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Laura S. Stewart

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HAS THE UNITED STATES ANTI-DOPING AGENCY GONE TOO FAR? ANALYZING THE SHIFT FROM ‘BEYOND A REASONABLE DOUBT’ TO ‘COMFORTABLE SATISFACTION’

I. INTRODUCTION: WHERE DID ALL THE HYPE ABOUT DOPING COME FROM?

Doping, the use of illicit drugs for body enhancement, is a pervasive and perplexing problem in the modern sporting arena. Unfortunately, doping has left professional bodybuilding and landed in America’s backyard. In 2003, four percent of twelfth graders admitted to trying steroids, translating into nearly 300,000 students between eighth grade and high school. The number of athletes caught using steroids and sanctioned soared in recent years. The variety of drugs on the market and the difficulty in testing leaves sports officials in a quandary on how to best proceed in this difficult territory. Currently, there is no standard in drug testing between sports, leaving spectators disgruntled with superhuman perform-

1. See Barrie Houlihan, Dying to Win 56 (2d ed. 2002) (analyzing spread of doping practices and encompassing existence in sporting events). There is an unending search for new doping products and techniques. See id. Doping knows no boundaries and branches out to new sports and activities. See id. For a further discussion of what constitutes doping, see infra note 15.


3. See Adler, supra note 2, at 45 (illustrating seriousness of drug problem in youth in United States). Experts call the effects of doping on youth sports a “burgeoning epidemic.” Id. Doping is not limited to boys and jocks; girls and boys who are not athletic use steroids to get better bodies. See id. For a further discussion of the effects of doping by sports icons on children, see infra notes 237-40 and accompanying text.

4. See Tom Weir, Drug-Free Sports Might Be Thing of the Past, USA Today, Dec. 8, 2004, at 1A (describing escalating epidemic of drug abuse in sports). Testing has met some success, such as at the 2004 Olympics in Athens, “where 24 drug cheats were caught, a record for the Summer Games.” Id. Experts predict, however, that the worst use of drugs in sports are yet to come and that the 2008 Summer Olympics in Beijing may demonstrate this concern. See id.

5. See Adler, supra note 2, at 47 (“[T]his does not begin to exhaust the list of performance-enhancing drugs in circulation. Human-growth hormone, thyroid hormones and compounds to enhance the oxygen-carrying capacity of blood are all available, albeit illegally, to professional and Olympic athletes; soon, gene therapy may make its mark on the record books.”). For a further discussion of the amount of drugs used for doping, see infra note 15, and Houlihan, supra note 1, at 56.
ances and a lack of accountability. For instance, when baseball player Mark McGwire broke the single-season home run record held by Roger Maris, he was taking androstenedione. In an interesting contrast, prior to this, gold-medalist shot putter Randy Barnes received a lifetime ban from track and field for using the same drug.

Doping in amateur and professional sports is a hotly contested issue in the media, legal circles, and even in Congress. This topic intensified acutely with recent scandals involving the discovery of an American drug ring and rampant accusations of drug use in baseball. To unify the differing levels of monitoring, the international community adopted a standardized code of doping regulation.

In August of 2004, the United States implemented this code for its Olympic athletes. The most significant innovation in the

6. See Weir, supra note 4, at 1A (discussing ramifications of drug use on spectators of baseball). It is unclear how much negative effect drug scandals had on baseball attendance, but in polls fans have voiced their dissatisfaction with current testing standards. See Eddie Pells, National Pastime Altered by Drugs, CBSNEWS.com, Mar. 31, 2003, http://www.cbsnews.com/stories/2003/08/31/health/printable547007.shtml. Baseball’s popularity is down, and fans chanting “steroids” might be an indication of how doping is perceived by the public. See id. For a further discussion on the doping scandal facing baseball, see infra note 80.

7. See Weir, supra note 4, at 1A (recognizing record was previously held by Roger Maris, set in 1961 when Maris hit 61 home runs). For a definition of androstenedione and other performance-enhancing drugs, see infra note 15.

8. See Weir, supra note 4, at 1A (noting Randy Barnes won gold in 1996 shot put). One commentator reveals the unfairness doping presents, even between different sports:

[T]he most prolific chronicler of recent sports and pop culture history, David Wallechinsky — author of the Book of Lists and The Complete Book of the Summer Olympics . . . . [said], ‘Randy Barnes, he got a lifetime ban for it . . . . McGwire got millions of dollars and became an American hero, and he was taking the same drug. . . . Personally, I felt a little furious. It was obvious that all these sluggers were taking steroids.

Id. For a further discussion of the unfairness of doping to athletes, see infra notes 226-30 and accompanying text.

9. See generally Howard Fendrich, Congress Expects Policy Change, FOXSPORTS.com, http://msn.foxsports.com/mlb/story/3471414?print=true (last visited Mar. 19, 2005) (indicating congressional dissatisfaction with current state of drug testing in professional sports, particularly baseball). The issue of doping in baseball has become so heated that Congress held hearings to assess the extent of the problem, threatening to pass legislation to curtail doping. See id. For a further discussion of Congress’s involvement in the baseball doping scandal, see infra note 80.

10. For a further discussion of the Bay Area Lab Co-Operative (“BALCO”) raid and repercussions, see infra note 150 and accompanying text. For a further discussion of the baseball doping scandal, see infra note 80.

11. For a further discussion of the WADA Code, see infra notes 89-102 and accompanying text.

new code is the shift in the standard of proof for doping allegations from "beyond a reasonable doubt" to a "comfortable satisfaction."\textsuperscript{13} As a result, lawyers and athletes alike are yelling foul, fighting against what they perceive as unfair and harsh regulations.\textsuperscript{14}

This Comment provides a definition and short history of doping, as well as presents the roots of international regulatory organizations.\textsuperscript{15} It examines the role of the United States in internal

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\begin{enumerate}
\item It is generally accepted that "doping" is: the presence of prohibited substances in the body (except with permission prior to administration); the attempted use of a prohibited substance; refusing to submit to testing or sample collection; failure to provide all necessary information on whereabouts and missed tests; tampering with any part of the process; possession of prohibited substances; trafficking prohibited substances; or administration, or attempted administration, of any prohibited substance into an athlete. See the WADA Code, supra note 13, § 2. The term "steroids" is commonly used to refer to illegal substances used to enhance performance, however, there are many other drugs used for doping that are not actually steroids. See HOULIHAN, supra note 1, at 35. Amphetamines, more common in the 1960s and 1970s, are used to promote endurance in sports such as cycling and boxing. See id. at 36. Ephedrine is much like amphetamines in that it is a stimulant, but for a long time it was harder to detect. See id. at 38. Most people have caffeine everyday in their coffee, but it has long been used by athletes as a stimulant and as a diuretic to flush out other drugs in the body. See id. at 41. Caffeine is still regulated and restricted by the Olympic Committee. See id. Anabolic steroids are some of the most abused drugs in sports. See id. at 47-48. These steroids use testosterone, a male hormone, used to increase strength and stamina. See id. at 71. It is believed that steroids are such effective because they increase the protein synthesis in the body. See id. Specifically, this means "[m]uscle tissue is produced by the conversion of amino acids which are not produced by the body but are obtained by ingesting protein-rich food . . . . [Steroids increase] the capacity of the body to create protein . . . ." Id. Humán Growth Hormone ("HGH") is a newer drug used for performance enhancement. See id. at 50. Its effects are similar to steroids but far harder to detect. See id. at 51. The drug that Mark McGwire admitted to using during his infamous home run season was androstenedione (commonly known as "andro"). See Weir, supra note 4, at 1A. For a further discussion of doping in baseball, see infra note 80. "[A]ndrostenedione [is] a steroid precursor that increases the body's ability to produce testosterone." Weir, supra note 4, at 1A. This is not nearly an exhaustive list of drugs and substances used for doping. See HOULIHAN, supra note 1, at 96. There are constant advancements of
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doping regulation and adherence to international directives. The analysis focuses on issues facing regulators and athletes, presenting each side of the argument. Finally, this Comment provides an examination of resources available to athletes, as well as an assessment of the purposes of doping regulation.

This Comment primarily addresses Olympic sports, although the same organization regulates the Paralympic and Pan American Games. Professional sporting organizations (such as the National Football League, Major League Baseball, National Hockey League, and National Basketball Association) are not regulated by the same rules because these organizations have yet to adopt the international doping code. Because of recent scandals involving professional athletes, it is helpful to draw parallels between the testing and sanctioning of Olympic athletes with their professional counterparts.

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16. For a further discussion of the U.S. role in doping regulation, see infra notes 113-26 and accompanying text.

17. For a further discussion of the view of testing and adjudication by the regulators and athletes, see infra notes 127-68 and accompanying text.

18. For a further discussion of the arbitration processes available to athletes, see infra notes 169-205 and accompanying text.


20. See 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, 134 (2003) (discussing differences in testing procedures and rules in professional sports). One commentator states: Because U.S. professional leagues are not under the jurisdiction of international sports federations or national governments, they can only be “encouraged” to comply. Because they are self-financing and operate independently from the U.S. government, they can develop guidelines of their own and are under no obligation to follow any of WADA’s antidoping rules or guidelines. However, if professional athletes wish to compete in the Olympic Games, they must comply with WADA’s rules.

John T. Wendt, WADA, Doping and THG, 21 ENT. & SPORTS L. 1, 29 (Winter 2004). For a further discussion of the current state of testing in professional baseball, see infra note 80.

21. For a further discussion of the baseball doping scandals, see infra note 80.
II. BACKGROUND: THE HISTORY AND PRESENT STATE OF DOPING IN OLYMPIC SPORTS

This section addresses the origins of doping in international athletic competition.\footnote{22} Steps taken by the international community to deal with this growing problem are also examined.\footnote{23} Thus far, the creation of an international doping regulating organization, with a formalized code, is the greatest endeavor purporting to level the playing field.\footnote{24} The purpose of this organization is to monitor doping and enforce sanctions against guilty athletes.\footnote{25} Additionally, the United States has its own disgraceful history of doping in athletics.\footnote{26} Although slow to join the world anti-doping movement, the U.S. recently adopted international standards to combat steroid use by athletes.\footnote{27}

A. Doping: Past and Present

The use of performance enhancing substances is not a new occurrence.\footnote{28} Doping plagued sporting events since the advent of competition.\footnote{29} According to one historian, “[t]he word doping is probably derived from the Dutch word dop, the name of an alcoholic beverage made of grape skins used by Zulu warriors in order to enhance their prowess in battle.”\footnote{30} Even ancient Greek athletes used substances believed to improve their skill and strength.\footnote{31} In

\footnote{22} For a further discussion of the history of doping, see infra notes 28-45 and accompanying text.
\footnote{23} For a further discussion of the measures taken by the international community to address doping, see infra notes 90-102 and accompanying text.
\footnote{24} See USADA, Code FAQs, supra note 12 (asserting that “World Anti-Doping Code is the first document to harmonize regulations regarding anti-doping matters across all sports and countries of the world.”).
\footnote{26} For a further discussion of the history of U.S. treatment of doping and drug use in national athletics, see infra notes 74-78 and accompanying text.
\footnote{27} For a further discussion of the U.S. adoption of the World Anti-Doping Code, see infra notes 113-26 and accompanying text.
\footnote{29} See id. ("The practice of enhancing performance through foreign substances or other artificial means, however, is as old as competitive sport itself.").
\footnote{30} Id. (emphasis added) ("The term became current around the turn of the 20th century, originally referring to illegal drugging of racehorses.").
\footnote{31} See id. (describing practices of Greek athletes for competition). Greek athletes tried mushrooms and dried figs to improve their performance. See Houlihan, supra note 1, at 33. Roman athletes used stimulants to combat fatigue. See id.
the nineteenth century, athletes experimented with drugs such as strychnine, opium, and caffeine to give them a competitive edge.\textsuperscript{32}

