

Doping and Anti-Doping Policy in Sport

Ethical, legal and social perspectives

Edited by
Mike McNamee and
Verner Møller



Ethics and Sport

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Doping and Anti-Doping Policy in Sport

The issue of doping has been the most widely discussed problem in sports ethics and is one of the most prominent issues across sports studies, the sports sciences and their constituent disciplines. This book adds uniquely to that catalogue of discourses by focusing on extant anti-doping policy and doping practices from a range of multidisciplinary perspectives (specifically ethical, legal and social scientific).

With contributions from a world-class team of scholars and legal practitioners from the UK, Europe and North America, the book explores key contemporary issues such as:

- sports medicine
- international doping policy
- the whereabouts system
- the criminalization of doping
- privacy rights, gene doping and ethics
- imperfection in doping test procedures
- steroid use in the general population.

Doping and Anti-Doping Policy in Sport offers an important critique of contemporary anti-doping policy and should be essential reading for any advanced student, researcher or policymaker with an interest in this vital issue.

Mike McNamee is Professor of Applied Ethics in the Department of Philosophy, History and Law in Healthcare, Swansea University, and is also a member of the Clinical Ethics Committee at Cardiff and Vale National Health Service Trust, UK. He is Series Editor of *Ethics and Sport* and Editor of the journal *Sport, Ethics and Philosophy*. He is a former President of the International Association for the Philosophy of Sport and the Founding Chair of the British Philosophy of Sport Association.

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Ethics and Sport

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The Ethics and Sport series aims to encourage critical reflection on the practice of sport, and to stimulate professional evaluation and development. Each volume explores new work relating to philosophical ethics and the social and cultural study of ethical issues. Each is different in scope, appeal, focus and treatment, but a balance is sought between local and international focus, perennial and contemporary issues, level of audience, teaching and research application, and variety of practical concerns.

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Introduction

Since institutionalised anti-doping began to emerge in the 1960s, the societal importance of sport has increased significantly. Unsurprisingly, economic interests too have increased accordingly, and it appears that the use of doping in sport has increased as well. When, in 1998, a Belgian soigneur from Team Festina was caught by customs officers on his way to the Tour de France with his trunk loaded with doping substances, the reality shockwaves extended well beyond the world of sports. Politicians across the world began to realise that sports leaders might be incapable of solving the doping problem on their own. Hence, they engaged constructively on an international scale to develop, in 1999, the World Anti Doping Agency (WADA). The idea behind this unique development, where sports organisations and governments around the world shared responsibility for anti-doping, was as reasonable as it was inevitable. Its guiding mission was premised upon key ethical ideals:

- athletes have the right to participate on equal terms with respect to doping-free sport;
- anti-doping should be harmonised, and athletes should be treated on a par across nations and sports;
- the health of athletes and fair play should be a main concern of the global governance of sports.

In the early years of WADA's operation, the initiative and its future looked bright. Not only did the governments commit themselves to sharing the economic burden of the enterprise with the International Olympic Committee (IOC), they also accepted the regulatory framework – the WADA code – despite its incorporation of legal principles not always harmonious with those held in high esteem in liberal democratic societies. Of course, not all societies of the international sports world may be described thus. Nevertheless, for practical reasons, anti-doping operates on the basis of a reserved burden of proof. The benefit of the doubt is not given to the athlete but to the prosecuting authority; intent and guilt have been replaced by the strict liability principle. Today, the WADA code has been adopted by almost every government and sports organisation in the world.

2 Introduction

Unfortunately, the near univocal support given to anti-doping by governments and sports organisations has not brought sports doping cultures to an end. Doping is still part of the reality of elite sport and widespread recreational sports cultures, in the west at least. At the minimum, two undesirable consequences flow from the increased anti-doping effort. Insofar as educational efforts, or personally held values, ensure the majority of athletes abstain from doping (or cease doping because of fears of being caught), the relative advantage increases to those who dope who are willing to run the risk. Another undesirable consequence of the anti-doping regime is that the market value of experts who know how to dope while minimising the risk of getting caught also increases.

These consequences are, of course, not unknown to the anti-doping authorities. Nevertheless, WADA's general policy response has thus far been to implement more and stricter controls. It is widely thought that in-competition testing was relatively inefficient, catching only careless athletes and their entourage, or those with unsophisticated or outmoded techniques of doping. To this measure has been added more rigorous policies, including out-of-competition testing, the declaration of athletes' whereabouts information and, most recently, blood testing for indirect detection of prohibited substances or methods. These advances in anti-doping policy have not met with universal accord. Athletes, scholars and scientists have begun to comment upon the apparent discrepancy between the moral rights inherited from the Enlightenment, which are still held in high esteem in liberal democratic societies, and the regulatory system elite athletes are now subjected to.

