

THE PLAYERS HAVE LOST THAT ARGUMENT: DOPING, DRUG TESTING, AND COLLECTIVE BARGAINING

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On September 28, 2005, the Senate Commerce, Science and Transportation Committee held hearings related to the Clean Sports Act¹ and the Professional Sports Integrity and Accountability Act.² Each of those proposed pieces of legislation would have required uniform standards related to the control of doping in American professional sports. Each would have taken from the leagues the freedom to set policies related to doping, at least to the degree that any of those policies set standards or penalties less than those provided for in the World Anti-Doping Code (“WADA Code”). Either bill, if enacted into law in their then current form, constitute a profound change in the way that those sports and their practices of collective bargaining are treated in the United States.³

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1. Clean Sports Act of 2005, H.R. 2565, 109th Cong. (2005).

2. The Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (2005).

3. The sponsors of the two bills, Sen. John McCain and Sen. Jim Bunning, announced on November 1, 2005 that the two bills would be combined and re-introduced as a single bill. See CBSSportsLine.com, Senators Bunning, McCain Reintroducing Steroids Legislation (Nov. 1, 2005), <http://cbssportsline.com/mlb/story/9016587>. Senators Bunning and McCain announced that they had revised their version of the legislation to soften the penalty portion. CBSSportsLine.com, MLB Settles on Steroids Standards (Nov. 15, 2005), <http://www.cbsnews.com/stories/2005/11/15/sportsline/main1044749.shtml>. It is unclear whether this change will be accepted in the House. Rep. Elijah E. Cummings of Maryland has stated that he prefers the stiffer penalties in the House version. Dan Connolly, *Baseball Stiffens Rules on Steroids: New 3- Strikes Policy Sets Suspensions of 50 Games, 100 Games, Potential Lifetime Ban*, BALTIMORE SUN, Nov. 16, 2005, at A1.

Although the World Anti-Doping Agency (“WADA”) has for years decried what it believes is the lax attitude of American professional sports leagues toward the issue of doping,⁴ these bills were not drafted in response to international pressure. There is nothing in the legislative history to suggest a desire to insure international harmonization of standards. In fact, various congressmen repeatedly voiced the view that they would prefer not to deal with these matters at all, and hoped to be able to defer to the judgments of each of the leagues about the best approach to dealing with the problems of doping in their particular sports.⁵ What they were not prepared to do was to permit the leagues to treat the matter as a normal issue of employment.⁶

The hearings made great political theater. Senator Jim Bunning warned the witnesses that he expected that the proceedings were likely to be heated and uncomfortable.⁷ They were, with most of the heat directed at Donald Fehr, Executive Director of the Major League Baseball Players Association. Senator John McCain of Arizona excoriated him for “not getting it.”⁸ It is hardly surprising that he and at least some of the participants did not get it. It would be difficult to imagine a more profound change in the climate related to drug testing in the employment context in the United States.⁹

Over the course of the hearing, various senators made clear what it was that Fehr had not gotten. Congress now regarded performance-enhancing drugs in sports as a “transcendent issue.”¹⁰ In the face of such

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4. See Rediff.com, *IOC Urged to Make US a Sports Outcast* (Nov. 21, 2003), <http://www.rediff.com/sports/2003/nov/21wada.htm>.
 5. Such an approach is directly contrary to that taken by WADA which mandates the same list of anti-doping rule violations, the same burdens of proof, and the same consequences for anti-doping rule violations. The WADA Code does not, however, require “absolute uniformity” in results management and hearing procedures. WORLD ANTI-DOPING AGENCY, *WORLD ANTI-DOPING CODE*, 6 (2003), http://www.wada-ama.org/rtecontent/document/code_v3.pdf.
 6. Referring to the Clean Sports Act of 2005 and the other similar bills pending in Congress, a spokesman for Congressman Tom Davis stated: “No matter which bill ultimately moves forward, one thing is certain: In the absence of self-initiated progress, legislation becomes a matter of when, not if.” CBSSportsLine.com, *Senators Bunning and McCain Reintroducing Steroids Legislation*, *supra* note 3.
 7. *The Clean Sports Act and the Professional Sports Integrity and Accountability Act: Hearing Before the Senate Commerce, Science, and Transportation Committee*, 109th Cong. (2005) (statement of Sen. Jim Bunning) available at <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1619> [hereinafter *Clean Sports Act Hearing*].
 8. *Clean Sports Act Hearing*, *supra* note 7, at 17 (statement of Sen. John McCain).
 9. When athletes from American professional sports compete in international competitions like the Olympics, they are covered by the WADA Code.
 10. *Clean Sports Act Hearing*, *supra* note 7, at 16 (statement of Sen. John McCain).

transcendence, a matter affecting the terms of conditions of work, drug testing, and thus a mandatory subject of collective bargaining, would not be permitted to go through the normal process of collective bargaining. The Union was informed that its obligation to protect all of its members did not extend to “cheaters.”¹¹ Comprehensive drug testing, including out of competition, random, unannounced testing was characterized as “not about privacy.”¹² As Senator Dorgan explained to Donald Fehr, “you and the players have lost that argument.”¹³

It was, in fact, never much of an argument. It was more of a public humiliation. Whether it was a constructive one is open to doubt.