Doping came to the forefront of modern international sporting organizations when athletes displayed obvious detrimental physical reactions to drugs.\textsuperscript{33} Initially, the problem went unchecked by sporting officials.\textsuperscript{34} As a result, athletes died in several major competition venues.\textsuperscript{35} Despite the rise in injuries and fatalities, drug testing in amateur sports did not begin until the 1950s.\textsuperscript{36} Nevertheless, the international community delayed establishing a committee or plan for addressing the problem.\textsuperscript{37} The problem escalated as athletes became larger, faster, and stronger at unnatural rates.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{32} See Houlihan, supra note 1, at 33 (illustrating dangerous combinations of drugs utilized by athletes during early competitions). "Throughout the last twenty years of the nineteenth century, there were rumours of fatalities due to the use of some very dangerous drugs such as strychnine which tested the limits of human tolerance." \textit{Id.} at 33-34.
  \item \textsuperscript{33} See Wendt, supra note 20, at 28 ("The winner of the 1904 St. Louis marathon, Thomas Hicks, was visibly under the influence of the strychnine and brandy that was administered to him during the course of the race.").
  \item \textsuperscript{34} See Houlihan, supra note 1, at 58 (discussing lack of response by officials in drug testing). Sporting officials, doctors, pharmacists, and coaches are just some of the culprits in the doping issue. \textit{See id.}
  \item \textsuperscript{35} See R. Craig Kammerer, \textit{What is Doping and How Is It Detected?}, in \textbf{Doping in Elite Sport: The Politics of Drugs in the Olympic Movement} 3, 4 (Wayne Wilson & Edward Derse eds., 2001) ("In the 1960 Rome Olympic Games, a cyclist died after apparent amphetamine use . . . . In the 1967 Tour de France, another cyclist died, with amphetamines found both on his person and in his body.").
  \item \textsuperscript{36} See \textit{id.} ("Drug testing of humans began in the late 1950s, when, after several European cycling and track races, evidence of drug use was observed.").
  \item \textsuperscript{37} See Jan Todd & Terry Todd, \textit{Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999}, in \textbf{Doping in Elite Sport: The Politics of Drugs in the Olympic Movement} 65, 67 (Wayne Wilson & Edward Derse eds., 2001) (discussing slow response to need for drug testing). Historians recount: [June 21, 1961,] The IOC [International Olympic Committee] sets up its first Medical Committee. There are four members . . . . The committee is asked . . . to investigate the doping situation and make recommendations to the IOC about how to proceed. However, no recommendations come from the Medical Committee until the Tokyo meeting in 1964. . . . [H]owever, the IOC Medical "Commission" did not begin until . . . the 26th and 27th of September, 1967. \textit{Id.}
  \item \textsuperscript{38} See \textit{id.} at 66 (portraying influence of steroids on sporting world). According to historians one of the first blatant uses of steroids was administered by a doctor:
  
  Dr. John Zielger, a physician from Olney, Maryland, begins giving methandrosteneolone, an anabolic steroid manufactured by Ciba Pharmaceutical Company and sold under the trade name of Dianabol, to three U.S. weightlifters: Tony Garch, Bill March, and Lou Riecke. All three were good lifters, but not the best in the country. Very quickly, all three made astonishing progress, gaining muscle mass as well as strength. All three became national champions and March and Riecke both set world records. At first, it was believed that their use of a new training tech-
Athletes and coaches could see the rampant drug abuse, but competition administrators and the media refused to address the problem.39

Officials at the 1972 Munich Olympic Games implemented the first testing procedures.40 Officials took informal samples, but tested very few.41 Testing for drug use, primarily anabolic steroids, slowly gained momentum at the Olympic Games and other amateur sporting events.42 In recent years, athletes revealed that some governments, particularly East Germany and the Soviet Union, actually encouraged or even required steroid use by their athletes.43 Drug

...
use was far more extensive than officials ever realized. Allegations have engulfed each Olympic Games since the introduction of testing procedures.

Moreover, doping is not exclusive to certain countries or regions. Australia, China, and the United States are currently the international community’s black sheep. Nonetheless, even countries that emphasize strict anti-drug policies, such as Canada, are plagued with scandal. In recent years, doping controversies con-

soon be scrubbing factory floors." She fled to West Germany, where her pills were identified as anabolic steroids.

GUTTMANN, supra, at 257.

44. See HOULIHAN, supra note 1, at 53 (relating information obtained following Cold War). It was later revealed that East Germany doped in every sport. See id. The International Olympic Committee (“IOC”) was aware that Chinese athletes were doping in the 1990s, but chose not to inform the individual sports organizations. See id. at 54.

45. See Todd & Todd, supra note 37, at 66-109 (documenting scandals at each Olympic games up to millennium).

46. See GUTTMANN, supra note 43, at 256 (noting first athletes caught when testing finally administered). “The first woman to be caught after the institution of steroid tests was the Romanian shot putter Valentina Cioltan; the banned substance was detected at the 1975 European Cup finals. The first Olympian to fall from grace was Poland’s Danuta Rosani, a discus thrower.” Id. More recent examples of countries that have been shrouded in doping allegations include the United States, Ireland, China, and Australia. See Todd & Todd, supra note 37, at 104-09.

47. See Todd & Todd, supra note 37, at 104-09 (demonstrating recent allegations against U.S., Chinese, and Australian athletes before 2000 Sydney Summer Olympic Games).

48. See Bruce Kidd, Robert Edelman, & Susan Brownell, Comparative Analysis of Doping Scandals: Canada, Russia, and China, in Doping in Elite Sport: The Politics of Drugs in the Olympic Movement 153, 154 (Wayne Wilson & Edward Derse eds., 2001). Some countries take doping seriously and implement strict procedures. See id. Canada serves as an example:

Canadians pride themselves on one of the strictest regimes of doping control in sport. Since 1984, when mandatory domestic testing was introduced for athletes in amateur and Olympic sport, the number of annual tests has risen tenfold to the point where approximately 2,000 urine samples are examined each year by the Canadian Centre for Ethics in Sport (CCES), the independent agency created by the federal government for the purpose . . . . Stars like Olympic sprint champion Donovan Bailey may undergo as many as 15 unannounced tests a year (in addition to the domestic and international in-competition tests they are required to take). The sanctions imposed for a positive result tend to be far more severe than those meted out elsewhere in the sport world.

Id. (footnote omitted).
stantly surround Chinese athletes. In fact, over thirty Chinese swimmers tested positive for drug use in the last five years.

Perhaps the most lasting effects of doping are not the amount of deaths, the positive tests, and disqualifications, but instead the tarnishing of the record books. Tainted swimming records have stood for over thirty years, sullying the validity of these times. Many wonder if the records will ever be broken by athletes unaided by chemical substances. In retaliation, the international sporting community stripped numerous medals from athletes, many times confiscating the honors long after the competition. The past wrongs cannot always be remedied, however, because the preserva-

49. See Todd & Todd, supra note 37, at 109 ("We have seen more than 30 Chinese swimmers test positive since they began their recent, brutal assault on both the record books and the equanimity of swimming officials around the world.").

50. See id. (discussing how many Chinese athletes have been implicated, while also examining how many violators in the world go unpunished).

51. See Leonard, supra note 39, at 231 (providing examples of current swimming records obtained by doped athletes).

52. See id. (explaining unchanged world records). There are several examples of German swimmers who later defected and related that they were forced to dope. See Houlihan, supra note 1, at 53. Many of these records still stand and no medals have been stripped. See id.

53. See Leonard, supra note 39, at 230-31. The record books demonstrated the change in athletes, however, it was not always evident in athletes' physical appearance. See id. One commentator writes:

A new generation of German swimmers emerged, highlighted by the very attractive and "feminine" Kristen Otto, the start of the 1986 world championships and 1988 Olympic Games. Certainly at the same time some other German swimmers exhibited some strange facial features and strange features of their hands and feet, which we later learned resulted from use of human growth hormone, but the old stereotype was gone. And with it, much of the growing suspicion of the world press. If you couldn't see it, it must not be there, seemed to be the attitude. The drug use must be over.

But the world's coaches knew better. If anything, their physical prowess in the water was even more fearsome than that of the previous versions of East German swimmers. The classic specific example was Kristen Otto's 100-meter freestyle in Madrid, when, in mid-pool at the 75-meter mark, she unleashed a finishing kick never before seen in any world-class race by a male or female. She went from being even with her competitors to a body length victory in the final 25 meters, a huge margin of victory in world swimming.

... [H]er testosterone to epitestosterone ratio on that day was a remarkable 18:1, shattering the "accepted limit" of 6:1.

Id. For a further discussion of the physical effects of steroids, see infra notes 210-26.

tion of tests and samples is a modern occurrence. The International Olympic Committee ("IOC") upholds a six-year statute of limitations for challenging records, so many old records will remain.

The ever-changing list of banned drugs cannot hope to keep up with the speed of doping. The list of performance enhancing substances is always a step ahead of accurate testing procedures. Former IOC President Juan Antonio Samaranch commented, "We are not going to apply sanctions from an event that happened four years ago. We'll never have retroactive sanctions." Despite this sentiment, competition officials began retaining samples of urine and blood from athletes, anticipating advancements in testing technology.

The list of prohibited substances fluctuates from each event and year. At the 1998 Nagano Winter Olympic Games, a Canadian snowboarder lost his gold medal because of a positive test for marijuana. Although the medal was subsequently returned, the

55. See id. at 259 ("But the IOC's [International Olympic Committee] unwillingness to rewrite history is more than grandiosity, since it also derives from a profound sense of insecurity about the history the IOC has made.").

56. See id. at 258 (quoting IAAF [International Amateur Athletic Federation] Rule Book, Division III, Rule 55.8). There is a statute of limitations restricting when a record can be appealed:

An admission may be made either orally in a verifiable manner or in writing. For the purpose of these rules a statement is not to be regarded as an admission where it was made more than six years after the facts to which it relates. Therefore, any discussion about East German track and field athletes becomes redundant. The last GDR team competed at the World Championships in 1987—when [Thomas] Schönelebe set his [400-meter] mark 11 years ago.

Id. (alteration in original) (quoting IAAF, Rule Book, Division III, Rule 55.8).

57. See David L. Black, Doping Control Testing Policies and Procedures: A Critique, in DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT 29, 36 (Wayne Wilson & Edward Derse eds., 2001) ("The doping programs have typically rushed to exploit sophisticated technology and instrumentation without the benefit of understanding the full consequences of the information produced.").

58. See id. (discussing slowness in technology governing doping).

59. Hoberman, supra note 54, at 257-59. Samaranch's views on doping in the Olympics were repeatedly questioned during his term as president from 1980-2001. See id. Critics claimed that his interest in political and commercial networking were valued more than a level playing field. See id. at 259.

60. See Cycling Group to Keep Samples, N.Y. TIMES, Nov. 17, 2000, at D7 ("Frozen urine samples from riders at the last Tour de France will be retained beyond the deadline set for the development of a reliable test for the hormone EPO.").

61. See WADA Code, supra note 13, § 4.1 ("WADA shall, as often as necessary and no less often than annually, publish the Prohibited List as an International Standard." (italics omitted)). WADA reserves the right to revise the Code and list of substances at any time. See id.

