

## Article

# Does Legislating Against Doping in Sports Make Sense?: Comparing Sweden and the United States Suggest Not

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### I. INTRODUCTION

The U.S. government has taken legislative action against doping in sports and policy makers have from time to time considered additional legislation in the field. The term “doping” here refers to all activities banned under World Anti-Doping Agency’s World Anti-Doping Code (2009) (henceforth “the WADA Code”)<sup>2</sup> since this term is comparatively clearly defined and its definition is the widest used, both among sport stakeholders and policy makers.<sup>3</sup> The fact that there is historically a correlation between such legislative actions and public revelations of drugs in sport<sup>4</sup> suggests that this topic is as relevant now as ever. It is largely undisputed that the federal government has the power under the Commerce Clause to regulate doping in professional sports on the basis that the professional leagues operate in interstate commerce.<sup>5</sup> There is however significant disagreement as to whether additional legislation targeting doping in sport is advisable.

Many U.S. politicians have publically addressed the need to combat doping in sport, including President George W. Bush.<sup>6</sup> In 2005, following the doping scandal in baseball, 38 members of the House of Representatives and 8 Senators sponsored a number of bills requiring professional sport associations to adopt and enforce policies and procedures for random testing and punishment of athletes for use of performance-enhancing substances.<sup>7</sup> In addition, many legal

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<sup>2</sup> World Anti-Doping Agency, The World Anti-Doping Code (2009), available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf) (last visited Mar. 15, 2013).

<sup>3</sup> See *infra* Part IV.

<sup>4</sup> See, e.g., Barrie Houlihan, *Dying to Win—Doping in Sport and the Development of Anti-Doping Policy* 34–35 (2d. ed. 2003); Rudhard Klaus Müller, *History of Doping and Doping Control, Doping in Sports*, reprinted in 95 *Handbook of Experimental Pharmacology* 1,3-4 (Detlef Thieme & Peter Hemmersbach eds. 2010); Joseph M. Saka, *Back To the Game: How Congress Can Help Sports Leagues Shift the Focus From Steroids To Sports*, 23 *J. Contemp. Health L. & Pol’y* 341, 342-43 (2007); Brent D. Showalter, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 *Marq. Sports L. Rev.* 651, 651-53 (2007); Adrian Wilairait, *Faster, Higher, Stronger? Federal Efforts To Criminalize Anabolic Steroids And Steroid Precursors*, 8 *J. Health Care L. & Pol’y* 377, 384–87 (2005).

<sup>5</sup> Daniel Gandert & Fabian Ronisky, *American Professional Sports Is a Doper's Paradise: It's Time We Make a Change*, 86 *N.D. L. Rev.* 813, 821 (2010); Matthew J. Mitten, *Drug Testing of Athletes – An Internal, Not External, Matter*, 40 *New Eng. L. Rev.* 797, 805 (2006).

<sup>6</sup> George W. Bush, U.S. President, 2004 State of the Union Address (Jan. 20, 2004).

<sup>7</sup> *Drug Free Sports Act*, H.R. 3084, 109th Cong. (2005); *Clean Sports Act of 2005*, H.R. 2565, 109th Cong. (2005); *Professional Sports Integrity Act of 2005*, H.R. 2516, 109th Cong. (2005); *Clean Sports Act of 2005*, S. 1114, 109th Cong. (2005); *Integrity in Professional Sports Act*, S. 1960, 109th Cong. (2005); *Professional Sports Responsibility and Accountability Act*, S. 1334, 109th Cong. (2005).

commentators favor additional federal intervention in the field of doping by various means.<sup>8</sup>

The main reason why increased governmental involvement is viewed favorably is arguably that governments have powers and resources to detect doping that in several ways far supersede those of sport organizations.<sup>9</sup> For example, the Court of Arbitration for Sport (CAS) recognized in its award in *Quigley* that sport organizations have insufficient power and resources.<sup>10</sup> CAS was asked to determine whether sport doping rules, which made athletes strictly liable were consistent with the fundamental principle of presumption of innocence.<sup>11</sup> The tribunal found that the practice was acceptable considering that “intentional abuse would in many cases escape sanction for lack of proof of guilty intent [and] 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.”<sup>12</sup> CAS elaborated on this in *Aanes* where it concluded that:

[S]ince neither the federation nor the CAS has the means of conducting its own investigation or of compelling witnesses to give evidence, means which are available to the public prosecutor in criminal proceedings, it would be all too simple for an athlete to deny any intent or negligence and to simply state that he/she has no idea how the prohibited substance arrived in his/her system.<sup>13</sup>

An example of what this could mean can be found in Australia. A bill recently introduced in Australia’s federal parliament would give the Australian Sports Anti-Doping Authority (ASADA) the power to issue disclosure notices to compel individuals to participate in their investigations and to penalize failure to comply.<sup>14</sup>

Another argument in favor of additional governmental involvement is that the government has the ability to impose deterring sanctions. It is plain to see that the financial rewards and glory that come with winning makes it very tempting for athletes to use PEDs. In addition to the perception, that everyone else is doing it and that it is necessary to keep up, one can understand why the penalties exacted by the sporting organizations appear insufficient to dissuade athletes from doping.<sup>15</sup> Adding the weight of the government can arguably tip the incentive scales by causing those who use these substances to face substantial financial penalties or even prison time as well.<sup>16</sup>

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<sup>8</sup> See, e.g., Gandert & Ronisky, *supra* note 5 (proposing that Congress establish an independent enforcement agency); Edward H. Jurith & Mark W. Beddoes, The United States’ and International Response to the Problem of Doping in Sports, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 461, 475–78 (2002) (proposing inter alia government oversight and an expansion of federal law to include more substances); Joshua M. Kimura, The Return of the Natural: How the Federal Government Can Ensure That Roy Hobbs Outlasts Barry Bonds in Major League Baseball, 16 *Sports Law J.* 111 (2009) (proposing an expansion of the federal mail fraud statute); Saka, *supra* note 4, at 361–62 (proposing legislation mandating arbitration); Allan H. “Bud” Selig & Robert D. Manfred, Jr., The Regulation of Nutritional Supplements in Professional Sports, 15 *Stan. L. & Pol’y Rev.* 35 (2004) (proposing legislation banning certain nutritional supplements); Steven M. Silverberg, Safe at Home? Assessing U.S. Efforts To Protect Youths From the Effects of Performance Enhancing Drugs in Sport, 35 *Brook. J. Int’l L.* 271 (2010).

<sup>9</sup> See, e.g., Kimura, *supra* note 8.

<sup>10</sup> *USA Shooting & Quigley v. UIT*, CAS 94/129, ¶ 15, 48, 64 (Ct. Arb. Sport 1995).