THE NEED TO CONTROL DOPING

The findings made by Congress in supporting these bills fall into three broad categories: the impact of doping, or perceived doping, in professional sports on general public health; the impact of doping on the integrity of competition in professional sports; and the impact of doping on the health of athletes participating in professional sports. In support of these findings, Congress cited evidence of frighteningly high and dramatically increasing levels of steroid drug abuse by American children.¹⁴ Whether those particular findings are well supported by the available evidence both on the number of steroid users and on the connection between professional sports and youth steroid use is open to doubt. There are serious methodological problems with the studies on which the findings about the extent of steroid use by American youth were based.¹⁵ The connection between that use, at whatever level it exists, and professional athletes is even more problematic. At least some of that use seems likely to be more related to concerns about body image,¹⁶ and the desire for improvements in athletic performance, than it is by a desire to

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11. *Id.* at 4 (statement of Sen. Gordon Smith).
 12. *Id.* at 3 (statement of Sen. Byron L. Dorgan).
 13. *Id.*
 14. *See Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 10 (2005) (statement of Rep. Henry A. Waxman, Ranking Minority Member, Comm. on Government Reform) (rate of steroid use among high school students increased from one in 45 in 1993 to one in 16 in 2003).
 15. *See Eradicating Steroid Use, Part IV: Examining the Use of Steroids by Young Women to Enhance Athletic Performance and Body Image: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 83 (2005) (presentation by Harrison G. Pope, Jr., Professor, Harvard Medical School).
 16. *See generally*, HARRISON G. POPE, JR., ET AL., *THE ADONIS COMPLEX: THE SECRET CRISIS OF MALE BODY OBSESSION* (2000).

emulate what are understood to be steroid using professional athletes.¹⁷ That particular question is, however, well beyond the scope of this paper. I will assume the argument that professional athletes are, in fact, role models and do influence the behavior of American young people. I will also assume that a credible set of policies making it clear that doping is not acceptable in American professional sports will have an effect on the behaviors both of teens generally and of non-professional athletes at all age levels.¹⁸

On each of the other two points, the importance of controlling doping has been proven beyond cavil. At the highest levels of competition the differences among competitors are generally very small. Even minor marginal advantages are likely to produce substantial competitive gains. Unless these advantages are controlled, they quickly become norms, or even requirements. These advantages can be the result of superior equipment, better training techniques, more effective coaching, better diet, or, obviously, performance-enhancing substances and methods.

For much of the history of sport, understanding of human physiology was so poor that the pursuit of advantage through performance enhancers was as likely to be irrelevant or counterproductive as it was to aid athlete performance. One nineteenth century Harvard football team, for example, resolved to eat only meat, on the theory that this would increase its toughness and aggressiveness. The resulting digestive problems caused the team quickly to abandon this ill-conceived strategy.¹⁹ The first recorded

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17. Alfred J. Smuskiewicz, *Steroids: Is Bulking up Worth the Risk?* (2004), <http://home.earthlink.net/~ajjsart/steroidswb.html> (“The main reason that U.S. adolescents in the NIDA survey gave for using steroids was not athletic achievement, but improvement in physical appearance.”).
 18. What constitutes a “credible” policy depends on many factors, including the degree to which Congress and the press report that it is “credible.” The NBA policy and the NHL complete lack of policy went largely un-remarked upon until the congressional investigations. A very aggressive policy that produces a large number of positive tests may, moreover, have the perverse effect of destroying confidence in the game. *See Clean Sports Act Hearing, supra* note 7, at 4 (statement of Sen. Gordon Smith). “Every time a player tests positive for drugs he casts [doubt] not only on his own achievements but on the achievements of all players.” *Id.* at 3. On public perception of the scale of the problem of performance-enhancing substances in Major League Baseball, see HarrisInteractive.com, *Most Think Many MLB Players Use Performance-Enhancing Drugs and Favor Strong Testing and Punishment for Offenders*, The Harris Poll #34 (May 12, 2004), http://www.harrisinteractive.com/harris_poll/index.asp?PID=463 (finding 94% of adults and 95% of those who follow baseball believed that at least some players used performance-enhancing drugs and those persons on average estimated that about a third of all players did so).
 19. At what is commonly judged to be the first intercollegiate athletic competition in the United States, a boat race between crews from Harvard and Yale on Lake

case of the use of performance-enhancing drugs in the modern era was in the marathon at the 1904 Olympic games. The eventual winner, Tom Hicks, was denied water, and instead given repeated doses of strychnine laced eggs and cognac, during the race.²⁰ His experience was not of the type to inspire imitators. His winning time was the slowest in Olympic history by nearly half an hour.²¹ He was in such poor physical condition at the end of the race that he had to be physically supported by two race officials and helped over the finish line. After the race, he was too weak and disoriented to receive his victory cup and had to be attended by physicians.²²

Mistaken ideas have a self-limiting quality.²³ But beginning in the 1950s, understanding of the human body and sports performance had progressed to the point that it was possible for athletes to realize real gains in performance by doping. These gains are often derided as substituting chemicals for training, hard work and sacrifice. That is clearly a mischaracterization of what is involved. Performance-enhancing substances are not a substitute for training, but an aid to training. They cannot transform a bad athlete into a great athlete, nor can they permit even a great athlete to get away with not training. They can, however, substantially improve the performance of athletes who train hard. They may be able to improve performance so much that unless removed from the competitive environment, they will render those athletes who do not use them uncompetitive.

If mistaken ideas have a self-limiting quality, bad ideas do not. This is particularly true where the idea is bad, because there is a trade-off of immediate benefit for long-term harm. This is the case with steroids. It is also true where the substance imposes immediate risks to health and safety, but those risks are deemed by the athletes to be more acceptable than the risk of losing. Just as bad money drives out good, doped athletes eventually will drive out clean athletes, unless doping is effectively regulated.²⁴

Winnepesaukee in New Hampshire, the Yale crews tried to increase their chances of winning by refraining from consuming pastries in the days leading up to the race, apparently hoping to gain an advantage on the donut-eating Cantabs.