62. See Todd & Todd, supra note 37, at 105 ("Canadian snowboarder Russ Rebagliati becomes the first Olympian to lose a gold medal for a positive mari-
reason for banning marijuana received critical scrutiny. Marijuana detracts from athletic ability, and therefore, does not fall under the same policy concerns as performance enhancing substances. As a result, athletes must wonder if their morals are regulated along with their bodies.

Many over-the-counter substances also pose a great risk to athletes. At the 2000 Sydney Summer Olympic Games, all-around marijuana test. His gold medal in snowboarding is returned, however, when an arbitration panel rules that the IOC failed to follow proper procedures.

63. See id. ("IOC president Juan Antonio Samaranch defends IOC's new drug test for marijuana use, claiming that marijuana use is an ethical issue and that athletes must be role models."). One commentator states:

Marijuana is similar to alcohol in that the main concern of anti-doping authorities is its association with sport, and especially the consequences for the image of sport of its recreational use by athletes, rather than its ergogenic value in sport. Marijuana is also similar to alcohol in so far as it is a depressant that operates through the central nervous system.

... The main physiological effects of the drug are to increase blood pressure and the resting heart rate without any beneficial effect on sport-related capacities, such as strength, fine motor coordination, alertness or endurance. There is anecdotal evidence that some athletes value marijuana for its capacity to reduce tension prior to and during competition.

... Chronic use of the drug has been associated with a decline in motivation and also decreased testosterone levels.

Houlihan, supra note 1, at 90-91 (footnotes omitted). For a further discussion of the effect of doping on the body, see infra notes 210-25 and accompanying text.

64. See Angel J. Schneider & Robert B. Butcher, An Ethical Analysis of Drug Testing, in Doping in Elite Sport: The Politics of Drugs in the Olympic Movement 129, 132-33 (Wayne Wilson & Edward Derse eds., 2001). Some commentators believe that the WADA has overstepped its bounds:

The IOC is a sports organization, not a law-enforcement agency. As a vast and powerful social institution the IOC has an obligation to uphold and respect our basic human rights. These rights involve the fundamental right of each of us to choose how we will live our lives (providing we do not harm others). We have a basic right to privacy, as well.

The system went wrong because it was intruding into something that is beyond its jurisdiction and its moral authority. It is unfair to athletes to test for more than is required to ensure fair competition.

Id.

65. See id. at 133. Although athletes are expected to allow their bodies to be examined at any time, it amounts to an invasion of privacy, and all of their activities are put under a microscope:

Drug testing in sport is an intrusion into an athlete's privacy. That intrusion requires an athlete's consent, something that is, and should be, freely given when the test is conducted in order to ensure fair competition. However, the demand for consent to test for something that is irrelevant to sport is unfair and coercive. The demand for consent to test for marijuana is unfair because marijuana is irrelevant to sport and it is coercive because unless the athlete consents to testing he or she is prohibited from competition.

Id.

66. See Ted Anthony, Tainted Games, Drug Legacy Wasn't What Sydney Wanted, CHARLES. GAZ. (W. Va.), Oct. 1, 2000, at 1E (discussing dangers of taking over-the-
gold medal winning Romanian gymnast, Andrea Raducan, lost her medal because she tested positive for cold medicine.\(^6^7\) Interestingly, the substance that Raducan took no longer appears on the banned substances list.\(^6^8\) Marijuana and other cannabis containing substances, however, are still prohibited.\(^6^9\)

B. Doping in the United States

In recent years, repeated doping allegations and an embarrassingly high number of positive drug tests placed athletics in the United States under intense scrutiny.\(^7^0\) International commentators and athletes alike agree that the United States is one of the more drug “dirty” countries in the world.\(^7^1\) This sentiment is not undeserved, as recent scandals show the U.S. lives up to this reputation.\(^7^2\)

Doping incidents are more prevalent in the U.S. because of historically weak doping resolutions and policies.\(^7^3\) In countries counter medicine prior to or during competition). The USADA website even states that taking over-the-counter medicines are at the athlete’s own risk because many contain prohibited substances. See U.S. Anti-Doping Agency, Doping 201: Substances, http://www.usantidoping.org/athletes/test_201/a4.html (last visited Mar. 19, 2004).

67. See Anthony, supra note 66, at 1E (“The 16-year-old was given cold medicine by her team doctor that, without her knowledge, contained a banned substance that almost certainly didn’t enhance—and could have impeded—her performance. She had to return her all-around gold medal, Romania’s first since Nadia Comaneci’s in 1976.”).

68. See Editorial, Nobles and Knaves, Wash. Times, Sept. 30, 2000, at A12 (noting substance that Raducan took was pseudoephedrine). The IOC admitted that the drug Raducan took offers “no competitive advantage.” Id.


70. See Tygart, supra note 20, at 124 (noting international opinion of U.S. testing procedures and doping athletes). The U.S. has been attacked repeatedly in recent years for its lax drug testing and anti-doping policy. See id.


72. See id. (noting recent scandals involving U.S. athletes). For a further discussion of the BALCO scandal, see infra note 150 and accompanying text.

73. See Lenn Robbins, U.S. Getting the ‘Point’ on Steroids, N.Y. Post, July 15, 2004, at 84 [hereinafter Robbins, Getting the Point]. There are recent examples of the lax U.S. policy that the international community has not forgotten:

Sprinter Jerome Young, a member of the U.S. 4x400 gold-medal-winning relay team, had tested positive for the steroid nandralone and received a two-year ban. But after Young passed another test six days later, a USA Track & Field appeals panel reversed the ban. The world never bought it and in June, the Court of Arbitration for Sports ruled Young should not have been allowed to run. He was stripped of his gold medal. In the World Court of Opinion, the U.S. had a steroid problem and it was time to look in the mirror.
like Canada, when athletes test positive, they are immediately banned.\textsuperscript{74} In contrast, many U.S. athletes receive positive tests and still compete.\textsuperscript{75} Even more devastating to the U.S. image are recent reports about drug use by celebrated athletes.\textsuperscript{76} Olympic gold-medalist Carl Lewis, who is largely considered one of the premier track athletes of modern times, used performance enhancing substances during his competitive years.\textsuperscript{77} Perhaps more shocking than the disclosure of this information was the scant attention it received from the U.S. media, despite its sensationalism in Europe.\textsuperscript{78}

Recently, doping and steroid scandals inundated the U.S. sporting scene.\textsuperscript{79} The current doping situation in professional baseball is so pervasive that Congress is reviewing the sport's drug

\textit{Id.}

\textsuperscript{74} See Kidd et al., \textit{supra} note 48, at 154 (discussing Canada’s very strict policies to stop doping in its athletes).

\textsuperscript{75} See Todd & Todd, \textit{supra} note 37, at 104-09 (discussing recent examples of U.S. wavering on drug testing policy). History shows that the U.S. repeatedly ignored or covered up incidents of doping:

Mary Decker Slaney appeals her 1996 drug-positive test, which was kept quiet so that she could participate in both the Atlanta Olympic Games and the 1997 World Indoor Championships. Slaney was positive because her testosterone level was too high. USA Track and Field backs Slaney in her quest for reinstatement.

\textit{Id.} at 108.

\textsuperscript{76} See Philip Hersh, \textit{In U.S., Lewis a Forgotten Man}, \textit{Ch. Trib.}, Apr. 29, 2003, at C2. A serious blow to U.S. credibility occurred when it was revealed that many U.S. athletes doped:

Documents released to Sports Illustrated and the Orange County Register by former U.S. Olympic Committee anti-doping chief Wade Exum show [Carl] Lewis was among many U.S. athletes allowed to compete in the Olympics despite apparently positive drug tests. In most of the cases, including Lewis’, the athletes were cleared by the USOC on appeal because the level of stimulants found was below the threshold for a conclusive positive test or the drug use was called inadvertent.

\textit{Id.}

\textsuperscript{77} See \textit{id.} A remarkable and famous athlete, many were surprised when evidence showed that Carl Lewis doped:

Lewis, you see, is a permanent icon in Europe and Asia, placed among the top five in many “Athlete of the Century” lists from those continents three years ago. His final European race drew a crowd of 56,000 in Berlin. Many consider him the greatest track and field athlete in history.

\textit{Id.}

\textsuperscript{78} See \textit{id.} (noting reactions from Europeans regarding allegations of Lewis using steroids). “There are several reasons for U.S. indifference to a story that also has prompted journalistic outrage in places like England and Australia - a reaction caused in part by the holier-than-thou attitude of U.S. Olympic officials and athletes about doping abuses in other nations.” \textit{Id.}

\textsuperscript{79} For a further discussion of current scandals involving BALCO, see \textit{infra} note 150 and accompanying text. For a further discussion of the current baseball scandal, see \textit{infra} note 80.
testing policy.\textsuperscript{80} Preceding the baseball scandal was the discovery of a U.S. drug ring involving Olympic gold-medalist Marion Jones and

\textbf{80. See Fendrich, supra note 9\textsuperscript{\(\sim\)} (explaining length of Congressional inquiries and plans to monitor baseball). Steroid suspicion in baseball is not a recent occurrence. See Pells, supra note 6. During the 1980s, Jose Canseco used steroids to become a leading power hitter and top baseball player. See \textit{Jose Canseco, JUICED: WILD TIMES, Rampant 'ROIDS, SHAM Hits and How Baseball Got Big 4} (2005). Despite beginning steroid use in 1985, suspicion about steroids did not surround Canseco or other players until 1991. See id. at 53. In 1991, Lyle Alzado, a professional football player, died of a brain tumor. Alzado addressed his use of steroids before his death, turning public attention to steroids in professional sports for the first time. See id. In the summer of 1998, Mark McGwire and Sammy Sosa revitalized baseball with a season-long home run contest. See id. at 201. Controversy erupted when McGwire admitted to using andro. See id. at 203-04. For a further discussion about steroids and an explanation of andro, see supra note 15. Because andro is not considered a full steroid and was not illegal at the time, McGwire's name was cleared and the home run record set that summer stayed. See \textit{Canseco}, supra, at 201. In 2002, Ken Caminiti admitted using steroids the season he won the 1996 National League Most Valuable Player. See Weir, supra note 4, at 1A. Caminiti was the first professional baseball player to admit to using steroids. See id. Caminiti died from a drug overdose in October 2004. See id. In 2003, when the BALCO laboratories were exposed, many famous baseball players surfaced as clients. For a further discussion of the BALCO scandal, see infra note 150 and accompanying text. BALCO grand jury testimony revealed that Jason Giambi, Barry Bonds, and Gary Sheffield used steroids or other performance-enhancing drugs while playing professional baseball. See Weir, supra note 4, at 1A. Heightening public awareness was the death of Steve Bechler, a Baltimore Orioles pitching prospect. See Pells, supra note 6. Bechler had ephedra in his system. See id. For a discussion of stimulants, like ephedra, and other steroids, see supra note 15. After Bechler's death, the League banned ephedra, but only for players with minor league contracts. See Pells, supra note 6. Interestingly, ephedra is still sold over the counter. See id. Professional baseball reacted by increasing drug testing. See id. Steroid testing in Major League Baseball ("MLB") is weaker than the National Football League, the National Collegiate Athletic Association, and the Olympic Committee. See id. With the publishing of a tell-all book, Jose Canseco alleged steroid use was more pervasive than the public knew or MLB ever admitted. See \textit{Canseco}, supra, at 200-01. Dissatisfied with the steps taken by MLB to deter steroids, Congress held hearings to assess the steroid issue. See \textit{generally Fendrich}, supra note 9. These hearings included Mark McGwire refusing to comment under oath about his steroid usage and the commissioner of baseball, Bud Selig, stating that steroids were not a problem in the sport. See Fendrich, supra note 9. Barry Bonds, arguably one of the best players of the game, claimed he used steroids unknowingly. See Mark Starr, \textit{Play Hardball}, Newsweek, Dec. 20, 2004, at 52. Members of Congress are threatening legislation to develop and enforce more stringent testing in baseball as well as many other professional sports. See Fendrich, supra note 9. At the time of publication, MLB has not responded to the bullying by Congress. See id. How the controversy affects fans is unclear. See Pells, supra note 6.

