Anti-Doping Policy: Rationale or Rationalisation?

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Faculty of Law, University of Sydney
ABSTRACT

ANTI-DOPING POLICY: RATIONALE OR RATIONALISATION?

Since 1998 anti-doping policy has undergone massive change. The level of world-wide cooperation involved in establishing an international anti-doping system is unprecedented in the history of the regulation of performance enhancing substances in sport. Such cooperation and the unipartite nature of public doping discourse give the impression that anti-doping policy is clear, unproblematic and universally acceptable. However, scratching the harmonious surface of modern anti-doping approaches reveals fundamental problems and inconsistencies, the two most basic of which go to the very core of the policy. Basic issues — what constitutes doping and the reasons why we prohibit it — are still unsettled, lack clarity and give rise to many significant operational issues. For instance, the definition of ‘doping’ in doping discourse is quite different from the definition in the World Anti-Doping Code: what is thought of as ‘doping’ is very different from what is punished as ‘doping.’ Moreover, the commonly suggested anti-doping rationales do not adequately explain the present prohibition on the use of performance enhancing substances in sport.

In light of this uncertainty, two questions arise: why is there so much confusion and why do we prohibit doping in sport? Desmond Manderson, in his study of the origins of illicit drug laws, has wrestled with a similar question; his conclusions are that drugs have been prohibited more for what they symbolise than their pharmacological properties. This thesis argues that, in a similar way to illicit drug policy, the symbolism of performance enhancing substances in sport has played a major role in the development of anti-doping policy. To demonstrate the influence of such symbolism, three significant time periods in anti-doping history are considered in the thesis: the 1920s, the 1960s and the 1970s.

The most formative aspect of symbolism in the 1920s, when anti-doping rules were first passed, was the association between doping and illicit drug taking. The stigma attached to stereotypical images of illicit drug-users contributed to ‘doping’ being viewed as contrary to the amateur ethos and the adoption of a regulatory system modelled on illicit drug policy approaches.
Anti-Doping Policy: Rationale or Rationalisation?

Abstract

In the 1960s, when anti-doping policy began in earnest, illicit drug symbolism was also extremely influential. Concerns regarding drug addiction in sport fuelled fears about the health of the athlete which were prominent in doping discourse at this time. Combined with a strong belief in the power of drugs in general, illicit drug symbolism led to the expansion of the illicit drug model of regulation to include illicit drug style testing.

Doping changed in the 1970s with the emergence of training drugs such as anabolic steroids. Steroids became strongly associated with ‘communist’ athletes and were viewed as extremely powerful transforming drugs. A kind of steroid hysteria was thereby created in doping discourse. Simultaneously, the continuing influence of illicit drug symbolism meant that the previously adopted illicit drug model was also applied to steroids.

The conclusion of the thesis is that anti-doping policy is not fundamentally a rational system: instead it has been driven much more by emotional factors such as public opinion than rational argument. Such a basis is bound to create confusion and explains many of the problems of current anti-doping policy. The way in which symbolism has led to the regulatory decisions in anti-doping history is summarised as constituting the ‘reactive regulation model’ in the concluding section of the thesis. This pattern of regulation has produced a number of important operational difficulties in current anti-doping law, the prime example being the ‘fallacy’ of in-competition drug testing to deal with the issue of training drugs such as steroids.¹

Finally, it is argued that in light of the reactive nature of anti-doping policy, it is unlikely that recent challenges, such as gene doping and the use of non-analytical evidence, will be treated any differently to past challenges. Anti-doping policy has always been largely driven by reactions to symbolism; there is no reason to suspect this type of approach will change.

ACKNOWLEDGEMENTS

This thesis is truly a combined effort and there are many people to whom I owe my heartfelt thanks.

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To my father, Dr William McClean. Thank you for the discussions and the editing. More importantly, for teaching me to express my own thoughts and ideas and giving me to confidence to pursue such a project. Thank you also to my brother, John McClean, for the ideas and advice.

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Finally, to my Lord, thank you for life, and for providing me with the opportunity to undertake this project and for such a network of friends and family to help.

Anne Amos
December 2008
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<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
</tr>
<tr>
<td>ABC</td>
<td>Australian Broadcasting Corporation</td>
</tr>
<tr>
<td>AFL</td>
<td>Australian Football League</td>
</tr>
<tr>
<td>AIS</td>
<td>Australian Institute of Sport</td>
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<tr>
<td>AMA</td>
<td>American Medical Association</td>
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<tr>
<td>AOC</td>
<td>Australian Olympic Committee</td>
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<td>ARU</td>
<td>Australian Rugby Union</td>
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<td>ASADA</td>
<td>Australian Sports Anti-Doping Agency</td>
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<tr>
<td>ATP</td>
<td>Association of Tennis Professionals</td>
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<tr>
<td>ATS</td>
<td>Australian Treaties Series</td>
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<tr>
<td>ASC</td>
<td>Australian Sports Commission</td>
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<tr>
<td>BALCO</td>
<td>Bay Area Laboratory Co-Operative</td>
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<tr>
<td>BASM</td>
<td>British Association of Sports Medicine</td>
</tr>
<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<tr>
<td>CCES</td>
<td>Canadian Centre for Ethics in Sport</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<tr>
<td>Cth</td>
<td>Commonwealth</td>
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<tr>
<td>EPO</td>
<td>Erythropoietin</td>
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<tr>
<td>FINA</td>
<td>Fédération Internationale de Natation</td>
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<tr>
<td>FMSI</td>
<td>Federazione Medico-Sportiva Italian (Italian Sports Medicine Association)</td>
</tr>
<tr>
<td>GDR</td>
<td>German Democratic Republic</td>
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<tr>
<td>HCT</td>
<td>Hydrochlorothiazide</td>
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<tr>
<td>hGH</td>
<td>Human Growth Hormone</td>
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<tr>
<td>IAAF</td>
<td>International Association of Athletics Federations (previously International Amateur Athletics Federation)</td>
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<tr>
<td>IOC</td>
<td>International Olympic Committee</td>
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<tr>
<td>ITF</td>
<td>International Tennis Federation</td>
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<td>LSD</td>
<td>Lysergic Acid Diethylamide</td>
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<td>NOC</td>
<td>National Olympic Committee</td>
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<td>NRL</td>
<td>National Rugby League</td>
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<tr>
<td>NSW</td>
<td>New South Wales</td>
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<td>OMADC</td>
<td>Olympic Movement Anti-Doping Code</td>
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<tr>
<td>ONDCP</td>
<td>Office of National Drug Control Policy</td>
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<td>SA</td>
<td>South Australia</td>
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<tr>
<td>THG</td>
<td>Tetrahydrogestrinone</td>
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<tr>
<td>UEFA</td>
<td>Union of European Football Associations</td>
</tr>
<tr>
<td>UIT</td>
<td>Union Internationale de Tir (International Shooting Union)</td>
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<tr>
<td>USOC</td>
<td>United States Olympic Committee</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>USADA</td>
<td>United States Anti-Doping Agency</td>
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<td>US or USA</td>
<td>United States of America</td>
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<td>UVI</td>
<td>Unione Velocipedista Italiana (Italian Cycling Federation)</td>
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<td>Vic</td>
<td>Victoria</td>
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<td>WADA</td>
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PROLOGUE

What is doping? Why do we prohibit it? These two questions should be easy to answer, especially when the solution appears clear on the face of the World Anti-Doping Code (WADA Code), the almost universal anti-doping code for sport. But, as this thesis will demonstrate, appearances can be deceiving.

This thesis is about anti-doping policy. It considers the reasons behind the modern approach to the use of performance enhancing substances and methods in sport. There have been a number of arguments in academic literature about the reasons for the present prohibition on such substances. There have also been a number of narratives of the history of anti-doping policy which tend to focus on the rational drivers of anti-doping policy such as concerns for health and the fairness of sport. However, as Dimeo states: ‘[t]he early discourses on anti-doping, from the mid-1950s onwards, can be interpreted in a number of ways.’¹ This thesis concentrates on one particular interpretation: one which focuses on the role of symbolism. It will be argued that the influence of symbolism is an extremely important factor in explaining how anti-doping policy has come to be the way it is today and that symbolism is the important link in explaining many of the confusions and inconsistencies in the modern approach to doping in sport.

The structure of the thesis can be compared to the working out of a mathematical algorithm and proof. Firstly the problem is set out, then the working and finally the solution. ‘QED’ (quod erat demonstrandum) is often written at the end to signify that the proof is complete. The first section of the thesis — Part I — is devoted to setting out the problem, identifying the need for the subsequent symbolic analysis. Part II presents the ‘solution’: the analysis of the symbolism of performance enhancing substances in sport. Part III reveals exactly how the analysis provides a solution for the problems presented in Part I. Chapter Eight explains how the analysis provides those answers and Chapter Nine is the QED at the end — the final word on the solution to the problem providing an explanation of the significance of what has come before.

Part I identifies the need for a new and different analysis of the history and origins of the modern approach to doping — since anti-doping policy is not what it appears. On the surface doping law and discourse seem to represent a rational and systematic approach to a well-defined problem supported by robust justifications. This seemingly untroubled

picture is presented in Chapter One through an examination of a number of aspects of recent anti-doping discourse and developments in anti-doping policy. But on closer examination, a very different picture appears. Even the most basic concepts are ill-defined and confused, as demonstrated in Chapters Two and Three.

Chapter Two focuses on the issue of doping definition and concludes that when we talk about ‘doping’ it is not clear exactly what we are talking about. Aspects of confusion include the role of the intent of the athlete, the effect of the substance on the athlete and the basis on which things are selected for inclusion on the list of prohibited substances. Chapter Three examines the question of why we prohibit performance enhancing substances and analyses the justifications which have been offered for a total prohibition in the past. It will be concluded here that we don’t know exactly why we prohibit doping. This much is clear from the short-comings of anti-doping rationales.

Having established the problem in Part I, Chapter Four goes on to answer the questions of why there is so much confusion in anti-doping discourse and why we prohibit performance enhancing substances. Desmond Manderson, in his research into the origins of illicit drug policy, has wrestled with similar questions. His answer is that drugs have been prohibited because of what they symbolise, rather than their pharmacological properties. This chapter will contend that a similar analysis is appropriate for doping due to the obvious importance of public opinion on the issue of doping and the parallels between illicit drug policy and anti-doping policy. It will be concluded that symbolism provides the missing piece to many puzzles in anti-doping discourse.

Part II — the solution to the problem — contains an analysis of the symbolism of doping in three important time periods in anti-doping history. Chapter Five focuses on the 1920s and 1930s and concludes that the most significant symbolism at work linked performance enhancing substances with illicit recreational drug use. This link led to the view of performance enhancing substances as being contrary to the essence of amateur sport and eventually to the adoption of a similar regulatory system: a total prohibition.

In Chapter Six the 1960s will be examined and it will be found that similar illicit drug symbolism was at work to the 1920s. It will be argued that such symbolism was a strong influence in the health concerns about doping which were so prominent in anti-doping

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2 The discussion will relate to anti-doping policy up to December 2008. There will be some significant changes to the WADA Code which will become operative in January 2009. These changes will not be considered in detail in the thesis but will be noted where important to the argument.
discourse in that era. The ongoing influence of illicit drug symbolism naturally led to the further adoption of regulatory enforcement procedures borrowed from illicit drug approaches in the form of drug testing.

The 1970s, examined in Chapter Seven, brought a new type of drug to sport, and with it a new type of symbolism. The rise of anabolic androgenic steroids fundamentally changed doping forever. Illicit drug symbolism was no longer the major imagery involved in anti-doping discourse, although it was still operative. Steroids became closely linked with ‘communist’ athletes and were seen as extremely powerful transforming drugs in that context. These two aspects of symbolism led to a kind of steroid hysteria. Ongoing illicit drug symbolism meant that the illicit drug model was thought adequate to deal with steroids despite their very different characteristics to previous doping agents.

Thus Part II, being the substantive part of the thesis, contains the symbolic analysis of anti-doping policy. The sources from which this analysis derives are publicly available documents from the relevant time periods, primarily newspapers and business documents of sports organisations. There has, therefore, been no need to acquire human subject ethics approval.

Chapters Eight and Nine form the final part of the thesis which draws together the first two parts by considering how the symbolism of doping has created problems in the operation of anti-doping law. Chapter Eight covers the problems previously identified in Part I of the thesis. Most significantly, it will be argued that the influence of symbolism has led to the confused state of doping definition and the unsatisfactory nature of anti-doping rationales.

Chapter Nine will take a wider view of the role of the symbolism of doping. Here, a model of the way in which such symbolism has affected anti-doping policy will be presented, called ‘The Reactive Regulation Model’. The remainder of the chapter will be devoted to demonstrating the implications of out-working out of such a model in anti-doping in the past, present and future. It will be argued that the past pattern of reactive regulation suggests that the future will be no different. Anti-doping policy, it is suggested, always was and always will be a reaction to the symbolism of performance enhancing substances and methods in sport.
Declaration

To the best of my knowledge and belief, the work presented in this thesis is original except as acknowledged in the text, and the material has not been submitted, either in whole or in part, for a degree at this or any other University. I have acknowledged in the relevant places the use of material from published papers of my authorship which formed a part of this research.
PART I: THE HIDDEN DILEMMAS OF ANTI-DOPING POLICY

CHAPTER ONE

WHAT LIES BENEATH ANTI-DOPING POLICY?

I INTRODUCTION

It is a clear, still night and the stadium is a-buzz with excitement. A hundred thousand spectators fill the stands to watch the Opening Ceremony of the Olympic Games. Millions more watch on television screens around the world. As the Olympic torch burns above the stadium, the Olympic flag is carried into the centre of the arena. When the flag reaches the centre of the field, the flag-bearers from every nation form a semi-circle around the rostrum and a lone athlete steps forward into the spotlight, raises their right hand while with their left they take a corner of the five-ringed flag. They say:

In the name of all competitors, I promise that we shall take part in these Olympic Games, respecting and abiding by the rules that govern them, in the true spirit of sportsmanship, for the glory of sport and the honour of our teams, committing ourselves to a sport without doping and without drugs.

The crowd roars its applause and an Olympic judge steps forward to take the judges oath…

At every Olympic Games since the year 2000, the athlete’s oath has included that last phrase: ‘committing ourselves to a sport without doping and without drugs’. The inclusion of these words indicates the status which the issue of the use of performance enhancing substances has in sport today. ‘Doping’ is so important that out of all the issues in sport it, alone, is singled out for a special mention in the oath taken at, arguably, the most important sporting competition in the world.

The presence of doping in the Olympic oath does not only indicate the significance of the matter, it also testifies to the level of consensus the problem attracts: ‘doping’ and ‘drugs’ are almost universally viewed as repugnant in the sporting context. At each Olympic

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3 Ibid.
Games one athlete promises ‘a sport without doping’ on behalf of more than ten thousand athletes.\(^4\) Over a hundred thousand spectators tacitly approve of these sentiments as they applaud the athlete’s oath being taken. Millions of others around the world silently agree as they watch the ceremony on television.

The scene certainly makes it seem that the issue of doping and drugs in sport is clear and that there is world-wide consensus on modern anti-doping strategies. But scratch the surface of this picture and you will find a very different reality. History shows us that even as the athletes vow to participate in the Games without doping, many are injecting prohibited drugs into their veins or popping prohibited pills into their mouths. And while the crowd applauds the ideals encapsulated in the oath, the majority of people believe that the Olympic competition will be far from drug-free.\(^5\)

Appearances and reality are quite different here. The same can be said for anti-doping policy in general. This chapter will contend that on the surface anti-doping policy appears to be unproblematic, rational and attracts universal consensus, but underneath the reality is very different.

As set out in the previous introductory chapter, the first part of this thesis will demonstrate the need for a new kind of analysis of the development of anti-doping policy. The justification for the symbolic analysis set out in the next part derives from the fact that anti-doping discourse and policy are full of difficulties, confusion and inconsistencies and thus previous, ‘rational’ explanations of the history of the development of anti-doping policy are inadequate to explain why anti-doping is the way it is today. To that end, this chapter will firstly review the ‘surface’ of anti-doping policy by considering a number of aspects of anti-doping policy and discourse, including recent international developments, rhetoric and public reaction to doping incidents. All these aspects of the modern anti-doping landscape give the impression that there is universal agreement on, and understanding of, the current approach. The chapter will conclude that the appearance of consensus is misleading and the arguments of the next two chapters will be foreshadowed. Finally, the overall argument and structure of the thesis will be presented in detail, to provide further context for the material in this chapter and the rest of the thesis.


II  THE APPEARANCE OF CONSENSUS: PRESENT

ANTI-DOPING POLICY

There is now unprecedented agreement and cooperation in anti-doping policy at an international level, which has had far-reaching implications for national anti-doping programmes.

On November 30, 2006, Reuters published an article stating that the world governing body of chess would introduce drug testing at the Asian Games in order to be considered for inclusion in the Olympic Games. The article stated:

the sport’s top official in Doha said he had no idea how drugs could enhance chess performance. “I would not know which drug could possibly help a chess player to improve his game” the competition manager Yousuf Ahmad Ali said. “But yes, there will be official monitors who may demand that players undergo a drugs test after the rounds”.

Such unity of international approach to anti-doping has been reached in the early 21st century that even sports which are not affected by doping are induced to comply! To appreciate the significance of this level of agreement, it is necessary to understand the efforts involved in establishing this unified approach.

A  International Developments

Before 1999 anti-doping policy was an individual matter for each sport, country and organisation. Although for many sports and organisers, the Olympic Movement Anti-doping Code (OMADC) provided a model, anti-doping policies varied in their definition of doping (strict liability versus intent-based violations), the types of substances and methods prohibited, the applicable sanctions, the defences available to the athlete and the avenues for appeal.

1  The Creation of the World Anti-Doping Agency

Since November 1999, when the World Anti-Doping Agency (WADA) was created as a result of an international conference on doping, there has been an international revolution in the approach to anti-doping. The establishment of this international agency was heralded as bringing in ‘…[a] new dimension…to the fight against doping in sport’ since

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Nevertheless, it should be noted here that the 2007 version of the Code sports were required to accept the Code as their anti-doping policy. In 2003, at a second world conference, many of the major sports federations and governments agreed to accept the new World Anti-Doping Code (WADA Code) as the universal anti-doping policy for sport — modelled on the OMADC, pursuant to the Lausanne Declaration of 1999. For the first time in history, all sports and countries could be subject to the same anti-doping rules.

The stated aim of the WADA Code is to ‘advance the anti-doping effort through universal harmonization of core anti-doping elements.’ Eight years on, the Code has come a long way towards achieving that aim. By the 2004 Athens Olympic Games all participating sports were required to accept the Code as their anti-doping policy.

‘[w]ith one historic associative act, sport organizations and governments [were] now united in their efforts to achieve completely drug free sport.’ In 2003, at a second world conference, many of the major sports federations and governments agreed to accept the new World Anti-Doping Code (WADA Code) as the universal anti-doping policy for sport — modelled on the OMADC, pursuant to the Lausanne Declaration of 1999. For the first time in history, all sports and countries could be subject to the same anti-doping rules.

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Richard Pound, WADA: Message From the Chairman <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=1> at 7 July 2005. The catalyst for the changes was a series of international doping scandals in 1998: Australian customs officials discovered vials of human growth hormone in the luggage of Chinese swimmers who were attending the World Swimming Championships; prosecutions relating to the former state-supported doping of East German athletes continued in Germany; Irish Olympic champion swimmer, Michelle de Bruin, was charged with tampering with her urine sample and French customs agents and police uncovered wide spread doping in the 1998 Tour de France: Jim Ferstle, ‘World Conference on Doping in Sport’ in Wayne Wilson and Edward Derse (Eds), Doping In Elite Sport: The Politics of Drugs in the Olympic Movement, 2001 (Champaign: Human Kinetics), 275 – 286, 275. These events, particularly the Tour de France scandal, prompted the IOC Executive Board to hold an international conference on the fight against doping in February 1999: Judge Kéba Mbaye, ‘Report of the Working Group on the Legal and Political Aspects of Doping’ (Paper presented at the World Conference on Doping in Sport, Lausanne, 2-4 February 1999), 1. The main result of the conference was the creation of WADA.


Nevertheless, it should be noted here that the 2007 version of the Code does contain a few significant changes from the 2003 version. For details of these changes see Lauri Tarasti, ‘Some Juridical Questions in the Revised World Anti-Doping Code’ (2008) 2008(2-3) International Sports Law Review 17 and John Marshall and Amy Catherine Hale, ‘Will The New WADA Code Plug All the Gaps? Will There Be By-Catch?’ (2008) 1-2 The International Sports Law Journal 37. The most significant of these changes for the purposes of this thesis relate to the increased flexibility in applicable sanctions via the reclassification of most doping substances as ‘Specified Substances’ which are therefore subject to Article 10.4 of the Code. The commentary in the next two chapters also pertains to the 2003 version of the Code and some comments which arise from the inflexible nature of the mandatory sanctions in the 2003 version may appear outdated after the January 2009 implementation date due to these changes. However, the purpose of the discussion in this thesis is not to criticise anti-doping policy as it stands but rather to understand why anti-doping policy has come to be the way it is. Therefore, the problems identified in the 2003 WADA Code remain significant since they serve as a means of highlighting the way in which anti-doping policy has developed historically. Thus, whether the comments apply to the 2009 version or not, anti-doping policy has demonstrated these problems at some point in time and they are, therefore, relevant to the overall argument. Furthermore, many of the changes to the 2003 Code have been made in recognition of some of the problems and inconsistencies identified.

governments were required to adopt the Code before the 2006 Winter Olympics in Turin. After a process of consultation, in 2007 the Code was modified: the changes to the Code were accepted by stakeholders at the World Conference on Doping in Sport in Madrid on 15–17 November 2007 with an implementation date for all stakeholders of January 2009.\textsuperscript{12}

WADA has now assumed a pivotal role in anti-doping programmes internationally, engaging in coordination and facilitation of out-of-competition drug testing of athletes throughout the world; updating and publishing the \textit{WADA Code Prohibited List} each year (the list of prohibited substances and methods); facilitating the adoption of the Code by sports and governments; promoting anti-doping research; accrediting drug testing laboratories and educating athletes regarding their doping responsibilities.\textsuperscript{13} Under the \textit{WADA Code}, WADA also has the right to appeal doping cases to the Court of Arbitration for Sport (CAS).\textsuperscript{14} In 2007 WADA had an expenditure of $27,268,260 (US),\textsuperscript{15} its budget being made up of contributions from the Olympic Movement and public authorities.\textsuperscript{16}

2 \textit{The Development of the WADA Code}

The \textit{WADA Code} has also assumed a vital role in the anti-doping movement. Sports which have accepted the Code still have their own anti-doping policies but the rules must contain certain provisions ‘without substantive change’, while other provisions allow for a little more flexibility on the part of the policy maker.\textsuperscript{17} Two major consequences of a universal anti-doping code are mandatory universal sanctions (two years for a first offence and lifetime for any subsequent offence\textsuperscript{18}) and a single list of prohibited substances and methods applicable to all sports.\textsuperscript{19} Although there are still some sports which have not adopted the \textit{WADA Code}, substantial political pressure has been brought to bear on these


\textsuperscript{13} \textit{WADA Code}, Article 20.7.

\textsuperscript{14} \textit{WADA Code}, Article 13.2.3 (e).


\textsuperscript{16} \textit{WADA Code}, 6. The provisions which must be incorporated without substantive change are listed on page 6 of the Code.

\textsuperscript{17} Sanctions are found in Article 10 (Individuals) and Article 11 (Teams) of the Code. Note that the 2007 amendments of the Code aim to introduce more flexibility in the sanctions applied: see Marshall and Hale, above n 10, 38.

\textsuperscript{18} Sanctions are found in Article 10 (Individuals) and Article 11 (Teams) of the Code. Note that the 2007 amendments of the Code aim to introduce more flexibility in the sanctions applied: see Marshall and Hale, above n 10, 38.

organizations to accept the Code. For example, the Australian Football League (AFL) did not wish to accept the WADA Code due to the applicable universal mandatory sanctions.\(^{20}\) After political and financial pressure from the federal government — including a threat to take away federal funding from the sport — the AFL accepted the Code.\(^{21}\) Given this sort of coercion, it seems that most sports will sign up to the Code in the future.\(^{22}\)

International agreement on policy has not been in name only: compliance with these international agreements has significant implications for national programmes. The administrative changes undertaken by national organisations in compliance with the Code are further evidence of the commitment of the parties to a unified approach.

### B National Developments

At the national level there are three significant developments in anti-doping policy to mention:

- the introduction of the WADA Code as government policy
- the establishment of specialist doping bodies
- the increasing involvement of state law enforcement agencies.

The effort that these changes have involved is further evidence of the level of commitment to achieving harmony in anti-doping policy.

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\(^{22}\) Similarly, in the US there has been substantial political pressure on the National Baseball League to accept the Code, including hearings before Congressional committees complete with TV coverage: US Committee on Government Reform, *Media Coverage for March 17th Hearing Into Steroids in Major League Baseball* (2005) <http://reform.house.gov/GovReform/News/DocumentSingle.aspx?DocumentID=23796> at 14 December 2006. WADA actively encourages this kind of pressure on the part of governments. Minutes of a WADA executive meeting discusses the pressure that was put on the ALF and the major league baseball: World Anti-Doping Agency, *Minutes of the WADA Executive Committee Meeting 20 November 2005, Montreal Canada* (2005) <http://www.wada-ama.org/rtecontent/document/ExCo_Minutes_20_11_05_DRAFT.pdf> at 14 September 2008. There has been ongoing discussion and argument between WADA and the powerful FIFA (Fédération Internationale de Football Association – the international federation in charge of association football, including the World Cup) regarding FIFA’s acceptance of and compliance with the Code. This resulted in WADA seeking an advisory opinion from the Court of Arbitration for Sport to determine whether FIFA’s policy did comply with the Code: see Court of Arbitration for Sport, *CAS2005/C/976&986: Advisory Opinion* (2005) WADA <http://www.wada-ama.org/rtecontent/document/CAS_Opinion_FIFA.pdf> at 16 January 2008. This is an example of the strong pressure which has been brought to bear on sporting federations.
1 Adoption of the WADA Code

In line with their international responsibilities under the Copenhagen Declaration and/or the International Convention Against Doping in Sport 2005, national governments have changed the policies of their national sports organisations to comply with the WADA Code. For instance, Australian government bodies such as the Australian Institute of Sport and the Australian Sports Commission now have anti-doping policies which are compliant with the WADA Code. Similar processes have been, and continue to be, undertaken around the world as national governments ensure that their organizations are WADA Code compliant.

2 Changes to Enforcement Bodies

National anti-doping structures have also received an overhaul in the wake of the adoption of the WADA Code. In Australia, a new government-funded anti-doping organisation was launched, the Australian Sports Anti-Doping Agency (ASADA) which undertakes drug testing and other doping investigations, preparation of doping cases, athlete education, policy development and monitoring. Similar agencies in the United Kingdom (UK Sport), Canada (the Canadian Centre for Ethics in Sport), and the USA (the United States Doping Agency) are either fully or partially funded by the respective national government.

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24 This process also affects private sporting organisations through funding constraints as mentioned above in relation to the AFL.


29 ‘In the United States, the Olympic effort is unique in that it is funded by contributions from private citizens and by major support from the corporate community. The U.S. Olympic Committee (USOC) is one of only a few of the current 198 NOCs (National Olympic Committees) that receives no continuous federal government subsidy’:
Although Australia has had a government funded anti-doping organisation since the early 1990s, ASADA’s functions and powers are wider than its predecessor. Of particular note is ASADA’s power to ‘receive, use and disclose information relevant to a possible breach of a sport’s anti-doping policy.’ This allows ASADA to exchange information with other government law enforcement agencies such as the Australian Federal Police and the Australian Customs Service. The existence of this power is reflective of a new trend in anti-doping, where national law enforcement agencies are playing a much greater role in the detection of doping violations. No longer is doping the primary domain of the sports federation, it is squarely within the jurisdiction of public law enforcement and, judging by a few recent cases, also within their enforcement priorities. In 2004 John Hoberman wrote: ‘Today, after two decades of sports doping scandals, the anti-doping campaign is being annexed by the War on Drugs and by state prosecutors in the United States and Europe.’

Events since 2001 indicate that the trend is not just confined to Europe but that this development, too, is part of the harmonious anti-doping approach of the 21st century. The...
Bay Area Laboratory Cooperative (BALCO) investigation was chiefly the work of government investigatory agencies.\(^{35}\) The 2004 doping scandal involving the Australian cyclist, Mark French (discussed in Chapter Two), involved a number of government departments and officials, including Australian Institute of Sport personnel, customs officials,\(^{36}\) police,\(^{37}\) Cycling Australia — the relevant sports federation — and an independent retired judge, Robert Anderson QC, acting on behalf of the Australian Sports Commission.\(^{38}\) The pattern of government agency involvement in doping cases continued in the 2005 Tour de France with another arrest by French police after customs officials and police discovered phials of EPO (erythropoietin) in a car owned by the wife of an Italian rider.\(^{39}\)

Never before have anti-doping efforts featured so strongly in the agendas of national governments. This unprecedented cooperation is certainly suggestive of a very strong underlying consensus on the issues. The unipartite nature of approaches to doping is not limited to official government policy, public opinion on the issue shows similar unity, as the next section will demonstrate.

III **THE APPEARANCE OF CONSENSUS: MODERN DOPING DISCOURSE**

It was September 1988 at the Seoul Olympics. Julie and I made our way to Juan Antonio Samaranch’s presidential suite at the Shilla Hotel, where we were entertaining members of the Coca-Cola board of directors. I had to be there as the chair of our marketing efforts, and Coca-Cola was one of our most enthusiastic supporters. We arrived, just on time, and were met by a clearly agitated Samaranch. “Have you heard the news?” he asked. “What news?” I replied. “It’s terrible”, he continued. "What is it? Has someone died?” “It’s worse”, he said. “For God’s sake, what is it?” I asked again. He took me into his bedroom and closed the door. “Ben Johnson”, he said. “He tested positive.” Only the day before, Johnson had run the most exciting 100 metre final in history, winning in an astonishing 9.79 seconds, well ahead of his fellow competitors. The analysis of the backup “B” urine sample was now under way and the International Olympic Committee’s Medical Commission would meet that evening to deal with the matter. It was, or so it seemed at the time, a very long lunch, especially with many of the American Coca-Cola directors and

\(^{35}\) The BALCO scandal will be considered in more detail later in the thesis.


their spouses congratulating us on Johnson’s win and several of them saying how happy they were that our Canadian had beaten Lewis, who was not well liked. We smiled and thanked them, while dying inside, and could hardly wait to escape.\[^{40}\]

Thus begins a chapter headed ‘Performance Cheats: Doping’ in Dick Pound’s *Inside the Olympics*; a volume which includes a detailed narrative of the events surrounding the infamous doping incident of the Seoul Olympics in 1988. Despite the intervening years, the events have enduring significance and the associated media commentary still represents some of the clearest and most poignant statements of public opinion about the issue of the use of performance enhancing substances in modern sport. The subsequent discussion of public opinion and doping will therefore begin with a brief analysis of the Ben Johnson saga.

**A Public Opinion and Doping Scandals**

1 *Ben Johnson*

(a) *The Background*

The events of September 1988 are well known and set out in Pound’s comments above.\[^{41}\] Johnson’s second sample confirmed the presence of stanozolol. He was disqualified from the competition by the International Olympic Committee (IOC) and he returned to Canada as a fallen hero.

There is no name in the history of sport which is more incontrovertibly associated with the issue of doping than that of Ben Johnson. Part of the reason for his infamy has to do with the specific circumstances of the positive test. In order to fully appreciate the public reaction to the 1988 scandal it is helpful to provide some background to the episode.

Firstly, there was a dramatic lead up to the race. Due to a long rivalry, the clash between Johnson and American, Carl Lewis, was heralded as the ‘the most anticipated footrace of the Olympics’;\[^{42}\] the ‘spotlight show of these 1988 Olympics’.\[^{43}\]


\[^{42}\] Steve Jacobson, ‘Seoul Olympic Games the 100 Still Carl “Me First” Lewis’, *Newsday Nassau and Suffolk* (New York), 23 September 1988, 185.

\[^{43}\] Leigh Montville, ‘Johnson's 100 Was a Dash Into History’, *The Boston Globe* (Boston), 25 September 1988, 73. Part of the reason that the race claimed so much attention was because of the different personalities involved. So different were the two men that their rivalry was claimed to be the ‘drag racer’s version of Frazier vs Ali. Johnson is Frazier: stern, no nonsense, a hard hat and lunch pail. Lewis is Ali: glib, flashy, a spotlight and a microphone’: Steve Kelley, ‘Johnson's Healed But Can He Top King Carl?’ *The Seattle Times* (Seattle), 14
Secondly, Johnson’s home country of Canada associated intimately with the victory. During a post-race interview the prime minister of Canada, Brian Mulroney, telephoned to congratulate Johnson, saying ‘it’s a marvellous evening for Canada’.\(^44\) The victory was celebrated more widely than in Canada.\(^45\) Klobuchar put it like this:

> Ben Johnson. He had lifted his country and millions around the world into one of those rare moments of shared exhilaration that crosses all boundaries and unites all cultures…

> It didn’t matter who you wanted to win. The finest athletic performances often cut across partisanship. They become concerts, evoking that spontaneous eruption of awe and recognition in which all can join, as the do for a Caruso or Leontyne Prince.

> That’s what has always made the Olympics something beyond — the universality of it, the performance of the best on the grandest stage. That is why for 48 giddy hours Ben Johnson belonged not only to Canada but to the world.\(^46\)

Thirdly, the guilty athlete was the winner of the blue ribbon event in the highest profile sporting competition in the world.

(b) The Reaction

When the results of the drug test were publicised, shock and disappointment were widespread. The public reaction was no less dramatic than the account given by Pound.\(^47\) Upon receiving the news, Canada moved instantaneously from a state of national celebration to mourning. Some of the headlines and comments published include:

- ‘Canada’s Shame’\(^48\)
- ‘the news hit Canada like a cyclone’\(^49\)
- ‘Ben Johnson, how could you?’\(^50\)

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\(^44\) CBC, above n 41.

\(^45\) It seems part of the celebration was because many were quietly satisfied that the ‘shy uncomplicated soul’ had won: James Christie, ‘Carl Lewis Versus Ben Johnson - Duel at 100 Meters Looms For Track Stars’, *The Globe and Mail* (Toronto), 15 September 1988, C7. Johnson was also described as ‘the no nonsense…hard hat and lunch pail’, ‘uncomfortable in public’, ‘the son of a Jamaican telephone installer/larner/beekeeper’: Bud Shaw, ‘The 100-Meter Showdown: If Ever There's Been a Grudge Match in Track, it's Carl Lewis vs. Ben Johnson For the Title of World's Fastest Human.’ *The Atlanta Journal-Constitution* (Atlanta), 22 September 1988, E/03. Lewis was not as popular, seen as ‘glib, flashy’, Kelley, above n 43.

\(^46\) Jim Klobuchar, ‘Olympic Ideal Hadn't Too Far to Fall’, *Star Tribune* (Minneapolis), 29 September 1988, O18.

\(^47\) In this thesis public reaction will be gauged by published opinion (i.e. in newspapers and other news media). It is recognized that there is a danger in equating public opinion with published opinion since published opinion may well represent a very limited and biased sample size of public opinion. However, the focus in this thesis is primarily on the type of opinion which would have affected sports policy makers. It is unlikely that sports officials have the resources to undertake suitable sociological studies to accurately measure public opinion. Thus the only source of information about this is from the press or from personal contacts. So the opinion in the published media will be considered as a reasonable indication of this influence.

\(^48\) CBC, above n 41.

Johnson was described as a ‘national embarrassment’\(^{51}\)

‘[it was] a moment of great sorrow for all Canadians’\(^{52}\)

‘Canadians Cry Betrayal’\(^{53}\) and

But in Calgary, host of this year’s Winter Games, the Olympic Spirit was rekindled by Johnson’s victory. There had been two nights of partying on Electric Avenue. Now there it’s just empty streets and hangovers, and Prime Minister Brian Mulroney has to feel foolish for phoning Seoul to congratulate Johnson.\(^{54}\)

So strong were the feelings generated that he had to be physically protected from the reporters and others who lined the route on Johnson’s journey home.\(^{55}\) Johnson was immediately banned from competing on any Canadian team for life\(^{56}\) and subsequently disqualified from athletics for two years by the international federation.\(^{57}\) Five months after his suspension, the Canadian government appointed a Commission of Inquiry into the events and the wider issue of performance enhancing substances in elite sport.\(^{58}\) During this inquiry it was revealed by Johnson’s coach, Charlie Francis, that Johnson and his other athletes had used steroids in their training. Before the enquiry Johnson had denied the charge, saying ‘I have never knowingly taken illegal drugs and I would never embarrass my family, friends and my country, and the kids who love me’.\(^{59}\) However, he subsequently confessed to having used steroids.\(^{60}\) The Commission’s findings led to major changes in Canadian sport.

Given the initial reaction to the events of September 1988, it was foreseeable that Johnson’s name would become ineradicably linked with the ‘dark side’ of sport which doping now represents. He has been condemned to history as the demon\(^{61}\) and ‘pariah of

\(^{50}\) Ibid. Comment by Mr John Anderson, a news anchor on Canadian local radio as reported by David Owen.

\(^{51}\) Ibid.

\(^{52}\) Ibid.


\(^{54}\) Tom Weir, ‘Johnson Hurt Much More than Himself’, *USA Today* (McLean), 28 September 1988, O4E.


\(^{56}\) Denton, above n 53.

\(^{57}\) The IAAF (International Amateur Athletic Federation as it then was): Joe Concannon, ‘International Athletes’ Response: No to Drugs’, *The Boston Globe* (Boston), 28 September 1988, 42.

\(^{58}\) Dubin, above n 41.

\(^{59}\) CBC, above n 41.

\(^{60}\) However, he and his then medical advisor, Dr Astaphan, maintained that Johnson had never used stanozolol and that the positive drug test in Seoul must have been wrong, a claim the Commissioner Dubin rejected, Dubin above n 41, 308.

the sporting world’. 62 Although Jackson claims that ‘[i]n Canada, the initial shock and disbelief quickly turned to either sympathy or anger and resentment, as evidence of Johnson’s prolonged steroid use emerged.’ 63 In the popular media, sympathetic views of Johnson were, and still are, few and far between. As a direct effect of this negative publicity, Johnson lost his livelihood: all sponsorship deals vanished 64 and he has since had great difficulty finding employment. 65

The Ben Johnson story and the subsequent governmental inquiry have been described as a melodrama 66 and academic attention has been given to the significance and effect of that melodrama in terms of race relations in Canada and US/Canadian rivalries. It is quite clear that the events were highly dramatic and that this influenced both the official and public response. However, what is of interest here is not so much the reasons behind the reaction to Johnson’s positive but the singularity of that response.


In 2003 it was publicised that Carl Lewis, a well-known anti-doping activist, tested positive to prohibited stimulants two months before the 1988 Olympics but was allowed to compete after arguing that his use was inadvertent: see Mark Zeigler, ‘Three Strikes and King Carl Kept Running’, The San Diego Union - Tribune (San Diego), 17 April 2003, D; Dave Hannigan, ‘If We Can’t Believe in Carl Lewis, Then Who’s Left?’ Evidence that American Authorities Covered up Positive Drug Tests by Top US Athletes in the 1980s Means it’s Hard to Credit That Anyone Was Clean’, Sunday Tribune (Dublin), 20 April 2003, 4.

Lindford Christie tested positive to pseudoephedrine after the 200m race at the Seoul Olympics but was cleared when the IOC Doping Committee gave him the benefit of the doubt after he explained his positive test by his use of ginseng tea: Tim Adams, Since When Did Seb Coe Learn to Jive Talk (2005) The Guardian <http://observer.guardian.co.uk/osm/story/0,,1559783,00.html> at 31 August 2006. He was suspended from competition at the end of his career for two years after testing positive for the steroid nandrolone (Christie has always maintained his innocence). See also Rachel Corbett, New Studies Shed Light on Nandrolone (2001) <http://www.sportlaw.ca/articles/doping_nandrolone.php> at 14 September 2008; Tim Kerr, ‘Doped or Duped? The Nandrolone Jurisprudence’ (2001) 1(March) International Sports Law Review 97.

Dennis Mitchell, who placed fourth in the final after Johnson’s disqualification, was suspended by the IAAF for two years in 1998 after testing positive for testosterone. Desai Williams, who came 6th after the disqualification, admitted using steroids during the Dubin enquiry but never tested positive.

Ray Stewart, who came 7th, coached track and field athletes including Jerome Young who lost his gold medal at the Sydney Olympics after testing positive for drugs.

Andrew Jennings maintains that Professor Manfred Donike retested a number of the male athlete’s samples from the Seoul Olympics and discovered at least 50 had been taking steroids, Andrew Jennings, The New Lords of the Rings: Olympic Corruption and How to Buy Gold Medals, 1996 (London: Simon and Schuster), 245.


65 Belton, above n 62. Interestingly, others in the Seoul final went on to have careers in sport and related fields despite their own subsequent positive doping tests as discussed above. See Jacquelin Magnay, above n 62.

66 John MacAloon, 'Steroids and the State; Dubin, Melodrama and the Accomplishment of Innocence' (1990) 2(2) Public Culture 41.
The public response to Johnson’s positive doping test was universal in its condemnation; there was very little evidence of division in public opinion, at least in the popular media. Whether showing any sympathy for Johnson or not, writers resoundingly condemned what Johnson did: ‘What Ben Johnson did was profoundly wrong because he did it, not because he got caught.’ Very little was said in Johnson’s defence. Examples of comments include:

- ‘Johnson knew the rules, and so did his trainers. It is sad that his wondrous speed may have come, in some way, from the chemistry lab instead of from the deep well of human effort and endurance that the Olympics is designed to tap.’

- ‘the absurdity that is Ben Johnson…Ben Johnson now knows he took a chance and it carried a price.’

- ‘Ben Johnson is the stained symbol of steroid use in the Olympics…’

- ‘To win an Olympic gold medal is one of the highest honours an athlete can seek. To win with the help of body-altering chemicals cheapens the recipient and cheats the competitors who play by the rules.’

- ‘Ben Johnson always ran like a man possessed. Now, it turns out, at least, part of the time he was…Ben Johnson made a deal with the devil and the account is coming due.’

- ‘I think the kids of Canada, and probably elsewhere, felt violated.’

- ‘Ben Johnson cheated…Rather than having achieved, Johnson deceived.’

- ‘He has gone from Ben Johnson to has-Ben Johnson.’

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67 Richard Estrada, ‘Learning From the Olympics’, The Dallas Morning Herald (Dallas), 28 September 1988, 26A.
68 The only partial departure in the media were occasional voices reminding the public that Johnson was just one of a large number of athletes who partook in this kind of activity or that some blame must be levelled at the competitive nature of modern elite sport: see Klobuchar, above n 46. These two themes came through strongly in the Dubin inquiry, above n 41.
69 ‘Stripping Ben’s Medal Upholds Game’s Integrity’, The Omaha World-Herald (Omaha), 29 September 1988, 60.
72 ‘Stripping Ben’s Medal Upholds Game’s Integrity’, The Omaha World-Herald (Omaha), 29 September 1988, 60.
74 Klobuchar, above n 46.
75 Denton, above n 53.
76 Weir, above n 54.
Even a writer who saw the fallout from the scandal as being a huge overreaction still agreed that ‘Ben was wrong. Ben took the place on the Olympic team of some kid who would have gone to Seoul and tried his best without test tube muscles. Ben let down his team mates.’

Thus ‘Ben Johnson remains one of the most infamous and controversial athletes in both Canadian and Olympic history.’ Simon Barnes has written:

> These days only drugs are immoral and Ben Johnson is the demon of all demons... But Johnson risked his liver and his virility and his psychological health for us, and we don’t relish that at all... We like to make sure that everyone associated with drugs is a Johnsonesque demon... Thus Johnson in general and sport in particular have become a convenient receptacle for the world’s terror of drugs...and the ultimate symbol of this fear and loathing of drugs is the figure of Ben Johnson. Sport in general and Johnson in particular have become a vehicle for our self-righteousness about the issue of drugs. Drugs is not what we do, it’s what people such as Johnson do. And, it is believed, they deserve everything that happens to them. And, by the same token, it proves that what we do is All Right.

Although a number of high profile doping scandals over subsequent years may have dulled the shock and surprise surrounding the scandal, there has been no softening of attitudes towards Johnson’s actions.

Thus, the public reaction to Ben Johnson’s story was, and remains, both predictable and homogenous. But is the treatment of Johnson typical of public reaction to doping? Subsequent doping scandals also prompted similar reactions and show that it was not the melodrama of these events alone which can explain the cohesive public reaction to Johnson’s situation. Each new public doping scandal, with its associated dramas, produces a similar cohesive response.

2  Marion Jones Confession

(a) The Background

In October 2007 US Olympic athletic champion, Marion Jones, confessed to having lied to federal authorities regarding her use of prohibited performance enhancing substances. Jones had been questioned in the course of a federal investigation into the BALCO and had denied that she had used prohibited substances throughout the course of the investigation which lasted for a number of years. In 2007 Jones finally confessed to lying to the

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78 Jackson, above n 63, 122.
79 Barnes, above n 61.
80 For an example of Johnson’s acts being put in context see Mary Jollimore, ‘Was Johnson Singled Out?’ 2004 164(3) *Time*, 46.
investigators about her knowledge and use of the designer steroid, ‘THG’ (tetrahydrogestrinone).^81

In a statement immediately after her court confession Jones said:

I have let my country down and I have let myself down. It is with a great amount of shame I stand before you and tell you that I have betrayed your trust. I recognise that by saying I’m deeply sorry, it might not be enough and sufficient to address the pain and hurt that I’ve caused you. Therefore, I want to ask your forgiveness for my actions, and I hope that you can find it in your heart to forgive me.^82

Jones returned her Olympic medals to the IOC soon after making her confession^83 and the International Association of Athletics Federations (IAAF) wiped all records she had set after 1 September 2000 from their books. On 11 January 2008 she was sentenced to six months imprisonment for lying to the investigators.^85

(b) The Reaction

The public reaction to this confession of doping was equally as unified as the response to Johnson’s doping positive. The reaction was predominantly shock and scandal over, not only her drug-taking, but also the extent of her lies regarding the issue: Jones having filed a defamation suit against the owner of BALCO who publicly claimed that she had used THG. There was also an element of vindication as the suspicions which had been hinted at in the media for some time were proved true. It seems that the only difference of opinion over the Jones story centred on the extent to which her confession (albeit belated) should atone for her sins. Some writers applauded Jones for finally telling the truth while others refused to give Jones any approbation for such a late confession. However, her initial conduct — taking prohibited substances and lying about it — attracted universal censure. No doubts were expressed about the morality of what she had done.^86 Judgement was passed on both her steroid use and her lying.

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^86 An interesting opinion, written for the Geelong Advertiser, suggests that we should be very slow to condemn Jones since cheating is part our culture. The evidence of this is found in networking to get ahead in business. Nevertheless, the opinion condemns both networking and Jones’ actions: ‘Cheating Part of Our Culture’, Geelong Advertiser (Geelong), 10 October 2007, 23.
Some examples of media statements include:

- ‘Sprinter’s Doping Shame.’[^87]
- ‘Her Great Shame.’[^88]
- ‘After consistently professing her drug-use innocence, Jones is finally coming clean, so to speak. That is a good thing. The bad thing is the lousy example she set for young athletes to whom she was a role model.’[^89]
- ‘Oh yes, Jones says she did not know she had been given steroids — falling back on the “someone fed me flaxseed oil” defence.’[^90]
- ‘Jones betrayal has robbed us of our faith…but deep down there is a horrible mix of sadness, disappointment and anger bubbling away like demonic butterflies…Little did us sports lovers know then she was making fools of us.’[^91]
- ‘She is now a liar and a cheat, her sins laid bare for everyone to see.’[^92]

### 3 Other Scandals

All major doping scandals of the last few decades have given rise to similarly homogenous reactions: some examples are the revelations of the doping programme undertaken by the German Democratic Republic (GDR) in the 1970s and 1980s[^93] and the circumstances of the Mark French affair in 2004 in Australia (discussed below). To argue that revelations of doping in elite sport give rise to consistent public responses is not to claim that each new revelation elicits exactly the same response. Naturally, the public reaction to each scandal varied in intensity according to the details of the circumstances. The lack of knowledge or consent involved in the case of the East German athletes quite appropriately produced much more public outrage than incidents where the athlete has knowingly and intentionally used doping agents. What did not vary was the unquestioning commitment to both the principle of prohibitive anti-doping policy and the operational system in place to deal with

[^87]: ‘Sprinter’s Doping Shame’, *Scottish Daily Record* (Glasgow), 6 October 2007, 9.
[^88]: New York Daily News, above n 82.
[^89]: Ibid.
[^90]: Ibid.
[^92]: ‘Olympic Hero’ Admits Steroid Use, Dishonesty’, *The St Petersburg Times* (St Petersburg), 9 October 2007, 79.
Furthermore, as will be discussed later in the thesis, even where public sentiment does not correlate with the law, there appears to be consensus on the response to ‘doping scandals’. For instance, the reaction to Andrea Raducan’s disqualification from the Sydney Olympics, although legal under the applicable anti-doping law, was equally homogenous. The Romanian gymnast was treated with almost universal respect and sympathy. Similarly, the Australian response to the disqualification of Alex Watson was characterised by widespread criticism of the IOC’s approach.

In the commentary surrounding these incidents, public reaction was in agreement regarding the moral dimension of the activities: practices viewed as ‘doping’ were seen as an evil that must be dealt with by the severest means possible. But the homogeneity of the public response to doping does not end with reactions to revelations of specific examples of doping by athletes. Rhetoric over the general issue of doping is also highly repetitive. Some examples of the rhetoric involved in the reporting of these scandals and the anti-doping ‘war’ will be considered below.

B Public Opinion and Anti-Doping Rhetoric

Anti-doping rhetoric universally characterises doping as a kind of evil or cancer which, if left untreated, spreads and infects the very essentials of sport. Like the public response to doping scandals, there appears only one acceptable type of language when discussing the issue of doping.

One of the most notorious condemnations of doping in modern times was delivered by Juan Antonio Samaranch, then president of the IOC:

Doping equals death. Death psychologically, with the profound, sometimes irreversible alteration of the body’s normal processes through inexcusable manipulation. Physical death, as certain tragic cases in recent years have shown. And then also the death of the

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94 It should be noted here that these comments do not apply to academic criticism. The focus of these comments is purely on public, non-academic comment as found in the popular press.

95 See for example Sue Williams, 'Life Goes On....A Perfect Score as Raducan Braves the World', The Sydney Morning Herald (Sydney), 29 September 2000, 4; 'An Olympic Victim of Zero Tolerance', Omaha World-Herald (Omaha), 27 September 2000, 26; Sam Venable, 'And For Goodness Sake, Don't Let 'Em Touch a Kleenex', The Knoxville News-Sentinel (Knoxville), 28 September 2000, A2 and Nancy Armour, 'In Her Heart, Raducan Still Has Two Gold Medals', Associated Press 29 September 2000. Note also that other incidents will be considered in Chapter Two. These incidents do not involve ‘doping’ under the legal definition but were treated as such by public opinion. Still there was almost universal disapproval.


97 The term ‘anti-doping war’ is used in a similar way to the ‘war on drugs’ and there are many similarities between the two ‘wars’. Like the ‘war on drugs’, the phrase is a little ambiguous and difficult to define. In this thesis the term ‘anti-doping war’ will be used to refer to anti-doping messages in the media and other forums, as well as official anti-doping policy.
spirit and intellect, by the acceptance of cheating. And finally moral death, by placing oneself outside the rules of conduct demanded by any human society.\textsuperscript{98}

Samaranch used this kind of language frequently, referring to doping as ‘a series of acts which transgress and violate certain immutable principles’.\textsuperscript{99} He characterised athletes engaged in doping as ‘using artificial means to provoke natural physiological reactions, or by attempting with various tricks to hide the irrefutable evidence of their dishonest actions.’\textsuperscript{100} Not confined to the IOC president, this kind of emotive, hyperbolic language is characteristic of the entire debate. Hints of it are found in the WADA Code. The fundamental rationale statement for the Code states: ‘Anti-doping programs seek to preserve what is intrinsically valuable about sport’ and ‘Doping is fundamentally contrary to the spirit of sport.’\textsuperscript{101}

It is not just the sports authorities that are convinced that doping is evil — public opinion appears to condemn it just as strongly. The consistency in public outrage is expressed in public support of tough anti-doping measures. Houlihan notes that ‘current [anti-doping] policy is, though, capable of being strongly defended on the basis of the weight of democratic community condemnation and pervasive disapproval.’\textsuperscript{102} The pervasive disapproval of doping is visible in the intense reaction provoked each time a new doping scandal arises, such as the ones discussed above. Calls for strict application of anti-doping policy are frequently made in a similar kind of emotional language to that used by anti-doping officials. For instance, in responding to the news of Dwain Chamber’s suspension for drug use, the famous British runner, Sebastian Coe, wrote in 2004: ‘we cannot, without blinding reason and cause, move one millimetre from strict liability — if we do, the battle to save sport is lost.’ Or, in the wake of the BALCO investigation, reporter, Sally Jenkins, wrote:

Let’s define exactly what performance enhancers are: non-sporting ways to gain an advantage that are unhealthy when abused, and which make it difficult for other competitors not to use them, too, in order to keep up. They are an insidious and seductive chain reaction of evil, because anyone who aspires to be great believes they have to use a substance in order to become so.\textsuperscript{103}


\textsuperscript{99} Ibid.