20. GEORGE R. MATTHEWS, *AMERICA'S FIRST OLYMPICS: THE ST. LOUIS GAMES OF 1904* 140 (2005).
21. See Sabrina Yohannes, *Altitude Training Secret of Ethiopian Golds*, Oct. 2, 2000, <http://www2.iaaf.org/news/Articles/getnews.asp?Code=2715&Event=OLY00>.
22. MATTHEWS, *supra* note 20, at 142.
23. See, e.g., Don H. Catlin & Thomas H. Murray, *Performance-Enhancing Drugs, Fair Competition, and Olympic Sport*, 267 *JAMA* 231, 232 (July 17, 1996) (codeine and dihydrocodeine bitartrate removed from the prohibited list because of lack of evidence of abuse by athletes or of performance-enhancing effects).
24. Several senators at the hearings expressed great concern about the effect that failing

Historically, the bodies responsible for regulating sports have been given wide authority to regulate their own affairs and to decide when the pursuit of marginal advantage, by whatever means, threatens the sport.²⁵

THE RESPONSE TO DOPING

Olympic Sports

In the 1950s, it became clear that a significant number of Olympic athletes were engaged in systematic doping. Concern over these practices led the International Olympic Committee ("IOC") Medical Commission to pass a resolution against these practices.²⁶ Spurred by the death of a cyclist, who had taken amphetamine, the IOC began limited testing for a limited range of stimulants at the 1968 Olympics.²⁷ Over the years, the IOC gradually increased the number of substances that it attempted to test for,²⁸ including anabolic steroids in 1976 and testosterone in 1984.²⁹

Initially, this drug testing—especially after the utilization of the gas chromatograph and mass spectrometer in 1983—uncovered a significant

to control performance-enhancing drugs would have on inter-temporal comparisons of performance. *See Clean Sports Act Hearing*, *supra* note 7 (statements of Sen. Jim Bunning, Sen. Byron L. Dorgan, Sen. Gordon Smith). This argument has some force when applied to records in individual competition events such as running and jumping. The difficulties of comparing the performance of team sport athletes from one era with those of another is so great that this particular concern seems seriously misplaced.

25. In general, scrutiny over self-regulation has been greatest where the effect of the regulation is to restrict competition. *See, e.g., Gunter Harz, Sports, Inc. v. U.S. Tennis Ass'n*, 665 F.2d 222 (8th Cir. 1981). The Federal government has, however, occasionally threatened to regulate sports in situations in which the self-regulating bodies have failed to control abuses. The most famous of these is probably President Theodore Roosevelt's threat to regulate or ban intercollegiate football unless something was done to curb violence in the sport. Robert Strauss, *Intercollegiate Sports Have Long Been a Political Football*, N.Y. TIMES, Dec. 24, 2000, § NJ, at 4.
26. James B. Jacobs & Bruce Samuels, *The Drug Testing Project in International Sports: Dilemmas in an Expanding Regulatory Regime*, 18 HASTINGS INT'L & COMP. L. REV. 557, 562 (1994).
27. Catlin & Murray, *supra* note 23, at 231.
28. In 1976 the IOC listed thirty prohibited substances. *See Jacobs & Samuels, supra* note 26, at 562. Twenty-two years later the list had grown so large that the Chairman of the IOC called for drastic changes in the definition of doping in order to reduce the size of the list. CNN Sports Illustrated, *Samaranch Says Dope List Must be Cut* (July 26, 1998), http://sportsillustrated.cnn.com/olympics/news/1998/07/26/samaranch_dope/. His suggestion was never acted on. The IOC currently bans approximately 3,000 drugs as performance enhancers. Jacobs & Samuels, *supra* note 26, at 564.
29. Catlin & Murray, *supra* note 23, at 232.

number of doping violations, and “led to the forfeiture of twenty-one medals, including eleven golds.”³⁰ Over the ensuing decade that number dropped sharply. Occasional high profile athletes were detected, including most notably Ben Johnson, who was stripped of the gold medal at the 1988 Seoul Olympics.³¹ The detection rate remained, however, extremely low.

Convinced that the low rate of detection reflected the failure of competition drug testing to uncover the use of training drugs like steroids, a group of American track and field athletes under the auspices of The Athletic Congress (now called USA Track and Field) developed the first no-notice out-of-competition drug testing program in 1989.³² This program was designed with substantial input from the athletes themselves. They were understandably concerned that this expansion of drug testing would constitute a substantial intrusion on their privacy rights, and that it increased the likelihood of false positives. The authors of this new, more aggressive program responded to these concerns by building in substantial due process protections, including a commitment to keep test results confidential until they had been confirmed.³³ Even this more expanded testing failed to uncover any significant number of violations.³⁴

A series of events in the 1990s changed the approach of the IOC. The experience of litigating the Butch Reynolds case in the American courts brought to a head problems that the various federations had in enforcing the anti-doping rules, and led to a variety of procedural changes including the reorganization of the Court of Arbitration for Sport (“CAS”).³⁵ They also led to the creation of an independent anti-doping body, WADA, in 1999.³⁶ WADA then promulgated the World Anti-Doping Code (“WADA Code”), which was adopted at the World Conference on Doping in Sport in Copenhagen in March, 2003.³⁷

30. Jacobs & Samuels, *supra* note 26, at 563.

31. Lawrie Mifflin, *Johnson's Testing Leaves Questions*, N.Y. TIMES, Sept. 27, 1988, at D31.

32. First Witness Statement of Patricia Plumer, IAAF v. USATF, CAS 2002/O/401, at ¶¶ 9-19.

33. *See id.*

34. Jacobs & Samuels, *supra* note 26, at 568 (stating that 1,400 tests were conducted with one positive result).

35. Paul H. Haagen, Professor of Law, Duke University School of Law, *Have the Wheels Already Been Invented? The Court of Arbitration for Sport as a Model of Dispute Resolution*, Lecture at the Duke Conference on Doping (May 17, 1999), <http://www.law.duke.edu/sportscenter/haagen.pdf>, in IAN S. BLACKSHAW, *MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES* 117-24 (2002).

