

A CONSTANT BATTLE: THE EVOLVING CHALLENGES IN THE INTERNATIONAL FIGHT AGAINST DOPING IN SPORT

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*The practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity, and fair play.*¹

*Doping is fundamentally contrary to the spirit of sport.*²

INTRODUCTION

Sport provides many benefits to the world community that should be lauded and commended. Every day, all over the world, the competitive spirit of sport leads individuals of all varieties to the playing fields and sporting arenas of their communities. Athletics promote health, leadership, commitment, fair play, and general interaction among human beings across the globe. From the local little league baseball diamond to the iconic stadiums of the Olympic Games, sport touches individuals in every country and from every walk of life. However, the same passions, which inspire the positive elements of sport can lead to negative consequences. The most blatant and widespread example of this passion gone awry is the rampant use of banned substances by athletes at all levels of sport to gain an unfair competitive advantage.

Doping in sports has become the biggest challenge facing the positive goals of the Olympic Movement. Nothing undermines the

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1. Int'l Olympic Comm. [IOC], Olympic Charter (2004), at 9, *available at* http://multimedia.olympic.org/pdf/en_report_122.pdf (last visited Apr. 2, 2006).

2. World Anti-Doping Agency [WADA], World Anti-Doping Code [hereinafter the Code], at 3, *available at* http://www.wada-ama.org/rtecontent/document/code_v3.pdf (last visited Apr. 2, 2006).

principles of “fair play” more than athletes giving themselves an unfair artificial advantage while others rely on their natural potential. In 1999, the world of sport took a meaningful step to address this problem, with the creation of the World Anti-Doping Agency (WADA)³ and the promulgation of the World Anti-Doping Code (“the Code”).⁴ The major achievements of WADA have been its ability to unify the fight against doping and provide a uniform code of doping standards.⁵ However, the first six years of WADA’s existence reveal that problem areas remain.

Accordingly, this Note will discuss problems of unregulated nutritional supplements and shortcomings in the international effort to keep up with designer drugs and new doping methods—persistent obstacles to WADA’s efforts. Additionally, the strict liability standard adopted by WADA⁶ effectively shifts the burden of these obstacles onto the athletes. Until the gap can be closed in the areas of regulation and testing, WADA must do more to shoulder this burden. Otherwise, the prevalence of false positive tests⁷ will continue, risking the careers and reputations of innocent athletes.

Part I of this Note will provide a brief discussion of doping regulations prior to the 1999 formation of WADA. Part II will highlight some of the changes that WADA has made to the fight against doping. Part III will detail the recent case of Kicker Vencill, an American swimmer who tested positive for a steroid precursor in 2003. Part IV will use the *Vencill* case to discuss the inadequacies of current testing. Part V will provide a discussion of WADA’s strict liability standard in light of the *Vencill* case. Finally, Part VI will present suggestions for improvement to the system. While doping is

3. WADA, Mission,

<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Mar. 9, 2006) (“The World Anti-Doping Agency was created to promote, coordinate, and monitor at the international level the fight against doping in sport in all its forms.”).

4. WADA, *What Is the Code*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=364> (last visited Mar. 9, 2006) (“The Code is the core document that provides the framework for anti-doping policies, rules, and regulations within sport organizations and among public authorities.”).

5. *Infra* discussion Section III.

6. The strict liability standard is embodied implicitly in Article 2. and explicitly in the Comment to Article 2.1.1. The Code, *supra* note 2, at 8.

7. The Note uses the term “false positive test” to describe the situation where a positive test result is caused by an outside source (not the athlete) such as the inadvertent ingestion of a banned substance, or sabotage (among other possibilities). This situation involves no intention on the part of the athlete to cheat or gain an unfair competitive advantage.

clearly an international problem, this Note will use examples and events from the United States.

I. THE PRE-WADA REGIME

Prior to WADA's formation in November of 1999, a complex system of organizations governed doping in sports. This pre-WADA system was seen as complicated, archaic, and unfair. Michael Straubel has even referred to it as "the Byzantine and dysfunctional world of anti-doping control."⁸ He further described this system from the athletes' perspective as one that "ignore[d] basic notions of due process by incorrectly assigning burdens, issue[d] punishment before holding a hearing and use[d] biased arbitrators."⁹ Even athletes that were routinely tested seldom knew about or understood the drug testing rules.¹⁰ In order to understand the pre-WADA system, a brief review of the structure of international sports governance is necessary.

The International Olympic Committee (IOC) heads the Olympic Movement, and its authority includes doping regulation.¹¹ In order for a sport to be included in the Olympics, the sport must have an IOC-recognized International Federation (IF).¹² An IF is charged with creating the rules for the sport it governs, organizing and holding competitions in the sport other than the Olympics, and establishing criteria for the selection of Olympic teams.¹³ Below the IFs are the National Governing Bodies (NGB) of each sport in each country.¹⁴ NGBs act similarly to IFs, yet they govern nationally rather than internationally. Each country that participates in the Olympics also has a National Olympic Committee (NOC) charged with overseeing

8. Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 531 (2002).

9. *Id.*

10. See Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing Within the Olympic Movement*, 2 VAND. J. ENT. L. & PRAC. 210, 211 (2000).

11. Straubel, *supra* note 8, at 532 ("[T]he Olympic Movement is still the blueprint that governs the distribution of control and power in international sports. International legitimacy begins with and flows from the Olympic Games including doping control.").

12. *Id.* Some examples of IFs are the International Association of Athletics Federations (IAAF) for track and field, the Federation Internationale de Football (FIFA) for soccer, and the Federation Internationale de Natation (FINA) for aquatic sports.

13. *Id.*

14. *Id.* For example, in the United States, U.S. Track & Field (U.S. T&F) is the NGB under the IAAF for track and field; US Soccer is the NGB under FIFA; and USA Swimming is the NGB for swimming under FINA.

the county's Olympic entries.¹⁵ Whether a NOC has authority over the NGBs only in Olympic years, or in both Olympic and non-Olympic years depends upon the country.¹⁶

Before the creation of WADA, the IOC set the testing procedures and the list of prohibited substances for the Olympic Games.¹⁷ However, outside of the Olympic Games, each IF controlled its own testing procedures, created its own prohibited substance list, and regulated the timing and frequency of testing.¹⁸ The NGBs and NOCs were then in charge of enforcing the rules established by their IF and the IOC.¹⁹

The first problem this type of system created was inconsistency—between sports,²⁰ between the IOC and IFs, and between IFs and NGBs²¹ (which were influenced by the domestic laws of their country). These inconsistencies were compounded by the conflicts of interest, which arose from an NGB's prosecution of its own athletes.²² The NGBs had a strong incentive to favor its own athletes in its proceedings.²³

Furthermore, cases could often be appealed (depending on the IF's rules) to the Court of Arbitration for Sport (CAS),²⁴ a tribunal created by the IOC to “bring order to the chaotic and inconsistent

15. Straubel, *supra* note 8, at 532.

16. *Id.*

17. *Id.* at 533.

18. *Id.*

19. *Id.*

20. *See, e.g., id.* at 539 (“[T]he IAAF rules place the burden of proof on the IAAF to prove that a doping offense occurred. In contrast, FINA places the burden of challenging the testing procedures on the athlete.”).

21. *See, e.g., Reynolds v. Int'l Amateur Athletic Fed'n*, 841 F. Supp. 1444, 1448 (S.D. Ohio 1992) (IAAF overturned the decision of The Athletic Congress (later U.S. T&F)); *Foschi v. Federation Internationale de Natation Amateure*, CAS 1996/156 (Ct. Arb. Sport 1996) (FINA overturned the decision of the U.S. Swimming Board of Directors and American Arbitration Association panel); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 587 (7th Cir. 2001) (IAAF overturned decision of U.S. T&F and found that Slaney *had* committed a doping violation).