\textsuperscript{100} Ibid, 242.

\textsuperscript{101} WADA Code, 3.


\textsuperscript{103} This emotive language was in an article in which Jenkins questions whether drugs should be banned in sport anymore. Even in this context the issue attracts emotive and colourful condemnation: Sally Jenkins, ‘Steroids,
Language of disapproval and condemnation is extremely consistent. There is very little room to doubt that doping is a persistent evil and the number one issue in sport today!  

IV CONCLUSION: THE APPARENT CONSENSUS

From the brief perusal of various aspects of the modern anti-doping landscape it can be seen that there is a strong consistency in publicly expressed opinions on the topic. It has also been demonstrated that the unity of opinion regarding doping is not limited to public opinion, the developments in official international anti-doping policy in the last ten years shows an unprecedented level of unity. Not only has WADA been established with inter-governmental support and the WADA Code been almost universally accepted by both sports federations and national governments, there has also been major changes at national government level to adapt to the requirements of this Code. The fact that national governments have been willing and eager to make these changes — often at great expense — demonstrates the high level of political commitment to the collective approach. No doubt this political commitment is due to the perceived level of public support.

Not only is there homogeneity in terms of official policy but public responses to doping scandals involving individual athletes and the rhetoric in the anti-doping war is highly repetitive in its message. Such is the potency of this ‘group think’ that there is a strong sense that to speak in a different way about doping would amount to betrayal. For example, it is quite common to read commentary which presents alternative suggestions for anti-doping programmes to be prefaced with a disclaimer stating that the author is not condoning doping or by re-emphasising the worthy goals of anti-doping programmes.


For example Dick Pound, Inside Dope: How Drugs are the Biggest Threat to Sports, Why we Should Care and What Can be Done About Them, 2006 (Ontario: Wiley Canada).

Eg Pat Connolly begins her article, ‘It’s Time to Ban Punitive Drug Testing’ by stating: ‘There is more confusion about drugs in sport today than ever. I have long been an opponent of drug use in sport, actively pushing for legislation and drug testing. But recently I have come to the conclusion that there should be only limited punitive drug testing...’ Pat Connolly, ‘It’s Time to End Punitive Drug Testing’, The New York Times (New York), 28 October 1990, A1. Norman Fost, ‘Banning Drugs in Sport: A Skeptical View’ (1986) 1986(August) Hastings Centre Report 5, 5 states: ‘Let me emphasize my personal distaste for drugs in sport, particularly performance-enhancing and recreational drugs. As an athlete I would not use them. As a physician, I would not prescribe them. As a father I would urge my children to avoid them. As a citizen, I deplore their wide-spread use...’

V WHAT LIES BENEATH THE APPARENT CONSENSUS?

The cohesive nature of the public reaction to doping scandals, the existence of WADA and the acceptance of the WADA Code may, at first blush, suggest that anti-doping policy is clear, unproblematic and universally acceptable. The consistency which has been achieved in anti-doping policy suggests, at least at a superficial level, the approach must be well-defined, lucid and consistent. At the very least, it could be assumed that the fundamentals of the policy are strong and that if the policy presents any difficulties, they must only appear on the very perimeter of the matter.

However, the apparently settled state that anti-doping policy has reached belies the fact that anti-doping policy is fraught with inconsistency and is characterised by a lack of clarity regarding some of the most basic issues. Below the unified surface of public reaction lies a perplexing web of confusion and questionable assumptions. Even the most basic questions such as ‘what is doping?’ and ‘why do we prohibit it?’ are far from clear; that lack of clarity has significant effects on the operation of anti-doping policy.

A Background: A Summary of Present Anti-Doping Policy

In order to appreciate the discussion below regarding some of the confusions in modern anti-doping policy, it is necessary to have some understanding of present anti-doping policy. Here, a brief summary of how the WADA Code works will be presented.

Up until 2003 all sports and all sports competitions had their own, unique anti-doping policy. Many, however, were modelled on the OMADC which was applicable to the Olympic Games. That policy also became the basis of the WADA Code. As stated above, all Olympic Sports and countries have adopted the WADA Code, as have many other major sports.\(^\text{107}\)

Under the Code there are numerous ways in which an athlete can be found guilty of doping. Despite the number of different ‘doping violations’, until recently the focus has been on drug testing. This process now involves random, unannounced testing of any athlete who is subject to the Code.\(^\text{108}\) In order to facilitate unannounced testing, the athlete

\(^{107}\) However, each sport still has its own anti-doping code which is based on the WADA Code. As Tarasti, above n 10, 17, notes, signatories to the Code are required to adopt all provisions in substance under the 2007 version (p 9 of 2007 version) but it is still not clear which articles are mandatory and which are not.

\(^{108}\) The anti-doping agency establishes what, in Australia, is called the Registered Testing Pool of athletes. ‘An athlete’s inclusion in the RTP is based on a number of factors related to the athlete, level of competition, sport and ASADA’s anti-doping program requirements. ASADA’s RTP is constantly reviewed and updated and athletes can be notified for inclusion or removal on to the RTP at any time.’ Australian Sports Anti-Doping Agency,
is required to provide information to the appropriate body as to their whereabouts at all times. Australian athletes need to submit ‘Athletes Whereabouts’ forms to ASADA in which the athlete nominates a location where they will be for one hour each day for sample collection.

Where a doping violation is proved via a positive drug test, doping is a strict liability offence.109 Unless able to prove that the test result was inaccurate, the athlete will be sanctioned, regardless of their subjective state of mind. Consequently, athletes who inadvertently or accidentally ingest performance enhancing substances are guilty of ‘doping’. The Code also includes a provision which applies the strict liability approach where the ingested substance gave them no advantage over their peers.

There are other forms of doping violations: use or attempted use of a prohibited substance,110 refusal to submit to testing,111 failure to provide whereabouts information,112 tampering with a sample,113 and possession, trafficking and administration of a prohibited substance.114 Although historically the strict liability offence with a positive drug test was the focus of doping prosecutions, an increasing emphasis is now being placed on these ‘non-analytical’ forms of proving doping. At this stage, however, drug testing and the strict liability anti-doping violation still appear to be the major focus of anti-doping policy.

The WADA Code describes the doping violations by reference to a list which contains categories of performance enhancing substances and methods, some of which are prohibited only within competition, others both during and outside competition. An example in the second category is anabolic steroids – predominately training drugs, the use of these drugs is primarily outside competition. As most international sports now have the

109 WADA Code, Article 2.1. The commentary to the revised Code now indicates that the ‘use of’ provision is also a strict liability offence, WADA Code, Article 2.2.1. This has clarified the uncertainty that surrounded the term ‘use of’ both before the establishment of the Code [see comments of the IAAF anti-doping panel in the Krabbe case, quoted in Lauri Tarasti, Legal Solutions in International Doping Cases, 2000 (Milan: SEP Editrice), 70] and after the adoption of the first version of the Code. See comments by the CAS panel in the French appeal: French v the Australian Sports Commission and Cycling Australia, Appeal Partial Award Pronounced by the Court of Arbitration for Sport Oceania Registry, CAS 2004/A/651, 11 July 2005. This point will be discussed more fully in Chapter Two.

110 WADA Code Article 2.2.

111 WADA Code Article 2.3

112 WADA Code Article 2.4

113 WADA Code Article 2.5

114 WADA Code Article 2.6, 2.7 and 2.8.
WADA Code as their doping policy, almost all athletes are now subjected to a single prohibited list.\footnote{WADA Code 2008 Prohibited List. There is a possibility of a particular sport adding to the List by agreement with WADA if a certain substance is deemed appropriate for inclusion for that specific sport. WADA Code, Article 4.2. See WADA Code 2008 Prohibited List, 10, for the list of substances for specific sports.}

The penalties for doping are now universally applicable. For a first offence, an athlete will receive a two year suspension and a life suspension for a second offence. The Code does contain some provisions for reducing the sanction in ‘exceptional circumstances’\footnote{WADA Code Article 10.5} or where certain ‘specified substances’ are involved.\footnote{WADA Code Article 10.3. The Specified Substances Provisions are found in Article 10.4 in the revised Code.} However, where an anti-doping rule violation takes place, disqualification from that particular competition and event will automatically ensue; only the additional ineligibility period will be open to reduction or elimination.\footnote{WADA Code Articles 9 and 10.1 respectively.} Cases under the exceptional circumstances provisions have so far shown that these provisions are difficult to trigger.\footnote{Richard McLaren, ‘Exceptional Circumstances: Is it Strict?’ (2005) 2 (May) International Sports Law Review 32; Jessica K Foschi, ‘A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport’ (2006) 16 Duke Journal of Comparative and International Law 457 and Anne Amos, ‘Inadvertent Doping and the WADA Code: Can Athletes with a Cold Breathe Easy?’ (2007) 19(1) Bond Law Review 1; Peter Charlish and Rob Heywood, ‘Anti-Doping Inconsistencies Snare American Star’ (2007) 8 Texas Review of Entertainment and Sports Law 79, 100. Note that under the revised Code these sections will apply to more types of anti-doping rule violations and thus may make these provisions easier to trigger.}

This very brief review does not, of course, cover all the details of the WADA Code. Rather than providing a full analysis of all the legal issues in the Code, the intention here is to provide an overview of some of the fundamental parts of the Code in order to provide a framework for subsequent discussion in this, and later chapters of the thesis.

B Far from Consensus: Ambiguities of the ‘Anti-Doping War’\footnote{In this thesis the term ‘Anti-doping War’ will be used to include references to anti-doping references in the media as well as official anti-doping policy.}

1 Miscellaneous Mysteries of Anti-Doping Policy

Any impression that anti-doping policy is unproblematic is far from accurate. Even a transitory observation of the current anti-doping approach reveals many questions and problems.

For example, questions can be raised as to why the use of ergogenic substances in sport is perceived as such an ‘evil’ thing when what is affected is sport: something which, for the vast majority of people, simply fills leisure time and does not affect their survival or long term happiness to any great extent. Questions also exist regarding the difference between doping rules and doping discourse: why are all prohibited substances and methods treated
equally in law — the same sanctions apply — when they are not treated equally in public opinion? For instance, there is a vast difference between the manner in which Ben Johnson, on the one hand, and Samantha Riley, Shane Warne, or Andrea Raducan on the other, were treated by the popular press. While both Ben Johnson and Andrea Raducan were punished in a similar way (both lost their Olympic gold medals), Johnson was demonised by the media while Raducan received sympathy. There was also a difference between the treatment of Ben Johnson compared to the other competitors in that race who subsequently tested positive for prohibited substances. The differences in guilt are obvious to the public: intentional dopers are hated while inadvertent ones are often given sympathy. Why is this not reflected in doping law?

Further questions exist regarding the persistence of anti-doping policies. Most experts agree that drug testing is largely ineffective in deterring the use of prohibited substances by athletes. For example, well known steroid experts Charles Yesalis, Michael Bahrke and James E Wright, in 2000, referred to the ‘impotence of drug testing’ and in 2004 Yesalis

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121 Assuming that the exceptional circumstances and specified substances provisions discussed above do not apply. It should be noted here that the recent changes to the WADA Code makes many substances ‘specified substances’ (exceptions include anabolic steroids). This means that in many situations the athlete will be able to reduce their punishment (the minimum sanction would be disqualification and a reprimand) if they are able to show how the substance came to be in their system and that it was not ingested in order to improve their performance: see WADA Code 2007 Code Amendments, Article 10.4. It should be noted here that under the OMADC (Article 3) there were different sanctions according to the specific substance involved, anabolic steroids attracting the severest punishments: Robert C.R. Siekmann, Janwillem Soek and Andrea Bellani, Doping Rules of International Sports Organisations (1999), 600-601. However, under the WADA Code they are all subjected to the same sanctions unless the specified substances provisions apply.

122 The Australian swimmer who took a Digesic tablet. Riley was resoundingly forgiven for trusting her coach and her place as media darling did not change: T Magdalinski, ‘Drugs Inside Sport: The Rehabilitation of Samantha Riley’ (2001) 1(2) Sporting Traditions 17. See also Caroline Overington, ‘When it Comes to Drugs in Sport, Australians Have No Right to Cry ‘Foul”, The Age (Melbourne), 30 September 2000, 4.


124 Discussed more fully in Chapter Two. Raducan tested positive for pseudoephedrine at the 2000 Olympics. Attitudes expressed in the media were overwhelmingly sympathetic to her. See for example ‘This Time, Back the Drug Cheat’, St Petersburg Times (St Petersburg), 30 September 2000, 1C; Peter Bossley, ‘Failing the Drugs Test But Passing the Test of Nobility’, The Sentinel (Stoke on Trent), 1 October 2000 and Sue Williams, ‘Life Goes On....A Perfect Score as Raducan Braves the World’, The Sydney Morning Herald (Sydney), 29 September 2000, 4. Note that pseudoephedrine has now been removed from the WADA Code Prohibited List. The argument still stands for other substances such as marijuana and alcohol.


and Bahrke claimed that ‘unless you are unlucky, careless or have an I.Q. somewhere at or below room temperature, you are probably not going to be caught by a drug test.’

The criticisms of modern sport drug testing programmes include the failure to strategically test athletes at appropriate times and the fact that analytical tests yield both false negatives (doped athletes do not test positive) and false positives (non-doped athletes test positive). Both these criticisms of the analytical aspect of drug testing have wide implications. Yet drug testing has continued to increase in amount and expense over the years. Why pour resources into something that is so imprecise and ineffective?

These are just a few examples of some of the more obvious mysteries which arise in relation to the ‘anti-doping war’. These conundrums are important in their own right, but there are two more difficult issues in current anti-doping policy which strike at the very heart of the whole ‘war on drugs in sport’.

2 The Basic Issues: Ambiguities in Doping Definition and Rationales

Many difficulties which arise in anti-doping policy can be traced back to a lack of clarity regarding two basic questions: what is doping and why should it be prohibited? Chapters Two and Three of this thesis will detail some profound problems with the way in which doping is currently defined and the justifications for the present policy. The ambiguities relating to these two aspects of anti-doping policy are not simply products of the current approach, they have existed for as long as anti-doping policy has. Therefore, by way of introduction to the problematic nature of these dimensions of doping policy, in this chapter some of the historic confusions over doping definition and doping rationales will be reviewed. This history will not only show that doping definition and doping rationales have always been characterised by difficulties but will also provide some context for the subsequent argument in Chapters Two and Three where current confusions arising from these two aspects of doping policy will be considered.

127 Yesalis and Bahrke, above n 125.
128 For an example of these kinds of criticisms see David L Black, 'Doping Control Testing Policies and Procedure: A Critique' in Wayne Wilson and Edward Derse (eds), Doping in Elite Sport: The Politics of Drugs in the Olympic Movement, 2001 (Champaign: Human Kinetics Publishers Inc) 29 who discusses the problem of false positives; R. Craig Kammerer, 'Drug Testing and Anabolic Steroids' in Charles E Yesalis (ed), Anabolic Steroids in Sport and Exercise (2nd ed, 2000) 415 and R. Craig Kammerer, 'Drug Testing in Sport and Exercise' in Michael S Bahrke and Charles E Yesalis (eds), Performance-Enhancing Substances in Sport and Exercise, 2002 (Champaign: Human Kinetics) 323 for examples of some of the problems of false negatives. Interestingly most critics of current drug testing programmes see the way forward as better testing, better sample collection and less conflict of interest on the part of the administrators of the programme rather than a different type of regulatory system. See for example, Black, this note, 38ff and Kammerer, this note, 334.
It is important to note first that the two questions — what is doping and why prohibit it — are interlinked, since determining which practices constitute doping can only be done by defining which practices are morally reprehensible. This, in turn, hinges on defining what is, in principle, repugnant about these practices. For the sake of clarity the two issues will be considered separately here.

C Far from Consensus: The Historic Confusion over Doping Definition

1 Doping Definition: The Deviant Behaviour

(a) General Concepts: ‘Theoretical Definition’

Since the late 1920s when anti-doping policy began, the range of practices that have fallen under the definition of ‘doping’ has substantially narrowed. In the 1930s ‘doping’ was ‘used in a general sense to describe any method of improving athletic performance temporarily, either during training or in connection with competitive events’. In the 1930s, Boje listed under the category of ‘doping’:

Apart from actual drugs, such as Benzedrine, cocaine, caffeine, coramine and others, the agents used for ‘doping’ also include dietetic preparations, glucose, vitamins, and various non-toxic salts such as phosphates, which are also normally consumed in food.

The term also covers the inhalation of pure oxygen and ultraviolet irradiation, indeed even massage and the encouragement shouted to competitors in athletic contests’ can be regarded as falling within the concept.

Now, however, the term technically only applies to the use of those substances and methods specifically identified on the relevant prohibited list. Of course, in everyday language, ‘doping’ also refers to things outside the list which are still viewed as illegitimate forms of performance enhancement. For instance, in 1998 Juan Antonio Samaranch was quoted in the newspaper, *El Mundo*, as saying ‘doping now is everything that, firstly is harmful to an athlete’s health and, secondly, artificially augments his performance. If it’s just the second case, for me that’s not doping. If it’s the first case it

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129 The term ‘theoretical definition’ is here used in opposition to ‘operational definition’ to connote the ideas that the general population have in mind when they discuss doping as a general concept.


131 Ibid. Interestingly Boje opens his article by stating that the term was originally used to describe ‘certain methods designed to augment the functional efficiency of athletes by means of highly active drugs.’ It appears that the concept had widened by the time of the first anti-doping policies only to be narrowed again to present conceptions. See also John Hoberman, *Mortal Engines: the Science of Performance and the Dehumanisation of Sport*, 1992 (Ontario: The Free Press), Chapter 4, 100ff for further examples of what might have been considered unacceptable performance enhancement in the past.
is.'\textsuperscript{132} Even in common usage, however, the term does not have the same wide connotations that it did in the 1930s; it appears to be limited to substances and methods which are identifiable as sports ‘drugs’ (this point is considered further in later chapters).\textsuperscript{133}

There is, then, a distinct difference between the way that ‘doping’ was defined when anti-doping first began and the present conception of the term. The definition of doping has proved to be a very difficult problem for anti-doping officials over the intervening years. It will be argued in Chapter Two that when the current theoretical definition of doping is analysed, it becomes evident that there is deep confusion in public opinion as to which practices should be defined as doping. The aspects of doping definition where these perplexities are particularly evident include the significance of the intent of the athlete, which substances are, or should be, included on the prohibited list and the significance of the route of entry of the substance. All of these aspects of doping definition in public discourse will be considered in Chapter Two.

\textit{(b) Legal Definition}

The confusions over doping definition are, perhaps surprisingly, not restricted to public opinion — the legal definition of doping has been, and remains, one of the most difficult aspects of anti-doping policy. In 1963, a convention of European sports governing bodies produced what appears to be the first ‘doping’ definition:

\begin{quote}
The administration to, or use by, a competing athlete of any substance foreign to the body or any physiological substance taken in abnormal quantity or by an abnormal route of entry into the body, with the sole intention of increasing in an artificial and unfair manner his performance in competition.\textsuperscript{134}
\end{quote}

Houlihan notes that although there were obvious weaknesses in this first definition (which was adopted by the IOC and other bodies) it marked the beginning of an ‘intense discussion by all the key bodies interested in the definition of doping’.\textsuperscript{135} Within a year a number of similar attempts to define the offence appeared. By 1964, Ariens was able to say ‘[c]oncerning the concept of doping there is quite a variety of opinions…’, stating that

\textsuperscript{132} These comments caused a huge public controversy and the IOC attempted to water down his comments: see MacAlloon, above n 34, 223.

\textsuperscript{133} This issue will be discussed in more detail later in the thesis. It is noted here that the \textit{WADA Code 2008 Prohibited List}, M1 to M3, also contains ‘methods’ such as blood doping which defies the categorisation of a ‘drug’. However, it will be argued later that these types of methods are prohibited because of their symbolic links with drugs through the use of needles and other drug related paraphernalia.

\textsuperscript{134} Houlihan, above n 102, 130. See also Lan Barnes, ‘Olympic Drug Testing: Improvements Without Progress’ (1980) 8(6) \textit{The Physician and Sports Medicine} 21, 22. Note that Paul Dimeo, \textit{A History of Drug Use in Sport 1876-1976: Beyond Good and Evil}, 2007 (London: Routledge), 95, suggests that there was a previous doping definition — in 1972 — produced by the Federazione Medico-Sportiva Italiana, which strongly influenced the first international meeting held by the Council of Europe committee in 1963.

\textsuperscript{135} Ibid.
there were ‘divergent definitions’.\textsuperscript{136} He went on to list a number of definitions proposed by various organisations:

- The Dutch Federation of Medical Sport-Examination Centres: ‘the application of unnatural means by sportsmen with intent to increase their performances.’

- The German League of Sports-Doctors: ‘the use of any drug – effective or not given with the intent to increase the performances in competition.’

- The IOC: ‘the use of drugs and artificial stimulants of any kind is condemned and any person offering or accepting doping in any form whatsoever, cannot compete in the Olympic Games.’

- Council of Europe Committee for Out-Of-School Education:

  the administration to, or the use by, a healthy individual of an agent foreign to the organism by whatsoever route introduced, or of physiological substances in abnormal quantities or introduced by an abnormal route with the sole object of increasing artificially and in an unfair manner the performance of that subject while participating in a competition.\textsuperscript{137}

Ariens went on to say:

Most definitions are restricted to the increase in the performance by the use of drugs...Furthermore, it is clear that not the effectiveness of the artificial means used, but the intention with which they are used, namely, the increase of the performance by these means, turns the scale.\textsuperscript{138}

Also in 1964, the British Association of Sports and Medicine (BASM) published a statement which included an extended definition of doping:

The administration to or use by a healthy individual while taking part in a sporting competition of:

a) Any chemical agent or substance not normally present in the body and which does not play either an essential or normal part in the day to day biochemical environment or processes of metabolism, regardless of dosage, preparation or route of administration,

and/or

Any chemical agent or substance which plays an essential or normal part in the day to day processes or metabolism or forms a normal part of the biochemical environment, when introduced in abnormal quantities and/or by abnormal route of entry and/or in abnormal form,


\textsuperscript{137} Ibid, 27-28.

\textsuperscript{138} Ibid.
Either or both of which (a. and/or b.) are present in the body of the individual during competition for the PURPOSE or with the EFFECT of modifying artificially the performance of the individual during competition.

DOPING IS ALSO:-

2. The administration to or use by an individual temporarily or permanently disabled by disease or injury who takes part in a sporting competition of:-

c) Any chemical agent or substance regardless of nature, dosage, preparation or route of administration, for the sole purpose of alleviating or curing the disability or its cause, which, being present in the body of the individual during competition would, BY ITS SECONDARY effects improve artificially the performance of that individual during competition.\(^{139}\)

Despite the inadequacies of these types of definitions,\(^{140}\) many anti-doping policies soon employed similar definitions with only minor alterations. At this stage in history, doping was consistently defined as an offence of intent — intentionally attempting to enhance performance.\(^{141}\)

It was not until 1967, when the IOC published its first list of banned substances and practices,\(^{142}\) that doping definitions began to evolve towards a strict liability definition.\(^{143}\) The focus changed from the subjective intent to the presence of particular banned substances in the athlete’s body fluids, detected through an ever-increasing battery of drug tests. By 1972 it was clear that intent was no longer needed to prove a doping offence. The IOC’s decision against US swimmer, Rick DeMont, was the first to show the irrelevancy of intent. DeMont lost his gold medal in the 400m freestyle following a

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\(^{140}\) Houlihan, above n 102, 130, points out that phrases such as ‘any substance foreign to the body’, ‘abnormal quantities’, ‘abnormal route of entry’ and ‘with sole intention’ are obviously problematic.

\(^{141}\) See for example the Council of Europe’s 1967 definition in Houlihan, above n 102, 130 and the IOC 1967 definition in Terry Todd, ‘Anabolic Steroids: The Gremlins of Sport’ (1987) 14(1) *Journal of Sport History* 87, 90. These definitions refer to the ‘sole purpose’ or ‘exclusive aim’ of the athlete respectively. There was also a focus at this stage on ‘abnormality’, and ‘unnaturalness’. All of these terms correlate with suggested rationales for anti-doping policy which will be discussed in the next chapter.

\(^{142}\) Note that Jan Todd and Terry Todd date the first IOC *Prohibited List* from 1967, see Jan Todd and Terry Todd, ‘Significant Events in the History of Drug Testing and the Olympic Movement’ in Wayne Wilson and Edward Derse (Eds), *Doping In Elite Sport: The Politics of Drugs in the Olympic Movement*, 2001 (Champaign: Human Kinetics Publishers Inc) 68, while Houlihan, above n 102, 132 and Commonwealth of Australia, Senate Standing Committee on Environment, Recreation and the Arts, ‘Drugs in Sport: An Interim Report’ (Canberra, Australian Government Publishing Service, 1989) 82 date the list from 1971. The IOC decided on a list of prohibited substances to be attached to their entry form for the 1968 Mexico Olympics in 1967: see International Olympic Committee, ‘Extracts of the Minutes of the 65th Session of the International Olympic Committee’ (1967) 98-99 (May-August) *Bulletin du Comité International Olympique* 89. It may have been 1971 before the list was published more widely.

\(^{143}\) It should be noted here that it is difficult to pinpoint an exact point in time when the strict liability rule developed because anti-doping policies in this period were often unwritten or have not been preserved. Even the IOC, the self-proclaimed leader in the field, did not actually have a legal document for its anti-doping policy until 1996: see Pound, above n 40, 69.
positive doping test for ephedrine, a substance present in his long-term asthma medication. He had reported using this medication on his official medical records before the event.  

Between 1971 and 2003, strict liability offences became increasingly important, to the point that this type of offence has been called the ‘fundamental cornerstone’ of anti-doping policies. There have been both legal and academic challenges to the strict liability doping offence. Despite these attacks, sports organisations, the CAS and domestic courts have all upheld the concept of the strict liability doping offence. The usual justification for such a severe rule is that it is necessary in order for sports organising bodies, with limited funds and resources, to be able to effectively enforce anti-doping regimes.

Thus there has been a substantial shift in the legal definition of doping. At one time intent was articulated as being the essence of doping, now the ‘cornerstone of anti-doping policy’ makes intent irrelevant. However, the near universal acceptance of the strict liability definition does not necessarily indicate that agreement was easily reached. As Ferstle states: ‘All organizations involved in the issue struggled with the dual problem of defining doping and establishing what constituted proof of a doping offence. These issues continue to be debated up to the present. The historic struggle over definition continues, albeit on a less visible level in the discourse and law surrounding the issue. There are a number of aspects of modern doping definition which, upon analysis, are flawed. Some of the aspects which will be considered in Chapter

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145 DeMont’s disqualification stood despite widespread criticism and appeals to the IOC which went on for a number of years. An article in 2001 stated that DeMont’s lawyers have recently forced the IOC to stop ‘shunning’ him and admit that he was a victim of the early drug-testing procedures. Gwen Knapp, ‘DeMont Case Can Indeed Be Trying’, *The San Francisco Chronicle* (San Francisco), 11 February 2001, D9.  
147 It was argued Gasser’s case that the strict liability offence contained in the Rules of the IAAF was unfair and unreasonable: *Gasser v Stinson and Holt*, Scott J (Unreported Decision, High Court of Justice, Chancery Division, 15 June 1988, No CH-88-G-2191 of 1988) in Michael Beloff, ‘Drugs, Laws and Versapaks’ in John O’Leary (ed), *Drugs and Doping in Sport: Socio-Legal Perspectives*, 2001 (London: Cavendish Publishers), 45.  
146150 Gasser v Stinson and Holt, above n 146.  
152 Ariens, above n 136.  
152 Ferstle, above n 8, 369.
Two include the divergence between the operational (legal) definition and the theoretical definition of doping and the impact of the provisions which make both the intent of the athlete and the effect of the substance irrelevant.

2 Doping Definition: The Prohibited List

Ferstle has linked the development of the first list of prohibited substances, produced by the European Doping Colloquium in 1963, to concerns over ‘the difficulty of discriminating between doping and legitimate medical treatment with a substance that could improve performance.’\textsuperscript{153} Along with an amendment clarifying the therapeutic use of such substances, the Colloquium developed a list to ‘further define what constituted an offence’.\textsuperscript{154} This list consisted of a number of broad categories of drugs such as narcotics, amine stimulants, alkaloids, analeptic agents, respiratory tonics and hormones. A similar list was produced by the IOC in 1967 (discussed in Chapter Five) which, as Houlihan puts it, became the ‘benchmark list’ for a large number of sports.\textsuperscript{155}

The fact that the IOC’s list became the guide for other policies is not necessarily indicative of a general agreement as to which substances should be considered doping: ‘Even agreement regarding what substances should be on the banned list was difficult to achieve.’\textsuperscript{156} Furthermore, the way in which the IOC list grew hardly provided a good role model. As Pound states, ‘[t]o say that the scientific basis of all the decisions to list certain substances and not others was sound would be a vast overstatement.’\textsuperscript{157} If the IOC list has been the benchmark standard since the late 1960s, it is clear that confusion over the list has existed since that time.

The discussion in Chapter Two will demonstrate that today there is still ambiguity regarding the way in which substances come to be regarded as doping agents. Although the process may be a marked improvement on the past, there are many avenues for confusion about which substances are, and which are not, doping agents. The confusion is evident in both public discourse on doping and the selection criteria for the \textit{WADA Code Prohibited List}, both of which will be discussed in the next chapter.

\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
\textsuperscript{155} Houlihan, above n 102, 132.
\textsuperscript{156} Ferstle, above n 8, 370.
\textsuperscript{157} Pound, above n 40, 56.
D Far from Consensus: The Historic Confusion Over Anti-Doping Rationales

The driving rationale for anti-doping policy in the 1920s and 1930s was articulated in quite a different way from today’s rhetoric. As will be discussed in Chapter Five, the IOC passed its first anti-doping ‘condemnation’ in 1938. At this time, doping was viewed as one of a number of aspects of elite sport which challenged the amateur ethos of the modern Olympic Games. Some of the other issues discussed under the broader heading of ‘amateurism’ included the nationalisation of sport for political aims, athlete training camps, appearance fees, athlete pocket-money and indemnities for the dependents of athletes during the athlete’s absence.\(^{158}\) In the 1930s there was no separate consideration of why doping should be viewed as challenging this ethos or why it should be prohibited outright.

Since the IOC lifted the prohibition on professional athletes competing in the Olympic Games in the late 1980s, the issue of professionalism in Olympic sport is a thing of the past.\(^{159}\) Doping now stands as an independent issue, quite apart from professionalism. And of all those issues, it is only doping which is now demonised. Furthermore, almost every kind of performance enhancement (apart from doping) is now acceptable. Full time training, dietetic preparation, oxygen tents,\(^{160}\) high altitude training and psychological assistance are all considered normal and legitimate aspects of athletic training. Doping alone raises the ire of the public. As Barnes points out, other sacrifices which athletes make to pursue their goals are applauded, while doping is abhorred.\(^{161}\) Doping is now seen as the ‘biggest threat to sport today’, not just one of a number of issues.\(^{162}\)

As will be discussed in Chapter Three, there have been a number of justifications or rationales presented for anti-doping policy over the years. The most contemporary statement is found in the introduction to the WADA Code:

\[\text{Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as “the spirit of sport”; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterised by the following values:}\]


\(^{159}\) The rules against professionals in the Olympics were gradually eroded: see Msn encarta, Olympic Games: Encyclopedia Article <http://encarta.msn.com/encyclopedia_761562380/Olympic_Games.html#s10> at 18 July 2008.

\(^{160}\) WADA has recently decided against banning these despite deciding that the tents could enhance performance and were against the ‘spirit of sport’: CBC, Anti-Doping Agency Won’t Ban Oxygen Tents (2006) <http://www.cbc.ca/news/story/2006/09/16/wada-hypoxic.html> at 14 September 2008.

\(^{161}\) The example Barnes give is of Daley Thompson training on Christmas Day: Barnes, above n 61.

\(^{162}\) Pound, above n 40, 56.
Doping is fundamentally contrary to the spirit of sport.\textsuperscript{163}

The reasons given for the prohibition on doping today are entirely different from those of the framers of the original anti-doping condemnations. Here no reference whatsoever to professionalism can be found; a prohibition on doping is assumed appropriate for both amateurs and professionals.

This thesis will also argue that the rationale statement of the \textit{WADA Code} in no way represents a complete and adequate answer to the question of why we prohibit doping in modern sport. There are still many inconsistencies and problems which can be identified in the commonly presented rationales. As will be demonstrated in the discussion in Chapter Three, these problems are no less real today than in the 1920s, despite the seeming solidarity of opinion which a statement like the \textit{WADA Code} rationale statement suggests.

\section*{VI \ THE THESIS}

As outlined in the previous chapter, the basic contention of the thesis is that anti-doping policy is not primarily driven by any of the anti-doping justifications (examined in Chapter Three). Rather, anti-doping policy is largely a result of the symbolism associated with the use of performance enhancing substances in sport. This symbolism has had an

\begin{footnotesize}
\footnotesize\textsuperscript{163} \textit{WADA Code}, 3. The sentiments expressed here are reflective of the shared attitudes of the delegates at the World Conference on Doping in Copenhagen in 2003. The opening words of the Resolution from the Copenhagen Conference declared that ‘doping in sport is contrary to the spirit of sport’ and later that ‘doping practices constitute violations of sport and of medical ethics as well as the fundamental principles of the Olympic Movement’: World Anti-Doping Agency, \textit{Copenhagen Declaration on Anti-Doping in Sport} (2003) <http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf> at 14 September 2008. It is also interesting to note that another commonly cited justification for anti-doping policy, that athletes are role models to young people and that doping detrimentally affects this, was not included in the Code even though it did appear in the Copenhagen Declaration. It is unclear whether this was a purposeful omission.
\end{footnotesize}
immeasurable impact on public opinion. Public opinion has, in turn, affected the public image of sport. This public image has been the driving force behind much of anti-doping policy to date. Desmond Manderson wrote in relation to illicit recreational drugs, ‘drugs have been prohibited for what they symbolize and not because of what they do’.\(^\text{164}\)

Adapting these words to the doping context provides a good summary of the thesis argument: doping agents have been prohibited for what they symbolize and not because of what they do.

A fuller outline of the progression of the argument will be provided below.

A  \textit{The Research Question}

The seemingly unruffled and harmonious surface of the ‘anti-doping war’ is actually a mirage. So far this chapter has presented the current picture of anti-doping efforts; the image being one of universal condemnation of doping as a general concept and for guilty individuals on the one hand and unparalleled cooperation towards achieving universal anti-doping policy on the other. For all intents and purposes, anti-doping policy seems to be based on widespread understanding and agreement. However, there has always been confusion and problems in anti-doping policy, even in relation to the very basic issues of doping definition and doping rationales. The next two chapters of the thesis will demonstrate that when it comes to doping, despite all appearances to the contrary, we do not really know exactly what we are talking about, nor exactly why we are talking about it. This analysis will lead to the research question.

It will be argued that there is a very basic reason why anti-doping policy is characterised by such profound ambiguity. The ambiguity arises from the origins of anti-doping policy. By understanding the way in which anti-doping policy developed, the reason for the resulting confusion will be clear. The primary research question of the thesis can therefore be put thus: why do we prohibit doping and why do we define it the way we do?

B  \textit{The Null Hypothesis}

Anti-doping policy did not develop upon a rational basis – it was not a well considered and balanced policy, logically tailored to deal with a clearly constructed and comprehensively understood problem. Rather, the predominant influence in anti-doping policy is to be

found outside the rational realm and in the emotional (or ‘arrational’\(^{165}\)) realm. The thesis will argue that the main driver of anti-doping policy was the perceived need to protect the image of sport and that, in turn, the primary reason public image was such a problem in doping was due to the emotional reaction caused by the symbolism of doping. This symbolism relates doping closely to the use of illicit recreational drugs by athletes. It will be shown that, rather than anti-doping policy being prompted by concerns about making sport fair for all, fears associated with the use of illicit drugs in sport were the main force behind these laws up until the 1960s. From that time on, the symbolism changed slightly. Still, the driving force was not so much about the pharmacological properties of the substance than what the substance symbolised. The symbolism relating to ‘doping’ and ‘doping agents’ has produced public sentiment strongly against the use of such substances in sport. Chapters Five to Seven of the thesis will provide historical evidence of these symbolic links.

The thesis will culminate in Chapter Nine with the presentation of a model (the ‘Reactive Regulation Model’) explaining the way in which symbolism has influenced anti-doping policy. The model, presented below in Figure 1, summarises the main argument:

**Figure 1: The Reactive Regulation Model**

This pattern has been repeated numerous times in the history of anti-doping policy and has led to a patchwork system which has little internal coherence or consistency.

The analysis of symbolism used in this thesis is based on a framework of analysis presented by Desmond Manderson, in his work on the history of illicit drug laws. Manderson argues that:

> What has remained constant throughout the changing face of reason in all these jurisdictions has been the feelings of revulsion or seduction, of dirt and purity, which images of drugs have always provoked. It is this symbolism which we need to understand… By focusing on the symbolism of drugs, we may begin to explain the

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\(^{165}\) This term has been chosen to distinguish it from the term ‘irrational’ which has very negative connotations. The point of the thesis is not to criticize modern anti-doping policy in terms of degrading its worth. Rather, the thesis aims to explain the reason why so many inconsistencies and problems are present in such a widely accepted policy. It is hoped that ‘arrational’ can remove some of those negative connotations.
intensity of emotion which surrounds the question of drug use in society and of which the
law is a clear and constant reflection.166

Similarly, it will be contended here that doping in general, and individual doping
substances specifically, have been prohibited not so much for what they do, as for what
they symbolise. The thesis therefore applies Manderson’s symbolic analysis to the field of
doping in sport.

By its very nature, ‘symbolism’ is a somewhat elusive concept to define. Dictionary
definitions of ‘symbolism’ refer — with a high degree of circularity — to the practice of
representing things by symbols, or of investing things with a symbolic meaning or
character’.167 ‘Symbol’ is defined as ‘something used or regarded as standing for or
representing something else; a material object representing something immaterial; an
emblem, token, or sign.’168 ‘Symbolism’ in this thesis means associated objects or ideas;
the images which generally spring to mind when confronted with a picture or description
of the use performance enhancing substances, or even at the mere mention of a particular
substance or practice. The ‘general consensus’ aspect of the concept highlights the fact
that associated ideas and images will be highly dependent on the social, political and
historic setting in which the term or vision is placed.

C The Thesis Framework

As previously outlined in the introductory chapter, the thesis will be divided into three
parts.

The first Part, comprising Chapters One, Two and Three, will consider in more depth the
problems of modern anti-doping policy. In this part, entitled ‘The Hidden Dilemmas of
Anti-Doping Policy’, the focus will be on the two basic questions of ‘what is doping’ and
‘why do we prohibit it’. These chapters will demonstrate that there has always been
uncertainty about these issues and that this lack of clarity has ongoing significance in anti-
doping policy. These chapters reveal the end product of the process of reactive regulation
which will be described later in the thesis: a confused maze of ideas, ethics and rules. In
essence these chapters will provide a dilemma for the subsequent analysis to explain: why
is anti-doping policy such a mess?

166 Desmond Manderson, ‘The Semiotics of the Title: A Comparative Analysis of Drug Legislation’ (1995) 2 Law,
Text, Culture 160, 173-175.
168 Ibid.
Part II, ‘The Symbolism of Anti-Doping Policy’, comprises Chapters Four to Seven. Chapter Four will present the alternative model of analysis that will be applied to the history of anti-doping policy in Part II. Chapters Five to Seven will then consider the symbolism of doping in three significant time periods: the 1920s, 1960s and 1970s. The aim of these chapters is to show just how strong and significant the symbolism associated with doping and doping agents was in these time periods.

Part III, ‘The Role of Symbolism in Anti-Doping History’, comprises Chapters Eight and Nine. This part will discuss the mechanism by which this symbolism has led to our present state of anti-doping policy. The final chapter of the thesis will also consider the future of anti-doping in light of the influence of symbolism.

In summary, the thesis will:

- Reveal the unsettled nature of anti-doping policy with a focus on two basic issues: what is doping and why do we prohibit it
- Pose the question: why is anti-doping policy so ambiguous and unclear?
- Demonstrate the profound role that symbolism has played in the formation of anti-doping policy and how that has led to confusion in anti-doping policy
- Suggest a model of how anti-doping policy has developed which takes public reaction to symbolism into account, and
- Consider what symbolism can tell us about the future of anti-doping policy.

The next chapter will examine the first basic issue: what is doping?
CHAPTER TWO

THE AMBIGUITIES OF DOPING DEFINITION

ARTICLE 1 DEFINITION OF DOPING

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

...The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample.

2.1.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation under Article 2.1. …

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

2.2.1 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed….¹

I INTRODUCTION

This chapter examines the definitional ambiguity which, it is argued, constitutes one of the puzzles of anti-doping policy: what exactly are we talking about when we speak of ‘doping’? A detailed analysis of the working of anti-doping law and doping discourse reveals the ‘arrational’² basis of modern anti-doping policy, as this chapter will reveal.

It may be axiomatic to suggest that the first task of any legal code is to clearly define the deviant behaviour. Anti-doping policy should be no exception. Upon initial examination, anti-doping policy is no different; the first few provisions of the World Anti-Doping Code (WADA Code) are devoted to defining doping. Doping is defined as the occurrence of any of the anti-doping rules listed in the Code. Apart from the usual ambiguities that lawyers

¹ World Anti-Doping Code (WADA Code), Articles 2.1 and 2.2. Note that the revised Code has included another subsection under Article 2.2 which states:

2.2.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation for Use of a Prohibited Substance or a Prohibited Method.

In this version, the old 2.2.1 is found at 2.2.2. The implications of this change will be discussed below.

² See comment in Chapter One, page 41, footnote 165, regarding use of this term.
are rewarded handsomely for exploiting, on the face of the document the WADA Code definition does not present any major inconsistencies or difficulties. Doping is defined by reference to the WADA Code Prohibited List; under the classic strict liability offence in Article 2.1, once it is proved that one of these substances was in the athlete’s specimen, a doping offence has taken place. This definition of doping seems unambiguous.³

However, as foreshadowed in the previous chapter, there are profound difficulties arising from the way in which the offence of doping has been, and is now, defined. Chapter One outlined the historical confusion over doping definition. Ever since anti-doping policy started, identifying the deviant behaviour and the contents of prohibited lists have been a source of perplexity. Both these aspects will be analysed in a modern context in this chapter, demonstrating that the troubled character of doping definition has not changed. Far from resolving the problems of the past, present anti-doping policy has come to a consensus which is no more satisfactory than past attempts. Since historic difficulties have already been addressed in the previous chapter, this chapter will consider only the current problems in doping definition.

The claim here is not that confusion reigned in developing the operational (legal) definition in the WADA Code. Being largely adopted from predecessor anti-doping policies,⁴ the current legal definition represents a consensus of opinion on what is considered a reasonable working definition. Although some of the problems identified in this chapter will focus on the operational implications of the legal definition, the inadequacies of the definition presented in this chapter largely relate to general notions of what constitutes the

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³ There are, of course, arguments about whether the drug test is accurate and also whether it actually shows a prohibited substance. Antonio Buti and Saul Fridman, Drugs, Sport and the Law, 2001 (Mudgeeraba: Scribblers Publishers) provide a good summary of some of these technical arguments: for an example of the first argument Capobianco, Modahl and Krabbe in Buti and Fridman, 67-74 and for an example of the second, Rebagliati at 11-12 and Baxter, discussed below.

⁴ The 1999 version of the Olympic Movement Anti-Doping Code (OMADC, also called the Olympic Movement Medical Code) contains similar provisions to the presence of, the use of and trafficking offences: see Article 2 in Robert C.R. Siekmann, Janwillem Soek and Andrea Bellani, Doping Rules of International Sports Organisations, 1999 (The Hague: TMC Asser Press), 600-601. Note that Pound states that the OMADC was not actually a legal document until this time, Dick Pound, Inside the Olympics, 2004 (Mississauga: John Wiley & Sons Canada), 69. The doping rules of the International Association of Athletics Federations (IAAF) in 1996 contained three main types of doping offences: the presence, the use of and admitting use. The IAAF rules also had the ancillary offences of failure to submit to doping control, assisting/inciting others and trading/trafficking/distributing/selling: Simon Gardiner, Alexandra Felix, John O’Leary, Mark James and Roger Welch, Sports Law, 1998 (London: Cavendish Publishing), 170. These offences were essentially the same in 2000 but failure to submit to doping control was a main offence: see Lauri Tarasti, Legal Solutions in International Doping Cases, 2000 (Milan: SEP Editrice), 69. Other sports, such as swimming, also had anti-doping definitions which were substantially the same as the IAAF policy: see Siekmann et al, this note. It is clear from the World Conference on Doping in Sport that the OMADC was a primary influence on the drafting of the WADA Code: Judge Kéba Mbaye, ‘Report of the Working Group on the Legal and Political Aspects of Doping’ (Paper presented at the World Conference on Doping in Sport, Lausanne, 2-4 February 1999), 2-3.
‘sin’ of doping in the eyes of the public. It will be argued that there is an enormous difference between this instinctive definition and the operational definition.

The next two chapters will go beyond merely pointing out the inadequacies of doping definition and rationales. Rather, the purpose of these chapters is to demonstrate that these inadequacies have implications for understanding how anti-doping policy has developed. Each chapter will conclude that such irregularities demonstrate that anti-doping policy is not fundamentally based on logic. Instead, it will be shown to largely be ‘arrational’ such that it is necessary to look to other, non-rational explanations for the development of such a policy. The subsequent chapters of the thesis, particularly Chapters Five to Seven, will be devoted to providing an explanation which more adequately explains how anti-doping policy, and its related difficulties, came into being.

II DOPING: THE DEVIANT BEHAVIOUR

One particularly troubling aspect of doping definition is the way in which the operational or legal definition of doping differs from the popular definition of doping; what is thought of as doping is different from what is punished as doping. There are two relevant aspects. The popular doping debate implicitly assumes that doping is about ‘intent,’ while the strict liability doping offence makes intent irrelevant. Secondly, the combination of strict liability and those provisions of the WADA Code which make the effect of the substance irrelevant cause particular problems. Working together, these provisions punish athletes who have no intention of enhancing their performance for having what is, essentially, an ineffective substance in their system. People may be willing to punish athletes for taking effective doping substances even in the absence of intent. But punishing athletes displaying neither intent, nor performance advantage, takes the operational definition of doping a long way from popular notions of what ‘doping’ is all about.

A The Role of Intent in Doping Discourse Versus the Strict Liability Rule

To support this argument, it is necessary first to identify the popular definition of ‘doping’. There are a number of sources which provide evidence of this ‘theoretical definition’, three of which will be considered here: the language used in the rhetoric surrounding the

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5 The term ‘theoretical definition’ is here used in opposition to ‘operational definition’ to connote the ideas that the general population have in mind when they discuss doping.
issue of doping; the language of case law; and the language used in the rhetoric of anti-doping debates.

1 Theoretical Definition of Doping

(a) Anti-Doping Rhetoric

One of the most notorious condemnations of doping is found in the speech by Juan Antonio Samaranch, set out in Chapter One. He describes doping as death of the body, spirit, intellect and morality. The message is that by ‘cheating’ athletes are committing a dreadful sin against themselves and their community. Cheating is seen as a deliberate act involving the mind as well as the body. Other condemnations of doping by Samaranch, such as ‘athletes who use banned substances to improve their performance commit a series of acts that transgress and violate certain immutable principles’, similarly refer to the moral/psychological life of the athlete, the mindset being the repugnant element. Furthermore, Samaranch’s rhetoric is representative of much anti-doping rhetoric. Doping is still fundamentally about ‘cheating’, no matter how the concept may be legally defined.

(b) Language of Case Law

Even in the language of the Court of Arbitration for Sport (CAS), which has continuously upheld the idea of strict liability in doping, it is possible to detect the implicit assumption that doping involves intent. For instance, in Kowalczyk, the court considered if there was evidence that use of a specified substance was not intended to enhance performance. The court stated that, by submitting medical certification, the athlete had shown a prima facie case that the use was medical, it was then up to the authority to prove that it was used as a ‘doping agent’. ‘Doping agent’ was juxtaposed against the words ‘was not intended to enhance sport performance’, implying that a ‘doping agent’ is one which was intended to enhance performance. The implicit belief that doping involves intent to enhance performance is consistent with the assumptions displayed in anti-doping rhetoric.

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6 See Chapter One, page 25, footnote 98.
8 Arbitral Award delivered by the Court of Arbitration, Justyna Kowalczyk v International Ski Federation, CAS 2005/A/918.
9 WADA Code, Article 10.3.
10 As opposed to the inadvertent ingestion of such substances, particularly in the course of treating a cold or other common illness.
(c) Language of Anti-Doping Rationales

This theoretical definition carries over into the language of the WADA Code. The introductory statement to the Code has been set out in Chapter One. It mentions ethics, honesty, values and spirit within sport. References to such principles show that what is repugnant about doping is that it exhibits the wrong mindset: athletes who dope do not share the ‘right’ values. And the spirit of sport ‘is the celebration of the human spirit, body and mind.’ It is simply preposterous to say that an athlete who accidentally and unknowingly ingests a prohibited substance has, by doing so, exhibited an attitude at all, let alone one which is contrary to the spirit of sport! Nor has an inadvertent ‘doper’ acted contrary to the values listed above. The implicit assumptions which drive this rationale statement are clearly based on the concept of ‘cheating’, an intentional use of performance enhancing drugs. There can only be consistency in notions of ‘doping’ if the offence involves the mind.

The concept of Olympism, so integral to the concept of the ‘spirit of sport’, is defined in the Olympic Charter:

Olympism is a philosophy of life, exalting and combining to a balanced whole the qualities of body, will and mind… Olympism seeks to create a way of life based on the joy found in effort, the traditional value of good example and respect for universal fundamental ethical principles.

Olympism, and therefore the spirit of sport, is a philosophy which balances the body, will and mind. This idea also has to do with conscious thought, values and ethics; the state of mind of the athlete. When these ideas are imported into the Code’s ‘rationale statement’, it further emphasises the fact that what is repulsive about the practice of doping is that it contravenes the mind-set or attitudes which sport is meant to exhibit.

In all these sources, it is implicitly accepted that ‘doping’ refers to intentional use of performance enhancing drugs. It appears, therefore, that anti-doping rules fundamentally aim to sanction athletes who try to gain advantage over their competitors by using prohibited substances.

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11 See Chapter One, page 39, footnote 163.
12 Emphasis added.
2 Operational Definition of Doping

For a number of pragmatic reasons, mostly to do with the enforceability of the rules, under the strict liability approach, doping has come to be defined as the mere presence of the substance in the body of the athlete. Under the strict liability rule, doping is defined, not with reference to the state of mind or values, but by reference to a state of body; as soon as a prohibited substance is discovered in the athlete’s specimen, a doping violation has occurred. Doping is not about ‘spirit, body and mind’; under this rule it is singularly about the ‘body’. Thus, under Article 2.1 of the WADA Code, it is possible that an athlete who is the very embodiment of the ‘spirit of sport’ — ethical, committed to fair play, honest, dedicated and respectful of the rules — will be guilty of contravening a provision which is intended to punish those who exhibit a state of mind contrary to the ‘spirit of sport’.

This inconsistency reveals that the WADA Code doping definition is not quite as clear as the current harmonious approach to anti-doping policy would suggest. Even within the WADA Code itself, there appears to be an unaccountable difference between the situations anti-doping policy is aimed at and the situations in which the policy actually takes affect.

B The Definition of Doping in the Inadvertent Doping Cases

These differences are most poignant in the inadvertent doping cases since it is in those cases that the clash of definitions is no longer simply a theoretical one. The cases outlined below reveal where there is a real difference between what is generally perceived to constitute doping and what is punished as such by modern anti-doping policy.

1 The Law: Inadvertent Doping Cases

In order to demonstrate the operation of doping definition in problematic cases, a brief summary of the outcome of a number of inadvertent doping cases will be provided.

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14 The classic defence of the strict liability doping offence is found in Arbitration CAS 94/129, USA Shooting & Q v International Shooting Union (UIT), award May 23, 1995 in Mathieu (Ed) Reeb, Recueil des sentences du TAS, Digest of CAS Awards II 1986 – 1998, 1998 (Berne: Staempfli Editions SA Berne), 193. The relevant part of that judgement was extracted and published in the commentary to the first version of the WADA Code as justification for adopting the strict liability approach: WADA Code, 9.

