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Ideology, Doping and the Spirit of Sport

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ABSTRACT

The current World Anti-doping Code can be characterised as a tough approach to doping. In this paper we investigate how the World Anti-Doping Agency (WADA) justifies this tough approach. To this end, WADA advances two justificatory arguments. It maintains, first, that protection of the *spirit of sport* warrants tough measures and, second, that athletes have *voluntarily* consented to the Code. We argue that in the way they are presented by WADA, neither of these arguments can withstand scrutiny. In the second part of the paper, we go on to show that these arguments are in fact ideological in nature. The specific aim of these arguments is not to be correct, but rather to distort social reality, because in this way they can be used to ward off any critical discussion of the Code. We conclude that WADA's interest is to create a façade of justice, not in serving justice itself.

KEYWORDS

Doping; ideology; spirit of sport; voluntariness; Quigley case

Introduction

The World Anti-Doping Agency (WADA) has adopted some tough measures in its mission to create doping-free sport. Since 1 January 2015, for instance, an athlete can be suspended for four years in the event of a first doping-related offence (this used to be two years).[1] Adding to this toughness is the fact that WADA relies on standards of strict and vicarious liability. With regard to strict liability, the World Anti-Doping Code ('the Code') stipulates that an athlete need not be at fault in order to be liable, i.e. it is sufficient for a prohibited substance to be found in an athlete's bodily specimens for that athlete to be considered liable. If an athlete can show that he could not help testing positive, this may alleviate the sanction, but it does not change the athlete's liability.[2] A standard of vicarious liability applies meanwhile in team sports. This means in cycling, for example, that if two riders on the same team commit a doping offence, not only will those two riders be suspended, but their teammates can also be banned from the sport for between 15 and 45 days, while this period can be extended to a year if a third rider on the team tests positive.[3] Finally, WADA has adopted a relatively lenient standard of proof, i.e. 'comfortable satisfaction' suffices, which is a less critical standard than 'beyond reasonable doubt'.[4]

This tough approach raises the issue of *justification*. Can WADA's heavy penalties, its reliance on strict and vicarious liability standards and its adoption of a relatively lenient standard of proof be justified?[5] To this end, WADA advances two justificatory arguments. First, it

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stresses that tough measures are warranted in order to protect what it refers to as the *spirit of sport*. According to WADA, this spirit of sport is a standard of justice as it aims to ensure that athletes can compete on a fair and equal footing. Although the strict and vicarious liability may result in occasional unfairness to an individual athlete, this risk is considered to be sufficiently mitigated by the fact that the rules allow for the period of suspension to be reduced if the individual athlete can prove that he was not personally at fault. Second, WADA states that the Code is based on *voluntary consent*; in other words, the various parties—WADA, IOC, sport federations, athletes and so on—have chosen to enter into a contract, whereby the athlete pledges *inter alia* to abide by the rules and to accept any sanctions that may be imposed in the event of failure to comply. The idea that the Code is based on agreement is considered to add to its legitimacy.

Our concern is with these two arguments. How ought they to be judged?[6] In the first two sections of this paper we argue that, in the way they are presented by WADA, neither of these arguments can withstand scrutiny. With regard to the first argument, we maintain that WADA's analysis of the spirit of sport is inconsistent, whereas our view on the second argument is that athletes have not voluntarily consented to the Code. In Section 3, we investigate whether the concept of the spirit of sport can be analysed more productively. To this end, we focus on the work of Michael Sandel, who presents an interesting argument in favour of anti-doping regulation. If, however, the spirit of sport is developed along these lines, the current Code is found to fall short in many respects. Section 4 examines the implications of these negative conclusions, whereby we contend that WADA's commitment to bad arguments qualifies as ideology and is symptomatic of a more widespread tendency. Sports officials create the impression of valuing the rhetorical effect of the justifications they provide over and above the soundness of these justifications. While WADA's arguments in justification of the Code have been discussed to some extent, our contention that these arguments are ideological provides a new and important insight.

Our argument, however, is subject to a caveat as although the discussions in the following sections may in certain respects be relevant from a legal perspective, our primary concern is philosophical and our analysis pertains specifically to the arguments used by WADA in justification of the Code.

1. Spirit of Sport

WADA was founded on 10 November 1999 as a private foundation, with its seat in Lausanne, in the aftermath of the doping scandals that arose during the 1998 Tour de France. The agency was set up with the aim of harmonising the various anti-doping regimes operating in sport and promoting and coordinating the fight against doping in sport in all its forms.[7] Its main instrument in the fight against doping is the World Anti-Doping Code, which WADA is required to update regularly. This Code contains certain 'core' articles, which the various sports federations are obliged to adopt. These core articles include definitions of what counts as a doping violation, what burdens and standards of proof should be adopted and what sanctions should be imposed. The Code also stipulates that international athletes wishing to appeal against any sanctions should lodge their appeal with the Court of Arbitration for Sport (CAS).[8]

In the Code, WADA provides only a *formal* definition of doping by stipulating that a substance or method counts as doping if it is included on the Prohibited List. Although this

definition does not, as such, tell us very much, WADA attempts to provide guidance by clarifying the rationale of anti-doping regulation and the criteria used to determine whether a substance or method should be included on the List. The concept of the 'spirit of sport' plays a central role in both instances as not only is the protection of this spirit considered to be the rationale of the Code, but it is also used as one of the criteria.