22. *See, e.g., Travis T. Tygart, Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 124, 126-27 (2003) (noting that the precursor to USADA, NADP, was criticized for having financial and other interests in having the best US athletes compete, and therefore had little incentive to find that they had committed a doping violation).

23. *Id.* at 127.

24. Straubel, *supra* note 8, at 539.

world of international sports adjudications.”²⁵ The CAS has, in effect, developed its own body of case law by applying “general principles of law and concepts of natural justice” rather than the law of any particular country.²⁶ The CAS also usually hears cases *de novo*, and, therefore, does not necessarily have to rely on the findings of the IF.²⁷ While the CAS was helpful to some degree because of its independence, it could not always make up for the confusion resulting from the inconsistencies among the IOC, IFs, NGBs, and NOCs.²⁸

II. WADA: ON THE RIGHT TRACK

Though the international community was aware of the system’s problems, the proverbial “straw that broke the camel’s back” was the 1998 Tour de France doping scandal.²⁹ After French police found large quantities of prohibited substances in a car belonging to Festina, a French cycling team, the police began raiding many of the other teams on the tour.³⁰ These raids led to drop-outs by several teams and individuals and the discovery of more banned substances.³¹ The 1998 Tour scandal was a reflection of the worldwide doping problem exhibited through a popular international sport and provided the catalyst for a larger, more comprehensive effort to fight doping.³² As a result of the Tour scandal, the IOC organized the World Conference on Doping in Sport in Lausanne, Switzerland, in

25. Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1207 (2005).

26. Straubel, *supra* note 8, at 542.

27. *Id.* at 543.

28. James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 179 (2002) (“The [CAS] likely will play an increasingly important role in itself and in establishing appropriate relationships among sanction-applying and sanction-reviewing institutions. Quite likely, however, the institutional structure for resolving disputes will remain complex.”).

29. WADA, A Brief History of Anti-Doping, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (last visited Mar. 9, 2006) [hereinafter History of Anti-Doping].

30. *Tour Tarnished by Drugs Scandal*, BBC NEWS, Aug. 3, 1998, http://news.bbc.co.uk/1/hi/special_report/1998/07/98/tour_de_france/144326.stm.

31. *Id.*

32. *But see* Straubel, *supra* note 8, at 555 (“[W]hile uniformity and efficiency may be the stated purpose of the Anti-Doping Code, the unstated purpose may very well be to improve public relations. Recent doping scandals threaten the future of the Olympic Movement . . . Such an image will seriously curtail sponsorship and money to the Olympic Movement. Shortly after the Tour de France scandal, many sponsors threatened to withdraw support. Even though the IOC benefits from the public attention created by drug produced world records, it would suffer from the mass exodus of sponsors and viewers.”).

February 1999.³³ This conference sought to create “an independent international agency, which would set unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities.”³⁴ The resulting organization, WADA, officially came into being on November 10, 1999.³⁵

WADA implements and oversees the World Anti-Doping Program (“the Program”), which consists of the Code, International Standards (including the Prohibited List, Testing Standards, Laboratory Standards, Standards for Therapeutic Use Exemptions), and Models of Best Practice.³⁶ The dual purposes of the Program and the Code are, first, “[t]o protect the Athlete’s fundamental right to participate in doping-free sport and thus promote health, fairness, and equality for Athletes worldwide;” and, second, “[t]o ensure harmonized, coordinated and effective anti-doping programs at the international level with regard to detection, deterrence and prevention of doping.”³⁷ Both the Code and the International Standards are mandatory upon an IF’s acceptance of the Code, while the Models of Best Practice are recommended, but not mandatory.³⁸ Since WADA’s formation, virtually every sporting organization in the world has accepted the Code.³⁹ Therefore, WADA has achieved major success in at least one of its goals, the harmonization of anti-doping programs.

WADA has also lessened the conflicts of interest, which were a major problem before its inception. Most countries now have a National Anti-Doping Organization (NADO), which oversees the WADA-type responsibilities for that country.⁴⁰ A NADO has the “primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of samples, the management of test results, and the conduct of hearings all at the national level.”⁴¹ Before WADA, an athlete contesting a positive test result would go through

33. History of Anti-Doping, *supra* note 29.

34. *Id.*

35. *Id.*

36. The Code, *supra* note 2, at 3.

37. *Id.*

38. *Id.* at 1.

39. WADA, Code, Acceptance, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270> (last visited Mar. 9, 2006). Note that no American professional sports have accepted the Code as of the date of this publication.

40. The Code, *supra* note 2, at 75.

41. *Id.*

the procedures set out by their NGB.⁴² Now, the athlete goes through the NADO. NADOs are usually independent of the NGBs and NOCs, which helps eliminate the conflicts of interest stemming from organizations prosecuting and adjudicating the doping violations of their own athletes. Additionally, the NADO applies the rules of the IF of the athlete's sport. Since all IFs must adopt anti-doping rules, which conform with the Code,⁴³ the NADO effectively applies one system of rules to all athletes. Similarly, on the international level, CAS (rather than the IFs) is responsible for hearing all appeals from NADOs.⁴⁴

WADA is meant to be a complete umbrella organization, governing even professional sports.⁴⁵ It is, therefore, a goal of WADA to encourage professional sports organizations to sign onto the Code.⁴⁶ The success of this goal has been mixed. For example, when the IOC first asked each IF to accept its new Anti-Doping Code, FIFA "balked at some of the provisions in the Code and felt that it had the independence to go its own way."⁴⁷ Indeed, professional sports, which have large amounts of resources and loyal fan bases do not necessarily need the Olympics in order to maintain their popularity.⁴⁸ Despite this fact, WADA and FIFA completed a November 2001 agreement allowing FIFA to "conduct an independent drug-testing regime and establish its own sanction

42. See Straubel, *supra* note 8, at 534 (using the example of Butch Reynold's case to demonstrate what an athlete had to do to contest a positive test result under the pre-WADA system).

43. The Code, *supra* note 2, art. 20.3.1, at 55.

44. *Id.* art. 13.2.1, at 38.

45. The Code, *supra* note 2, at 1 ("The Code is the fundamental and *universal* document upon which the World Anti-Doping Program in sport is based.") (emphasis added).

46. WADA, Q&A on the Code, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367> (last visited Mar. 9, 2006) ("WADA has contacted many of these leagues and, with the support of governments and other sports organizations, hopes that all of them will accept and implement the Code in order to have one single standard for all athletes in all sports and in all countries.").

47. Straubel, *supra* note 8, at 533.

48. See Sarah Baldwin, Note, *Performance Enhancing Drug Use in Olympic Sports: A Comparison of the United States and Australian Approaches*, 24 LOY. L.A. INT'L & COMP. L. REV. 265, 273 (2002) (noting that the IOC has to fight to keep soccer in the Olympic games because "FIFA is not dependent upon the IOC for its funding or existence").

schedule.”⁴⁹ However, while FIFA has adopted the Code, it usually only sends developing players to compete in the Olympics.⁵⁰

In a separate effort, the Olympic charter has been amended to mandate the adoption of the Code in order for a sport to be included in the Olympic Games.⁵¹ However, professional sports organizations (such as the NBA and NFL) that have yet to adopt the Code can still send players to events under the jurisdiction of organizations that *have* adopted it as long as the players comply with the Code at the particular event.⁵² Although this is not exactly the “mandatory” compliance that the Code calls for, “it suggests that WADA’s potential to transcend Olympic sport and influence professional athletics is very real.”⁵³

While there is no doubt that WADA has unified the anti-doping infrastructure and has provided an independent⁵⁴ body to oversee the adjudication of doping cases, there are still many areas that require revision and improvement. As mentioned earlier, WADA has been very successful in fulfilling one of its stated purposes, harmonization. However, it has been far less successful in the pursuit of its other stated purpose, protection of the athlete. The remainder of this Note will analyze WADA’s current efforts to fulfill this latter purpose and provide suggestions for greater success. The following case highlights some of the imperfections remaining in the WADA Code.