[A] USA TODAY/Gallup/CNN Poll in 2004 found 91\% [of fans] support testing baseball players for steroids.

\ldots \text{[T]}he outrage seems to be highest among men \ldots who grew up watching baseball when it was still considered the national pastime, \ldots view[ing] that today's players 'couldn't carry the jockstrap' of such '40s, '50s and '60s baseball icons as Ted Williams, Mickey Mantle and Willie Mays. Weir, supra note 4, at 1A.
seven-time National League Most Valuable Player Barry Bonds.\(^8\) The events dishonored many famous and respected U.S. athletes.\(^8\)

In many countries, sports administration is centralized; often times with head officials located in the same building.\(^8\) These officials do not understand the complete separation of U.S. sports from each other or between professional and amateur sports.\(^8\) Recent controversies and ignorance of U.S. officials lead the international community to believe that because the United States is "dirty" in one sport, it is most likely unscrupulous in its administration of other sports.\(^8\)

C. The World Response to Doping

In 1999, in response to the increasingly difficult problem of doping regulation in international sporting events, IOC met to establish a new agency.\(^8\) Prior to this meeting, numerous organizations existed to address the issue of drug-use and athletics.\(^8\)

\(^8\) See William C. Rhoden, Susicion is the Standard in Judging Elite Athletes, N.Y. Times, June 20, 2004, § 8 (discussing international standard of suspicion towards Marion Jones). For a further discussion of Marion Jones and related controversy, see \textit{infra} notes 150-56 and accompanying text.

\(^8\) See Carol Slezk, \textit{Tough Times: It Seems Everyone is Out to Get Marion Jones, Who is Trying to Stay on Track for Athens, Chi. Sun-Times}, June 22, 2004, at 103 (mentioning suspicion of Tim Montgomery and guilt of C.J. Hunter, two notable Olympic track athletes). For a further discussion of the baseball scandal, see \textit{supra} note 80. For a further discussion of the BALCO scandal, see \textit{infra} note 150 and accompanying text.

\(^8\) See Leonard, \textit{supra} note 39, at 232-33. International sentiment toward the U.S. is also tainted how U.S. sports are organized:

For a European or an Asian, where track and field national offices sit “down the hall” or in the same building as swimming offices, there is a constant interaction between coaches and administrators. There is good reason to expect that “if a nation is dirty in one, it’s dirty in all.” The organization of most national Olympic Committees around the world follows this centralized model, at least to some extent.\(^8\)

\textit{Id.} at 232.

\(^8\) See id. (discussing how other countries do not understand how or why U.S. cannot or will not nationalize drug testing on athletes).

\(^8\) See id. (analyzing international opinion of U.S. sports). Recent scandals have not reduced international suspicion of the U.S. See Hersh, \textit{supra} note 76, at C2. For a further discussion of current U.S. baseball scandals, see \textit{supra} note 80. For a further discussion of the BALCO scandal, see \textit{infra} note 150 and accompanying text.

\(^8\) See Schneider & Butcher, \textit{supra} note 64, at 129 (“At the international level, the International Olympic Committee (IOC) recently hosted a World Conference on Doping in Lausanne, Switzerland, in February 1999, in order to launch a new international anti-doping agency called the World Anti-Doping Agency (WADA).”).

\(^8\) See Wendt, \textit{supra} note 20, at 29 (“Now, for the first time, for the majority of national and international athletes and organizations, the anti-doping policies are harmonized.”).
Determining which of these organizations had jurisdiction over the athletes was a major difficulty. The new organization, the World Anti-Doping Agency ("WADA"), "seeks to foster a doping free culture in sport. It combines the resources of sport and government to enhance, supplement and coordinate existing efforts to educate athletes about the harms of doping, reinforce the ideal of fair play and sanction those who cheat themselves and their sport." All major international sports federations and nearly eighty governments instated WADA and adopted its standardized rules. This unified international organization developed to formalize doping standards and procedures, giving athletes a cohesive collection of rules to follow.

In order to publicize the rules to athletes, sporting organizations, and administrators, WADA developed an official set of rules, the World Anti-Doping Code ("WADA Code"). WADA codified five major areas that have long differed amongst sporting regulatory organizations. These rules received a great deal of criticism and anger from both athletes and lawyers. First, there is "strict liability" for any substances found in an athlete’s body. An athlete is responsible for doping no matter how the substance entered the.

88. See id. One commentator points out the positive aspects of having a central organization to regulate doping:

For example, in the past, a U.S. international track athlete would have to abide by the anti-doping rules of a number of different organizations, each with its own policy. These would include: USA Track and Field, U.S. Anti-Doping Agency, U.S. Olympic Committee, International Association of Athletics Federation and the International Olympic Committee. Id.


90. See Wendt, supra note 20, at 28 (observing United States adopted WADA prior to Athens Summer Olympic Games in August of 2004).

91. See id. at 29 (noting goal to harmonize various regulating organizations).

92. See generally WADA Code, supra note 13 (outlining specific rules for athletes to follow and specific substances banned).

93. See Wendt, supra note 20, at 29 (discussing areas WADA Code addressed). The WADA Code simplified doping regulation by giving one set of rules for athletes to follow. See id.

94. See Rhoden, supra note 81, § 8 ("In fact, who really knows if [Dick] Pound, chairman of the World Anti-Doping Agency, has a vendetta or is conducting a witch hunt.").

95. See WADA Code, supra note 13, § 2.1.1, Comment. According to the Code, athletes are responsible for what is found in their body, specifically stating: For purposes of anti-doping violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), the Code adopts the rule of strict liability . . . . Under the strict liability principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete's bodily Specimen. The violation occurs whether or not the Athlete
body.\textsuperscript{96} Second, there is a two-year suspension for a first violation and a lifetime ban for a second.\textsuperscript{97} The caveat to sanctions, however, is that if athletes can prove they did not put the substance in their bodies intentionally or bears "no fault," then punishment can be reduced.\textsuperscript{98} Third, there is an exception for "therapeutic use."\textsuperscript{99} This exception applies to the use of substances that are banned but are necessary for a medical condition.\textsuperscript{100} Fourth, the burden of proof is on the athletes to dispute positive results.\textsuperscript{101} Finally, the standard of proof established in the WADA Code requires that organizations need not prove guilt beyond a reasonable doubt, but only to a "comfortable satisfaction."\textsuperscript{102}

intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault.

\textit{Id.} (italics omitted).

96. See Wendt, \textit{supra} note 20, at 29 (explaining responsibility of athletes). "Hence, 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." WADA Code, \textit{supra} note 13, § 2.1.

97. See WADA Code, \textit{supra} note 13, § 10.2 (noting athletes may appeal and be granted less severe punishment if circumstances allow).

98. See \textit{id.} § 10.1.1 (providing example when athletes can be granted leniency). There is some flexibility in the rules for instances where it might not be the athlete's fault:

If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

\textit{Id.} (italics omitted).

99. See \textit{id.} § 4.4 ("WADA shall adopt an International Standard for the process of granting therapeutic use exemptions." (italics omitted)).

100. See \textit{id.} ("Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption." (italics omitted)).

101. See Wendt, \textit{supra} note 20, at 29; see also WADA Code, \textit{supra} note 13, § 3.1 ("[T]he Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances . . . ." (italics omitted)).

102. See WADA Code, \textit{supra} note 13, § 3.1. The organization is responsible for showing that doping has occurred:

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

\textit{Id.} (italics omitted).
D. U.S. Response to Doping

The United States has borne the brunt of criticism in recent years for being ineffective in doping regulation. In October 2000, the United States Olympic Committee ("USOC") established the United States Anti-Doping Agency ("USADA") to monitor doping in Olympic athletes. The development of USADA addressed the United States's perceived lack of credibility in controlling doping in its athletes. Congress and President George W. Bush went so far as to recognize USADA as the "official anti-doping agency for Olympic, Pan American and Paralympic sport in the United States." The mission of USADA is to "preserve[e] the well being of Olympic sport, the integrity of competition, and ensuring the health of athletes." The organization focuses on four areas: research, education, testing, and results management. USADA only monitors athletes for Olympic, Pan American, and Paralympic events, not professional events. If professional athletes, however, choose to compete in the Olympic Games, they are subject to USADA jurisdiction.

103. See Leonard, supra note 39, at 232 (noting that U.S. consistently did not enforce doping punishments and attempted to cover up doping scandals). For a further discussion of inconsistent enforcement of anti-doping policies by the U.S., see supra notes 70-78 and accompanying text.

104. See Longman, supra note 14. The U.S. has taken steps to redeem the negative international image:

"When the United States Anti-Doping Agency was created in October 2000 to oversee drug testing in Olympic sports, it was largely hailed as an independent body that would aggressively nab cheaters and dampen international allegations of foot-dragging or cover-ups on the part of American officials."

Id.

105. See U.S. Anti-Doping Agency, USADA History, http://www.usantidoping.org/who/history.html (last visited Oct. 5, 2004) ("The USOC was aware that its program lacked credibility internationally for a number of reasons ... ").


107. USADA, Mission, supra note 25 (explaining goals and areas of focus of USADA).

108. See id. (describing each area of focus).

109. See id. ("USADA is responsible for managing both In- and Out-of-Competition testing for athletes in the U.S. Olympic Movement including Olympic, Pan American, and Paralympic athletes.").

110. See Tygart, supra note 20, at 134; see also USADA, What We Do, supra note 19 (stating mission of USADA). Each sport handles doping regulation differently:

The professional sports leagues in the United States such as the National Hockey League (NHL), National Basketball Association (NBA), Association of Tennis Professionals (ATP), and Women's Tennis Association (WTA) are not generally governed by IFs [International Federations], NGBs [National Governing Bodies], or USOC [United States
Since the development of USADA, the United States has taken great strides toward redeeming itself from a “dirty” nation to leading the world in test administrations and drug research. The hope is that the U.S. will not only continue to address doping incidents, but will also encourage other nations to follow its example. USADA adopted the WADA Code in August of 2004, to further demonstrate a commitment to fairness in competition and put itself on par with the rest of the world.

III. Analysis: A ‘Comfortable’ Shift to the New “Comfortable Satisfaction”?

The decision to adopt the WADA Code was a momentous event in U.S. sporting history. The adoption meant the change from the fundamental principle of “beyond a reasonable doubt” to a “comfortable satisfaction.” The regulators, like USADA, want to keep competition fair while maintaining the health of competitors. They see the shift as a necessary evil in maintaining drug-free competition. Athletes, however, already face rigid doping policies.

Olympic Committee]. Thus, athletes participating in professional leagues are not subject to testing by the USADA. The athletes in these leagues are subject to the jurisdiction of the IF, NGB and USOC only when they are named by an NGB to compete on an international team or named by the USOC to compete on an Olympic or Pan American Games team.