WADA is committed to the following three criteria:

- Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;
- Medical or other scientific evidence, pharmacological effect or experience that the use of the substance or method represents an actual or potential health risk to the athlete;
- WADA's determination that the use of the substance or method violates the spirit of sport described in the introduction to the Code.[9]

Interestingly, it is sufficient for a substance or method to be included on the Prohibited List if it meets two of these three criteria. A substance or method can thus be classified as doping if it (1) enhances the performance and poses a health risk, (2) enhances the performance and violates the spirit of sport, or (3) poses a health risk and violates the spirit of sport.[10] *Prima facie*, this is a broad delineation as it does not, for example, exclude the possibility of a substance being included on the Prohibited List even though its use *adversely* affects the athlete's performance. Indeed, the broadness of the delineation has attracted criticism. In a 'Call for WADA' a number of scientists urged WADA to adopt a more restrictive approach by making the first criterion a necessary condition (Waddington et al., 2012). Although WADA initially considered taking on this recommendation when preparing the new Code, the 'two out of three' approach ultimately prevailed (Kornbeck 2013, 318).

In order to determine how broad this delineation actually is, we need to know how WADA interprets the concept of the spirit of sport. In the introduction to the Code, this is stated to comprise the following values:

- Ethics, fair play and honesty
- Health
- Excellence in performance
- Character and education
- Fun and joy
- Teamwork
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other participants
- Courage
- Community and solidarity.

WADA's analysis has received mixed reviews. Some scholars insist that it is too vague,[11] while others have argued that although the concept remains vague, the above enumeration provides valuable clues as to what the Code is about as it can be understood in aspirational terms. Michael McNamee has even invoked the language philosophy of Wittgenstein to argue that language need not always be precise in order to be useful. He concludes that the objection of vagueness is an impotent one.[12] In our view, however, the main problem with

this enumeration is not so much one of clarity, but rather one of consistency. It ought, at least in principle, to be possible to apply these values to determine whether a certain substance or method contravenes the spirit of sport. The above enumeration, however, cannot be applied in such a way.

Let us explain our view in more detail. Consider the value of courage, as referred to in the above enumeration. Does an athlete contravene this value by using a certain substance? In our view, this question is ill-conceived, i.e. ingesting a substance is not normally associated, in common parlance, with this value. Suppose, for example, that a new performance-enhancing substance 'X' becomes available to athletes and WADA's health commission has to determine whether to include it on the Prohibited List. Does it make sense to investigate whether ingesting this substance is a sign of courage? Or of cowardice? If pressed for an answer, we would say that ingesting a substance that poses a significant health risk testifies to courage rather than to cowardice. The point here, however, is that this value makes no sense as a criterion. A similar verdict befalls the values of 'character and education', 'fun and joy', 'teamwork', 'dedication and commitment', 'respect for self and other participants' and 'community and solidarity'. We will leave consideration of these values to the reader.

At first glance, the values of 'respect for rules and law' and 'fair play and honesty' appear better suited to serving as criteria, given that it could be regarded as dishonest, for example, to ingest a certain substance. In contrast to the question of courage vs. cowardice, such a claim makes some sense. Upon closer consideration, however, these values, too, are unsuitable. The problem is that a claim of dishonesty presupposes that the substance is already on the Prohibited List. After all, as long as it is not prohibited, an athlete using it cannot be regarded as dishonest. Similarly, the athlete cannot be said to violate the value of 'respect for rules and law' because, if the substance is not prohibited, there is no rule to violate. Finally, if the substance is available to all competitors, it is hard to see how an athlete using it can be said to be violating the value of fair play. In other words, cheating presupposes the existence of rules; it can be claimed that it is 'unfair, dishonest, *et cetera*, to use substance 'X' *because* it is prohibited by the rules', but not that 'substance 'X' should be on the Prohibited List because the use of it would be unfair, dishonest, *et cetera*'. So, these values cannot be used as criteria to determine whether a certain substance ought to be classified as doping.[13]

Our dismissal of 'fair play' as a suitable criterion may have been over-hasty. Suppose, for example, that a new drug is developed which is highly effective in boosting performance while at the same time posing a significant health risk to the athlete using it. If some athletes start using the drug, it may put significant pressure on other athletes to also use this drug, because otherwise they may no longer be competitive. Effectively, this means that there is pressure to use a drug that poses a serious health risk and this, so it may be claimed, is unfair.[14] Notice that this judgement does not presuppose a prohibition. Still, this interpretation of 'fair play' cannot be considered fruitful for present purposes, because WADA's intention is to use 'spirit of sport' as a criterion independent of the other two (enhancing performance & posing a health risk). But this understanding of 'fair play' presupposes the satisfaction of both criteria. After all, if the drug does not boost performance, there is no pressure to use it, and if there is no health risk, it is difficult to see how any pressure could be considered unfair.