<sup>11</sup> See also *infra* Part V.

<sup>12</sup> *Quigley*, CAS 94/129 at ¶ 15.

<sup>13</sup> *Aanes v. Fédération Internationale de Lutttes Associées (FILA)*, CAS 2001/A/317, ¶ 34 (Ct. Arb. Sport 2001).

<sup>14</sup> Australian Sports Anti-Doping Auth. Amend. Bill 2013 (Feb. 6, 2013), available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22legislation%2Fbillho me%2Fs902%22> (last visited Mar. 15, 2013).

<sup>15</sup> Richard A. Posner, In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping, 57 *Duke L.J.* 1725, 1736–37 (2008); Silverberg, *supra* note 8, at 274.

<sup>16</sup> Posner, *supra* note 15, at 1737; see also Sport doping laws don't go far enough: AOC boss John Coates, *The Australian* (Feb. 28, 2013), <http://www.theaustralian.com.au/sport/sport-doping-laws-dont-go-far-enough-aoc-boss-john-coates/story-e6frg/mf-1226587859420> (the

Others oppose increased legislation. While President Obama, like his predecessor, has publicly condemned doping, he believes that it is primarily a problem that those involved in sports need to solve for themselves.<sup>17</sup> In line with this, legal commentators have argued that legal intervention is not an effective remedy against the phenomenon of doping,<sup>18</sup> that “the benefits of harsher steroid policies are outweighed by the complications that government-mandated steroid testing creates,”<sup>19</sup> or that the whole thing is simply a “pseudo-controversy.”<sup>20</sup> Thus, one can conclude that there is significant disagreement regarding the proper role of the government in fighting doping in sports.

The U.S. is not the only place where these issues are being considered: many nations have used or consider using legislation to fight doping. This article uses the Swedish regulatory model and the experience with that model as a point for comparison and evaluation. This comparison covers both sport stakeholders<sup>21</sup> and policy makers<sup>22</sup> and consequently focuses on four actors: (i) U.S. sport stakeholders, (ii) Swedish sport stakeholders, (iii) U.S. policy makers, and (iv) Swedish policy makers. While the Swedish example is in some regards representative of a wider, European example, the reader should be aware that there are significant differences between European countries.

Through a pan-Atlantic comparison, this article seeks to inform on the expediency of policy makers being more directly involved in the battle against doping in sports. The general conclusion of this article is that deepened governmental involvement is undesirable. While unified in their condemnation of doping, sport stakeholders and policy makers disagree on why doping should be fought and this translates into regulatory difference, including on what constitutes doping and how it should be fought. As a result, the overlap between government and sport policy is limited and unable to sustain a successful partnership. Actions such as those proposed<sup>23</sup> do not make sense for policy makers considering their stated goals and their closer involvement could affect existing rules in unforeseen and, for some, undesirable ways. Also, both Swedish and American experiences suggest that existing rules would be susceptible to constitutional challenges if the government became more deeply involved.

The remainder of this article is divided into five sections. Section 0 provides a broad overview of the actors involved and actions that they currently take. Section 0 describes the aims underlying these actions. Section 0 defines what doping is for each of the actors involved. Section 0 discusses the fundamental rights of athletes and their bearing on the issue. Section 0 summarizes the findings of the article and presents some final conclusions.

## II. WHO AND WHAT? ACTORS AND ACTIONS

### A. SPORT STAKEHOLDERS

Several public deaths in cycling in the 1960s led the international federations for cycling and soccer, UCI and FIFA, to implement and enforce

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Australian Olympic Committee (AOC) considers the maximum penalty of a 5100 AUD fine insufficient and calls for jail terms).

<sup>17</sup> See Walter T. Champion & Danyahel Norris, *Obama vs. Bush on Steroids: Two Different Approaches to a Pseudo-Controversy - Or Is It Really Worthy of Note in a State of the Union Address?*, 36 T. Marshall L. Rev. 193, 199–204 (2011).

<sup>18</sup> Rick Collins, *Changing The Game: The Congressional Response to Sports Doping Via the Anabolic Steroid Control Act*, 40 New Eng. L. Rev. 753, 762–63 (2006); Colin Leitner, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 Depaul J. Sports L. & Contemp. Probs. 192, 217–18 (2006).

<sup>19</sup> Showalter, *supra* note 4, at 678.

<sup>20</sup> Champion & Norris, *supra* note 17. See also Mitten, *supra* note 5 (arguing against the legislation proposed but arguing in favor of federal criminal sanctions).

<sup>21</sup> Including professional leagues, non-profit organizations, team owners, team leaders, the Olympic movement, international sporting federations, and individual athletes.

<sup>22</sup> Primarily consisting of the U.S. Congress and the Swedish Parliament.

<sup>23</sup> See *supra* notes 7-8 and accompanying text.

doping regulations at their respective world championships in 1966.<sup>24</sup> It was however the International Olympic Committee (IOC) that came to spearhead the drive against doping in sports<sup>25</sup> by introducing rules banning doping and the accompanying list of banned substances at the 1968 Olympics.<sup>26</sup> In 1999, the World Anti-Doping Agency (WADA) was established and assumed the leading role in the battle against doping in sports.

WADA's most important contribution has been the establishment of the World Anti-Doping Code (WADA Code). The WADA Code binds all international federations that are members of the IOC and any national governing body that is a member of these international federations. In this manner, many athletes in Europe and North America are bound by the Code. For example, the International Amateur Athletic Federation (IAAF) is an IOC member and counts among its members USA Track & Field (USATF) and Svenska Friidrottsförbundet (Swedish Athletic Association). In addition, an international federation outside of the Olympic movement may opt-in to be bound by the WADA Code. For example, this is the case with the Rugby League International Federation (RLIF) and the International Federation of American Football (IFAF).

The IOC has its own doping rules that are applicable and enforced in connection with the Olympic Games.<sup>27</sup> Much of the continuous enforcement on the national level is however done by national anti-doping organizations (NADO's). In order to reduce actual or perceived involvement by sporting organizations with interest in the outcome, the responsibility for testing and related anti-doping measures has in the US been placed on the U.S. Anti-Doping Agency (USADA), which is independent from the Olympic movement.<sup>28</sup> In Sweden, this responsibility rests with the Swedish Sport Confederation (Riksidrottsförbundet) (RF).<sup>29</sup>

There are important organizational differences between Swedish and North American sports. In Sweden, professional, amateur, and youth sports are all organized by clubs belonging to the same NGB and who are, almost without exception, bound by the WADA Code. This means that youth and amateur players are subject to the same doping rules, testing, and disciplinary sanctions as professional players. By comparison, the major North American professional leagues are not members of an international federation that is bound by the Code, nor have they independently opted to be bound by the WADA Code. The four largest major professional leagues are Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL). All of these leagues have their own doping rules that are included in their respective collective bargain agreements. Stronger policies have been agreed upon in recent years, at least in part due to Congress threatening to otherwise legislate.<sup>30</sup> The league policies are however significantly weaker than the WADA Code with regard to scope, testing, and penalties.<sup>31</sup> This carries with it certain consequences. For example, when participating in the FIBA Basketball World Cup, Swedish and American basketball players competing for their respective countries are bound by the rules

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<sup>24</sup> Rudhard Klaus Müller, *supra* note 4 at 4.