15 Under the WADA Code, there are a number of other ways of defining doping (outlined in Chapter One). Some of these do involve the mind of the athlete. However, the fact that the strict liability offence is not the only way of defining doping does not detract from the argument that in many doping cases the offence is defined without reference to intent. It is therefore legitimate to consider only the strict liability offence in this discussion.
(a) Pre WADA Code Cases

(i) Laumann

A Canadian rower, Silken Laumann, mistakenly took Benadryl Decongestant (containing pseudoephedrine) rather than Benadryl (containing no banned substances) for a cold. She had sought advice from two doctors, who had not distinguished between these two preparations. Initially suspended by her federation, Laumann was subsequently reinstated but a doping offence was recorded and her Pan Pacific medal confiscated. No further sanction was imposed because ‘there was no intentional or negligent use of a banned substance.’

(ii) Foschi

US swimmer, Jessica Foschi, tested positive for a prohibited steroid, mesterolone. Foschi, her parents and her coach ‘consistently denied knowingly taking or giving the substance to the appellant, or any product that may have contained mesterolone’ or knowing how such a substance could be found in her urine sample. The American Arbitration Association (AAA) accepted that the applicable rules (those of the \textit{Fédération Internationale de Natation} — FINA — the international federation for swimming) imposed the strict liability definition but said:

\begin{quote}
Having concluded that the Claimant and all those connected to her are innocent and without fault, we unanimously conclude that the imposition of any sanction on the Claimant so offends our deeply rooted and historical concepts of fundamental fairness so as to be arbitrary and capricious.
\end{quote}

The case was subsequently appealed to the CAS by FINA. The court upheld the strict liability approach and only took subjective matters into account in determining the further sanction to be applied.

\begin{itemize}
\item[16] The Pan Pacific medal was not returned even though the federation reinstated her because the decision regarding the medal was in the hands of the event organizers rather than the international rowing federation: see Maclean's the \textit{Canadian Encyclopaedia}, \textit{Laumann Fails Drug Test} (1995) <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0010416> at 13 September 2008.
\item[20] Yasser et al, above n 18, 152-153.
\item[21] The CAS found Foschi guilty of doping in accordance with the strict liability approach but reduced her ban from two years to six months due to the mitigating circumstances. The court there differentiated between an absolute liability offence (where the athlete can do nothing to exculpate herself) and strict liability, where a positive drug
\end{itemize}
(iii)  **Raducan v International Olympic Committee (IOC)**

The gold medal winning Romanian gymnast was given Nurofen Cold and Flu tablets (containing pseudoephedrine) by the team doctor at the 2000 Olympics. The *Olympic Movement Anti-Doping Code* (OMADC) strict liability definition was applied and her Olympic gold medal confiscated. During the case, expert evidence was adduced that the substance had not enhanced performance. The evidence was rejected as irrelevant by the court, deciding that Article 4.4 of the OMADC specifically stated that ‘the success or failure of the use of a Prohibited Substance’ was irrelevant to the offence.

(iv)  **Baxter v IOC**

The British slalom skier, Alain Baxter, took a Vicks Vapor inhaler (containing the prohibited stimulant, levmetamfetamine). The product appeared identical to a permitted version sold in the United Kingdom so he didn’t read the ingredients list. The strict liability offence in the OMADC was applied and Baxter’s Olympic bronze medal was confiscated. Again during the case, evidence was adduced that there was no intention to enhance performance and that no ergogenic effect was gained but the court rejected these factors as irrelevant under the OMADC.

(b)  **Post WADA Code Cases**

The cases above predate the *WADA Code*. There have also been a number of relevant cases since the introduction of the Code. However, under the Code there are provisions which can affect the outcome of such cases. Under Article 10.3 the anti-doping panel is able to adjust the ineligibility period (i.e. suspension) according to the level of fault of the athlete for doping violations involving certain specified substances. However, the strict test raises a rebuttable presumption that the athlete is guilty. McLaren notes that the Foschi case seems to contradict the approach taken by the court in *C v Federation Internationale de Natation Amateur (FINA) CAS 95/141* in Matthieu (Ed) Reeb, *Recueil des sentences du TAS, Digest of CAS Awards II 1986 – 1998*, 1998 (Berne: Staempfli Editions Berne) at 220 as to the role of the fault of the athlete in determining a doping case: see Richard McLaren, ‘A New Order: Athlete’s Rights and the Court of Arbitration at the Olympic Games’ (1998) VII Olympika: The International Journal of Olympic Studies 1, 8.

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The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as a doping agent. Where an Athlete can establish that Use of such a specified substance was not intended to enhance sport performance, the period of *ineligibility* found in Article 10.2 shall be replaced with the following:
liability rule still applies and an athlete will be disqualified regardless of fault.  But if an athlete can prove that they were without fault or negligence’ as defined in Article 10.5.1, or without significant fault or negligence, defined in Article 10.5.2, then the ineligibility period can be eliminated or reduced respectively.

(i) Squizzato v FINA

An Italian swimmer used a cream (containing an anabolic steroid, clostebol) purchased by her mother to treat a skin infection. She did not ask a doctor or anyone else whether the substance contained prohibited substances. She was found guilty of doping by the CAS. The court stated that she had failed in her duty of diligence since ‘with a simple check, she could have realized that the cream was containing a doping agent’[sic], as the product listed the prohibited substance on the label. Squizzato failed to show no fault or negligence but since there was no intention to enhance her performance, her negligence was found to be ‘mild in comparison with an athlete that is using doping products in order

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) years’ Ineligibility.

Second violation: Two (2) years’ Ineligibility

Third violation: Lifetime Ineligibility

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5

It should be noted here that the 2007 version of the Code seeks to satisfy criticism of the inflexible nature of the mandatory sanctions of the 2003 version by allowing consideration of the athlete’s intent through the widening of the application of the Specified Substances provisions. Although this may help to deal with the perceived injustice of some of these cases, it does not change the definitional problems in that the new Article 10.4 only deals with the ineligibility period and not the finding of an anti-doping rule violation (i.e. a finding of ‘doping’). Therefore, the changes to the Code at this point do not significantly change the argument here. Interestingly, the comment to the revised Art 10.4 refers to the specified substances as substances where there is a greater likelihood of susceptibility of credible ‘non-doing’ purposes, suggesting again that theoretically doping is about intent.

WADA Code, Comment to Article 2.1.1 and Article 9.

Article 10.5.1 No Fault or Negligence.

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

Article 10.5.2 No Significant Fault or Negligence.

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

G. Squizzato v FINA, CAS 2005/A/830, 11.
Ibid, 11.
to gain such advantage.”

She received a one year suspension (rather than the usual two years) under the no significant fault provisions.

(ii)  *Puerta v ITF* 34

A tennis player accidentally drank from a glass that his wife had used to take medication (which contained etilefrine). He had been drinking water with his family at a table with a number of identical glasses. While temporarily away from the table, his wife used the glass that he had been drinking from to take her medication. The medication was tasteless, odourless and colourless. His wife had gone from the table when Puerta returned. He took the same glass and drank water from it. The CAS held that although the circumstances of the case were exceptional, Puerta had failed to exercise the utmost caution. The panel stated:

> Athletes must be aware at all times that they must drink from clean glasses, especially in the last minutes before a major competition… In the Panel’s view it would not have been too much to expect of him to ask his brother-in-law upon returning to the table whether the glass that he was going to use was “his glass” or whether “anyone had used his glass” during his absence. Mr Puerta cannot avoid the conclusion that he suffered a momentary lapse of attention and exhibited a momentary lack of care when he used a glass over which he had lost visual control.35

Puerta was found not to be significantly at fault or negligent, due to these factors: the substance ingested was water which he had brought with him (in an effort to avoid inadvertent doping); the substance was colourless, odourless and tasteless; he had no reason to know that his wife had used his glass in his absence; the glass was only unattended for a few minutes; and the concentration of etilefrine could not have been performance enhancing. Puerta received a two year sanction instead of the otherwise applicable life suspension.36

(iii)  *Canas v ATP* 37

A tennis player was found to have taken hydrochlorothiazide (HCT) due to a mix up of medications by ATP tournament staff. Canas had medication prescribed by a tournament doctor which was to be left at the reception desk for him. However, the medication left for Canas was one that had been prescribed for someone else. Canas was found guilty of a

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33 Ibid, 11–12.
34 *Puerta v ITF* CAS 2006/A/1025.
36 This was Puerta’s second doping offence. The CAS panel reduced the eight year suspension that the ITF anti-doping panel had given (in accordance with the *ITF/WADA Code* doping rules) as they were of the view that this was indistinguishable from a life suspension and was therefore disproportionate to the circumstances of the offence; ibid, 41.
37 *Canas v ATP*, CAS 2005/A/951.
doping offence by the CAS. The court found that he had been ‘clearly’ negligent in taking the medication ‘with no review whatsoever of the contents of the box even though he knew that the medication had been through several hands before being delivered to him’. Relying ‘blindly’ on the system did not show the diligence required. Therefore, Canas failed to satisfy the no fault or negligence test. The court did, however, accept that he was without significant fault. Factors which the court took into account included: the fact that the player’s use of the medication was medicinal; he had never had other positive doping test; Canas dealt with his illness in the safest possible way (i.e. seeing a tournament doctor) and the mistake was made by the ATP’s staff not the player himself. On this basis, the sanction was reduced from two years to fifteen months.

(iv) Edwards  
A US athlete ingested nickethamide when she took two glucose tablets given to her by her chiropractor. She was found guilty of a doping offence under the applicable doping rules (International Association of Athletics Federations — IAAF — which were WADA Code compliant) by the CAS. The court found that Edwards had ‘conducted herself with honesty, integrity and character’, and that she did not seek to ‘gain any improper advantage or “cheat” in any way’. She was, however, negligent in failing to check whether the glucose tablets given to her contained a prohibited substance. The tablets were purchased in a foreign country and the packaging contained warnings (in French) that the product contained a prohibited substance. These factors should have led the athlete to enquire further. The situation was found not to be ‘truly exceptional,’ and therefore neither the no fault nor the no significant fault provisions were applied. Edwards was suspended from athletics for the usual two years.

38 Ibid, 14.
39 Final Award in the Arbitration between Ms Torri Edwards and International Association of Athletics Federations (IAAF) and USA Track and Field (USATF), Court of Arbitration for Sport Ad hoc Division – Games of the XXVIII Olympiad – Athens, CAS Arbitration No CAS OG 04/003.
40 Ibid, 16.
Theoretical Definition in Inadvertent Doping

There’s many a slip between cup and lip! The case summaries provided here demonstrate just how easy it is for an athlete to be guilty of the most heinous crime in sport: doping. In some cases one must wonder at the naivety of top level athletes who fail to check the contents of medication. But is *stupidity* what ‘doping’ is really about? Reliance on fallible expert medical advice is certainly not the behaviour that ‘doping’ involves, while a policy which holds athletes responsible for simply taking a drink of water from their own cup is so far from what society considers as ‘doping’ that it is almost comic.\(^\text{42}\)

There has been much written and said in criticism of the strict liability doping offence and the cases outlined above are evidence of the potential difficulties of such an approach. This thesis does not aim to contribute to the debate regarding the appropriateness of this type of offence for doping. The point here is that there is disparity between what the general population — including athletes and administrators — perceive doping to be (intentional cheating) and what the legal system defines as such (the mere presence of a substance). It may be that the strict liability approach to doping is fully justified and represents the fairest compromise for all involved. It may be that society is fully cognisant of the injustices presented by these inadvertent doping cases but counts them as a necessary price to pay for ensuring that the guilty do not go unpunished.\(^\text{43}\) Nevertheless, the important point here is that the strict liability approach does not accord with what people unconsciously think of as ‘doping’. If society *is* willing to accept the strict liability approach, then the only way to avoid confusion and inconsistency is to change the way doping is thought and spoken of.

The Irrelevancy of Effect and the ‘Use Of’ Provision

Differences between the theoretical and operational definition of doping are magnified where the strict liability offence operates in conjunction with provisions which make the effect of the prohibited substance irrelevant in determining whether doping has taken place.

Article 2.2, set out above, contains the ‘use of’ doping offence. Article 2.2.1 makes it clear that under this offence the ‘success or failure’ of the substance is irrelevant in
determination of the offence. It is the combination of these two provisions which is so problematic.

The main problem arises in interpreting the ‘use of’ provision as a strict liability offence. If the ‘use of’ provision required proof of intent then evidence would be needed to show that the athlete endeavoured to use a prohibited substance to enhance their performance; whether their endeavour succeeded or not would be irrelevant. This would be entirely consistent with the popular definition of ‘doping’: an athlete attempting to gain an advantage over their peers by using a prohibited substance or method. Like the WADA Code, whether that endeavour succeeded is not relevant to the theoretical understanding of doping either.44

In the revised edition of the Code there is a new Article 2.2.1 which makes it clear that intent is not needed for this offence to be proved. Before its insertion there was some ambiguity as to the role of the Athlete’s intention.45 Since the insertion of the new Article 2.2.1, however, it is now beyond doubt that from January 2009, the ‘use of’ provisions require no proof of intent or knowledge.46

44 This would also be consistent with notions of ‘attempt’ in criminal law where it is agreed that the accused should not escape judgement simply because their attempt to commit a crime failed. At criminal law there is need to show intent on the part of the accused to prove ‘attempt’ to commit an offence as well as the accused taking a positive step towards committing the offence; see Britten v Alpogut [1987] VR 929 at 938 per Murphy J. The combination of the concept of ‘attempt’ in the WADA Code which does involve intent and the concept of ‘use’ which now clearly does not, seems a little at odds. However, the comment to Article 2.2.1 makes it clear that intent is needed to prove ‘attempted use’ under Article 2.2. This brings the idea of attempted use in line with common law ideas of attempt.

45 The definition section of the Code lists a number of activities as ‘use’ such as application and ingestion, which appear to involve some intentional conduct on the part of the Athlete. The definition section of the Code defines ‘use’ as ‘the application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method’ while ‘attempt’ is defined as: ‘purposefully engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation’. WADA Code, Definition, 78 and 73 respectively. Application and injection seem to involve knowing conduct, while ingestion and consumption do not necessarily involve such knowledge. Accordingly, without the revised Article 2.2.1, it was unclear on the face of the Code whether the ‘use of’ provisions were intended also to be strict liability offences. Despite the existence of similar provisions in previous anti-doping instruments such as the OMADC, this type of provision has rarely been considered judicially in isolation. It was therefore a subject of legal debate as to whether the ‘use of’ provisions were intended to be strict liability offences or not. For example, Judge Tarasti contended that ‘use of’ provisions in the former anti-doping code regulations of the IAAF required proof of intent. Beloff discusses the judge’s comments and, while he takes exception to the comment that the ‘presence of a prohibited substance’ required intent or negligence, he has does not question the comment in relation to the ‘use of’ provision: Michael Beloff, ‘Drugs, Laws and Versapaks’ in John O’Leary (ed), Drugs and Doping in Sport: Socio-Legal Perspectives, 2001 (London: Cavendish Publishing) 44ff for a discussion of the different doping offences in the IAAF anti-doping policy. See also Hayden Opie, ‘Legal Regimes for the Control of Performance Enhancing Drugs in Sport’ (1990) 12 Adelaide Law Review 332, 347 who also argues that ‘uses or takes advantage of’ is likely to involve intent on the part of the athlete.

46 Interpreting Article 2.2 as strict liability appears to be consistent with one CAS case which briefly considered the ‘use of’ provisions under the WADA Code. In French v The Australian Sports Commission and Cycling Australia, the panel said: A Doping Offence occurs if there is use of a glucocorticosteroid. Does the verb ‘use’ require an interpretation that mens rea be an element or does the word ‘use’ create strict liability? In sporting matters involving anti-doping rules the approach of strict liability has normally been the case.
It is also now clear that the definition of doping Article 2.2 is not consistent with the theoretical definition considered above, since no mind-set is required for this provision. But there is a further discrepancy with the theoretical doping definition. In order to illuminate this it is necessary to make a few preliminary points.

Firstly it has been stated above that general notions of doping involve intent of the athlete. However, it is conceded that, despite the implicit assumptions in public discourse that doping involves intent; the general population and anti-doping authorities appear willing to accept a definition of doping that involves only the state of body in the strict liability offence. The CAS has made this clear in their classic defence of the strict liability doping offence in *Q v UIT*. Secondly, the justification for the ‘body-only’ definition has always been the argument that an athlete who accidentally takes a prohibited substance nevertheless gains an advantage and it would therefore be unfair to the competitors to allow that athlete to compete. Thirdly, when considering the ‘body only’ definition of doping, it is necessary to consider the question: what is the state of body that doping involves? There are two possibilities. It could be that doping is defined as a body containing a prohibited substance. The other possible definition is that of a body which has been enhanced by a prohibited substance. These three points taken together reveal the ambiguity.

This last point may seem like a fine distinction but it is extremely important and lies at the heart of the confusion. If the required state of body for ‘doping’ is merely the presence of a prohibited substance then there is no inconsistency between Article 2.2 and the theoretical definition of doping. Alternatively if the generally accepted ‘body only’ definition hinges on an enhanced state of body, then clearly the current Article 2.2.1 — which makes this irrelevant — is at odds. Given the points set out above it is much more likely that the latter is the case.

The obvious assumption in the justification for the strict liability offence as articulated by the CAS is that the inadvertent doper is distinguishable from the rest of the field in sporting terms, making their participation unfair for the other athletes. The only way a relevant distinction can arise is if the athlete’s performance has been positively affected by the substance. It is clear, then, that the objectionable state of body here is not simply the

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47 *Q v UIT* above n 14, 194. There the CAS stated that inadvertent doping must be punished to maintain fairness for other competitors. The previous version of the *WADA Code* quoted this as the justification for including the strict liability offence in the Code. This will be discussed in detail in Chapter Nine.
presence of a prohibited substance but a body affected by that substance. There can be no question of unfairness to the rest of the cohort of athletes if the substance has no effect.

Since neither ergogenic effect nor intent are necessary under (present) Articles 2.2/2.2.1, an athlete could be guilty of doping despite having neither the appropriate state of mind or body.\footnote{It is noted here that the latest version of the WADA Code recognises some (inverse) relationship between performance enhancement, intent and guilt. The comment to the revised Article 10.4 (Specified Substances) states that the greater the performance enhancement potential, the higher the burden to prove no intent. This demonstrates that either intent or effect are important in doping since if there is no effect, then it is more important to prove that there was no intent to dope in order to disprove a doping accusation. Nevertheless, the fact remains that it is possible to be guilty of doping despite having no intent and no performance effect.} Herein lies another inconsistency: the state of mind and body (as defined by the justification for the strict liability offence) are fundamental to the definition of doping as defined by the rationale for the Code, while neither are relevant to the definition of doping as defined by Article 2.2.1.

An example may illustrate the point. Let us say that information emerges that an athlete has been ingesting (‘using’) a substance which they assume is a legal supplement, but which actually contains a prohibited substance. Circumstantial evidence could allow the athlete to fall foul of Article 2.2, despite there being no intent to use a prohibited substance (assuming the athlete was taking the supplement for its general health benefits).\footnote{This anti-doping rule violation can be proved in a number of ways: see WADA Code, Comment to Article 2.2.1.} Let us also suppose that the prohibited substance has no benefit in that athlete’s particular sport — like anabolic steroids for a spin bowler in cricket\footnote{ACB Doping Panel, Decision: Shane Warne (2003) <http://www.abc.net.au/mediawatch/documents/acb_findings_warne.pdf> at 13 September 2008, 9.} or cannabis for most athletes.\footnote{Stephen Heishman, ‘Cannabis: Clinical Pharmacology and Performance Effects in Humans’ in Charles E Yesalis and Michael S Bahrke (eds), Performance Enhancing Substances in Sport and Exercise 2002 (Champaign: Human Kinetics) 247, 253.} The athlete could still be prosecuted for doping, even though they haven’t intended to gain a performance advantage and have not gained any such advantage. This seems a far cry from general notions of ‘doping’.

Such inconsistency between the theoretical and operational definition of doping is the very reason that cases such as Raducan, Baxter and Puerta (described above) are often perceived as being unfair. Those athletes had no intent to gain an advantage and yet were disqualified from their sport — and in two cases lost their Olympic medals — for having a substance in their system which would not have had any positive effect on their performance. These situations do not correlate with what ‘doping’ is all about.\footnote{It should be noted here that under the WADA Code there is opportunity to have the ineligibility period either eliminated or reduced under Articles 10.3 and 10.5 as outlined above. The point has also been made above that despite these provisions, the athlete will always be disqualified from competition and a doping violation recorded.}
4  Conclusions: Inadvertent Doping

The puzzles and ambiguities presented by the inadvertent doping cases are troubling because they lead to a major difference between what society defines as ‘doping’ and what the law punishes as ‘doping’. The operation of the strict liability rule in inadvertent doping situations leads to athletes who clearly have no such repugnant intent being found to have ‘doped’. This is troubling but it is not inexplicable since a number of justifications exist for including these situations — where there is no intent but an advantage is gained — in the definition of doping have been accepted. What is puzzling beyond explanation is the operation of the strict liability rule where it is clear that the athlete without intent has not gained a performance effect. By operation of the current Article 2.2.1 these athletes are still punished for doping. This type of situation is so far from what society defines as ‘doping’ that it is a wonder that such situations have been accepted as ‘necessary’ to the anti-doping effort.

C  Doping Definition in Doping Discourse: Responses to ‘Doping’ Incidents

The uncertainty over doping definition is not confined to the operation of the strict liability rule. It is clear that there is confusion as to what constitutes doping also in popular discourse surrounding the issue, most apparent in the public response to ‘doping’ incidents. The point is therefore best illustrated by a recent example of such an incident.
1 BALCO Investigation

The Bay Area Laboratory Co-operative (BALCO) investigation and subsequent court cases has been hailed as the ‘biggest doping scandal of all time.’\(^5\) Although Ben Johnson’s positive at the Seoul Olympics and the East German state-sponsored doping plan are arguably on the same scale, there can be little doubt that the BALCO enquiry has attracted world-wide media attention and had far-reaching implications.

(a) The Facts

In 2002 federal investigators began an investigation of BALCO, a Californian company supplying performance enhancing substances to athletes.\(^5\) The investigation gathered momentum after federal agents raided the BALCO offices and an anonymous coach sent a syringe to the University of California laboratory which contained the previously unknown designer steroid, tetrahydrogestrinone (THG).\(^5\) BALCO was implicated as the source of the drug. After the laboratory developed a test for the new drug, a number of high profile athletes were sanctioned for use of either THG or modafinil (a doping stimulant).

Of more interest for present purposes though, is the federal investigation involving a grand jury trial in which four BALCO personnel were convicted and sentenced on various charges including distribution of illegal steroids to athletes.\(^5\) On May 6, 2004, the US Senate Commerce Committee made the evidence gathered in the federal investigation available to the United States Anti-Doping Agency (USADA) for purposes of investigating drug use among athletes. On the strength of the evidence given to USADA, a number of athletes received suspensions for THG and modafinil use.\(^5\) Elite athletes such as Alvin

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\(^{57}\) BALCO had been supplying various substances to elite athletes since it had been founded by Victor Conte in 1984: USA Today, BALCO Investigation Timeline (2006) <http://www.usatoday.com/sports/balco-timeline.htm> at 13 September 2008.


Harrison\textsuperscript{61} and Kelli White admitted to the use of these drugs, while Michelle Collins and Tim Montgomery fought their suspensions in the CAS.\textsuperscript{62} The fallout from the investigation has continued for some years.\textsuperscript{63}

(b) The Reaction

Not surprisingly, the BALCO investigation received world-wide media attention. Of particular interest were comments made by US journalists regarding the ‘non-analytical positive,’ the term used to describe a doping case where the evidence does not include a positive drug test.

About 10 days after the Senate committee made the grand jury evidence available to USADA, Sally Jenkins, in the \textit{Washington Post}, criticised the ‘non-analytical positive’ which she called an ‘evil little something’; ‘USADA’s way of dealing with athletes they suspect but can’t catch red-handed.’\textsuperscript{64} She was appalled by the idea that Marion Jones might be sanctioned on the strength of evidence such as ‘signed checks and e-mails,’ and pronounced that: ‘The US Anti-Doping Agency ought to be promptly restructured, and its

\textsuperscript{61} United States Anti-Doping Agency, Press Release: U.S. Track Athlete Alvin Harrison Receives Four-Year Suspension For Participation In BALCO Drug Conspiracy, October 2004 (2004)
\textsuperscript{62} Collins subsequently settled her case in return for a decreased suspension (to four years): USA Today, above n 57, eventually received a two year suspension from the court: Mark Fainaru-Wada and Lance Williams, \textit{Montgomery Banned Two Years For Doping, World Record Expunged; Gaines Also Banned} (2005)
\textsuperscript{63} During the Athens Olympics two Greek athletes who missed their drug tests in mysterious circumstances were later linked with BALCO, USA Today, above n 57. One of these athletes, sprinter Katerina Thanou, was barred by the IOC from competing at the Beijing Olympics as a result of the events surrounding the Athens Olympics: \textit{CBC, IOC Confirms Positive Doping Test by Greek Hurdler} (2008)
\textsuperscript{64} Sally Jenkins, ‘This Agency Lacks the Inside Dope’, \textit{The Washington Post} (Washington), 17 May 2004, D01; Sally Jenkins, \textit{This is Wrong: USA Has Athletes Guilty Until Proven Guilty} (2004)
martinet CEO Terry Madden stripped of his blazer, for threatening to use such a thing against anyone…” She claimed ‘the “non-analytical positive” was a tacit admission by USADA that it ‘[w]asn’t doing its job particularly well – otherwise why would it need such a thing? USADA has way too much power and not nearly enough good science and sound legality.’

Jenkins ended the article with this: ‘What’s really going on here is that the drug police are short-circuiting due process because their science isn’t good enough. They can’t catch cheaters fair and square – so they’ve decided to cheat, too, on the rules of evidence.’

Similar sentiments were expressed by Tim Guierda:

That process got more complicated when the United States Anti-Doping Agency came up with this silver bullet called the non-analytical positive, an unprecedented and seemingly unconstitutional device that allows athletes to be banned because of suspicion and without traditional proof… It no longer takes a failed steroids test to keep someone from competing in the Olympics. USADA can now do it on the basis of documentary evidence or corroborating testimony or whatever else is convenient.

Not all commentators were of the same view, however. Responding to Jenkins comments, David Kindred had this to say:

Well, now. To call that “evil little something” by its proper American name is to call it circumstantial evidence; that is its evidence from which a reasonable conclusion can be made. As it happens, of course, most criminal prosecutions are built on that kind of evidence. Martha Stewart could bake you a cake out of the circumstantial evidence used against her.

These journalists, of course, are writing to sell newspapers and are not being paid to be consistent or logically defensible. Nonetheless, examination of some of these comments reveals yet another way in which the definition of doping has been distorted.

\(c\)  

**Doping Definition in the BALCO Example**

The journalistic comments above focus on the way doping should be proved; the argument being that doping should only be proven by way of a positive doping test. As has been noted above, this type of proof goes hand-in-hand with the strict liability definition of doping. Circumstantial evidence (such as emails and signed cheques) goes more to proving intent. Claiming that drug testing is the only appropriate way to prove doping is akin to saying that doping should only be defined with reference to the state of body of the

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65 Ibid.
66 Ibid.
athlete, and that the state of mind is irrelevant to the definition. As the above discussion has demonstrated, the state of body definition is a far cry from the type of practices that the public wish to be punished as doping. Even within the BALCO discourse it is clear that the abhorrent part of the episode was that athletes were intending to gain advantage over their peers through the use of prohibited substances. Yet here it is claimed that evidence proving the repugnant state of mind is not sufficient.

This is just one example of public doping discourse which suggests that the universal understanding of what doping is all about is perhaps not as universal as first thought. In the next section, three other examples of doping discourse will be discussed in relation to the contents of the prohibited list. These examples also demonstrate the lack of consistency in this aspect of doping definition.

D Conclusions on Doping Definition: the Deviant Behaviour

Doping definition is not as clear cut as could be assumed on the face of modern anti-doping policy. It has been demonstrated that there is a profound inconsistency between what anti-doping rhetoric and public debate consider to be ‘doping’ and what is actually punished as ‘doping’. This is clear in doping case law, particularly the inadvertent doping cases, and public debate surrounding ‘doping’ related incidents. The lack of clarity in these examples largely relates to the role of the athlete’s intent which is at odds with intuitive notions of doping. While, theoretically, the repugnancy of doping relates to the state of mind of the athlete, legally the focus is solely on the state of body (in some cases not even the same state of body as the theoretical model). As shown in Chapter One, the issue over the way the offence of doping should be defined is not only a modern problem; it has been at the heart of the debate over anti-doping policy since the 1960s. The confusion continues today and applies not just to the definition of the deviant behaviour but also which substances should be defined as ‘doping.'
III DOPING DEFINITION: THE PROHIBITED LIST\textsuperscript{69}

The ambiguity over doping definition goes beyond the general issues discussed above. There is, and always has been, difficulties in defining which substances should be included on prohibited lists and thus be defined as doping.

Three recent examples of the public reaction to ‘doping’ scandals are the best starting point for illustrating the confusion prevalent in modern doping discourse in this regard.

A Doping Definition in Doping Discourse

1 The Caffeine Pill Debate

(a) The Facts

In May 2005 the Australian media revealed that some athletes were using caffeine pills to enhance their performance. Sports involved included Australian-rules football, Rugby Union (notably George Gregan,\textsuperscript{70} then captain of the Australian Wallabies) and hockey.\textsuperscript{71} These revelations were set against a backdrop of controversy over the role of caffeine in sport. At the beginning of 2004, caffeine had been removed from the WADA Code Prohibited List\textsuperscript{72} — largely a result of concerns about the lack of accuracy of testing\textsuperscript{73} but the World Anti-Doping Agency (WADA) also considered caffeine not to be a significant performance enhancer.\textsuperscript{74} However, a 2002 study by scientists at the Australian Institute of Sport (AIS) on caffeine revealed modest performance enhancing effects.\textsuperscript{75} The AIS published a fact-sheet on caffeine which, among other things, recommended safe dosages.\textsuperscript{76} If, as the Australian Wallabies claimed, the use of the pills was in accordance

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\textsuperscript{69} It should be noted here that up until the introduction of the WADA Code there were a number of different operational prohibited lists according to the particular sport involved. Reference to the ‘Prohibited List’ before this time is therefore a little misleading. However, in most cases such a reference will be to the Olympic prohibited list unless otherwise stated.


\textsuperscript{74} ‘Why Gregan Does Not Make a Dope’, The Sydney Morning Herald (Sydney), 19 May 2005, 14.

\textsuperscript{75} These effects were valued at approximately 3%: Gregory R. Cox, Ben Desbrow, Paul G. Montgomery, Megan E. Anderson, Clinton R. Bruce, Theodore A. Macrides, David T. Martin, Angela Moquin, Alan Roberts, John A. Hawley, Louise M. Burke, ‘Effect of Different Protocols of Caffeine Intake on Metabolism and Endurance Performance’ (2002) 93 Journal of Applied Physiology 990.

\textsuperscript{76} The fact sheet suggested safe levels of use, warned against potential side-effects at high dosages and recommended use only under supervision: Australian Institute of Sport, AIS Sports Supplement Program Fact Sheet: Caffeine (2005)
with the AIS recommendations, then, according to Professor Peter Fricker (director of the AIS), the dosage was ‘well within the range of the usual daily caffeine intakes of most members of the community.’

The substance involved in these events was a legal, permitted substance, used freely in the community without controversy. The substance’s significance in performance enhancement was, by no means, universally accepted. The dosages were no higher than many non-athletes consume on a daily basis. Although there are potential side effects at high concentrations, there was no evidence of danger under the AIS recommendations.

(b) The Reaction

The revelations of caffeine pill use set off a torrent of media commentary on the issue. Newspaper headlines read:

- ‘Gregan Stirs Caffeine Row – Tablet Use “Sends a Bad Message to Kids”’
- ‘Why Gregan Does Not Make a Dope’
- ‘Storm Brews Over Gregan’s Caffeine Confession’
- ‘Why Captain George Pops the Pills Mr 7 Per Cent’
- ‘Gregan’s Caffeine Use “Bad Message”’
- ‘Gregan Should Just Say No to Caffeine’ and
- ‘Children Beg Sports Stars: Don’t Pop Pills’

Many high profile figures made public comment. The criticism focussed on the message that George Gregan’s comments sent to young people: ‘Taking caffeine isn’t the worst
crime in the world, but, yes, the major problem to me is that it sends the wrong message to the youth of Australia or young kids playing rugby’,86 ‘athletes using caffeine tablets to enhance performance sen[ds] “the wrong message about sport”.87 Even the Australian federal treasurer at the time, Peter Costello, made comment, “I can’t understand how clubs allow it myself. They might say, ‘well it’s a legal drug and there is nothing wrong with taking it’, but gee it sends a bad example doesn’t it when you down pills like that.”88

David Howman, chief executive officer of WADA, entered the debate, describing the use of caffeine as ‘bordering on cheating. If it’s not on the list it’s not cheating but it’s bordering, and it’s saying “well let’s take every step now”…’.89

WADA indicated that it would be reviewing the decision to take caffeine off the WADA Code Prohibited List in light of the AIS research and the subsequent increase in caffeine use, while the Australian government promised to provide all information and cooperation to WADA to assist the review.90 Interestingly, two opinion polls were taken by The Sydney Morning Herald on 18 May 2005:

**CAFFEINE TABLETS: Should professional athletes take them?**

- **No way, ban them – 44%**
- **Possibly but there should be a limit – 8%**
- **Perhaps, if there are no long-term side effects – 5%**
- **Sure, a little boost never hurts – 2%**
- **Yes. They’re legal - get over it – 41%**

Total votes: 763 Poll Date: 18/05/05

**Waratahs and caffeine pills: Should they take them?**

- **Yes – 44%**
- **No – 48%**
- **Undecided – 8%**

Total Votes: 1851 Poll date: 18/05/05

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87 Alan Thompson in NZSDA, above n 71.


89 Australian Broadcasting Corporation, above n 86.


91 Sydney Morning Herald Website, *Sports Poll* (2005) <http://www.smh.com.au/polls/sport/form/html> at 17 August 2005. It is not being suggested here that these results are representative of a random sample of public opinion on the subject. It is merely presented to show that the debate was not confined to authorities and sports people.
From those polls it seems that the criticisms recorded in the media may have been representative of the attitudes in the wider community, the majority of people in the poll voting in some way against caffeine pill use.

2 The Mark French Affair

(a) The Facts

In December 2003, cleaners at the AIS cycling facility in South Australia discovered needles, syringes and other injecting paraphernalia in the room that cyclist, Mark French, had recently vacated. Although it was not clear who had been using the materials, French was found guilty under the AIS and cycling federation rules of being knowingly involved in trafficking and use of a prohibited substance (Testicomp, a glucocorticosteroid) and possession of equine growth hormone. Shortly after the CAS finding was handed down, the issue came to public attention through parliamentary debate and media coverage.

French had made allegations regarding group-injecting sessions in his room at the AIS residence. These alleged group sessions, in which a number of high profile Australian cyclists regularly injected themselves, were mentioned in Federal Parliament by Senator Faulkner in June 2004. The focus of attention in the subsequent public debate was not so much on the alleged use of Testicomp by French, nor the equine growth hormone used by an unknown person, but on these injecting sessions. The comments concentrated on the practice of injecting, rather than the substance which was being injected, the rumours involving widespread injecting at the AIS being largely to do with multivitamin injections (a permitted substance).

A number of separate investigations into both the specific circumstances of the French case and the wider allegations of a self-injection culture at the AIS resulted. French appealed his sanction and in July 2005 was exonerated of all charges.

92 Australian Sports Commission and Cycling Australia v Mr Mark French, AS/2004 ASC & ACF v Mark French, partial award pronounced by the Court of Arbitration for Sport Oceania Registry, Panel: Mr Malcolm Holmes QC. Note that this decision was overturned on appeal. See below discussion.

93 Commonwealth of Australia, Parliamentary Debates, Senate, 17 June 2004, 24103-24104 (Senator Faulkner) and 18 June 2004, 24295-24298, 24303-24305 (Senator Kemp, Minister for Arts and Sport).

94 It is accepted that some of the public outrage to do with this incident was generated by rumours of injections of prohibited substances. However in the subsequent public debate no distinction was made between prohibited and non-prohibited substances and it was the practice of injecting that was the focus of the outrage: see for example ‘Kelly Admits he Injected Vitamins in AIS Room’, Geelong Advertiser (Geelong), 8 July 2004, 1 where Shane Kelly made extreme efforts to point out that he admitted injecting permitted substances, showing that the distinction had been lost in the public outrage of the incident.

95 The appeal panel found that Testicomp had not been proved to contain a prohibited substance and there was a lack of evidence to identify the person who had used the equine growth hormone. An interesting aspect of the case was the decision that listing a prohibited substance on the ingredients of the product was insufficient...
(b) The Reaction

The French affair has been called ‘the biggest scandal...in drugs in sport in this country for at least a decade...’ and ‘one of the biggest controversies to hit Australian sport.’ Such was the impact of the controversy that AIS athletes became subject to random room searches, the AIS and AOC policy against self-injection was strengthened and the new Australian drugs in sport investigatory body, ASADA, was given wide-reaching investigatory powers at the AIS, the extent of which were unknown to its predecessor.

Some examples of the headlines and comments published include:

- ‘Inside the Shooting Gallery’
- ‘Elite Cyclists Caught up in Drug Scandals’
- ‘Bombshell allegations of widespread drug injecting by Australian cyclists have rocked the Olympic Team on the eve of the Athens Olympics’
- ‘Federal Parliament yesterday heard claims six cyclists at the Australian Institute of Sport turned a bedroom into a ‘shooting gallery’
- ‘Details emerged yesterday of a second “shooting gallery” used by Australian Olympic cyclists while training in Germany’

evidence to prove that the product contained a prohibited substance. Scientific testing of the product had failed to show that Testicomp contained glucocorticosteroids: Appeal Partial Award pronounced by the Court of Arbitration for Sport Oceania Registry, Mr Mark French v Australian Sports Commission and Cycling Australia, 11 July CAS 2004/A/651, 13.

Commonwealth of Australia, Parliamentary Debate, Senate, 5 August 2004, 25621 (Senator Faulkner, Leader of the Opposition in the Senate).


Evidence to Senate Committee for the Environment, Communications, Information Technology and the Arts, Parliament of Australia, Canberra, 15 February 2005, ECITA 102-104 (Mr Mark Peters, Executive-Director of the Australian Sports Commission).

For example random room searches, access to athlete’s documents and computer discs in their residence.

Cyclist Mark French’s allegations of a drug-injecting culture at the Australian Institute of Sport have led to the creation of a Big Brother-style regime for scholarship holders. And if the legislative changes to the proposed new drugs body, the Australian Sports Anti-Doping Agency, follow through in the same vein, all of Australia’ athletes could be left with fewer personal rights.


3 The Cannavaro Film

(a) The Facts

In April 2005 an Italian state television broadcaster showed footage of Italian football player, Fabio Cannavaro, on the night before the 1999 Union of European Football Associations (UEFA) Cup Final. He was seen connected to an intravenous drip of the drug, Neoton, administered by the Parma team doctor. Neoton was not a prohibited substance; such use apparently was common in football circles. The drug is used by athletes as an ‘integrator of vitamins’, a ‘restorative, a sort of multi-vitamin feed necessary for tired players’.

(b) The Reaction

Predictably, the screening of the incident ‘caused a furore in Italy’ and was a ‘major source of polemic controversy’. The Associated Press reported ‘[v]ideo shows Cannavaro doping before 1999 UEFA Cup Final’ (despite also reporting that Neoton was not a banned substance.) Other news headlines read: ‘Juventus Defender Sparks Scandal after Drug Tape is aired on National Television’. Italian Olympic Committee president, Gianni Petrucci, said he was ‘upset’ and ‘shaken’ after seeing the footage. Negative comments
regarding the incident reached the Australian media, who took exception to injecting substances into athletes, whether the substance was legal or not.\textsuperscript{112}

4 Confusion Over Doping Definition in the Three Examples

There is a constant theme running through these examples. In each case, the public response to the ‘doping’ incident was to treat it as exactly that, a ‘doping’ incident. Yet none of the examples actually involved ‘doping’ as defined by modern anti-doping policy, for none involved prohibited substances or methods.\textsuperscript{113} Public reaction was as volatile as if the substance/practice involved appeared on the relevant prohibited list. Why? In the case of the caffeine pill debate, it may be possible to argue that the response was a ‘hangover’ from the time when caffeine was a prohibited substance; public opinion just not having caught up on that issue. However this explanation appears weak, since neither substance in the French and Cannavaro affairs had ever been prohibited.

It seems that it was simply believed that there was something wrong with the practice in question. In arguing that Gregan was setting a bad example for youth, it was simply assumed that there was something inherently wrong with taking caffeine pills. The outrage over the ‘shooting gallery’ in the Mark French case presupposes that there is something intrinsically wrong with injections, regardless of the legal status of the substance. Similar comments apply to the Neoton intravenous injections.\textsuperscript{114} There is obviously confusion regarding exactly what doping is; and public outrage is not fettered by whether a substance or practice is legally defined as ‘doping’. Something else was driving public outrage at


\textsuperscript{113} The Mark French affair, with the focus on the ‘shooting gallery’ which involved largely multivitamins, is a little less clear cut. However, the way in which multivitamin injections were treated by the public was akin to the practice of doping. It was clearly not doping since multivitamin injections were not prohibited under any of the applicable rules at the time. There was some suggestion that self-injection of any substance, whether it be prohibited or not may have been a breach of the AIS code of conduct. See Luke McIlveen and Bronwyn Hurrell, ‘Taken By a Friend to a German Pharmacy, It was the Incident that Changed a Champion’s Life. The Day Mark French Bought His First Drugs.’ \textit{The Advertiser} (Adelaide), 26 June 2004, 10. However, in his second report to the ASC and Cycling Australia on the allegations, the Honourable Robert Anderson QC made it clear that there was no such policy despite the practice being generally frowned on at the AIS. This was ‘corrected’ later and self-injection officially became a breach of AIS policy. The Honourable Robert Anderson QC, \textit{Second Stage Report to the Australian Sports Commission and to Cycling Australia 27 October 2004} (2004) \texttt{<http://www.dicta.gov.au/?a=16787> at 30 August 2005, 20-21. Even if there had been a policy in place the fact that permitted substances were involved takes it outside ‘doping’. Anderson, at 11, made this clear when he said ‘[m]y inquiry has been focused mainly on what may loosely be described as doping offences and only activities that would fall into that category in this case are activities relating to Testicomp and Equigen (ie not multivitamins).’ Thus, insofar as the scandal related to multivitamin self-injection, the outrage centred on permitted practices.

\textsuperscript{114} At the relevant time, intravenous injections were allowed under the \textit{WADA Code} and, one presumes, under the football anti-doping rules. Neoton was, and remains, a permitted substance under the Code. Since 2004 the World Anti-Doping Agency (WADA) has added intravenous transfusions to the \textit{WADA Code Prohibited List} as a prohibited method: \textit{WADA Code: 2008 Prohibited List}, M2.
this point. Evidence of such attitudes was noted in the Anderson report, a section of which seems particularly apt for this discussion:

On the one hand there are sports administrators… who believe that the public perceive the unsupervised use of needles by athletes as in itself a sinister and unacceptable practice. This is probably true and is due perhaps to the fact that so many banned substances come in injectable form. On the other hand there are others… who see little difference between the taking of a permitted product orally and the taking of it intravenously, as long as in all cases the substance is a permitted substance and the rules as to disclosure are followed.  

The lack of clarity over what is, or should be, on the prohibited list is hardly surprising given the lack of transparency which exists as to how substances are chosen for the list.

B The Criteria for Inclusion on the Prohibited List

1 The WADA Code Criteria

For some time now, most anti-doping policies have included a list of substances or methods of administration which are prohibited in the relevant jurisdiction. The WADA Code has continued that tradition, the offence of doping being defined according to the contents of the associated WADA Code Prohibited List. A significant development with the WADA Code is that it establishes criteria by which substances and methods are considered for inclusion on the WADA Code Prohibited List. Article 4.3.1 states:

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to enhance or enhances sport performance;

4.3.1.2 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;

4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.

4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances and Prohibited Methods.

These criteria correlate with the rationales for anti-doping rules which have been accepted for the last fifty years or so: threat to health, fairness and the ‘spirit of sport’. Until now

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115 Anderson above n 113, 21.
117 Organisations such as the Council of Europe in the mid 1960s based their resolutions condemning doping on 'health, poor example to the young and that doping was contrary to the spirit of fair play in sport': Barrie
there has been no explicit criteria applied in determining which substances and methods should appear on the list.

Historically there has been surprisingly little reliable research underlying the inclusion of most substances on the list since the health or ergogenic effects of many of the drugs on the list have not been well researched. Dick Pound, IOC vice-president and one-time WADA chairperson, admits in his book that, rather than being based on reliable scientific research:

> The list grew like Topsy, with no generally agreed-upon criteria for why a particular substance was included, while another was not. Quite often the decision was merely a function of a particular research interest — such as beta-2 agonists and glucocorticosteroids — of one of the members of the commission.

It seems that anti-doping efforts were, in the past, strongly driven by the interests of research scientists; the list reflecting these research interests rather than an evidence-based approach. This historic problem appears to be correcting itself. Caffeine (discussed above) and pseudoephedrine are two examples; as research revealed only modest performance enhancing qualities, they were removed from the list. Having an explicit set of criteria to work toward will also encourage more research into the effects of the drugs. These provisions therefore represent an improvement on the previous system.

Nonetheless, the way in which the criteria have been articulated in Article 4.3 is far from clear. If, in the opinion of WADA, the substance or method meets any two out of the three of the criteria, WADA will then consider including the substance or method on the WADA Code Prohibited List.

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118 Houlihan, Dying to Win: Doping in Sport and the Development of Anti-Doping Policy, 1999 (Strasbourg: Council of Europe Publishing), 130.

119 For example Campbell Aitken, ‘Lifting Your Game’ (2002) 61(12) Meanjin 217, 220 states:

> The number of health problems associated with steroids might lead one to think that using steroids is extremely dangerous, but in fact the more serious of these effects have been observed in only one or two case studies while others, such as gynaecomastia, are common but essentially cosmetic. Moreover, it isn’t always possible to attribute health effects to steroid use alone.

He also says (at 221):

> Interestingly, while there is no doubt among athletes that steroids do improve performance, few studies have been conducted to determine whether this is the case, and their findings are equivocal. For practical purposes, given the documented willingness of athletes to use steroids, we have to assume that they really do work.

It is also interesting to examine the book edited by Yesalis and Bahrke, Charles E Yesalis and Michael S Bahrke (eds), Performance Enhancing Substances in Sport and Exercise, 2002 (Champaign: Human Kinetics) and see the number of chapters which conclude that there is a lack of research or evidence about the ergogenic effects of the relevant substance.

120 It will be argued later in this thesis that the list was not just a result of the research interests of the scientists but was strongly influenced by public opinion.

121 There is now financial support going into research into these areas, WADA supports a number of research projects which attempt to further define the ergogenic and health effects of various substances on the WADA Code Prohibited List: see World Anti-Doping Agency, Projects Relating to the Prohibited List (2006) <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=346> at 27 September 2008.

These two substances are now on the Monitoring Program and are no longer considered Prohibited Substances.
Anti-Doping Policy: Rationale or Rationalisation?

Chapter Two

Code Prohibited List. The criteria are proven performance enhancement potential, proven potential to risk health and violation of the ‘spirit of sport’ (as outlined in the introduction to the Code).

2  Ambiguities in the Criteria

The first source of ambiguity is the third criteria for selection, the ‘spirit of sport.’ The values and concepts encompassed in the term ‘spirit of sport’ have been discussed above. Given the width and vagueness of the concept, it is unlikely to work effectively as a limiting device for the list. Since the ‘spirit of sport’ refers to values including fairness and health it is possible that this criterion could amount to nothing more than a repetition of the first two criteria. No doubt the concept has been included in order to cover a number of situations, including where new substances are discovered and appropriate research is not yet available or where it is deemed inappropriate for athletes to use recreational drugs such as marijuana. However, it is difficult to predict when a substance or practice will be determined to be against the ‘spirit of sport’.

There is further potential for ambiguity. Even if a substance or method is determined to satisfy two out of three criteria, there is still discretion on the part of WADA to choose not to put it on the list; WADA is only bound to consider including the substance. Thus the criteria still leave a large margin for discretion on the part of WADA, adding potential vagueness and imprecision to the decision making process.

Furthermore, the decision to ban a particular substance on the basis of its ergogenic properties does not relate to any particular sport. Given that there is now to be one prohibited list for all signatories, a substance can be included on the list, even if its ergogenic properties are limited to a number of high-profile sports. This is particularly so, given that provision is made only to expand the WADA Code Prohibited List for a

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123 The point of the criteria is to ensure that substances are not included on the list unless they have more than one reason for being there: not just that they are ergogenic or dangerous. Thus a vague notion like the spirit of sport in many ways defeats the purpose of having these limiting devices. It is submitted that due to the width and imprecision of the notion of ‘spirit of sport’, once it is shown that a substance either endangers health or enhances performance, the third criterion will be virtually assumed in most cases.

124 Such as THG the new ‘designer steroid’ in the BALCO case discussed above.


126 For example WADA recently decided not to add hypoxic tents to the list. WADA had decided that the tents, which mimic the low oxygen environment of high altitude training, were performance enhancing and against the ‘spirit of sport’ but still decided not to prohibit them until further research was completed: CBC, *Anti-Doping Agency Won’t Ban Oxygen Tents* (2006) <http://www.cbc.ca/news/story/2006/09/16/wada-hypoxic.html> at 14 September 2008.
particular sport, not to *delete* any substances. For example let us say that anabolic steroids do not have the potential to enhance performance in a sport such as shooting. There is no provision in the *WADA Code* for anabolic steroids to be deleted from the list for shooting.\textsuperscript{127} This gives rise to the possibility that shooters may be suspended from their sport, even if the drug that they were ‘caught’ with did not help them in any way. Since there are a number of substances whose ergogenic effects are not universal, the reason behind prohibiting the substance becomes somewhat disassociated from its operational prohibition in any one sport. This disassociation extends to the *WADA Code Prohibited List* in general; it seems less important to articulate the justification for including that substance on the list. Such disassociation adds to the ambiguity of the list.

It may be argued that WADA will use the criteria in a way that does not make them unworkable. However, given the influence of politics in an area of international interest such as doping, these concerns may not be unfounded. History also suggests that decisions such as these will continue to be unclear. For example, a number of commentators have criticized the inclusion of recreational drugs, such as cannabis on the *WADA Code Prohibited List*, since it is highly unlikely that such a drug would be performance enhancing.\textsuperscript{128} Under the criteria in Article 4.3 such substances can be included on the list since WADA may accept that it is danger to the health of the athlete and, given its illegal status in many jurisdictions, it is against the spirit of sport.\textsuperscript{129}

The confusion over determining which substances should be on the list therefore appears to extend beyond the public, to the drafters of the Code. Many of the difficulties with the *WADA Code Prohibited List* appear to arise from the attempt to place rational criteria on a process that appears to be driven by something other than rationality. The public debate surrounding the three ‘doping’ incidents discussed above seems to spring more from the appearance of doping, than any rational cognition about the properties of the substance in question. It will be argued in subsequent chapters that the reason for ambiguity in the definition of doping — including the decision about which substances should be on the prohibited list — is that anti-doping policy is not a result of rational reasoning at all. Thus,

\textsuperscript{127} Although the substance may not be tested for it would still officially be a prohibited substance.

\textsuperscript{128} At least not in most sports and not to any extent which would be relevant in elite competition. The ambiguities of the list are added to by the inclusion of drugs which are largely ‘recreational’ rather than performance enhancing on the list. As Buti and Fridman, above n 3, 47ff, point out there has been a lively debate over whether such substances should be included or not. Many argue that there should be a distinction made between recreational drugs and performance enhancing ones. For a good example of where this distinction has been made, see John Birmingham, ‘No Stoner Unturned’ (2006) 124(6515) *The Bulletin* 38.

\textsuperscript{129} This is also debatable but it is widely accepted that marijuana has some detrimental effects on health.
attempting to apply rational criteria to a process which is largely ‘arrational’ will always fail.

If, in the past, the IOC Prohibited List grew ‘like Topsy’, the criteria in Article 4.3.1 of the WADA Code allow for the possibility of this trend continuing. It is puzzling how such an important list — which athletes will be strictly held to at the risk of their careers and involves substantial amounts of money in drug testing — could develop in such an unprincipled way. With such an unprincipled and vague approach to the list on the part of sports administrators, it is no wonder that it is unclear to the general public which substances and practices constitute ‘doping’ and which do not.

IV  WHY ALL THE CONFUSION?