This leaves us with the values of 'ethics' and 'health'. The inclusion of these values in WADA's analysis of the spirit of sport is unsatisfactory. To say that ethics in general are the rationale

of anti-doping regulation leaves it entirely unclear why WADA chose to adopt the Code. This is a problem because (1) it is not self-evident that there needs to be a Code and (2) it sets no clear limit on the pursuit of doping-free sport. The inclusion of 'health' as a value is also unsatisfactory because not only is it used to elucidate the concept of the spirit of sport, but it is also the second of WADA's three criteria. It is strange that the second criterion returns in the analysis of the third criterion. This is all the more unsatisfactory because only two of the three criteria need to be met for a substance or method to be included on the Prohibited List. In effect, therefore, any substance that poses a health risk can be classified as doping. This significantly stretches the meaning commonly associated with doping.

Hence, it emerges that none of these values can properly serve to elucidate the concept of the spirit of sport. Although some scholars have criticised the notion of the spirit of sport for being vague, the main problem is that the values WADA associates with it cannot be properly applied at all.

2. Voluntary Consent

The World Anti-Doping Code was unanimously adopted at the 2003 World Conference on Doping in Copenhagen and accepted by the signatories. These signatories include the International Olympic Committee, national Olympic Committees, the International Paralympic Committee, international federations, national anti-doping organisations and WADA itself. National federations are indirectly bound by the Code through their agreements with the relevant international federations and national anti-doping organisations. Athletes, in turn, commit themselves to the Code by being a member of their national federation. Finally, virtually every country in the world is committed to the Code due to a UNESCO Conference in 2005 in Paris where agreements were made on state level to support WADA.[15] This means that the commitment to the Code resembles a layered caked as it is based on agreements on different levels. According to WADA, these agreements are voluntary on each level.[16]

This claim of voluntariness has far-reaching implications, both legally and philosophically. From a legal point of view, this claim is significant because it is one of the reasons why the Code should be characterised as contract law.[17] This characterisation, in turn, has a bearing on the legal protection offered to athletes as it prevents the invoking of fundamental human rights and legal principles associated with criminal law. As a result, the legal protection available to athletes is limited. From a philosophical point of view, too, the claim of voluntariness is important because—if it is true—it adds to the justification of the Code. Of course, athletes will not rejoice if sanctions are imposed on them, but it matters morally that they agreed to this sanctioning system in the first place as this signifies that the Code (at least in some sense) respects the athletes' autonomy. This claim of voluntary consent is, therefore, significant from both a legal and a philosophical point of view. But is it tenable? Have athletes consented voluntarily to the Code by becoming members of the relevant federation?

In order to answer these questions, some more needs to be said about the concept of voluntariness. Joel Feinberg states that a choice can only be fully voluntary if it is deliberately made by a normal adult human being in control of the situation. This includes the absence of coercive pressure (Feinberg 1986, 104). The making of a decision can be shown to be coerced for various reasons. One of the generally accepted—and, for our discussion, relevant—reasons is that the actions of another agent can result in the options available to

the individual in question becoming so curtailed that the latter faces only bad alternatives. According to Serena Olsaretti, a choice should be considered non-voluntary if it is made only because there is no acceptable alternative. An option is unacceptable when it is so thoroughly bad that no rational agent could be expected to choose it (Olsaretti, 1998, 70–71). In other words, if X curtails the options of Y so thoroughly that Y faces only two alternatives, one of which is merely acceptable and the other one unacceptable, Y's decision in favour of the acceptable option is non-voluntary owing to a lack of real alternatives.

If we employ the Feinberg/Olsaretti criterion, it emerges that athletes' commitment to the Code is non-voluntary. Some examples can make this clear. In the first of these, Susan is an elite athlete who is now in the prime of her career after years of disciplined training, which included numerous sacrifices. Although she does not like the changes to the Code, she nevertheless remains a member of the relevant federation. Can her decision be characterised as a voluntary commitment to the new Code? In the light of the above analysis, the answer is negative. WADA has curtailed her options in the sense that the only alternative to agreeing to the Code is retiring from the sport altogether. This alternative is unacceptable because, by this stage, Susan has simply invested too much. No rational agent could be expected to choose this option under these circumstances.[20] In the second example, Robert is attempting to become an elite athlete. Does he then voluntarily consent to the Code by becoming a member of the relevant federation? In contrast to the previous example, the choice not to become an athlete could be seen as more acceptable because Robert has not yet invested so much. However, if Robert is really serious about becoming an elite athlete, he is probably still a minor because otherwise his attempt to become an elite athlete would be doomed from the start. If so, his commitment to the Code is also not fully voluntary.[21]

These examples show that this general claim of voluntary consent is highly problematic. WADA curtails the options available to athletes to the extent that the only choice available to them is to choose to accept the Code or to end their career. In light of the Feinberg/Olsaretti criterion, making such a choice is non-voluntary.

3. A Reinterpretation of the Spirit of Sport

In the way they are presented by WADA, neither the argument of the spirit of sport nor the argument of voluntary consent can withstand scrutiny. Although we do not think there is a better way to formulate the argument of voluntary consent, there is room for improving the analysis of the spirit of sport. It is quite possible that this concept can be developed as a viable principle of justice. In this section, we examine whether such an interpretation is available. To this end, we focus on the Michael Sandel's influential book *The Case against Perfection*, in which he discusses problems related to biotechnological advancements (Sandel, 2007). One of the chapters is devoted to bionic athletes. Our goal in this section is to show that when the spirt of sport is interpreted as a genuine principle of justice, this imposes important restrictions on the pursuit of doping-free sport. In Section 3.1 we present Sandel's view and in section 3.2 we discuss the restrictions.