36. World Anti-Doping Agency, WADA History, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (last visited Mar. 20, 2006).

37. World Anti-Doping Agency, Introduction, <http://www.wada-ama.org/en/dynamic>

The WADA Code reflects both the experience gained by the IOC in twenty years of serious efforts at testing for performance-enhancing substances in sports, and the European bureaucratic tradition out of which it developed. It is an extremely athlete-unfriendly document. It enacts a strict liability regime, placing on the athlete complete responsibility for any substance found in that athlete's body.³⁸ The WADA Code recognizes that this standard may lead to results that are in "some sense" unfair to the athlete. "[T]he Athlete may have taken medications the result of mis-labeling or faulty advice for which he or she is not responsible—particularly in the case of sudden illness in a foreign country."³⁹ It chooses, however, not to deal with that unfairness, and to treat the harm to an individual athlete associated both with being banned from the sport and labeled a "doper," as yet another of the "vicissitudes of competition, like those of life generally."⁴⁰

With the exception of a narrow range of "specified" substances, which are "less likely to be successfully abused as doping agents," or are "particularly susceptible" to unintentional anti-doping rules violations because of their general availability in medicinal products, the presumptive sanctions are severe: two years for the first violation, and a lifetime ban for the second.⁴¹ A violation, moreover, is defined as the presence of a prohibited substance, its metabolites or markers.⁴² Thus, an athlete who tested positive for an amphetamine and later tested positive for a marker of testosterone would receive a lifetime ban.⁴³ Where the athlete can establish that she had no fault or negligence in the violation, there is the possibility of a reduction in the period of ineligibility, but the reduction can never be more than half of the minimum period otherwise inapplicable.⁴⁴ The athlete

.ch2?pageCategory.id=267 (last visited Mar. 20, 2006).

38. WORLD ANTI-DOPING AGENCY, *supra* note 5, at 8.

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 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

Id.

39. *Id.*

40. *Id.*

41. *Id.* at 26-27, art. 10.2. The WADA Code defines "doping" as the occurrence of one or more anti-doping rule violations. *Id.* at 8, Art. 1.

42. *Id.* at 8, art. 2.1.

43. *Id.* at 27, art. 10.2.

44. WORLD ANTI-DOPING AGENCY, *supra* note 5, at 31, art. 10.5.2.

must, moreover, be able to establish how the substance entered her body.⁴⁵ Occasionally, an athlete, like the American swimmer Kicker Vencill, has succeeded in meeting that burden of proof.⁴⁶ Vencill tested positive for 19-Norandrolone, a steroid precursor.⁴⁷ He had the resources to have a variety of substances that he had taken during his training analyzed to determine if they might have been the source.⁴⁸ Those tests revealed that one of those substances, a multivitamin, was contaminated with trace elements of the prohibited substance that showed up in his drug test.⁴⁹ His period of ineligibility was reduced from four years to two.⁵⁰ As he later noted: "Who would think that a multivitamin is contaminated? But it was and we proved it."⁵¹

Another American swimmer, fifteen year old Jessica Foschi, was not so lucky. She had no idea why she tested positive.⁵² Nothing in the circumstances of the case suggested any reason to believe that she took the substance knowingly, and the Court of Arbitration for Sport was convinced that she did not. Nothing in the circumstances of the case suggested that it could have given any sort of competitive advantage.⁵³ She could not, however, identify the source, and thus would have been unable to meet her burden of proof under the WADA Code.⁵⁴

Since the mid-1980s, the IOC has tested both for substances that must have been introduced exogenously, because they are not naturally occurring in the body, and for evidence that naturally occurring substances, like testosterone and human growth hormone, have been introduced exogenously. The tests for exogenous substances are inherently subject to greater uncertainty and potential error. The risks of error are shifted to the athlete.

When an athlete is tested, the bodily specimen is divided into an "A" and a "B" sample. If the A sample is positive for a doping violation, the athlete is entitled to request a testing of the B sample to ensure that the first test is confirmed. The WADA Code somewhat grudgingly acknowledges

45. *Id.*

46. Ben Fox, *Banned Swimmer Wins Case Over Supplements*, USA TODAY, May 13, 2005, available at http://www.usatoday.com/news/health/2005-05-13-swimmer_x.htm.

47. *Id.*

48. *See id.*

49. *Id.*

50. *Id.* Vencill successfully sued the manufacturer of the multivitamin for damages. *Id.*

51. Ben Fox, *supra* note 46.

52. Foschi v. FINA, CAS 1996/156, § 15.2 (Ct. Arb. Sport 1997).

53. *Id.* § 15.2.3.

54. *Id.* § 15.2.4.

the possibility that it might not be.⁵⁵ The name of the athlete is, however, made public before the B sample confirmation, with all of the negative publicity and suspicion that would attach to such a disclosure. Requiring such disclosure is not irrational, and reflects the culture of mistrust that pervades international sport. It is, however, a choice, and one that has significant consequences for the athletes named. The negative publicity and suspicion do not go away even if the A test is not confirmed and the athlete eventually exonerated.