Tygart, supra note 20, at 134. For a further discussion of professional sports testing, see supra note 20 and accompanying text.

111. See Leonard, supra note 99, at 232 (noting harsh stance taken by U.S. has contributed to redeeming it in view of international sports). For a further discussion of the view of the international community toward historically weak U.S. antidoping regulation, see supra notes 70-78 and accompanying text.

112. See Tygart, supra note 20, at 138 (“Not only will the new system increase the effectiveness of the United States anti-doping program, but hopefully the improvements will influence other nations to actively pursue more fair and effective anti-doping programs.”).

113. See USADA, Code FAQs, supra note 12 (“All international federations should adopt and implement the Code by Aug. 13, 2004, which is the opening of the 2004 Olympic Games.”).

114. See Robbins, Getting the Point, supra note 73, at 84 (stating that USADA was quickly aggressive and controversial).

115. See Slezak, supra note 82, at 103 (“[T]he USADA has adopted a new standard of proof concerning illegal drug use. In the past, guilt had to be proved beyond a reasonable doubt. Now, if the panel hearing the case finds to its ‘comfortable satisfaction’ that an athlete has used steroids, she has.”).

116. See USADA, Mission, supra note 25 (explaining goals and areas of focus of USADA).

117. See Tygart, supra note 20, at 137 (“[T]he USOC has also passed aggressive anti-doping policies directly aimed at assisting USADA in its mission to end doping among athletes in the Olympic Movement in the United States.”).
regulations and testing requirements. This shift has put regulators and athletes on opposing sides of the spectrum.

The standard of "beyond a reasonable doubt" is an essential element of the U.S. criminal justice system. The standard, based on common law, originated in Ireland in the 1700s. The Supreme Court eventually addressed the issue, accepting the standard in criminal cases. The Court reasoned that the standard is imperative to the criminal justice system.

Since USADA adopted the WADA Code, there has been a great deal of protest. Despite heated debate, it appears that the new standard is here to stay. Officials take such a harsh stance against


If you are an Olympic medalist, you're going to get tested automatically at the venue where you competed. For many athletes who are physically exhausted from their competition, as the road cyclists where after a grueling race in hot, steamy central Athens, providing a urine sample is easier said than done.

Id.

119. For a further discussion of the regulators' view on doping control, see infra notes 127-41 and accompanying text. For a further discussion of the athletes' perspective, see infra notes 142-68 and accompanying text.


121. See id. at 913 ("It is generally believed that the reasonable doubt standard, as such, first surfaced in 1798 in the Irish Treason cases, wherein defense counsel argued that 'if the jury entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue . . . they are bound' to acquit." (citing May, Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases, 10 AM. L. REV. 642, 656-57 (1876) (footnote omitted)).

122. See id. at 916 (examining implications of In re Winship, 397 U.S. 358 (1970)).

123. See id. (discussing reasoning of Court). The Court asserted three reasons why "beyond reasonable doubt" is so imperative to the criminal justice system. Id. First, the standard reduces risk of conviction due to a factual error. See id. (quoting In re Winship, 397 U.S. 358, 363 (1970)). Second, it demonstrates the "presumption of innocence." Id. at 916-17 (quoting In re Winship, 397 U.S. 358, 363 (1970)). Finally, it is "indispensable to command the respect and confidence of the community in applications of the criminal law." Id. at 917 (quoting In re Winship, 397 U.S. 358, 363 (1970)). The Court reiterated the importance of protecting individuals from prosecution for a doubted offense. See id.


125. See Wendt, supra note 20, at 28 (observing that USADA has not considered changing its policies).
doping because of the important implications drugs have on matters of health and fairness.\textsuperscript{126}

\textbf{A. Regulating Doping}

Sports officials are interested in catching dopers, however, proving drug use "beyond a reasonable doubt" might be impossible.\textsuperscript{127} Currently, the system is almost cost prohibitive.\textsuperscript{128} Regulators provide the entire infrastructure including: tests, facilities, training, and salaries for officials.\textsuperscript{129} The goal of USADA's system is to be cost effective, quick, and predictable while rendering quality decisions and adequate remedies.\textsuperscript{130} Evidence demonstrates that costs are probably less for administrators when each case is not taken to court, and there is faster reconciliation.\textsuperscript{131}

Officials face drug technology increasing with incredible speed; steroids advance faster than tests can keep up.\textsuperscript{132} To keep competitions legitimate and avoid later speculation, regulators often have no choice but to keep samples of blood and urine.\textsuperscript{133}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{126}] For a further discussion of the dangers of steroids to health, see infra notes 210-25 and accompanying text.
\item[\textsuperscript{127}] See Black, supra note 57, at 36 (noting difficulty in conclusive tests because of false positives and making agents).
\item[\textsuperscript{128}] See Michael S. Straubel, Doping Due Process: A Critique of the Doping Control Process in International Sport, 106 Dick. L. Rev. 523, 551 (2002). Running an efficient adjudication system is extraordinarily expensive:

Theoretically, the cost of the Olympic Movement's doping control process should be less expensive than the judicial system for the accused athlete. . . . When the Olympic Movement constructs its own dispute settlement system, it must pay the expense of the entire infrastructure: the training, expenses, and salaries of the arbitrators; the cost of the physical facilities and the administrative cost of the system.

Id.

\item[\textsuperscript{129}] See id. at 554 (discussing system that USADA as well as WADA have built in order to govern doping).
\item[\textsuperscript{130}] See id. at 566 (listing what USADA intends to accomplish to have efficient system).
\item[\textsuperscript{131}] See id. at 567 ("USADA's strict time limits, three months in the case of the AAA [American Arbitration Association] hearing, and its use of CAS [Court of Arbitration for Sport] in the place of IF [International Federation] appeals will speed the process considerably." (footnote omitted)).
\item[\textsuperscript{132}] See Kammerer, supra note 35, at 18 ("New developments in drug testing may make the process cheaper, faster, and more reliable. On the other hand, it is also likely that new drugs will be developed that escape detection.").
\item[\textsuperscript{133}] See Cycling Group to Keep Samples, supra note 60, at D7 (discussing retention of samples for future testing). For a further discussion of the current statute of limitations for medal stripping and overturning records, see supra notes 49-56 and accompanying text.
\end{enumerate}
\end{footnotesize}
The anticipation is that the samples may prove positive for steroid use in several years, once technology catches up with abuse.\(^{134}\)

Drug tests are very difficult to interpret.\(^{135}\) There are a multitude of false positives and masking agents that athletes can ingest.\(^{136}\) Because the balance in athletes' bodies is subject to change with an intense workout regime, result management is even more difficult.\(^{137}\) Additionally, typical male hormones, such as testosterone, can increase naturally in women's bodies with exercise, which can distort results.\(^{138}\) With all the variations, regulators face an immense task.\(^{139}\)

Proponents of the regulations find that even if the system fails in some cases, it still exceeds expectations.\(^{140}\) WADA, and now USADA, have come far in their quest to halt inconsistencies between governing organizations and to develop a standardized system, even if some gaps exist in the current framework.\(^{141}\)

B. The Athletes' Perspective

A doping allegation is a serious affront to athletes.\(^{142}\) It threatens their livelihood and has extensive psychological detriments.\(^{143}\)

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134. See Kammerer, supra note 35, at 18 ("The ability to legally prove abuse of some of these agents is extremely doubtful, even if an unequivocal confirmation test exists.").

135. See Black, supra note 57, at 35-36 (discussing complications in test interpretation). "The current practice of overlooking or ignoring laboratory errors of commission and omission has in many cases resulted in athletes being falsely accused of drug use." Id. at 31.

136. See Kammerer, supra note 35, at 18 (discussing agents that athletes can take to prevent detection from routine steroid screening).

137. See Black, supra note 57, at 36 ("The issue is more complicated in female athletes, with hormone and steroid production more variable than in the male.").

138. See Kammerer, supra note 35, at 18 ("[I]t is possible to have a 'false-positive' drug test when individuals did not take a drug to enhance performance, but only consumed a meal; in fact, they did not even know that they had been exposed to the drug at all.").

139. See Black, supra note 57, at 36 (discussing complications of interpretation that accompany use of sophisticated testing instrumentation without full understanding of consequences).

140. See Straubel, supra note 128, at 570 ("Though not perfect, USADA's system of a preliminary hearing, fairly neutral arbitrators, and no pre-hearing suspension is far better than the rather draconian and disorganized system administered by the IFs [International Federations] outside the United States.").

141. See id. at 571-72 ("Medical science is not infallible, and the application of generalities to individual athletes may not be justified in exceptional cases.").

142. See Black, supra note 57, at 35 (noting serious impact steroid allegations have on athletes). "The stigma, cost, and psychological effect on the accused athlete are profound." Id.

143. See id. (describing how athletes must cope with allegations and loss of moral support). Athletes face official sanctions, which may include a two-year ban on the sport. See WADA Code, supra note 13, § 10.2. For a further discussion of
When athletes are accused of doping, their infrastructure crumbles. The athlete may no longer have the support of coaches, their sporting organization, fellow athletes, and sometimes family. The negative media attention and loss of respect from competitors causes further damage to an athlete's good name.

The detrimental effects of doping allegations are very harsh for athletes. Track star Marion Jones recently faced charges of doping from USADA. Jones threatened to pursue litigation against USADA for defamation. The crux of the controversy came from the disciplinary ramifications for athletes, see supra notes 97-100 and accompanying text.

144. See Black, supra note 57, at 35 (noting that athletes bear costs, loss of family, friends, and other support). “The immediate loss of moral support by their federations often leaves athletes psychologically unable to effectively participate in developing a defense.” Id. To note the example of Marion Jones, see infra notes 150-56 and accompanying text.

145. See Black, supra note 57, at 35 ("The athlete is immediately deemed to have diminished rights within the review and hearing process within the athlete’s own federation or governing body."). For a discussion on how the adjudication proceedings are unlike a criminal trial and result in fewer resources and rights for athletes, see infra notes 171-78.

146. See Straubel, supra note 128, at 568 (finding many times athletes face stigma before guilt is clearly determined). “The stigma resulting from the accusation removes any opportunity for fairness or unbiased review within the hearing process.” Black, supra note 57, at 35. Athletes many times feel deserted by the media, the following excerpt is an example of this:

After running a personal best in 3000 meters at a Global League meet in Paris, Olga Yegorova’s blood showed signs of the banned substance erythropoietin (“EPO”). Before the equivalent of B-Sample had been tested, the results of her blood test were released to the press by the French meet organizers. The IAAF suspended Yegorova while the results of her B-sample test were pending. With Olga’s 5000 race in the World Championships only a week off, the IAAF announced that its laboratory in Lausanne hadbotched the urine test and that a new test would have to be conducted. That error put off the test results for three days. In the meantime, one of Olga’s competitors publicly announced that she would boycott the race if Olga was allowed to compete.

Straubel, supra note 128, at 568 (footnotes omitted).

147. See Straubel, supra note 128, at 568-69 (revealing that athletes are “denied due process, punished, and subjected to withering attacks from the press and [other] competitors”).

148. See Slezak, supra note 82, at 103 (referring to Jones’s problems with USADA concerning doping allegations).

149. See John Jeansson, In the Wake of BALCO; Jones Wants a Public Hearing; With Investigation Over Drug Use Ongoing, She Wants Facts Bared, NEWSDAY (N.Y.), June 17, 2004, at A82 (discussing legal implication of Jones’s controversial investigation). Marion Jones brought attention to her perfect drug testing record:

Last month, Jones threatened to sue if she were barred from the Olympics based on anything short of a positive test. She has not been accused of steroid use, but last week, her former husband - retired shot put champion C.J. Hunter, who failed four steroid tests in 2000 - was in touch with USADA officials and apparently agreed to aid investigators.