<sup>25</sup> Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need To Ensure Fair Athletic Competition Through Effective Anti-Doping Programs Vs. the Protection of Rights of Accused Athletes*, 5 Va. Sports & Ent. L.J. 161, 163 (2006).

<sup>26</sup> Antonio Buti & Saul Fridman, *Drugs, Sports and the Law* 30–32 (2001).

<sup>27</sup> See, e.g., IOC, *Anti-Doping Rules applicable to the Games of the XXX Olympiad* (Dec. 15, 2011), available at

[http://www.olympic.org/Documents/Games\\_London\\_2012/Anti-doping/IOC\\_Anti-Doping\\_Rules\\_London%202012-eng.pdf](http://www.olympic.org/Documents/Games_London_2012/Anti-doping/IOC_Anti-Doping_Rules_London%202012-eng.pdf) (last visited Mar. 15, 2013).

<sup>28</sup> Connolly, *supra* note 25, at 165–66. See also Gandert & Ronisky, *supra* note 5, at 842–43 (on the importance of independent enforcement agencies).

<sup>29</sup> The possibility of placing it with an independent entity is currently being discussed. See, e.g., SOU 2011:10, *Antidopning Sverige* (2011) (suggesting that the function be placed in a corporation that is jointly owned by the Swedish government and RF).

<sup>30</sup> Saka, *supra* note 4, at 355; Showalter, *supra* note 4, at 656.

<sup>31</sup> Leitner, *supra* note 188, at 196–203; Showalter, *supra* note 4, at 664–66. See, e.g., National Hockey League, NHL, *NHLPA Team Up Against Performance-Enhancing Substances*, available at <http://www.nhl.com/ice/page.htm?id=26397> (last visited Mar. 15, 2013).

of the International Basketball Federation (Fédération Internationale de Basketball Amateur) (FIBA) that includes the WADA Code. If the player plays in the Swedish league, the WADA Code applies; but, if the player plays in the NBA, the more relaxed rules laid out in the NBA-NBAPA Collective Bargaining Agreement apply. This explains why U.S. legislators have pushed the major professional leagues to abide by the WADA Code.<sup>32</sup>

Selig & Manfred argued that “it is not at all surprising” that professional leagues in North America have failed to implement rigorous doping rules like those applicable to amateurs and college athletes. Rules for professional leagues must be agreed upon by employers and employees. Amateur and college leagues, in contrast, “do not have the ability to resist unilateral implementation.”<sup>33</sup> The Swedish experience suggests that it is not impossible to implement effective drug testing in professional sport (in case anyone thought otherwise) but that doing so probably depends, as Selig & Manfred suggest, on the athletes’ lack of “ability to resist.” Unlike in North America, amateur and professional sports in Sweden are organized by the same entities. In addition to being employees<sup>34</sup>, professional athletes in Sweden belong to a sport federation whose members are bound by the WADA Code. Hence, we can argue that athletes have no real alternative to accepting the doping rules: it is “play by our rules or not at all.”<sup>35</sup> While we can question if such a system is appropriate or even legal, it is effective.

## B. POLICY MAKERS

In both Europe and North America, policy makers have used their legislative powers to combat doping, primarily by imposing criminal sanctions.<sup>36</sup> The first country to take such action was France, which in 1965 they enacted an act making it unlawful to use certain substances in connection with sport competitions.<sup>37</sup> Legislation targeting doping can be distinguished based on if it specifically targets those participating in organized sports or generally to all members of society.<sup>38</sup> Such legislation can also be distinguished on the basis of whether it only covers those involved in the manufacture and distribution of doping substances or whether it also covers users.<sup>39</sup>

The bills introduced by the U.S. Congress in 2005<sup>40</sup> were never enacted into law and there is no other federal law specifically targeting doping in organized sports. There is also no such state law.<sup>41</sup> There are however federal laws targeting doping in society generally. The most important of these are the relevant sections of the Controlled Substance Act (CSA).<sup>42</sup> CSA’s scope was expanded through the Anabolic Steroids Control Act of 1990 (ASCA) to include eighteen anabolic substances,<sup>43</sup> and subsequently amended through the Anabolic Steroid Control Act of 2004 to include another sixty substances, including numerous steroid precursors.<sup>44</sup> ASCA criminalizes acts related to the

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<sup>32</sup> See supra note 7 and accompanying text in Part I.

<sup>33</sup> Selig & Manfred, supra note 8, at 35.

<sup>34</sup> Or as the case may often be outside of team sports, individual contractors.

<sup>35</sup> Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases* 319 (2006).

<sup>36</sup> It should be noted that governments can and frequently do also fight doping by non-regulatory means. See Johan Lindholm, *The Changing European Landscape of Anti-Doping Following the Lisbon Treaty*, 9 *Int’l Sports L. Rev. Pandektis* 92, 93-94 (2011).

<sup>37</sup> Loi no. 65-412 du 1er juin 1965 tendant à la répression de l’usage des stimulantes à l’occasion des compétitions sportives, *Official Journal of the French Republic*, June 2, 1965, p. 4531 (a.k.a. “Loi Herzog”).

<sup>38</sup> See Lindholm, supra note 36, at 93-94.

<sup>39</sup> See infra Part IV.

<sup>40</sup> See supra Part I.

<sup>41</sup> Maxwell J. Mehlman et al., *Doping in Sports and the Use of State Power*, 50 *St. Louis L.J.* 15, 17 (2005).

<sup>42</sup> 21 U.S.C. §§ 801–966 (2006).

<sup>43</sup> Pub. L. No. 101-647, 104 Stat. 4851 (1990).