American Professional Sports

In November 2003, the Chairman of WADA told Reuters that he was considering urging the President of the International Olympic Committee to treat the United States as an international sports pariah, and to pressure all of the member federations to remove their international sports competitions from the United States. He was, he explained, dismayed both by the Bush Administration's cuts in the funding provided by the United States to WADA, and by the refusal of the professional sports leagues in the United States to sign on to the WADA anti-doping effort. It would probably be more accurate to say that the American sports leagues did not so much refuse to sign on to the WADA anti-doping campaign as ignore it altogether. The Commissioner of the National Hockey League ("NHL"), according to Pound, would not even return his telephone calls and the then Associate General Counsel of the Major League Baseball Players' Association, Gene Orza, labeled both WADA and its Chairman, "irrelevant."⁵⁶ It was a view apparently shared by officials at the White House. Again according to Pound, a Bush administration representative "was here (in Montreal) and wouldn't even talk to us."⁵⁷

The consistent approach of the American professional sports leagues was to treat the control of doping like other workplace drug testing programs, and thus as a matter to be resolved in collective bargaining. Collective bargaining consistently produced either no action or programs that showed a high level of sensitivity to the procedural rights and privacy interests of athletes. The NHL was an example of the former. In 2003, it had no testing program for performance-enhancing drugs.⁵⁸ The National Basketball Association ("NBA") was an example of the latter. The NBA

55. WORLD ANTI-DOPING AGENCY, *supra* note 5, at 23, art. 7.5 Comment.

56. Rediff.com, *supra* note 4.

57. *Id.*

58. See Letter from House Committee on Government Reform to Gary Bettman, Comm'r, Nat'l Hockey League, and Robert Goodenow, Executive Dir., Nat'l Hockey League Players' Ass'n (July 27, 2005), <http://www.democrats.reform.house.gov/documents/20050727165422-73491.pdf>.

had a drug testing program, but one that differed dramatically from the WADA program in virtually all respects.⁵⁹ The NBA program was directed most centrally at drugs of abuse.⁶⁰ Although it covered performance enhancing drugs, the sanctions for use of those substances were much less severe than those for drugs of abuse.⁶¹ Unlike the WADA Code, which is entirely punitive, the relevant NBA program had significant treatment and counseling elements.⁶² An NBA player who voluntarily came forward and admitted a substance problem, whether one involving drugs of abuse or performance-enhancing drugs, was given counseling and treatment, and no penalties imposed for drug violations committed before that player came forward.⁶³ Under the WADA Code, an athlete who came forward voluntarily and admitted to a doping offense would be subject to a two year competition ban.⁶⁴ Finally, unlike under the WADA Code, the NBA drug testing program contained significant protections for athlete confidentiality.

In Major League Baseball (“MLB”), the Major League Baseball Players Association (“MLBPA”) had long taken the position that suspicionless drug testing was an inappropriate invasion of privacy.⁶⁵ This position came under pressure as generalized suspicion about the level of steroid use grew from the mid-1990s on. Various players claimed that forty, fifty, even eighty percent of players were using steroids.⁶⁶ In 2002,

59. See NBA Collective Bargaining Agreement, Jan. 1999, art. XXXIII, available at http://www.nbpa.com/cba_articles/article-XXXIII.php.

60. See *id.* at Exhibit I-2(a), available at http://www.nbpa.com/cba_exhibits/exhibitI-2.php.

61. There was a similar pattern in Major League Baseball, which began testing for cocaine twenty years before it extended its testing program to performance-enhancing drugs. See *Steroid Use in Professional and Amateur Sports: Hearing Before the United States Senate Committee on Commerce, Science and Transportation*, 108th Cong. (2004) (statement of Donald Fehr, Executive Director and General Counsel, Major League Baseball Players Association), available at http://commerce.senate.gov/hearings/testimony.cfm?id=1100&wit_id=1911 [hereinafter *Statement of Donald Fehr*].

62. See *id.* (describing the drug testing program in MLB as “a program that emphasized education, not punishment, that includes progressive, not draconian, discipline”).

63. See NBA Collective Bargaining Agreement, *supra* note 59, art. XXXIII § 7, available at http://www.nbpa.com/cba_articles/article-XXXIII.php#section7.

64. See WORLD ANTI-DOPING AGENCY, *supra* note 5, at 12 (art. 3.2 Methods of Establishing Facts and Presumptions). See also *id.* at 26-27 (art. 10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods).

65. See Statement of Donald Fehr, *supra* note 61 (asserting that MLBPA believes that suspicionless searching of an individual merely because he is a member of a class is at odds with fundamental American principles).

66. See CNN SPORTS ILLUSTRATED.COM, *Caminiti Comes Clean, Ex-MVP Says He Won*

Ken Caminiti admitted that he was on steroids when he won the National League MVP award in 1996.⁶⁷ Collectively, these revelations and suspicions forced the MLBPA to modify its position on testing. In August 2002, baseball finally banned steroids and began random testing of players.⁶⁸ These tests were sanctionless, and only for the purpose of determining the extent of the steroid problem in the sport. Under the terms of that program, if more than five percent of players who were tested yielded a positive result, then a program involving disciplinary sanctions would be instituted. More than five percent of those tested did test positive for steroids and accordingly, baseball instituted disciplinary testing in 2004.⁶⁹ The 2004 testing program resulted in twelve confirmed violations, or about one percent of those tested.⁷⁰ The 2005 testing program uncovered a similar number of violations.⁷¹

CHANGING POLITICAL ENVIRONMENT

The politics surrounding the issues of performance-enhancing drugs and professional sports began to change rapidly at about the same time as the promulgation of the WADA Code. A federal investigation into the Bay Area Laboratory Co-operative, begun in 2002, started to bear fruit in the fall of 2003. As part of that investigation, a series of very high profile athletes, including professional baseball and football players, were subpoenaed to testify in front of the grand jury.⁷²

In his January 20, 2004 State of the Union address, President Bush called on the leaders of American professional sports to “get tough” on doping:

To help children make right choices, they need good examples.
Athletics play such an important role in our society, but,

Award While Using Steroids, May 28, 2002, http://sportsillustrated.cnn.com/si_online/special_report/steroids/.

