 68-70 (2012).

ensure that athletes are not forcing each other into unpalatable decisions that risk their health. The Code effectuates this purpose by banning certain substances on the assumption that those substances are performance enhancing. However, when the Code punishes athletes that accidentally ingest a small amount of a prohibited substance that has no performance-enhancing effect, the Code is not carrying out any rational purpose. Many commentators often cite the arbitration panel's opinion from *Quigley v. UIT*²⁶⁷ as articulating the necessity of the strict liability principle in every case:

It is true that a strict liability test is likely in some sense to be unfair in an individual case . . . where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible – particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense “unfair” for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.²⁶⁸

The problem with continuing to punish athletes even when it is very likely that no performance-enhancing effect was present is that no unfairness was actually present.²⁶⁹ No other athletes were disadvantaged, and the only unfairness that results is to the athlete that actually gets sanctioned. Doping sanctions are not, in fact, some vicissitude of life but rather a legal structure imposed by WADA, and one that it can correct. As a result, imposing a suspension is not necessary in every case.

Although commentators have proposed this standard before,²⁷⁰ many concerns linger that this may allow athletes who intentionally dope to slip through the cracks and that an actual performance-enhancing effect is difficult to show in many cases.²⁷¹ The concern that athletes will intentionally dope while aspiring to use this defense is mostly mitigated by the stringent requirements of the defense. For many prohibited substances like anabolic agents and EPO, it will be very difficult for an athlete to conjure up a credible unintentional doping story. Additionally, an athlete who attempts to ingest enough of a substance such that it would enhance performance will have a hard time arguing that the level of the substance in his or her body

267. USA Shooting v. Int'l Shooting Union, Case No. 94/129 (CAS 1995).

268. *Id.* ¶ 14.

269. Amos, *supra* note 229, at 22.

270. *See id.* at 23 (proposing a change to the doping standard that takes both intent and performance-enhancing effect into account).

271. *See* Connolly, *supra* note 28, at 182 n.80 (“Actual performance enhancement is nearly impossible to conclusively prove or disprove.”).

was not performance enhancing. By definition, the athlete will first have to prove that he or she unintentionally took the substance, which the athlete did not, and then prove that the amount had no effect on performance, which would make his or her doping attempt futile anyways. The other concern—that a performance-enhancing effect is difficult to prove—is only troublesome if the burden is on WADA to show the performance-enhancing effect. In requiring WADA to show performance enhancement, the policies and goals of deterring antidoping in sports might be frustrated by difficulty in administering the system.²⁷² However, allowing athletes to show lack of performance enhancement as a defense will place this burden upon the athlete. In fact, this argument is made often, even though CAS has never accepted it.²⁷³

For certain substances such as clenbuterol, which is detectable in minute amounts and has no threshold for a positive test, this argument could be successful given that small amounts are unlikely to have pharmacological effects.²⁷⁴ It could also potentially work for other substances that are unintentionally taken in small amounts through contaminated supplements. If the athlete cannot muster convincing scientific evidence that the substance had no performance-enhancing effect, then he or she will still face the conventional framework under the Code and will not be able to escape suspension and ineligibility.²⁷⁵ This suggestion does not assume that many athletes will be actually successful in arguing this point. However, in certain cases like *Raducan*, this avenue will at least give athletes an opportunity to retain their awards if the panel can truly say that the purpose of the Code is not served by punishing the athlete.

VI. CONCLUSION

The current Code sets up a fairly effective framework for preserving a level playing field in international competition but could be further tailored to screen innocent athletes from severe penalties. It should be both limited to only include performance-enhancing substances and expanded to allow more flexibility when sanctioning athletes that have unintentionally taken a banned substance. These revisions will promote trust and fairness in the current system and

272. See *supra* note 212 and accompanying text.

273. *Union Cycliste Internationale v. Contador*, Case No. 2011/A/2384, ¶ 28(e) (CAS 2011); *Raducan v. Int'l Olympic Comm.*, Case No. OG 2000/011, ¶ 19 (CAS 2000).

274. See generally DE BOER, *supra* note 66 (discussing the irrelevance of ingesting a small amount of clenbuterol in regard to potential performance enhancement).

275. But see Connolly, *supra* note 28, at 182 n.80 (discussing the possibility that a panel might be persuaded by an athlete's expert that a substance was not performance enhancing even though this conclusion could be circumspect).

will avoid some of the harsher effects of the strict liability system. Simply put, a system that suspends a sixteen-year-old gymnast for a prescription from a team doctor while allowing Armstrong to cheat for a decade does not exactly inspire confidence. Although these changes may place burdens on the current system, they are necessary to ensure the continued support of antidoping and to safeguard the rights of clean athletes.

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