<sup>44</sup> Pub. L. No. 108-358, 118 Stat. 1661 (2004).

manufacture and distribution of the specified substances,<sup>45</sup> but also the possession of such substances for personal use.<sup>46</sup> By merit of being classified as Class III substances, possession is punishable by “a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both” for a first offense.<sup>47</sup> States have written their respective laws to conform to the CSA and have otherwise limited their actions to regulating steroids in schools and to disseminating information.<sup>48</sup>

Gandert & Ronisky describe ASCA as a failure: it fails to address the problem of doping in professional sports and has failed to reduce doping among amateurs, a phenomenon that they describe as having become “epidemic.”<sup>49</sup> Other commentators point to Congress’s failure to include specific substances. While the additions made in 2004 were an improvement, several commentators have argued that ASCA’s scope should be expanded further.<sup>50</sup>

Substances not covered by the CSA may fall within the scope of the Dietary Supplemental Health and Education Act of 1994 (DSHEA).<sup>51</sup> Compared to what was previously the law, DSHEA relaxed the U.S. Food and Drug Administration’s (FDA) control of nutrient and dietary supplements, which may include some doping-class substances. Under DSHEA these substances are essentially presumed safe and the FDA has the burden to prove that they are harmful.<sup>52</sup>

In 1991, the Swedish Parliament adopted the Swedish Doping Act.<sup>53</sup> The law covers (i) synthetic anabolic steroids, (ii) testosterone and its derivatives, (iii) human growth hormone, and (iv) substances that increase the production or release of testosterone and its derivatives or growth hormone.<sup>54</sup> Before 1991 these substances were covered by legislation regulating the manufacture, import, distribution, marketing, and sale of medicinal drugs.<sup>55</sup> This is still true for the many doping substances not covered by the Doping Act.<sup>56</sup> The separate regulation achieves primarily two things. First, it covers users. In addition to acts previously criminalized, the Doping Act made it a criminal offense to possess or use these substances.<sup>57</sup> Second, it imposes stricter criminal penalties. The Act categorizes doping crimes by three degrees of severity and provides that the respective penalties shall be (i) a fine or a term of imprisonment not more than six months, (ii) a term of imprisonment not more than 2 years, and (iii) a term of imprisonment not less than six months and not more than six years.<sup>58</sup> When applying the provision in a recent decision, *Operation Liquid*, Swedish courts handed out three month prison sentences for second degree violations and about three year sentences for third degree violations, including one seven year sentence.<sup>59</sup> Use or possession of a quantity of a substance equivalent to or less than a normal usage dose is normally classified as a doping

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<sup>45</sup> 21 U.S.C. § 841 (2006).

<sup>46</sup> 21 U.S.C. § 844(a) (2006).

<sup>47</sup> *Id.*

<sup>48</sup> Mehlman et al., *supra* note 411, at 17.

<sup>49</sup> Gandert & Ronisky, *supra* note 5, at 819.

<sup>50</sup> *Id.* at 820–21 (regarding certain steroid precursor); Jurith & Beddoes, *supra* note 8, at 478 (regarding e.g. EPO and clenbuterol); Wilairat, *supra* note 4 (regarding DHEA).

<sup>51</sup> Pub. L. No. 103-417, 108 Stat. 4325 (1994).

<sup>52</sup> Jurith & Beddoes, *supra* note 8, at 473–75; Selig & Manfred, *supra* note 8, at 38–41.

<sup>53</sup> Lag om förbud mot vissa dopningsmedel (Svensk författningssamling [SFS] 1991:1969) (Swed.) [hereinafter *The Swedish Doping Act*].

<sup>54</sup> *Id.* § 1.

<sup>55</sup> E.g., Lag om ändring i läkemedelslagen (Svensk författningssamling [SFS] 1992:859) [hereinafter *The Medicinal Drug Act*]; Lag om handel med läkemedel (Svensk författningssamling [SFS] 2009:366) [hereinafter *The Medicinal Drug Trade Act*].

<sup>56</sup> See *infra* Part IV.

<sup>57</sup> The Swedish Doping Act § 2 (SFS 1991:1969 as amended by SFS 1999:44). The Act’s scope was expanded to include use in 1999.

<sup>58</sup> Swedish Doping Act, §§ 3–3a.

<sup>59</sup> Sundsvalls tingsrätt’s judgment in case B 3192-09 et al. (Aug. 4, 2011).

offense of the first, least serious degree and punishment is normally limited to a fine.<sup>60</sup>

The European Union has not adopted any legislative acts targeting doping. In 2009, the European Union received limited but independent regulatory power in the fields of sport that are particularly well suited for regulation.<sup>61</sup> There is also a significant political movement to use these powers to harmonize national measures against doping. However, no such measures have yet been agreed upon,<sup>62</sup> and will likely not be agreed upon any time soon.<sup>63</sup>

### III. DUELING AIMS AND NOT AGREEING ON WHY DOPING IS BAD

#### A. Introduction

In order to assess the appropriateness of a partnership against doping between policy makers and sport stakeholders it is necessary to identify what each seeks to get out of the partnership or, differently phrased, their underlying policy aims. There are several possible reasons for combating doping. Mehlman *et al.* identifies seven rationales: (i) safety, (ii) ethics of sport, (iii) protecting children, (iv) the war on drugs, (v) the Cold War, (vi) nostalgia, and (vii) aesthetics.<sup>64</sup> This section explores in turn what drives sport stakeholders and policy makers to take actions against doping and finds that their motives differ quite significantly.

#### B. Sport Stakeholders

A good starting point for understanding the underlying rationale for anti-doping rules in sports is the WADA Code. A substance or a method can be banned under the WADA Code if it satisfies at least two of three criteria: (i) it enhances or has the potential to enhance the user's performance, (ii) it is harmful to his or her health, or (iii) it violates "the spirit of sport."<sup>65</sup>

The third criterion, the spirit of sport, is unclear and largely redundant. According to the WADA Code, the spirit of sport "is the celebration of the human spirit, body and mind" and is *inter alia* characterized by the values of ethics, fair play, honesty, and health. As these values by and large overlap with the other criteria, it is difficult to see how the spirit of sport adds to our understanding of the underlying policy.

With regard to the criterion of performance enhancement it should first be noted that there are several banned substances that do not have a scientifically established performance enhancing effect, for example glucocorticosteroids<sup>66</sup> and cannabinoids<sup>67</sup>. Second, it is not obvious why performance enhancement is problematic from a sporting standpoint: performance and enhancement are central elements of sport, arguably its defining characteristics. One attempt to distinguish doping from other means of performance enhancement is that the former constitutes cheating. This argument is self-defeating: doping is cheating because it is banned and if it was not banned it would not be cheating.<sup>68</sup> It is similarly difficult to clearly distinguish that which is banned from that which is

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<sup>60</sup> Statens Offentliga Utredningar [SOU] 1996:126 Doping i folkhälsoperspektiv, at 251; Martin Borgeke & Georg Sterzel, *Påföljdspraxis* 667 (4th ed. 2009).

<sup>61</sup> Treaty on the Functioning of the European Union, art. 165, Mar. 30, 2010.

<sup>62</sup> See Lindholm, *supra* note 366.