67. *Id.*

68. John Shea, *Baseball Player's Tests Show Steroid Use*, SAN FRANCISCO CHRONICLE, Nov. 14, 2003, at A1.

69. *Hearing on Steroids Legislation Before the United States Senate Committee on Commerce, Science and Transportation*, 109th Cong. (2005) (statement of Donald Fehr, Executive Director, Major League Baseball Players Association), available at <http://commerce.senate.gov/pdf/fehr.pdf>. There was a disagreement over the interpretation of the results, so the exact number of positive tests is uncertain, but was somewhere between five and seven percent. *See id.*

70. *Id.*

71. Baseball Almanac, *Baseball Steroid Suspensions*, available at http://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited Jan. 12, 2006).

72. *See* CBS News, *Jason Giambi Subpoenaed* (Oct. 20, 2003), <http://www.cbsnews.com/stories/2003/10/22/national/main579448.shtml>.

unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message—that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.⁷³

Three weeks after the President's State of the Union Address, Attorney General John Ashcroft announced a forty-two-count indictment against four men associated with BALCO.⁷⁴ A month after that Congress held hearings and began earnestly investigating performance-enhancing drugs in professional sports one year later.⁷⁵

These hearings threw all of the professional sports on the defensive. All made substantial concessions to the new political realities, with baseball making the fewest. The MLBPA continued to defend both its record in responding to the issue of performance-enhancing drugs, and to insist on negotiating terms that provided for relatively less punitive sanctions and greater procedural protections for its members. Those attempts have been met with contempt, not surprisingly by WADA, but also from Congress. The Chairman of WADA referred to the initial plan as “a complete and utter joke” and “an insult to the intelligence of the American public.”⁷⁶ More ominously for baseball, Congress treated every deviation from the WADA model as a sign of a weak commitment to dealing with performance-enhancing drugs.

DOES DRUG TESTING WORK?

There can be no question that drug testing alters the behavior of competitive athletes. Some risk averse athletes may decide not to chance getting caught. Some athletes who do not want to get involved in doping may be sufficiently reassured by the existence of a drug testing program

73. Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 4, at 94 (Mar. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

74. USA TODAY.COM, *BALCO Investigation Timeline*, <http://www.usatoday.com/sports/balco-timeline.htm> (last visited Mar. 20, 2006).

75. See *Hearing on Steroids Legislation Before the United States Senate Committee on Commerce, Science and Transportation*, supra note 69 (testimony of Donald Fehr).

76. Stephen Wilson, *WADA Chief Calls Baseball Drug Penalties a 'Joke'*, USA TODAY, Nov. 14, 2003, http://www.usatoday.com/sports/baseball/2003-11-14-testing-reax_x.htm.

that they decide that they can both stay in the sport and stay clean.⁷⁷ There is, however, a serious question about the degree to which testing is successful in reducing the use of performance-enhancing substances, as opposed to merely creating incentives for athletes to seek out substances that are more difficult to detect, or in some other way evade detection.

When testing was limited to in-competition testing, it was extremely easy to avoid detection, and especially to avoid detection of training drugs.⁷⁸ Even when unannounced out-of-competition testing was instituted, the results continued to suggest that dopers were not being detected.⁷⁹ Consistently, anecdotal evidence suggests dramatically higher rates of doping than are uncovered in any testing program.

There have admittedly been some notable successes in uncovering doping abuses. As noted previously, the initial use of the gas chromatograph and mass spectrometer resulted in a large number of positive tests in 1983-1984. A decade later, drug testing uncovered testosterone use by eleven Chinese athletes, all medal winners, and pervasive doping among shot put participants at the World Championships.⁸⁰ Both successful testing efforts such as these, and the substantial periods in between, have led to calls for ever more comprehensive testing, with highly uncertain results. “Only a fraction of users, usually the ill-advised or careless, turn up positive.”⁸¹

If IOC and WADA testing programs apparently can be evaded, there is an even stronger reason to be skeptical about the less comprehensive plans in American professional sports.⁸² One of the reasons to be skeptical

77. *Cf.* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666, 673, 676 (1989) (rationalizing that even though only 5 out of 3,600 employees tested positive, testing may have a deterrent effect on employee use of drugs).

78. *See, e.g.,* Jacobs & Samuel, *supra* note 26, at 566 (quoting Hans Skaset, president of Norway's Confederacy of Sport, who stated “[y]ou can produce statistics showing that we have tested 35,000 persons in one year, as the [IOC] did in 1987, and only some eight or ten were caught. But that is, of course, because everybody knows the game.”).

79. *Id.* at 568 (testing 1,400 out-of-competition athletes produced only one positive result).

80. *Id.* at 567.

81. *Id.* at 566 (quoting Mike Fish, *Steroids: Riskier Than Ever*, ATLANTA J. & CONST., Sept. 26, 1993, at A1).