Id.
a September 2003 raid on Bay Area Laboratories Co-Operative ("BALCO"), a business specializing in producing steroids for athletes.\textsuperscript{150} The information obtained from BALCO led to suspicion and the subsequent suspension of several well-known U.S. track athletes from competition.\textsuperscript{151} Jones never failed a single drug test, forcing USADA to present a case built on circumstantial evidence.\textsuperscript{152} Even with the lack of concrete evidence presented by USADA, they still threatened to bar Jones from competing in the Olympic Games.\textsuperscript{153} Jones had to defend herself and her livelihood to the media.\textsuperscript{154} It is possible that the mental and emotional strain took a toll on Jones's running.\textsuperscript{155} The former Olympic gold-medal-

\textsuperscript{150} See Slezak, supra note 82, at 103 (discussing evidence found in BALCO raid). The BALCO scandal started when there was a raid on the Bay Area Laboratory Co-Operative. See id. The raid uncovered illegal substances, most of which were related to athletic performance enhancement. See id. Shortly after the raid, names of clients surfaced while the owners of BALCO tried to plea bargain out of jail time. See id. Names that surfaced include C.J. Hunter, an Olympic shot putter and ex-husband of Marion Jones, Marion Jones, and Olympic track star Tim Montgomery. See id. Although there is no definitive proof for each of these athletes, the scandal has soiled their names. See id. Grand jury testimony has not concluded at this point, and the criminal sanctions have yet to be determined. See id.

\textsuperscript{151} See Jeansonne, supra note 149, at A82 (examining repercussions of BALCO raid).

\textsuperscript{152} See Slezak, supra note 82, at 103 (noting evidence is circumstantial and does not definitively prove Jones's guilt, while also showing numbers did not reveal obvious doping). See Jeansonne, supra note 149, at A82 (reporting from news conference where Jones reiterated her perfect record with drug tests).

Dr. Gary Wadler, an NYU professor of medicine and member of WADA, said that "without knowing any facts or passing any judgment at all, I can tell you that to infer in any way that this is saloon-type justice is wrong. A fly on the wall would know that these arbitration boards really give the athlete due process."

\textit{Id.} USADA also presented reports from Jones's ex-husband and former coach, claiming her involvement with BALCO. See Slezak, supra note 82, at 103.

\textsuperscript{153} See Slezak, supra note 82, at 103 (documenting evidence gathered by USADA against Jones to pursue action against her).

\textsuperscript{154} See Longman, supra note 14, at D1 (noting that lawyers had information but did not think it would help clear Jones's name in media).

\textsuperscript{155} See Paul Hagen, \textit{Olympics Without Medal for Jones; Veteran Fails to Qualify in Long Jump; 400-Meter Relay Team is Disqualified}, \textit{Akron Beacon J.} (Ohio) Aug. 28, 2004, at C5 (hypothesizing about Marion Jones's mental state during Olympics). A commentator contemplates:

\begin{quote}
Was she thinking about how, four years earlier at Sydney, she was the one basking in all that glory by winning five medals, three of them gold? How much easier her life had been before the BALCO steroid scandal had exploded, casting a shadow over her past, her present and her future?
\end{quote}

\textit{Id.}
ist failed to qualify in her premier event at the Olympic trials for the 2004 Summer Olympic Games.\textsuperscript{156}

It was not only the shift in the burden of proof that was unnerving to athletes, but also how the change came to light.\textsuperscript{157} In June of 2004, a memorandum released by USADA's director of legal affairs, Travis Tygart, to the Anti-Doping Review Board revealed the change to a "comfortable satisfaction."\textsuperscript{158} USADA applied the changed standard to cases that occurred prior to its implementation.\textsuperscript{159} The "beyond a reasonable doubt" standard governed offenses prior to August 1, 2004, and officials intended to commence use of the WADA Code for the Athens Summer Olympic Games.\textsuperscript{160} USADA, however, started using the "comfortable satisfaction" standard with pre-Athens Olympic cases.\textsuperscript{161} Because the burden of proof is a procedural issue, USADA says it can be changed by the agency at will.\textsuperscript{162} USADA (and WADA) go so far as to change re-

\textsuperscript{156} See id. (explaining that Jones failed to win in long jump, 400-meter relay team disqualified; she failed to qualify for 100-meters and pulled out of 200-meters).

\textsuperscript{157} See Longman, supra note 14, at D1 (noting how standard changed). Athletes are wary of the sudden changes. See Robbins, Getting the Point, supra note 73, at 84. Hurdler Allen Johnson stated that he does not believe that the USADA is an ally to him as an athlete, rather that the organization is looking out for itself. See id.

\textsuperscript{158} See Jeansonne, supra note 149, at A82 ("[A] memo by Tygart that said the standard burden of proof used in U.S. courts - 'beyond a reasonable doubt' - is not applicable under the code of USADA and the World Anti-Doping Agency; rather, a requirement that USADA prove doping 'to the comfortable satisfaction' of a panel hearing the case.").

\textsuperscript{159} See Rhoden, supra note 81, § 8 (discussing possibility of application of comfortable satisfaction burden of proof to Jones's case). When the BALCO scandal unfolded, USADA was still utilizing the criminal standard of beyond a reasonable doubt, but they considered switching for Jones's case. See id.


\textsuperscript{161} See Robbins, Lower Standard, supra note 124, at D2. Lawyers and athletes are both reeling at the sudden change:

"It's interesting that [USADA] seeks to lower the standard of proof to a vague standard, which includes the word 'satisfaction,'" said Brian Getz, the lawyer for the sprinter Michelle Collins, who has been accused of a doping offense. "What's particularly troubling about the standard is that in the past, a lot of arbitrators have had ties to [USADA], and one has to wonder if personal experience one has with [USADA] factors into the process, which is alarming for anyone whose career is on the line."

Id.

\textsuperscript{162} See id. The agency defends its right to change the standard:

The June 1 memo . . . states that aspects of anti-doping rules considered substantive are "substances on the banned list, sanctions and the definition of doping" and are not "generally applied retroactively to conduct occurring before rules were adopted." The agency says that the standard of proof is a procedural issue, and can be changed by the agency.
results based on technology that was not available at the time of the competition.163 This precedent stems from a case USADA presented before the Court of Arbitration for Sport in Switzerland in 2000.164 Officials used technology not available at the time of the offense to prove doping, thereby altering anti-doping rules and policies.165

The ease of a positive test, the debilitating effects of a doping charge, and the mistrust of the governing organization are all real fears for athletes.166 Some athletes are so afraid of unintentional doping that they even refrain from eating and drinking at restaurants.167 Not surprisingly, athletes feel that their basic legal rights are threatened, as well as their livelihood and public image.168

C. The Only Outlet

According to USADA, the program is "fair and credible when an athlete is found to be in violation of anti-doping rules and regulations. USADA's adjudication process relies on an American Arbitration Association (AAA)/Court of Arbitration for Sport (CAS)

Id.

163. See Kammerer, supra note 35, at 18-19 (noting changes in technology in detecting doping and actions by governing organizations). For a further discussion on the impact of technology on regulation of doping, see supra notes 57-60 and accompanying text.

164. See Robbins, Lower Standard, supra note 124, at D2 (noting sprinting case reviewed in front of arbitration board). The USADA cited this case in its memo, providing justification for the change in the standard. See id.

165. See id. (discussing retroactive changes used by USADA in reasoning behind changed standard).

166. For a further discussion of the possibility of false positive results in drug testing, see supra note 138 and accompanying text. For a further discussion of the negative psychological effects on athletes accused of doping, see supra notes 142-46 and accompanying text. For a further discussion of the athlete's mistrust of the USADA, see supra note 157 and accompanying text.

167. See Walker, supra note 118, at A1. Athletes take extreme precautions to avoid unintentional doping:

The athletes are constantly told to be careful about taking substances and drinks. Athletes bring their own water or drinks to restaurants and cafes. At a kayak competition this week, a Swiss competitor refused repeated requests from a fan who offered her a drink of water.

Maurice Greene, the top U.S. hope in the 100-meter run this weekend, said when he carries water to a meet and puts it down for a moment and looks away, he won't drink it again. Someone might be tempted to put something in it that could be deemed illegal.

Id.

168. See Black, supra note 57, at 35 (discussing stigma and psychological effects of doping allegations). For a further discussion of the effects on athlete's earnings and media perception, see supra notes 142-46 and 152-56 and accompanying text.
arbitrated hearing under modified AAA Commercial Rules." 169 Unfortunately, if athletes are not happy with this alternative dispute resolution, they have little recourse. 170

Arbitration is usually a concept agreed upon by two parties, either when making a contract or to solve a dispute. In this case, however, athletes are not given a choice for adjudication. 171 USADA utilizes independent review panels for doping allegations and determinations which is very different than a criminal or civil trial. 172 In a criminal trial, the accused receives certain protections of process: a fair and full hearing, discovery, and a punishment fitting the crime. 173 Doping adjudication hearings are not criminal trials, and regulators intentionally do not give athletes the same measures of protection. 174 First, because of double jeopardy, the

169. U.S. Anti-Doping Agency, Adjudication, http://www.usantidoping.org/what/management/adjudication.html (last visited Jul. 9, 2005) [hereinafter USADA, Adjudication] (explaining what rules USADA follows in adjudication proceedings). The main objectives of the arbitration process are to provide fair, credible, and full evidentiary hearings that will eliminate the need for any other organization to take action, as well as decreasing the likelihood of subsequent action. See id.

170. See Longman, supra note 14, at D1 (recounting legal opinion that indicates athletes must abide by arbitration on matters of eligibility). Experts think athletes would have extreme difficulty overturning an arbitration decision in court. See id.

171. See id. ("Typically, athletes participating in Olympic-related sports sign a contract agreeing to binding arbitration on matters of eligibility.").

172. See Straubel, supra note 128, at 563-64 (noting composition of USADA's Anti-Doping Review Board includes three to five independent experts). "Application of the standard criminal due process protections to the Olympic Movement's doping control process would forbid several common practices." Id. at 550. The process USADA adheres to is dissimilar to criminal or civil proceedings:

According to USADA, the process before a Review Board is not a hearing. Therefore, no oral proceedings or pleading may take place. Rather, only documentary submissions are permitted. USADA will supply the Board with the laboratory documents and any other relevant documents and after receiving the same documents given by USADA to the Board, the athlete is permitted to submit written material. Id. at 564 (citations omitted).

173. See id. at 569 ("If athletes are not afforded the protections of the criminal system, the stability, legitimacy, and effectiveness of the doping control process will always be in jeopardy."). When an athlete is suspected of doping, the matter is presented in front of the USADA Anti-Doping Review Board ("Review Board"). See Tygart, supra note 20, at 135. Before the board meets, an athlete may submit written materials for its consideration. See id. The athlete, however, is not permitted to testify in front of the board, and is not permitted to have legal representation appear. See id. The Review Board will decide, by a majority vote, whether or not to proceed with a full hearing on the matter. See id.