<sup>63</sup> See, e.g., Andrzej Rogulski & Samuli Miettinen, *The EU and Sport: The Implementation of the White Paper on Sport and Future Prospects*, 1 *Int'l J. Sport Pol'y* 245, 246 (2009); An Vermeersch, *The European Union and the Fight Against Doping in Sport: On the Field or on the Sidelines?*, 4 *Ent. & Sports L.J.* 1, 7-8 (2007); Stephen Weatherill, *Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?*, 3-4 *Int'l Sports L.J.* 11 (2010).

<sup>64</sup> Mehlman *et al.*, *supra* note 41, at 27-49.

<sup>65</sup> WADA Code, § 4(3) (2003).

<sup>66</sup> Peter N. Elliott, *Glucocorticosteroids*, in *Drugs in Sport* 207-08 (5th ed. 2011).

<sup>67</sup> David R. Mottram, *Cannabinoids*, in *Drugs in Sport* 199, 202-03 (5th ed. 2011).

<sup>68</sup> See Terry Black & Amelia Pape, *The Ban on Drugs in Sports: The Solution or the Problem?*, 21 *J. Sport & Soc. Issues* 83, 85-86 (1997).

allowed on the grounds that the latter is more natural.<sup>69</sup> It is difficult to distinguish unfair advantages that some athletes have over others from advantages that are considered fair.<sup>70</sup>

It is also difficult to see how the criterion of protecting participants' health can explain anti-doping policies in sport. For some doping substances there are scientifically proven physical and mental health risks, the prime example being anabolic steroids.<sup>71</sup> There are however other substances for which the health risks are more uncertain, including EPO<sup>72</sup> and cannabinoids<sup>73</sup>. The health argument has also been criticized for being inconsistent, as sport in general and professional sport in particular is not necessarily healthy for the participants. Some sports have inherent health risks,<sup>74</sup> whereas other sports become dangerous as athletes try to push boundaries.<sup>75</sup> Practicing and competing while injured is dangerous for an athlete's health but not banned and probably pretty common.<sup>76</sup> Also, in some sports the competitors starve themselves to enhance their performance without organizers taking preventative actions like those discouraging doping.<sup>77</sup> It can finally be noted that the health risks associated with doping are in part attributable to over-use<sup>78</sup> and that this is largely administered by the athletes themselves. On this basis, one could argue that health risks would decrease if athletes were allowed to seek expert advice.<sup>79</sup>

Reasonable minds can differ as to whether the lack of a clear and consistent underlying policy is a problem. For example, Tamburrini has argued that the lack of consistency and transparency makes the system arbitrary and that it would make more sense to scrap the whole thing.<sup>80</sup> By comparison, Mitten states that "[s]ports governing bodies have a legitimate interest in establishing uniform rules necessary to maintain the sport's integrity and image, to ensure competitive balance, and to protect athletes' health and safety" and "[e]ven if a sport's rules of play are arbitrary (and they often are), the sport's governing body has the inherent authority to promulgate clearly defined rules to ensure fair play and enforce them in a uniform, non-discriminatory manner."<sup>81</sup>

Regardless where one comes down on this issue, doping rules in sport cannot convincingly be based on the reasons stated. I would argue that the dominant reason for combating doping in sport is to uphold its legitimacy: certain activities are banned in sport because otherwise people would not be willing to participate in (internal legitimacy) or support the activity (external legitimacy). This can be described as the economics of doping in sport: when doping becomes too rampant in a sport it will self-regulate or perish.<sup>82</sup> There are

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<sup>69</sup> W.M. Brown, *Ethics, Drugs, and Sport*, 7 *J. Phil. Sport* 15, 17–18 (1980); Houlihan, *supra* note 4, at 126; cf. Silverberg, *supra* note 8, at 273 (arguing that dietary supplements do not create an unfair advantage because they are "widely available").

<sup>70</sup> Posner, *supra* note 15, at 1727–32; Patricia J. Zettler, *Is it Cheating to Use Cheetahs?: The Implications of Technologically Innovative Prosthesis for Sport Values and Rules*, 27 *B.U. Int'l L.J.* 367, 389–94 (2009).

<sup>71</sup> See, e.g., Latiner, *supra* note 18, at 195–96; John O'Leary, *Doping Solutions and the Problem with 'Problems'*, in *Drugs and Doping in Sport* 255, 263 (2001); Saka, *supra* note 4, at 344–45.

<sup>72</sup> See Carsten Lundby & Niels Vidiendal Olsen, *Effects of Recombinant Human Erythropoietin in Normal Humans*, 589 *J. Physiology* 1265 (2011).

<sup>73</sup> Mottram, *supra* note 67, at 200–01.

<sup>74</sup> Houlihan, *supra* note 4, at 133; O'Leary, *supra* note 71, at 263.

<sup>75</sup> Brown, *supra* note 69, at 19; Norman C. Fost, *Ethical and Social Issues in Anti-Doping Strategies in Sport*, in *Sport, The Third Millennium* 479, 481 (1991); see Houlihan, *supra* note 4, at 133; Michael Lavin, *Sports and Drugs: Are the Current Bans Justified?*, 14 *J. Phil. Sport* 34, 37 (1987).

<sup>76</sup> Houlihan, *supra* note 4, at 133–34; Verner Møller, *The Ethics of Doping and Anti-Doping: Redeeming the Soul of Sport?* 9 (2010); O'Leary, *supra* note 71, at 261.

<sup>77</sup> See Møller, *supra* note 76, at 10, 109.

<sup>78</sup> See Brown, *supra* note 69, at 19.

<sup>79</sup> See Posner, *supra* note 15, at 1732–33.

<sup>80</sup> Claudio Tamburrini, *Are Doping Sanctions Justified? A Moral Relativistic View*, 9 *Sport in Society* 199 (2006); Claudio Tamburrini, *What's Wrong with Doping?*, in *Values in Sport 200* (Torbjörn Tännsjö & Claudio Tamburrini eds., 2000).

<sup>81</sup> Mitten, *supra* note 5, at 799–800.

<sup>82</sup> But see Gandert & Ronisky, *supra* note 5, at 815, 834–35 (arguing that the collective bargaining agreement model used by the major leagues "fail[s] to effectively address doping" and "will never be able to effectively address doping," *id.* at 815); Kimura, *supra* note 8, at 137 ("To hope to rely upon



early examples of this. The first sport organization in modern history to ban certain substances was the English Jockey Club in 1908 and it took this measure in order to keep the public interested in betting on horseraces.<sup>83</sup> This is particularly clear in professional and commercial sports whose long-term viability is dependent on keeping the interest of the general public.<sup>84</sup> Leitner makes a similar observation: professional leagues should be able to decide to what extent it is necessary to ban drugs in order to maintain public interest and, by extension, profitability.<sup>85</sup>

### C. Policy Makers

There are primarily two rationales proposed in favor of policy makers combating doping: (i) upholding the integrity, honesty, and fairness of sporting competitions (henceforth “the fair-play argument”) and (ii) protecting the general public, and in particular the youth, against the harmful physical effect of using performance enhancing substances (henceforth “the public-health argument”).