82. *See Steroid Use in Sports, Part II: Examining the National Football League's Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 55 (2005) (statement of Gary I. Wadler, Associate Professor, New York University School of Medicine); *see also Steroid Use in Sports, Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 9 (2005) (statement of Rep. Henry Waxman, Ranking Minority Member, H. Comm. on Gov't Reform).

is the radical disjunction between insider estimates of drug abuse and the small number of individuals who have been caught. In baseball, for example, there were various estimates of steroid use during the 1990s ranging from 20%⁸³ to as high as 80%⁸⁴ of all players. But when non-disciplinary testing was put in place in 2003, only between 5% and 7% of players tested positive.⁸⁵ The disciplinary testing instituted the following year produced even lower numbers—about 1% in 2004.⁸⁶ So far in 2005, there have been only 12 positive tests.⁸⁷ Either there has been a lot of deterrence or abusers have learned how to play the game.⁸⁸

The demographic profile of the twelve who did test positive in 2005 appears very odd. A quarter were from one team, the Seattle Mariners.⁸⁹ Eight of the twelve are Hispanic and all but one of the eight was born outside the United States.⁹⁰ Only one, Rafael Palmeiro, was a star player. Unless we are to make some highly improbable assumptions about the distribution of dopers in Major League Baseball, this testing program would appear to be catching only the ill-advised and careless. That clearly has been the conclusion of Congress. During the hearings on performance-enhancing drugs, members repeatedly pointed out “loopholes,” gaps, and other failings in this and the various other plans put forward by the various professional sports leagues.

Suspicion that major league sports and Congress did not have this problem under control and needed to go to more comprehensive testing seems confirmed by the BALCO scandals, which revealed that a number of very high profile MLB and NFL players had used performance-enhancing substances. The evidence that the more comprehensive, expensive, and intrusive drug testing regime (which has been part of Olympic sports for twenty-five years) is dramatically more effective at rooting out serious abuses is, however, far from compelling. The majority

83. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Government Reform, supra* note 14, at 2.

84. USA TODAY.COM, *Canseco: Steroids Made Baseball Career Possible*, Feb. 13, 2005, http://www.usatoday.com/sports/baseball/2005-02-13-canseco-60minutes_x.htm.

85. *See* Wilson, *supra* note 76 (quoting Gary Wadler who referred to the results of this first test as “probably the blackest day in the history of sports.”).

86. *See* Statement of Donald Fehr, Executive Director of the MLBPA, Mar. 17, 2005 hearing of the House Committee on Government Reform, MLBPA Press Release (on file with the *New England Law Review*).

87. *See* Lawton Becomes 12th Suspended for Steroids, ESPN.COM, Nov. 2, 2005, <http://sports.espn.go.com/mlb/news/story?id=2211753>.

88. *See id.*

89. *Id.*

90. *See generally id.*

of athletes publicly implicated in the BALCO scandal were not baseball players or other professional athletes. They were athletes who were covered by international drug testing protocols. Many of them had been tested repeatedly over many years, and none of them had tested positive.

This is not to say that the WADA Code is not more likely to detect abusers, nor that with better and more effective research it may eventually be possible to institute a program that might insure drug-free sport. However, WADA is not definitively more effective in ridding sport of performance-enhancing drugs, which warrants a serious debate about whether the costs associated with this program are worthwhile in the context of American professional sports. The purposes and structure of professional sports are very different from the purposes and structure of the Olympic sports that are central to WADA and its mission. The WADA Code explicitly makes a series of trade-offs in determining how to combat performance-enhancing drugs, and those trade-offs place heavy burdens on participating athletes. Those costs are not speculative, they are real. They include invasions of privacy and false positives. Congress should be very slow to take the decisions about how to make those trade-offs in American professional sports out of collective bargaining.

Congress is not without other tools to deal with the problems associated with performance-enhancing drugs in sports. One of those tools, criminal investigations, has proven very effective in the past ten years. For years, it was widely believed that doping was rampant in cycling. It was the sport that triggered the first drug testing program at the Olympic level, and, because of the nature of the activity, it is one where performance-enhancing substances are likely to have a decisive impact. It was not testing, however, that uncovered the scandal of systematic doping by the Festina team, who were widely regarded as the best team in the world at the time; rather, it was a French criminal investigation.

For years, it was widely rumored that the East Germans, and especially the East German female swimmers, were part of a systematic program of doping. It is now known that those rumors not only were both correct, but also badly underestimated the scale and sophistication of the scheme. Again, drug testing did not uncover these abuses. A German criminal investigation did. Similarly, BALCO was a criminal investigation.

If Congress wanted to send the message that it was serious about cracking down on the abuse of performance-enhancing drugs in sports, it has at its disposal a powerful weapon in criminal law. At most, drug testing is a second best alternative.

THERE OUGHT NOT BE QUESTIONS ABOUT PENALTIES

The WADA Code provides that, in most cases, an athlete who is determined to have committed an anti-doping rule violation will be banned

from competition for two years for a first violation, and for life for the second. These sanctions, whether deliberately or not, appear to follow the example of soccer, in which a player receives a yellow card for a first cautionable offense, and is disqualified for a second one. Possibly, they developed by analogy from the “two false starts” rule in track and field. The American professional leagues have now all adopted a policy based on baseball’s “three strikes” rule, with progressively greater sanctions leading to a lifetime ban for a third offense. It seems appropriate symbolically for American professional sports.