3.1. The Case against Perfection

Biotechnological advancements are, in Sandel's view, both a blessing and a curse. On the positive side, they hold the promise of enabling us to cure diseases that are as yet incurable.

But there is also a significant danger as striving biotechnologically to perfect ourselves may mean we are no longer content with *what we are given*. In this effort to perfect ourselves, our freedom and responsibility may fade away, as the following example shows. Suppose it becomes possible in the near future for parents to design their baby, i.e. to make decisions about his intelligence, looks, athleticism and so on. What would be wrong with making such decisions? According to Sandel, the main problem is a loss of freedom. By being designed, the child becomes indebted to his parents in a way in which 'normal' children are not. The child's position can be characterised as one of subjugation. In Sandel's view, our freedom is closely connected with the beginning of our lives. Only a beginning that is beyond our control can be at the basis of a life of freedom.[23] This plea against perfection should thus be understood as a warning against a *Brave New World*.

The idea of respect for the given character of human abilities is central to Sandel's discussion of bionic athletes. Suppose it becomes possible to genetically modify batsmen in such a way that they almost always hit a home run. What would we lose by this? Sandel points out that allowing this kind of enhancement would dramatically change the game of baseball. Watching genetically enhanced batsmen hitting one home run after the other is not watching a game, but rather a *spectacle*.[24] As scoring a home run would no longer be special, the game would lack the drama and heroism that are essential to baseball as it is ordinarily played. Furthermore, admiring a player because of his achievements would become problematic because they would not really be *his* achievements to begin with.[25] If we were to admire anyone, it should be the geneticist who made this constant hitting of home runs possible. In other words, enhancing individuals in such a way would threaten the integrity of the game and thus pose a threat to the spirit of baseball.[26]

Of course not all enhancements should be seen as a threat to the spirit of sport. The introduction of spikes on running shoes, for example, did not turn athletics into a spectacle. Instead it meant a great improvement because running on spikes, rather than barefoot, significantly reduces the chance of injuries to athletes. So Sandel's plea for contentment with what we are given does not mean that we should dismiss each and every form of improvement. Developing new running shoes, trying out new training regimes and so on are all compatible with his plea. This results, however, in a line-drawing problem.[27] The two examples—genetically enhanced batsmen, and spikes—are two extremes at the opposite ends of the spectrum and, as such, easy to classify. However, most enhancements are not so easily classified as either an improvement or a threat. What should we think, for example, of the altitude tent that enhances the performance of athletes by reducing their blood oxygen saturation? Does using this tent threaten the spirit of sport? Would it somehow be wrong for us to admire an athlete who uses such a tent? Answers to these questions are likely to be somewhat arbitrary.

Drawing inspiration from Sandel's analysis certainly does not, therefore, resolve all the problems in interpreting the concept of the spirit of sport as the objection of vagueness, which we discussed in the first section, is still on the table. However, it is possible to resolve the more important objection of consistency. In contrast to WADA's enumeration, this interpretation provides guidance on what the Code is about and can be used to determine whether a specific substance ought to be on the Prohibited List. Indeed, the above analysis shows that protecting the spirit of sport should not be thought of as an independent criterion, but rather as one adding to the first criterion (enhancement of performance). In Sandel's analysis, it is not any enhancement of performance that should be regarded as suspect, but

only those enhancements that threaten the spirit of the particular sport (if, for example, the enhancement turns the game into a spectacle or makes admiration of the athlete problematic and so on). This addition to the first criterion is meaningful, albeit not necessarily always easy to apply.

3.2. Justice and the Code

What matters is this: when the spirit of sport is interpreted as a *genuine* principle of justice, it can be used as a *critical* standard as it imposes restrictions on the pursuit of doping-free sport. This raises a general concern: is the current Code sufficiently in line with this standard? As we explain below, this issue is problematical. We argue that the Prohibited List, the application of strict and vicarious liability and the severity of the sanctions are not in line with this standard.

First, the Prohibited List includes a number of substances, such as cannabis, that do not enhance performance.[28] Doping authorities test for this substance only when the athlete is in competition (not when they are out of competition). However, the fact that the active component in cannabis—THC—is released from the body slowly over an extended period of time means that, after steroids and EPO, cannabis is the substance for which athletes test positive most often (Mottram, 2015, 191–195). *Prima facie*, using cannabis poses no threat to the integrity of sport. David Mottram opposes this view and claims that the use of cannabis may have a positive effect on performance by reducing anxiety. Mottram concludes that cannabis is rightly on the Prohibited List.[30] However, the fact that cannabis impairs the performance of exercise, diminishes alertness and results in slower reaction times, for example,[31] strongly suggests that using it will adversely affect performance. In our view, athletes using cannabis do so for recreational purposes, not to win medals. In the 'Call for WADA' referred to above, various scientists called on WADA to remove cannabis from the Prohibited List.[32] In the light of the critical standard developed in this section, their call is not without merit.