Most existing and proposed legislative acts rest primarily on the public-health argument.<sup>86</sup> This is for example evident in ASCA that, among other things, provides that the Office of Substance Abuse Prevention shall “develop and support innovative demonstration programs designed to identify and deter the improper use or abuse of anabolic steroids by students, especially students in secondary schools.”<sup>87</sup> It is also evident in the Swedish Doping Act. In considering which substances the act should cover, the legislature considered whether there was scientific proof for health risks with its uncontrolled use and if its use is so widespread that it constitutes a public health issue.<sup>88</sup>

The public-health argument is however also sometimes linked to the fair-play argument. A good illustration of this are the anti-doping bills introduced in the U.S. Congress in 2005.<sup>89</sup> For example, the stated purpose of the Clean Sports Act of 2005 (CSA) was to reduce minors’ use of PEDs which “is a public health problem of national significance” which would be reduced through “[t]he adoption by professional sports leagues of strong policies to eliminate the use of performance-enhancing substances” as “the actual or alleged use of performance-enhancing substances by professional athletes results in the increased use of these substances by children and teenagers.”<sup>90</sup> President Obama has similarly stated that the biggest concern with doping in professional sports is “the message that it sends to our kids”<sup>91</sup> who are “modeling themselves on athletes.”<sup>92</sup>

### D. Summary and Conclusions

The examination above shows that sport stakeholders and policy makers seeking to combat doping are motivated by predominantly different interests. At first sight, it appears that both actors’ efforts are motivated by health

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MLB players to internally change the abuse of performance-enhancing drugs that is prevalent in baseball is to be naïve about the history of the game.”)

<sup>83</sup> Ask Vest Christiansen, ‘We are not sportsmen, we are professionals’: Professionalism, doping and deviance in elite sport, 7 *Int’l J. Sport Mgmt. & Marketing* 91, 95–96 (2010).

<sup>84</sup> See Showalter, *supra* note 4, at 651.

<sup>85</sup> Laitner, *supra* note 18, at 215–16. See also *id.* at 219 (“[A]llow the professional leagues to keep expanding their level of play by permitting some deference to professional athletes’ creativity.”).

<sup>86</sup> *Id.* at 210–11; Mitten, *supra* note 5, at 803.

<sup>87</sup> 42 U.S.C. § 290bb-21(b)(11) (2010).

<sup>88</sup> *Statens Offentliga Utredningar [SOU]1998:76 Till statsrådet Lars Engqvist [government report series] (Swed.)* at 151–53. Considering these standards it is surprising that the Act covers HGH which does not appear as commonly used and the health effects of which are uncertain. Johan Lindholm, *Doping – Idrottsligt fusk eller rättslig angelägenhet?* 90–91 (2013).

<sup>89</sup> See *supra* note 7 and accompanying text.

<sup>90</sup> Clean Sports Act of 2005, S. 1114, 109th Cong. § 2 (2005). See also Showalter, *supra* note 4, at 660–61.

<sup>91</sup> Press Conference by President Obama, Feb. 9, 2009 (regarding Alex Rodriguez), transcript available at <http://www.whitehouse.gov/the-press-office/press-conference-president> (last visited Mar. 15, 2013).

<sup>92</sup> Ben Pershing, *Obama Differs With McCain on Steroids*, *Washington Post*, Oct. 2, 2008, <http://voices.washingtonpost.com/44/2008/10/obama-takes-swipe-at-mccains-s.html>.

reasons, but a closer examination reveals that this is not true: sport stakeholders use the health argument in an inconsistent and partially unsupported way whereas policy makers base their actions on a *public* health argument.

The common denominator underlying governmental and sport actions against doping is thereby largely reduced to the claimed connection between, on one hand, drug use in professional sport and, on the other, its prevalence among amateurs and, in particular, young people. This is not a terribly strong connection nor is the claims of such a connection convincingly substantiated. Considering that research in the field suggests that there are a large number of factors that affect attitudes towards doping,<sup>93</sup> the impact of doping in professional sports on young people must at this time be considered an unconfirmed hypothesis.<sup>94</sup>

#### IV. DUELING DEFINITIONS AND NOT AGREEING ON WHAT DOPING IS

The difference in underlying rationale for fighting doping between policy makers and sport stakeholders has consequences for what they want to fight or, differently phrased, what constitutes doping under their respective regulations. As previously mentioned, this article takes as a point of departure the definition of doping found in sports and in particular in the WADA Code. While there are differences between the studied actors' regulations, sport stakeholders' rules are, as explained in this section, consistently more extensive than policy makers'.<sup>95</sup> When comparing legal measures and measures promulgated by sport stakeholders, substances that are banned under the WADA Code can be divided into three categories.

A first category consists of substances that are illegal to possess. To this category belong substances covered by the WADA Code as well as the ASCA and the Swedish Doping Act, including testosterone and anabolic steroids. The Swedish Doping Act additionally covers human growth hormone (HGH), whereas ASCA does not.<sup>96</sup> It should also be noted that there is a long history of using amphetamines and other stimulants substances to enhance performance in sports<sup>97</sup> and that contact with such substances, other than when medically prescribed, is and has been for some time, criminalized in both Sweden and the U.S.<sup>98</sup>

It can also be noted in this context that the Swedish Doping Act goes further than ASCA in that it makes it illegal not only to possess these substance but also, following amendments in 2000,<sup>99</sup> criminalizes use.<sup>100</sup> In theory, this should enhance its effective enforcement as it brings the law in conformity with the sporting rules and thus athletes caught using anabolic steroids or HGH could also be criminally charged. The case of Robin Rahm is illustrative. In 2010, Rahm, a professional ice hockey goalie, tested positive for a number of anabolic substances for which he subsequently received a two-year suspension. As a result of media reporting on the suspension, police enforcement launched an investigation. Rahm admitted using the substances and he later found guilty of a doping crime of the first degree.<sup>101</sup>

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<sup>93</sup> See, e.g., David A. Baron et al., Doping in sports and its spread to at-risk populations: an international review, 6 *World Psychiatry* 118, 122 (2007); Andrea Petróczi, Attitudes and doping: a structural equation analysis of the relationship between athletes' attitudes, sport orientation and doping behavior, 2 *Substance Abuse Treatment, Prevention, & Policy* 34 (2007).