To define doping is, if not impossible, at best extremely difficult, and yet everyone who takes part in competitive sport or who administers it knows exactly what it means. The definition lies not in words but in the integrity of the character.130

This chapter has demonstrated that, as Pound puts it, there is still ‘no clear view of exactly what [we are] talking about when it comes to doping’.131 Historically there has been a lack of clarity about exactly what doping is: namely the deviant behaviour and which substances constitute doping. Perhaps unsurprisingly, given his previous position, Pound’s view seems to be that many of these issues are now settled and that a good understanding of what doping is, if not already arrived at, is well in the process. The analysis in this chapter tells a very different story. Far from being clear and complete, the definition of doping remains in confusion. The operational definition may be obvious but this clarity does not extend to doping rhetoric, or to doping case law. In light of the discussion in this chapter, the above quote from Sir Arthur Porrit is in many ways wildly inaccurate, yet in many ways very true. It is patently clear that not everyone knows exactly what doping is; in fact it is more likely that no-one knows exactly what it is. But Porrit hints at the real driver in doping definition: the gut instinct about what should constitute doping and what shouldn’t.

In light of the confusion over doping definition, the question arises: why is there so much confusion? This is the most significant issue for this thesis. Pound blames the years of confusion on the fact that scientists controlled policy development, rather than ‘generalists’

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131 Ibid, 59.
who would have taken a more principled, ethical approach. Pound is right when he argues that the ad hoc nature of anti-doping policy produced this confusion, but the issue is not simple. The influence of popular opinion on anti-doping policy cannot be discounted. Chapters Four to Nine will demonstrate that anti-doping policy has been strongly driven by public opinion and that it is only through understanding the drivers of that public opinion that the reason for such confusion becomes evident.

In this chapter it can be seen that very strong reactions are prompted by practices which do not lie within the definition of doping. In the three examples of ‘doping’ scandals, public reaction to the practice in question was the same as if the substance had been prohibited. In all these cases anything that ‘looked’ like doping was thought appropriate for punishment without reference to the legal status. There appears to be a powerful ‘visual’ element — anything that has the taste or ‘stench’ of drugs to it is open to question. Caffeine pills, multivitamin shots and intravenous drips of Neoton are strong reminders of the use of performance enhancing substances because they look like doping. Even though the substances may not appear on the relevant prohibited list, the jar of pills, the intravenous injection and the hypodermic syringe are all paraphernalia connected in the minds of the public with performance enhancing substances such as anabolic steroids.

The strong emotional reaction to the appearance of doping is also evident in the operation of anti-doping law. The combination of the strict liability rule and the operation of the ‘no effect’ provision in the WADA Code has led to athletes who are guilty of nothing but having a prohibited substance in their system being punished for doping, even though the substance is not ‘active’ in the sense of giving a performance advantage. The mere unintentional presence of an inactive prohibited substance is enough to attract sanction. This suggests that the punishment for doping is not related merely to concerns about the

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132 Ibid.
134Appearances also provide a clue to why drug testing is seen as the panacea to doping problems despite their obvious failings. Drug testing looks like it would be the best way to detect doping because of the substances involved, they are look like ‘drugs’ and the best way to catch ‘drug’ use is through a ‘drug test’. This will be discussed further in Chapter Nine.
135 In an article in 2005, Manderson made these comments about the crime of drug possession in relation to illicit drugs: ‘The act is made so passive as virtually to vanish... One need intent nothing in relation to the drugs: not to use or to sell them or even to flush them down the toilet. Just knowing of their existence is enough’: Desmond Manderson, ‘Possessed: Drug Policy, Witchcraft and Belief’ (2005) 19(1) Cultural Studies 36, 36. And later, at 38, ‘[w]hat lies beneath is undoubtedly fear of contamination. We fear that just coming into contact with certain substances will taint us. But taint us with what?...What is it, in these drugs, that the very idea of their existence — not their abuse, not even their use, but merely the possibility of some future use — causes us to fear their touch.’ These comments seem apt for performance enhancing substances too. What is it about these substances that their very presence, not even their abuse or active effect, is so harmful?
level playing field, cheating or the health of the athlete. There is something more powerful at work; when simply a whiff of doping is enough to attract the law. In theory, what is repugnant about doping is that athletes intend to ‘cheat’; but, in practice, the power of the substance is feared to such an extent that the mere presence of it is enough to require prohibition.

These visceral reactions are also demonstrated in the discussion relating to the prohibited list. Decisions about what to include on the list appear to be driven less by rational consideration of the issue and more by a gut reaction to the spectre of doping. The use of the vague notion of the ‘spirit of sport’ in the WADA Code is appropriate in light of the fact that much doping law is influenced by gut reactions.

It is clear that there is something more involved in defining doping than simple reference to a list of prohibited substances and methods. Doping is not defined merely by the rules of the game. In anti-doping it seems that appearance is everything; if it looks like doping then it is doping.

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136 This point will be argued fully in subsequent chapters.
CHAPTER THREE

THE AMBIGUITIES OF ANTI-DOPING RATIONALES

I INTRODUCTION

This chapter turns attention to the variety of justifications or rationales advanced for anti-doping policy. It will be argued that no single rationale or combination of justifications meets the tests of rationality and logic but, instead, represent post-hoc rationalisation rather than logical policy development. There are two significant implications arising from these ‘failures’ of the anti-doping rationales: firstly it confirms the argument that anti-doping policy is full of confusion and inconsistencies and, secondly, it reveals that the fundamental reason for prohibiting performance enhancing substances in sport remains elusive.

The Macquarie Dictionary defines rationale as ‘a statement of reasons; a reasoned exposition of principles; the fundamental reasons serving to account for something.’ As set out in Chapter One, the World Anti-Doping Code (WADA Code) states that the fundamental rationale for anti-doping policy is to preserve ‘what is intrinsically valuable about sport’ or the ‘spirit of sport’ which is characterised by the 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.’ These kinds of statements are representative of many preambles to anti-doping codes in the past. Here are three examples:

- The sport of weightlifting involves physical health and fitness, mental application and dedication to training. The use of banned substances and other doping methods to artificially enhance performance can endanger the health of athletes and is unethical, contrary to the concept of fair play and undermines the values of sport.
- Certainly we agree that no triathlete should be allowed to gain an unfair advantage over another, or compromise his health through the use of performance enhancing substances, or through other illegal methods. Even so as the level of triathlon competition increases and the stakes multiply, so does

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1 Colin Yallop (ed), Macquarie Encyclopedic Dictionary, 2006 (Sydney: Macquarie University), 998.
the temptation to use artificial means to extend the limits of human performance. Unfortunately, doping abuse is a very real part of that temptation. It is vitally important that each of us in the ITU family understand that the use of performance enhancing substances and methods is contrary to everything we represent and espouse.\textsuperscript{4}

- Whereas the Olympic Movement Anti-Doping Code is essentially intended to ensure respect for the ethical concepts implicit in Fair Play \textsuperscript{5}sic, the Olympic Spirit and medical practice and to safeguard the health of athletes.

Like the doping definition in the WADA Code, these statements are rhetorically impressive and, at first glance, suggest that the reasons behind anti-doping policy are well accepted and well understood. The fact that these kinds of rationales have featured in the discourse surrounding anti-doping policy over a number of decades adds to the impression of solidarity in understanding. On cursory reflection it appears that we know why we are doing what we are doing in anti-doping policy.

However, this chapter will demonstrate that anti-doping rationales exhibit the same level of confusion and ambiguity as doping definition upon closer examination. There have been many rationales given for banning doping in sport over the last century: from the health of the athlete to the artificiality of performance enhancing substances. The very existence of such a number of justifications for one policy could be seen as a puzzle in itself: why would such a seemingly obvious moral issue need so many justifications to support it? The multitude of justifications for anti-doping policy also speaks to the fact that any explanation has not been satisfactory in and of itself; the more justifications suggested for a policy, the greater the likelihood that these rationales represent post-hoc rationalisation rather than logical policy development. The argument in the subsequent chapters of this thesis is that this is certainly the case with anti-doping policy. The presented rationales represent post-hoc rationalisation for a policy based on things other than compelling logical reasons for taking action.

But it is not the mere existence of the numerous ethical positions which is problematic in anti-doping rationales. A rationale supplies the fundamental reason or the reasoned exposition of principles for anti-doping policy. Among all the possible justifications advanced, it will be shown that no single one can be found which can be called the ‘fundamental reason’ or ‘reasoned exposition of principles’. As much prior literature has shown, every justification which has been presented over the history of anti-doping

\textsuperscript{5} Olympic Movement Anti-Doping Code (OMADC) current 1999, in Siekmann, above n 3, 599.
programmes has been roundly criticized as being unable to support current policy from an ethical point of view.

This chapter concludes that, not only is there no satisfactory justification for anti-doping policy, such a logical reason for the policy will never be found. This is because the policy is not fundamentally a rational one. Later chapters of the thesis therefore advance an alternative explanation as to how anti-doping policy developed. As Manderson writes,

[i]t will do no good, therefore, to try and elaborate reasons for the maintenance of current policy, or, for that matter, to use logic to criticize it. For it is not reason which is operative here…

II THE ANTI-DOPING RATIONALES

A The Spirit of Sport?

The notion that doping violates some indefinable essence of sport is not a new concept. From as early as 1967, with the condemnation of doping passed by the Council of Europe, the ‘spirit of fair play in sport’ has been a distinguishable element in anti-doping discourse. For example, in 1969, the International Olympic Committee (IOC) published an article in their newsletter by Dr G.M. Oza which stated that doping was ‘unnatural and contrary to the spirit of the Olympic Games.’ Until 2003 that ‘spirit’ had never been defined and remained an ethereal and vague concept.

The WADA Code has now sought to give some meaning to the phrase by listing ‘values’ which make up the ‘spirit of sport’, as outlined above. These sentiments did not wholly originate with the Code: but within the Code rationale statement it is possible to discern reference to a number of justifications for anti-doping policy previously relied on by anti-doping authorities. Rationales with particular familiarity include fair play/equality, health, and respect for rules. Each of these rationales will be explained separately in the first section of this chapter, as well as the other commonly presented justifications. In the

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6 Desmond Manderson, 'The Semiotics of the Title: A Comparative Analysis of Drug Legislation' (1995) 2 Law, Text, Culture 160, 173. Manderson wrote in relation to illicit drug policy but this thesis will argue that the same comments apply equally to anti-doping policy.

7 Barrie Houlihan, Dying to Win: Doping in Sport and the Development of Anti-Doping Policy, 1999 (Strasbourg: Council of Europe Publishing), 130.

8 Dr GM Oza, 'Athletes, Doping and Olympism,' (1969) 19(30 May) Olympic Review 209.

second part of the chapter the criticisms and analysis of these justifications will be presented.

B Protecting Health?

The health argument regards doping as an unacceptably serious threat to the well-being of otherwise healthy individuals, whether the danger lies in the simple taking of performance enhancing drugs or the way in which they are taken (i.e. without medical supervision). It is thought that the way to deal with this danger is to forbid athletes from using such products and methods. As will be explained in Chapter Six, this rationale was particularly important in the 1960s, as concerns for athletes’ health escalated after the deaths of a number of athletes associated with the use of performance enhancing substances.11

C Protecting the Level Playing Field or Fairness?

As Houlihan points out, ‘[w]hile unfairness is the most common justification, it is also one of the most problematic.’12 The level playing field argument views the taking of certain substances, or indulging in certain practices, as conferring on the athlete an unfair advantage over other participants. Again, the solution to dealing with this unfairness is considered to be prohibition with associated drug testing designed to ensure compliance.

D Harm to Young: Role Models?

The idea that athletes are role models to the young who must not be seen to be taking drugs has been very strongly advocated, perhaps most strongly in recent times by Director Barry McCaffrey of the United States Office of National Drug Control Policy (ONDCP). The negative role model associated with the use of recreational drugs in elite sportspeople was the main motivating factor for the USA’s push to have marijuana added to the WADA Code Prohibited List.

ONDCP pushed the International Olympic Committee (IOC) to make marijuana a banned substance after an athlete who tested positive for marijuana was awarded the Olympic Gold

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10 One of the best examples of this type of argument is presented by Bob Goldman, *Death in a Locker Room: Steroids and Sports*, 1984 (South Bend: Icarus Press). In Chapters One and Seven he recounts some of the terrible side effects that performance enhancing substances, particularly anabolic steroids, can (allegedly) have on an athlete’s body as a basis for arguing that these substances should be banned. For further such arguments by Goldman, see Bob Goldman, ‘Medical Effects and Side-Effects of Ergogenics in Athletes’ in Ronald S Laura and Saxon W White (eds), *Drug Controversy in Sport*: *Medical and Socioethical Issues*, 1991 (Sydney: Allen & Unwin) 128, 143. See also Dick Pound, *Inside Dope: How Drugs Are the Biggest Threat to Sports, Why You Should Care, and What Can Be Done About Them*, 2006 (Toronto: John Wiley & Sons Ltd), 36ff.

11 See Dick Pound, *Inside the Olympics*, 2004 (Mississauga: John Wiley & Sons, Canada), 55, who writes ‘[t]here is no doubt that the initial concerns were related almost entirely to the health of the athlete.’

12 Houlihan, above n 7, 110.
and hoisted up on the medal platform as a hero to all the world’s youth. The IOC responded and marijuana is now prohibited.\textsuperscript{13}

The argument also featured in the Presidential State of the Union speech by US president George W Bush that same year:

To help children make right choices, they need good examples. Athletics play such an important role in our society, but, unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message — that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.\textsuperscript{14}

We have already seen in the last chapter these kinds of arguments at work in the media in relation to the caffeine pill debate in Australia. Although the basis of these comments was not explicit, the message itself was clear: caffeine pills should not be used in sport because it sends the ‘wrong message’ to young people.\textsuperscript{15}

E Medical Ethics?

The main problem with regard to medical practitioners prescribing drugs for athletes appears to be that the doctor is helping the athlete disobey the rules of sport or to ‘cheat’.\textsuperscript{16}

Although many doctors would hold the position that assisting athletes to utilise prohibited substances in their preparation is against medical ethics, it is unclear whether this would be the case if the substances in question were not prohibited. It may also be that use of any performance enhancing substance would be seen to be going against the medical ethic of helping sick people become well as opposed to assisting well people. Whatever the basis, it is clear that the idea that doping somehow challenges medical ethics has been influential for some time.\textsuperscript{17} The argument for doping control on the basis of medical ethics was implicitly referred to in the IOC’s Medical Code: ‘The IOC Medical Code is essentially
intended to safeguard the health of athletes, and to ensure respect for the ethical concepts implicit in Fair Play, the Olympic Spirit and medical practice.\(^{18}\)

F  **Harm to Other Athletes: Coercion?**

The idea here is that anti-doping rules can be justified on the basis of protecting athletes who would rather not use such substances being coerced into similar use. The coercion is thought to be due to a perception that drug taking is necessary in order to successfully compete with the ‘drugged’ athlete.\(^{19}\)

G  **Drugs are Unnatural?**

The ‘unnaturalness’ argument — doping should be prohibited because the substances involved are unnatural and dehumanising — has been highly influential in the doping debate since the 1960s.\(^{20}\)

So influential was the idea that doping rules could be justified by the artificiality argument that the concept was written into early definitions of doping. For instance, as mentioned in Chapter Two, one of the earliest attempts at defining doping arose from the convention of European sports governing bodies in 1963, the definition being:

> The administration to, or use by, a competing athlete of any substances foreign to the body or any physiological substance taken in abnormal quantity or by an abnormal route of entry into the body, with the sole intention of increasing in an artificial and unfair manner his performance in competition.\(^{21}\)

Dr A F Creff of St Michael’s Hospital in Paris, in the IOC’s newsletter in 1968, proposed to define doping as ‘the use of any non-physiological means (it being understood that physiology is the science dealing with the organic functions characteristic of life), i.e., any means that are not *fundamentally natural*.\(^{22}\) From the very beginning of anti-doping efforts in 1928, doping was defined as ‘the use of any stimulant not normally employed to


\(^{19}\) Murray, above n 9, 2, Spedding and Spedding, above n 14, 497 and Eoin Carolan, ‘The New WADA Code and the Search for a Policy Justification for Anti-Doping Rules’ (2006) 16 Seton Hall Journal of Sports and Entertainment Law 1, 26-27 are good examples of this argument. These kinds of arguments were particularly strong during the Cold War. See Chapter Six for some quotes from US athletes who claimed that they took drugs in order to keep up with their Cold War counterparts. One example is provided by Jere Van Dyk, US middle-distance runner from the early 1970s: ‘I remember we would sit around at meets talking about pill parity. The idea was that if they were using something in the East Bloc, and there was even a chance that it worked, could we afford not to use it?’: Michael T Kaufman, ‘Rise in Steroid Use Seen as Side Effect’, The New York Times (New York), 29 September 1988, B18. Similarly, a 1976 article quotes US Long Jumper Willye White: ‘If we’re up against synthetic athletes, we must become synthetic athletes’: Neil Andur ‘Femininity or Prowess: US Women Must Choose’, Chicago Times (Chicago), 2 August 1976, E2.

\(^{20}\) See for instance Canada, The Honourable Charles L. Dubin, Commission of Inquiry Into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (Ottawa: Canadian Government Publishing Centre), 504.

\(^{21}\) See Houlihan, above n 7, 130.

\(^{22}\) Dr A F Creff, ‘Thoughts on Doping’ (1968) 12 Olympic Review 447. Emphasis added.
increase the power of action in athletic competition above the average, while the IOC’s first condemnation of doping in 1938 was worded thus: ‘The use of drugs and artificial stimulants of any kind must be condemned most strongly...’

H Competition Should be Between Athletes, Not Drugs or Pharmacists?

The rationale which seeks to justify anti-doping policy on the basis that competition should be between athletes rather than chemists is related to the naturalness argument. The underlying reason why competition should not be between drugs or chemists is that this erodes the natural basis of athletic competition. Again, this kind of argument has featured in anti-doping policy from very early on. In a special edition of the British Journal of Sports Medicine, which reported on the 1969 symposium on Doping in Sport, J.G.P. Williams, the UK representative to the Council of Europe Working Party on ‘Doping of Athletes’, wrote:

If the variable is the question of the amount of doping or the type of dope, then, again, the essence of competition is distorted because it ceases to be a matter of the comparison of the performance of one man against another and it becomes instead the performance of one pharmacologist against another — “I can make my guinea pig run faster than you can make your guinea pig run”. Although it makes a very good sport in the sense of competition between pharmacologists it ceases to be a sport in the sense of competition between the individual athletes concerned!

I Image of Sport?

There are a number of different facets to the image of sport rationale but all relate to the way in which sport is perceived by members of the public and the effects of that public perception. At a practical level, the concern is that doping leads to the public becoming disenchanted with sport as a product, since they may not wish to observe sports where the participants are suspected of taking performance enhancing drugs. The fear is that if people think they are being cheated out of watching fair competition, then their interest will wane. Waning of public interest in sports competition and any associated decline in

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25 J.G.P. Williams, ‘Dope in British Sports’ (1969) 4(2) British Journal of Sports Medicine 128, 132. One of the implicit assumptions in this argument is that drugs are extremely effective, to such an extent that all other factors are sidelined in determining the outcome of the sporting competition. It may not be surprising that these kinds of statements came from the medical profession. Membership of that profession is generally testament to their belief in the power of drugs!

26 See Angela Schneider and Robert Butcher, ‘An Ethical Analysis of Drug Testing’ in Wayne Wilson and Edward Derse (ed), Doping in Elite Sport: The Politics of Drugs in the Olympic Movement, 2001 (Champaign: Human Kinetics) 129, 142. This links the argument to the level playing field argument. Interestingly Carolan, above n 19, 41 argues that the rise of professional sport has increased the importance of the image of sport in that the public now have greater interest in and ‘ownership of the sporting ethos’.
attendance would, of course, concern sports administrators and sponsors. This, in turn, would threaten the viability of modern professional sport.

Another facet of the image argument focuses on sport as a healthy pastime and sportspeople as the model of good health: the discovery of doping tarnishes that wholesome image. It is argued that people will no longer allow their children to be involved in sport, jeopardising the future of the industry. An extension of this argument includes a moral dimension: sports people should provide good role models for young people, and doping detracts from that healthy, ethical role model. As stated above, the effect of doping on young people has been of concern since at least 1966. This argument has been very forcefully put by representatives of the United States government in recent international negotiations regarding the inclusion of recreational drugs on the WADA Code Prohibited List.

J Discouraging Illegal Activity?

This rationale was put forward by Buti and Fridman, who point out that in Australia (and other countries) possession, importation and sale of many doping agents is against the criminal law, and that ‘sporting organisations have legitimate concerns aimed at preventing their most important assets, the athletes, from the prospect of criminal prosecution.’

III THE CRITICISMS

Every one of these proposed rationales have been criticized in previous literature. So strong has been the criticism of each rationale that commentators such as the Canadian Centre for Ethics in Sport (CCES), Black, and Cox all argue that none of these arguments are sufficient to justify the prohibition on drugs in sport. Some of these analysts go on to suggest alternative justifications for the ban on doping, in an effort to show that problems relating to the justification for doping policy does not destroy the policy itself.

29 Cox, above n 27, 82.
30 Houlihan, above n 7, 130.
31 McCaffrey, above n 1.3.
32 Antonio Buti and Saul Fridman, Drugs, Sport and the Law, 2001 (Mudgeeraba: Scribbler’s Publishing), 61.
35 Cox, above n 27, 77.
Some examples of alternate justifications include protecting the joy of sport, the irrelevance of doping, avoidance of unnecessary risk, athletic prudence and the self-defeating nature of doping.\textsuperscript{36} Others view the problematic nature of the justifications as undercutting the entire system of anti-doping rules. For example, Fost argues that it is not at all self-evident that there should be a ban on drugs in sport and that, like society’s opposition to other activities such as pornography, ‘it is often difficult to show real danger or harm, and it is harder to say why these activities should be considered immoral.’\textsuperscript{37}

Whether the lack of a consistent rationale undermines the existence of the policy itself is not the point of this discussion. What is important is that such a lack of consistent and ethically acceptable rationales shows that there is confusion at the deepest level, not only as to what doping is, but why it is banned. A brief examination of some of the criticisms which have been levelled at the anti-doping rationales will demonstrate the unsatisfactory nature of the reasons behind anti-doping policy.

\textbf{A \hspace{1cm} Spirit of Sport}

Even this latest articulation of the rationale for anti-doping codes has come under criticism from academic circles. Savulescu, Foddy and Clayton argue that rather than doping being \textit{against} the ‘spirit of sport’, doping practices actually harmonise with the essence of modern professional sport. For Savulescu et al, sport is not purely about biological superiority; it involves a creative element as well. They contend that human sport is distinct from horse or dog racing, where the aim is simply to find the biologically fastest animal, since achievement in human sport involves the competitor’s determination, courage, discipline, choice of training methods, and motivation. This creative element in sport could include the choice to take performance-enhancing drugs. ‘Far from being against the spirit of sport, biological manipulation embodies the human spirit — the capacity to improve ourselves on the basis of reason and judgement.’\textsuperscript{38}

Houlihan also addresses the idea that doping policies can be justified on the basis of a vague notion such as the spirit, ethic or value of sport. In responding to an argument put by Schneider and Butcher — that drug use undermines the essential humanity of sport and

\begin{footnotesize}
\textsuperscript{36} CCES, above n 33.
\end{footnotesize}
the athlete, Houlihan presents an equally attractive counter-claim: that sport and the athlete is simply ‘a social construct and imposes no prior obligation on the individual’ including to refrain from using certain performance enhancing substances.

Murray, on the other hand, uses the spirit of sport concept to counter arguments against the doping prohibition. For example, in response to the idea that all performance enhancers present similar ethical difficulties and it is, therefore, inconsistent to ban doping but accept fibre glass poles in pole vaulting, Murray argues that some performance enhancers ‘undermine the meaning of sport’ (see below for discussion of this argument). Similarly, he claims that ‘[d]rawing lines is not only permissible, it is essential for preserving the meaning of each sport and sport in general’. However, Murray gives no logical reason why doping should undermine the meaning of sport in this way. The comparison that he cites is of a competitor in the New York Marathon winning by wearing roller blades. About this example he says:

Does she deserve to be crowned as the winner? Virtually everyone I’ve asked this question says no, she does not. Not all means of going faster in the marathon are equal. Some like roller blades — and perhaps EPO, anabolic steroids, and other drugs — undermine the meaning of sport.

It seems that Murray is claiming that a distinction can be made on the basis of general consensus as to what does and does not undermine the meaning of sport. This, and the absence of any logical explanation as to why doping should so challenge the meaning of sport, suggests that the basis for the spirit or meaning of sport argument is a ‘gut feeling’ rather than a reasoned response.

As was mentioned above, the ‘spirit of sport’ concept embodied in the Code appears to be an amalgam of a number of justifications previously asserted for anti-doping policies. Thus, the arguments presented below regarding the various individual rationales, equally apply to the most recent justification statement in international anti-doping policy as part of the concept of ‘spirit of sport’.

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39 Angela Schneider and Robert Butcher, ‘The Mesalliance of the Olympic Ideal and Doping, Why They Married and Why They Should Divorce’ in Landry F, Landry M and Yerles M (eds), Sport...the Third Millennium (1991) 495 quoted in Houlihan, above n 7, 121-122. See also Schneider and Butcher, above n 26, 129ff.
40 Houlihan, above n 7, 122.
41 Murray, above n 9, 1.
42 Ibid.
43 This theme will be expanded later in this chapter.
Despite the apparent widespread acquiescence to the health rationale, there has also been widespread criticism of using the desire to protect the health of the athlete as a justification for the prohibition of certain substances. The most elementary objection to this rationale relates to the lack of evidence regarding the danger of the prohibited substances. Although most people would accept that steroids and some of the other prohibited drugs and practices are dangerous, some commentators question the extent to which this is true, suggesting that there is little evidence that serious side-effects are common when these drugs are taken at therapeutic doses. The lack of evidence, of course, may be partly due to the ethical difficulties involved in forming an appropriate research design involving prohibited or illicit drugs. Whatever the reason, the evidence is lacking. An extension of this argument suggests that many of the serious side-effects of performance enhancing substances relate not so much to the pharmacological properties of the drug itself, but the context in which it is taken, that is, without medical supervision with drugs often obtained from the black market (and therefore of unknown composition.)

Another objection to the prohibition on the basis of health accepts that there are health dangers, but takes exception to the paternalism involved in trying to protect competent adult athletes from their own voluntary choice to take drugs. This argument is not extended to child athletes since they are in a different category of competency. However, in the adult context, it is argued that prohibiting athletes from taking performance

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45 CCES, above n 33. See also Cox, above n 27, 81.

46 See David Mottram, ‘Does the International Olympic Committee (IOC) List Need Updating?’ (1999) 27(1) Sports Medicine 1, 6. Note, however that Coleman, above n 9, 1786, argues that lack of definitive evidence does not mean that the risks of doping should not continue to be emphasised since lack of clinical data does not definitively prove doping to be either dangerous or safe. Even so, assumed risks are hardly a watertight basis for a whole system of prohibition.

47 This is similar to the argument put in relation to illicit drug laws, mostly by those supporting the harm minimisation approach, which suggests that the prohibition of drugs actually increases harm to athletes rather than decreases it. See for example, John Burge, ‘Legalize and Regulate: a Prescription for Reforming Anabolic Steroid Legislation’ (1994) 15 Loyola of Los Angeles Entertainment Law Journal 33, 56-57; British Medical Association, above n 44, 10 and Black and Pape, above n 34, 89.

48 See W.M Brown, ‘Paternalism, Drugs and the Nature of Sports’ in William J Morgan and Klaus V Meier (eds), Philosophic Inquiry in Sport, 1988 (Champaign: Human Kinetics) 303; CCES, above n 33 and Cox, above n 27, 81. See also Fost above n 37, 5.
enhancing substances with the goal of protecting them from themselves, does not sit well within an otherwise liberal notion of individual freedom.49

For other commentators, the health rationale presents an unacceptable inconsistency in that there are many other aspects of sport which also present a danger to the athlete which are not subjected to prohibition or regulation. Fost points out: ‘In many sports the risk of competing is greater than the risk of taking certain banned substances.’50 Brown argues, ‘[w]e believe in the capacity of sports to promote health and fitness, but many originated in the practice of war and routinely involve stress and injury, sometimes death.’51 Other training techniques are also identified as presenting a danger to the health of sportspeople, yet these techniques are accepted as legitimate.52 There are also many permitted substances within sport which pose a danger to the health of the athlete.53 If authorities really were motivated by a desire to protect the health of the athlete, these other potentially dangerous aspects of sport would have been treated similarly.

C Protecting the Level Playing Field or Fairness

Buti and Fridman contend that there is a problematic assumption underlying the argument that performance enhancing substances create unfairness in sport: the premise being that prohibited drugs do actually enhance sporting performance.54 In a similar way to the health rationale, there is surprisingly little evidence that many of the prohibited drugs are actually ergogenic aids. Indeed, there is even less rigorous scientific evidence regarding the ergogenic properties of the prohibited substances than there is in relation to the health of athletes.

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49 Simon Gardiner, Alexandra Felix, John O’Leary, Mark James and Roger Welch, Sports Law (3rd Ed), 2006 (London: Cavendish Publishing), 290. For a counter argument see Murray, above n 9, 2 who argues that paternalism is justified, on the basis of discussions with athletes who state that ‘they did not see using performance enhancing drugs as a glorious expression of their personal liberty’ and that the coercive nature of drug taking means that ‘protecting athletes from the coercive power of drugs in sport remains a solid ethical justification for effective doping control.’ The coercion argument is dealt with below. Moreover, athlete’s attitudes to doping cannot be isolated from the attitudes against doping created by the existence of anti-doping. Thus, to base an argument for the prohibition on attitudes which are probably largely a result of that prohibition demonstrates the logical fallacy of arguing in a circle or begging the question considered below. Note also that Cox, above n 27, 80-81, argues that the paternalism argument may be ‘ill-founded’ for a number of reasons, particularly on the basis of inconsistency in that there is ‘no shortage of legislation regulating, for instance, the amount of time a person may work and preventing excessive working hours.’

50 Fost, above n 37, 6.
51 Brown, above n 48, 303.
52 Techniques such as carbohydrate loading are identified. For examples of this kind of argument see British Medical Association, above n 44, 9-10. See also Cox, above n 27, 83 regarding training techniques and diets.
consequences of doping. Parry, Aitken, and others point out that, although most athletes and sporting officials firmly believe that steroids and other ‘so-called performance enhancers’ do enhance sporting performance, scientific data to this effect is lacking. The fact that there is now a universal list for all sports exacerbates this problem since not all substances on the WADA Code Prohibited List will enhance performance in every sport.

Furthermore, the CCES argues that something is unfair in sport only if it is against the rules. So although the fairness argument may provide justification for enforcing the rule against doping, it does not provide a basis for the rule in the first place. The CCES takes the position that it is unclear how doping can be seen as inherently unfair, even if the rules permitted doping and athletes condoned it. The inherent unfairness of doping has been questioned by a large number of other commentators. Some argue that sporting competition itself is inherently unfair: Houlihan contends that the essence of sport is about seeking advantage over other competitors, while Savulescu et al contend that genetic inequalities — finding the naturally fastest, strongest and skilled — is what sport is all about. Thus, the prohibition of drugs on this basis is at odds with the very nature of sport itself. As Mignon has put it, ‘[i]n fact, condemning doping as an artificial aid is, in the end, challenging a fundamental principle of sport, one which attaches it to modernity, namely its relation to the idea of human progress.’

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58 Michael Kennedy, ‘Drugs in Sport: Testing at the 2000 Olympics’ (2002) 34 Australian Journal of Forensic Sciences 25. See also Charles E Yesalis and Michael S Bahrke (eds), Performance Enhancing Substances in Sport and Exercise, 2002 (Champaign: Human Kinetics) generally. Each chapter of the book is devoted to a different performance enhancing substance and the research available regarding that substance (in a sporting context) is reviewed. It is interesting to note the number of chapters which concludes that there is a lack of evidence to support either performance enhancement or health dangers.
59 JC McGrath and DA Cowan, ‘Commentary: Drugs in Sport’ (2008) 154 British Journal of Pharmacology 493, 493 state that ‘any “benefit” is usually unproven and the dangers are not properly assessed.’ From the discussion of the way in which prohibited lists were developed in Chapter Two, it is also quite clear that the relative ergogenic effects or health dangers of certain substances was not the motivating force behind many additions to the list. See Chris Cooper, ‘Drugs and Ergogenic Aids to Improve Sport Performance’ (2008) 44 Essays in Biochemistry 1, 2-3 for a good discussion of the problems in proving ergogenic effects in these substances.
60 See Chapter Four for a more detailed discussion of this issue.
61 CCES, above n 33.
62 Houlihan, above n 7, 110ff.
63 Savulescu et al., above n 38, 667.
Others have identified various aspects of modern professional sport which also create unfairness, but have not been prohibited. These aspects include: legal performance enhancing substances, access to financial sponsorship, expensive and contemporary scientific training techniques, advantages coming from the athlete’s country of birth or residence, and advantages arising from genetic disposition. As the Australian Senate inquiry into drugs in sport put it: ‘the playing field has always been uneven and, with recent advances in knowledge and techniques, is getting more so.’ Indeed, in relation to anabolic steroids, Aitken claims that there is more equal access to these performance enhancers than many of the expensive training techniques and equipment. Since steroids are relatively inexpensive and common, more athletes would be able to use them than other forms of enhancement and therefore may actually be ‘fairer’.

Another argument against the fairness rationale is the idea that the prohibition on doping has not created a level playing field at all; rather it may have made the field less even. Some athletes take drugs despite the doping rules, while others refrain in obedience to the rules. Since some of those abstainers would probably have taken drugs if they were not against the rules, the difference between the two types of athletes is exaggerated. The doping rules are, in effect, disadvantaging the rule-abiding athlete, by giving those willing to breach the rules more scope to enhance their performance beyond that of the general cohort. Consequently, the playing field is actually less even than it would be without a prohibition on drugs. It is argued that if all athletes were allowed to use performance enhancing substances, the athletes willing to break the rules would not have such an advantage. Others argue that, rather than creating an unfair advantage, performance enhancing substances can actually take away unfair advantages relating to genetic differences among sportspeople.

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66 Fost, above n 37, 6.
69 Such as skiers would enjoy raised in Austria as opposed to Belgium, Waddington, above n 53, 109.
70 Savulescu, et al, above n 38, 667.
71 Commonwealth of Australia, Senate Standing Committee on Environment, Recreation and the Arts, above n 16, 48.
72 Aitken, above n 56, 221. It was noted above that Murray, n 9, argues that not all these performance enhancers are the same on the basis that some undermine the meaning of sport. This argument is addressed above.
73 See for example Cox, above n 27, 83-84.
74 One problem with this argument is that it could be applied to most rules in sport and not specifically to doping alone. The advantages gained by participants who are willing to breach the rules of sport are really the essence of what is referred to as ‘cheating’ and one could argue that no rules should be in place.
75 Savulescu, et al, above n 38, 667. See also Burke, above n 67 regarding sexual differences as well.
D Harm to Young: Role Models

One counter-argument against using the role-model case to support the doping prohibition centres on the extent to which it is appropriate to designate this esteemed role to elite sportspeople. Both Houlihan\(^76\) and Butcher and Schneider\(^77\) contend that it is inconsistent to prohibit drug-taking by athletes while ignoring the drug habits of musicians, models and movie stars who are equally idolised by young people.

Moreover, even if it is appropriate to assign athletes a special job as role-models, why should drug-taking be inappropriate? It is important to note here that the role model argument applies to all prohibited drugs, not just illicit recreational drugs. So the contention is that taking any drug, whether illegal for the general population or not, is inappropriate in sports people. The reasoning here is not entirely clear. If it is because drug-taking is cheating, the argument is destined to come against the problems discussed above under the fair-play argument: drug taking is really only cheating because it is against the rules and unfairness is not a basis for the rule itself.\(^78\) If the concern is that performance enhancing drugs would cause young people harm to their health,\(^79\) then, as Houlihan points out, ‘[i]n order to be consistent it would be necessary to apply the same argument to the dangers arising from intensive training, training while injured, and potentially dangerous diets.’\(^80\) Given the potential danger to adolescent bodies associated with participation in elite sport,\(^81\) it could even be argued that young people should not be encouraged to participate in professional sports at all.\(^82\)

In his 2004 *State of the Union* speech, US President George W Bush, claimed that athletes taking drugs sends the message to children ‘that there are shortcuts to accomplishment, and that performance is more important than character.’\(^83\) It is difficult to see how this reasoning applies prior to a prohibition being in place. Certainly once anti-doping rules are in place, taking drugs would be an unacceptable shortcut and a slight on the character of

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\(^76\) Houlihan, above n 7, 118-119.
\(^77\) Schneider and Butcher, above n 26, 141.
\(^78\) CCES, above n 33.
\(^79\) It appears that this is one concern for President Bush, above n 14.
\(^80\) Houlihan, above n 7, 118.
\(^82\) This adds another dimension to the attack on the idea that athletes should be role models to young people.
\(^83\) Bush, above n 14.
the athlete, since they would be disobeying the rules of sport. But, again, it does not provide a reason for banning drug use in the first place. As with the level playing field argument, there are other ‘short-cuts’ to accomplishment which are not subjected to a prohibition the way performance enhancing substances are. If Bush was claiming that there is something inherently immoral in taking drugs,\textsuperscript{84} then, as Buti and Fridman point out, targeting this type of moral behaviour is inconsistent since other immoral behaviour in sports people is not treated similarly.\textsuperscript{85}

I contend that part of the problem with this justification is that it is largely a self-perpetuating predicament. Banning drugs in sport creates a need to enforce the rules by way of drug testing athletes. Drug testing athletes reveals information about athlete’s drug taking habits.\textsuperscript{86} Once in the public domain, this knowledge then presents a certain image of the athlete and of the sport they represent. Without drug testing, people would know no more about what drugs their favourite sports star was taking than they do about their favourite model, musician or movie star. Thus the only damage to the image of the athlete and sport would be that of rumour and conjecture, all of which can be easily dealt with by public relations experts. Testing and public dissemination of the information actually contribute a great deal to the image problem. My argument, of course, depends on the extent to which knowledge of drug taking can come from other sources.

Nevertheless, the case of the Canadian snow-boarder, Ross Rebagliati, is an example which suggests that there may be some substance to the argument. If the IOC had not tested for marijuana use, there is little chance of the world ever knowing of Rebagliati’s drug use.\textsuperscript{87} Thus ‘an athlete who tested positive for marijuana’ would not have been ‘hoisted up on the medal platform as a hero to all the world’s youth’.\textsuperscript{88} Instead, the athlete who was so ‘hoisted’ would have had a clean record as to drug use. Without drug testing, Rebagliati’s marijuana use would have been only a rumour, if that. Although this public

\textsuperscript{84} Ibid. This seems unlikely given that many drugs on the list are legal and some are over-the-counter drugs. It would be somewhat ironic for President Bush to claim that taking any of these drugs was somehow inherently immoral given that one of the major points in his speech was that his government had given prescription drug benefits to seniors, ‘giving them the modern medicines they deserve.’


\textsuperscript{86} Exactly how much information drug testing reveals is questionable and depends on the view one takes as to the efficacy of drug testing.


\textsuperscript{88} Comments by McCaffrey, above n 13.
view of sportspeople may not be an accurate portrayal of the drug taking culture within sport, the argument here is about the message that young people receive, not about the public’s right to know the truth. Children would have few role models to follow of athlete drug taking without drug testing.

E Medical Ethics

Although many doctors would hold that assisting athletes to utilise prohibited substances in their preparation is against medical ethics, it is unclear whether this would be the case if the substances in question were not prohibited. If the ethical problem is that prescribing doping agents to athletes assists well people rather than helping sick people, the argument poses a problem. Other aspects of modern medicine, such as cosmetic surgery, also present a challenge to this ideal and yet have not led to a prohibition on such treatments. It is also by no means clear that the consequential ethical position would be to support prohibition. Some suggest that medical ethics may compel a doctor to take a harm-minimisation and educational approach to the problem, ‘rather than a necessarily prohibitive one.’

F Harm to Other Athletes: Coercion

This argument has also been identified as problematic, the criticisms best summarised by Parry, who responds to the suggestion that use of drugs forces others to use them:

No, it doesn’t! But even if it does, so does six hours in the pool per day. All top class swimmers know the hours put in by rivals, and must match that to compete. Does that make it immoral? If drugs are immoral on that criterion, then so are intensive training levels. In fact, there is a school of thought which sincerely holds this view: that modern sport forces most athletes to become over-trained, one-dimensional people, thus denying the central value of sport as a joyful contest between untrained participants (i.e. their ‘natural’ state).

Similarly Houlihan, Fost and Black maintain that no athlete is actually forced to use performance-enhancing drugs. There is always a choice, albeit a difficult one in the light

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89 It is interesting to note that the infamous doctor Robert Kerr who provided athletes with steroids in the USA in the 1980s in his book, *The Practical Use of Anabolic Steroids with Athletes* he claims that some of his patients used anabolic steroids to develop a ‘trim, muscular, “beach physique.”’ Robert Kerr, *Practical Use of Anabolic Steroids with Athletes*, 1982 (San Gabriel: Robert Kerr), 5. The links between performance enhancement in the social setting and in sport are not as tenuous as they initially appear. There is further evidence that a major motivator in the use of anabolic steroids by young people is related to cosmetic reasons rather than sporting performance. The trend extends to high school students. See also Charles E Yesalis, Michael S. Bahrke, Andrea N. Kopstein and Camille K. Barsukiewicz, “Incidence of Anabolic Steroid Use: A Discussion of Methodological Issues” in Charles E. Yesalis (ed) *Anabolic Steroids in Sport and Exercise*, 2000 (Champaign: Human Kinetics), 73-115, 105.

90 British Medical Association, above n 44, 10.
91 Parry, above n 55.
92 Houlihan, above n 7, 120.
93 Fost, above n 37, 6–7.
of the pressures of modern professional sport. Like Parry, these authors argue that athletes are already compelled to make many choices on the basis of what other competitors do: full time training, special diets and training methods, and lifestyle changes, to name a few. The taking of drugs is not seen as any more coercive than these other aspects of modern professional sport. As Cox maintains 'if the clean athlete is in an intolerable dilemma then this is the result of the professionalisation of sport more than the legality of doping.'

**G Drugs are Unnatural**

The criticisms of this argument can be divided into two major categories: that prohibited substances are not necessarily unnatural, and that unnatural does not equate to unfair.

The most basic issue identified with this argument is the definition of what is natural and what is unnatural. Aitken argues that erythropoietin (EPO) and anabolic steroids are based on endogenous substances (meaning substances from the human body eg testosterone) and are therefore far more ‘natural’ than permitted performance enhancers such as light-weight bicycles and pressure chambers. As Black says: ‘the day of the natural athlete no longer exists, if it ever did. Instead all athletes have been artificially produced…’. Parry also suggests that an athlete may be ‘unnatural’ by definition since, in order to become world-class athletes, they have to be born with certain genetic statistical variations. Savulescu et al claim that nature is not necessarily fair: success in modern sport is determined by genetic differences which cannot be categorised as fair. These arguments suggest that, even if it was accepted that doping agents were not natural, the assumption that this would therefore make doping agents unfair is equally problematic.

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94 Terry Black, 'Does the Ban on Drugs in Sport Improve Societal Welfare?' (1996) 31 International Review for Sociology of Sport 367, 376. Black argues that ‘only athletes in communist countries are forced to use steroids and that occurs whether or not the ban exists.’ Even this may not be completely accurate as there is evidence of some that these athletes refused to take the drugs prescribed, albeit at the risk of losing their benefits and place on the national squad: see for example the story of Renate Neufeld Spassov in John Vincour, 'East German Tale of Tyranny', The New York Times (New York), 11 January 1979, D17. Obviously if the athlete was a minor and was unaware of the contents of the drug then they were practically forced to take the drugs.
95 See also CCES, above n 33 and Schneider and Butcher, above n 26.
96 Cox, above n 27, 84.
98 Aitken, above n 56, 222. Similar arguments are put forward by Houlihan, above n 7, 110-111, and Parry, above n 55.
99 Black, above n 94 at 370.
100 Parry, above n 55.
101 Again it should be noted that Murray, above n 9, argues against these ideas on the basis of the meaning and spirit of sport:

The glory of sport is learning what we can do with the natural talents we have, perfecting them through admirable, persistent effort. Yes, I could probably ascend the four mile climb into Fahnestock Part near my home more easily if I used EPO. I could do it much more quickly on a motorbike. But where is the satisfaction in that?
H  Competition Should Be Between Athletes, Not Pharmacists

There is also a problematic assumption here: that the work of the pharmacist (drugs) is the controlling factor in every competition in which they are used. In this argument doping agents are assumed to have the power to determine the outcome of any athletic event in any and every situation. Given the above discussion it is clear that this cannot be the case. But even if the assumption were true, it is not clear why pharmacological technology should be singled out for condemnation. The increasing use of sports science and other disciplines such as psychology, biomechanics and dietetics could lead to a similar argument that competition should be between athletes, not coaches or biomechanists and so on. As Parry says, ‘[i]f we are so worried about removing the competition from the track to the lab, maybe we should look again at the ethical status of sports sciences more generally.’

I  Image of Sport

There has been comparatively little criticism of the image of sport rationale. Buti and Fridman appear to accept that image is a legitimate concern but argue:

While sporting organisations might justifiably be concerned with maintaining the confidence of the public in the integrity of the sports they administer, such concern must be managed with care, lest it develop into sinister and intrusive regulation of those who participate in sport.

Schneider and Butcher offer a more direct criticism when they reject the argument that tarnishing the image of sport ‘harms’ the sports watching community by cheating them out of watching dope-free sport. They suggest that this is only the case if audiences expect sport to be dope-free. As these commentators point out, the question then needs to be asked as to why audiences expect dope-free sport. If it is because of the anti-doping rules then, again, this argument cannot support the adoption of those rules in the first place. However, it may be that there is something more inherent in doping which makes it repugnant to audiences, rather than simply being a breach of sporting rules. If this is the case — and this thesis will argue it is — then it appears that this inherent repugnancy has little to do with rationality or ethics. This theme will be continued below.

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102 This argument does not seem to address the issues that Savulescu et al, above n 38, raise.
103 This argument is also part of the justification for the strict liability rule in doping and will be considered in more detail in Chapter Six.
104 Parry, above n 55.
105 Buti and Fridman, above n 32, 60.
106 Schneider and Butcher, above n 26, 142.
Perhaps the strongest argument against the idea that the use of performance enhancing substances in sport will ruin the image of sport, is provided by the steroid researchers Charles Yesalis and Michael Bahrke:

The litany of scandals appears to have had a strong effect on the public and even on the athletes, some of whom have spoken out. Indeed, if sports fans were asked if they were against doping, many would say yes. But a far more relevant question is whether they were upset enough to turn off the television and not watch sports. Judging by the continuing profitability and popularity of both amateur and professional sports, most would probably answer no.

If we do not have the willpower to turn off our television sets in protest of doping, will we have the stomach to tolerate federal arrests, prosecutions and convictions of our sports icons?  

The problem with the image argument is that the predicted effects of the public perception of doping simply do not appear to be coming to fruition. Yesalis and Bahrke present a strong argument here. Although there does appear to be a common perception that the use of performance enhancing substances in sport has reached epidemic levels, audiences still flock to games and watch on television in droves: there has been no noticeable decrease in interest or the financial worth of the product.

Moreover, the argument also assumes that sports loving audiences see something wrong with the use of performance enhancing substances, quite apart from the fact that it is against the rules and therefore perceived as cheating. Since all modern audiences have been imbued with the idea that doping is immoral, it is impossible to tell whether audiences would feel this way if there was no rule against the use of such substances.

Perhaps the best indication of the effects of the public knowledge of doping is the attitude of sports audiences before the prohibition on doping was established. From all reports, audiences enjoyed doping fuelled performances with no particular concerns about the ethics of the competitors.

Nevertheless, it appears now that there is some validity to the concern that sports audiences will turn away from sport due to their dislike of doping. Chapter One and Two demonstrated that public discourse about doping is overwhelmingly negative. In the face of this kind of publicity, concerns that this negative image will affect sport as a product do

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107 Dimeo provides a very thorough analysis of the attitudes of audience and participants in the events such as the 1904 and 1908 Olympic Games marathon event where it was quite publicly acknowledged that participants had used performance enhancing substances: Paul Dimeo, A History of Drug Use in Sport 1876-1976: Beyond Good and Evil, 2007 (London: Routledge), 26ff. Note also the image of sport argument is closely related to the role model argument and is considered in more detail under that heading.
seem reasonable. Furthermore, the fact that these fears have not been realised as yet may be due to the prohibition on doping; enforcement efforts may have maintained the integrity of the product enough to sustain public confidence.

Thus the image of sport is probably the strongest argument to support the prohibition on doping. This argument, however, cannot be classified as a particularly rational one. The argument is, in reality, based on public sentiment and there is no rational explanation for why the public would feel this way. The rationality of the image argument relies on the other rationales for logical legitimacy. That is, if the reason for public sentiment was due to the idea that athletes should be role models, then the rationality of the image argument would then rest on the rationality of the role model argument. It will be concluded that such logic is difficult to find among the anti-doping rationales. It will also be argued that it is not surprising that this, the strongest argument for doping prohibition, is not one based on logic.

J Discouraging Illegal Activity

As Buti and Fridman point out, this rationale is based on the presumption that activities such as importation, possession and sale of recreational drugs should attract criminal penalties; something which they say has been accepted as ‘undeniable truth.’ Even if it is accepted that the criminal law is justified in its application here, the rationale would only apply to a small number of doping agents, since many substances on the WADA Code Prohibited List are legally available either on prescription or over-the-counter. Anabolic steroids, which are subjected to criminal penalties in a similar way to illicit recreational drugs, are an interesting case, but since they appear to have been criminalized as a result of their status in sport, the argument does not provide justification for their prohibition in the first place.

K Conclusion: The Criticisms

The above criticisms of the anti-doping rationales suggest the search for a watertight, consistent rationale is still very much in progress. And since it is widely accepted in academic circles that none of these arguments provide the fundamental reason for the

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108 Buti and Fridman, above n 32, 61.
109 For a discussion of the influences that led to the involvement of the criminal law in the regulation of steroid use in the US, see Carol Kleinman and C.E. Petit, ‘Legal Aspects of Anabolic Steroid Use and Abuse’ in Charles E Yesalis (ed), Anabolic Steroids in Sport and Exercise, 2000 (Champaign: Human Kinetics) 333, 342.
110 The alternative suggestions that have been presented by a few commentators have not gained widespread support and remain very much the realm of academic debate. They have not been considered here since this discussion focuses on the reasons why we, as a society, prohibit doping.
policy, it is accurate to say that the reasons for the prohibition on performance enhancing substances in sport is certainly not as clear as anti-doping discourse would suggest. There is obviously ambiguity and confusion when it comes to finding a reason for prohibiting the use of performance enhancing substances in sport. Not only is it unclear what we are talking about when we talk of ‘doping’, we also don’t know why we are talking about it.

IV ANTI-DOPING RATIONALES: A LOGICAL ANALYSIS

A logical analysis of the anti-doping rationales helps to highlight, not only the fact that we do not seem to know why we prohibit doping, but also the logical failings of the foundations of the policy. Such an analysis reinforces the argument that anti-doping policy is based on something other than logic.

Most commentators do not couch their criticisms of anti-doping policy in the language of logic; the policy is generally not explicitly labelled ‘illogical.’ However, many of the criticisms which have been discussed above are akin to saying so. Two logical fallacies are particularly significant here: inconsistency and begging the question.

A Inconsistency

In the study of logic, the premise of the argument is a proposition which is offered as providing evidence or reasons for accepting the conclusion offered. Inconsistency involves a contradiction in the premises of the argument. There are a number of different types of inconsistency, but practical inconsistency is the relevant one for the purposes of this chapter. Logic requires that ‘like cases’ are treated alike while cases which are relevantly different are treated differently. If ‘like cases’ are not treated alike, then a practical inconsistency is said to arise.

Throughout the consideration of anti-doping rationales above, inconsistencies have been identified on a number of occasions. In most cases, the commentator did not use the term in the same sense as the discipline of informal logic. However, the inconsistency revealed can also be said to satisfy the definition of a practical inconsistency within informal logic since ‘like cases’ are not treated ‘like’ doping. That is, for most of the justifications advanced, it is possible to point to similar things that happen in sport which are not

111 The exception here is Simon Barnes, Why Transition to a Clean Sport has Left us Cynical and Self Righteous (2003) Timesonline <http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article1162321.ece> at 13 September 2008.
subjected to prohibition. In other words each time we say ‘drugs in sport are banned because….’, it is possible to say ‘yes but …. is the same, but that is not banned.’

A table is provided below to illustrate this point. In one column is the justification, in the other the like case.