In light of this, the International Network of Humanistic Doping Research found it timely to focus its third conference on the human and legal rights aspects of anti-doping. Hence, a group of world-leading experts from a wide range of disciplines within the human and social sciences were invited to present their thoughts and studies on the topic. From the resulting convention, held at Aarhus University, 20–21 August 2009, it became clear that there were serious reasons for concern coming from both advocates and detractors of general anti-doping postures. Equally, it also became clear that credible alternatives to the current approach were hard to find. After the conference, the speakers were invited to turn their oral presentations into the essays that now comprise this volume. The network consists of independent researchers who share an interest in rigorous and principled debate about ways to improve the situation for the athletes, but who nevertheless hold differing and sometimes opposing views about core questions regarding the ethics of performance enhancement. The result is a rich and diverse body of thinking that is reflected in the present volume.

The book opens with Mike McNamee's and Lauri Tarasti's chapter on 'Ethico-legal aspects of anti-doping legislation'. This chapter sets the scene for the volume by drawing attention to the interface between law, medicine and ethics in the contexts of elite sports and sports medicine. The authors explore arguments concerning the apparent legal idiosyncrasies of anti-doping

legislation and their ethically salient features in terms of guilt negligence and liability, punishment, means of legal defence, implications of previous offences when imposing sanctions and, finally, privacy in anti-doping practice and policy. After having pointed out some of the core problems and peculiarities related to the application of legal principles to sport's anti-doping regulations, the authors close the chapter with the reminder that, although finding a firm and justified ethical and legal rationale for anti-doping is of international significance, there are no easy ways to iron out the ethical and legal dilemmas coupled with anti-doping.

In 'The burden of proof in endogenous substance cases: a masking agent for junk science', James E. Coleman, Jr. and Joshua M. Levine launch a sustained critique of one of the cornerstones of anti-doping: the strict liability rule, which puts the burden of proof on the athlete accused of doping after an adverse analytical finding. In doping cases involving endogenous substances, both the governing authorities and accused athletes often must rely on circumstantial evidence to prove or rebut a doping charge. To negate the evidentiary difficulties of not having direct evidence to prove or disprove a violation, they note that WADA relies on two legal moves that pose as standards of proof: first, that indirect or proxy evidence deemed credible by WADA satisfies the authorities' burden to prove doping by clear and convincing evidence; and, second, that, despite this mandatory presumption of doping, the legal rights of accused athletes nevertheless are protected because they are afforded the opportunity to rebut the presumption of guilt under the less demanding preponderance of evidence presented. Taking into account both the current state of the science relating to doping with endogenous substances, and the important interests implicated in the development of any evidentiary standard, this chapter evaluates the merits of these legal strategies and argues that they neither account adequately for the needs of the anti-doping authorities nor adequately protect the legal rights of accused athletes.

David McArdle follows the legal discussion in his chapter on 'Longitudinal profiling, sports arbitration and the woman who had nothing to lose: some thoughts on *Pechstein v. International Skating Union*'. He addresses the new challenge athletes face in defending themselves against an accusation based on blood profiling, the so-called biological passport. The conviction of German speed skater Claudia Pechstein – the first ever to be banned on the basis of blood profiling – has been the cause of much debate. The Pechstein case is significant because it involves sanctions against an athlete who had never returned an adverse analytical finding. McArdle uses the case as an opportunity to discuss the jurisdictional scope of the Court of Arbitration in Sport (CAS), based in Switzerland. He addresses legal concerns that come with the incorporation of indirect evidence, as it is the core of this new anti-doping measure. In the course of his essay, McArdle reveals a perceived laxity in the proceedings of CAS and draws attention to powerful arguments that were apparently overlooked by the defence at the CAS. Given the special

status of sports law, athletes who are charged under the regulations hold the burden of proof. In light of this, and given the fact that WADA's blood profiling provisions are now in force across all sports, the essay concludes that any athlete wishing to challenge profiling would be advised to consider their options very soon.