<sup>94</sup> See also Philip Jacques, Is Congress' Latest Effort to De-Juice Professional Sports Unconstitutional?, 6 *DePaul J. Sports L. & Contemp. Probs.* 97, 116–19 (2009).

<sup>95</sup> See supra notes 2-3 and accompanying text.

<sup>96</sup> The Swedish Doping Act, § 1. The wisdom of this policy can however be questioned, see supra note 88.

<sup>97</sup> Michele Verroken, Drug use and abuse in sport, 14 *Baillière's Clinical Endocrinology & Metabolism* 1, 2–3 (2000).

<sup>98</sup> Amphetamine is, like anabolic steroids, classified as a Schedule III substance under the CSA. 21 U.S.C. § 812 (2012).

<sup>99</sup> The Swedish Doping Act § 2.

<sup>100</sup> The Swedish Doping Act, § 2.

<sup>101</sup> See Dagens Nyheter, Rahm: Man tog väl en typ av chansning (Aug. 5, 2010); Dagens Nyheter, Även polisen utreder Rahm (Aug. 10, 2010); Dagens Nyheter, Böter för dopad hockeymålvakt (Sep. 14, 2010).

An empirical study of rulings by the Disciplinary Board for Doping Violations in Swedish sport (Dopingsnämnden) and general trial courts (Tingsrätter) suggests however that this rarely happens. Most doping violations punished by the Disciplinary Board involved use but there was no significant overlap.<sup>102</sup> In fact, Rahm is to my knowledge the only example in Sweden of an individual being punished for the same offense under both the criminal system and his sport's anti-doping rules. While this suggests that there are problems with enforcement, the Swedish solution of criminalizing use in addition to possession is an appealing one, worth considering in the United States. If ASCA is expanded to include use it would mean that athletes that test positive for one of the substances covered by the Act could, in addition to sports' penalties, face criminal charges. Such legislative action would be consistent with the underlying policy: although policy makers are not in the business of upholding sport's legitimacy per se, there is no reason why proven violators should avoid prosecution just because they are athletes.

A second category consist of those substances which are banned under the WADA Code and that are illegal to manufacture and distribute without appropriate permits. This category primarily includes substances that are classified as prescription drugs. This includes, among other substances, erythropoietin (EPO), insulin-like growth factor (IGF-1), beta-2 antagonists such as clenbuterol, and, under U.S. law, HGH. These substances are legal to possess and use even though they can enhance athletic performance.<sup>103</sup>

The third and final category contains substances that are banned in sports but legal to possess as well as legal to manufacture and distribute without a special permit. This category includes many of the nutritional or dietary supplements that some commentators would like to see covered by expanded legislation.<sup>104</sup> An example of a substance that belongs to this category under U.S. law is DHEA (dehydroepiandrosterone). DHEA is an endogenous steroid hormone. In Sweden, DHEA is classified as medicine and thus falls under the second category. All doping methods banned by the WADA Code, including blood doping and gene doping, also belong to this category.<sup>105</sup>

Therefore, one can conclude that sport stakeholders and policy makers on both sides in both jurisdictions extensively cover anabolic steroids; but, the same is not true for other frequently used and much-discussed substances. Despite amendments made in the 2000s, there are significant differences in scope with regard to which substances are covered between, on one hand, the WADA Code and other sporting rules, and on the other, ASCA and the Swedish Doping Act.

The difference in scope between the policy makers' and the sport stakeholders' rules is not random but consistent with their respective aims. For example, the internal and external legitimacy of cycling, cross-country skiing, and other endurance-intensive sports has been seriously harmed by revelations that athletes consume EPO and engage in blood doping and the future of these sports could depend on their ability to purge such behavior.<sup>106</sup> EPO use and blood doping is, however, uncommon among the general public, does not constitute a public health problem, and consequently does not concern policy makers based on their underlying rationale.<sup>107</sup> Unless policy makers radically change their

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<sup>102</sup> Johan Lindholm, *Dopad i praktiken – rättslig och idrottslig praxis*, 14 *Svensk Idrottsjuridisk Förenings artikelsamling* 85 (2009).

<sup>103</sup> See Jurith & Beddoes, *supra* note 8, at 469–73.

<sup>104</sup> See *supra* note 50.

<sup>105</sup> World Anti-Doping Agency, *The World Anti-Doping Code (2009), The 2012 Prohibited List* (Aug. 24, 2011), M1–M3, available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-Prohibited-list/2012/WADA\\_Prohibited\\_List\\_2012\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2012/WADA_Prohibited_List_2012_EN.pdf) (last visited Oct. 28, 2013); see also *supra* note 2.

<sup>106</sup> See, e.g., Steve Keating, *Armstrong Scandal Could See Cycling Dropped from Olympics*, Reuters, Jan. 15, 2013, available at <http://www.reuters.com/article/2013/01/15/us-cycling-armstrong-olympics-idUSBRE90E0ZU20130115> (last viewed March 15, 2013).

<sup>107</sup> But cf. Jurith & Beddoes, *supra* note 8, at 478 (arguing that the U.S. needs stricter legislation that covers substances, such as EPO and clenbuterol, which are “uncontrolled and open to diversion and abuse”).

underlying rationale for fighting doping to include upholding the legitimacy of sport, expanded legislation like that suggested by some policy makers<sup>108</sup> and legal scholars<sup>109</sup> is not in the government's interest.

Increased government involvement in the fight against doping in sport could even lead to restricting sport's own regulations because of balancing competing interests. For example, the European Union wants to become more actively involved in the fight against doping and its institutions have stated that such involvement should include greater protection of athletes' fundamental rights.<sup>110</sup> Such protection would come at the expense of more rules that are effective and enforcement of those rules that some sport stakeholders would prefer.

## V. FUNDAMENTAL RIGHTS OF ATHLETES

Numerous scholars have discussed whether existing anti-doping rules in sport violate the athletes' fundamental rights. It is not possible to exhaustively present this extensive debate, but a few examples of such conflicts are in order.

A first example is the Fourth Amendment, which provides "the people the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>111</sup> The European Convention on Human Rights, drafted in 1950, contains a roughly corresponding right, the right of every person "to respect for his private and family life, his home and his correspondence,"<sup>112</sup> as does the European Union's Charter on Fundamental Rights.<sup>113</sup> It is clear that doping controls and other elements of the procedure in sport constitutes a significant intrusion into an athlete's private life.<sup>114</sup> U.S. scholars have concluded that the Fourth Amendment applies to and could be used to challenge a federal act governing doping testing,<sup>115</sup> including the proposed but never adopted CSA.<sup>116</sup>

There are also elements that potentially violate the rights to due process protected in both legal orders.<sup>117</sup> For example, McCaffrey draws attention to the fact that many central aspects of the current anti-doping regime, such as the principle of strict liability,<sup>118</sup> are sensitive to due process challenges.<sup>119</sup> A related but distinguishable example is the application of the general principle of proportionality. Sanctions handed out within the sport system are quite rigid and little distinction is made with regard to the severity of infringement.<sup>120</sup>

Challenges on fundamental rights grounds do however require that the rights apply to those that undertake the actions. Sport stakeholders, including

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<sup>108</sup> See supra note 7.