49. Edward H. Jurith & Mark W. Beddoes, *The United States’ and International Response to the Problem of Doping in Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 461, 483-84 (2002).

50. Baldwin, *supra* note 48, at 273.

51. WADA, Q&A on the Code, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367> (last visited Mar. 9, 2006).

52. *Id.*

53. Jurith & Beddoes, *supra* note 49, at 483-84.

54. While WADA is clearly independent of IFs and NGBs, its independence is undermined by its strong ties to the IOC, which paid twenty-five million dollars for its establishment and covers fifty percent of its annual budget. *See* IOC, Protection of Athletes: Activities of the International Olympic Committee, <http://www.olympic.org/uk/organisation/missions/athletesuk.asp> (last visited Mar. 9, 2006).

III. *VENCILL V. USADA*⁵⁵

To begin the discussion of the inadequacies of the current anti-doping system, it is helpful to examine a recent real-world example. On January 21, 2003, a twenty-five-year-old American swimmer named Kicker Vencill tested positive for 19-norandrosterone (a byproduct of nandrolone and a steroid precursor) in a routine out-of-competition drug test.⁵⁶ The test, administered by the United States Anti-Doping Agency (the NADO for the United States, hereinafter USADA) and performed by the accredited UCLA laboratory, showed Vencill's urine sample contained 4.3 ng/ml of 19-norandrosterone,⁵⁷ just above the 2 ng/ml level which triggers a positive test.⁵⁸ USADA recommended a four-year suspension from the date of the test and a six-month retroactive cancellation of all competitive results from that date.⁵⁹ Vencill elected to contest the proposed sanctions and exercised his right to a hearing before a panel of the American Arbitration Association (AAA).⁶⁰ The AAA hearing was held on June 21 and 22, 2003, and on July 24, an arbitral decision suspended Vencill for four years but did not require any retroactive cancellation of competitive results.⁶¹ Due to Vencill's suspension, he was removed from the United States' roster for the 2003 Pan American games, and he missed the 2004 Olympic Trials.⁶²

Maintaining his innocence, Vencill had all the nutritional supplements he was taking tested for banned substances, even though

55. This case is used in this Note to highlight the problem of inadvertent ingestion of banned substances through the taking of contaminated nutritional supplements; the Note does not purport to validate or invalidate Mr. Vencill's claims of innocence. The Note does, however, mean to purport that Mr. Vencill's situation is representative of other cases like it. *See, e.g.,* Hans Knauss v. Int'l Ski Fed'n, CAS 2005/A/847 (Ct. Arb. Sport 2005) (finding that an Austrian skier who took a contaminated nutritional supplement, which led to his positive drug test should have his sanction reduced from two years to eighteen months because he barely fit under the no significant fault or negligence standard because he had inquired about the product directly to the distributor and personally knew and trusted a supplier of the supplement in Austria).

56. U.S. Anti-Doping Agency v. Vencill, AAA No. 30 190 00291 03, 3-4 (American Arbitration Association, 2003) [hereinafter Vencill AAA Decision].

57. *Id.* at 7 (noting a study which found a grey zone between 2 ng/ml and 5 ng/ml, due to the possibility of endogenous production).

58. *Id.* at 13

59. *Id.* at 4.

60. *Id.*

61. *Id.* at 22 n.26.

62. *Kicker Vencill*, 20 Question Tuesday Archive, USA SWIMMING, May 17, 2005, <http://www.usaswimming.org/USASWeb/ViewMiscArticle.aspx?TabId=280&Alias=Rainbow&Lang=en&mid=408&ItemId=1706> [hereinafter *Kicker Vencill*].

none of them, according to their labels, contained any banned substances.⁶³ The results from the private lab showed that a multivitamin that Vencill had been taking—Super Complete manufactured by Ultimate Nutrition—was tainted with three different steroid precursors.⁶⁴ Vencill took this new information to his appeal from AAA to the CAS hearing, held on November 10, 2003.

On July 11, 2003, subsequent to Vencill's AAA hearing but prior to his appeal to CAS, the Federation Internationale du Natation [FINA], the international federation for swimming, adopted WADA's Code.⁶⁵ Under the Code, when an international federation or other "Anti-Doping Organization" adopts the code, Articles 1, 2, 3, 10, 11, 13 (with exception of one provision), "must be incorporated essentially verbatim by each Anti-Doping Organization in its own anti-doping rules."⁶⁶ These new rules adopted under the Code went into effect, as far as FINA was concerned, on September 11, 2003.⁶⁷ This being the case, FINA's original requirement of a four-year ban for a first offense was reduced to a two-year ban under the new Article 10.2.⁶⁸

Article 10.2, however, was not the only rule change that was considered in the CAS decision. In light of Vencill's private testing of his multivitamin, he argued that, under newly adopted Article 10.5.1 ("No Fault or Negligence")⁶⁹ or, in the alternative, 10.5.2 ("No Significant Fault or Negligence"),⁷⁰ his sanction should be eliminated or reduced.⁷¹ The CAS panel cursorily dismissed Vencill's 10.5.1 claim,⁷² pointing to the 10.5.2 comment, which gives the following example of when the "no fault or negligence" standard would not apply: "a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement."⁷³ The panel also rejected Vencill's argument that he should get a reduced sanction under 10.5.2, but it provided a more thorough analysis for their 10.5.2

63. *Id.*

64. *Id.*

65. Vencill v. U.S. Anti-Doping Agency, CAS 2004/A/484, at 11 (Ct. Arb. Sport 2004) [hereinafter Vencill CAS Decision].

66. The Code, *supra* note 2, at 7.

67. Vencill CAS Decision, CAS 2004/A/484, at 11 n.12.

68. The Code, *supra* note 2, art. 10.2, at 26.

69. *Id.* art. 10.5.1.

70. *Id.* art. 10.5.2.

71. Vencill CAS Decision, CAS 2004/A/484, at 19.

72. *Id.* at 20-21.

73. The Code, *supra* note 2, art. 10.5.2 comment, at 30.

holding.⁷⁴ First, the panel qualified its comments by finding that Vencill's multivitamin was contaminated, that Vencill did not know of the contamination, that he was taking this multivitamin at the time of his January 2003 test, and that *the contamination is what led to the positive test*.⁷⁵ Despite these findings, the panel reprimanded Vencill for not living up to the Article 2.1.1 standard, which reads:

It is each Athlete's personal duty to ensure that no Prohibited Substances enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.⁷⁶

In concluding that he did not live up to this standard, the panel said that his conduct—including ignoring the many warnings he received from USADA regarding the risk involved in taking nutritional supplements, and also taking a variety of supplements recommended to him by teammates without consulting a parent, coach, or doctor, and without getting them tested—“amount[ed] to a total disregard of his positive duty,” and that his “‘fault or negligence’ in the circumstances [was] exceptionally ‘significant.’”⁷⁷ Finally, the panel said of Vencill:

We hold that for an athlete in this day and age to rely—as this athlete claims he did—on the advice of friends and on product labels when deciding to use supplements and vitamins, is tantamount to a type of *willful blindness* for which he must be held responsible. This “see no evil, hear no evil, speak no evil” attitude in the face of what rightly has been called the scourge of doping in sport—this *failure to exercise the slightest caution* in the circumstances—is not only unacceptable and to be condemned, it is a far cry from the attitude and conduct expected of an athlete seeking the mitigation of his sanction for a doping violation under applicable FINA Rules.⁷⁸

Ultimately, The CAS Panel sanctioned Vencill with a full two-year suspension under the newly adopted FINA Rules.⁷⁹ After being banned from swimming for two years, Vencill brought suit against Ultimate Nutrition, the Connecticut-based supplement manufacturer

74. Vencill CAS Decision, CAS 2004/A/484, at 22-25.

75. *Id.* at 23.