If the above were the only discrepancy, Sandel's rationale could perhaps serve as justification of the Code after all. However, there are more discrepancies. WADA's use of very strict and vicarious liability standards is not warranted by this rationale either. Let us explain. Part of the conundrum, as we saw, with bionic athletes is that *admiration* for the enhanced athlete becomes problematic. The Code should, therefore, operate as a counterweight to ensure that the athlete's performance can indeed be said to be *his* achievement. But if that is what the Code is about, surely this also holds true the other way around. If we are to *condemn* the athlete, it presupposes that he was at fault and the fault ought to be *his*. Typically, however, this is not required in the case of strict and vicarious liability. Since a positive result on a doping test is sufficient for liability, it is perfectly possible for an athlete to be condemned and sanctioned even though he was not at fault. The Code stipulates that even when the athlete can prove that he had no intention of enhancing his performance, this makes no difference in terms of his liability.

Some care is needed to avoid the trap of making too sweeping claims. As many authors recognise, it is notoriously difficult to prove that an athlete intended to enhance his performance.[33] It stands to reason that if anti-doping doping regulation is to have any chance of being effective, a balance has to be found between justice and effectiveness, i.e. some degree of compromise is needed. However, the result of such compromise is individual unfairness,

and this is what philosophers aptly call a *moral loss*. Most philosophers claim that we can sometimes allow for a moral loss, but only when the consequences of not allowing the loss would be so dire that they would cross a certain threshold ('*threshold deontology*').[34] It could, therefore, be possible to justify anti-doping regulation even if this flouted some important demands of justice. But this would require the flouting of these demands to be kept to a minimum. Moral losses should be avoided, wherever possible. The problem is that WADA is not committed to such a minimising approach. Its imposition of sanctions on athletes who can prove not to be at fault shows that WADA is liberal in its acceptance of moral losses.[35] If we are to understand the spirit of sport as a standard of justice, such a permissive approach surely cannot be justified.

What about the increase in the suspension period from two to four years in the case of a first offence? In order to assess this increase properly, we need to be clear that the rules allow this sanction only if the offence concerns i) a non-specified substance (substances in the classes of anabolic agents and hormones) or ii) a specified substance (all other substances listed on the Prohibited List), in which case the doping authority has to prove that the violation of the anti-doping rule was intentional.[36] If the doping authority cannot prove the required intention, the maximum suspension is two years. How does the four-year suspension compare with the rationale examined in this section? To our minds, this rationale—since it is a standard of justice—includes a commitment to the principle of proportionality, i.e. the sanction ought to be in line with the gravity of the offence. Whether this is so can be measured in two different ways: by comparing the sanction with other sanctions (is this sanction severe in comparison with other sanctions?), which is referred to as *ordinal* proportionality, or by comparing the sanction with the offence (does this sanction sufficiently express the gravity of the offence?), which is referred to as *cardinal* proportionality.[37]

Although it is typically more difficult to make statements about cardinal proportionality than ordinal proportionality, it is cardinal proportionality in which we are interested here. What can we say about the Code in this respect? There are at least two reasons why the four-year suspension should be considered a too severe penalty. First, in some sports, such as gymnastics, competing at the highest level is usually possible only for a short period of time. In these sports in particular, a four-year suspension is likely to be a career-ending event because it will be impossible for the athlete to remain competitive during the suspension. This fundamentally alters the two-strikes-and-you-are-out approach (first offence: two-year suspension; second offence: lifelong suspension) that hitherto governed anti-doping regulation; in gymnastics the new approach is likely to turn out to be one-strike-and-you-are-out. Another reason why we consider the four-year suspension to be problematic is that the sanction can be imposed on the basis of strict liability. Although the suspension period will be significantly reduced if the relevant athlete can prove his innocence, proving one's innocence may be difficult and sometimes impossible. In our view, enforcement of a strict liability standard ought—from a justice point of view—to include provision for sanctions imposed on athletes to be guided by the principle of *restraint*.[38] However, no such principle is operative in the context of the Code.[39]

In this section, we have shown that the concept of the spirit of sport can be further developed with the help of Sandel's *Case against Perfection*. However, interpreting the spirit of sport as a genuine principle of justice reveals that this also imposes some important restrictions on the pursuit of doping-free sport. We have argued that the Code, as it is currently structured, does not take sufficient account of these restrictions.

4. Ideology

The conclusions drawn on the World Anti-Doping Code in the previous three sections were primarily negative. First it was argued that WADA's justification of the Code is not successful, given that neither its interpretation of the spirit of sport nor its contention that the Code is based on voluntary consent can withstand scrutiny. We subsequently demonstrated that if the spirit of sport is analysed as a genuine principle of justice, the Code is found to deviate significantly from this principle. What are we to make of these negative assessments? In this section, we argue that, in pursuing doping-free sport, sport officials commit themselves to *ideology*.