<sup>109</sup> See supra note 8.

<sup>110</sup> See, e.g., Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Community support plan to combat doping in sport, COM(1999) 643 final (Dec. 1, 1999), p. 5; Presidency Conclusions from the Informal Meeting of EU Sport Directors (Nov. 1–2, 2009), p. 5 ("not only must the fight against doping in sport go on, but so must efforts to protect individuals' fundamental rights in Europe"); Resolution of the European Parliament on urgent measures to be taken against doping in sport, OJ C 98, Sep. 4, 1999, p. 291, ¶ 11.

<sup>111</sup> U.S. Const. amend. IV

<sup>112</sup> European Convention on Human Rights, art. 8(1), Nov. 4 1950.

<sup>113</sup> European Union, Charter of Fundamental Rights, art. 7, Dec. 7, 2000, 2001 WL 538870.

<sup>114</sup> Antonio Rigozzi et al., Doping and fundamental rights of athletes: comments in the wake of adoption of the World Anti-Doping Code, 2003 Int'l Sports L. Rev. 39, 44. See also Steve Messler, Drug Testing through the Lens of an Olympian, 21 J. Legal Aspects of Sport 173 (2012).

<sup>115</sup> Showalter, supra note 4.

<sup>116</sup> Jacques, supra note 94; See also Saka, supra note 4, at 355–56; But see Holli N. Heiles, Baseball's "Growth" Problem: Can Congress Require Major League Baseball To Test Its Athletes For Human Growth Hormone? A Proposal, 62 Ark. L. Rev. 315 at 346–48 (2009) (suggesting that legislation less specific than SCA could fall outside the scope of the Fourth Amendment).

<sup>117</sup> U.S. Const. amend. V; European Convention on Human Rights, art. 6, Nov. 4, 1950.

<sup>118</sup> See also supra notes 10–12 and accompanying text.

<sup>119</sup> Paul McCaffrey, Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action, 22 J.L. & Pol'y 645, 648 (2006); See also Soek, supra note 355.

<sup>120</sup> See Connolly, supra note 25, at 193–94.

both those that are part of the Olympic movement, other federations, and professional sport leagues are private entities and are therefore, as a general rule, not subject to these fundamental rights. American legal commentators disagree as to whether the existing anti-doping regime can be challenged for violating fundamental constitutional rights by merit of USADA being a “state actor.”<sup>121</sup> While there is currently no clear answer to this question, it is clear that additional governmental involvement would increase the ability to challenge anti-doping rules on fundamental rights grounds.

The Swedish situation is somewhat similar. Fundamental rights and freedoms provided by the Swedish Constitution only apply to “the public,” a term that shall be interpreted narrowly and therefore does not include the entities that currently enforce doping rules in sport,<sup>122</sup> but increased governmental involvement might change that conclusion. Similarly, the European Convention on Human Rights only applies directly to the signatory states but, according to the case law of the European Court of Human Rights, a state may be held responsible for the actions of a private entity, such as when the private entity was delegated a task by the state.<sup>123</sup> This can be compared to the state action doctrine discussed above and suggests that Sweden or another signatory state would have to answer for acts it directed private entities to commit. States are also under a positive duty to protect individuals’ rights from being infringed by other individuals (a.k.a “Drittwirkung,”) <sup>124</sup> including actions taken by sporting organizations.<sup>125</sup> This is however reserved for gross violations of fundamental rights.

In conclusion, on both sides of the Atlantic, there are fundamental rights that limit what actions can be taken to combat doping in sport. Also, in both legal jurisdictions, the likelihood that such fundamental rights are invoked to successfully challenge doping rules increases with enhanced government involvement.

## VI. CONCLUSIONS

Based on the discussion above, this contribution makes three observations regarding the expediency of legislative involvement in doping in sport.

First, sport stakeholders and policy makers have different reasons to fight doping and the overlap between their aims<sup>126</sup> is tenuous and unsubstantiated, which translates into policy makers and sport stakeholders wanting to fight different things. This is a poor foundation for increased cooperation. Moreover, this article suggests that government involvement may move drug policy in sport away from the path that some sport stakeholders prefer.

Second, the ability of the law to reduce the prevalence of doping in society in general is closely tied to the resources allocated to agencies entrusted to enforce it. Realistic ways of increasing the efficiency of the system include increasing resources to enforce existing laws, expanding ASCA to include use, and increasing the criminal penalties for manufacturing and distributing already-criminalized substances.

Third, government action is constrained by fundamental rights limitations that sporting stakeholders take quite lightly and the current anti-doping rules in sport likely do not comply with. Increased government

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<sup>121</sup> Compare, e.g., McCaffrey, *supra* note 119, at 670–75 and Showalter, *supra* note 4, at 668–69.

<sup>122</sup> Prop. 1975/76:209, at 85–86, 120.

<sup>123</sup> See, e.g., *Van der Musselle v. Belgium*, 8919 Eur. Ct. H.R. 80 (1983); *Costello-Roberts v. Great Britain*, 13134 Eur. Ct. H.R. 87 (1993); *Woś v. Poland*, 22860 Eur. Ct. H.R. 02 (2005).

<sup>124</sup> See, e.g., *Airey v. Ireland*, 6289 Eur. Ct. H.R. 73 (1979); *X & Y v. Netherlands*, 8978 Eur. Ct. H.R. 80 (1985); *Odièvre v. France*, 42326 Eur. Ct. H.R. 98 (2003); *Evans v. Great Britain*, 6339 Eur. Ct. H.R. 05 (2007).

<sup>125</sup> The Commission’s decision in *X & Y v. Netherlands*, 9322 Eur. Ct. H.R. 81 (1983).

<sup>126</sup> Being role models, doping athletes influence use among young people and this constitutes a public health problem.

involvement in the fight against doping increases the likelihood that those rules are challenged on fundamental rights grounds.

In conclusion, beyond potentially scoring political points, policy makers have limited reasons for getting more directly involved in the battle against doping in sports. Moreover, at least some sport stakeholders would probably prefer if the government did not get involved. Enhancements of the current regime that would come with government power and resources to find and punish doping would likely, at least partially, be offset by other factors.