At the September 28th hearing, Donald Fehr reported to Congress that the MLBPA and the MLB had not yet reached agreement on the new penalties to be imposed for each of these strikes.⁹¹ The Commissioner had proposed a fifty-game suspension for the first offense, a hundred game suspension for the second offense, and a lifetime ban for the third offense. The players had countered with twenty, seventy-five, and a presumptive lifetime ban with the discretion of the Commissioner not to impose it in exceptional circumstances.⁹² This dispute provoked the ire of Congress including a remarkable comment by Senator Dorgan: “[T]here ought not to be questions about penalties.”⁹³ It is not entirely clear what this comment meant. It is clear, however, that there ought to be questions about penalties.

There is no evidence in the record before Congress that any particular set of penalties works better than any other. The Commissioner’s proposal called for stricter penalties than the Union’s proposal did. The WADA regime provides for stricter penalties still. To the degree that *in terrorem* penalties work, these may work. It is not obvious that they do. Mike Stulce came off a two year doping ban just in time to win the gold medal at the Barcelona Olympics, and the next year was disqualified for life after testing positive for steroids at the World Championships in Stuttgart.⁹⁴ The threat of a lifetime ban for the second offense was not enough to deter him. Conversely, the economic incentives in professional sports are such that

91. CBS NEWS.COM, *Hall of Famers Back Steroid Plan*, Sept. 28, 2005, <http://www.cbsnews.com/stories/2005/09/28/national/main887659.shtml>.

92. The MLBPA proposal that the Commissioner retain authority not to impose a lifetime ban after the third strike has resulted in particular derision and has been characterized as three strikes and you might be out. Putting aside the question of whether there is sufficient reason to treat doping as *sui generis* and to place authority over it in a body wholly independent from MLB, thus never giving the Commissioner such discretion, it bears noting that the WADA Code actually permits some of the discretion for which the MLBPA has called. See WORLD ANTI-DOPING AGENCY, *supra* note 5, at 27-28, Art. 10.3. The MLBPA, under the threat of Congressional intervention, has now accepted the Commissioner’s proposed penalties.

93. *Clean Sports Act Hearing*, *supra* note 7, at 3 (Statement of Sen. Byron L. Dorgan).

94. Jacobs & Samuels, *supra* note 26, at 567-68.

even much less severe penalties than those imposed under the WADA Code can have significant financial consequences for the player. Those consequences may well be enough to dissuade professional athletes.

The logic that would support the Commissioner's proposal over that put forward by the Union is the same logic that would support USATF's zero tolerance proposal, with a lifetime ban for the first offense, over the penalties in the WADA Code. In a profound sense, this is and ought to be a debate about symbols and their effectiveness. There is no necessary magic about the decision of the European dominated IOC to use a two strikes policy. The baseball analogy "three strikes and you are out" structure that has been adopted by all of the American professional sports leagues is obviously more lenient than a two strikes rule, but there is no evidence that it is any less effective either as a symbol or as an effective tool for controlling actual doping abuse. Given the lack of evidence one way or the other, it seems reasonable to allow the parties to work it out in collective bargaining, and to defer to their judgment as long as it is reasonably calculated to achieve the goals. It is particularly appropriate if one other factor is taken into account.

DUE PROCESS IN CSA AND THE EMERGING *LEX SPORTIVA*

Both the WADA Code and the sponsors of the Clean Sports Act ("CSA") in the House emphasize that the Code provides for due process. It clearly does. An athlete who is accused of a doping violation is entitled to a timely hearing before a fair and impartial body. The athlete has the right to be represented by counsel, albeit at their own expense. The athlete has the right to be informed of the violation, to respond, to present evidence, and to receive a written decision. However, given the underlying substantive rules, these procedural rights are likely to be of small comfort to the accused.

As it has emerged in the case law from CAS, the substantive due process guarantees are essentially contractual in nature. Athletes are entitled to what the federations and doping agencies obligate themselves contractually to do. They may not be entitled to any more. A federation or other sporting body that signs on to the WADA Code is required to insure that its member athletes agree to adhere to it, and there is only a very limited provision for a federation to negotiate special provisions. Thus, in the case of WADA, the substantive due process guarantees are essentially only those contained in this adhesive agreement. Where such weight is placed on contract principles, it would seem reasonable to defer as much as possible to the collective bargaining process. Such deference might not be possible in the context of international sport. But, it is both possible and appropriate in the context of the completely unionized workforce in American professional sports.

“IT’S NOT COMPLICATED. IT’S NOT COMPLICATED.”⁹⁵

Sports competition at any serious level is about excess. It is about pushing human physical accomplishment to its outer limits. Those limits continue to be pressed by better coaching, better training, and better understanding of the human body. For good reasons, sporting bodies like the World Anti-Doping Agency have sought to remove from that competition the use of substances that are either injurious to the health of athletes or are deemed to be contrary to the spirit of sport. Because those substances are both so effective and so difficult to detect, the effort to keep them out of sport is extraordinarily difficult. Inevitably, whatever credible system is used to deal with this problem will involve significant invasions of athlete privacy, will inappropriately penalize the unwary and ill-informed, and will fail to detect some egregious cheats

Congress has clearly been both embarrassed and frustrated by the slowness and incompleteness of the response by American professional sports to the issue of doping. It is almost certainly correct that without significant pressure from it, the response would have been even slower and more incomplete. Congress’s frustration has caused it to fail to see how much already has changed, and to threaten easy solutions to complicated problems. There is no model out there that works so well that it is critical that it be universalized. Until there is, it makes sense to defer to collectively bargained responses to the difficult questions of who ought to bear the burdens associated with cleaning drugs out of sports.

95. *The Clean Sports Act Hearing*, *supra* note 7, at 17 (statement of Sen. McCain).

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