Although the concept of ideology is sometimes used without any negative connotations, our use of this concept includes a negative judgement. We hold that a claim or argument is ideological in nature if two specific conditions are met. First, the claim or argument must proceed from a distorted view of social reality, while, second, this distortion must serve a useful purpose in the eyes of the party propagating it. In the case of ideology, the advancement of the distorted view is not a mistake, but rather stems from the desire to achieve a certain end. This end is considered more important by those propagating the ideology than the giving of a true account of social reality.[40]

On this understanding of ideology, WADA's claim of *voluntary consent* can be characterised as ideological. First, this claim is untenable because, as we saw in section 3, WADA curtails the options to such an extent that the only choice available to the athlete is to accept the Code or to end his career. Such a choice is non-voluntary. Second, this distortion serves a useful purpose for WADA. The fiction of voluntary consent is useful from a rhetorical point of view because it makes athletes' complaints against the imposition of sanctions seem suspect from the start. An athlete seeking to appeal can always be put back in his place by being told that he agreed with the Code in the first place. More importantly, claiming that the Code is based on voluntary consent enables the doping authorities to characterise the Code as contract law. This means that the athlete cannot call in safeguards typically related to criminal law.

The significance of this characterisation as contract law should not be underestimated. Not only is it at the basis of the strict liability regime, but it also means that within the Code there is no, or at the most a very limited, commitment to the presumption of innocence (PoI). In the context of criminal law, the importance of the PoI is virtually undisputed.[41] Central to the PoI is Blackstone's ratio which asserts that 'it is better that ten guilty persons escape than that one innocent suffer'. This ratio indicates a commitment to a stringent standard of proof such as the beyond reasonable doubt standard adopted in Anglo-Saxon countries. However, a more lenient standard has been adopted in the Code. It suffices when an anti-doping rule violation is established 'to the comfortable satisfaction of the hearing panel'. In the Code it is indicated that this standard of proof is greater than a mere balance of probability, but typically it does not include a commitment to Blackstone's ratio.[42] So, this ideological argument of voluntary consent is not without effect as it provides a basis for the sober legal protection offered by the Code.[43]

WADA's analysis of *the spirit of sport* in the form of an enumeration of values also qualifies as ideological. By listing these values, WADA creates the impression that we are dealing with a standard of justice. As we demonstrated, however, this impression is false as none of these values can be properly applied. From WADA's perspective, however, the inapplicability of

the criteria is not a problem, but rather the point of the enumeration in that it aims to create an impression of justice, while not actually being committed to a standard of justice. So, the values' general inapplicability serves a dual purpose: on the one hand, WADA may claim that the Code is about serving justice, while, on the other hand, it can classify non-performance-enhancing substances such as cannabis as doping and adopts standards of strict and vicarious liability which—in other contexts—are generally considered to be contrary to justice. Interpreting the spirit of sport as a genuine principle of justice—as we did in the previous section—is, from WADA's perspective, unwelcome because this could then be used as a critical standard.[44]

The picture we are painting of the Code is bleak as it suggests that WADA's approach is *amoral*. But is this picture too bleak? It could be claimed, in objection, that anti-doping regulation is governed by a willingness to do justice. That is why there is a Court of Arbitration for Sport (CAS), to which athletes can turn when facing sanctions. The CAS in turn investigates whether the doping authority has lived up to its responsibilities and whether the rules have been properly applied. Does this not show then that the value of justice is actually of significant importance in the context of the Code?

Given that it certainly has some role to play, we are not seeking to claim that the value of justice is of no importance in this context. However, we do maintain that sports officials are especially prone to ideology, with this tendency being illustrated by a judgement in one of the most famous CAS cases. The Quigley case (1994) is generally considered to be a landmark case as the CAS explains, in its verdict, why application of a strict liability standard is justified in principle.[45] In the first Code (2003), WADA cites part of the judgement with approval, which means that CAS' reasoning is at the basis of the current strict liability regime. Our interest relates specifically to considerations 14 and 15 of the Quigley verdict:

> 14. It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q., where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible—particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense 'unfair' for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.
>
> 15. Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations—particularly those run on modest budgets—in their fight against doping.

In consideration 14, the CAS compares suspension with illness. According to the CAS, suspending an athlete for consuming mislabelled medication is unfair, but so, too, is not postponing the competition in order to wait for the recovery of the athlete. This, however, is a false comparison. In both examples bad luck is involved, but in the example of food poisoning the organiser of the competition, sport federation, CAS and so on, remain inactive, whereas in the second example, the sport federation actively decides to exclude the athlete from the

competition. In the first example, it makes no sense to hold one of the sport authorities responsible for the athlete's inability to compete, but in the second example, the sport federation suspends the athlete and obviously is responsible for this state of affairs. It is hard to see, therefore, how commitment to the view that an athlete should accept his own bad luck in the case of illness has any bearing on the question of whether doping authorities may impose sanctions on athletes who were not at fault. In summary, who or what is the cause of the inability to participate matters from a moral perspective.