76. The Code, *supra* note 2, art. 2.1.1, at 8.

77. Vencill CAS Decision, CAS 2004/A/484, at 25.

78. *Id.* (emphasis added).

79. *Id.*

that produces Super Complete. Armed with his evidence from the private testing of his supplements, he sued Ultimate Nutrition in Orange County Superior Court in California. In May of 2005, a unanimous jury awarded Vencill \$578,635, finding that his Ultimate Nutrition multivitamin was contaminated with a steroid precursor.⁸⁰ Vencill found this holding an inadequate substitute for his chance to swim, however. In an interview for USA Swimming's website on May 17, 2005, Vencill said "all the money in the world can't rewind the clock."⁸¹

Based on Ultimate Nutrition's own private testing on capsules from the same as those purportedly taken by Vencill, and capsules from surrounding lots, which were all negative for steroid precursors, the company requested that the California Superior Court vacate the decision against them.⁸² In July 2005, the California Superior Court granted Ultimate Nutrition's request to vacate the decision.⁸³ Following this decision, the parties settled.⁸⁴

IV. INADEQUACIES OF TESTING

A. Unregulated Nutritional Supplements

As evidenced by the *Vencill* case, the possibility that unregulated nutritional supplements may be contaminated with banned substances poses a pressing problem in the fight against doping. The Code holds the athlete liable in such an event.⁸⁵ A discussion of the efficacy and fairness of this rule will follow in Part VI.

In an IOC-funded study led by Professor Dr. Wilhelm Schänzer at German Sport University in Cologne (as referenced in *Vencill*), Professor Schänzer found that many supplements whose labels indicated that they contained no banned substances (or failed to indicate that they did) tested positive for prohormones.⁸⁶ The study,

80. *Vencill Was Suspended Two Years, Missed Olympics*, ASSOCIATED PRESS, May 13, 2005, available at <http://www.sports.espn.go.com/oly/news/story?id=2059714>.

81. *Kicker Vencill*, *supra* note 62.

82. Press Release, Health Strategy Consulting L.L.C., Court Vacates Judgment against Ultimate Nutrition in the Matter of Kicker Vencill v. Ultimate Nutrition (July 19, 2005), available at <http://www.health-strategy.com/contentmgr/showdetails.php/id/2350>.

83. *Id.*

84. *Id.*

85. The Code, *supra* note 2, art. 2.1.1, at 3.

86. Dr. Wilhelm Schänzer, *Analysis of Non-Hormonal Nutritional Supplements for Anabolic-Anrogenic Steroids—An International Study*, 2001, at 85, available at http://multimedia.olympic.org/pdf/en_report_324.pdf.

conducted from October 2000 to November 2001, analyzed 634 non-hormonal nutritional supplements from thirteen countries and 215 different suppliers, obtained through different methods (stores, Internet, phone, and two samples from the IOC).⁸⁷ Additionally, 289 of 634 supplements were from companies that also sell prohormones, while 345 of the supplements were from companies that do not offer prohormones at all.⁸⁸ Ninety-four of these supplements (14.8%) were found to contain prohormones—of either testosterone, nandrolone, or both.⁸⁹ These supplements were bought in the Netherlands, Austria, the United Kingdom, and the United States and were attributable to companies located in the United States, the Netherlands, the United Kingdom, Italy, and Germany.⁹⁰ The level of anabolic androgenic steroid concentrations found in the ninety-four positive supplements ranged from 0.01 ng/g up to 190 ng/g.⁹¹ Probably the most alarming finding of the study was “[e]xcretion studies with application of supplements containing nandrolone prohormones corresponding to a total uptake of more than 1 ng resulted in urinary concentrations of the nandrolone metabolite norandrosterone *above the cut-off limit of the IOC for several hours (positive doping result)*.”⁹²

Only one study, in which ninety-four supplements tested positive for androgenic steroid concentrations, demonstrate conclusively that there are multiple supplements on the market, manufactured and sold in different countries that contain banned substances. Furthermore, the IOC itself endorsed and funded the Schänzer study, giving its results more prominence and credibility.⁹³ The Schänzer study indicates that positive results for nandrolone and testosterone may indeed be caused by contaminated supplements.

The study also demonstrated that 9.6% of the supplements tested came from companies that do not sell any prohormone products.⁹⁴ For these supplements to test positive, either the company is manufacturing these products at a factory that manufactures other

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Dr. Wilhelm Schänzer, *Analysis of Non-Hormonal Nutritional Supplements for Anabolic-Androgenic Steroids—An International Study*, 2001, at 85, available at http://multimedia.olympic.org/pdf/en_report_324.pdf (emphasis added).

93. *Id.*

94. *Id.*

companies' products, which *do* contain prohormones, or the company is adding prohormones to its own products and not indicating this on their labels. Either of these alternatives increases the difficulty for athletes of determining which supplements are safer to use than others.

While legislation to provide for the comprehensive regulation of all dietary supplements would be an ideal solution, it is unlikely that there could be an across-the-board regulation imposed. Variations in regulations exist from country to country and from substance to substance, and this is unlikely to change any time soon. Yet, WADA must address the realities of the supplement world, whether or not adequate legislation is enacted. Such remedies will be discussed below in Parts V and VI.

B. Testing Technology

The vast improvements that have been made in the technology of testing still lag behind the technology, expertise, and skill of the cheaters themselves. For example, just prior to the 2004 Athens Olympics, the exposure of the Bay Area Laboratory Co-Operative (BALCO) scandal involving some of America's top track and field athletes rocked the United States.⁹⁵ BALCO supplied some of these athletes with tetrahydrogestrinone (THG, or colloquially, "the Clear"), a new designer drug.⁹⁶ THG was only identified after a prominent coach came forward and sent a syringe containing THG to the USADA.⁹⁷ The USADA then used the THG from the syringe to develop a test for detecting the substance.⁹⁸ On the eve of the Sydney Olympic Games, the international sporting community faced the shock of having a new undetectable drug in use by many of the big names set to compete, without any means of testing for the substance. The BALCO scandal, while a huge embarrassment for the United States, was an equally large embarrassment for the international sporting community. If top athletes, who were regularly tested by their NADO could circumvent their NADO's testing technology by using substances not yet tested for, how could the system maintain credibility?

95. *I Was THG Whistleblower, Admits Gatlin Coach*, Athens Olympics 2004—ABC Sport, Aug. 23, 2004, <http://www.abc.net.au/sport/content/200408/s1182730.htm>.

96. *Id.*

97. *Id.*

98. *Id.*

The BALCO scandal illustrates how athletes can cleverly undermine testing standards and procedures, while anti-doping agencies struggle to maintain accuracy and credibility in the system. For example, anabolic steroids were in wide-spread use long before a reliable test for them was developed in 1974.⁹⁹ While testing made up some ground, athletes wanting to cheat began blood doping.¹⁰⁰ Yet, blood doping was not added to the prohibited list until 1986.¹⁰¹ Erythropoetin (more commonly known as EPO) became a popular drug, especially among cyclists, and was added to the prohibited list in 1990.¹⁰² Yet, a reliable testing method for EPO was not implemented until the 2000 Sydney Olympics.¹⁰³ Part of this pattern is clearly attributable to the lack of coordination in the world of sports of doping prior to WADA discussed above in Part I. Indeed, the response to BALCO and THG seems swift and effective compared to prior discoveries of previously undetectable substances. While a positive sign for the future, the race between athletes trying to find new designer drugs and methods, and the anti-doping effort to find ways to test for those drugs and methods, seems far from over.