<table>
<thead>
<tr>
<th>Justification for Prohibiting Drugs</th>
<th>Like Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protecting the health of the athlete: drugs are dangerous to the health of the athlete.</td>
<td>Elite sport itself(^\text{112}) — eg aerial skiing, marathons, repetitive injury in top level sport.</td>
</tr>
<tr>
<td></td>
<td>Carbohydrate loading.(^\text{113})</td>
</tr>
<tr>
<td></td>
<td>Overtraining, especially in adolescents.(^\text{114})</td>
</tr>
<tr>
<td></td>
<td>Other supplements such as creatine.(^\text{115})</td>
</tr>
<tr>
<td>Protecting the fairness of sport, the ‘level playing field’ argument: drugs give an unfair advantage.</td>
<td>Genetic inequalities.(^\text{116})</td>
</tr>
<tr>
<td></td>
<td>Supplements and vitamins.(^\text{117})</td>
</tr>
<tr>
<td></td>
<td>Access to financial sponsorship.(^\text{118})</td>
</tr>
<tr>
<td></td>
<td>Scientific training techniques.(^\text{119})</td>
</tr>
<tr>
<td></td>
<td>Advantages coming from the athlete’s country of birth or residence.(^\text{120})</td>
</tr>
<tr>
<td>Athletes are role models, doping sets a bad example.</td>
<td>Movie stars, musicians, models are all role models.(^\text{121})</td>
</tr>
<tr>
<td></td>
<td>Other moral behaviour is not regulated such as extramarital affairs.(^\text{122})</td>
</tr>
</tbody>
</table>

\(^\text{112}\) Fost, above n 37, 6. For a compelling examination of some of the safety issues in the Tour de France see Mignon, above n 65.

\(^\text{113}\) The practice can lead to hypoglycaemia, nausea, dizziness and fatigue, British Medical Association, above n 44, 10.

\(^\text{114}\) Pennington and Webber, above n 81.

\(^\text{115}\) Cox, above n 27, 81.

\(^\text{116}\) Savulescu, et al, above n 38, 667.

\(^\text{117}\) Fost, above n 37, 6.

\(^\text{118}\) Cox, above n 27, 83 and Burke, above n 67, 9.

\(^\text{119}\) König, above n 68, 249.

\(^\text{120}\) Such as advantages that skiers would enjoy raised in Austria as opposed to Belgium: Waddington, above n 53, 109.

\(^\text{121}\) Schneider and Butcher, above n 26, 141 and Houlihan, above n 7, 118.

\(^\text{122}\) Buti and Fridman, above n 85, 184.


<table>
<thead>
<tr>
<th>Justification for Prohibiting Drugs</th>
<th>Like Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Against medical ethics: prescribing drugs for athletes is assisting well people instead of treating sick people.</td>
<td>Cosmetic surgery.</td>
</tr>
<tr>
<td>Coercion: use of drugs by some athletes coerces other athletes into using drugs.</td>
<td>Full time training, use of supplements, paid coaching.123</td>
</tr>
<tr>
<td>Drugs give athletes an unnatural advantage.</td>
<td>Pressure chambers, sporting equipment.124</td>
</tr>
<tr>
<td>Role of science: sport should be competition between athletes not pharmacists.</td>
<td>Biomechanists, physiologists, psychologists and nutritionalists.125</td>
</tr>
</tbody>
</table>

The table above demonstrates that, for every rationale presented, like cases can be identified which have not been treated in the same manner. In most cases the like case has not even been subjected to regulation, let alone prohibition. Thus, basing the justification for the prohibition of doping on these grounds would produce a practical inconsistency. If these justifications were truly the motivation behind the doping rules, it seems incredible that doping alone would have been banned, while the like case was allowed. It suggests that there must be something about doping, above and beyond these rationales, which led to its prohibition.

B Begging the Question

Inconsistency is by far the most common logical fallacy to be found in anti-doping rationales. A number of the major rationales, however, also exhibit another type of logical fallacy, the fallacy of begging the question.

Begging the question occurs when the contention that is intended to be proved is used as evidence to support that very contention. Here the most obvious example is found in the role model rationale, the argument that drug taking should be prohibited because sportspeople are role models for young people and drug taking in that population provides a negative role model to youth. Implicit in this argument is the assumption that there is something wrong with taking performance enhancing substances. Otherwise how could

123 Parry, above n 55.
124 Ibid and Aitken, above n 56, 222.
125 Parry, above n 55.
such practices send a bad message to youth or provide a poor role model for them? But the fact that there is something wrong with taking performance enhancing substances is exactly what the argument seeks to prove. The argument therefore appears to be:

Taking performance enhancing substances is bad because it provides a bad role model to young people.

It provides a bad role model because taking performance enhancing substances is bad.

The fallacy of begging the question is also referred to as arguing in a circle; the circularity of the argument can certainly be seen here. In trying to prove that performance enhancing substances should not be taken by our elite athletes who are role models to our youth, the argument assumes that such practices are bad.126

Circularity can also be found in the argument that the prohibition on performance enhancing substances in sport is justified on the basis of the rules of sport; i.e. that it is wrong to dope because it is against the rules. This argument runs:

Performance enhancing substances should be prohibited in sport because it is against the rules of sport.

It is against the rules of sport to use performance enhancing substances because they are prohibited.127

Obviously, the fact that some of these justifications display the logical fallacy of begging the question speaks to a deeper problem: the assumptions that are at work in these

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126 A similar assumption is at work in the argument that these substances are prohibited because of the impact on the image of sport. In a similar way to the role model rationale, this argument implicitly assumes that there is something wrong with taking performance enhancing substances. Athletes using performance enhancing substances cannot tarnish the image of sport unless there is something wrong with taking those substances in the first place. Again, this is exactly what the argument is intended to prove, that there is something wrong with enhancing performance this way. So in essence the argument is:

Athletes taking performance enhancing substances is ‘bad’ because it damages the image of sport.

It damages the image of sport because it is ‘bad’ to taking performance enhancing substances.

It is, of course, possible that there are other assumptions at work in the image of sport argument. For example, it may be that the argument in premised on the fact that athletes taking performance enhancing substances creates the impression that the competition is not fair, or that the competition is between pharmacists and not athletes (both of which have their own problems as discussed above), which in turn leads to this bad image. However, by and large these assumptions remain unarticulated, and the argument is left to stand on its own. On its own it is a circular argument.

Although this argument is not often put so starkly, as the CCES argues, above, this is part of the assumptions behind the argument that performance enhancing substances are prohibited because their use is unfair.
arguments. These assumptions often defy logic and are further evidence that something other than logic is at work in anti-doping policy.

V WHY ALL THE CONFUSION? THE DIFFERENCE BETWEEN KNOWING AND FEELING

From the above consideration of the criticisms that have been levelled at the rationales for anti-doping policy by other commentators, it appears that no one rationale is unproblematic from an ethical standpoint. None are adequate to explain the prohibition on performance enhancing substances. Not only are the rationales for anti-doping policy ethically inadequate, they are also logically inadequate. The prominence of logical fallacies in the arguments for doping rules suggests two things: firstly that the discussion and arguments presented to support anti-doping policy are as ambiguous and problematic as doping definition and, secondly, that anti-doping policy is not primarily driven by logic at all.

In addition to the criticisms presented above, in many cases the inadequacy of the argument is compounded by the fact that it does not go far enough in explaining why we prohibit drugs in sport. For instance, the argument that sport should be a competition between athletes not pharmacists, has been labelled as inconsistent because there are many other sports sciences involved in the preparation of an elite athlete which are not targeted for prohibition. A further question therefore needs to be asked: why is it that pharmacy is the only science whose involvement in sport is viewed as repugnant? What is it about pharmacological products that cause this reaction? Similarly, it has been argued above that the image of sport justification is circular because it assumes that taking performance enhancing substances is somehow bad. But the question also needs to be asked: why are such practices implicitly perceived as bad?

The inadequacy of these rationales reveals a difference between the rationales for anti-doping policy and the reasons for the policy. If none of the rationales fully supports our present anti-doping approach, then it is difficult to equate rationale with reason. Although the Macquarie Dictionary defines ‘rationale’ as ‘a reasoned exposition of principles; the fundamental reasons serving to account for something’,¹²⁸ it seems here that the rationales are not reasoned, nor are they the fundamental reason for prohibiting performance enhancing substances in sport. As noted above, the strongest argument for the prohibition

¹²⁸ Yallop, above n 1.
is not actually one based in reason, it is the ‘image’ argument. Again, there is no indication as to why doping would create such a bad image. It is merely assumed that it does. The question needs to be asked, why would the public feel this way about doping?

Where does this leave us then? Firstly it can be said that, as yet, the underlying reason for the prohibition of performance enhancing drugs in sport is still fairly much a puzzle.\textsuperscript{129} It is obviously not entirely due to the ‘reasonable’ explanations usually offered to justify the ban. If none of these rationales explain it, and if so many highly respected ethicists have failed to come up with a ‘watertight’ rationale for anti-doping policy, it is a wonder that such a policy can be so firmly entrenched in our modern sporting culture. It appears that the apparent consensus on the fundamental rationale for anti-doping policy in the WADA Code is, at best, mere rhetoric and does not actually provide the reason for doing what we are doing in anti-doping policy.

A wise man once said that you only need one good reason to do something. If the anti-doping rationales fail to provide that one good reason, then why does anti-doping policy enjoy such widespread, virtually unanimous support? How could a policy with such a poor ethical and logical basis gain so much influence? How could it not only get off the ground in the first place but continue to gain momentum to a point of unprecedented international agreement? The great question of anti-doping policy therefore remains: why is the use of performance enhancing substances prohibited?

Both Houlihan and Fost point out that while there may not be a consistent ethical rationale for the prohibition of drugs in sport, the policy is based on widespread public sentiment. Houlihan argues that ‘[c]urrent policy is, though, capable of being strongly defended on the basis of the weight of democratic community condemnation and pervasive disapproval.’\textsuperscript{130} Fost is somewhat more critical of this lack of ethical justification when he claims:

\begin{itemize}
  \item For some vague, inchoate reason, they [drugs] violate majority notions of acceptable behaviour. For lack of a better way to express this contempt for deviance, we declare it immoral. Rick DeMont, according to this view was scapegoated, not for doing anything that can be shown to be immoral, but so we can remind ourselves of our purity, our goodness, and perhaps our homogeneity. This basis for condemning drugs has nothing to do with ethics; it is more properly called moralism.\textsuperscript{131}
\end{itemize}

\textsuperscript{129} The work of Maxwell J Mehlman, Elizabeth Banger and Matthew M Wright, ‘Doping in Sports and the Use of State Power’ (2005) 50 Saint Louis University Law Journal 15, 46ff is noted here who provide a number of factors which may have contributed to the prohibition on doping in sport. One of their arguments fits into the argument of this thesis, that the ‘war on drugs’ has been highly influential.

\textsuperscript{130} Houlihan, above n 7, 128.

\textsuperscript{131} Fost, above n 37, 10.
Their claim appears to be that the answer to why performance enhancing substances have been banned in sport lies not in the rational, logical and ethical domain, but rather in the realm of public opinion: ‘but a more profitable avenue for reaching a publicly convincing basis for current policy is to abandon the search for an a priori rationale for policy and concentrate on middle order justifications which are derived from social experience.’

Herein lies the reason that anti-doping rationales are unsatisfactory and inadequate. Performance enhancing substances are prohibited in sport because there is strong public sentiment against the use of such substances. There may be no good logical reason for a ban on doping but public opinion strongly upholds such an approach. We may not know why we prohibit doping but we feel that such a prohibition is right and wise. The fact that the strongest argument for anti-doping policy is simply that the public image of sport is at risk reveals that the prohibition is linked more to what we feel than what we know.

This, of course, is not the end of the matter. It naturally leads to the next question: why do we feel this way, why would public sentiment be so strongly against the use of performance enhancing substances in competitive sport? If the reason behind public sentiment is discovered, then the reason for the prohibition on doping agents will be understood. The next chapter will therefore present an alternative framework for understanding the motivations behind public opinion in doping.

The last three chapters have painted a picture of current anti-doping policy. In Chapter One the picture was one of consensus. The public reaction to doping and the universal nature of anti-doping policy suggests that anti-doping policy is well established, well supported and well understood. The conclusion in Chapter Two was that the ambiguities associated with doping definition revealed that it is certainly not clear what we are talking about when we talk about doping. This chapter has revealed that it is also not clear why we are talking about it. What is clear is that when it comes to doping, even though we don’t know exactly what we are talking about or exactly why we are talking about it, we do know that we don’t like it. The next part of the thesis will examine why.

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132 Houlihan, above n 7, 124.
PART II: EXPLAINING THE DILEMMAS —

THE SYMBOLISM OF ANTI-DOPING POLICY

CHAPTER FOUR

WHY THE CONFUSION?

‘You always admire what you really don't understand.’

Blaise Pascal

I  INTRODUCTION: THE STORY SO FAR

Chapter One argued that anti-doping policy appears to be characterised by universal consensus, acceptance and understanding, but that a very different situation lies beneath the calm surface. In Chapters Two and Three, dilemmas relating to two fundamental issues were presented: what is doping and why do we prohibit it? These perplexities are revealed through a thorough analysis of the operation of anti-doping policy and the assumptions behind it.

In Chapter Two, the focus of discussion turned to the definition of doping: the deviant behaviour and the contents of prohibited lists. At the heart of the problem of defining ‘doping’ behaviour is the fact that the legal definition is inconsistent with common notions of what constitutes the practice of doping. Accordingly, the operation of the strict liability rule in circumstances of inadvertent doping is a little puzzling in light of society’s implicit definition of doping; the athlete’s intention is intrinsic to the societal definition, while the strict liability definition treats it as entirely irrelevant. More difficult still is the operation of the strict liability rule in inadvertent doping situations where the athlete does not gain any performance enhancing effect from the ingested substance. Since intent and effect are both deemed irrelevant, situations which involve nothing correlating with our lay definition of ‘doping’, are nonetheless punished as ‘doping’. It is disturbing that the legal operation

2  Reference here is to the strict liability definition of doping.
of the doping rules could be so far from common notions of ‘doping’, suggesting that fundamental issues with doping definition persist despite all appearances of consensus.

The second ambiguous aspect of doping definition examined was the content of the World Anti-Doping Code (WADA Code) Prohibited List. It is clear that public outrage over ‘doping’ extends far beyond those substances and practices which appear on the list. In public doping discourse, permitted substances and practices are treated as if they were prohibited substances and practices. Accordingly, another discrepancy between common notions of doping and the legal definition of ‘doping’ was identified. It was also argued that, in light of the fact that the list was developed with no clearly articulated criteria or reasoning behind it, it is no surprise that this aspect of anti-doping policy would be confusing. The confusion is compounded by the fact that the new criteria established in the WADA Code leave room for further ambiguities.

Together these two problematic aspects of doping definition — the deviant behaviour and the contents of the list — show a very basic problem with anti-doping policy, we simply don’t know what doping is.

Chapter Three discussed a second fundamental question in anti-doping policy: why do we prohibit the use of performance enhancing substances and methods in sport? One mystery of the anti-doping rationales lies in the fact that even though no watertight, universally applicable and ethically acceptable reason for the prohibition can be discovered, the policy continues to enjoy wide support. More importantly, if the rationales for anti-doping policy do not adequately explain the prohibition, then why do we prohibit doping if not for the reasons provided by the rationales?

The point has therefore been made clearly: many aspects of anti-doping simply do not make sense upon close examination. There is no obvious explanation to be found within anti-doping law, discourse or rationales. But is there some other factor to explain why such confusion exists? And can this factor answer the questions: what is doping and why do we prohibit it? It is the task of this thesis to identify such an explanation. Obviously, it would be foolhardy to claim that all the puzzles of anti-doping policy have one simple solution. But there is one factor which provides an explanation for the existence of many of the confusions and dilemmas identified in the first three chapters of this thesis. This chapter will introduce that factor.

3 This fact alone is difficult to understand in light of the importance that this list has in the lives of the athletes.
In each of the previous chapters certain things have been established which help to point to a solution to the puzzle of why anti-doping policy is not what it appears to be. What has been established — at least to some degree — can be summarised in 7 points:

- Anti-doping policy is ambiguous, despite the apparent consensus it attracts.
- The legal definition of doping is not limited by the common understanding of ‘doping’ and public opinion is not restricted by the legal definition of ‘doping’.
- Anti-doping policy is not based on rational argument; a full explanation for the policy lies beyond the rational realm.
- Public reaction and consensus appear to be important in shaping anti-doping policy.
- Strong emotions are involved in doping discourse.
- In both doping law and public discourse ‘gut reactions’ appear to be at work.
- Appearances are important; how doping ‘looks’ and ‘feels’ is significant.

These factors hardly provide a conclusive solution, but are pointers to a more cohesive explanation. In order to arrive at the full solution, however, it is necessary first to consider three separate issues. Although the relevance of these issues may not be immediately apparent, their significance will be made clear in the concluding section of this chapter. The chapter will be divided into four sections. The first section will consider anti-doping policy as a public relations issue; the second will introduce the work of Desmond Manderson while the third section will examine the similarities between illicit drug and anti-doping policy. The final section will bring all these issues together, revealing their relevance to the thesis argument.

II DOPING AS A PUBLIC RELATIONS PROBLEM

An effective international anti-doping campaign was never a major priority of the IOC before the 1998 Tour de France scandal. Between 1968 and 1996 approximately one in every thousand Olympic athletes tested positive for a banned substance at the Games. The Olympic drug testing programme was widely recognised as a sham, and more effective enforcement was expected from national and international federations. For Juan Antonio Samaranch and his
closest associates, doping was primarily a public relations problem that threatened lucrative television and corporate contracts that are now worth billions of dollars.\(^4\)

The IOC and the IAAF downplay the disease eating away at sport. Late in 1988 in Lausanne IOC President Samaranch stated baldly, ‘The IOC is winning the war against doping.’ One of his widely publicised plans was for an IOC ‘flying laboratory’ to help implement random testing. It was expected to cost $1 million to set up and $500,000 a year to operate. It sounded impressive; the IOC drugs police circling the globe, diving down to catch the bad guys. As usual, it was all appearance and no substance.\(^5\)

One of the ideas established in the first three chapters was that the prohibition of performance enhancing substances stems not from logical and rational arguments but from the fact that public sentiment is strongly against the use of these substances in competitive sport. This point is extremely important and foundational for the argument of the thesis. It is therefore not enough to simply state this as a fact; further evidence is needed. This further evidence is to be found in both current anti-doping discourse and the history of anti-doping policy.

Perhaps the most obvious evidence for the role of public sentiment in anti-doping policy is in the anti-doping rationales. As concluded in Chapter Three, given the emotions aroused by media reports of doping, there appears to be some basis for the concern that doping practices may have an untoward effect on the image of sport. The mere fact that such an argument has been proposed as a basis for anti-doping policy is testament to the fact that public opinion regarding the issue is seen as significant; significant enough, in fact, to underpin the whole policy.\(^6\)

The history of the development of anti-doping policy shows public opinion has always had a major part to play. It is possible to see evidence of this influence in the concern organisations, such as the International Olympic Committee (IOC), regularly showed for public opinion in doping.\(^7\)

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6. It is possible that public opinion has been shaped by the fact of the prohibition so that, in adopting the policy (for other reasons) sports administrators have created an image of doping which has coloured the public mind. Now, after decades of indoctrination as to the repugnancy of doping, the public no longer tolerates such behaviour and sports administrators have no choice but to continue with the prohibition whether they feel it justified or not. In other words, public opinion, created by the prohibition, may have become the reason for the continuance of the prohibition rather than what it once was: the result. Thus the question arises, has public opinion always been influential in anti-doping policy; was it a leader or a follower? This is answered by the subsequent historical evidence.

7. The IOC has been chosen for this discussion since, not only is it one of the most prominent sports organisation in the world, but the existence of documents, such as the IOC newsletter, makes it possible to trace some of the ‘unofficial’ influences on the IOC’s actions.
From at least the 1950s, the IOC frequently informed itself about public opinion on the issue before taking concrete steps to deal with the use of ergogenic substances in sport. For instance:

- In 1955 the IOC bulletin contained a section called ‘What Other People Say’ which included a statement by Pope Pius XII condemning the practice of ‘consuming highly stimulating drugs’ in order to ‘obtain results that are beyond his own natural forces’ in sport.\(^8\)

- In 1962 the IOC bulletin contained an article entitled ‘The Doping’. The introduction stated: ‘This topical matter has been discussed recently in a most interesting manner in L’Equipe in Paris, the various points discussed seem to us so interesting that we are quoting herewith a few extracts of this article’.\(^9\)

- In 1963 the IOC bulletin contained an article entitled ‘Doping, The International Olympic Committee and the Press’ which included references to the way in which the ‘Press’ had contributed to the identification of doping as a problem in sport.\(^10\)

- In 1968 a report on the work of the IOC Medical Commission included a plan to draw up a more detailed report for various groups, including the press.\(^11\)

- An extremely influential article on the issue from the 1968 *Sports Illustrated* was reprinted in the IOC newsletter.\(^12\) IOC President, Avery Brundage, had forwarded this article to the head of the IOC Medical Commission, Prince Alexander de Merode.\(^13\)

- In 1969 President Brundage was asked by a journalist how the IOC was going to stop athletes using steroids if they stopped using them before competition. Brundage then wrote to de Merode enquiring whether the IOC medical commission was considering the impact of anabolic steroids on their competition.\(^14\)

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\(^12\) Monique Berlioux, ‘Doping, Drugs and Sport’ (1969) 25(October) Olympic Review 561.


\(^14\) Ibid.
In 1973 the IOC newsletter reprinted an article which was critical of the fact that the IOC had not been able to develop a test for steroids.  

In 1998 Juan Antonio Samaranch stated that he felt that the IOC Prohibited List should be cut down. Such was the public outrage elicited by his comments that the IOC was forced to set up the first international doping summit as a ‘public relations move’ intended to ‘stop the media bloodletting’. Thus the World Conference on Doping in Sport was seen by many as a public relations exercise on the part of the IOC to overcome the negative press that Samaranch attracted with his comments regarding shortening the list in 1998.

In retrospect, Samaranch’s candid and heretical comments were a public relations faux pas that called into question his commitment to the campaign against doping. To repair his damaged reputation, Samaranch called for a world anti-doping conference under his leadership what would convene in early 1999, and by November the IOC had published the agenda of this hastily organised event.

These events are just a few of the indications that the IOC has always been acutely aware of the fact that the use of performance enhancing substances in sport is a very live public issue. The regularity with which the IOC reprinted topical articles on the subject in their newsletter is telling.

The influence of public opinion on the issue has not been limited to the IOC. As Houlihan notes, it was the public outcry over the doping-related deaths in sport which prompted sports organisations to action in the 1960s:

Until the mid 1960s, concern about doping had been limited to a relatively small group of specialists within sport and the private concern had not yet become a public issue. The series of high profile scandals in the early to mid 1960s forced the issue on to the agenda of both governments and sports bodies.

In more recent times, it is clear that the way in which the Australian Institute of Sport (AIS) and the Australian Sports Commission (ASC) reacted to the allegations about

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17 Hoberman, above n 4, 266. See also Ibid and Andrew Jennings, The Great Olympic Swindle, 2000 (London: Simon &Schuster), 293.
18 It can also be argued that the IOC’s efforts at controlling doping were lacklustre and that their failure to implement out-of-competition testing demonstrates that they were more interested in the appearance of antidoping programmes rather than implementing effective strategies. This will be considered in later chapters.
19 See Verner Møller, 'Knud Enemark Jensen's Death During the 1960 Rome Olympics: A Search for Truth?' (2005) 25(3) Sport in History 452 for a thorough analysis of the case of Knud Jensen which suggests that the role of amphetamines in this tragedy has been vastly overstated.
20 Barrie Houlihan, Dying to Win: Doping in Sport and the Development of Anti-Doping Policy, 1999 (Strasbourg: Council of Europe Publishing), 130.
‘shooting galleries’ at the AIS residential facility in the French case (discussed in Chapter Two) was in a large measure due to the public response to the allegations.21

The hints in Chapters Two and Three regarding the role of public sentiment in the development of anti-doping programmes allude to the deeper role of public opinion in driving ant-doping policy. Furthermore, since there is no consistent justification for the prohibition on doping: there is still an unsolved puzzle: why does the public hate doping so much? This question will be left until the final section of the chapter.

III MANDERSON’S ILLICIT DRUG LAW ANALYSIS

It has already been foreshadowed that the symbolic analysis in the next three chapters is based on the work of Desmond Manderson, who has extensively analysed the history of illicit drug laws. It is important at this point to explain some of the background to his analysis in order to show why such an approach is appropriate for anti-doping policy.

As previously mentioned, Manderson argues:

Undoubtedly, those involved in the formation of drug policy have often sought the elimination of drugs as a purely functional exercise… Their actions, therefore, have not been in any conscious sense symbolic; but the very reason why certain drugs have come to seem so important is steeped in symbolism.22

In order to fully understand how Manderson came to such a position, it is important to understand the background to his work.

A The Background: Drugs Politics School

As Manderson puts it, drugs politics theory ‘is a school of analysis which…argues that drug laws have little to do with health risks, or the dangers of addiction. They have developed rather as a means of suppressing the lower class or racial minorities.’23 And, ‘[t]he “drugs politics school” argues that drugs laws have not been about drugs at all, but have reflected deeper concerns about race and difference, international relations or social change.’24

21 See Chapter Two, page 71, footnote 115 for a quote from this report to the effect that sports administrators think there is a section of the public who view the use of needles as sinister in itself. The comment suggests that the public’s opinion of the practice was significant to these administrators.
24 Manderson, above n 22, 179.
This drugs politics theory developed from a movement in academic circles in the late 1960s which criticised repressive drug controls.\(^{25}\) Himmelstein recognises four basic points that arose out of these criticisms:

- There is no simple relationship between the dangers/benefits of a drug and the severity of its legal and moral status.\(^{26}\)

- The legal and moral status of most drugs varies widely, both historically and culturally.\(^{27}\)

- Repressive drug controls are substantially irrational, meaning that they do not achieve the desired outcome. Instead they create black markets and are likely to make drug taking more dangerous.\(^{28}\)

- The drug control critics, ‘faced with the pervasive arbitrariness and irrationality of repressive drug controls have attempted to explain why some drugs come to be proscribed and stigmatized, while others do not.’\(^{29}\)

One of the three major theories presented to explain these problems associated with the drug laws is drugs politics theory.\(^{30}\) The basic assertion is that drug controls have more to do with the structure of class, status and power than with the inherent characteristics of the drug being controlled. Accordingly, those drugs associated with the less privileged classes are more likely to be prohibited than those associated with privileged classes.\(^{31}\)

Manderson’s himself claims that his work is ‘largely in keeping with this approach of the drugs politics school.’\(^{32}\) One thing, however, distinguishes Manderson from the rest of that school of thought. While most of these theorists concentrate on specific instances of the operation of racial oppression in our drug laws, Manderson also provides a more general framework of analysis: ‘one which focuses on drugs as symbols rather than substances and
which is attuned to the subtleties not of pharmacology but of discourse’ and explains rather than simply illustrates the way in which drugs have stood as symbols. It is this framework of analysis which will be applied in the rest of the thesis.

B Why Has Manderson Taken This Approach?

Obviously there must be some reason that Manderson has chosen to follow this path; why he is convinced that such an analysis is useful and provides an accurate portrayal of the motivations behind illicit drug laws. Understanding why Manderson considers symbolic analysis appropriate for illicit drug laws provides some insights as to why such an approach would also be useful in considering the history of anti-doping law.

1 Failure, Lack of Logic and Inconsistency of Prohibition Policy

Manderson makes the motivation for his approach explicit:

my aim in exploring the assumptions behind the emotional reaction that the word ‘drugs’ so often provokes stems from my own belief that the legislative drug policy pursued in Australia has manifestly failed to reduce harm associated with drug use and has, on the contrary, created a climate of fear and hatred that has been enormously destructive.

‘Destructive’ policies here, no doubt, refer to the problems associated with the use of drugs purchased on the black market, overdoses arising from the use of substances of unknown purity, crime stemming from the high price of drugs on the black market, morbidity and mortality in drug users due to the lack of medical supervision, spreading of transmissible diseases as a result of sharing needles, and, finally, drug-related corruption in law enforcement organisations. In a number of his works, Manderson points out the many myths regarding the dangers posed by illicit drugs and demonstrates that the social and emotional reaction elicited by these drugs is in no way proportional to the dangers posed.

The inconsistency of illicit drugs policy is also a contributory factor. Many authors have pointed out that the most dangerous drugs in society are not the illicit drugs but nicotine

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34 Ibid.
38 Manderson, above n 33, 394.
and alcohol: two drugs currently largely untouched by prohibition laws. These sentiments are echoed by Manderson.

Thus Manderson’s decision to investigate the symbolism of modern drug policy is based on his view that the prohibitive approach is both illogical and inconsistent – the policy has not served to protect society’s health but, instead, has increased the dangers to users of those particular drugs, while virtually ignoring the drugs that do pose the most danger to our society.

It will do no good, therefore, to try and elaborate reasons for the maintenance of current policy or, for that matter, to use logic to criticize it. For it is not reason which is operative here…

When someone behaves irrationally for a long time, we eventually stop giving them information and instead give them therapy. Neither do we go on believing them if they say that they really want to change their behaviour. The families of addicts know this well. They’ve suffered too long the promises that tomorrow will be different. Rational arguments do not always work. Therapy looks to discover the irrational motivation underlying destructive behaviour.

It’s time to put our laws “on the couch”…

2 Results of His Historic Inquiry

Another compelling reason Manderson presents for the importance of symbolism in understanding the illicit drug laws stems from the discoveries he made while examining the history of these laws: namely, that a symbolic analysis simply makes sense of the history. The rhetoric and debate associated with the enactment of these laws tended to concentrate not on the pharmacological effects of the drugs and the most effective and efficient ways of dealing with the undesirable use of these substances, but on the emotional responses to perceived evils associated with the drugs; evils more related to social fears than medical ones. The workability of his theory adds weight to his hypothesis that drugs and drug laws are highly symbolic.

3 Inability to Understand Drug Laws Without Reference to Symbolism

‘Drug law and policy cannot be understood without reference to the popular pressures that influenced them…’. Not only is this framework useful in explaining illicit drug policy,


Manderson, above n 36.
Manderson believes that it is impossible to fully understand the motivations behind the drug laws without reference to the role of symbolism.

In his earlier research, Manderson did not claim that symbolism provides the *only* reason for its prohibition, ‘only that the symbolic meaning and association is an important element in accounting for social change.’ However, in his later writing, he appears to have elevated that role when he claims that the prohibition on drugs dramatises the necessary symbolic function that drugs play in our modern society:

> The drug laws we have been considering are no more designed to outlaw drugs than the Inquisition wanted to outlaw the Devil. On the contrary, they need them. Both drugs and witches serve necessary symbolic functions to those who are committed to their oppression.

4 Influence of the Drugs Politics School

Himmelstein’s account of the drugs politics school, discussed above, aids in an understanding of the Manderson thesis that Australian drug laws sprang from racial fears and social class differences.

C Manderson’s Theory

It is clear from the above discussion that Manderson’s work seeks to answer the question of why certain drugs have been subjected to total prohibition while others have been regulated only to a small degree. In seeking to understand the reasons behind the drug laws he:

> dared to criticise some of the assumptions that people make – that laws have developed with specific and rational purposes in mind, that the reason for a law’s enactment is the same thing as the reasons given for it, and that laws are effective tools for changing people’s behaviour.

Here Manderson demonstrates his rejection of the conservative approach to drug law. Although it would be impossible to adequately summarise Manderson’s work and do justice to the complexities of his analysis and research, some major aspects of his argument regarding drug laws are outlined briefly below.

43 Manderson, above n 35, 12.
44 Manderson, above n 33, 388.
46 Manderson, above n 33 generally.
47 Manderson, above n 35, 207.
Manderson’s starting point, in line with his understanding of the position of the drugs politics school, is the controversial claim that ‘drug laws, in fact, have not really been about drugs at all.’ In a number of different works over a period of more than fifteen years, he has undertaken a detailed examination of historic sources relating to Australian drug laws, and has been able to illustrate that the motivation behind drug laws in Australia had very little to do with concerns regarding the dangers to health that the drugs pose. He claims that drug laws cannot be rationalised as a response to the social problem of addiction. In short, Manderson contends that drugs are not prohibited because of what they do or what they are, or the pharmacological properties of the substance: ‘the “drug problem”…has little to do with drugs per se…’, ‘drug policies often have very little to do with real considerations about drugs themselves.’ Thus he claims that ‘drugs have been the subject of our laws but not their object.’

2 What Drug Laws are About – the Role of Symbolism

This has been the subject of Manderson’s increasingly sophisticated drug law analysis. Some of his findings of most relevance to this thesis are outlined below.

(a) Role of symbolism: General

Manderson contends that society’s attitudes to certain drugs are ‘steeped in symbolism’. Certain drugs, he argues, became the ‘symbolic expression of other fears’. In this symbolic analysis, where drugs are revealed as an expression of ‘deep-rooted social fears’, lies the explanation for the powerful emotions and moral censure that specific drugs have attracted; emotions and censure which cannot be satisfactorily justified by consideration of the physical or moral dangers they present to the user.

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48 Manderson, above n 33, 383.
49 Manderson, above n 35, 11. See also Manderson, above n 33, 384.
50 Ibid, 12.
51 Manderson, above n 33, 383 and 394 (regarding opium: ‘for it was not what it was and what it did that was important…’).
53 Ibid, 32.
54 Manderson, above n 35, 12.
55 Manderson, above n 22, 180. Manderson explores why drugs have become such powerful symbols in this article and in above n 33. He undertakes a literary analysis and shows how opium, and the related ideas of pollution and dirt, became a metaphor for the dissolution of barriers, particularly sexual barriers, between races and a metonym for the fear of the Chinese by white Australians.
56 Manderson, above n 33, 383.
57 Manderson, above n 35, 12.
58 Manderson, above n 33, 394.
He claims that drug laws have provided a stage on which social values and community fears are played out. In his later writings he even goes so far as to say that drug laws amount to an ‘elaborate morality play staged for the public benefit’. In these later works on the similarities between witchcraft and drug laws, Manderson argues that neither type of law was designed to eliminate their subject at all, instead functioning to make the issues more public and theatrical as a drama representing society’s fears and anxieties, ‘….offering] us physical proof of the existence of this threat and of its evil power in the world.’

(b) Specific Symbols in Australian Drug Law

Given the intense feelings in society regarding the use of illicit drugs, and the ‘surprising amount of support’ the prohibition on drugs receives, the claim that drug laws are not about drugs at all, and target the symbols of our fears rather than the drug itself, is a remarkable one. How does Manderson justify such claims? What do the prohibited drugs symbolise and what evidence does Manderson present to support this analysis? It is unnecessary to provide a complete account of Manderson’s arguments in order to understand his approach: two of his major examples of the role of symbolism in the drug debate provide a sufficient example of his approach to the analysis.

The most significant example of symbolism in Manderson’s works relates to the early Australian opium laws. Through his examination of numerous contemporary sources such as parliamentary debates, newspapers, serial publications, parliamentary and government reports, legislation, parliamentary committee reports, speeches, conferences, royal commissions, policy statements and government department documents, the author uncovers the less obvious, more insidious reasons behind the opium laws. He claims that the first prohibitive drug laws in Australia were motivated mainly by fear and racism against the Chinese population and ‘were just part of a broader current of anti-Chinese

59 Manderson, above n 45, 51.
60 Ibid.
61 Ibid.
62 See Manderson above n 23, n 35 and n 52 for the presentation of his research findings.
63 As others have in relation to drug laws in countries such as the USA and Canada, for example John Helmer, Drugs and Minority Oppression, 1975 (New York: The Seabury Press); Richard Bonnie and Charles H Whitebread II, The Marihuana Conviction: A History of Marihuana Prohibition in the United States, 1974 (Charlottesville: University Press of Virginia), 14 and 30. See also Jerome L Himmelstein, The Strange Career of Marihuana: Politics and Ideology of Drug Control in America, 1983 (Westport: Greenwood Press) 141ff. References to these authors can be found in Manderson’s works.
attitudes…’ 64 Early opium laws prohibited only the smoking of opium, a habit peculiar to the Chinese, and left untouched the manifestations of the same drug utilised by white Australia (largely patent medicines). Debate surrounding the prohibition of opium focused on the evils of Chinese opium dens and the sexual corruption of white Australian females which opium was said to bring. Opium, then, came to be ‘a symbol — of the Chinese, of fears of invasion, of sexual licence, of racial impurity, of pollution and violation…’ 65

Similar arguments regarding the racial motivations of illicit drug laws have been made in the USA and Canada. 66

The second example is the prohibition of drugs such as marijuana and amphetamines in the 1960s and 1970s. Concerns about recreational drug use in the 1960s and 1970s centred on the characteristics of the rebellious youth sub-culture rather than the dangers of the drugs themselves. For example, Manderson admits that a drug like LSD (lysergic acid diethylamide) ‘may have been dangerous in itself, but more to the point it was a symbol of youth and rebellion which confronted medical and legal power.’ 67

Manderson therefore presents the same type of analysis for this era in drug law history: drug use symbolised social change and youth rebellion, things which threatened the status quo and thus were feared by the generation in power. Strong prohibitive laws against these particular drugs were a way of responding to these fears, rather than being primarily about the health of young people.

D Conclusions: Manderson

Manderson presents an extremely compelling case in his history of illicit drug policy. The evidence he presents clearly demonstrates that illicit drug policy is not a rational, reasonable response to well defined and well researched public health dangers of the various prohibited substances. It is clear that certain drugs have been inextricably linked

64 Manderson, above n 33, 387. See also Desmond Manderson, ‘Disease, Defilement, Depravity: Towards an Aesthetic Analysis of Health. The Case of Chinese in Nineteenth Century Australia’ in Laura Marks and Michael Worboys (eds), Migrants, Minorities and Health, 1997 (London: Routledge) 22, 36.
65 Manderson, above n 22, 183.
66 See also Clarence Lusane, ‘In Perpetual Motion: the Continuing Significance of Race and America's Drug Crisis’ (1994) University of Chicago Legal Forum 83 generally and specifically 95-98. For example opium laws directed towards the Chinese were also a characteristic of American drug law history, while marijuana has been linked with the Mexican people and cocaine with African Americans. Manderson, above n 33, 384. Although the symbolism relating to marijuana and cocaine was not directly at work in Australia, the indirect effects of the American associations have been equally strong in Australia. As Manderson argues, much of Australian drug law is a direct result of international influences, largely due to the power and determination of the USA in relation to drug policy: see Manderson, above n 35, 115-138 and above n 52, 24-29. Thus, not only were the early Australian opium laws of racial basis, but later prohibitions on cocaine and marijuana were also largely influenced by racial fears and concerns, albeit racial concerns in the USA rather than Australia.
67 Manderson, above n 35, 148.
with particular groups within society; this has fuelled concerns about the use of that particular substance.

The force of Manderson’s case leads to the consideration of whether such an analysis would be equally applicable to the issue of doping. Not only are both policies at a very basic level about ‘drugs’ but many of the justifications that Manderson presents for his analysis could equally apply to anti-doping policy. The justification for applying Manderson’s analysis will be considered in more detail in the conclusion to this chapter. The similarities between anti-doping and illicit drugs policy will be considered in the next section.

IV THE SIMILARITIES BETWEEN ANTI-DOPING POLICY AND ILLICIT DRUG POLICY

Given the obvious similarities between illicit drug policy and anti-doping policy, a section devoted to parallels between the two may seem redundant. However, the obvious similarities are often assumed to be the only ones. In every other way the two policies are treated as being entirely unrelated. Anti-doping is situated firmly within the sporting field, the policy being seen as one relating to fairness in sport, while illicit drugs policy is seen as a moral and health issue in wider society.

A number of factors provide proof of the difference in treatment of the two issues. For example, anti-doping authorities propagate the distinction between the two by emphasising the rationales for doping as having to do with the sporting ethic. Government bodies dealing with the two issues are generally separated: there is a specific body to deal with doping in Australia, the Australian Sports Doping Authority (ASADA), while wider drug issues are dealt with by bodies like the Ministerial Council for Drug Strategy. The way in which doping issues are reported in the media is entirely separated from the general issue of drugs: drug issues, being a subject of the criminal law, are reported as mainstream news while doping issues are placed in the sections containing sports news. Even in academic writings the two issues are largely separated in legal, medical and other fields.68

68 See discussion below regarding the tendency to see the two issues quite separately.
69 This has already been made clear in references to the fundamental rationale statement in the World Anti-Doping Code (WADA Code).
70 Often the more general bodies have some policies on doping in sport but there is no operational force to them.
71 This conclusion has been reached after a brief survey of legal academic works such as: David Helipern and Steve Bolt, Rough Deal: Your Guide to Drug Laws, 1998 (Sydney; Redfern Legal Centre Publishing); Manderson,
Until recently, enforcement bodies have been totally separated as well, anti-doping policy has been enforced by sports bodies whereas drugs policy is a criminal matter for the state.72

Even if there are some obvious similarities between anti-doping and illicit drugs policies, the differential treatment of the two issues warrants proof that they are, in reality, similar policies. Such proof will be provided below.

A Subject Matter

By far the most obvious similarity is the fact that both types of laws are directed against the use of particular substances which society finds unacceptable. Both laws prohibit certain practices — use, possession, aiding and abetting — with reference to a long list of specified substances.


Of the 62 stimulants prohibited in competition in the WADA Code Prohibited List, approximately 12 of them are also listed as prohibited substances in NSW. Since the Prohibited List also prohibits ‘other substances with similar chemical structure or same biological effect,’ it is highly likely that the number of stimulants which are prohibited in both NSW and under the WADA Code is much higher than the approximate 20 percent identified at first glance. And that is only one category of drug on the Prohibited List. Since cannabinoids have been included on the WADA Code Prohibited List, there are very few illicit drugs which are not prohibited in sport.

B  Legislative Approach

Both doping laws and drug laws incorporate the strict liability offence. The illicit drug offences of possession, supplying and trafficking characteristically incorporate a strict liability offence. Further, under the Drugs Misuse and Trafficking Act 1985 (NSW), if a person is found to have in their possession a ‘traffickable’ quantity of a drug, as defined in Schedule 1, then they are deemed to have had the drug in their possession for supply unless they are able to prove otherwise. Thus a person can be guilty of trafficking without any intention of doing anything with the substance. As discussed previously, the WADA Code also incorporates the strict liability offence, since the mental element of the athlete is

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74 Section 3(1) defined ‘Prohibited Substance’ as any substance other than a Prohibited Plant, specified in Schedule 1 to the Act.
75 WADA Code Prohibited List, above n 73, S6: Stimulants Prohibited In Competition.
76 Ibid.
77 It is accepted that stimulants may have a larger representation within the illegal drugs than anabolic steroids but the point remains that there is an overlap between the two lists.
78 This was added after the incident at the Nagano Winter Olympics where a snowboarder retained his gold medal, despite testing positive to marijuana. It was largely through the influence of the United States that marijuana was added to the list: see Director Barry R McCaffrey, Combating the Use of Drugs and Doping in Sport (1999) <http://commerce.senate.gov/hearing/1020mcc.pdf> at 13 March 2004.
79 By far the most telling overlap between the substances prohibited in sport and those prohibited under state criminal law relates to the inclusion of recreational drugs on the doping lists. These drugs have been included on the WADA Code Prohibited List despite the fact that there is little evidence that they enhance athletic performance. For example, although a few studies suggest that the use of cocaine in exercise leads to little or no improvement in performance, and could even have a detrimental effect on athletic performance (through producing a sense of euphoria which distorts an athlete’s perception of their performance), cocaine remains on the WADA Code Prohibited List: see Robert Conlee, ‘Cocaine’ in Michael S Bahrke and Charles E Yesalis (Eds) Performance Enhancing Substances in Sport and Exercise 2002 (Champaign: Human Kinetics), 279-288 for a review of the literature on cocaine’s ergogenic properties.
80 Drugs Misuse and Trafficking Act 1985 (NSW), s29.
completely irrelevant: even negligence, fault or intent is not to be considered under Article 2.2 of the Code.

The structures of many drug and doping laws are also similar: there is usually a blanket prohibition on ‘prohibited substances’ in the main text of the legislative instrument, with the prohibited substances listed in an attached appendix. For instance, the Drugs Misuse and Trafficking Act states that ‘a person who has a prohibited substance in their possession is guilty of an offence.’

A table of prohibited plants and drugs is found in Schedule 1 of the Act. The similarity with the WADA Code is clear, as previously mentioned, the Code states that an anti-doping rule violation is ‘the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s bodily Specimen’. The Prohibited Substances are found in the WADA Code Prohibited List which is updated each year by the World Anti-Doping Agency (WADA).

The above-mentioned similarities between the structure of doping and drug laws may, of course, spring from a common desire to incorporate the most efficient approach as having a single and fairly compendious list circumvents the need for endless repetition and continual amendments to the body of the statute. The use of the strict liability offence may also arise from a shared need to reduce the burden on enforcement bodies. However, the history of anti-doping policy — as revealed in the subsequent symbolic analysis — shows that the drafting similarities are not simply the coincidental result of a desire for efficiency.

C Penalties

To suggest that penalties for drug related offences and doping offences are similar is a somewhat contentious proposition for there can be no comparison between life imprisonment and the death penalty and suspension from sport. One should not trivialise the seriousness of a drug related sentence in comparing them to doping sanctions.

Nonetheless, there is a similarity between doping sanctions and drug related penalties, in that the sanctions imposed for both offences can be characterised as severe or even draconian. Punishments relating to drug offences are some of the harshest in criminal

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81 WADA Code, Article 2.1. It should be noted that there are other doping offences, such as Article 2.2 (‘Use of’) which would involve consideration of the mental element. See discussion in Chapter Two.
82 Section 10(1).
83 Articles 1 and 2.
85 In relation to doping the Rugby Football Union Disciplinary Hearing said: ‘The Regulations are draconian and meant to be. It is not for us to comment further on that, still less to seek to re-write them. We must apply them,
law. Doping offences are mostly civil in nature and the worst outcome is life suspension from involvement in a voluntary sporting competition. Nevertheless, it has been pointed out that the severity of such a sanction should not be underestimated: a doping conviction can bring a premature end to an athlete’s career and thus affect their ability to work.86

D Use of Criminal Law and Approach to Enforcement

One area of overlap between doping and drug laws is the use of the criminal law to penalise those who supply prohibited substances to others. Use of the criminal law in illicit drug policy is well known; the involvement of the criminal law in doping less so.

Of particular significance is the use of the criminal law to penalise the supply and importation of anabolic steroids.87 In Australia, ‘anabolic and androgenic substances’ are listed under Schedule 8 of the Customs (Prohibited Imports) Regulations 1956 (Cth) (along with many of the ‘hardest’ illicit drugs) and attract severe criminal penalties. In other countries, such as under the Controlled Substances Act88 in the United States, the criminal offence of importing and distributing anabolic androgenic steroids attracts large monetary penalties and imprisonment.

The criminalisation of anabolic steroids primarily for their use in sport provides a strong link between doping and drug laws, as it is an example of a doping substance that has been treated in the same way that the traditional ‘illicit’ recreational drugs have been. And, with the increasing involvement of the criminal law in doping, there appears to be an increasing acceptance that doping agents should be treated as other ‘drugs.’90
E Level of Control by Medical Practitioners

Another point of similarity worth mentioning is the way in which medical practitioners exhibit some level of control in both drug and doping related issues.

Medical practitioners act as gatekeepers in both areas, since they have the power to provide legitimised access to the substance which would otherwise be prohibited. For example, in Switzerland and in the United Kingdom, members of the medical profession are able to allow limited access to heroin maintenance programmes for people addicted to heroin.\(^91\) In a similar way, the medical profession has the power to legitimize the use of some doping substances through the Therapeutic Use provisions of the \textit{WADA Code}.\(^92\)

F Rhetoric and Societal Reaction

Doping convictions and drug related convictions tend to raise the ire of the public in a way that many other laws do not. Of particular interest here is one similar aspect of the rhetoric associated with doping policy and drug policy: the use of war or battle analogies. Some examples of the language used to refer to drug policy include:

- politicians declare the need for a ‘war on drugs’\(^93\) or that they are getting ‘tough on drugs.’\(^94\)
- titles of articles include the ‘US Drug War’;\(^95\) ‘The Drug War and the American Jewish Community: 1880 to 2002 and Beyond’\(^96\) and ‘Has the War on Drugs Failed?’\(^97\)
- drug users have been labelled an ‘addicted army of foot soldiers who obey without question, and under penalty of death, the order of their capos’\(^98\)

Similar rhetoric is found in the doping debate:

\(^92\) \textit{WADA Code}, Article 4.4. The power is not unlimited in either case and is, of course, subject to a large degree of supervision and accountability. For example, WADA may review the granting of a therapeutic use exemption to any athlete by the international federation.
\(^95\) Keith Evans, ‘Update on the US Drug War’ [1996](February 16) \textit{New Law Journal} 206.
\(^97\) Don Weatherburn, ‘Has the War on Drugs Failed?’ (2001) 33(1) \textit{Australian Journal of Forensic Sciences} 15.
anti-doping authorities are often said to be involved in the ‘fight against doping’.\footnote{McCaffrey, above n 78.}

The ONDCP in the USA is ‘Combating the Use of Drugs and Doping in Sport’.\footnote{Jim Ferstle, ‘World Conference on Doping in Sport’ in Wayne Wilson and Edward Derse (eds), \textit{Doping In Elite Sport: The Politics of Drugs in the Olympic Movement}, 2001 (Champaign: Human Kinetics) 275, 283.}

Furthermore, although anti-doping programmes are usually referred to as the ‘war on drugs in \textit{sport’}, in one case, the IOC’s desire to develop their anti-doping programmes has been referred to as a hope to ‘push forward in the War on Drugs’.\footnote{Another similarity between the two is the influence of politics in shaping the relevant policy such as international conventions like the \textit{WADA Code} and the international drugs conventions. The role of politics in both these aspects is a topic on its own and won’t be covered here.} This is more than a mere slip of the pen: as will be clear from the subsequent analysis, drug policy and doping policy are so intimately connected that they are, in reality, both part of the ‘war on drugs’.\footnote{There are, of course, exceptions in both fields: some substances are only restricted, rather than prohibited. The rationale for the use of a prohibitionist approach is similar as well: to protect the health of would-be drug-users and to protect the health of others. In the case of illicit drug laws, the stated aim is to protect people from themselves by stopping them from using illicit drugs and also protecting the rest of society from the effects of illicit drug use (such as property crime, prostitution and violence). See for example New South Wales, Second Reading Speech, State Drug Crime Commission Bill and Miscellaneous Acts (State Drug Crime Commission) Amendment Bill, \textit{Parliamentary Debates}, Legislative Council, Thursday 17 October 1985, 8086 (Barry Unsworth, Minister for Transport and Vice President of the Executive Council). Similarly, the prohibition on doping substances is, in part, justified on the grounds of preventing harm to the athlete from the prohibited substances, preventing harm to other athletes (in the form of being coerced into drug use) or the wider society: Angela Schneider and Robert Butcher, ‘An Ethical Analysis of Drug Testing’ in Wayne Wilson and Edward Derse (ed), \textit{Doping in Elite Sport: The Politics of Drugs in the Olympic Movement}, 2001 (Champaign: Human Kinetics) 129, 136 to 142. The moralist argument for these prohibitionist policies also demonstrates similarities in approach. In the drug debate the issue is protection of the moral well-being of society, in the doping debate it is the protection of the moral well-being of the institution of competitive sport. In illicit drug policy, the issue is the protection of the purity of, and essential elements of, good society (such as the family unit); in doping policy, the issue is protection of purity of the competition and the essence of sport.}

\textbf{G Continued Commitment to the Prohibition Model}

Another fundamental similarity is that a prohibitionist approach is taken to both issues. The historical significance of the adoption of a prohibitionist model will be considered below. At present it suffices to note that in both policies regulated but limited access to specified substances has been rejected and the substances have instead been absolutely prohibited.\footnote{The Copenhagen Declaration where stakeholders adopted the \textit{WADA Code} as the basis for the fight against doping: Antonio Rigozzi, Gabrielle Kaufmann-Kohler and Giorgio Malinverni, ‘Doping and the Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code’ (2003) 3(AUG) \textit{International Sports Law Review} 39, 39; Frank Oszuch, ‘Harmonization of Anti-Doping Codes Through Arbitration: The Case Law of the Court of Arbitration for Sport’ (2002) 12 \textit{Marquette Sports Law Review} 675, 681.}
Many have argued vehemently against the prohibitionist approach in both drug law and doping law. In both cases, the argument has been put firstly that the prohibitionist approach is simply not working: the usage rates of illicit drugs and doping substances do not appear to be decreasing. Secondly, the approach is said in both cases to be doing more damage than good. However, for a number of reasons, the arguments against prohibition have always met with resistance and the prohibitionist approach has remained in favour. It has been a pro-active decision by drug and doping authorities to pursue the prohibitionist stance on the issue.

H Historic Trends

An examination of the trends and patterns of various eras in the histories of the two policies reveals startling similarities. Since the subsequent analysis of doping law will dwell at length on the role of symbolism in the development and history of doping law, at this stage it is not appropriate to focus on the details of the history of either type of law. Instead, in broad brush strokes, the major movements in both will be compared. This meta-level examination of the history of doping and drug law will sufficiently demonstrate their commonality.