174. See Straubel, supra note 128, at 550 ("Application of the standard criminal due process protections to the Olympic Movement's doping control process would forbid several common practices."). The chairman of the World Anti-Doping Agency claims that doping offenses are not criminal, therefore, there is no
anti-doping organization cannot reassess a single doping offense.\textsuperscript{175} Second, the burden of proof shifts to the controlling organization, not the athlete.\textsuperscript{176} Also, the organization must participate in more discovery procedures.\textsuperscript{177} Finally, the evidence obtained by regulators must be revealed.\textsuperscript{178}

USADA defends its policies with the fairness of the adjudication system.\textsuperscript{179} It claims to present a system that is fair and credible while providing ample arbitration and review.\textsuperscript{180} To further demonstrate its commitment to justice, USADA offers harsh repercussions for doping offenses.\textsuperscript{181} Additionally, the rules are lenient for accidental or unintentional doping instances.\textsuperscript{182} Unfortunately, the system places a high encumbrance on athletes. Athletes have the burden of proof to contest positive drug findings.\textsuperscript{183}
Because athletes do not benefit from the protections of criminal procedures, they have limited powers to fight doping allegations. When athletes challenge a ruling by USADA or WADA, their outlet, as outlined by the bylaws of these regulating organizations, is arbitration. Unlike a criminal court, where a defendant must be found guilty beyond a reasonable doubt, athletes are not afforded such a privilege. Athletes suspected of doping must prove their innocence, therefore carrying the burden of proof. Essentially, an athlete is treated “guilty until proven innocent.” Criminal concepts such as “intent” and “proof beyond a reasonable doubt” are constantly raised during proceedings. Additionally, athletes are not given a choice as to where to seek remedies; the system is imposed on them at their expense. The only remedy available to

It places the burden of proof on athletes to contest positive drug findings. An anti-doping violation during competition leads to automatic disqualification, including the loss of any medals. If the positive sample came from an in-competition test, then the results of that competition are automatically invalidated and the athlete forfeits any awards.

Id.

184. See USADA, Adjudication, supra note 169. Athletes have some choice as to which arbitration body to use:

The athlete may elect to proceed to a hearing before the American Arbitration Association (AAA) using a single arbitrator (or three-arbitrator panel, if requested by either parties) selected from a pool of the North American Court of Arbitration for Sport (NACAS) arbitrators, who shall also be AAA arbitrators. [ ] The athlete may elect to proceed directly to a final and binding hearing before the full Court of Arbitration for Sport held in the United States.

U.S. Anti-Doping Agency, FAQs, http://www.usantidoping.org/resources/faqs.aspx (follow “Adjudication Process” hyperlink; then follow “Does the athlete have the right to a hearing if USADA proceeds with adjudication as a result of a positive or elevated test, or other potential rules violation?” hyperlink) (last visited Sept. 22, 2005).

185. See Straubel, supra note 128, at 569 (recommending how system should run for athletes). Athletes are treated like criminals but not afforded the protections that a criminal system provides. See id.

186. See id. (“As a criminal system, an athlete should be afforded the protections of the criminal process . . . . The athlete should be given a full and fair hearing, including full discovery, before being punished. And the punishment should fit the crime.”).

187. Black, supra note 57, at 35 (noting rights of athletes are often violated by presence of doping control).

188. See Straubel, supra note 128, at 569 (explaining how jargon associated with doping processes resembles criminal trial terms). Cheating is a crime of moral turpitude in a criminal justice system, yet athletes do not face a criminal tribunal. See id.

189. See id. at 551. Although USADA claims the system is less expensive: For the accused athlete, the theoretically streamlined system, when compared to the judicial process, should demand less time and therefore be less expensive. But this is illusory. The athlete will still hire counsel, pay an investigator, bear the expense of expert witnesses, and incur the cost of travel to distant locations for the hearing.
Athletes are a civil trial, which can be delayed tremendously by USADA’s lengthy processes.190

Athletes are not presented with a choice as to which arbitration rules the organizations follow.191 This principle was recently decided in the Second Circuit Court of Appeals in Jacobs v. USA Track & Field.192 Regina Jacobs is a track star, a world record holder in the indoor 1,500-meters, and was an Olympic hopeful for the 2004 Olympic Games.193 Jacobs’s urine test at a 2003 competition tested positive for tetrahydrogestrinone, a substance prohibited under the rules of USADA.194 Jacobs and USADA disputed as to which rules of arbitration to apply.195 The Second Circuit denied Jacobs’s petition, stating that it would not interpret the terms of the agreement.196 The court held that Jacobs raised her claim prematurely, that determining to use specific rules of arbitration did not constitute refusal to arbitrate.197

Long before the creation of USADA, AAA handled cases for USOC.198 In 1998, the Ted Stevens Olympic and Amateur Sports Act allowed USOC to resolve issues involving amateur athletes.199 The Act granted USOC the authority “to provide swift resolution of

Id.

190. See id. at 566 ("From start to finish, each hearing must be completed within three months.").
191. See id. at 551 (comparing arbitration with doping control process). One commentator notes:

However, in a true arbitration system, the parties voluntarily agree to arbitrate the dispute, agree on the arbitrator, and agree on the rules to govern the arbitration. In the Olympic movement's doping control process, the dispute settlement system, the decision maker, and rules are imposed on the athlete.

Id.

192. 374 F.3d 85, 86 (2d Cir. 2004) (deciding whether athlete has choice as to which rules of arbitration to follow).
193. See id. at 86-87 (discussing Jacobs's background as world class athlete).
194. See id. at 87 (noting circumstances in which Jacobs produced positive test indicating steroid use).
195. See Straubel, supra note 128, at 565 ("The AAA Commercial Arbitration rules, as amended by USADA, govern the procedure of the hearing.").
196. See Jacobs, 374 F.3d at 89 (deciding that if there is no refusal to arbitrate, petitioner cannot seek alternate forms of arbitration other than what is provided by rules of agency).
197. See id. (noting that Jacobs cannot compel arbitration until other party has refused arbitration).
199. See id. (noting authority given to AAA to handle such cases). The Ted Stevens Olympic and Amateur Sports Act emphasized the use of arbitration to settle Olympic disputes. See id.
conflicts and disputes involving amateur athletes," and to allow
AAA to handle these disputes.\textsuperscript{200} The USADA process involves
arbitrators from both AAA and CAS.\textsuperscript{201} According to USOC Constitu-
tion and Bylaws, there are several ways to adjust the procedures of
AAA used in athlete adjudication.\textsuperscript{202}

AAA has handled some prominent doping cases.\textsuperscript{203} The or-
ganization can function as a preemptive force, deciding whether
athletes are eligible for competition.\textsuperscript{204} Interestingly, most profes-
sional sports do not use AAA to handle doping cases.\textsuperscript{205}

\section{D. Why Doping Matters}

Doping is an intense international issue, the focus of much
publicity and controversy.\textsuperscript{206} It must be discussed, however,
whether it matters if athletes turn to performance enhancing
substances.\textsuperscript{207} The basic issue becomes whether doping is a problem,
and in turn, whether it should be banned.\textsuperscript{208} There are five impor-
tant factors to weigh in this reasoning, including: risky health is-
ues, fairness, unnaturalness, whether abuse encourages others to

\begin{itemize}
\item \textsuperscript{200} See id. (quoting Ted Stevens Olympic and Amateur Sports Act).
\item \textsuperscript{201} See id. (establishing that AAA was selected because of past expertise in
this area). AAA recognizes that athletes do have a choice between arbitration bod-
ies, they can opt for either AAA or directly to CAS for appeal. See id.
\item \textsuperscript{202} See id. (noting AAA procedures are subject to change). The USADA and
the bylaws of the Olympic Committee allow for arbitration proceedings to change
as needed. See id.
\item \textsuperscript{203} See AAA, Focus Areas, \textit{supra} note 198 (listing areas that AAA has heard
cases including: boxing, judo, taekwondo, cycling, softball, tennis, and more).
\item \textsuperscript{204} See id. (noting examples of particular cases). Athletes and officials filed
no cases with AAA during the 2000 Sydney Olympic Games. See id. "Three days
prior to the opening of the Nagano Games in '98, an Olympic skier filed an arbi-
tration. The AAA acted quickly and had an arbitration hearing scheduled within
24 hours. The arbitrator decided the skier was eligible for the games." \textit{Id.}
\item \textsuperscript{205} See id. (indicating AAA's lack of involvement with doping in contexts
other than Olympic, Paralympic, and Pan American athletes).
\item \textsuperscript{206} See Wendt, \textit{supra} note 20, at 28 (describing 1980s as time when doping
became issue internationally). Efforts to combat doping on the international level
were pursued by more than just athletic organizations. See id.
\item \textsuperscript{207} See Johann Olva Koss, \textit{Preface to the Second Edition of BARRIE
HOULIHAN, DYING TO WIN} at 7, 7 (2d ed. 2002) (holding that doping is unacceptable). One
commentator emphasizes the importance of keeping sports free of doping:
Ideals of dignity, human excellence and fair play are not unique to the
Olympic movement, but apply to the very nature of sport - to be the best
an athlete can be. But at some point, a line must be drawn between being
the best through hard work, perseverance and certain levels of biological
luck and that of taking extraordinary means. Doping, winning at all
costs, cannot be accepted, least of all by athletes.
\textit{Id.}
\item \textsuperscript{208} See id. (reasoning why doping needs to be banned).
\end{itemize}
use steroids, and the detrimental effects when athletes are role models.\textsuperscript{209}

Most importantly, drug use is dangerous.\textsuperscript{210} There are serious health implications.\textsuperscript{211} For example, steroids have been known to cause heart disease and blood pressure problems.\textsuperscript{212} These consequences are not limited to physical harm, but include serious psychological repercussions.\textsuperscript{213} Users of chemically engineered substances are able to recover more quickly from exercise, resulting in the ability to train for longer periods of time at higher levels of intensity.\textsuperscript{214} This can result in injury from overuse of the body.\textsuperscript{215} Kelli White, an American sprinter banned for two years for steroid use said, "you could run harder, longer . . . . If the workout was four 200s really, really fast, they wouldn't seem as hard as before. You could cut the rest down from five minutes to three. That's a big difference."\textsuperscript{216} Athletes who feel pressure to succeed see the opportunity to work out longer and harder as an invaluable edge in training.\textsuperscript{217} Even more devastating than the wearing of muscles are the risky side effects of the drugs.\textsuperscript{218} Beyond the physical injuries


210. See Houlihan, supra note 1, at 74-75 (noting specific side effects of steroids).

211. See Guttmann, supra note 43, at 255 ("Medical experts differ over the degree of damage, but the consensus is that steroids are dangerous.").

212. See Koss, supra note 207, at 7 (demonstrating risks athletes take by using steroids). Steroids have particularly dangerous side effects. See id. (listing physical side effects of steroids). For a further discussion of the side effects of steroids, see infra note 218.

213. See Adler, supra note 2, at 49 (listing psychological side effects of steroids). Side effects include "roid rages and mood swings," higher levels of aggression, and depression. Id.

214. See id. at 46 (explaining effects of steroids on human body).

215. See id. at 49 ("Steroids cause muscles to grow without a compensating strengthening of the tendons that attach them to the bones, a disproportion that increases the risk of crippling injuries.").

216. Weir, supra note 4, at 1A (summarizing drug use experience of Kelli White and other notable athletes).

217. See Adler, supra note 2, at 46 ("Athletes who train on steroids can gain muscle mass at phenomenal rates, as much as two pounds a week.").