Besides the problem of testing falling behind the cheaters, there are also questions in regard to the accuracy of the current testing. Most of the prohibited substances on the WADA List are of an exogenous nature, meaning that they are “not ordinarily capable of being produced by the body naturally.”¹⁰⁴ Therefore, when a laboratory test reveals the presence of such a substance in the athlete’s specimen, it is reasonable to assume that the substance was introduced into the athlete’s body by some outside source. However, the WADA List also contains certain prohibited substances, which can be produced endogenously (by the human body naturally).¹⁰⁵ These substances are subject not to mere detection, but to detection in excess of a pre-determined level or ratio.¹⁰⁶ This level is deemed to be where the concentration of the substance in the specimen “so

99. History of Anti-Doping, *supra* note 29.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. WADA Int’l Standard, The 2006 Prohibited List, at 4, *available at* http://www.wada-ama.org/rtecontent/document/2006_LIST.pdf [hereinafter 2006 Prohibited List].

105. *Id.*

106. The Code, *supra* note 2, art. 2.1.3, at 9.

deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production.”¹⁰⁷

Such levels or ratios continue to be a hotly contested issue. The most notable case to confront this issue was that of Mary Slaney.¹⁰⁸ Mary Slaney tested positive for testosterone at the U.S. Olympic Track and Field Trials in 1996.¹⁰⁹ A positive test for testosterone at the time required a ratio of testosterone to epitestosterone (T/E ratio) greater than six-to-one.¹¹⁰ Slaney argued that such a ratio was not reliable, especially with regard to women.¹¹¹ She claimed that her heightened T/E ratio was due to the combination of her menstrual cycle and changing birth control pills.¹¹² USA T&F ruled for Slaney, finding that “the IAAF’s rules regarding the use of the T/E ratio test were vague and inconsistent and the six to one ratio was not scientifically proven to be inconsistent with the normal ratio in humans.”¹¹³ However, the IAAF found that their rules were clear, and that Slaney had committed a doping offense.¹¹⁴ Regardless of the validity of Slaney’s claims, her case brings to light the problems associated with these ratios and levels provided for in the Code. On the one hand, WADA must somehow define the illegal level; yet, on the other hand scientists have conducted studies to show that humans (especially elite athletes) can naturally produce levels higher than those provided for under the Code.¹¹⁵ If true, the imperfect science behind these ratios are putting athletes at risk for false positive testing results.

The Code does provide some additional protections to guard against this risk. For example, if the athlete can prove that the concentration in their specimen is due to a “physiological or pathological condition,” the sample will not be deemed to contain a

107. 2006 Prohibited List, *supra* note 104, at 3.

108. *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 580 (7th Cir. 2001).

109. *Id.* at 586.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Slaney*, 244 F.3d at 587.

114. *Id.*

115. *See, e.g., B. Le Bizec et al., Evidence for the Presence of Endogenous 19-Norandrosterone in Human Urine*, 723 J. CHROMATOGRAPHY BIOMEDICAL SCI. APPLICATIONS 157, 169-71 (1999) (finding that intense efforts in soccer competition have been observed to increase endogenous levels of 19-norandrosterone by a factor of three and suggesting that even more intense exertions could increase the levels by even higher factors).

prohibited substance.¹¹⁶ Additionally, the testing itself can sometimes determine whether the substance in the specimen, although capable of endogenous production, actually is of exogenous origin.¹¹⁷ In this case, a valid positive test will be declared.¹¹⁸ In other, more questionable situations, there might be further investigation such as an examination of the athlete's past tests and/or subsequent testing.¹¹⁹ Despite these protections, the scientific jury is still out on these levels, and it appears that there is enough debate to assume that this is another area where athletes are at risk for false positive test results.

C. Towards the Future: Gene Doping

The challenges facing the international community are only going to get tougher as time and technology advance. WADA recently held its second-ever Gene Doping Symposium in Stockholm, Sweden, on December 4-5, 2005.¹²⁰ Participants, hailing from fifteen different countries, included geneticists and other biomedical scientists, ethicists, public policy experts, and IOC representatives.¹²¹ The conference focused on research, education, and progress.¹²² Conference participants opined that, although it is not believed that gene doping is currently being used by athletes, there is a distinct likelihood that it will be in the future.¹²³ Gene doping¹²⁴—or gene transfer—“represents a proven, although very immature and still experimental field of human medicine.”¹²⁵ The conference also found that the process of gene doping is a dangerous one, and there should be education at every level of athletics to guard against these dangers.¹²⁶

116. 2006 Prohibited List, *supra* note 104, at 3.

117. *Id.*

118. *Id.*

119. *Id.* at 3-4.

120. WADA, Gene Doping Symposium Reaches Conclusions and Recommendations, Dec. 5, 2005, <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115229> [hereinafter Gene Doping Symposium].

121. *Id.*

122. *Id.*

123. *Id.*

124. Defined as “[t]he non-therapeutic use of cells, genes, genetic elements, or of the modulation of gene expression, having the capacity to enhance athletic performance.” 2006 Prohibited List, *supra* note 104, at 7.

125. Gene Doping Symposium, *supra* note 120.

126. *Id.*

WADA is clearly taking an aggressive approach to future doping issues, which is a positive sign for the future of sport. There has also been substantial research into detection methods for gene transfer, and gene doping is already listed as a prohibited method on WADA's 2006 Prohibited List.¹²⁷

WADA has also added a Monitoring Program.¹²⁸ In addition to testing for the menu of substances for in-competition and out-of-competition, WADA's Monitoring Program includes a shorter list of substances, which are also tested for.¹²⁹ The purpose of the monitoring program is to enable WADA "to detect patterns of misuse in sport."¹³⁰ The Monitoring Program is proof that WADA is keeping a close eye on the pattern of drugs in sports in order to make adjustments to the Prohibited List.

V. RULE 2.1'S STRICT LIABILITY STANDARD

In *Vencill*, the CAS panel used Rule 2.1.1 to reject Vencill's plea for a reduced sanction under 10.5.2's "No Significant Fault or Negligence Standard."¹³¹ Rule 2.1 contains the strict liability standard that is applied to positive tests—the mere "presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's* bodily *Specimen*"¹³² is sufficient to establish a doping violation, and intent, fault, negligence, or knowing use need not be demonstrated.¹³³ In a comment to Rule 2.1.1, the Code explains the rationale behind this strict liability standard by quoting a 1994 CAS case, *Quigley v. UIT*.¹³⁴ The *Quigley* case involved a skeet shooter who was competing in a World Cup event in Cairo, Egypt. He was ill during the competition and consulted with a local doctor.¹³⁵ The doctor, despite knowing English and looking over the list of banned substances shown to him by Quigley, provided him with a cough syrup that contained ephedrine, a banned substance.¹³⁶ Following an in-competition test,

127. 2006 Prohibited List, *supra* note 104, at 7.

128. The Code, *supra* note 2, art. 4.5, at 18-19.

129. WADA, International Standard, The 2006 Monitoring Program, *available at* http://www.wada-ama.org/rtecontent/document/Monitoring_Program_2006_Eng.pdf.

130. The Code, *supra* note 2, art. 4.5, at 14-15.

131. Vencill CAS Decision, *supra* note 65, at 23.

132. The Code, *supra* note 2, art. 2.1, at 8.

133. *Id.* art. 2.1.1, at 8.

134. *Quigley v. UIT*, CAS 94/129, 193 (Ct. Arb. Sport 1994).

135. *Id.* at 187-88.

136. *Id.* at 188.