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106 It is contended that the prohibition actually increases the risk to those who persist in using the prohibited substances firstly because they are unwilling to seek medical advice and secondly through risks of purchasing impure drugs on the black market: Wodak, above n 36, 93. It has also been suggested that regulated access to illicit drugs and doping agents may actually minimise the harm to the drug user: J Savulescu, B Foddy and M Clayton, ‘Why We Should Allow Performance Enhancing Drugs in Sport’ (2004) 38(6) British Journal of Sports Medicine 666 and Burge, above n 104, 33.

Rowe and Reynolds provide succinct summaries of the major movements in the history of Australian drug policy. The following summary of the history of the two policies will focus on the significant periods identified by these authors; developments in doping history in these periods will be compared.

1 **Late Nineteenth Century**

Although the sale, labelling and use of chemical substances had been regulated to some degree since the 19th century through instruments such as the various Poisons Acts, most legal historians identify the 1870s to 1890s as the introduction of illicit drug laws in the modern sense. Early laws targeted opium only when smoked, so cannot be characterised as absolute prohibitions. However, the use of the criminal law to regulate chemical substances was a forerunner to modern illicit drug laws. During this period in doping history, various substances — such as alcohol, heroin, strychnine and cocaine — were in use in athletic events. Even if these practices elicited condemnation in some quarters, such condemnation was by no means widespread, and there is little evidence of a ‘doping debate’ at this stage in history.

2 **Post World War I**

This was the next major period in the development of drug policy. The 1920s and 1930s will be discussed in detail in Chapter Five. It suffices at this stage to point out that in both drug and doping policy there was marked activity in this period.

3 **The 1950s and 1960s**

It was not until the 1950s that the next major period of drug policy arrived: ‘drugs did not seem to be an issue of great concern.’ At this stage there was increasing concern over

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108 Rowe, above n 98.  
109 Reynolds, above n 39. The following summary of the major developments on illicit drug laws is taken from a number of sources such as Manderson, above n 23; Evans, above n 95; Terry Carney, ‘The History of Australian Drug Laws’ (1981) 7 *Monash University Law Review* 165 and Barry, above n 104, 92.  
109 Houlihan, above n 20, 33.  
110 See Carney, above n 109, 181.  
111 See Carney, above n 109, 181.  
112 Paul Dimeo, *A History of Drug Use in Sport 1876-1976: Beyond Good and Evil*, 2007 (London: Routledge), 26 and 28 provides a detailed discussion of attitudes towards two famous doping incidents in the early nineteenth century which, contrary to the usual presumptions made about these events, demonstrated that there was little criticism of the practice at that stage. Dimeo, 32, suggests that by the early nineteenth century ‘the wider social receptiveness towards drugs was becoming more cautious’. See also Ordway and Rolfe, above n 110, 16.  
113 Reynolds above n 39, 76.
the use of heroin and morphine and pressure was brought to bear on the international stage for tougher prohibitions on these and other drugs. Rowe identifies the international adoption of the *1961 Single Convention of Narcotic Drugs* as ‘the defining moment in modern international drug control’.\(^{115}\) From that time onwards, the push towards increasing prohibitions was realised as more international drug treaties and national drug laws (with ever increasing penalties) were enacted. Many authors have identified this period of time as one in which social change and youth rebellion, including experimentation with drug taking, was met with fear, resistance and increasing prohibition on drug use.

Patterns which can be identified in doping policy in this period are reflective of the patterns identified in the history of drug policy. Very little is said of doping during the 1930s and 1940s.\(^{116}\) Although some concern was raised after drug use became evident during the Olympic Games in the 1950s,\(^{117}\) most authors agree that it was not until the 1960s that doping was seen as a serious issue in sport.\(^{118}\) The history of anti-doping policy in the 1960s will be discussed in detail in Chapter Six.

4 Recent Developments

The most recent period of drug policy has been characterised by intense debate over the best approach to drug control, and experimentation with new strategies.\(^{119}\) As mentioned above, there has been a growing recognition of the failure of the ‘war on drugs’ to date and a realisation that prohibition may not be the best approach to the problem.\(^{120}\) Thus the

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\(^{116}\) No doubt because the war took attention away from both elite sport and doping.


\(^{119}\) This is particularly true of Europe and to a lesser degree Australia. See Rowe, above n 98, 127, emphasis added.

\(^{120}\) Proponents of this argument include references in above n 104. Since the late 1990s a number of countries, including the Netherlands and Switzerland, have introduced government regulated supply of heroin to people addicted to the drug. The Netherlands permit purchase of cannabis in approved coffee houses and have made the supply of cannabis for medicinal purposes legal, as also in Canada: see Australian Institute of Criminology, *Illicit Drugs and Alcohol: International and Overseas Responses* (2007) [http://www.aic.gov.au/research/drugs/international/] at 14 March 2008. NSW also held a brief experiment with a medically supervised injecting room in Kings Cross which caused great controversy: *The Australian, Injecting Room to Stay Open* (10 December 2006), [http://www.theaustralian.news.com.au/story/0,20867,20903523-29277,00.html] at 14 March 2008.
debate is polarised: one side pushes for stronger control, the other proposes a complete rethinking of the prohibitionist stance.

In the wake of the doping scandal of the 1998 Tour de France, a new era in anti-doping policy also arrived, as discussed in Chapter One. The result of the widespread international dissatisfaction with anti-doping efforts by bodies such as the IOC, has been a high level of cooperation between governments and international sporting bodies, the introduction of WADA and the WADA Code. Although it can be argued that this latest wave in anti-doping policy has been in the opposite direction to drug policy developments, in the present era drug policy and doping policy still have much in common: the recognition of past failures and exploration of new ways of approaching the issue.

I  Conclusion: The Similarities Between Doping and Illicit Drugs

For many years these two types of policies have been distinguished. Doping has been seen as a problem related to the ethic of sport, while drug policy has been firmly grounded in either the criminal justice or health arena. Similarities between illicit drug policy and doping policy are, however, more than a series of mere coincidences.

The above survey of similarities provides strong evidence that the issue of doping has been treated very similarly to the issue of illicit drugs. Recent events in doping history suggest that there may now be a growing tendency to treat doping as part of the wider issue of the abuse of drugs in society. The subsequent analysis will show that doping is not a separate issue to illicit drug taking and that the tendency towards combining the two issues is therefore more appropriate than most people recognise.

The further importance of these similarities will be discussed below. The remaining section of this chapter will connect some of the ideas presented in this chapter.

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122 See Ferstle, above n 105, 279.
V PUTTING IT TOGETHER: WHAT EXPLAINS THE DILEMMA?: THE ROLE OF SYMBOLISM IN ANTI-DOPING POLICY

Up until this point the evidence and discussion in this chapter has been presented in disconnected sections. But there is a link between them, as the below discussion will demonstrate. Perhaps the best way to begin putting these sections together is to consider the implications of each of the three issues discussed above.

A Public Opinion

The first issue examined was the role of public sentiment in the development of anti-doping policy. The significance of this is quite obvious. It has been argued that anti-doping policy was largely driven by scientific interest, particularly in the development of drug tests. Others have argued that the driving concern was the health of athletes and preserving the integrity of competition. Neither explanation provides a complete picture of the development of anti-doping policy. The history cannot be understood without an appreciation of how public opinion has influenced decision-makers.

The role of public opinion can help to explain why the ‘image of sport’ argument is the strongest of all the rationales presented for anti-doping policy. If public opinion has been important in the imposition of the prohibition on doping, then it is natural to justify the adoption and maintenance of such a policy with concerns relating to that public opinion.

Another puzzling aspect of anti-doping policy is also explained by the influence of public opinion; the continued widespread support that it commands. It has been noted in Chapter Three that, given the lack of ethical and logical justification for a total prohibition on these substances, it is surprising that the prohibitive approach seems as popular as ever. When it is understood that the prohibition is largely a result of public opinion, it is much less surprising that the approach would attract widespread support.

It is also not surprising that the policy is marked by confusion. One would hardly expect a policy strongly driven by public sentiment to be particularly clear or logically defensible, since public opinion is not concerned with logic.

Thus, the influence of public opinion can explain a number of factors in anti-doping policy. There is, however, much that it cannot tell us. Although it may not be surprising to find that a policy driven by public opinion is not rational or clear, it is not necessarily the case; it depends on how public opinion is formed. There are policies with strong public support which also have a rational basis. If the main factor in shaping public opinion is exposure to reasoned debate, then the resultant policy may well be reasonable and rational. On the other hand, emotive and sensationalist media reporting may produce unreasonable and irrational policies.

Clearly it is important to consider the origin of public opinion in any public policy; anti-doping policy being no exception. Here there are two important questions to be answered: why are such strong emotions caused by doping and why is public opinion like this?

B Manderson’s Analysis

Manderson’s symbolic analysis can provide a way of determining what is behind the strong public sentiment that has been so influential in the development of anti-doping policy. Since public opinion cannot be traced back to rational argument — since there does not appear to be any rational argument for anti-doping sentiment — there must be some other influence behind its formation. Since the symbolic analysis undertaken by Manderson provided an explanation for an irrational policy such as illicit drug law, so a similar analysis could provide an answer to the general question: what drives public sentiment in anti-doping?

It is important to justify further the use of Manderson’s analysis in anti-doping, particularly since, as noted above, this policy has been treated quite separately from illicit drugs. Unfortunately, much of the justification for applying this framework lies in the actual application of the analysis; examination of the symbolism of doping reveals the importance of that symbolism. However, a number of factors point to the appropriateness of this approach in anti-doping.

Manderson’s case in relation to illicit drug law is a compelling one, particularly in light of the evidence that he presents. His theory provides a cogent explanation of the evidence provided, making the application of such an argument in a related field a natural step.

Furthermore, Manderson’s justifications for his analysis have parallels in anti-doping policy. Manderson believes that modern illicit drugs policy has failed in its apparent objectives: to reduce the harm related to the use of drugs in society. Similarly, it has been
forcefully argued that anti-doping policy has failed in its objectives. Manderson also argues that the policy cannot be explained by logical argument. This point has been made in relation to anti-doping policy in Chapter Three. He identifies many myths perpetuated about the dangers of illicit drugs and that the reaction to these drugs is in no way proportional to the dangers involved. Reliable research into the frequency and seriousness of the dangers of doping substances is also troublingly scant. A final parallel between arguments about illicit drugs policy and anti-doping policy is the problem of inconsistency; the inconsistencies in both policies have been pointed out previously. Equally compelling is the close resemblance between the two types of policies, examined in the third section of this chapter. This close relationship warrants a similar analysis.

These factors provide some justification for the application of the symbolic analysis to anti-doping policy. And this type of analysis promises much. In understanding that it is symbolism which has driven public reaction — and therefore anti-doping policy — and the specific symbolism involved, it becomes clear why anti-doping policy is in such a confused state. It is no surprise that there is a lack of clarity regarding exactly what doping is and why it is prohibited, since the basis for decision-making relates more to the symbols involved than the pharmacology of doping. So, too, the reason why certain aspects of sport have been prohibited, while others have been untouched, will become clear. These points will be considered further after the symbolism of doping has been examined in Chapters Five to Seven.

C The Similarities Between Illicit Drug Policy and Anti-Doping Policy

It has already been shown that one of the implications of those similarities justifies the application of the Manderson-style analysis. However, the similarities have wider implications for the thesis.

At the most general level, the similarities noted above demonstrate that there is a strong link between illicit drugs and doping and suggests that anti-doping policy may, in reality, be a sub-variety of illicit drug policy. More specifically, the close resemblance suggests those involved in the adoption and development of anti-doping policy were strongly influenced by these connections, whether consciously or not. These administrators appear

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to have viewed the use of performance enhancing substances in sport as part of the same issue as illicit drug use. This is a slightly novel claim, given that the usual accounts of the history of anti-doping policy tend to concentrate on the unique issues which drugs in sport raise, such as fairness of competition.

Most significantly, the similarities between the two types of policies reveal the starting point for the symbolic analysis to be performed in Chapters Five to Seven. These anti-doping/ illicit drug links can therefore provide a pointer to the answer to the specific question that this thesis will answer: what is the symbolism which drives the public abhorrence of the use of performance enhancing substances in sport? In the initial chapters of the thesis, appearances seemed to be extremely important in anti-doping policy. The links between the two policies show us what doping may ‘look’ and ‘feel’ like.

Given the above analysis, it appears that symbolism in doping may have something to do with illicit drugs. The conclusions resulting from the examination in the following chapters will show just that — the major symbolic influence in early anti-doping policy was that associated with illicit drug use. Furthermore, the historic investigation of early anti-doping policy will show that this symbolism led to the adoption of a regulatory model based on illicit drug policy. The adoption of such a system is not only evidence of the power of illicit drug symbolism in anti-doping policy but has also served to perpetuate those links with illicit drugs.

D  Summary: Putting it Together

In the introduction to this chapter some propositions were presented arising out of the discussion in Chapters One to Three. At that point the connections between the statements were unclear. Now they make more sense. Below is a table of the statements made and an explanation of the connection to the argument of the thesis.

<table>
<thead>
<tr>
<th>Statement</th>
<th>Connection</th>
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<tbody>
<tr>
<td>Anti-doping policy is ambiguous, despite the apparent consensus it attracts.</td>
<td>This is because it is largely driven by public opinion based on the emotions arising from symbolism associated with doping; a basis which creates ambiguity.</td>
</tr>
</tbody>
</table>
The definition of doping is not confined to the common understanding of ‘doping’ and public reaction is not restricted by the legal definition of ‘doping’.

Anti-doping policy is not based on rational argument; a full explanation for the policy lies beyond the rational realm.

Public reaction and consensus appear to be important in shaping anti-doping policy.

Strong emotions are involved in doping discourse.

In both doping law and public discourse ‘gut reactions’ appear to be at work.

Appearances are important; how doping ‘looks’ and ‘feels’ is significant.

This demonstrates the ambiguity in doping definition. The confusion is a result of the influence of public opinion (driven by emotions not legal definitions). The influence of emotion in public opinion is as strong today as it was in the early days of anti-doping policy and even operates on the legal definition of doping.

It is impossible to explain anti-doping policy without reference to the emotions involved as a result of the symbolism of doping.

The development of the policy can’t be understood without reference to public opinion.

This is not surprising in light of the role of public opinion: something driven by strong public opinion will naturally attract widespread support, whether it is a sensible policy or not.

They are. This is more influential than reason. The gut reaction is produced by symbolism in doping.

How doping ‘looks’ and ‘feels’ is explained by symbolism, particularly illicit drug symbolism.

The argument of the thesis to this point can therefore be summarised quite simply: Anti-doping policy is not what it seems — under the placid surface of consensus lie fundamental ambiguities. Upon deeper analysis it is not clear exactly what doping is or why we prohibit it. There appears little rational basis for such a policy. Anti-doping policy can be explained by the influence of public opinion; sports administrators desire to
protect the image of sport which is damaged when the public believe that athletes are using performance enhancing substances. The image of sport is damaged by doping because there is strong public sentiment against the use of doping agents by sportspeople. The reasons behind this public sentiment can be explained by reference to the symbolism associated with doping; symbolism is therefore one of the main driving forces behind the development of anti-doping policy. It is not so much about pharmacological properties of prohibited substances, nor the ethics of the targeted practice, but about what the practices and methods represent in the minds of the public. At least in the initial stages of anti-doping policy, this symbolism appears to be largely about illicit drugs.\(^{125}\)

It should be noted here that others have pointed out the importance of understanding anti-doping policy within the wider context of society’s attitude to drugs. For instance, the sociologist, Ivan Waddington, argues:

It is clear that the strong emotions aroused by drug use in sport cannot be adequately understood without reference to processes within the wider society which have little to do directly with sport. In this connection, it is suggested that public attitudes towards the use of drugs in sport have been ‘contaminated’, as it were, by the widespread public concern about the possession, sale and ‘abuse’ of controlled drugs in society more generally. These activities, it should be noted, are not only illegal in their own right in most western societies but are also widely held to be associated with other forms of criminal activity and with a wide variety of other social problems, with physical and psychological addiction, with dangers to the ‘moral’ health particularly of young people, and with severe risks to health including the risk, in the case of injecting drug users, of hepatitis and, more recently and even more anxiety-arousing, AIDS. It is suggested that the generally emotive response to the use of performance-enhancing drugs in sport is to be explained, at least in part, by reference to the widespread public concern — ‘moral panic’ would not perhaps be too strong a term — relating to other patterns of ‘drug abuse’ within society generally.

It is therefore important to locate the concern about drugs in sport within the context of this wider concern about the use of controlled drugs in society more generally. More specifically, it is important to recognise how public attitudes and anxieties towards the use of controlled drugs in society generally have ‘spilled over’ into the sports arena and have influenced anti-doping policies in sport.\(^{126}\)

The role of symbolism in anti-doping policy has not, however, been fully examined. The task of this thesis is to provide a fuller account of this symbolism. Indeed, this thesis will argue that not only is anti-doping policy to be understood with reference to these wider attitudes but that from the 1920s anti-doping policy has been more about symbolism than sport.

\(^{125}\) It will be argued later in the thesis that the symbolism of doping changed in the 1970s and that although illicit drug symbolism was still operational in the doping debate, other symbolism became equally important.

\(^{126}\) Ivan Waddington, *Sport, Health and Drugs: a Critical Sociological Perspective*, 2000 (London: E & F Spon), 111-112. See also Dimeo, above n 113, generally, for another example. It will be argued in Chapter Six that in the 1950s and 1960s there was a much stronger tendency to see doping in sport as part of the wider issue of drugs in society and that this tendency had a large influence on the banning of such practices.
Consequently, the next three chapters of the thesis will provide a symbolic style analysis of the anti-doping laws. This will be divided into three significant time periods in the history of anti-doping policy: the first being the 1920s and 1930s, the second the 1960s and finally the 1970s. The remaining chapters of the thesis will consider how the symbolism identified helps to explain the dilemmas identified in the first few chapters, as well as how it may impact on the future of anti-doping policy.

Doping symbolism will be examined by way of analysis of the sentiments and language of anti-doping discourse, as found in the official documents of sports administration bodies such as the IOC and in public sources such as newspaper articles. It is noted here that the examination will be limited to documents printed in English. This, of course, is a potential shortcoming of the analysis since anti-doping policy has been developed through influences from a number of different regions in the world. Other authors have undertaken studies in the history of doping and anti-doping policy using sources in languages other than English, such as Dimeo and Hoberman. From their work it appears that the emotions and sentiments expressed in the English sources accurately represent the tone of the debate. Given the strong influence that the UK and the US had in this area, English sources are particularly useful in discovering the symbolism associated with doping. Furthermore, as the next chapter will argue, many of the terms used in the official sources borrowed American and English phrases — ‘dope’, ‘stimulants’ and ‘pep pills’ — use of American slang phrases once again demonstrating the influence of American public sentiment in the debate. Thus, although the analysis will, in some ways, be limited by language, the documents chosen for analysis still provide an accurate portrayal of anti-doping discourse.

A few other comments regarding the methodology of the study need to be made before beginning the analysis. The first relates to the term ‘performance enhancing substances and methods’. The focus of the analysis of this thesis is on substances rather than methods. This is not an oversight. Performance enhancing methods in sport were not really an issue until the mid 1980s when blood doping became more widely known. This is well after the time periods which are the focus of this thesis. Furthermore, the addition of ‘methods’

\[127\] Dimeo, above n 113.
\[129\] This will be discussed in the next three chapters.
\[130\] The first method to be part of modern anti-doping discourse was blood doping, which became widely known after the US cycling team admitted using it in the 1984 Olympics, see Todd and Todd, above n 111, 83.
to the list of prohibited substances came about after anti-doping policy took on a life of its own and was not a part of original anti-doping policies. Nevertheless, as will be argued in Chapter Eight that the methods that are prohibited in sport also hold strong reminders of illicit drug use and, as such, can be seen to be originating from a similar source: illicit drug symbolism. The term ‘performance enhancing substances’ will be used in this thesis although much of the analysis would apply equally to the prohibited methods.

Secondly, the thesis focuses on amateur sport — particularly Olympic sport — and does not consider anti-doping policy in professional sport specifically. There are a number of reasons for this. Most importantly, anti-doping policy began with amateur and Olympic sport and the IOC has continually been looked to for leadership in anti-doping policy. Indeed, as will be discussed in the next chapter, when anti-doping policy first began, rules prohibiting doping were discussed within the context of the professionalisation of sport. The idea of amateurism and the rich symbolism inherent in the Olympic Games, provides fertile ground for the subsequent analysis. Still the issues arising from the use of, and prohibition on, performance enhancing substances in professional sport are different to those in amateur sport. Furthermore, most other authors who discuss anti-doping policy concentrate on Olympic and other amateur sports. In order to engage with these commentators and consider the role of symbolism in anti-doping discourse, a similar focus is warranted.

Finally, the analysis will be limited to documents and has not included personal accounts of the developments in anti-doping history. This has been done purposefully; the focus of the study is on public opinion at the time of the developments and not on individual’s views of the issue. Moreover, personal accounts could be tainted by more than thirty years of indoctrination regarding the evils of doping and thus would not accurately reflect the views of doping in the 1920s, 1960s and 1970s. Thus, the most useful historical sources for this account are the newspaper articles and official documents which will be analysed in the following chapters.

The analysis will begin in the next chapter with an examination of the symbolism of doping in the era the first anti-doping rules were passed: the 1920s and 1930s.

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131 Professional sports such as baseball in the US have been slow to take the same approach to doping as Olympic sports. See for example Dick Pound’s view of the matter: Dick Pound, Inside Dope: How Drugs Are the Biggest Threat to Sports, Why You Should Care, and What Can Be Done About Them, 2006 (Toronto: John Wiley & Sons Canada), 128ff.

132 Houilhan, above n 20, 131ff. This does not mean that the IOC has always provided that leadership.
CHAPTER FIVE

THE GENESIS OF ANTI-DOPING POLICY

If any person shall administer a drug or stimulant internally or by hypodermic methods prior to a race, or shall use in any race any application, electrical or mechanical, other than whip or spur, this offender shall be ruled off the turf.¹

[International Amateur Athletic Federation Agenda item 1928]...a proposal to suspend from amateur athletics any person involved in giving competitors “drugs or stimulants internally by hypodermic or other methods.”²

I INTRODUCTION

Many historic accounts date the beginning of anti-doping policy from the 1960s but the first anti-doping rules were actually enacted in the late 1920s and 1930s. These first rules were far from the comprehensive anti-doping programmes characteristic of the 21st century and are best described as prototypes. Since they were the product of original ideas about doping, these early attempts at regulating the use of performance enhancing substances provide useful insights into the reasons behind the rules. By the 1960s, when anti-doping policy blossomed, the early rules had already created a status quo in favour of total prohibition. Therefore, the discourse surrounding the first prohibition — where assumptions generated by the status quo were not at work — provides rare insight into the influences at work in the development of anti-doping policy.

This chapter will demonstrate the powerful influence of symbolism on early anti-doping policy. The chapter will be divided into a number of sections. In the first section, the text of the first anti-doping rules will be set out. In the second, some historic background to these developments will be provided. Then an analysis of the symbolism associated with doping will be undertaken, followed by a discussion of the significance of the type of regulation adopted. The chapter will close with a consideration of the role of this symbolism in the amateur/professional issue. A similar pattern will be followed in the other chapters in this Part in relation to their respective time periods: Chapter Six will consider the symbolism of doping in the 1950s and 1960s, while Chapter Seven will consider the same in the 1970s.

II THE GENESIS OF THE PROHIBITION ON DOPING

A 1912 Olympic Marathon

Although the first international sports federation to pass a rule banning the use of drugs was the IAAF (International Amateur Athletic Federation, as it then was) in 1928, there appears to have been at least one anti-doping rule before the 1928 prohibition. In the Official Report of the 1912 Stockholm Olympic Games there is a section entitled ‘General Regulations for the Officials for the Marathon Race.’ Part of the text of that section states: ‘Competitors must not, under penalty of disqualification, take drugs of any kind, either at the start, or during the progress of the race.’

The intention behind this rule and the zeal with which it was enforced is unclear. It seems unlikely that there had been similar rules against drugs in previous Olympics since there are at least two doping incidents in Olympic competition which did not lead to disqualification. Nevertheless, it appears that by 1912 there was a sufficient level of anti-drug feeling to establish such a rule. However, since the significance and origin of this 1912 rule is unknown, the discussion in this chapter will focus on the two subsequent anti-doping rules.

B 1928 International Amateur Athletics Federation

The first recorded rule limiting the use of drugs at all events within a jurisdiction was passed by the IAAF. At the time of the 1928 Amsterdam Olympics, the IAAF congress passed a resolution condemning the use of stimulants in sport:

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4 Lord Desborough, The Olympic Games of Stockholm 1912 (1912) <http://www.la84foundation.org/6oic/OfficialReports/1912/1912.pdf> at 13 September 2008, 112. Athletes were also to be subjected to medical examination regarding their fitness to compete.

5 There is no explanation provided within the rule and it has not been considered in any historic examinations of anti-doping rules.

6 Paul Dimeo, A History of Drug Use in Sport 1876-1976: Beyond Good and Evil, 2007 (London: Routledge), 26-28, examines incidents from the 1904 and 1908 Olympic marathon in which two competitors used drugs to aid their performance. Thomas Hicks was not disqualified at all despite the fact that it was commonly known that he had received strychnine and brandy. Dorando Pietri was disqualified, not for doping, but for being physically supported over the finish line. Dimeo reports that this was a very unpopular decision by the officials of the Games.

7 Since the Swedish Olympic Committee was in charge of all the sports at these Games, it is, of course, possible that this rule was entirely a product of the Swedish influence which has always been strongly anti-drug: ‘Sullivan Explains Olympic Games Rules’, The New York Times (New York), 14 April 1912, C9.
Doping

(Comp. Section 22)

The Council having studied the question of doping in its sessions during the Olympic Games proposed to the Congress that a rule should be made prohibiting the use of drugs or stimulants in athletic competitions. The congress voted unanimously that such a rule should be introduced. Whereupon a lively discussion ensued as to the text to be adopted in this respect. The various propositions and amendments were handed over to the Council which was asked by the Congress to present a definite text to be adopted by the Congress at the next day’s meeting.  

The definitive text which was accepted by the Council reads as follows:

Doping is the use of any stimulant not normally employed to increase the power of action in athletic competition above the average.

Any person knowingly acting or assisting as explained above shall be excluded from any place where these rules are in force or, if he is a competitor, be suspended for a time or otherwise, from further participation in amateur athletics under the jurisdiction of this Federation….

C  1938 International Olympic Committee

Ten years later, in 1938, the International Olympic Committee (IOC) also officially condemned doping. The minutes of the XXXVth Session in Cairo on Thursday, 17 March recorded:

Doping of Athletes.

Reply:

The use of drugs or artificial stimulants of any kind must be condemned most strongly, and everyone who accepts or offers dope, no matter in what form, should not be allowed to participate in amateur meetings or in the Olympic Games.

D Other Anti-doping Rules

Although it is somewhat difficult to pinpoint when other international sporting federations first passed anti-doping resolutions, the World Anti-Doping Agency (WADA) states that after 1928 other federations soon followed the IAAF’s example.

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9 Ibid. 39 and 41.

10 International Olympic Committee, ‘Sessions of Thursday, March 17th, 1938, Morning and Afternoon’ (1938) 37 *Bulletin Officiel du Comite International Olympique* 29, 30. The background to this condemnation, discussed below, was an enquiry into a number of aspects of the professionalisation of sport: Maxwell J Mehlman, Elizabeth Banger and Matthew M Wright, ‘Doping in Sports and the Use of State Power’ (2005) 50 *Saint Louis University Law Journal* 15, 22 explain that the issue of drugs had arisen for the IOC as early as 1933.

III  BACKGROUND: DOPING AND DRUGS BEFORE THE PROHIBITION

The point has been made many times that doping has a long history dating back to the Roman gladiators. Apparently very little moral censure attached to these practices in early times; it is really only in the last century that the use of such substances has been frowned upon.\textsuperscript{12} However, it is difficult to isolate exactly when attitudes towards such behaviour began to change. In this respect the work of Paul Dimeo is instructive; the following summary is largely taken from his work. The background information will provide a framework for understanding the symbolism of doping in the 1920s and its significance in the development of anti-doping policy.

A  Doping in Sport

1  Pre World War I

Dimeo summarises the use of performance enhancing substances in this period by saying:

there is not a great deal of evidence on drug use in this period. However, it is clear that the myth of the ‘golden age’ of equal competition based on talent alone does not fit with reality. The examples of alcohol use, coca and kola tonic drinks, oxygen, cocaine and strychnine use all show that some athletes were willing to try stimulant drugs to gain that extra edge over their competitors… There is no evidence of widespread drug use…\textsuperscript{13}

Dimeo’s point — that the use of drugs was not widespread — is an important one. The relative unimportance of drug use in terms of the number of athletes involved actually highlights the importance of the issue for rule-makers. For instance, the 1912 Olympic marathon rule gains significant import in light of the fact that these practices were not widespread: if it was relatively uncommon for such a thing to happen, there must have been a strong feeling generated by the practice in order to generate such a rule.

Nevertheless, it is clear that performance enhancing substances were being used by some athletes in the late nineteenth and early twentieth century. Some of the examples of the types of substances in use at that time include:


\textsuperscript{13} Dimeo, above n 6, 32.
• The tonic drink, Vino-Kolafra — a drink containing the stimulant, kola — was freely advertised and promoted as a performance enhancer for athletes in athletic magazines in the late 1800s. The drink was reportedly used by college athletes in the US and UK.\textsuperscript{14}

• In the mid 1890s the English cycling trainer, ‘Choppy’ Warburton, allegedly gave his charge, Arthur Linton, strychnine, trimethyl and heroin.\textsuperscript{15}

• The 1904 official St Louis Olympic Games Report relates an incident during the marathon where the winner, Thomas Hicks, was administered substances to help him to continue: ‘As Hicks approached the twenty-mile post, his color [sic] began to become ashen pale, and then another tablet of one-sixtieth grain strychnine was administered him, and two more eggs, besides a nip of brandy.’\textsuperscript{16}

• In 1908 the leader of the Olympic marathon, Dorando Pietri, was given ‘stimulants’ to help him finish the race.\textsuperscript{17}

• A British long distance swimmer, Jabez Wolffe, was given doses of oxygen during his attempts to cross the English Channel.\textsuperscript{18}

It was not only human athletes who were taking advantage of these types of substances. In fact, the term ‘doping’ appears to have been more commonly associated with horse racing, where the use of performance enhancing substances appears to have been much more common. So problematic was the use of substances such as heroin, cocaine, caffeine and strychnine in horse racing in the 1930s that routine saliva testing, pioneered in 1911 by an Austrian chemist, was introduced by racing officials in many jurisdictions.\textsuperscript{19}

\textsuperscript{14} Dimeo, above n 6, 24.

\textsuperscript{15} Ibid, 26. Dimeo points out that there had been rumours surrounding the mysterious mixture that Warburton had been giving his cyclists but that it was quite possible that he was employing the placebo effect and that the mixture did not contain any known performance enhancers.


\textsuperscript{17} Commentators have claimed that the substance involved was strychnine, however, Dimeo, above n 6, 28, disputes the accuracy of those claims.

\textsuperscript{18} For which he received strong criticism: Dimeo, above n 6, 29. Oxygen therapy does not usually fit the modern criteria of doping since it does not involve ‘drugs’ but, as argued previously, the definition of doping was once wider than it is now.

Another important element in anti-doping history before World War I (WWI) was the beginning of research into the ergogenic effects of various substances. Both Dimeo\(^\text{20}\) and Hoberman\(^\text{21}\) examine the substances used in detail and it is unnecessary to do so here. Some of the substances which were studied in this regard included coffee/caffeine,\(^\text{22}\) strychnine,\(^\text{23}\) narcotics,\(^\text{24}\) oxygen,\(^\text{25}\) hormones,\(^\text{26}\) Pitbury leaves,\(^\text{27}\) coca,\(^\text{28}\) alcohol, tea, cocaine (from coca leaves), chocolate (theobromine — from cocoa beans), nicotine, morphine, opium, digitalis,\(^\text{29}\) testosterone (testicular extracts),\(^\text{30}\) kola nuts,\(^\text{31}\) marijuana,\(^\text{32}\) milk, mint water, lemonade\(^\text{33}\) and bicarbonate soda.\(^\text{34}\)

2 \hspace{1cm} 1918 to 1920s and 1930s

The most important difference between the pre and post war periods was the development in sports science that took place from the 1920s.\(^\text{35}\) At this time sport became much more scientific: old perceptions about the fixed capacity of the body gave way to an understanding of the potential for enhancing performance, resulting in the establishment of exercise physiology as an independent discipline.\(^\text{36}\)

This new body of science had applications in training and coaching techniques. More relevantly, it also led to an increase in research into the ergogenic effects of doping agents. Further impetus for such research came from the potential military applications of these substances. By 1941, a review article listed the substances which had been studied at that stage as ‘alcohol, alkalies, ammonia chloride, Benzedrine, caffeine, cocaine, coramine, ...
digitalis, gelatine, glycine, fruit juices, hormones, lecithin, metrazol, oxygen, phosphates, sodium chloride, sugars, ultraviolet rays and hormones. Although this sort of research went on world wide (particularly in the US and Germany) conclusions were by no means unanimous.

These developments correlated with the increasing importance being placed on sport in society at the time. Boxing and other sports increasingly involved prize-money and gambling. Horse gambling was becoming more organised and gaining in social acceptability at this time, particularly in the USA, after the financial strain of the great depression. The beginning of the modern Olympic Games in 1898 provided a focus for athletics and other sports which added to the competitive nature of these activities.

A lack of consensus on the part of the scientists regarding the ergogenic properties of performance enhancing substances did not hold athletes back from experimenting with these substances. As Dimeo states, ‘the American situation was characterised by experimentation by athletes with stimulants and a background of scientific research.’ He aptly sums up this period: ‘Sport was becoming modernised, the application of science was central to that process, and Germany was one of the leading lights.’

**B Attitudes to Doping**

Dimeo traces a number of public criticisms during the period before the first official anti-doping rules:


- The National Cyclist’s Union in England banned the trainer, Choppy Warburton, for his alleged doping of cyclists in the late 1890s.

Significantly, Dimeo also demonstrates a lack of public criticism where it might be expected. For instance, the doping events of the 1904 and 1908 Olympic marathons

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40 Ibid, 39. Hoberman states that during the interwar period in Germany, the use of drugs became widespread: Hoberman, above n 21, 134.

41 Dimeo, above n 6, 42.

42 See also Hoberman, above n 21, 131ff for a detailed examination of attitudes to doping in Germany between 1920 and 1940.
mentioned above — which subsequently have received much negative attention — were not accompanied by widespread condemnation.\(^{43}\)

Dimeo does, however, relate one incident which suggests that even at that time there was a perception that admissions of doping would not be looked on favourably by the general public. The English football team, Arsenal, used ‘pep pills’ to aid their performance in 1925. Dimeo reports that the team manager feared the public response should news of the use of the pills be leaked to the media. As Dimeo says, ‘Knighton’s unwillingness to publicise his ventures at the time does suggest a much more complex situation in which risks were taken by people in authority knowing full well that bad publicity and criticism would follow if the story were to leak out.’\(^{44}\)

Thus, although it seems that for most, doping was not a particularly contentious or important issue, there were some critics, mostly from the public or medical profession. Scientists and athletes involved were not overly troubled by concerns of ‘cheating’ in their doping research or practice.\(^{45}\)

### C attitudes to ‘Drugs’

This chapter argues that attitudes to doping were actually part of the wider attitude to the non-medical use of ‘recreational’ drugs. A summary of the developments in illicit drug policy at this time will be provide background for this discussion.

It was in the late nineteenth century that illicit drug laws began with the introduction of prohibitions on the smoking of opium, particularly by the Chinese community. At a similar time the ‘Temperance Movement’ was gaining support, (discussed below), the campaigners addressing alcohol and other ‘habit-forming drugs’\(^{46}\) such as opium and cocaine. By 1928 there were a number of international conventions regarding the prohibition of drugs in place and commitment to these principles was increasing internationally, mostly through the influence of the US.\(^{47}\)

Dimeo also examines the influence of the ‘anti-fatigue’ movement — ‘a new discipline of the body that focused on the problem of fatigue and had grand designs of social reform and

\(^{43}\) Dimeo, above n 6, 26 - 28.

\(^{44}\) Dimeo, above n 6, 44.

\(^{45}\) Dimeo, above n 6, 26 and Hoberman, above n 21, 132.

\(^{46}\) Dimeo, above n 6, 31.

\(^{47}\) For a good summary of these events see Keith Evans, ‘Update on the US Drug War’ [1996](February 16) New Law Journal 206.
modernising zeal. These ideas led to the modernisation of sport — sport being seen as a redeeming practice from indolence and fatigue. These beliefs explain why scientists studied the energising effects of various substances and why athletes were keen to harness these powers. Clearly, from this point of view ‘drugs’ were positive agents, the powers of which could help to improve society.

D Conclusions: Two Points of View

Two separate attitudes are identifiable at this point. On the one hand there was the influence of modernism and progressivism which saw competitive sport as something to be encouraged and developed through the use of scientific knowledge. For this group, doping in sport was an issue of experimentation and research; the potential of such substances was exciting rather than dangerous.

On the other hand, for another group in society, performance enhancing substances were viewed with suspicion, especially with regard to their associated health risks, particularly their addictive properties. To that group doping was a dangerous and unacceptable form of cheating. The use of performance enhancing substances in sport created fears of where such practices may lead in the future.

In the early twentieth century, these two points of view appeared to be in balance. Obviously by the late 1920s anti-doping sentiment had gained momentum enough to establish the first rudimentary anti-doping rules. Why was it that anti-doping sentiment became the dominant one in this way?

IV Doping Symbolism

The subsequent analysis of symbolism demonstrates that in early anti-doping discourse the use of performance enhancing substances symbolised another form of non-medical use of ‘drugs’, namely recreational drug use. The choice of language, the regulatory approach and the drugs involved are all evidence of the fact that sports administrators must have been influenced by this symbolism.

48 Dimeo, above n 6, 29.
49 As Dimeo, above n 6, 31, states: ‘The ideology of modernity and progress that was linked to industrial productivity and the rationalising impulses of European and American cultures provided a backdrop to the development of drug use in sport.’
50 It should be noted that it is not being suggested here that doping in sport was a prominent issue in society or that it was a mainstream concern.
A Language of Anti-Doping Rules and Discourse

Important historic evidence supporting the claim that performance enhancing substances symbolised illicit drug use is found in the language used in the first anti-doping rules.

The early anti-doping rules have been set out above. Within the text of these rules, there are three terms which stand out: ‘doping’, ‘drugs’ and ‘artificial stimulants’. The historic significance of these terms will be considered below.

1 ‘Doping’

(a) Meaning Within Sport

From at least 1923, the use of performance enhancing substances in human sport was referred to as ‘doping’:

- In 1923 Pierre de Coubertin, founder of the modern Olympic movement, made a speech in Rome where he criticised a number of aspects of sport: ‘the intrusion of politics into sports, the increasingly venal attitude towards championship, the excessive worshipping of sport, which leads to belief in the wrong values, chauvinism, brutality, overworking, overtraining, and doping.’

- The minutes of the 1928 IAAF meeting referred to ‘the use of drugs or stimulants in athletic competition’ as ‘doping’.

- When, in 1933, The New York Times reported ‘[a]ssertions that Japanese swimmers in the 1932 Olympic Games were administered “oxygen or some stimulant” were under investigation’. The headlines read ‘Charges Japanese “Doped” Swimmers.’

- When the IOC first condemned the use of performance enhancing substances, it referred to the practice as ‘doping’:

  Doping of athletes.

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51 It was used in horse racing before this: “Dope” An American Term, The New York Times (New York), 7 April 1901, 19.
53 IAAF, above n 8, 39 and 41.
The use of drugs or artificial stimulants of any kind must be condemned most strongly...\(^5\)

A number of authors have explained the etymology of the word ‘dope’. Ordway states:

> It is thought to come from the word ‘dop’, which originated from a South African drink made of an extract of walnuts, with xanthines (found in caffeine) and alcohol added. The drink was intended to improve endurance in ceremonial dances. There is no suggestion that the drink or the word ‘dop’ had any moral restrictions to its original use.\(^6\)

Voy and Deeter claim that the word first appeared in the English dictionary in 1889 when it meant a narcotic mix of opium used for racehorses.\(^7\) It is clear from a brief survey of newspaper articles from the turn of the century that the term was used commonly to refer to horse racing. In 1901 *The New York Times* published an article entitled ‘‘Dope’’ an American Term’:

> “dope” meant a mysterious something that made slow horses fast and cowardly horses brave and in general was something that put in the power of the Yankees contingent to so control results that they could make any horse win they were disposed to favour. That they were believed is not surprising, for in this country the same means of swindling the unsuspecting public has been in general use ever since the use of stimulants other than old-fashioned alcohol was invented.\(^8\)

By 1902 the term was becoming more widely known, the *Chicago Daily Tribune* reported a case involving the use of ‘stimulants’ as a ‘doping’ case: ‘Ruling of Harlem Judges in Gazzolo “Doping” Case Causes Wide Discretion’.\(^9\) By 1934 it was reported that race officials were joining ‘in U.S. War on Doping.’\(^10\)

Yesalis and Bahrke note that the term had come into use for human athletes in the early twentieth century to ‘describe certain methods designed to augment the functional

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\(^{55}\) International Olympic Committee, above n 10, 29.


\(^{58}\) *The New York Times*, above n 51. It is noted here that most of the references in this chapter are to newspaper articles from the US and England. The use of these references to explain rules passed by bodies which were based in Europe needs some justification. It is clear that there were a number of points linking Europe and the US in this regard which suggest that these references, and the symbolism in them, are relevant to an analysis of the early doping rules. Firstly, these were international bodies and the US and the UK were strongly represented: e.g. Avery Brundage became president of the United States Olympic Committee in 1929 and vice-president of the IAAF in 1930. The use of the term ‘dope’ to refer to drugs in sport was common in both regions and it is clear in the 1960s that similar imagery and symbolism was associated with these terms. Finally, and most significantly, prohibition sentiment was strong in both the US and Europe, particularly Scandinavia. Since prohibition sentiment in these countries arose from similar influences, the arguments put forward in this chapter regarding the significance of the prohibition model are equally applicable to both regions.

\(^{59}\) ‘Racing Ends at the Big Tracks’, *Chicago Daily Tribune* (Chicago), 4 October 1902, 4. The case was reported as being ‘quite out of the ordinary’ and the use of inverted commas around the word ‘doping’ suggests that the term ‘doping’ was not universally known. The term was, however, obviously in wide enough usage for it to be possible to report the case as a ‘doping’ one.

\(^{60}\) Ibid.
efficiency of athletes by means of highly active drugs.’ By the mid twentieth century it was used to refer generally to ‘any method of improving athletic performance temporarily, either during training or in conjunction with competitive meets.’

(b) Meaning Outside Sport

Use of the word ‘doping’ was not confined to the sporting context and its meaning outside the athletic field is highly significant. In the late 19th century, the word became associated with recreational drugs. It is also thought to come from the Dutch word ‘doop’ which means ‘thick dipping sauce’, due to the practice of smoking semi-liquid opium preparation. Although it was specifically applied to opium, it was also used to refer to all sorts of recreational drugs.

Despite Ordway’s contention that the word did not have moral restrictions on its original use, this was certainly not the case when the term was used outside the sporting context. Headlines from US newspapers just after WWI refer to the ‘dope menace’, the ‘dope evil’ and the ‘dope conventions’. In a 1940 article entitled ‘Dope Fiend’ Mythology, A.R. Lindesmith described many common stereotypes about ‘drug addicts’, referring to ‘dope-crazed killer’, ‘dope fiend rapist’, ‘dope peddler’ (drug dealer) and the ‘boot and shoe dope fiend (impoverished drug user).’ Abramovskiy and Edelstien say ‘[t]he last quarter of the 19th century marked the high tide of popular drug use in America, the epoch remembered as the “dope fiend’s paradise”’. It appears that ‘dope fiend’ was a derogatory term used for drug addicts of all sorts; particularly associated with criminal

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64 Many of the examples provided in this chapter demonstrate this point: see for example Perry M Lichtenstein, ‘Narcotic Addiction’ in H Wayne Morgan (ed), Yesterday's Addicts, 1973 (Oklahoma: University of Oklahoma Press) 67, 67.
65 Ordway and Rolfe, above n 56.
67 A.R. Lindesmith, “Dope Fiend” Mythology’ (1940-1941) 31 American Institute of Criminal Law and Criminology 199.
68 Ibid, 199.
69 Ibid, 204.
70 Ibid, 205. He points out in a footnote that his article only considers opiate addicts and not cocaine or marijuana users: ibid, 199. The fact that he felt it necessary to distinguish this reveals that the term must have been commonly used to refer to users of cocaine and marijuana as well as opium.
behaviour attributed to them. Thus, from the early 1900s the term ‘dope’ had become a
general (derogatory) term for recreational drugs. Its use in the sporting context is
therefore highly suggestive of the assumption that use of performance enhancing
substances was akin to recreational drug use.

B ‘Stimulants’

The term ‘stimulant’ is not commonly used in everyday language now, but from the early
1900s through to the 1960s, the word appeared frequently in newspapers and other
documents. The term was one which was significant in the 1928 IAAF rule and in the IOC
1938 condemnation of doping. Since there is little explanation of the rules in the relevant
text, reference needs to be made to extrinsic material in order to define the term.

Unfortunately, as Hoberman points out, there was no clear definition of the term, even
while it was in use: ‘But what do these terms actually mean? Cabanis and his readers
seem to share a colloquial definition of ‘stimulant’ so self-evident that only a handful of
substances is ever mentioned.’ Hoberman later discusses the distinction which was made
in the 1920s and 1930s between ‘nutrients’ and ‘stimulants’:

In the meantime those who talked in terms of nutrients and stimulants overlooked the fact that
the term ‘stimulus’ remained unclarified and almost meaningless. Doping was, in fact,
virtually synonymous with stimulation. But it was easier to assume than to demonstrate the
efficacy, let alone the mechanism of any given ‘stimulant’. The very concept of the stimulus
had been one of the classic problems of physiology since the seventeenth century and was still
being debated in the 1920s and 1930s. Inadequate understanding of the entire subject had not,
however, prevented the spread of fashionable terms like ‘stimulant cells’ and ‘cell stimulation’.
In short, the nutrient/stimulant distinction was hopelessly blurred by the impossibility of
defining these terms in a consistent and contrastive way.

Hoberman’s examination of the work of early sports scientists supports his argument
regarding the confusion relating to the phrase ‘stimulant’. Substances considered as
‘stimulants’ in this context included alcohol, coffee, tea, cacao beans, cocoa nuts,
morphine, cocaine, strychnine, opium, digitalis, tea, quinine and others.

It is impossible to know exactly which substances the rule-makers had in mind when they
drafted the first doping rules. The substances which were commonly used at the time
included strychnine, alcohol, caffeine, cocaine, heroin and nitroglycerine, thus it is highly
likely that these are the substances that the first rules were directed towards. As will be
discussed below, many of these substances had been subjected to moral censure outside of sport, and this would have had a significant effect on views of the use of that particular substance within sport. Further, the very term ‘stimulant’ had a symbolism of its own, linked with illicit drugs.\textsuperscript{76}

Use of the term ‘stimulant’ to refer to drugs of abuse was common in the period, some examples of this nomenclature include:

- In 1893 a newspaper article entitled ‘Use and Abuse of Stimulants’ said:

  Ask any conscientious competent doctor which two of the remedies in the pharmacopoeia he regards as most useful to mankind and he will in all probability say opium and alcohol – opium first and alcohol a close second.
  But should you press him further with the question, which two drugs are most dangerous to mankind, he will surely reply opium and alcohol, or alcohol and opium to save himself from being paradoxical.
  At any rate, it is an unquestionable fact that these two drugs have done incalculable good and immeasurable mischief.\textsuperscript{77}

- An advertisement from \textit{The Times} in 1914, ‘The Abuse of Alcoholic Stimulants’, read:

  Under continuous mental or physical strain the habit of resorting to stimulants in the form of different alcoholic beverages with food, between meals, and at less and less intervals during each day after day, is readily formed until the habit becomes a necessity, then a craving, and ultimately a masterful power over the whole mental and physical energies.
  This is the general trend of present day life – and undoubtedly the habit of resorting to alcoholic beverages or narcotic drugs as a temporary stimulant has grown and become a natural ordinary daily routine; spurring on the jaded faculties, acting for a time as a forcer of expending energy, but with what ultimate result?...
  When the desire or apparent need for stimulants or narcotics is found to be gradually creeping on and repeating, then is the time to recognize the need and value of the Turvey Treatment.\textsuperscript{78}

- In 1902 an article in \textit{The New York Times} entitled ‘Prohibition and Stimulation,’ the author wrote:

  Not alone in the increasingly keen competition of breadwinning and the progressive narrowing of the lives of the wage-earning class in the large cities is found the reason


\textsuperscript{77} Silver et al, above n 66, 25. Both alcohol and opium were, of course, soon after subjected to criminal prohibition.

\textsuperscript{78} ‘The Abuse of Alcoholic Stimulants’, \textit{The Times} (London), 8 September 1914, 11.
for the craving for artificial stimulation which is magnified into an evil of greater
gmagnitude by the advocates of prohibitive legislation than all other evils combined.79

The article later reported on a study by Dr A P Grimnel who ‘made a critical
study consumption of stimulants...chiefly the narcotic drugs...’. Morphine,
opium, paregoric, laudanum, cocaine, chloral and Indian Hemp were referred to
in the article.

- In 1926 an article in *The New York Times*, ‘Says Opium Critics Exaggerate
Evils’, reported on a statement made by the Royal Opium Commission of 1893-
1895 regarding the use of opium in India:

opium almost everywhere in India is the common domestic medicine of the people,
that it is extensively used for non-medical and quasi-medical purposes and that the
non-medical uses are so interwoven with the medical uses that it would not be practical
to draw a distinction between them in the distribution and sale of the drug; that as
regards the use of opium, as a stimulant, the practice of taking the drug in pills or
infusions is of old standing and is generally followed in the moderation and without
injurious consequences….80

- An advertisement in the *Chicago Tribune* in 1927 for Postum, a drink for
‘nervous’ people read: ‘Then so many add to the confusion by taking regular
doses of caffeine – a drug stimulant – at mealtime.’81

- A 1927 article in the *Chicago Tribune* regarding the effects of the alcohol
prohibition stated that ‘[n]umerous authorities contended that prohibition of
intoxicants would drive an ever increasing number of persons to seek
satisfaction of their craving for stimulants by indulgence in narcotic drugs.’82

- In 1933 the *Chicago Daily Tribune* referred to ‘doped horses’ as having been
administered a ‘narcotic stimulant’.83

- In 1928 Columbia University Professor Mason ‘called attention
to….unleisurely, hurried, distracted, noisy and feverish’ activities including ‘the
artificial stimulants and feverish pumped-up gayety of the “wild party”; the
“thrills” so insistently demanded by the younger generation…’84

82 Arthur Sears Henning, ‘More Federal Prisons Demand Upon Congress’, *Chicago Daily Tribune* (Chicago), 29
December 1927, 2.
83 ‘Florida Adopts Salivary Test for Horse Doping’, *Chicago Daily Tribune* (Chicago), 12 October 1933, 26.
• When *The New York Times* reported on the introduction of the ‘dope box’ in France and England to test horses for the use of performance enhancing (or inhibiting) substances, the tests were said to determine whether horses had been ‘stimulated’.\(^8^5\)

• In 1934, the *Chicago Daily Tribune* reported stories of a horse drugging syndicate which had attracted the attention of Federal Narcotics Commissioner, Harry Ainslinger, whose officers had ‘arrested several needlemen at tracks in Chicago’ in an effort to eliminate the ‘use of stimulants of any sort for horses’.\(^8^6\)

Examination of these examples clearly demonstrates that the term ‘stimulant’ was closely linked with the non-medical, recreational ‘abuse’ of drugs and ‘narcotics’. ‘Stimulant’ was used interchangeably with ‘narcotic’ or ‘drug’ and referred to a number of different substances including alcohol, marijuana, caffeine, cocaine, opium and other narcotic drugs.

Furthermore, the term ‘stimulant’ also referred to the *way* in which those substances were used. This is obvious in the above example from the Royal Commission on Opium — opium could be used in a number of ways, the way attracting the most moral censure was as a ‘stimulant.’

‘Stimulant’, therefore, was a way of describing what is today referred to as ‘recreational drug use’: the terms encompassing both the type of drugs used and the intent with which they were used. This is an important point in relation to the symbolism involved in ‘stimulant’ use in sport. If the term ‘stimulant’ was roughly equivalent to our modern expression ‘recreational drug use’, then use of the term in the early anti-doping rules has further significance. For at one level ‘stimulant’ was an obvious reference to particular substances which were subject to criminal prohibition outside of sport, strongly suggesting that the use of these substances on the sporting field held strong reminders of the ‘abuse’ of such drugs in society. But at the more general level, the lack of self-control and the immoral life-style associated with the ‘drug addict’ were bound up in this word ‘stimulant’.