In consideration 15, the CAS states that '[I]t appears to be a laudable policy objective not to repair an *accidental* unfairness to an individual by creating an *intentional* unfairness to the whole body of other competitors' [our italics]. This contrast between accidental and intentional unfairness is false. On the one hand, if an athlete can show that he is not at fault, but sanctions are nevertheless imposed, the unfairness is not—in contrast to what the CAS claims—accidental, but intentional. It is intentional because the doping authority knows and accepts that the sanction is being imposed on an innocent person.[46] On the other hand, it is not so clear that allowing an athlete to compete who inadvertently consumed (a perhaps marginal amount of) doping constitutes an intentional unfairness to the other competitors. His participation would, so we agree, be unfair to them if the athlete enhanced his performance, but to assert that this enhancement took place often bespeaks of speculation. As long as the doping authority does not have a strong suspicion to suspect that the athlete's achievement is positively influenced by his inadvertent use of doping, it would be disingenuous to call it an intentional unfairness if the athlete is allowed to compete.

However, the CAS is right, so it may be said, in signalling a *conflict of duties*, i.e. any solution to be adopted is likely to be unsatisfactory in some respect. This objection is not without merit as we agree that there is a conflict. But even under the assumption that in this conflict it is better to protect the body of competitors instead of the individual athlete, there is still no sufficient basis for the strict liability regime adopted in the Code. The point is that CAS' reasoning allows for reparation, but not for punishment. In traditional law, it is common practice that a defendant can only be punished if he was at fault, but that reparation may sometimes be judged to be in order even if the person has no intention of committing a wrong. Why is the making of this distinction important? John Gardner aptly explains why punishment without fault is so problematic. He states that

> The fault principle is not primarily an institutional principle. It does not apply to the criminal law because the criminal law is part of a legal system and legal systems need to regulate the potentially oppressive power of their own officials. Rather it applies to the criminal law because the criminal law exacts punishments. Punishments are subject to the fault principle irrespective of whether they are exacted by a legal system and irrespective of whether there is any potential for abuse of official power. If I punish one of my friends for wrongdoing (e.g. by not sending him an invitation to my party) it is no cause for complaint on his part that he had no idea and indeed no way of knowing that I might take an interest in his actions. As a friend I am not bound by the rule of law, nor (hence) by the mens rea principle. It is not my job to put people on notice that they are about to get into trouble with me. But I am bound by the fault principle. My friend does have serious cause for complaint if I punish him for a wrong that he committed faultlessly. […] *Reparation for faultless wrongs is one thing; punishment for them, whether by the criminal law or otherwise, is quite another*.[47] [our italics]

If we accept Gardner's view, it may be said that reparation is appropriate after inadvertent usage, which, for example, could mean that the athlete is not allowed to compete for a very limited period of time. But it would not be justified to label the athlete as an offender (or

worse: as a doping sinner) or to impose punishment. The Code, however, demands just that. So, it emerges that the CAS not only presents the matter in a distorted and ideological fashion (false comparison between consuming mislabelled medication and illness, and playing games with the notions 'accidental' and 'intentional'), but also, and perhaps more importantly, that it fails to see that this signalling of a conflict of duties does not provide a sufficient basis for the punishment of the innocent.

Hence, the most important organisations devoted to doping-free sport—WADA and CAS—have committed themselves to ideological arguments when seeking to justifying anti-doping regulation. This suggests that these organisations value notions of fairness not because these notions really mean something in the context of anti-doping regulation, but primarily because of the rhetorical dividend that lip service pays. The organisations' interest is in creating a façade of justice, not in serving justice itself.

5. Conclusion

In this paper, we have shown that WADA has sought to defend the current Code in terms of the spirit of sport and with the help of the argument of voluntary consent. We argue that WADA's defence of these arguments does not stand up to scrutiny. With regard to the analysis of the concept of the spirit of sport, WADA provides us with an enumeration, but this enumeration has been found to be inconsistent. Similarly, the argument of voluntary consent also fails to withstand scrutiny. Since WADA significantly curtails athletes' options, with the result that their only choice is between committing to the Code or retiring from their sport altogether, their commitment to the Code cannot be said to be voluntary. Lastly, we claim that WADA's arguments are not just bad arguments, but should be considered ideological in nature. And indeed it is ideology's ability to distort social reality that is the specific aim of these arguments because, in this way, they can be used to ward off any critical discussion of the Code.

Notes

1. Art. 10.2 World Anti-Doping Code 2015. For a discussion, see section 3.1 of this paper.
2. Art. 2.1 World Anti-Doping Code 2015.
3. Art. 7.12 UCI Anti-Doping Rules 2015.
4. Art. 3.1 World Anti-Doping Code 2015. Also see section 4 of this paper.
5. This paper is primarily concerned with justificatory issues relating to the liability of the athlete and the extent of the sanction. However, there are more concerns. A question of justification can also, for example, be raised about how the most important sports agencies—WADA and the CAS—are organised, i.e. do they themselves adhere sufficiently to democratic values?
6. A methodological comment: since WADA's Code is not a philosophical document, it would not be fair to scrutinise it accordingly. However, we may demand that WADA's justificatory arguments make some sense and have the potential of being further developed. Making this demand is fair, so we think, because WADA's arguments have practical importance as they are at the basis of the regime adopted in the Code.
7. See https://wcd.coe.int/ViewDoc.jsp?id=433715&Site=COE.
8. David (2013, 53–54). See also Articles 1, 2, 3 and 13 of the Code.
9. See Article 4.3.1 of the Code.
10. Further subdivisions in terms of potential and actual (e.g. potential/actual enhancement, potential/actual health risk) are possible. See Kornbeck (2013, 318).