Quigley tested positive for ephedrine and was banned by UIT.¹³⁷ However, CAS reversed the sanctions because, although they upheld the strict liability standard, they found that UIT's rules were not clear enough to be enforceable.¹³⁸ The "well-stated" rationale for strict liability in the *Quigley* decision said that

It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q., where the Athlete may have taken medication as the result of mislabeling 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. Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations—particularly those run on modest budgets—in their fight against doping.¹³⁹

The following discussion will demonstrate why this rationale is inadequate to support the Code's strict liability standard.

A. *Quigley* Rationale: A Poor Analogy

The analogy of an athlete getting sick on the eve of a competition to an athlete suspended due to inadvertent ingestion of a banned substance is simply not credible. An athlete who is sick and forced to miss a competition (even a major one) will certainly suffer the loss of being able to compete; maybe even the loss of an entire season's worth of work. This is unfortunate, but does not hold a candle to the effects of being banned for two years from one's sport through no fault of one's own. Not only do athletes who accidentally ingest a

137. *Id.* at 188-89.

138. *Id.* at 197-98.

139. The Code, *supra* note 2, art. 2.1.1 Comment, at 8-9 (quoting *Quigley v. UIT CAS 94/129*, 193 (Ct. Arb. Sport 1994)).

banned substance suffer the loss of a longer period of lost competition, they suffer the much greater harms to their reputation, loss of contracts or endorsements, and a mark on their record that will remain with them for the rest of their careers and possibly even beyond. To say that it is a laudable policy to suspend some innocent athletes so that no guilty athlete ever competes is to belittle the years of preparation, dedication, and commitment to their sport that these athletes have contributed.¹⁴⁰

Such a standard easily takes an individual who is in every other respect a role model and turns them into the disgrace of the sporting world. This concept, contrary to what many countries consider to be fundamentally fair,¹⁴¹ is offensive to the very spirit of sport that WADA and the Olympic Movement seek to develop and protect. It might, in the short-term, protect the whole body of other competitors; however, in the long-term, it puts that body of competitors at risk for the same thing happening to them. As Michael Straubel noted, “[i]f the system wrongfully punishes or harshly treats athletes it will lose the support of those it governs.”¹⁴²

Quigley is also a bad example for WADA to rely on because of its sympathetic facts. This is exactly the kind of situation in which the application of a strict liability rule seems particularly disproportionate to the offense (if you can even call this an offense). Additionally, the life-is-unfair tone of the *Quigley* rationale is misguided because, while life is indeed sometimes unfair, in the case of doping, it is WADA itself that is creating this particular unfairness to the athletes. If anything, WADA should have a duty to *minimize* the unfairness that athletes are exposed to rather than to add to it.

140. “An athlete accused of taking a performance-enhancing drug has been accused of an immoral act, and in some cases, a crime. Such an accusation can harm the athlete in a way that being fired from a job cannot.” Staubel, *supra* note 7, at 546. See, e.g., *Kicker Vencill*, *supra* note 62 (“I care about what people think about me when it comes to questioning my values and my integrity . . . for someone who came from a small town in the middle of nowhere in Kentucky where swimming doesn’t mean anything, and worked my way to a national and international level, only to be called a cheater when I knew it came from hard work, sacrifice and dedication[.]”).

141. See Gabrielle Kaufmann-Kohler, Antonio Rigozzi & Giorgio Malinverni, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law*, Feb. 26, 2003, at 30, available at <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf> [hereinafter *Legal Opinion*] (“[C]ritics argue that strict liability doping offences aim to catch the majority of the ‘guilty’ parties while sacrificing a few ‘innocent’ ones: a concept incompatible with the basic tenets of civilized societies.”).

142. Straubel, *supra* note 8, at 569.

In a commendable effort to improve the legitimacy of its organization, WADA had a legal opinion (hereinafter Legal Opinion) rendered in 2003 on specific provisions of its Code and their conformity with “commonly accepted principles of international law.”¹⁴³ The opinion, authored by three legal experts, analyzed several Code provisions, compared them to standards of international law (in particular notions of human rights) and either approved the provisions, or suggested changes.¹⁴⁴ Of note for this discussion, the opinion found that “[s]trict liability doping offences are, in and of themselves, consistent with internationally recognized human rights and general principles of law.”¹⁴⁵ However, the opinion makes clear that the reason that WADA’s Rule 2.1 does not violate such principles is because the strict liability standard only applies to the finding of a doping violation (due to the bifurcated nature of the Code), and because “the only automatic consequence of the strict liability offence rule is that the athlete is disqualified from the competition which produced the positive test.”¹⁴⁶ In other words, the hook that keeps the Code’s strict liability rule from violating human rights and general principles of international law is the inclusion of sections 10.5.1 and 10.5.2 (discussed below). Yet, the original version of the Code did not even include Article 10.5 at all, and it was only added at the recommendation of this Legal Opinion.¹⁴⁷ So, while the Legal Opinion declares that the *wording* of 10.5 complies with the principle of *nulla poena sine culpa* (no punishment without fault),¹⁴⁸ the question remains whether the *effect* of 10.5 (in particular 10.5.1 and 10.5.2) complies with this standard.

B. Rules 10.5.1 and 10.5.2: Real Possibilities or Mere Tautology?

One of the most hopeful changes in the shift from pre-WADA to WADA standards was the inclusion of the principles embodied in Rule 10.5.1 and Rule 10.5.2 of the Code. These are the provisions that were included to balance out the strict liability standard of Rule 2.1 by providing an opportunity for an athlete with “exceptional

143. Legal Opinion, *supra* note 141, at 5.

144. *Id.*

145. *Id.* at 31.

146. *Id.*

147. *Id.* at 39 (“[W]e recommended adding a provision specifying that an athlete could not be suspended, unless at fault. Following this recommendation, Article 10.5 was added to the Code.”).

148. *Id.* at 40.

circumstances” to have their sanction reduced or eliminated.¹⁴⁹ In theory, this is possible to do under these two provisions. The Code provides examples of what would and would not satisfy the standards of these provisions. For instance, the comment to 10.5.2 says that sabotage by a competitor, despite all due care, would be sufficient for meeting the “no fault or negligence” standard, but the following situations would not be sufficient: a mislabeled or contaminated vitamin or nutritional supplement; the administration of a prohibited substance by a personal physician or trainer even if the athlete did not know; or sabotage of food or drink by a spouse, coach, or other closely related individual.¹⁵⁰ The comment adds that any of these situations might be able to meet the “No *Significant* Fault or Negligence” standard and gives the particular example of an athlete who “clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.”¹⁵¹

While it is comforting to know that these provisions have been included in the code, it is not clear yet whether they are actually viable, working Code provisions. There is the potential that Rule 2.1.1 will always be used to say, in a sense, “you should have done more.” For example, in *Vencill*, the CAS panel accepted his evidence that he had *no knowledge* that the multivitamin he was taking was contaminated, and that the taking of this contaminated multivitamin *is what caused his positive test result*.¹⁵² This sounds quite similar to the explanatory comment discussed above. However, the panel also found that Vencill did not exercise enough care in the taking of his supplements to get a reduction under 10.5.2.¹⁵³ The panel went so far as to blast Vencill for his “significant” fault, “total disregard of his

149. The Code, *supra* note 2, art. 2.1.1 Comment, at 8-9. The 2.1.1 Comment reads in part: “[t]he strict liability rule for the finding of a Prohibited Substance in an Athlete’s Specimen, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of all “clean” Athletes and fairness in the exceptional circumstances where a Prohibited Substance entered an Athlete’s system through no fault or negligence on the Athlete’s part.” The Code, *supra* note 2, art. 10.5.2 Comment, at 30-32 (“Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.”).

150. *Id.* art. 10.5.2 Comment, at 30-32.

151. *Id.* (emphasis added).