**C Other ‘Drug’ Symbolism**

Another significant word used in the early anti-doping rules was ‘drugs’. This, too, was a highly symbolic word. The word did, of course, refer to substances used in a medical

\(^8^5\) Field, above n 19.

\(^8^6\) *Chicago Daily Tribune*, above n 1, *Chicago Daily Tribune*, above n 59.
sense: ‘medicine’ might be an equivalent term. But in everyday language, the word also referred to ‘habit-forming’ substances. A number of the examples provided above in relation to ‘stimulants’ and ‘doping’ also refer to ‘drugs’, ‘drug evil’ and ‘drug stimulant’.\(^87\) One of the advertisements above provides an interesting example. When referring to the medical use of opium and alcohol the term ‘remedy’ is used, while speaking of the dangers of these substances ‘drugs’ is used. Four further examples confirm the point that ‘drug’ had connotations of illicit drugs:

- A headline in *The New York Times* in 1923 entitled ‘1,500,000 Drug Users in America, He Says’ examines the ‘narcotic drug evil’.\(^88\)

- A headline from 1926 reads ‘Foes of Drug Evil Call a World Meeting: Conference on Narcotic Education at Philadelphia Next Month Will be the First of Its Kind — Campaign Will Warn Public of the Disastrous Effects of Addiction.’\(^89\)

- Headlines from *The Times* refer to the ‘Drug Habit’: ‘Growth of the Drug Habit, United States Statistics’,\(^90\) ‘A Victim of the Drug Habit’, referring to people who were ‘addicted to the habitual use of narcotic drugs’.\(^91\)

- In 1928 *The New York Times* reported on plans by the Anti-Narcotic Union to organise a world-wide effort against ‘the spreading evil of drug addiction’ including a world conference. It was reported that Mussolini would attend the conference and quoted him as saying: “I think very well of the world program as outlined… I always enjoy working with America and shall continue to throw all my force against this great drug evil which is threatening the world.”\(^92\)

In the references provided above there are other indicators of the symbolism involved in doping in the very early years of anti-doping policy. A significant indicator of the connection between the ‘immoral’ practice of recreational drug use and doping is found in an article from 1928 which appeared in *The New York Times* regarding the IAAF congress.

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87 See Silver et al, above n 66, 25, quoted in above n 77, regarding opium and alcohol being the most useful and most dangerous in pharmacopia.


90 ‘Growth of the Drug Habit: United States Statistics’, *The Times* (London), 4 March 1913, 7. The term ‘drug’ was used to refer to illicit drugs in both the US and the UK.


92 ‘Opens World Drive On Drug Traffic: Anti-Narcotic Union Plans Active in All States and Countries: 8,000,000 Women to Aid: Mussolini Quoted as Saying He Would Come Here to Great Meeting in Effort to Fight Evil’, *The New York Times* (New York), 8 March 1928, 8. This quote by Mussolini also suggests that he was familiar with the term ‘drug’ and ‘drug evil’ as referring to the use of narcotic drugs. Apparently Mussolini claimed to speak fluent English: see Peter Neville, *Mussolini*, 2004 (Oxon: Routledge: Taylor and Francis Group), 91.
It states: ‘the federation also shelved, until August 6, other debative subjects such as the proposal to suspend from amateur athletics any person involved in giving competitors “drugs or stimulants internally by hypodermic or other methods.”’ In anti-drug discourse the image of the hypodermic syringe was commonly associated with the recreational use of drugs. For instance:

- In a 1914 article the author wrote ‘[i]t is rare to see a coloured or a Chinese hypodermic fiend. White women, when once addicted to drugs, very frequently resort to the hypodermic syringe’.

- In 1913 a criminal investigation was undertaken by Newark police into an assault. The newspaper reported it as the ‘Needleman Case’, as the victim alleged that she had been stabbed with a hypodermic syringe and possibly injected with a narcotic drug. Similarly, in 1920 the Chicago Daily Tribune reported on an assault allegedly with a hypodermic syringe which turned out to be a pin. The headline read: ‘Needleman? Huh! He Jabbed Girl with Pin; $100.’ The implicit suggestion here is that being jabbed with a hypodermic syringe is much more serious than a pin because of what the hypodermic syringe would contain: narcotic drugs.

- In 1914 it was reported in The New York Times that the Senate committee on Public Health was considering a bill to make it harder to get ‘habit drugs’. Among the proposals was one to make it unlawful to supply anyone with hypodermic syringes without a prescription.

- A report on a book by Mr Charles B Towns stated: ‘The hypodermic syringe, he thinks, has been the chief creator of the drug habit in this country. Anyone could buy it cheaply and without question, and except in New York, can do so still.’

- An article in a magazine from Portland in the 1920s presented a ‘Table of Common Dopes’. The columns of the table read ‘Name of Dope’, ‘What it is’, ‘How

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93 Williams, above n 2.
94 Lichtenstein, above n 64, 68.
96 ‘Needleman? Huh! He Jabbed Girl with Pin, $100,’ Chicago Daily Tribune (Chicago), 1 December 1920, 21.
97 This is regardless of the intended use, suggesting that there was great symbolic power in this particular route of entry: ‘To Make it Harder to Get Habit Drugs’, The New York Times (New York), 26 January 1914, 9.
Generally Taken’ and ‘Effects’. The five ‘dopes’ were opium, morphine, heroin, cocaine, marijuana and three of them were identified as being taken by injection. This also reveals the significance placed on the route of entry of the drug, probably because it increased the visual impact of the imagery created.  

The hypodermic syringe, therefore, was strongly connected with the use of habit-forming drugs. As a consequence of the focus on the route of entry, the mere mention of the syringe held strong reminders of illicit drug use — even though the apparatus obviously had other legitimate medical applications. Thus in many of the cases above, the hypodermic syringe stood for narcotic drugs. For example, in the ‘needleman’ case it appears to have been assumed that being stabbed with a hypodermic syringe meant being injected with a narcotic drug.

In articles set out above, terminology such as ‘needleman’ and ‘hypodermic’ and ‘pill’ were also used in relation to doping in sport. With such a strong connection between the image of the hypodermic and recreational drug use, use of these terms in the doping context further established the link between these two forms of non-medical drug use.

Another strong indicator of the close association between performance enhancing substances in sport and recreational/illicit drug use comes from a newspaper article quoted above regarding the involvement of the Federal Narcotics Bureau in the horse doping problem: ‘Race Officials Join in U.S. War on Doping.’ Use of the term ‘war on doping’ — a term which referred to attempts to deal with the use of recreational drugs in society — and the involvement of Harry Ainslinger — the Federal Commissioner of Narcotics — reinforced this link between doping in sport and recreational drug use.

D Performance Enhancing Substances

In examining the symbolism involved in doping in the 1920s and 1930s, an important factor to consider is the type of doping substances that gave rise to this form of regulation. Consideration of the symbolism attached to the substances confirms that, and explains why, the use of performance enhancing substances in sport symbolised illicit drug use so strongly.

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99 Silver et al, above n 66, 49.
100 It should be noted here that I am not trying to argue that needles and syringes were exclusively the domain of recreational drug use. Obviously the syringe was used in medical applications and to administer performance enhancing substances. The point here is that the strong association with recreational drugs meant that use of these terms could not be completely divorced from those associations and that therefore the images of drug abuse were operative in these contexts as well.
101 Chicago Daily Tribune, above n 1.
Unfortunately there was no list of prohibited substances accompanying the first anti-doping rules, making the relevant substances difficult to identify. Later accounts identify the drugs which had been in use in sport up until the 1920s and 1930s as follows:

- In the late 1800s: ether and sugar cubes, caffeine and alcohol, caffeine, cocaine and strychnine, heroin, nitroglycerine in cycling; milk-punch champagne, belladonna, strychnine and morphine in pedestrianism and opium-based drugs in swimming.

- In the 1900s: cocaine, strychnine, caffeine, nitroglycerine and alcohol in boxing; narcotic drugs in horse racing; alcohol and strychnine in the marathon; cocaine in ‘bicycle riders, prize fighter and race horses.’

Significantly, a large number of these substances had, by 1928, been subjected to regulation outside the sporting context. Many were ‘illicit’ drugs in the sense that they had been identified as dangerous, habit-forming drugs, and their use had been censured in society by way of prohibition, being strongly associated with the negative symbol of drug addiction.

Morphine, being a derivative of opium, had been the subject of criminalisation since the turn of the century. Some have argued that this prohibition sprang from racial misunderstandings. Whatever the motivation for these rules, opium was a drug which had caused widespread concern in the community and had been the target of sensationalist journalism.

The same can be said for alcohol: even though the prohibition on alcohol was nearing its end in the US in the late 20s and early 30s, the issue of alcohol use still attracted sensationalist press coverage. For example, on 22 March 1925, an article was published in

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103 Donohoe and Johnson, above n 38, 3.

104 Houlihan, above n 12, 33.

105 Prokop above n 102.

106 Lucas, above n 16.


108 As Manderson and others have traced, the specific substances also had varying but very negative symbolism attached to them.

the *Sunday New York American* which was headed ‘Death Among the Poppies’. Below the headline was a picture of the Grim Reaper walking among a field of poppy flowers, all of which bore a skull on the flower. In his hand was a cane with a bulb on the end with the word ‘Dope’ written on it. The first paragraph of the article stated ‘[o]pium and whiskey. Those are the words that stand for human misery, failure, shame and ruined lives.’

Cocaine had similarly attracted extremely sensational, negative press coverage in the years before the 1928 doping rules. Campaigns against cocaine were largely based on disinformation arising from associations made between the recreational use of the substance and the black American population of the Southern states of the USA. These misconceptions helped to ensure cocaine’s eventual illicit status. Cocaine’s reputation as a dangerous illicit drug had become an international phenomena thanks to its inclusion in the 1912 *International Opium Convention*. The use of the same substance in sport could not be divorced from these kinds of associations.

Heroin had also gained a negative reputation, since by the 1920s it had become the drug of choice for recreational drug users, at least in the USA. It was added to the Hague convention in 1919, and its production in the USA was prohibited in the 1920s. Even caffeine, although not subjected to regulation, had been condemned as an immoral ‘stimulant’ at times.

There were other substances used at the time to increase performance such as chocolate, sugar, UV rays and oxygen. The use of these substances by sportspople attracted various levels of criticism. However, they were not identified as illicit drugs in the same way as the substances considered above. Nevertheless, the presence of such a number of illicit drugs in the athletic pharmacopoeia coloured the public perception of the practice of doping: doping was identified strongly with these substances and was condemned in the same manner.

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111 For example “[a]rticles were published in southern newspapers and magazines in which it was actually asserted that when a Negro used cocaine he became bulletproof”: Evans, above n 47, 207.
113 Ibid.
114 Similarly, access to strychnine had been tightly controlled through legislation such as the *Arsenic Act 1851* (UK): Royal Pharmaceutical Society of Great Britain, *The Evolution of Pharmacy Theme E, Sheet 1: The Control of Harmful Substances* <http://www.rpsgb.org.uk/pdfs/museve1.pdf> at 1 April 2008.
115 See for example Balzac’s treatise on stimulants, in Hoberman, above n 21, 113.
116 See Hoberman, above n 21 and Dimeo, above n 6 generally.
E Conclusions on Symbolism

The sports officials who first proposed rules to regulate the use of performance enhancing substances in sport used the heading ‘doping’ and incorporated the terms ‘artificial stimulants and drugs.’ In using these terms, they must also have been familiar with the connotations that the words had outside the sporting field. Yet they chose the same word to describe the use of drugs in sport, something we now see as a very distinct practice to ‘illicit’ drug taking. Thus from the very beginning of anti-doping policy, it is clear that symbolism was extremely influential in the adoption of a prohibition on doping. It was not the simple fact that these substances effected sporting performance that led to their prohibition. It was also that ‘artificial stimulants’, ‘drugs’ and ‘dope’ were involved. It is no wonder that the response to such practices was to adopt a total prohibition.

V THE SIGNIFICANCE OF PROHIBITION POLICY

Sports administrators in the 1920s could have chosen to allow free use of performance enhancing substances or adopted a partial restriction on the use of some of these substances. Instead, the first doping rules in sport were total prohibitions on the use, acceptance or offering of any drug or artificial stimulant in athletic competition. The choice is highly significant for two reasons. Firstly, it confirms the argument presented above regarding the role of symbolism in doping. Secondly, it reinforces this symbolism by strengthening the association between doping and illicit drugs. The importance of the mode of regulation will be demonstrated below through a consideration of some aspects of prohibition policy and doping policy in the relevant time period.

A The Temperance Movement and Prohibition Policy

In the 1920s and 1930s there was a growing international consensus (led by the US) regarding illicit drug policy. It was, of course, the period of the prohibition on the sale of

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117 So ingrained is the prohibitionist approach that we have come to accept that it is the natural approach to drugs in sport. There are, however, other possible approaches to the use of performance enhancing substances and methods in sport, ranging from unrestricted access, to athlete participation based on health parameters, to varying degrees of regulated and supervised use: J Savulescu, B Foddy and M Clayton, ‘Why We Should Allow Performance Enhancing Drugs in Sport’ (2004) 38(6) British Journal of Sports Medicine 666; John Burge, ‘Legalize and Regulate: a Prescription for Reforming Anabolic Steroid Legislation’ (1994) 15 Loyola of Los Angeles Entertainment Law Journal 33. Given the problems inherent in a system based on total prohibition, both our initial and continued commitment to prohibition is, perhaps, not as natural and rational as we assume. It is appropriate therefore to question why this model of doping regulation was chosen at the outset. In relation to illicit drug prohibition see Alex Wodak and Timothy Moore, Modernising Australia's Drug Policy, 2002 (Sydney: UNSW Press) and Alex Wodak, Alison Ritter and Charles Watson, 'Separating Politics and Scientific Research on Heroin Prescription' (2002) 176(9) Medical Journal of Australia 449.
alcohol in the United States. After decades of lobbying by the Temperance Movement, the 18th Amendment to the US Constitution was passed which allowed the passing of laws establishing a nationwide prohibition on alcohol. Prohibition in the US ended in 1934 when the 21st Amendment was passed. The US prohibition was not unique: the Temperance Movement was successful in gaining a prohibition on alcohol in a number of other countries such as Canada, Russia, Iceland, Norway, Finland and parts of Australia.

Prohibition policy and the influence of the Temperance Movement were not limited to alcohol. As discussed above, by 1928 there were already a number of international agreements prohibiting certain substances, as well as growing international support for extending prohibition policy in relation to other habit-forming drugs.

Although the prohibition on drugs and alcohol are seen as distinct policies, they stemmed from the same views; the forces that led to the prohibition on alcohol also led to a prohibition on other drugs. The ideas of the Temperance Movement have been linked with the spirit of ‘progressivism’ which viewed moral problems as a legitimate area for legislation. It was thought that by criminalising ‘gambling, pornography, drug abuse, prostitution…’, the law would serve as a guardian for common morality and deal with the social problems which arose from the abuse of alcohol and other drugs. It is no coincidence that the first international efforts towards prohibition on drugs came about during the ‘dry years’ of the Unites States. As Justice Kirby put it:

The prohibition spirit lingered on in that country. It has now turned to the international fora where, especially after the Second World War, the voice of the United States was so powerful. What failed nationally in that country as a strategy against abuse of one drug became the strategy internationally against another.

This was the era in which the anti-doping rules were set. Given the power of the ‘prohibition spirit’, it is no wonder that the natural response to reports of the use of substances in sport (such as alcohol, morphine, opium and cocaine) was to pass rules

\[118\] These were groups of people all around the world, but most famously in the US, who were committed to the abolition of alcohol due to what they saw as the social evils inherently associated with the substance.

\[119\] United States Constitution amend XVIII, United States Constitution amend XXI. The results of those laws were widespread law breaking and corruption of officials, as well as the development of organised crime and gangs: see Herbert Asbury, The Great Illusion: An Informal History of the Prohibition 1950 (New York: Doubleday).


\[123\] Ibid.

\[124\] Kyvig, above n 122, 169.

prohibiting them. The prohibition of drugs in sport was an identical response to what was seen as the same issue: the abuse of ‘drugs’, this time in sport. The significance of the adoption of a total prohibition as the regulatory model for doping in sport gains even greater significance when a few contextual factors are taken into account.

B The Background of the Doping Prohibition

The IAAF, the first international sports federation to prohibit drugs, was founded and headquartered in Stockholm, Sweden. It had Swedish office bearers — the president and honorary secretary/treasurer — from its initiation in 1913 until 1946. Sweden has often been compared to the US in terms of the strength of their commitment to drug prohibition. Sweden, like other strongly prohibitionist Scandinavian countries such as Finland and Norway, have long maintained a very strong commitment to the total prohibition of recreational drugs, aiming for a ‘drug-free’ society. There can be little doubt that the delegates of the IAAF from Scandinavian countries, and Sweden in particular, had a great influence on the decisions of the IAAF. Given the strong prohibitionist background of the members of the organisation, it is not surprising that the chosen approach to the regulation of ‘stimulants’ incorporated a prohibitionist approach.

The 1938 IOC condemnation of the use of ‘drugs or artificial stimulants of any kind’ had a similar background of international commitment to prohibitive drug policy. Although it could be argued that international drug policy would hardly affect the decisions of a sports administration body, it must be remembered that the IOC was made up of members from multiple countries, each a product of the prevailing attitudes of their home country. At the time, Henri de Baillet-Latour from Belgium was president and Swede, J Sigfrid Edström, was vice president. Interestingly, Edström was also the IAAF president in 1928. Both these countries were signatories to at least one of the international drug treaties in 1938, and had consequently enacted prohibitive drug laws. Moreover, almost every country

126 At this point two British gentlemen were elected to the positions and the headquarters were moved to London: International Association of Athletics Federations (IAAF), IAAF Member Federation Management and Administration Manual, A Practical Guide, Chapter Two: The Organisational Framework for Athletics <http://www2.iaaf.org/InsideIAAF/Development/MemFedManualIntro.html> at 13 September 2008, 19ff.


131 A note in the 1927-1928 Handbook, above n 8, 39, suggests that there may have been a unified approach to issues between the Scandinavian delegates: Mr Ekelu of Sweden ‘withdrew the Scandinavian proposition’.
represented on the IOC at that time was a signatory to these conventions. Thus, the
home countries of the IOC delegates had committed themselves — at least theoretically —
to the principle of prohibition in relation to drug policy. It is hardly surprising, with this
background, that the delegates should so readily view ‘drug use’ in sport as an evil which
needed to be prohibited.

C Conclusions: The Significance of Prohibition Policy

As stated above, the choice of a total prohibition on performance enhancing substances is
highly significant in two ways. Firstly, it confirms the identification of doping substances
as ‘illicit drugs’ and provides further evidence of the argument presented above. Total
prohibition policy was one which had been used and advocated for many substances which
were perceived as habit-forming, dangerous or immoral and thus was seen as a policy
about the moral vices of drinking and illicit drug taking. In light of the historical and
geographical background, the fact that a prohibition policy was adopted without apparent
debate or controversy shows that ergogenic substances were unanimously viewed as
‘drugs’. The evidence provided above regarding the symbolism of doping shows why
this would be the case — the substances involved, the way in which they were used and the
language chosen to describe doping practices all show that performance enhancing
substances were ‘drugs’ in the same sense as those subject to the international prohibition
policy. Application of the prohibition policy confirms this identification.

The second major significance of the adoption of a total prohibition policy was to reinforce
the link between doping and illicit drugs. Since prohibition was a policy used for alcohol
and other ‘habit-forming’ drugs, the implicit message in choosing this kind of approach
was that doping was akin to other forms of illegitimate, non-medical drug taking. Thus
the association and symbolism was perpetuated.

132 There appears to have been roughly 60 members from approximately 50 countries: Wolf Lyberg, Fabulous 100
Years of the IOC: Facts, Figures and Much, Much More, 1996 (Lausanne: International Olympic Committee),
25, 45.

133 The question may arise: but what about alcohol? It is not a ‘drug’ and yet prohibition was the model applied to it.
Therefore a prohibition approach may not necessarily prove that doping agents were seen as ‘drugs’. However,
the distinction between alcohol and drugs is quite a modern one. In the late 19th century, alcohol was a substance
commonly used in medicine and was identified as a drug or artificial stimulant. For example, see above n 77
regarding opium and alcohol being useful but dangerous drugs from Silver et al, above n 66, 25.
VI THE STATED RATIONALE: AMATEURISM VERSUS PROFESSIONALISM

A Introduction

An examination of the minutes of meeting of the IOC in the years surrounding its first public condemnation of doping reveals that doping was viewed as just one of a number of issues relating to the amateur status of athletes at the Olympic Games. At the IOC meeting in 1937 at Warsaw, the IOC ‘began the examination of the different questions on the Agenda relating to amateurism.’ A number of issues were discussed there, including the status of gymnastic instructors and ski instructors; Olympic winners who received prizes from their national governments; professional sports writers and doping. A committee was appointed to consider the issues and asked to prepare a report for the next year’s meeting in Cairo.

The minutes of the Cairo meeting state:

The President read the report of the committee which had been instructed to express its views on certain customary practices, so as to enable the International Olympic Committee to judge whether these were compatible with the principle of prohibition of making good the loss of earnings. [sic]

Each of the issues were addressed, doping being the sixth issue of the report.

The view of doping as a threat to the amateur nature of athletics appears also to be a significant motivator for the IAAF rule in 1928: the doping competitor being suspended from ‘amateur athletics under the jurisdiction of the Federation’. Associated newspaper reports refer to ‘the proposal to suspend from amateur athletics any person involved in giving competitors “drugs or artificial stimulants internally by hypodermic or other methods.”’

Thus the first anti-doping rules were explained at the time in terms of a breach of the amateur ethos in sport. Where does this leave the symbolic analysis?

B Is Symbolism Redundant?

The discourse of amateurism appears to provide an explanation for the development of anti-doping policy without the need to refer to the symbolism of doping. However, when

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135 Ibid.
136 International Olympic Committee, above n 10, 28-29.
137 Williams, above n 2. Emphasis added. The minutes of the meeting also record that ‘lively discussion ensued as to the text to be adopted’ suggesting that the inclusion of the ‘amateur’ was intentional: IAAF, above n 8.
these issues are examined in more detail, it becomes clear that symbolism also played an important role in the professionalism argument.

The amateur ethos in sport was considered to be at odds with the use of ‘drugs and artificial stimulants’. Why this is the case is generally not articulated and, unlike the case of earning of money for performances or entering full time training which are quite blatantly against the amateur concept, is not self-evident. One can extrapolate that the issue had to do with the ‘seriousness’ the athlete showed in resorting to the use of such substances. But, again, it is not clear why taking performance enhancing substances should be seen as taking sport too seriously. Indeed, since little time or effort was involved in taking a pill or tonic, there could be an argument that doping was less serious than training. It is necessary to consider the question of why doping should be contrary to the spirit of amateurism. This section of the chapter will argue that, rather than the amateur issue making a symbolic analysis redundant, the argument has much to do with the symbolism associated with doping.

C Amateur Ethos

1 The Rhetoric

The 1894 Olympic Congress in Paris, which founded the modern Olympic Games, was convened to discuss the issue of amateurism and the unification of sports rules. ‘Amateur’ was defined as:

Any person who has never participated in open competitions, who has never taken part in a competition in return for money or prize money of whatever origin, in particular if it were entrance fees, who has never challenged professional athletes and who has never been a sport teacher or a coach for money will be considered an amateur.

Sports historians have identified a number of ideas, evolved in the Victorian era, which characterise the amateur ethos.

- ‘Play for plays sake rather than for profit’; pursuit of the activity as an end in itself…with a corresponding downgrading of achievement, striving, training and specialisation.

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139 Marie-Helene Roukhadze (ed), The Olympic Movement, 1997 (Lausanne: International Olympic Committee), 83.
140 Norbert Muller, One Hundred Years of Olympic Congresses, 1994 (Lausanne: International Olympic Committee), 35. A number of regulations regarding amateurism were also passed at that conference which further illustrated the concept.
The ethos also incorporated a concept of the perfect athlete.\(^{150}\)

Amateurism was aesthetic as well as environmental. The amateur sportsman came to stand for the ideal type of new English gentleman….\(\text{[t]}\)he social elite who pioneered modern sports believed in a neo-classical norm of human proportion, balancing height, weight, muscle development and mobility. Central to this was the idea of equilibrium both between different elements of the human anatomy and the inner self.\(^{151}\)

These are some of the images behind the amateur ethos. However, by the 1920s it became clear that the ideal was not being lived out.

2 The Reality

It has already been noted that the 1920s saw somewhat of a scientific revolution in sport, including amateur sports. The application of the scientific method to sports was certainly a challenge to the amateur ethos, since these represented blatant attempts at achievement. Even more fundamental contradictions within the amateur code were evident by the 1920s. Although amateurs supposedly ‘abhorred…the corruption of money’,\(^{152}\) it became clear that amateurs were receiving ‘considerable sums of money as a reward for their sporting

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142 Polley, above n 141, 464.
144 Polley, above n 141, 464.
145 Bryson, above n 143, 141.
146 Ibid.
148 Ibid.
149 Bryson, above n 143, 141.
150 Often referred to as the ‘Corinthian’ ideal. It seems that the term incorporates the athlete with the right attitudes to sport as well as the perfect sporting body. See R.J.Moore-Colyer and J.P.Simpson, ‘High-Caste Corinthians: Amateurism and the Bloodstock Industry 1945-75’ (2004) 21(2) International Journal of the History of Sport 277 for a fuller explanation of the Corinthian ideal.
152 Ibid, 365.
achievements in the form of expenses, ‘first class travel, boot money and testimonial games’. Bale puts this aptly:

But the fact that the commonplace definition of an amateur was ‘someone who doesn’t get paid’ did not prevent the principle of ‘no material gain’ being extremely difficult to enforce. Financial gain from sport could clearly be obtained without being seen to contravene the amateur rules. Such contravention is usually thought of in terms of ‘shamateurism’ or underhand ‘expenses’.

Furthermore there is evidence to suggest that ‘ungentlemanly’ competitiveness was as evident in amateur athletes as professionals:

I found after professional games that professionals don’t boil over if another player has played badly. I think the professionals realise that if a player has reached a certain ability they can be excused their off days. Amateurs niggle, they always tend to mention a bad performance.

Thus the amateur ethos was more rhetoric than reality even by the time of the first anti-doping rules.

D  Professional Sport

Sports which were commonly identified as professional at this stage included: horse racing, cycling, football, cricket, boxing (prize fighting) and baseball.

Like the amateur ethos, it is important to consider a few characteristics of professional sport at this time in order to understand the distaste in which amateurism held professional sportspeople.

Some of the realities of professional sport included:

- Professional athletes were often very poorly paid, only making enough money for a meal, while amateurs were extremely well looked after.

- Professional sports were viewed with great suspicion:

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154 Polley, above n 141, 454.
155 Bale, above n 153, 485.
157 Riordan, above n 141, 472.
159 There is obviously class issues involved: only aristocratic gentlemen could afford to be true amateurs, thus professional athletes were largely drawn from non-aristocrats. See Riordan above n 141 for a discussion of socialist views of amateurism.
160 Porter and Wagg, above n 156, 347, quote RW Harrison in the late 1920s:

The amateur, who sports plus-fours and knows the best people, travels in comfort, lunches before the match, dines after it and stays at the best hotels keeps his status. The stocky built bow-legged Durham pit lad goes without lunch, crowds into a United bus, receives five shillings for tea, contents himself with a pie or a snack in a side street and consequently is a professional. Verily football law like English law is sometimes an ass.
A common thread of the late nineteenth century debate over the introduction of professionalism into many sports was a concern that professionals, whose livelihoods were at stake either would commit fouls to avoid defeat or be susceptible to corruption to ensure it.161

- Professional sports were often linked with ‘vices’: gambling, corruption162 and alcohol. Polley states of the British Foreign Office and Diplomatic Service: ‘officials would assume that every amateur was a gentleman and every professional a drunken embarrassment.’163

- Professional athletes were not viewed in the same romantic way as amateurs, the Corinthian ideal did not apply to them: ‘Professional sportsmen continued to have specialised bodies and were not necessarily physical models for the rest of humanity.’164

Thus, although professional sports were becoming more popular in the 1920s, there was some stigma attached to the professional athlete, at least from the view of the proponents of amateurism.

E The Role of Doping Symbolism: Why Were Drugs Contrary to the Amateur Ethos?

Like many societal attitudes, it is difficult to pinpoint one reason why the use of performance enhancing substances was seen as contrary to the amateur ethos. Bryson provides a number of reasons why both professionalism and drugs were seen in this light; arguing that they represent:

a triumph of rationality or instrumental reasoning. The sole goal becomes winning. All efficacious means are employed to achieve this. There are of course other key examples of this technocratic rationality in sport. Professionalism is underpinned by this logic as are the increasingly ‘scientifically’ devised training, dietary and psychological regimes which elite athletes pursue today.165

No doubt the technocratic rationality and the unveiled desire to win played a large part in making doping appear contrary to the amateur spirit.166 But, as Bryson points out, there were other aspects of sport which were examples of ‘technocratic rationality’ which remained unaddressed at the time of the first anti-doping rules.

161 Vamplew and Kay, above n 147, 378.
162 Ibid.
163 Polley, above n 141, 464.
164 Holt, above n 151, 363.
165 Bryson, above n 143.
166 Doherty, above n 138, 65, argued ‘it is certain that our present code of amateurism could never bless such all out efforts.’
Furthermore, at the time a certain amount of training had come to be acceptable even in amateur sport. In the IOC minutes of the meeting where doping was condemned in 1938, it was stated that a two week training camp was allowed for amateur participants in the Olympic Games.\textsuperscript{167} Thus some disruption to the athlete’s normal life had come to be accepted. In light of the fact that this type of effort was allowed, why should taking a pill or a shot be viewed as taking things too seriously if stopping work and attending a two week training camp was not? The taking of performance enhancing substances at the time would have involved very little ‘effort’ — since at this time they were short-acting substances which required only a dose at the time of competition and not ongoing application.\textsuperscript{168} In fact, doping has often been characterised as athletes attempting to take a ‘short cut’ to achievement.\textsuperscript{169} It is difficult to reconcile this view with the idea that doping involved too much effort.

It is here that the significance of the divide between amateurism in theory and practice is important. There were a number of aspects of the amateur ethos that were being challenged at the time, particularly the idea that sport should be played for the love of the game and not out of any desire for achievement. We know that the IOC’s first condemnation was couched in terms of the desire to protect the amateur characteristic of the Olympic Games. The two aspects that were considered worthy of protection were the payment of Olympic athletes and doping. There is a certain element of inconsistency here, since the IOC was running a competitive sporting festival where achievement was celebrated through the awarding of gold medals and athletes were encouraged to strive to achieve to the best of their ability for their national and personal pride. All this is contrary to the notion of participation for the love of the game and the downgrading of achievement.\textsuperscript{170} Thus the IOC, simply through organising the Olympic Games, was, in many ways, contributing to the erosion of the amateur ethos. Additionally, although the 1920s and 1930s saw a growth in the application of the scientific method to sport, sports science was not condemned as contrary to the amateur ethos in the same way doping was.

\textsuperscript{167} International Olympic Committee, above n 10, 29.  
\textsuperscript{168} Beamish and Ritchie, above n 35, 423.  
\textsuperscript{170} A contrary example is found in the Workers Olympiads, organised by socialist movements in the 1930s. Here the organisers encouraged mass participation and downplayed the competitive nature of the festival such as records: Robert Wheeler, ‘Organized Sport and Organized Labour: The Workers’ Sports Movement’ (1978) 13(2) \textit{Journal of Contemporary History} 191, 201. These games ‘… were truly amateur, organized for the edification and enjoyment of working women and men’: Riordan, above n 141, 471.
The singling out of doping therefore, again, shows the importance of the issue and needs further explanation. There must have been some additional elements which singled doping out for condemnation.

1  \textit{The Health Aspect}

Part of the motivation behind the amateur code was based in the ‘Victorian obsession with health’.\textsuperscript{171} As Holt points out, professional sport was not seen as being conducive to public health — it involved watching sport in polluted, crowded places. Amateur sport, on the other hand, was seen as a useful way to maintain and improve public health since its focus was on producing athletes balancing perfect health of mind and body rather than achievement.\textsuperscript{172}

It seems that the use of performance enhancing substances was assumed to be contrary to these health-inducing goals of amateur sport. These assumptions need exploring; for it was not as natural for doping to be seen as unhealthy as one would immediately assume. Since most of the drugs used in sport were harnessed for their ‘stimulant’ properties, doping could be seen as a \textit{positive} thing for the health of the athlete by the anti-fatigue movement: a ‘useful as a way to ‘solve’ fatigue’.\textsuperscript{173} And since research was being undertaken, it could ensure minimal damage was done to the athlete. Moreover, as Dimeo explains, in at least one doping incident — the Thomas Hicks affair — the use of these substances was seen as the reason for his survival rather than a danger to his health.\textsuperscript{174}

The predominance of the anti-doping message based on the health argument is difficult to understand in light of these factors. However, when the connection between doping and illicit drug taking is taken into account, the health assumptions are much easier to explain. Drug takers were viewed as particularly unhealthy. One particularly vivid example is found in a newspaper article in 1925:

\begin{quote}
The drug habit is formed so quickly that it is FIXED [sic] before the miserable victim knows it. Even as he says to himself “I can stop when I like” he is beyond all hope of stopping.

The grip that the poison fastens upon its victims is one that the strongest will ever born in man is powerless to release. It is the GRIP OF DEATH [sic] and it holds until death.
\end{quote}

\textsuperscript{171} Holt, above n 151, 358.
\textsuperscript{172} Associated with this was the regulation of violent play: Ibid, 362.
\textsuperscript{173} Ibid, 18. See also Harry L Hillman, ‘Athletics Helpful to American Youth: Overindulgence is Bad, but Wise and Moderate Performances Aid to Preserve Health’, \textit{The New York Times} (New York), 17 September 1910, 14 where moderate athletics is advocated for health along with living a ‘clean’ life.
\textsuperscript{174} Dimeo, above n 6, 25. In that case the dangerous aspect of the situation was the running of the marathon.
Be warned by this picture, young and old. Drugs mean slow death for the body, quick death for the spirit. And any death, however painful, is infinitely better than the slow death and the long drawn-out agony of the drug fiend.175

Since doping was a form of drug taking, it must also be a drain on the health of the athlete. More specifically, one of the most repugnant aspects of illicit drug taking seemed to be its habit-forming tendency; habitual drug taking was seen as leading to an exceptionally unhealthy and unbalanced life — the drug was all-encompassing for the taker. The dangers of addiction to these drugs were very prominent in anti-drug discourse and spilled over into anti-doping discourse as well.176 Indeed, the common phrase for recreational drugs at the time was ‘habit-forming’ drugs. One example of this focus is found in an article from the New York Medical Journal in 1914:

The conspiring individuals, being familiar with the habit forming action of the drugs, believe that the increased number of “fiends” will create a larger demand for the drug, and in this way build up a profitable business… When once the drug has taken hold on these people, they will do anything to acquire a supply.177

Drug-taking, particularly when it involved the kinds of drugs used by athletes, was seen as a potentially all-encompassing practice.

Contrary to this, the amateur ethos ideally produced a healthy, balanced lifestyle. It entailed the idea that sport should not be the focus of athlete’s lives but simply one enjoyable part of a healthy, balanced existence. Since the use of performance enhancing substances in sport was indistinguishable from other forms of drug taking, it was natural to assume that doping would be a habit-forming practice and that it was likely to become the focus of the athlete’s life to the exclusion of all other things. This would bring an end to the balanced life of the perfect amateur.178

In many ways, therefore, the health aspect of amateurism was implicitly affected by doping symbolism: doping was drug taking and drug taking was unhealthy.

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175 New York American, above n 110. Emphasis in original.
176 See The Times, above note 78, for example:
Under continuous mental or physical strain the habit of resorting to stimulants in the form of different alcoholic beverages with food, between meals, and at less and less intervals during each day, day after day, is readily formed until the habit becomes a necessity, then a craving, and ultimately a masterful power over the whole mental and physical energies.
177 Lichtenstein, above n 64, 67.
178 See Boje, above n 61, 458 for an example of the issue of addiction in a discussion on the use of cocaine in sport: ‘A warning must also be uttered as regards the acute intoxicating effects of this substance when used in large doses, as well as its chronic action which engenders addiction. Cocaine should hence never be used in connection with athletics and every infringement of this prohibition should be severely punished.’ The issue of addiction was also prominent in anti-doping discourse in the 1960s as will be discussed in the next chapter.
2  The Clash Between Amateurism and Doping

Perhaps the strongest influence of the symbolism of doping in the amateur issue was the clash between the symbol of illicit drug use — the dope addict — and the Corinthian athlete. This clash can be clearly demonstrated by comparing the following passages:

He who would try a deadly drug of whatever name — opium, morphine, cocaine — might far better put a pistol to his head and blow out his brains, so far as happiness is concerned, and apart from the question of sin.

The Bible pronounces suicide a sin. It might have pronounced the use of drugs a sin ten times greater, had that use prevailed when the Bible was written.

The suicide with pistol or knife kills only HIMSELF. He may inflict sorrow on others but it passes.

The drug fiend tortures his family, ruins, degrades and disgraces himself. And frequently sinking to the lowest depths, his degradation takes the form of seeking with malicious Satanic ingenuity, to inflict the drug curse upon others.  

A drug addict… suggests to many a vicious and rather disgusting person who, however wretched his condition may be, has brought it upon is own head.

The new male body, advocated by doctors and the proponents of amateur sport alike was a neo-classical norm of human proportion, balancing height, weight, muscle development and mobility. The ideal athlete was neither too tall nor too small, too thin nor too fat.

The contrast between these passages is clear: the user of illicit drugs was morally destitute, repulsive, unhealthy and dangerous to themselves and others. The amateur athlete was clean, healthy and physically beautiful. It is no wonder that exception was taken to amateur sportspeople — the pinnacle of health, self-discipline and beauty — debasing and ‘dirtying’ themselves by use of drugs.

3  Professional Sports and ‘Drugs’

Drug taking was seen as being contrary to the spirit of amateur sport partly because of the divide between amateur and professional sport. As Hoberman states, doping was seen as a practice associated with professional sports. He provides an example of the coach of the

179 New York American, above n 110. Emphasis in original.
181 Holt, above n 151, 366.
182 For instance, Beamish and Ritchie state ‘unlike track and field which was governed by a strict code of amateurism, cycling has been thoroughly professionalized early on and winning was the rider’s unabashed goal. Performance-enhancing substances have a long and open history in the sport.’ Above n 35, 423. Hoberman, above n 180, 183 refers to the use of performance enhancing substances in professional cycling as ‘long-established doping practices of the European professional cyclists.’ A number of the references cited above provide evidence for the use of ‘doping’ in horse racing and Dimeo notes some evidence of doping in professional football in the UK. See above n 6, 42. It has also been noted above that there is some suggestion that drugs were used in boxing and one can only assume that this applied to both professional and amateur boxing.
French cycling team in 1960 who said “[m]any pros are drugged, of course, but we don’t drug amateurs.”

Even in the professional/amateur divide the symbolism of illicit drugs played a role. For many professional sports were not only associated with the use of performance enhancing substances but were also strongly linked with the use of illicit recreational drugs.

(a) Professional Cycling

Professional cycling was probably the sport most widely associated with the use performance enhancing substances. Many of the substances used in professional cycling were the ones which had been subjected to criminal prohibition outside sport. The significance of this has been noted above: the association with illicit drugs would undoubtedly have stained the reputation of cycling and subsequently professional sports in general. The same can be argued of other professional sports such as boxing.

(b) Horse Racing

Horse racing was one of the first professional sports and, as Addis Smith wrote in 1961, ‘has been referred to as the Sport of Kings. Yet, in spite its antiquity and its favour in high places, it has often been plagued by numerous forms of corrupt practices.’

Newspaper articles at the time, and expert commentary since, show that horse doping was quite a high profile problem in the late 1920s and early 1930s. Addis-Smith states that the ‘[d]oping of horses in the early 1930s in U.S.A. was so widespread that breeders complained frequently of impotency…’ Thus doping and the professional sport of racing

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183 Hoberman, above n 180, 183, says: ‘A cultural apartheid separated drug-free amateurs from professional athletes, whose right to use drugs was taken for granted... assumed that professional athletes enjoyed tacit exemption from the ethical standards that applied to amateurs.’ He was speaking specifically about the 1950s but there is no reason to think that the situation in the 1920s and 1930s would have been different. See also Arthur Porritt, ‘Doping’ (1965) 5(3) Journal of Sports Medicine and Physical Fitness 166, 166 and Patrick Mignon, ‘The Tour de France and the Doping Issue’ (2003) 20(2) The International Journal of the History of Sport 227. Mignon reveals some of the doping practices of professional cycling in the Tour de France. Why drugs were more acceptable in professionals is not entirely clear. It may be partly a recognition of the physical demands of professional sport. And, of course, the arguments that were put forward regarding the amateur ethos did not apply to professionals: striving for achievement was integral. However, the discussion above regarding the link between illicit drug symbolism and the professional/amateur issue must have played a part as well. The image of the professional was not as ‘clean’ as the amateur, thus illicit drug imagery was not viewed as producing as much of a clash with the image of the professional.

184 See Mignon, above n 183, who provides an account of riders admitting to the use of cocaine and other drugs. Although there is not a lot of evidence regarding drug use in boxing, authors such as L.Prokop, above n 102, state that cocaine and heroin were used in boxing in the late eighteenth hundreds. The use of cocaine is confirmed by a more contemporary source: see Towns, above n 107.

185 Addis-Smith, above n 19, 121.

186 Ibid, 122. No doubt one of the objections to doping in this sport was its effect on betting — doping added an unknown and unquantifiable influence on the race, which would have been unacceptable to the punter and bookmakers alike.
were strongly connected, the word ‘doping’ being common in horse racing before it was widely used in the sports context.

Doping in horse racing was closely associated with the wider issue of ‘narcotics’. Reports that narcotics traffickers were supplying their drugs to race tracks led Federal Narcotics Commissioner, Henry Anslinger, to meet with the racing commissioners in 1933\(^\text{188}\) and to instigate an extensive investigation of doping in race horses. This led to the arrest of more than one hundred owners, trainers and attendants for possession of illegal drugs.\(^\text{189}\) One newspaper reported similar arrests in 1933:

> At the same time information leaked out in New York City that prisoners among nearly a thousand drug peddlers rounded up in a nationwide drive against the drug evil last week have admitted to federal authorities their connections with gangs doping horses at more than a dozen of the bigger tracks.\(^\text{190}\)

Use of the illicit drug laws and enforcement agencies in horse racing presents a compelling case for arguing that horse racing had a reputation associated, not only with doping, but also with illegal narcotic drugs.\(^\text{191}\)

This kind of reputation in one of the major professional sports of the time would have affected the reputation of professional sports in general. Implicitly, amateur sports administrators feared that if their sport allowed professionals to compete, then all the negative aspects of professionalism, including an association with illegal narcotics, could not be far behind.\(^\text{192}\) Visions of drug busts by the likes of Harry Anslinger’s officers could not have been an attractive prospect for sporting officials.

(c) **English Football**

The main association between football and drugs was the ‘abuse’ of alcohol by professional footballers in the UK. Dixon and Garnham assert that in the late nineteenth and early twentieth century ‘the early professional (footballer) was regularly cast as a

\(^{188}\) Chicago Daily Tribune, above n 83.

\(^{189}\) Chicago Daily Tribune, above n 1.

\(^{190}\) Ibid.

\(^{191}\) The fact that the practice of drugging horses was referred to as ‘doping’ is no coincidence, the same substances which had been singled out for censure and prohibition in wider society had made their way into the racing world. And the same enforcement agency investigated and dealt with the use of ‘narcotics’ in the horse racing world. Not only did horse ‘doping’ have connotations of illicit drug use by morally depraved human beings, it also symbolized the disreputable side of the horse racing world where horses were used as a means of making money without reference to their best interests.

These events took place in the USA but it is clear that ‘doping’ in horses was not confined to America: see The New York Times, above n 51. It is also quite plausible that events in the USA horse racing scene could have influenced the considerations of the IOC and IAAF as Avery Brundage, an American, was a high standing official in both these organisations during the 1930s (president of the US Olympic Committee in 1929, vice president of the IAAF in 1930 and president of the IOC in 1952) who, during his tenure as IOC President, was an outspoken supporter of the preservation of the amateur ethos of the Olympic Games.

\(^{192}\) Vamplew and Kay, above n 147, 378.
drunkard in the press, sometimes with good reason. They go on to provide a number of examples, such as a statement from 1896 to the effect that many people thought of the professional footballer as ‘a person beneath contempt — a vagabond who spends his whole time in a public house except for an hour and a half, when he is called upon to earn his wages.’ It is clear from the evidence they present that the public had a strong perception that English professional footballers were abusers of alcohol.

As noted above, at this time alcohol was identified as a dangerous substance of abuse, being the subject of criminal prohibition in many countries around the world. Thus, another professional sport, with which performance enhancing drugs had also been associated, had a public image with strong links to criminally regulated substances.

4 Conclusions: Why Not Doping For Amateurs?

Clearly the decision to prohibit doping in sport was a multifactorial one. One factor which should not be discounted is the role of doping symbolism. As we have seen above, the image of the illicit drug taker was strongly associated with the use of performance enhancing substances in sport. Consequently the image of the ‘doper’ was seen as contradictory to the amateur ethos in sport. Since drug taking was habit-forming and unhealthy, since drug takers were physically and mentally the antithesis of the perfect amateur, and because there were strong links between many professional sports and the illicit drug trade — drug taking could not be accepted in amateur sport. All of these images and associations played a contributory role in producing the ‘abhorrence’ in which amateurism held professional sport. The symbolism of doping also helps to explain why this aspect of sport was seen as warranting prohibition, while other things which equally chipped away at the amateur ethos were not.

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194 Ibid, 377. Dixon and Garnham go on to argue that this public perception may not have been justified and that it may have been a result of a lack of understanding by middle class journalists of the role of alcohol in working class society. Whether this image reflected reality is beyond the scope of this chapter, the important point being made here is that there was a firm connection in public opinion between professional football and abuse of alcohol.
196 Dimeo, above n 6, 42-45.
Hence, even the amateur/professional issue, which on the face of it seems to provide an explanation for the first anti-doping rules quite apart from symbolism, was also influenced by this symbolism.

**VII CONCLUSIONS: ANTI-DOPING POLICY IN THE 1920S AND 1930S**

‘Dope is a dirty word as Aldous Huxley once said.’

Choice of language is significant. The use of words such as ‘dope’, ‘hypodermic’ and ‘artificial stimulants’ in the first anti-doping rules demonstrates that, from the 1920s, perceptions and beliefs about the use of performance enhancing substances in sport have been heavily influenced by the symbolism associated with illicit recreational drugs.

The short examination of the history of doping in sport shows that there were two competing attitudes to the use of these substances in the 1920s. The forces of modernism and the excitement associated with technological advances in sport viewed the use of such substances in a positive, if somewhat cautious light. Whereas the influence of the Temperance Movement made the use of anything identified as a ‘drug’, particularly the habit-forming variety, to be viewed as highly dangerous.

The analysis of doping symbolism presented in this chapter helps to explain one influence in the eventual prevalence of anti-doping sentiment. The use of language such as ‘dope’, ‘drugs’ and ‘stimulants’ is highly suggestive of a symbolic association between doping in sport and illicit drug taking. The adoption of the prohibition policy, particularly in light of the timing and geographical origin of anti-doping rules, confirms that this association was highly influential in the formation of anti-doping policy. Although the first rules were couched in the language of ‘professionalism’ and ‘amateurism,’ even these concepts had strong connections to illicit drug use.

The anti-doping rules of the 1920s and 1930s were not comprehensive, or even enforceable, policies. These rudimentary rules, however, provided the basis on which modern anti-doping policies were built. When anti-doping policy took off in the 1960s, the

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197 Silver et al, above n 66, 7.
198 This is true even for amateur sports where striving for achievement was supposedly frowned upon. As we have seen, the amateur ideal did not always meet with the reality of amateur sport.
199 Drug tests were not available until the 1960s and a lack of funding on the part of sports federations would have prevented any real enforcement of the ‘rules’. This is why it is often said that it was not until the 1960s that anti-doping policy began.
IOC used this condemnation as the initial basis for their *Prohibited List*. Similarly, the symbolism at work in the 1920s and 1930s provided a basis on which the symbolism of anti-doping in the 1960s was built. Many of the themes that were foreshadowed in this time period would be fully illuminated in the 1960s. The 1950s and 1960s were pivotal years in the history of anti-doping policy and the influence of symbolism of performance enhancing substances in sport in that period will be considered in the next chapter.

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200 This will be discussed in Chapter Six.
CHAPTER SIX

THE 1950S AND 1960S: ANTI-DOPING TAKES OFF

The drugs are potentially dangerous, he said. A high-pitched person can be stimulated to “violent behaviour”, he explained. Drug addicts, he added, might get their start in taking amphetamines during high school and college athletics.¹

I INTRODUCTION

Chapter Five considered the first anti-doping rules. While it is true that rudimentary anti-doping rules were adopted in the late 1920s, most commentators point to the 1960s as the time when anti-doping efforts began in earnest. The rules adopted in the 1920s and 1930s remained dormant through lack of enforcement until the late 1960s.² Moreover, the whole issue of performance enhancing substance use in sport appears to have retreated into the background during this time. Wolf Lyberg, in his history of the International Olympic Committee (IOC) says ‘[i]n the minutes of the IOC…not a word could be found on medical problems [including doping] until the 1961 session in Athens, where a passage turned up under the heading “doping”’.³ This apparent cease-fire in the ‘anti-doping war’ continued until the 1950s.

This chapter therefore examines the role of doping symbolism in the development of anti-doping policy in the 1950s and 1960s, possibly the most significant time period in anti-doping history. The picture is somewhat more convoluted than the 1920s. Whereas in the 1920s and 1930s the issue of doping did not occupy a major place in the public mind, in the ‘50s and ‘60s a variety of groups, all with slightly different agendas and approaches, began working on the problem. The media also became increasingly interested in the issue.

² See also J.G.P. Williams, 'Dope in British Sports' (1969) 4(2) British Journal of Sports Medicine 128, 128, who stated that prior to the 1960s the IOC had a ‘nebulous sort of regulation forbidding the use of doping, but as an instrument of control it was quite valueless.’
³ Wolf Lyberg, Fabulous 100 Years of the IOC: Facts, Figures and Much, Much More, 1996 (Lausanne: International Olympic Committee), 375. This is due to a number of factors, chief among which is the fact that attention was focused on World War II (WWII): sport and doping were much less important issues. Dimeo summarises the history of re-emergence of sport post WWII and the formative effect that the war years had in terms of the application of performance enhancement research for military purposes into the sporting context: see Paul Dimeo, A History of Drug Use in Sport 1876-1976: Beyond Good and Evil, 2007 (London: Routledge), 87ff.
In seeking to understand the drivers of anti-doping policy, it is important to keep the complexities and multi-faceted nature of such a history firmly in mind. As previously mentioned, Dimeo points out that ‘[t]he early discourses on anti-doping, from the mid 1950s onwards can be interpreted in a number of ways…’. This chapter presents one particularly important interpretation which emphasises the role of symbolism in this most formative period in anti-doping policy.

As will be demonstrated in this analysis, it is no coincidence that anti-doping policy got serious in the 1950s and 1960s: a time when attitudes towards the use of recreational drugs in society were also changing. The primary example of this change is the case of amphetamines, the main sports drug of the time. While amphetamines were becoming increasingly identified as ‘illicit drugs’ in wider society, the connection between doping in sport and illicit drug taking, established in the 1920s, became stronger. Thus, social concerns over illicit drug taking affected sport as well.

As with the previous chapter, this chapter will begin with a brief account of the anti-doping rules in the 1950s and 60s followed by an outline of some important historical events which had implications on attitudes to doping in this era. The symbolism of doping will then be examined, followed by a consideration of how symbolism fits with some of the alternative explanations for the developments in anti-doping policy. The final section of the chapter will present conclusions on the influence of symbolism.