11. See, for example, Waddington et al. (2013, 45). Against this enumeration it is also argued that sport is a creative endeavour and that athletes who biologically manipulate their body are therefore acting in accordance with the spirit of sport. See Savulescu et al. (2004, 667) and also Posner (2008, 1740).
12. (McNamee 2012, 388). McNamee also defends this view on the WADA website. See https://www.wada-ama.org/en/media/news/2013-02/the-spirit-of-sport-and-anti-doping-policy-an-ideal-worth-fighting-for.
13. A similar argument is made by Loland and Hoppeler (2012, 348).
14. An interesting analysis of fair play can be found in Simon (2004, 75–83). Also see Butcher and Schneider (1998, 1–22).
15. See *International Convention against Doping in Sport*, 19 October 2005.
16. Paul David explains:

> The agreement-based system has significant advantages and reflects the way in which sporting organisations both large and small have regulated their affairs in the past. The way in which the Code functions by way of *voluntary agreement* under the rules of private organisations, means that challenges as to its validity on the grounds that it contravenes fundamental human rights, may be met with the contention that the disciplinary rules of a private organisation should not generally be invalidated by reference to the general principles protecting fundamental rights under a particular legal system, or, at least, courts should be reluctant to interfere with the autonomy of such private associations on this basis David 2013, 59 [Italics: VCG].

17. See Soek (2006, 319). The former president of the European Court of Human Rights, Jean-Paul Costa, maintains that the anti-doping sanctions qualify as civil sanctions on the grounds *inter alia* that although the sanctions are serious, they are not so substantial as to be on a par with criminal law sanctions. See Costa (2015, 4).
20. Sarah Teetzel reaches a similar conclusion: 'However, the coercive elements that underlie an athlete's agreement to forgo his or her right to privacy in sport are often ignored. When the only options available to elite athletes are to play by WADA's rules or to not play at all, the consent given by athletes may not be truly voluntary or freely given.' Teetzel (2009, 47).
21. WADA recognises that minors deserve better protection. The new Code has therefore been adjusted accordingly, i.e. the legal protection for minors has been improved significantly.
23. Sandel 2007, 81–82.
24. Ibid., 36.
25. Robert Simon argues that if doping would be allowed, sport contests would—at least to some extent—cease to be a competition between *persons*, because the competition would be decided by how well the body of the athlete reacts to the drug. Simon (1985, 11).
26. Sandel's take on the matter is controversial. A very different view is presented by Claudio Tamburrini. He states that 'even more than today, it will then become a freak show. There will always be people who feel attracted by such a spectacle. But that attraction is not massive enough to become a social problem. Quite the contrary: it might even be expected that as a consequence of such a development, people will choose to spend their time practising recreational sports instead of expressing their ethically dubious admiration for the winner in commercialised sport arenas.' Tamburrini (2009, 119).
27. For a discussion see Lambelet Coleman and Coleman (2008, 1754–1769).
28. Angela Schneider states that 'very few scientists seriously argue that marijuana improves training or performance.' Schneider (2004, 442).
30. Ibid., 195–196.
31. See Saugy et al., i13–i14. For a more detailed discussion, see Waddington et al. 2013, 41–47.
32. Waddington et al. 2012.
33. See, for example, Pitsch, (2011, 66–83).
34. Nagel (1979, 62). See also Moore (1997, 719–725). Notoriously, Immanuel Kant's categorical imperative does not allow for moral losses. He prescribes, for example, that lying is never justified even if, by lying, we can avoid grave consequences. See Kant (2011, 33, 35).

35. According to Soek, 'the concept of doping has been completely detached, abstracted and instrumentalised. Doping is no longer viewed as an act knowingly performed by an athlete.' Soek 2006, 58–59.
36. See Article 4.2.2 and 10.2.1 of the Code.
37. See Hirsch and Ashworth (2005, 137–143).
38. Ibid., 142–143.
39. In the light of these assessments we are somewhat mystified that Costa does not elaborate on his claim that a four-year suspension is proportionate. See note 14 and Costa 2015, 9.
40. Our understanding of ideology is similar to Hans Kelsen's. He argues that the principle of equality, the rule 'to each his own', Aristotle's mesotes formula and the golden rule are empty. At the same time, propagating such an empty ideal may be attractive for those in power, because due to its emptiness it is ideally suited to justify the existing order. Kelsen (1960, first essay and also 128, 135–136, 172–173).
41. For an interesting broad analysis of the PoI see Duff (2013, 170–192).
42. Art. 3.1 World Anti-Doping Code 2015.
43. For a critical discussion of how the Code relates to the PoI see Kornbeck (2016, 172–196).
44. Ritchie shows that, from a historical point of view, the concept of the spirit of sport can also be considered *mythological* in character. See Ritchie (2014, 820–838).
45. *Quigley* v. *UIT*, CAS 94/129. The CAS panel ruled, however, in favour of Quigley because the strict liability standard was not clearly articulated in the UIT Anti-Doping Regulations.
46. The literature on intentionality is extensive. See, for example, Duff (1990).
47. (Gardner, 2005, 71).

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