218. See Todd & Todd, supra note 37, at 87 (describing side effects from drug use).

For two decades doctors have warned against the dangers of steroids. They talked about heart problems. They talked about liver problems. They talked about cancer. . . . Now the anti-steroid warnings are illustrated by clogged arteries, ruptured vessels, lifeless limbs, cancerous growths and softball-sized tumors. Real people are having real, life-threatening problems. The doctors were right.
and side effects that afflict steroid users, sometimes the psychological damage is far greater and more dangerous to the user.\textsuperscript{219} Depression, addiction, and aggressive behavior are just some of the heavy tolls users struggle against.\textsuperscript{220}

A final dangerous health aspect of steroids is the suspicious drug market.\textsuperscript{221} Because performance enhancing substances for the most part are illegal, there is no protection through government regulation.\textsuperscript{222} Scarily, many substances are not what they

\textit{Id.} (ellipsis in original) (quoting Bill Utterback of the \textit{Pittsburgh Press}). It is almost impossible to know what permanent damage steroid use has on the body, particularly in adolescents. \textit{See Adler, supra note 2, at 47}. Some of the known side effects include: terrible acne, headaches, male pattern baldness, strokes and blood clots, impotence, and aching joints. \textit{See id.} The male body responds to an "oversupply of testosterone by signaling the testes to shut down, causing them to shrink." \textit{Id.} "Another way the body deals with excess testosterone is by converting some of it to estrogen, which can cause men to grow breasts." \textit{Id.} The side effects are just as devastating for women, symptoms include "masculinizing changes including body hair, enlargement of the clitoris and a deepened voice." \textit{Id.}

\textsuperscript{219} \textit{See Adler, supra note 2, at 45} (noting devastating effects of doping on mind and body). Demonstrating what steroids can do to an adolescent:

[Chris Wash, a high school basketball player using steroids] went from a rangy 180 pounds to a hulking 230 . . . . And he developed a whole new personality to match that intimidating physique: depressed, aggressive and volatile. After a series of fights in his junior year his coach threw him off the team, but by then building muscles had become an end in itself. He switched from pills to injecting himself with steroids in the buttocks, often with a couple of friends . . . . That went on for several months, until one day [one of the friends] was found dangling from his belt in his bedroom, an apparent suicide. Frightened, Wash gathered up his vials and syringes and threw them down the sewer. But an insidious thing about steroids is that stopping them abruptly can lead to depression. A few weeks later Wash drove to a bridge across a Dallas freeway and walked to the middle, looking down at the rushing traffic.

\textit{Id.}

\textsuperscript{220} \textit{See id.} at 49 (explaining mental effects of steroid use).

And there are the infamous psychological effects of volatile aggressiveness - the "roid rage" that . . . . landed other users in jail or in the hospital . . . . \textit{[W]hen a heavy user stops taking steroids, his testosterone level can drop practically to zero for weeks until his testes resume production-producing the opposite syndrome, a devastating depression.}

\textit{Id.}

\textsuperscript{221} \textit{See id.} at 48 (noting how doping drugs are disseminated and how dangerous this system is). Because there is a multitude of drugs on the (black) market, athletes often do not know what they are ingesting. \textit{See id.}

\textsuperscript{222} \textit{See id.} at 46 (describing dangerous manner by which steroids are obtained).

Testosterone and its relatives are controlled substances, approved to treat only a few, uncommon medical conditions-although any doctor can legally prescribe them for so-called off-label use to anyone . . . . Since the market is unregulated, products claiming to be steroids might in fact be almost anything, in concentrations that can only be guessed at by anyone without an analytical lab at his disposal.

\textit{Id.}
promise to be, sometimes including lethal substances totally unrelated to performance enhancement. Even the supplements sold over the counter in nutrition stores are dangerous; many times the side effects of these drugs are unknown, particularly on adolescents. In short, consumers rarely know exactly what they are buying or what they are injecting into their bodies.

A predominant argument against doping is fairness. The ability to train longer and to recover faster gives doping athletes a competitive advantage. The common and popular response to criticism by doping offenders is that “everyone does it.” Due to the sheer volume of admitted steroid users and the amount of accusations, it often feels that the credibility of sports and competition is questionable. Clean athletes are unfairly questioned and stigmatized despite a lack of convincing evidence. The world of international sports has become a modern day witch hunt where athletes

223. See id. at 48 (noting how dangerous these drugs can be). “Dr. Douglas McKeag, who heads the Indiana University Center for Sports Medicine . . . once analyzed a ‘protein supplement’ one of his students had bought at the gym, and found it contained a cocktail of steroids, plus the poison strychnine, none of them listed on the label.” Id.

224. See Adler, supra note 2, at 46 (explaining that over-the-counter substances are still not safe). “[A]ndro has virtually the same effects, and side effects, as steroids, although it requires a much higher dosage . . . . Andro has been sold legally in nutrition stores and on the Internet for years.” Id. For a further discussion of andro and its effects on athletes, see supra note 15 and accompanying text.

225. See supra notes 221-24.

226. See GUTTMANN, supra note 43, at 255 (“Steroids allow some athletes to achieve muscular size and strength greater than that obtainable by the most naturally mesomorphic person following the most intense workout program.”).

227. Id. at 257 (recounting argument utilized by steroid users that claims all athletes dope).

228. See id. at 255. Sports lose credibility when athletes use illegal means to get ahead:

Because steroid use is banned, it is secret; and because it is secret, no one knows which performance was achieved honestly and which was not. Did Ludmilla Toureschiva, the strikingly muscular gymnast who defeated Olga Korbut in Munich in 1972, win by ethical means or was she propelled chemically to an unfair victory? Did Florence Griffith-Joyner transform her body by dint of hard work or did she do what Ben Johnson did? The moral climate is such that everyone is suspect.

Id. at 255-56 (italics omitted).

229. See Black, supra note 57, at 36. False positives pose a significant risk to athletes:

These complicated test interpretation issues have been exposed over time as athletes, accused of banned substance use, have developed arguments in their defense. The evolution of a better understanding how these factors affect test results has come at the expense of athletes subjected to poorly formed doping program procedures and policies.

Id.
deny themselves cold medicine, asthma inhalers, birth control pills, and even aspirin, to avoid accusations.\textsuperscript{230}

Another moral argument against doping is the unnaturalness of the results.\textsuperscript{231} Any success or accolades earned by an athlete while doping are not really earned on one's own.\textsuperscript{232} Even if steroids or performance enhancing drugs are made from natural ingredients, they still do not represent a pure form of sport.\textsuperscript{233}

Unfortunately, the use of drugs by one athlete encourages use in other athletes.\textsuperscript{234} This principle is demonstrated by the recent scandal in the United States involving BALCO.\textsuperscript{235} When one athlete is discovered doping, many times there is involvement by friends and training partners.\textsuperscript{236}

Doping extends beyond competitions and the health of the athletes themselves. An important consideration as to the implications of doping is the position of athletes as role models.\textsuperscript{237} In particular, children are most influenced by athletes.\textsuperscript{238} There are direct links between drug use in children and use by popular athletes.\textsuperscript{239} Thus, the impact on the health of the individual and the

\textsuperscript{230} See id. (discussing types of substances that can impede drug tests such as disease, diet, and supplements).

\textsuperscript{231} See Yesalis et al., supra note 209, at 44 ("The use of drugs in sport is unnatural in that any resulting success is due to external factors."); see also Rhoden, supra note 81, § 8 (stating actions by USADA and chairman of WADA are administering inquisition of athletes).

\textsuperscript{232} See Yesalis et al., supra note 209, at 43 ("'To the victor go the spoils,' and with large amounts of money and adulation at stake, some competitors will cheat to obtain these objectives. One method of cheating is to use performance-enhancing drugs.").


\textsuperscript{234} See Yesalis et al., supra note 209, at 44 ("The use of drugs by one athlete may coerce other athletes to use drugs to maintain parity.").

\textsuperscript{235} For a further discussion of BALCO and Marion Jones, see supra notes 150-56 and accompanying text.

\textsuperscript{236} For a further discussion of Marion Jones and the athletes accused during the BALCO scandal, see supra notes 150-56 and accompanying text.

\textsuperscript{237} See Schneider & Butcher, supra note 64, at 140 ("People look up to athletes and view them as role models.").

\textsuperscript{238} See id. at 140 (explaining how much children look up to athletes).

\textsuperscript{239} See id. at 141. Athletes have a very real effect on children: The recent example of Mark McGwire's drug use is a good case to strengthen this argument. There is apparently a good deal of anecdotal evidence to suggest that there was a marked rise in drug use by children in the United States; apparently these children aspired to be like McGwire.

\textit{Id.}
extreme harm to society are notable factors in the dangers of doping.240

IV. CONCLUSION: WHERE CAN ATHLETES GO FROM HERE?

Under the rules of USADA, athletes have few legal options if they are unhappy with doping sanctions.241 If athletes refuse testing, they are subsequently barred from competition.242 The most common outlet is arbitration.243 Arbitration, however, does not necessarily mean a better or higher standard of proof will be applied to the athlete’s case.244 Many times arbitration is less favorable to athletes, and if it does not produce the desired result, they have no recourse.245 The U.S. Courts, as demonstrated in Jacobs v. USA Track & Field, seem to step back from this issue and do not invade arbitration agreements.246 Doping is not a criminal offense, but a moral issue, hence the reluctance of court involvement.247 Athletes are breaking rules set by an independent

240. See id. ("From a societal perspective, if this hero is morally despicable, this will be a negative influence because young people will not separate the athletic abilities of their heroes from the quality of their personal lives, especially when fame and glamour surround the hero.").

241. See Longman, supra note 14, at D1 (discussing limited legal options after arbitration because of binding nature of arbitration and reluctance of courts to overturn decisions).


The United States Anti-Doping Agency (USADA) announced Thursday that Johnny Vasquez, Jr. of Snyder, Texas, an athlete in the sport of boxing, received a two-year suspension for refusing to take part in a USADA out-of-competition test on Mar. 21, 2004. Vasquez, Jr., 20, received a two-year suspension from all sanctioned competition as provided in the rules of Association Internationale de Boxe Amateur (AIBA), the sport’s international federation.

Id.

243. See Straubel, supra note 128, at 551 (noting that athletes do not have choice to arbitrate and system is imposed on them as only source of retribution).

244. For a further discussion of the Regina Jacobs case vying for a different form of arbitration, see supra notes 192-96 and accompanying text.

245. For a further discussion of Regina Jacobs’s lack of alternatives to arbitration, see supra notes 192-96 and accompanying text.

246. For a further discussion of the court’s finding in the Regina Jacobs case, see supra notes 192-97 and accompanying text.

247. See Straubel, supra note 128, at 550-51 (examining limitations placed on regulators if criminal system is used); see also Robbins, Lower Standard, supra note 124, at D2 (explaining that USADA is independent and can change standards and due process at will).
organization. Accordingly, the organization does not have to implement criminal procedures.248

Doping allegations are incredibly damaging to athletes, affecting their psychological state as well as their training regimens.249 Although the courts are hesitant to involve themselves in the policies of USADA, they may consider a more active role in the future.250 Unfortunately for U.S. athletes, because most testing is international, even with assistance from the U.S. government or courts, athletes are still subjected to harsh regulations internationally.251

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248. See Robbins, Lower Standard, supra note 124, at D2 (discussing claims by USADA that they are free to change standard).

249. For a further discussion of the detrimental effects of doping allegations on athletes psychologically, morally, and financially, see supra notes 142-46 and accompanying text.

250. See Robbins, Lower Standard, supra note 124, at D2 (indicating that lawyers believe that shift in standard of proof will not be upheld in courts).

251. See Wendt, supra note 20, at 30-31 (discussing multitude of international federations and national governments who have adopted World Anti-Doping Code and intend to implement it).