152. Vencill CAS Decision, *supra* note 65, at 23.

153. *Id.* at 25.

positive duty” under 2.1, and “willful blindness.”¹⁵⁴ The panel viewed Vencill as not only falling short of the standard in 10.5.2, but falling *far* short of it. Yet, the decision does not indicate how much care would have been enough in Vencill’s case to have satisfied 10.5.2. The apparent near impossibility of meeting the 10.5.2 standard, not to mention the 10.5.1 standard, effectively reduces these provisions to empty words. It is hard to imagine how anyone would prove that, despite due care, they were sabotaged by another competitor.

The *Vencill* situation presents evidence of the insurmountable burden on the athlete. Vencill was reprimanded for not testing his supplements prior to using them. Indeed, it seems that the general position of WADA, endorsed by CAS, is that in order to live up to the 2.1.1 standard, an athlete must test every bottle of every supplement that he or she uses, must guard these bottles against any kind of sabotage from a competitor or a close relation, and might even want to get their food and drink tested as well, just to be sure. In today’s world, where it is not only common for athletes but non-athletes as well to take nutritional supplements for basic health, this standard is not realistic. Even in the face of warnings given to athletes, it is unreasonable to expect that anyone, even elite athletes, could control the chemical make-up of every substance that enters their body. The WADA rules seem to operate in a world, which naively hopes that such a burden can easily be complied with by responsible and careful attention to supplement use. However, athletes subject to its rules live and act in the real world, where normal mistakes, inaccuracies, and variability make such a hope infeasible.

There seems to be no limit to how far 2.1.1 can be used to reject any defense the athlete puts forward. In essence, if Rule 2.1.1 rejects almost any excuse under 10.5.1 and 10.5.2, then these provisions have no effect at all. Thus, it can be argued that these provisions are included in the Code as empty language solely to satisfy the requirements of the Legal Opinion.

C. Back to *Quigley*: Fear of the Floodgates¹⁵⁵

With respect to inadvertent ingestion of a banned substance, World Anti-Doping Agency Chairman Dick Pound said “there could be no leniency in such cases without destroying the system’s

154. *Id.*

155. Legal Opinion, *supra* note 141, at 29-30.

credibility.”¹⁵⁶ This is the unsubstantiated fear of the international sporting community of what would happen in the absence of a strict liability standard. An additional fear, which the *Quigley* opinion forecasted, is that “a requirement of intent would invite costly litigation that may well cripple federations.”¹⁵⁷ The real threat to the system’s credibility and to the pocketbooks of the federations, however, is that athletes do not believe that the system is working, and that drug scandals are pushing fans and future athletes away from athletics.

WADA’s use of the *Quigley* quote as its rationale for strict liability is an example of the feared alternative to strict liability—the collapse of the whole system and guilty athletes getting away with doping. Yet, there are other possible alternatives to strict liability that maintain a heavy burden on the athlete but provide them with a real chance to prove their innocence. Such a possibility is discussed below in Part VI. Furthermore, no one is necessarily advocating a system in which the burden is on the federation to prove, even after a positive test, that an athlete intended to dope or cheat. This would be just as unreasonable as the current system and *would* lead to the results feared by WADA.

The strict liability standard can also be said to overshoot even the tough barrier it is meant to erect. For example, the unlikelihood of success (because of the strict liability standard) combined with the costs of litigation borne by the athlete, has lead at least one athlete who claimed innocence not to pursue a legal challenge.¹⁵⁸ Certainly, while the system is not meant to let an accused athlete out of a sanction by fanciful legal arguments, it is also not meant to have the effect of deterring an innocent athlete from even making such arguments.

156. Amy Shipley, *Caught Cheating, or Was She Cheated? Area swimmer has few options after positive test*, WASH. POST, at D1 (Nov. 8, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A32870-2004Nov7.html>.

157. The Code, *supra* note 2, art. 2.1.1 Comment, at 8-9.

158. Rachel Burke, a 21-year-old swimmer at the University of Virginia, tested positive in June of 2004 for a small amount of a steroid called Boldione. While she initially vowed to fight to result, “the more she learned about the process . . . the more resigned she became. The USADA has never lost a case. The [CAS], which hears appeals of USADA decisions, applies the same rules as the USADA. And the costs of paying the legal, technical, and medical experts necessary to prove her claims seemed both daunting and, ultimately, useless.” Burke was quoted as saying that “[i]t was adding up to quite a pretty penny . . . for me to be able to tell them I didn’t do this, and then they would look me in the eye and say ‘I’m sorry, you know the rules.’” Shipley, *supra* note 156.

D. Towards the Future: Non-Analytical Positives

The BALCO scandal, discussed above, not only changed the world of drug testing because of THG, but it also supplied the first “non-analytical positives.”¹⁵⁹ Traditionally, a positive drug test results from an “analytical positive” under WADA Rule 2.1. That is, “[t]he presence of a Prohibited Substance or its Metabolites or Markers in an athlete’s bodily specimen.”¹⁶⁰ If an athlete takes an in-competition or out-of-competition drug test, and the lab reports a positive finding, this is an example of an analytical positive. Conversely, a “non-analytical positive” is a doping violation which is the result of anything other than a positive laboratory test, such as admitting to the use of a prohibited substance or trafficking in a prohibited substance.¹⁶¹

In these cases, the anti-doping organization¹⁶² has the burden to prove there has been a doping violation.¹⁶³ The organization must prove this “to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made.”¹⁶⁴ In meeting this burden, the organization may use “any reliable means, including admissions.”¹⁶⁵ Thus, circumstantial evidence can be used to find a doping violation, although “[t]here is little guidance regarding what type of evidence may be used or how much is enough to convict an athlete of a doping offense.”¹⁶⁶

The type of non-analytical positives resulting from the BALCO situation expanded upon the prior understanding of non-analytical positives.¹⁶⁷ The USADA actually used circumstantial evidence to show that a doping violation had occurred due to *use or attempted use*

159. See Cameron A. Myler, *How Much Is Enough? Using Circumstantial Evidence to Prosecute Olympic-Sport Athletes for Anti-Doping Rule Violations*, 16 N.Y. ST. B.A. ENT. ARTS & SPORTS L.J. 8, 10 (2005), available at <http://www.nysba.org/template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=65691>.

160. The Code, *supra* note 2, art. 2.1, at 8.

161. *Id.* arts. 2.3-2, at 8 (providing for non-analytical positives); see also, Myler, *supra* note 156, at 9.

162. Unlike analytical positives, where the athlete bears the burden of adducing evidence to rebut the presumption of doping, for non-analytical positives, “the burden never shifts to the athlete and the anti-doping organization must prove each element of its case.” Myler, *supra* note 159, at 9.

163. The Code, *supra* note 2, art. 3.1, at 12.

164. *Id.*

165. *Id.* art. 3.2, at 12.

166. Myler, *supra* note 159, at 9.

167. *Id.*

of a prohibited substance or method.¹⁶⁸ These cases were revolutionary because of both the expansion of the role of anti-doping agencies into investigative areas and also for using all evidence available to determine use of a prohibited substance in the absence of a traditional positive test. The significance of the BALCO cases is in their potential precedent. In these cases, all facts and circumstances were considered even in the absence of a positive test. These cases recognized the fact that a positive test does not always tell the whole story. If this is the trend in doping, it should lead to more facts and circumstances considered even when there *is* a traditional analytical positive test.