Athletes' potential vulnerability under WADA governance is further emphasised in Werner Pitsch's contribution, 'Caught between mathematics and ethics: some implications of imperfect doping test procedures'. In this chapter, Pitsch reminds us that WADA's claim that the core rationale for anti-doping is the protection of athletes' fundamental right to participate in doping-free sport is an ideal. Being an ideal, it is of course unreachable. Insofar as there is always a risk of false positive and false negative results in doping tests, the reality, he argues, is likely to fall too far short of the desired end. Both false positive and false negative results restrict the possibilities of clean athletes to participate in doping-free sport. False positive test results deprive clean athletes of their right to participate. A false negative result affects the integrity of a 'doping-free' sport, as doped athletes are allowed to participate. By application of a mathematical simulation model, Pitsch explores the extent to which doping test procedures are 'fair' and 'effective' and, accordingly, the extent to which WADA reaches its objective of enabling 'doping-free sport' and 'a level playing field'. It concludes that anti-doping agencies are faced with an unachievable task.

Bengt Kayser shares the concern over the athletes' poor protection against doping charges, but for another reason. In his chapter, 'On the presumption of guilt without proof of intentionality and other consequences of current anti-doping policy', Kayser acknowledges that the establishment of WADA has significantly improved the 'fight' against doping. He argues, however, that the advances have not come without side effects. A substantial number of people who have been caught for a doping rule violation are punished for the presence of substances that clearly were not taken with the intent to enhance performances. Kayser addresses the ethical problem that, in the name of the 'spirit of sport' – one of the three criteria for which a substance or process can be banned – the anti-doping agencies apparently consider it justifiable that athletes who were not performance enhanced, or had no intent to enhance their performance, are charged with doping offences. Under present anti-doping policy, he argues, athletes who try to play the game according to the anti-doping rule risk significant harm, while we must presume that there are athletes who dope but get away with it. Cognisant of the use of psychotropic drug use in wider society, Kayser concludes that anti-doping policymakers should become more pragmatic and choose regulation and harm-reduction strategies that can replace the presumption of guilt without proof and other controversial side effects of current anti-doping policy.

The European trend towards the criminalisation of doping offenders is a troublesome matter, which John Hoberman analyses in 'Athletes in handcuffs? The criminalization of doping'. For at least a century, the idea that

doping is an unacceptable and unethical practice has been promoted, but a strong, political counter-critique has only existed for two or three decades. The setting-up of WADA, the unique international organisation to fight doping worldwide, was a manifestation of an unprecedented, unified political will to remedy the problem. So far, however, the initiative has largely succeeded in addressing the problem. Nevertheless, a lasting solution to the problem still looks frustratingly far from completion. One fairly drastic policy response from certain countries has been to criminalize doping offences, which, given the 'reversed' burden of proof in doping cases, appears to be a worrying development. Drawing extensively on the German debate, this essay discusses the broader social consequences, including those pertaining to the image of sport itself. The investigation leads to the conclusion that the criminalisation of doping in sport may be taking the fight one step too far, not least in light of the growing medicalisation of the problems of everyday living.

A consequence of progressive medico-technological research is that new drugs and techniques are invented that can be used to enhance athletic performances. In her chapter on 'Privacy rights, gene doping ethics', Angela Schneider adds to the much debated prospect in this field, namely the consequences of advances in gene technology that create a new set of problems for anti-doping. If testing for gene therapy is to have any chance of success, even restraints on athletes' rights may be necessary. Schneider analyses the concept of privacy rights as they pertain to athletes and doping control protocols, in light of the problems gene doping raises. Part of this analysis comprises an examination of whether or not 'privacy' counts as an essentially contested concept. It also addresses the relationship between athletes' privacy rights, rules and sport, before it ends by pointing to the dangers that may face athletes' autonomy when, or if, the prospect of gene doping becomes a reality.

The right to privacy, which athletes claim they should enjoy in liberal democracies, is also a central issue in Ask Vest Christiansen's 'Testing citizens training recreationally in gyms'. Christiansen shows how the anti-doping campaign, run by WADA and targeting achievement sports, has an impact outside the world of elite sport. In Denmark, the WADA strategy has been adopted and adapted as a political tool to remedy the problem of casual drug use in recreational gyms. His essay brings to light the implications of the model of elite sports surveillance for this arena and demonstrates that the application of the WADA standard for out-of-competition testing in gyms may paradoxically give rise to further ethical problems and leave a number of relevant issues unresolved. Moreover, whereas male bodybuilders are tested for use of androgenic anabolic steroids, female athletes' abuse of medicines for slimming purposes, which are on the banned substance list, are not targeted.

Following the analysis of the political impact of the anti-doping campaign outside the sphere of elite sports, Rob Beamish focuses, in his chapter on 'Steroids in the court of public opinion: Roger Clemens versus the