VI. PROPOSALS FOR IMPROVEMENT

A. Giving Effect to the Word of the Code

As discussed previously, the strict liability standard currently employed by WADA affords an innocent athlete virtually no opportunity to be fully exonerated. Yet, on the flip side, giving the federations the burden to prove an athlete's guilt is equally unappealing.¹⁶⁹ Therefore, this Note proposes a system where a positive test raises a rebuttable presumption of a doping violation.¹⁷⁰ No sanction shall be imposed or even recommended until a hearing has taken place in front of AAA (or the comparable NADO sanctioned adjudicatory body in other countries¹⁷¹). At this arbitration hearing, the athlete will be able to offer any evidence and arguments he or she may have on his or her behalf, to both the validity of the test itself and to any extraordinary circumstances,

168. See *USADA v. Gaines*, CAS 2004/O/649, 25 (Ct. Arb. Sport 2004); *USADA v. Montgomery*, CAS 2004/O/645, 24 (Ct. Arb. Sport 2004) (both cases charged and sanctioned the athlete for the *use* of various performance-enhancing drugs although neither had ever tested positive for in an actual drug test); see also, *French v. ASC and Cycling Australia*, CAS 2004/A/651, 3-4 (Ct. Arb. Sport 2004) (non-analytical positive was determined because of a bucket of used syringes and banned substance found a hotel room which French had previously occupied).

169. “[I]t would be both very difficult and very costly for a sports federation to prove the fault of an athlete. An athlete is undoubtedly in a better position than a sports federation to explain why a specific substance was detected in his or her body. In this regard, it should be emphasized that sports federations are private bodies that lack the powers of coercion necessary to undertake the type of investigation required to discharge such a burden.” Legal Opinion, *supra* note 141, at 41.

170. “[I]t is clear that the presumption of fault . . . is not only appropriate but also essential in order to pursue an efficient anti-doping policy.” *Id.*

171. The Code, *supra* note 2, art. 13.2.2, at 38.

which could lead to mitigation of the sanction. Only after such evidence is presented would there be any determination of whether there was a doping violation. Furthermore, this determination would be made taking into account both the validity of the test and any mitigating circumstances offered by the athlete. A doping violation would be found if the athlete is at fault *in any way* for the presence of the banned substance in their specimen. If the athlete proves no fault, then there will be no doping violation.¹⁷² After a doping violation is found or not found, a sanction will be determined, based on the extent of the athlete's fault, ranging from a warning to a two-year suspension (for first-time offenses) and from two-years-and-one-day, to a lifetime suspension (for a successive offense).¹⁷³

This might sound similar to the current system under the Code, and it is. Yet, unlike the current Code, Articles 10.5.1 and 10.5.2 would be used and implemented with the spirit in which they were added to the Code. Otherwise, there has been no change since the pre-WADA system. Additionally, if these sections are not given *real* effect, WADA risks violating human rights guarantees.¹⁷⁴ This system would offer a true case-by-case analysis, protecting the accused athlete's rights, while at the same time keeping the entire burden on the athlete to prove no fault. The focus would be on determining an appropriate level of punishment, if any, that is proportionate to the athlete's degree of fault. Finally, this system would not alter the number or basic nature of the hearings, therefore keeping the costs to the anti-doping organization at their current rate.

B. Additional Recommendations

This Note recommends several improvements for the current problems with the adequacy of testing. It breaks its recommendations into two categories, based on the two different

172. This proposal would alter the present bifurcated nature of the current WADA rules. The process would still be bifurcated into a determination of a doping violation followed by a determination of the proper sanction, yet the factors considered in each stage will be altered and the emphasis would be on the latter phase.

173. If it is a second or subsequent offense, that will be a factor in determining both if there was a doping violation and what the appropriate sanction should be.

174. Legal Opinion, *supra* note 141, at 35-39. "There is considerable debate as to whether human rights apply to doping disputes. This being so, there are arguments in favour of their application and it may be that in the future, courts will enforce human right guarantees in sport matters. Hence, the Code should be in conformity with human rights and general principles of law." Legal Opinion, *supra* note 139, at 5.

forms of false positive—those caused by contaminated supplements and those caused by mistakes in the laboratory.

The first recommendation is directed specifically at the problem of unregulated supplements, discussed *supra*. In the absence of any change in the regulation patterns of countries, there needs to be a response from WADA. As of now, with the evidence of contamination, the burden placed on the athletes is just too heavy to be reasonable. Part of easing this burden would be to back away from the strict liability standard as discussed *supra* in Part VI. In addition, WADA should assist athletes in narrowing down the choices of supplements. One possibility is to institute a program in which WADA would contract with supplement companies/manufacturers to endorse their products to all athletes in exchange for the company's use of certain quality standards. Such standards might include the testing of each batch of supplements that they produce or compliance with strict manufacturing standards to ensure that no banned substances are being produced at the same plant as their 'clean' substances. On top of this, the company would accept liability for any athlete that can prove they tested positive from the contamination of one of their products.¹⁷⁵ The encouragement of more programs such as these would provide safer choices for athletes.

The second recommendation is intended to help protect athletes from the demands on WADA-accredited laboratories. Under current WADA rules, the only way to prevent a finding of a "doping violation" under Rule 2.1 is to prove that the test itself was inaccurate. However, since the laboratory is in full custody of the specimen from start to finish of the test, it is difficult for an athlete to ever prove any problems with the test itself. One simple way to place an extra check of the laboratories would be to send the A and B samples¹⁷⁶ to separate laboratories. This would reduce the possibility of false positives and prevent a laboratory from covering a false positive test up by matching the B sample to the A (as both tests are in its control).

175. At least one Canadian company has already taken such a step. See USANA Press Release, Jan.15, 2004, available at <http://www.usanahealthsciences.com/news/news/15Jan04.pdf> (USANA, a nutritional supplement manufacturer, offers a one million dollar guarantee to elite Canadian athletes against positive drug tests as a result of any of their products).

176. When an athlete provides a sample to a doping organization, the sample is separated into an A sample and a B sample (labeled with the same sample number), which are both sealed and sent to the same laboratory.

CONCLUSION

The international fight against doping has come a long way since the days of confusing rules and divergent systems of the pre-1999 anti-doping administration. WADA is a tool that can be effectively used by the international community to put a large dent into the plans of a devious athlete. However, great precaution must be taken to ensure that the desire to rid the sport of cheaters does not carelessly allow innocent athletes to bear the same label without the same fault.

As this Note has exhibited, many avenues leading to false positives still exist. It has illustrated there are things that athletes cannot avoid (despite the highest levels of care). It has further demonstrated that in such situations athletes are consistently left with no recourse, as they cannot meet the proof standards required under WADA. With this knowledge, WADA has a responsibility not only to protect all athletes from cheaters, but also to protect innocent athletes from false positives. If WADA does not make adjustments to its policy in order to do this, it is shirking its responsibility to those yet-identified athletes. The *Vencill* case provides an example of such an athlete. Instead of protecting him, the system reprimanded him for not living up to the unbearable burden of Rule 2.1.1. A system that fears cheaters so much that it is willing to sacrifice the Kicker Vencills of the world is a system that is hurting those it was created to protect.

WADA rules 10.5.1 and 10.5.2 contain the potential for a fair and effective system. However, so far these provisions have been reduced to mere words and are seemingly easily quashed by the burden of Rule 2.1.1. According to the 2003 Legal Opinion procured by WADA, without the effect of these two provisions, the Code violates human rights and general principles of International Law. WADA must, as it is doing in the circumstance of non-analytical positives, keep moving towards a practice of considering all the facts and circumstances on a case-by-case basis and give each athlete a fair and *real* opportunity to prove their innocence.

Taking a step back from Code provisions and legal opinions, the main goal of an anti-doping organization is to catch cheaters—those intending to disrespect their sport by enhancing their performance. The concept of a ‘cheater’ without a doubt involves intent on the part of the individual involved. A system to catch cheaters, which disregards intent, is destined to sweep up many innocent individuals in its path. If WADA and the international community can live with

that on their conscience, then doping has truly taken a toll on the spirit of sport.