II ANTI-DOPING GETS SERIOUS: THE 1960S REGULATIONS

As interest and concern about doping increased in the 1950s, a number of conferences were held in Europe in which the issue of doping was addressed. Many had substantial

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4 Dimeo, above n 3, 130.
5 Although anabolic steroids were available and becoming more widely used in this time frame, amphetamines were identified as the main sports drug by rule-makers while anabolic steroids were not addressed until the 1970s. This may be partly due to the fact that illicit drug symbolism was not as strong in the steroid debate. Since steroids did not rate much of an official mention until the 1970s they will be dealt with in the next chapter.
6 Dimeo, above n 3, 89ff, again provides an invaluable outline of the significant events here. He points out that the first of these conferences, in Oslo in 1952, included members of the IOC and representatives from fourteen countries. This demonstrates one of the mechanisms by which a consensus of opinion on the matter was reached.
impact on anti-doping policy but it was the IOC decisions of the late 1960s which were to become the most operationally significant ones.\footnote{Barrie Houlihan, \textit{Dying to Win: Doping in Sport and the Development of Anti-Doping Policy}, 1999 (Strasbourg: Council of Europe), 32, states that the \textit{IOC Prohibited List} was ‘to become the benchmark list of banned substances and practices’.
}

\section{Early Regulations by Various Stakeholders}

In 1962 two Italian organisations — FMSI (\textit{Federazione Medico-Sportiva Italiana} or the Italian Sports Medicine Association) and UVI (\textit{Unione Velocipedistra Italiana} or Italian Cycling Federation) — agreed on an anti-doping programme which entailed testing, education and funding. The agreement established a definition of doping\footnote{One that would strongly influence the first international meeting held by the CoE (Council of Europe) in 1963: Dimeo, above n 3, 91. See Chapter Two for a consideration of early definitions of doping.} which included ‘a ‘preliminary list of prohibited substances…(1) amphetamine and its derivatives; (2) substances similar in action to amphetamine; (3) anti-MAO\footnote{Dimeo, above n 3, 92.}; (4) caffaines.’\footnote{Ibid.} The BASM (British Association of Sports Medicine) developed a similar list in the early 1960s which included alcohol, amphetamines, cocaine, narcotics, hormones and strychnine.\footnote{Dimeo, above n 3, 92.}

Other significant anti-doping policy developments which were precursors to the IOC’s decision of 1967 included:

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- A convention held by the Council of Europe (CoE) (in conjunction with a subcommission of the IOC) in 1963 where a definition of doping was produced which was later used by the IOC.\footnote{Houlihan, above n 7, 130. This definition appears to have been influenced by the definition produced by the Italian organisation, FMSI, in 1962: Dimeo, above n 3, 91. The CoE also passed a strong condemnation of doping in June 1967 after the death of Tommy Simpson in the Tour de France (also as a result of the refusal of cyclists to undertake doping tests). One of the resolutions adopted there was to request the IOC to establish an international commission which would educate, study doping patterns and maintain a list of proscribed drugs and activities: Todd and Todd, above n 11, 67.
}

- The 1964 International Doping Conference convened by FMSI in Tokyo where the same definition of doping was adopted.

- Introduction of testing in Italian football and British cycling.\footnote{Due to doubts about the reliability of the tests, no consequences attached to a positive finding at that stage: Arnold Beckett, GT Tucker and AC Moffat, ‘Routine Detection and Identification in Urine of Stimulants and Other Drugs, Some of Which May Be Used to Modify Performance in Sport’ (1967) 19(4) \textit{Journal of Pharmacy and Pharmacology} 273. See also Houlihan, above n 7, 132.
}
B | IOC Decision of 1967

In May 1967 the IOC decided to amend their rules to deal with the problem of doping. The minutes stated:

The standard entry form, as proposed, was discussed and adopted.... Sir Arthur Porritt (New Zealand) addressed the meeting specially on the problems of doping, sex tests and anabolic steroids and proposed that contacts should be taken up with the Organizing Committee for the Olympic Games so as to make sure that the medical machinery to cope with these problems would be available, and advised the inclusion of some technical doctors on the medical staff, as was done during the World Cup for Football. Furthermore, a list indicating the main drugs to be regarded as dope should be published (Annex la). In connection with anabolic steroids, a resolution was presented (Annex lb) which was adopted for release.

And later:

Annex la

Doping

As a consequence of the new I.O.C. Entry Form

1. An official medical set up will be established at the Olympic Games for dope-testing. This will consist of international specialists (from F.I.M.S.) working with the profession locally at the site of the Games

2. The following drugs are included amongst those constituting “dope” (the list is not exhaustive):

   — Alcohols. [sic]
   — Amphetamines and Ephedrine.
   — Coca.
   — Vaso dilators. [sic]
   — Opiates (Opium, Morphine, Heroin, Pethedrine, Methadin). [sic]
   — Cannabis (Hashish).  

This prohibited list was to be enforced by way of drug testing, to be introduced at the 1968 Mexico Games. The details were published in the IOC newsletter in 1968.  

It appears these developments were based on the IOC’s 1938 condemnation of doping (see Chapter Five) and that their legal force was derived from a contractual agreement between the IOC and the athlete contained in the Olympic Games entry form. 

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14 International Olympic Committee, ‘Extracts of the Minutes of the 65th Session of the International Olympic Committee’ (1967) 98-99 (May-August) Bulletin du Comité International Olympique 89, 94. This was followed by a note about anabolic steroids which will be considered in the next chapter.

15 Ibid, 95.

16 In support of this is the fact that the text of this anti-doping rule was reprinted in the IOC bulletin in 1962 under the heading ‘Eligibility Rules of the International Olympic Committee’, International Olympic Committee: ‘Eligibility Rules of the International Olympic Committee’ (1962) 80(November) Bulletin du Comité International Olympique 44, 45. See also Sir Arthur Porritt, ‘Doping in Sport’ (1969) 4(2) British Journal of Sports Medicine 105. It appears that there was no explicit rule against doping adopted in 1967. To lawyers, it may appear
III  HISTORIC BACKGROUND

A  Interwar Period

The developments in the rules relating to doping came on a background of changes in sport, doping and drugs which began in the post WWII period.

Sport began to be taken more seriously after WWII. The Olympic Games, postponed during the war, were relaunched in 1948 and many returning soldiers, particularly in the US college system, became involved in amateur and professional sports. There was also increasing scientific and media interest in sport at this time and more money became involved. Sport was also beginning to be used as a political tool more: as the Cold War developed, the sports field became an arena where political systems attempted to show the superiority of their system.

Military research undertaken during and after WWII on the performance enhancement capabilities of pharmacological substances had direct application on the sporting field. The use of similar substances in sport appears not to have been seen as particularly problematic: ‘The immediate post-relief and austerity would not have engendered concerns about using the sorts of stimulant drugs that had helped soldiers and pilots. Health issues about drugs were not foremost in the minds of the public readjusting to normal civilian life.’

Furthermore, returning WWII soldiers involved in sport brought with them the practice of utilising pharmacological agents to enhance their performance. This was particularly true of amphetamines which had been commonly used by soldiers:

somewhat unusual for such an invasive procedure as urine testing. These IOC doping rules were not, however, drafted by lawyers, and at the time they were written, the legal implications of such rules were beyond the imagination of most of the IOC delegates.


Dimeo, above n 3, 61.


Dimeo, above n 3, 61.


Dimeo, above n 3, 46ff.

Dimeo, above n 3, 53.
Following the return of the veterans to college, the use of amphetamine ‘pep pills’ became quite common among professional and intercollegiate athletes. Since the high school athlete and coach are influenced by the professional and intercollegiate athlete, the amphetamines became popular even in interscholastic athletics.24

As Dimeo points out, the use of amphetamines in sport was reflective of their use in wider society: ‘Amphetamines were not simply seen as a ‘doping’ substance at this time but an acceptable and legitimate public medicine.’25

B 1950s

Much of this began to change in the 1950s. In sport, the entrance of the USSR into the Olympic Games had heightened the Cold War tensions surrounding amateur sport and the potential of sport as a political tool became apparent.26 This further politicalisation of sport led to what was later referred to as a chemical arms race in doping.27 A number of authors have highlighted the pressure on athletes to remain competitive with their Cold War rivals. Since there was a common perception that their opposites were using performance enhancing substances, that pressure resulted in experimentation in doping substances.28 This process 29 began in the 1950s as the ‘rumour mill’ began to churn with stories of drug use.30

There was a mixture of attitudes to doping in sport in the 1950s.31 Early on, some athletes openly used drugs without apparent guilt.32 On the other hand, from as early as 1952, the use of such substances to enhance sports performance was identified as problematic at sports conferences: this sort of discussion became increasingly common in the 1960s.33

25 Dimeo, above n 3, 62.
28 Dimeo, above n 3, 71ff, points out that this perceived pressure was on both sides of the Cold War but that subsequent Western discourse has emphasized the use of substances by communist countries and retold the story of the development of steroids in a way which makes Western athletes the innocent victims. This theme will be returned to in Chapter Seven.
29 The process related to both stimulant drugs and anabolic steroids: Bob Goldman, Death in a Locker Room: Steroids and Sports, 1984 (South Bend: Icarus Press), 1-2 (Preface by John Ziegler). This issue will be dealt with more fully in the next chapter.
30 Many of the examples in this chapter are evidence of this process. See also Dimeo, above n 3, 54.
31 John Hoberman, Testosterone Dreams: Rejuvenation, Aphrodisia, Doping, 2005 (Los Angeles: University of California Press), 183ff argues that the early 1950s was an age of innocence regarding drug use, that at that time doping was viewed as an innocent practice. Dimeo, above n 3, 87, regards this view is not entirely accurate, there being some condemnation even at this stage.
32 Ibid, 186.
33 Dimeo, above n 3, 89.
By the late 1950s, the issue began to attract more negative attention. In Europe there was concern over the use of ergogenic substances in cycling and football. Italian researcher, Vernerando, began gathering data on doping and developing screening tests. In 1957 claims arose that runners who had recently broken the four minute mile had used amphetamine tablets (commonly known at that time as ‘pep pills’). The American Medical Association (AMA) formed a committee to consider the issue, and debate appeared in the media. Although most sports officials denied any knowledge of the practice, a number of sports federations claimed to have rules to deal with the use of these substances.34

This change of attitude coincided with increasing concerns about the use of drugs such as amphetamines outside sport. As stated above, in the 1940s and early 1950s, these drugs were widely available and seen as ‘useful and safe stimulants’.35 By the early 1960s they were identified as dangerous drugs of addiction and subjected to the criminal law in an increasing number of jurisdictions.

C  1960s

The 1960s saw an outworking of the changes mentioned above. Sport was now serious business and Cold War politics were well and truly a part of international sport. The use of performance enhancing substances was no longer viewed as benign; the rhetoric surrounding the issue was becoming increasingly condemnatory.

The use of stimulant drugs was well known in the 1960 Rome Olympics and concerns were fuelled by reports that the death of the Dutch cyclist, Knud Jensen, was related to the use of such drugs.36 Anabolic steroids were also a factor at the 1960 Games although their use was quite limited until four years later.37

In the mid 1960s reports reached the media38 that doping was rife, particularly among professional cyclists in Europe. In 1965 the great cycling champion, Jacques Anquetil, stated ‘[e]veryone in cycling dopes himself. Those who claim they don’t are liars’.39 So much concern was generated by these reports that conferences were held in Tokyo and

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34 Plumb, above n 1. The existence of the rule about doping appears to have given some comfort even though those rules lay in disuse.
36 Considered in more detail below.
37 Dimeo, above n 3, 75 -77.
38 Examples will be considered below.
Brussels. At these conferences the latest research regarding the effects of doping substances on performance and health, the morality of the issue and how to define and deal with the problem were discussed. The issue of how to detect doping was a particular challenge. Although Italian scientists had been working on similar tests, it was British scientists who first trialled drug testing in 1966 at the soccer World Championships and cycling’s Tour of Britain.

Even though there had been a number of previous efforts at establishing a workable anti-doping policy, it is generally acknowledged that it was 1967 before such a policy was launched. Responding to the amphetamine-associated death of British cyclist, Tommy Simpson, in the 1967 Tour de France, the CoE adopted a resolution condemning doping. Earlier that year, the IOC had produced its first Prohibited List and announced that drug testing would be introduced at the Olympic Games in 1968. The first competitor to be sanctioned for doping in Olympic competition was the Swedish pentathlete, Hans-Gunnar Liljenwall, banned in 1968 for alcohol use.

The 1960s were a decade of immense change in other aspects of society. The post WWII baby boom era had produced a number of these changes, and the 1960s were a period of social upheaval. Major events, such as man’s first walk on the moon, fuelled the modernist belief in the power of science to accomplish great feats and improve lives. However, the baby boomers were beginning to doubt their ordered, mechanistic world and the youth rebellion and counter-culture revolution which dominated the news in the late 1960s had

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40 Houlihan, above n 7, 130.
42 Beckett, Tucker and Moffat, above n 13. This will be discussed in more detail below.
44 Lyberg, above n 3, 383.
begun.\textsuperscript{45} One aspect of that rebellion was the increasing use of recreational drugs, leading to an increase in severity of criminal sanctions relating to their use.

The 1960s also saw the introduction of new chemical analysis procedures which aimed to identify drugs in the body fluids of animals and humans. Such tests had application not only in drug safety and efficacy, but were also used to detect ‘drugs of abuse’ in various groups within society, athletes being one of them.\textsuperscript{46}

Dimeo summarises the changes in the 1950s and 1960s as including:

changing social perceptions of the value of science and technology; anxieties over drug use in youth cultures; professionalism and nationalism in sport; the modernising rational-scientific approach to sports performance; the rising profile of sports stars in the media. At the same time, a number of journalists were beginning to realise that drugs provided scandal and a story.\textsuperscript{47}

\section*{IV Symbolism of Doping}

This background history makes it possible to appreciate more fully the power of symbolism in anti-doping policy in the 1960s. There are two particularly important aspects of the symbolism of doping in this time period: the association of doping agents with the power of science and their association with illicit drugs. The association between doping and illicit drugs, established in the 1920s, appears to have waned a little in the 1950s as doping was identified in a more positive light. But in the 1960s illicit drug symbolism once again became extremely significant and the association between these two types of non-medical drug use became even more influential than in the 1920s.

\subsection*{A The Power of Science and Drugs}

Beamish and Ritchie demonstrate that one of the reasons for the growing importance of sport was a paradigm shift from the theories of conservation of energy to performance

\begin{itemize}
\item \textsuperscript{45} For a good discussion of the issues surrounding drug use at this time see Desmond Manderson, \textit{From Mr Sin to Mr Big: A History of Australian Drug Laws}, 1993 (Melbourne: Oxford University Press). Verner Møller, ‘Knud Enemark Jensen's Death During the 1960 Rome Olympics: A Search for Truth?’ (2005) 25(3) \textit{Sport in History} 452, 465 identifies anti-doping as being ‘based on a growing skepticism towards modernity and the medical progress of modernity.’ The era of the 1960s obviously saw the clash between modernist beliefs and this growing scepticism.
\item \textsuperscript{47} Dimeo, above n 3, 105.
\end{itemize}
capacities during this period.\textsuperscript{48} From WWII, the view of human performance changed and, as Beamish and Ritchie put it, ‘modern world-class sport now locates human performance within an ontological conception that permits, and indeed promotes the continuous, scientifically assisted enhancement of athletes’ performance capabilities.’\textsuperscript{49} Thus the 1960s was an era in which science and sport experts alike had come to accept that there were ways in which the capacity of an athlete to perform could be permanently increased rather than temporarily boosted.

This paradigm shift was in the context of a predominately modernist world view where ‘modern scientific enterprise… promised such widespread benefits to humanity’.\textsuperscript{50} Thus drugs were naturally seen as powerful agents capable of bringing about significant changes in the human.\textsuperscript{51}

An extremely influential article, published by \textit{Sports Illustrated} in 1969, demonstrated this view:

Furthermore, we have all been sold on the efficacy of drugs. We believe that the overflowing pharmacopoeia is one of the unquestioned triumphs of the age. We have been sold on drugs empirically because we have tried them and enjoy the results. We have been sold countless magazines and newspaper stories about wonder drugs — many of which later turned out to be less than wondrous — by massive pro-drug campaigns mounted by pharmaceutical manufacturers, by TV actors dressed in doctor’s coats and by real doctors many of whom are very quick with the prescription pad. Generally, we have accepted rather uncritically the central message of this persuasive pitch — drugs are good for you. These days it is a cultural reflex to reach for a vial, an atomizer, a capsule or a needle if you suffer from fever, chills, aches, pains, nausea, nasal congestion, irritability, the doldrums, sluggishness, body odour, obesity, emaciation, too many kids, not enough kids, nagging backache or tired blood.\textsuperscript{52}

It was a combination of the beliefs described above that set up one aspect of the symbolism of doping in the 1960s: performance enhancing substances symbolised the transforming power of science and drugs. Not only were these drugs seen as effective but they were also

\begin{itemize}
\item Beamish and Ritchie, above n 19.
\item Ibid, 428.
\item Dorothy Ross (ed), \textit{Modernist Impulses in the Human Sciences}, 1994 (Baltimore: John Hopkins University Press) for a fuller consideration of the issue.
\item Bill Gilbert, ‘Problems in a Turned-On World’ (1969) \textit{Sports Illustrated} 64, 68.
\end{itemize}
assumed to be the sole determinant of a sporting competition.\textsuperscript{53} A number of newspaper articles from the era demonstrate this symbolism.

In 1965 the famous Australian swimming great, Dawn Fraser, published an article in the \textit{Chicago Tribune} which opened:

\begin{quote}
I feel quite certain that Russian observers went home from the Melbourne Olympic Games under the firm impression that Jon Hendricks and I used ‘pep pills’ to boost our performances. We expected it really. After all, we had furnished the evidence.\textsuperscript{54}
\end{quote}

Fraser went on to relate a number of incidents in which she, Hendricks and their coach organised a ‘little pantomime’ for Russian observers at their training sessions. Fraser complained of feeling unwell before getting in the pool. She continued:

\begin{quote}
I swam the first six laps very fast and the seventh much slower. On the eighth I pulled up altogether — and floundered to the side of the pool not far from the Russians. They moved close as I gasped to Harry, “I don’t think I can do anymore”. Harry produced a bottle full of aspirin and a glass of water. He looked around craftily and gave me a couple of tablets. “They ought to fix you” he said loudly.

I waited a little while, then went back and finished the workout as hard as I could. The improvement was dramatic and the Russian women seemed very impressed. They whispered a lot and took copious notes. Later Hendricks pulled the same gag.\textsuperscript{55}
\end{quote}

The trick was only possible because of what the bottle of aspirin symbolised to all involved: such a joke would not have been possible if there was not widespread belief in the power of drugs. Here the bottle of aspirin symbolised a potion with transforming powers reminiscent of Dr Jeckyll and Mr Hyde or the Incredible Hulk.\textsuperscript{56}

An earlier example of this symbolism is found in a 1957 article from \textit{The New York Times} by Robert Plumb.\textsuperscript{57} This article reported suggestions that the four-minute mile (by then achieved by twelve athletes) ‘might have been run by athletes temporarily made super-

\begin{footnotes}
\item[53] It is interesting that drugs should be viewed as so important when all aspects of athletic training were then under scientific review and contributed to the improvements in performance. Other contributions by science to improving athletic performance capacity were largely ignored. This, too, goes to show that there was something special about drugs.
\item[55] Ibid.
\item[56] In the famous novel by Robert Louis Stevenson, \textit{The Strange Case of Dr Jeckyll and Mr Hyde} (1st published 1886), Dr Jeckyll magically transformed into his evil counter-ego after taking a potion which he had concocted to separate the good and evil in one person: Robert Louis Stevensen, \textit{The Strange Case of Dr. Jekyll and Mr. Hyde} Electronic Text Centre: University of Virgina Library <http://etext.virginia.edu/toc/modeng/public/StJeJk.html> at 13 September 2008. The comic book character, the Incredible Hulk, first appeared in 1962. Dr Robert Bruce Banner changed into the Hulk whenever he became angry after being subjected to an enormous dose of gamma radiation: Marvel/Universal, \textit{The Incredible Hulk: Hulk History} <http://www.theincrediblehulk.ca/hulk_history.asp> at 13 September 2008.
\item[57] Plumb, above n 1. Although this extract seems to suggest that the main issue with amphetamine use must have been concerns regarding performance enhancement, we shall see later that it was more about the growing concerns regarding illicit drug use, amphetamines being seen at the time as leading to harder drugs.
\end{footnotes}
athletes by the use of drugs.’ This extract, and the Fraser article, capture the language and tone of other articles around this time.

Further evidence of the power of the symbolism of drugs as powerful transforming potions is found in the fact that athletes continued to believe in the transforming power of drugs, despite assertions by medical authorities to the contrary. For instance, the BASM published a statement regarding amphetamines which read ‘[n]o known chemical agent is capable of producing both safely and effectively an improvement in performance in healthy human subjects.’ Yet athletes continued to use amphetamines.

An even more telling example of the power of drugs is the power of the placebo effect. In an article published in the IOC’s bulletin in May 1962 by Professor Giuseppe La Cava, General Secretary of the Fédération Internationale de Médecine Sportive, claimed: ‘I can testify to one case when in the finals of an Olympic competition, an athlete, who anxiously requested a shot of camphor, was given distilled water with the same results.’ This anecdote reveals the immense power of the belief in drugs, more significant than the chemical effects of the drug.

The idea that ingesting a chemical substance could turn an average athlete into a superhuman is the basis for Fraser’s pantomime. The unwavering belief in the power of doping agents has been pervasive throughout anti-doping history despite, in many cases, a lack of credible evidence of such an effect.

B Doping in the 1950s and 1960s: from ‘Medicine’ to ‘Drugs’

1 Doping in the 1950s and early 1960s: ‘Medicine’

Now, whenever the term drug is mentioned in common parlance, people tend immediately to conjure up ideas of sleazy dens and slant-eyed maidens, of the spirit of the East and all manner of nefarious intrigue and sexual deviation! Which is most regrettable, because nobody has clearly distinguished, at any rate in the scientific or medical circles, between a medicine and a drug. The Oxford dictionary under “drugs” refers to medicine and under “medicine” refers to drugs! Now this may seem like bandying words but it really is relevant because drugs which are causing anxiety in the present context are, in fact, invaluable medicines if they are used properly. It is very, very difficult to convince people, especially politicians, of this point. They seem to have the idea that there are things called “medicine” which are splendid and save life, and things called “drugs” which are villainous
and lead people to eternal damnation. There are, as it were, “goodies” and “baddies” as in the television comedies. Actually this is very far from being so – in fact it is rather the intent with which these things are used that lead to them conferring benefits or leading to addiction.\textsuperscript{61}

There is a significant difference between the terms ‘drugs’ and ‘medicine’. While drugs tend to be those associated with illicit drug culture, ‘medicine’ tends to connote the socially acceptable, medically-indicated use of drugs. The view of doping in the 1950s was largely one which identified performance-enhancing substances as ‘medicines’. Two aspects of this view will be explored below.

\textit{(a) Performance Enhancing Substances as Positive Agents}

In the 1950s public debate regarding the use of performance enhancing substances was fairly limited: interest in the issue was mostly confined to the medical and scientific communities.\textsuperscript{62} Research was undertaken into the ergogenic effects of doping substances; early studies on amphetamines characterised them as useful substances with few side effects. Set out below are a number of examples of the way in which scientific studies at the time reported on the use of performance enhancing substances. Used as a medicine, under medical supervision, these substances were viewed as helpful in enhancing performance without danger.

For example, two famous studies by Smith and Beecher, in 1959 and 1960, on the effect of amphetamine sulfate and secobarbital on athletic performance, did not contain any negative comments on the subject of the use of such drugs. Moreover, much of the language is neutral, or even positive, in reporting the use of amphetamine in this way: the study subjects being said to have ‘definitely benefited by the amphetamine’.\textsuperscript{63}

Similarly, a 1962 review article of the effects of caffeine and amphetamines on human performance concluded:

Both from the standpoint of physiological and psychological cost, amphetamines and caffeine are rather benign agents. Except for reports of insomnia, the subjective effects of amphetamines in normal doses are usually favourable... Caffeine is somewhat less benign.... At dose levels that clearly enhance performance, the amphetamines seem not only more effective than caffeine, but less costly in terms of side-effects.\textsuperscript{64}

\textsuperscript{62} Houlihan, above n 7, 130.
\textsuperscript{64} Bernard Weiss and Victor Laties, 'Enhancement of Human Performance by Caffeine and the Amphetamines' (1962) 14 Pharmacological Review 1, 32.
(b) **Doping as a Medical Problem**

The positive views associated with doping agents in the above studies were not universally shared. However, even when doping was discussed as a problem in sport, the discussion was mostly located within a medical or scientific genre rather than a criminal justice one. Examples are provided below.

A 1962 article from the IOC newsletter regarding anti-doping programmes in Switzerland stated:

> Practically speaking, it is necessary to describe as doping any use of medicines which permit the athlete to reach his goal by artificial means. In this sense, medicine means all substances and patents enumerate on the most recent lists A, B and C of the International Medicine Control Officer, which consequently, are obtainable at chemists. Considering the practical difficulties, one might envisage the temporary limitation of doping substances delivered only on presentation of a prescription.\(^65\)

Medical language was prominent in this discussion and the taking of any medicine by an athlete could only be legitimized by a medical script.

A 1962 article in the IOC bulletin read:

> As for the sanctions punishing this offence they are difficult to apply because the addicted to drugs is rarely found out. When he or the guilty parties, who give or supply the drugs, are discovered, it ought to fall within the competent medical profession to prosecute the responsible parties on the charge of illegal medical practice and to apply severe sanctions, going as far as imprisonment or attempt to injure a person’s health. This penalty may give cause to reflection with the facetious advisers.\(^66\)

At this point in time it was assumed that the source of doping agents was the medical profession, and that doping was therefore a problem of medical ethics. In this passage the ‘guilty’ party was the person who had supplied the drug, rather than the person who took it and the appropriate method of punishment was through the usual disciplinary procedures of the medical profession. The athlete was seen as a passive recipient in the process:

> Athletes do because they have far more access to drugs than most of us. They do not have to stand around in waiting rooms, at pharmacy counters or on street corners for their fixes. Drugs are brought to them, and usually provided free of charge. The athlete gets free professional advice from physicians and assisting trainers as to what drugs to take, and when and how…. While physicians and trainers will often bridle at the suggestion (drug has become a four-letter word for them as well as others), the general pattern seems to be that the more closely one is associated with the medical profession the larger one’s drug consumption.\(^67\)

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\(^{65}\) International Olympic Committee, 'Severe Measures Taken in Switzerland Against Doping' (1962) 78(May) Bulletin du Comité International Olympique 52.


\(^{67}\) Gilbert, above n 52, 68.
A similar sentiment was expressed in the IOC newsletter in 1962: ‘Let us save young athletes who are often in the hands of trainers with what might be termed somewhat elastic consciences.’ And in 1969: ‘Nearly every sport has been contaminated by the experiments of doctors, trainers and masseurs in their quest for the philosopher’s stone.’

This kind of language correlates with the ‘medical’ view of doping, where doping agents are medicines which can be used either ethically or unethically by the medical profession. The symbolism of performance enhancing substances as ‘medicines’ rather than ‘drugs’ was consistent with the wider view of drugs. Dimeo states: ‘The paradigm of the 1940s in which drugs offered opportunities in sport and society, gave way to a new paradigm in which drugs were something to be feared and regulated.’ By the 1960s the symbolism was to change again.

2  **Doping in the 1960s: ‘Drugs’, ‘Addiction’ and ‘Drug Addicts’**

The Chairman mentions the use in certain sport circles of a pharmaceutical product called Amphetamine Sulfate (PEP pills) which is nothing else but a dope or a drug. Mr Brundage draws the attention of the members upon the seriousness of the case and requests them to speak of this matter in their respective countries.

By the late 1960s, a new ‘drug epidemic’ had begun throughout the Western world. The history of the pattern of drug use in the late 1960s has been well documented. The rising use of recreational drugs such as marijuana and amphetamines was associated with increased criminalization of these drugs.

(a)  **Doping: Dangerous and Evil**

In strong contrast to the positive views of performance enhancing substances in the scientific literature of the 1950s, by the 1960s, doping was regarded as both dangerous and evil. Some of the language characteristic of the debate is provided below.

It also includes poisonous drugs. Even under expert medical attention, excessive use of dope may lead to disastrous results… In fact dope may not be beneficial to human life; it may do us more harm. A doped athlete may have a high degree of uncertainty: drugs dull the mind and senses. A severe narcotic effect may slow down the general responses of an...
athlete… They may become lazy and indifferent towards leading the life of a sportsman. They may lose their natural smartness and intelligence.  

In the last aspect one must deplore the error of claiming the right to dispose unconditionally of his body and thereby to submit it to obvious risks and obtain results that are beyond his natural forces to ABSORB GRAVELY NOXIOUS SUBSTANCES. SUCH IS THE CASE WHEN CONSUMING HIGHLY STIMULATING DRUGS WHICH BESIDES BEING LIKELY TO CAUSE HARM OF A POSSIBLY IRREPARABLE NATURE TO THE SYSTEM, ARE LOOKED UPON AS A KIND OF FRAUD BY SPECIALISTS. In such cases, the responsibility of spectators, organisers and the press is very serious when they encourage this risky practice.  

Drug taking “has killed and will kill more young people than thalidomide has produced monsters”, an international conference at Uriage, near Grenoble, was told by Professor Boissier, of the Paris Medicine Faculty. He urged that athletes should be warned of the risks they were running in taking drugs. The conference, which had as its theme “Doping is the cancer of sport”, tonight passed a motion formally condemning doping…  

(b) Doping: the Problem of Addiction and Athletes as Drug Addicts  

In the early to mid 1960s there were an increasing number of references to the problem of drug addiction in doping discourse, reflecting concerns in society regarding recreational drug use. In fact, the discourse on doping was extremely reminiscent of the discourse surrounding illicit drugs from the turn of the century, considered in the previous chapter. One particularly poignant example of the similarities between doping discourse and illicit drug discourse is extracted below in Figures 2 and 3 in the form of two cartoons, one from the 1960s and one from the 1920s.

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75 ‘Drug Warning to Athletes’, The Times (London), 28 January 1963, 8. Interestingly Dimeo recognizes the thalidomide events as being influential in turning public opinion against drugs: Dimeo, above n 3, 88.  
76 For example a Medline search on the term ‘addiction’ for the years 1950 to 1960 reveals 383 articles, while the same search for the years 1960 to 1965 reveals 508 articles. This increase in the number of articles on this topic is at least partially due to the increasing concern about drugs of abuse. For a contemporaneous view on addiction see C W M Wilson, ‘Drug Addiction’ (1965) 58(6) Proceedings of the Royal Society of Medicine, 405, and John A Clark, ‘Opiate Addiction’ (1965) 58(6) Proceedings of the Royal Society of Medicine, 412.
The first cartoon, from the 1960s, pictures a cyclist being congratulated after winning a race and in place of his head, a big circle with ‘DOPE’ written on it appears. This cartoon implicitly suggests that ‘dope’ was the only reason that this cyclist won the race. The form of the cartoon is exactly the same as the cartoons from the 1920s picturing ‘dope’ as a separate character of its own, as shown below. The link between illicit recreational drugs and doping is obvious in the use of similar ways of representing the issues in cartoon form.

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Figure 2: 1960s Dope Cartoon

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77 Ariens, above n 41, 45.
Below are a number of examples from anti-doping discourse which show that doping was viewed as a problem of drug addiction and the doping athlete as a drug addict: the association also being reflected in the language used.

Medically, of course, there is a further danger, although it is hard to prove, that habitual use, particularly with increasing doses of drugs, can lead to addiction. And this of course is not only in the forefront in this context of sport but also of the national wellbeing in many countries – America is very much up against it at present, while in Great Britain it is a growing problem (or if it is not a growing problem it has been brought to light very much more in the last year or two)…. In America and other places, the mere word “dope” has a sinister and unpleasant meaning. And this is really appropriate, for morally, mentally and physically a man can become a wreck through this misuse of drugs.\(^{79}\)

Such are the ways of the press, the whole thing was magnified and blown up in the national papers to such an extent as to make it appear that many British athletes and sportsmen were little more than “junkies”…\(^{80}\)


\(^{79}\) Porritt (1969) above n 17, 107.

\(^{80}\) Williams, above n 2, 129.
It is not for one moment suggested that everyone who plays football, who runs or who
swims competitively has his fix before he starts!  

Well then, what is dope? It is a preparation of a drug, which forms habit, such as that of
narcotics or of opium. Its use produces pleasure and stimulation. It is used also to deprive
of sensibility. Before a race, dope is given to a horse to depress or stimulate it temporarily:
this may spoil or improve the speed. The idea behind doping is to impregnate an organism
with a foreign substance in order to obtain the desired appearance, performance, property,
etc. In popular terms, dopes are stimulating substances. In slang dope is referred to as a
harmful drug taken by a narcotic addict. In short, doping conquers fatigue due to physical
and metal [sic] labours, for a certain period.

Habitual use of any drug potent enough to improve physical performance is likely in the
long run to damage health. Continued use of stimulants (or depressants) automatically
leads to increased dosage and so a habit is set up which is the first stage of addiction.

The second last extract, from the Olympic Review in 1969, demonstrates a confused mix of
references to the use of drugs for performance enhancement and the use of drugs for
recreational purposes. The intermingling of these two issues, today regarded as quite
separate, is typical of the doping debate at the time.

Correlating with the changing symbolism of doping from ‘medicine’ to ‘drugs’ came a
change in focus from the medical profession to the athlete in terms of responsibility. The
athlete was no longer a passive recipient, but the main actor making moral choices about
the use of ‘drugs’. For example, in a 1969 British Journal of Sports Medicine article,
Goulding considered the supply of doping agents:

Once the young people get on to these drugs then they are into the market where, because
control in the factories and in the shops is difficult to exercise, there is always some in
circulation, and they can buy them on the black market. There is perhaps a tighter control
here now which has been achieved to a small extent by another act — the Drugs Prevention
and Misuse Act — of a year or two ago, which has effect this way: if the police make an
arrest or search and they find one of these youngsters who has got this sort of tablet in a
handbag or a pocket when they have no good and sufficient reason for possessing them,
then they can be picked up and that is prima facie an offence.

An article in the IOC newsletter in 1968 called ‘Thoughts on Doping’ read “‘[h]omo
Ludens’: who survived up to the beginning of the century has been replaced by another
type of man, for whom the end justifies the means including those that might kill him.”
And further: ‘Doping is ‘a form of moral deception in which the athlete is achieving his results not on his own merits, but artificially, and in a manner contrary to the code of sportsmanship...’\textsuperscript{86}

The use of performance enhancing substances was now seen as part of the wider issue of drug ‘abuse’ within society. In the period between the 1950s and 1960s doping had moved from an interesting challenge for science, to a problem of medical ethics, to a dangerous and immoral practice. The ‘sports doper’ in the late 1960s symbolized a more sinister form of non-medical drug use: the recreational drug user.

C Amphetamines in the 1950s and 1960s: From ‘Pep Pills’ to Illicit Drugs

More specifically, the treatment of the use of amphetamines in sport also changed substantially between the 1950s and late 1960s. This, and the fact that amphetamines were then the main doping agents in sport, makes the public debate surrounding amphetamines particularly useful for illustrating the role of illicit drug symbolism in the doping debate.

In the 1950s, amphetamines had been commonly used for twenty years for a variety of disorders including ‘inability to sleep, epilepsy, migraine, depression and hyperactivity in children.’\textsuperscript{87} They were sold as an over-the-counter inhaler known as Benzedrine,\textsuperscript{88} thus giving rise to one of its street names, ‘Bennies.’\textsuperscript{89} Although in the 1930s and 40s use was sporadic, in the 1950s and 1960s ‘amphetamines gained acceptance as an appetite suppressant for weight loss programs and youth experimentation with a variety of drugs, including amphetamines, became more widespread.’\textsuperscript{90} Amphetamines in the 1950s and 1960s were used by a wide range of people — bored housewives, truck drivers, people who worked long hours and businessmen\textsuperscript{91} — and known by various names: ‘tonics’ (for, people who felt low and needed an energy boost),‘benzies’ and ‘dexies’\textsuperscript{93} ‘go-pills’ (in the military),\textsuperscript{94} uppers, copilots, speed, zip, crosstops and crank (on the street).\textsuperscript{95} The name ‘pep pill’ was employed by students who used them to stay awake in all-night study

\textsuperscript{88} PBS, above n 35.
\textsuperscript{91} DrugScope, above n 87.
\textsuperscript{92} Ibid.
\textsuperscript{93} Plumb, above n 1.
\textsuperscript{94} CBC News, above n 89.
\textsuperscript{95} Ibid.
sessions. In the sporting context, the only particularly negative view of amphetamines related to their potential to extend the athlete beyond the natural limits of their body.

By 1967, with their increasing use by young people, amphetamines, along with marijuana and LSD (lysergic acid diethylamide), became associated with youth rebellion and the counter-culture movement feared by parents of the baby-boomer generation.\(^\text{96}\) They were criminalised in most jurisdictions during the 1960s.\(^\text{97}\) Like the language used to describe doping in general, in the late 1960s amphetamines were constructed as dangerous drugs and associated with the problems of addiction and overdose.

1 Amphetamines in the 1950s and early 1960s: ‘Pep Pills’

Although there may have been some concern about the health implications of the use of stimulants such as amphetamines in the 1950s, the view of such practices was far from the criminal drug addiction model that was prevalent in the late 1960s.

One example of the neutral language used in relation to amphetamines can be found in the article by Dawn Fraser extracted above. Dawn refers to ‘pep pills’ in her charade rather than using their scientific name or some of the other colloquial names listed above. This term, which was commonly used in sport at the time,\(^\text{98}\) had relatively positive associations of clean-cut university students using pills to improve their academic performance.\(^\text{99}\) ‘Pep pills’, in academia and sport, were linked with striving to achieve socially desirable goals. Furthermore, Dawn and her associates do not appear to be disturbed by the idea that the Russians would assume that they were using amphetamines. The fact that she was willing to be connected with such a substance certainly suggests that she and her associates, at least, did not see the drugs in a particularly negative light.

\(^\text{96}\) Houlihan, above n 7, 36. For a detailed account of the use of amphetamines in the US in the 1960s and 1970s see Grinspoon and Hedblom, above n 35.\(^\text{97}\) Manderson, above n 45, 146-150. For an in-depth analysis of amphetamine use in the 1960s in Canada see Canadian Government Commission of Inquiry, ‘The Non-Medical Use of Drugs: Interim Report of the Canadian Government Commission of Inquiry’ (Canadian Government, 1970). See also Reynolds, above n 72, 76-79 and James M Graham, ‘Amphetamine Politics on Capitol Hill’ (1972) 9(3) Transaction 14-23.\(^\text{98}\) For example, one of the first major articles on the practice of ‘doping’ appeared in The New York Times on Thursday, 6 June 1957: see John Hoberman, ‘After ‘Unbreakable’ Barriers Fall, Doping Questions and Denials’, The New York Times (New York), 25 April 2004, regarding the significance of this article. The article detailed comments made by Dr Herbert Berger, an authority on drug addiction and chairman of the New York State Medical Society’s Committee on Narcotics and Alcohol Addiction, during a meeting of the American Medical Association (AMA) regarding the use of stimulants, particularly amphetamines among athletes. It displays an interesting mix of language. Dr Berger, referring to ‘drugs’, ‘addicts’ and ‘dangers’ while the commentary used the more neutral phrase ‘pep pills’. See also ‘Sport Physicians to Check on Pills’, The New York Times (New York), Sunday, 9 June 1957, 17 and ‘Girls in Olympic Swim Trials Accused of Taking Pep Pills’, The New York Times (New York), Monday 8 August 1960, 17.\(^\text{99}\) This is a stark contrast to the image of a drug addict who was usually cast as completely lacking in ambition.
The use of the innocent phrase ‘pep pill’ extended to the medical and scientific literature as well. For example, in 1964 Ariëns referred to amphetamines and methamphetamine as ‘so-called “pep pills”’. Like most other medical/scientific discussions of doping with ‘pep-pills,’ the main danger considered was the fact that amphetamines could confuse the signals of exhaustion in the athlete and lead to the athlete going beyond their natural limits:

The healthy organism offers natural resistances against overloading. The feeling of fatigue plays an important role here: it is as it were a warning signal. As a result of the use of weckamines this warning signal is put out of action. The result of this is that the physiological limits are extended with all the risks involved. It may lead to complete exhaustion and severe damage to the organism. The use of these drugs may be compared to putting a fire alarm signal out of order with intent to go quietly to sleep, thinking that there will be no alarm and accordingly no fire.\footnote{Ariens, above n 41, 42.}

Although in general medical literature concerns were beginning to be raised about the addictive nature of amphetamines, this was not the major focus of discussions in the late 1950s and early 1960s in the sporting literature. The ‘risk of addiction and also dangerous intoxications’ were mentioned only in passing by Ariëns: no real attention was given to this aspect of amphetamine use, while the danger of over exertion was concentrated on at length. This appears to be common in the medical literature regarding doping at this stage. Goulding, in 1969, repeated the same pattern, ‘[t]here is a feeling of excitement and anticipation and a carelessness and determination in throwing off fatigue and herein lies the danger.’\footnote{Ibid.} Even at that late stage, Goulding was able to claim that ‘it may well be safer to drive under the influence of amphetamine (even though the legality is dubious) than run the risk of falling to sleep at the wheel.’\footnote{Ibid.} Amphetamine is even compared with caffeine and theophylline by Goulding ‘[w]hen people were given tablets of caffeine almost the same reaction was found as is obtained with an amphetamine!’\footnote{Ibid.}

Evidence of other non-judgemental, neutral language appears in an article published on Sunday, June 9, 1957, in \textit{The New York Times}, under the headline ‘Sport Physicians to Check on Pills’. It reported that the American College of Sports Medicine was appointing a committee to investigate the use of ‘pep pills among athletes.’\footnote{‘Sport Physicians to Check on Pills’, \textit{The New York Times} (New York), Sunday, 9 June 1957, 17. The article read: The resolution came after a closed-door discussion that Dr Wolfe said was shocking to him. Prof. Thomas K. Cureton, director of the University of Illinois’ physical fitness research laboratory, reported that the use of amphetamines apparently was common among Australian Olympic swimmers last year….. Frank J. Wiechec, trainer of the Philadelphia Phillies baseball team and the Philadelphia Eagles football team, told the group earlier that some professional athletes took the pills occasionally.} Although there are a
few phrases which convey shocked disapproval — the college was to investigate charges of widespread use of pep pills among athletes’ and Dr Wolffe was said to be ‘shocked’ by the reports — the tone of the article is not one of the outrage so characteristic of later discussions. The practice is referred to as ‘taking’ or ‘using’ amphetamine pills rather than ‘abusing’ them, there is no mention of ‘cheating’ and the athletes are not described as ‘drug cheats’ or ‘drug users’. The neutral tone even borders on approval: ‘Professor Cureton credited the performance of Australia’s Olympic swimming team to fine training plus fortification with vitamins, wheat germ oil – and, in at least one case, pep pills.’

A second report of interest came three years later under the headline ‘Girls in Olympic Swim Trials Accused of Taking Pep Pills.’ This 1960 article does not demonstrate quite so much neutrality regarding the practice of amphetamine doping. The swimmers are ‘accused of taking pep pills’, Ruuska ‘charged’ both the named American swim clubs and the Australian 1956 Olympic female swimmers of using pep pills and claimed that the American clubs he named were ‘guilty’ of the ‘charge’. The words chosen in the 1960 article have connotations of illegality — charge, accused, guilty. Within three years there had been a change in tone from one of mild surprise and disapproving interest (almost

The college’s move followed the decision of the American Medical Association to inquire further into the report made by Dr Herbert Berger, Staten Island Drug Authority, last Wednesday, Dr Berger said the drugs were widely used in boxing, and he hinted that they might be a factor in the frequent cracking of the four-minute mile barrier by track men.

He said it [the committee] would try to determine the effect of amphetamines (including Benzedrine and Dexedrine) and tranquilizers on athletic performance, and their effects on health.

The ethics involved in the use of these drugs also will be considered, he added.

Professor Cureton credited the performance of Australia’s Olympic swimming team to fine training plus fortification with vitamins, wheat germ oil – and, in at least one case, pep pills. He named David Tyler, backstroke champion as one using pills.

A physiologist, Professor Cureton, said that the pills would increase the oxygen capacity of the lungs and aid athletic performance. Dr Wolffe said, however, that the college knew of no controlled experiments that had been made with these drugs on athletes.

Emphasis added.


The father of a United States Olympic swimmer charged tonight that pep pills had been found in the women’s locker rooms last week at the Olympic swimming and diving tryouts in Detroit.

…Ruuska said the Santa Clara (Calif.) Swim Club, Multanomah Swim Club of Portland, Ore. and the Los Angeles Athletic Club were guilty of the charge.

…Ruuska said he did not think the boys used pep pills.

Ruuska said ‘Some of the girls were swimming thirty seconds faster than their best previous times.

‘Those things just don’t make sense,” he said. He also charged Australian women swimmers have been using pep pills.’
ambivalence) to shock and outrage. This subtle change became more obvious in the 1960s.

2 Amphetamines in the 1960s: Illicit Drugs

By the late 1960s, amphetamines had been criminalised in many jurisdictions. Accordingly, they were now viewed as illicit recreational drugs in wider society and associated with youth rebellion.

(a) Amphetamines in Sport in the 1960s

By the 1960s, amphetamines had become associated with a number of incidents in sport with serious medical consequences. The death of Knud Jensen has been mentioned above while Tommy Simpson’s death will be discussed below. Other significant events included the death of a professional cyclist from amphetamine poisoning in 1948, a cyclist being admitted to psychiatric hospital from complications of amphetamine use in 1956, and two cyclists being taken to hospital in 1962 and 1963 with amphetamine poisoning.

On one level, it may appear unsurprising that amphetamines became seen as extremely dangerous substances in sport. On another level it needs further explanation. For example, the two most prominent events — Jensen and Simpson’s death — are not the straightforward amphetamine overdose cases they have come to be reported as. Jensen died on August 26, 1960, when he collapsed during the 100 kilometre road race at the Olympic Games in Rome on a typical Roman summer day of 34 degrees. He sustained a fractured skull and was admitted to hospital with a temperature of 41 degrees where he died 2 hours later without having regained consciousness. Although later reported as an amphetamine-related death, Møller points out that it is not even clear that Jensen had amphetamines in his system when he fell. There were also a number of other factors which contributed to his death, possibly much more than any amphetamine did.

The other incident of concern was the death of Tommy Simpson who fell from his bike during the 1967 Tour de France.

108 Still the language is significantly different to that used to refer to amphetamines in the late 1960s as will be demonstrated below.
109 Dimeo, above n 3, 91.
110 Møller above n 45 and Mignon, above n 39, 231.
111 A number of newspaper articles from the time revealed the details of his death. ‘Chris von Saltza Sets Olympic Record’ Chicago Daily Tribune (Chicago), August 27 1960, B1; ‘Steps to Protect Athletes Taken’, The New York Times (New York), August 28 1960, S3 and ‘First Death in Modern Olympics’ Chicago Daily Tribune August 27 1960, B1. A letter to the IOC Bulletin in 1962 by Leo Fredericksen, president of the Danish Olympic Committee, stated that the official report on Jensen’s death was that it was caused solely by heat stroke: Leo Fredericksen, ‘Correspondence’ (1962) 78 Bulletin du Comité International Olympique 47.
112 Mignon, above n 39, 231.
In the searing heat Tommy Simpson began weaving across the road before slipping off his bike. After ordering onlookers to “put me back on my bike,” Tommy continued only a short distance before he collapsed and lost consciousness.\footnote{Chris Jackson, \textit{Inside Out: Remembering a Sensation} (2004) \texttt{<www.bbc.co.uk/insideout/northeast/series6/cycling.shtml> at 13 September 2008.}}

Mouth-to-mouth artificial respiration administered by Dr Pierre Dumas, chief of the tour’s medical services, met with partial success, and Simpson was taken from Mount Ventoux by helicopter to hospital in Avignon. He died there at 5.40 p.m. today…\footnote{Malcolm Winton, ‘Cycling Ace Dies on Mountain Climb’, \textit{The Times} (London), Friday, 14 July 1967, 1}

Although it is clear that Simpson had been using amphetamines — he was well known for using these substances in his cycling and amphetamines were found in his system and in his riding jersey\footnote{Dimeo, above n 3, 61.} — it was later found that other factors, such as the severe heat, dehydration and diarrhoea, contributed to his fatal collapse.\footnote{Ramin Minovi and Association of British Cycling, \textit{Tom Simpson Lives} (2002) \texttt{<http://www.abcc.co.uk/Reviews/bio_simpson2.html> at 13 September 2008.}}

Out of the many contributing factors in these deaths, only amphetamines/drugs have been targeted for prohibition. Why amphetamines should be so targeted in these, and other doping events, needs further explanation. It can be partially accounted for through understanding the impact of the drug symbolism of amphetamines in the 1960s.

\textit{(b) What Did Amphetamines Symbolise Outside Sport in the 1960s?}

On 28 June 1967, the day before the start of the 1967 Tour de France, the front page of \textit{The Times} reported that the musician, Mick Jagger, had been found guilty of possessing four tablets containing amphetamine sulphate and methylenedioxymethamphetamine hydrochloride.\footnote{Unauthorised possession of amphetamines had become illegal in the UK in 1964. See DrugScope, above n 87.}

Ronald Faux and Keith Richards had been found guilty of smoking Indian Hemp and using heroin. On 30 June 1967, \textit{The Times} reported that the three had been sentenced to jail for these offences. The same edition reported Tommy Simpson’s efforts in the first stage of the Tour de France.\footnote{Ronald Faux, 'Gaol Sentences on 2 Rolling Stones: Appeal Certificate Granted', \textit{The Times} (London), 1967, 1; Ronald Faux, 'Mick Jagger to Face Sentence', \textit{The Times} (London), 28 June 1967 1967, 2 and Malcolm Winton, 'First Stage Won by Spaniard', \textit{The Times} (London), Friday 30 June 1967, 14.}

Not two weeks after these rock stars were imprisoned for the use of amphetamines and methylenedioxymethamphetamine, the same substances were discovered in the body and possessions of Tommy Simpson.\footnote{Jackson, above n 113.} This coincidence clearly demonstrates why the language associated with amphetamine use in sport changed over the period; the Rolling Stones incidents show
the place that amphetamines had come to hold in the public mind. Instead of being associated with clean-cut college students, these drugs were now part of the rebellious, uncontrolled world of rock and roll.

(c) The Changing Symbolism of Amphetamines in Doping Discourse

The changing view of amphetamines is reflected in the language used to describe the 1960 death of Knud Jensen and the 1967 death of Tommy Simpson. As noted above, in newspaper articles from the late 1950s to early 1960s, amphetamines were usually referred to as ‘pep pills’. In an article regarding Jensen’s death, Dr Howard A Rusk wrote: ‘The drug, Roniacol, which he gave them is not a so-called “pep” pill. It is a form of nicotinic acid, which is one of the vitamin-B complexes.’ The use of such neutral terms was consistent with the legal status of amphetamines, in both society and sport.

However, when The Times reported the death of Simpson, he was not said to have ‘used’ ‘pep pills’, he ‘had drugs’. Gone are references to the seemingly innocent ‘pep pills’: Simpson’s death was not said to be partially attributable to his use, or misuse of ‘pep pills’ or ‘amphetamines’ but due to a ‘drug overdose.’ The connotations arising from the word ‘drug’ and ‘overdose’, with associated images of illicit drug use and youth rebellion, are substantially different from that of ‘pep pills.’ Drug addicts and ‘junkies’ use ‘drugs’ and die of ‘overdoses.’

Sometimes the concerns relating to amphetamines as illicit drugs were made explicit. This link is apparent in the 1957 article mentioned:

The drugs are potentially dangerous, he said. A high-pitched person can be stimulated to “violent behaviour”, he explained. Drug addicts, he added, might get their start in taking amphetamines during high school and college athletics.

It is clear here that the primary concern was the fact that young people may start taking amphetamines in the sporting context and that this may, in turn, lead to addiction and violence. What prompted the medical authorities to raise the alarm regarding

122 Since there were only very general censures on doping before the first prohibited list appeared in 1967: Todd and Todd, above n 11, 68.
124 Although the first article does refer to amphetamines as ‘drugs’, the term is surrounded by references to ‘pills’ and the use of amphetamines is referred to as ‘taking’ or using pills. Any sinister connotations that the word ‘drug’ may have had if it was used in isolation is neutralised by the context of the other, very neutral language.
125 Plumb, above n 1.
amphetamine use in sport was not exclusively the sporting issue of unfairness or the creation of ‘super-athletes’, it was the wider issue of drug addiction, an issue no different to that outside the sporting context.

In 1957, amphetamines were largely legal and their transformation into ‘evil’ illicit drugs had only just started. As amphetamines became increasingly demonised because of their links with ‘drug addicts,’ those associations spilled over into the sporting context. By the 1967 death of Simpson in the Tour de France, the transformation of amphetamines from ‘pep pills’ to ‘drugs’ was complete. ‘In the 1940s and 1950s they were a panacea for all manners of ailments, by the 1960s they were a social tragedy.’

V SIGNIFICANCE OF THE REGULATORY MODEL

The influence of illicit drug symbolism in the developments in anti-doping policy in the 1960s is reflected in the form in which anti-doping rules took at this time, particularly the total prohibition, drug testing and prohibited lists.

A Total Prohibition

Although the prohibition on alcohol ended in the 1930s, total prohibition was still the favoured approach to recreational drug regulation between the 1930s and the 1960s. The 1960s witnessed a strengthening of that approach with an associated increasing of criminal penalties. Similarly, the 1960s anti-doping rules were also total prohibitions: the system put in place in the 1920s and 1930s was accepted as the appropriate approach. No doubt the acceptance of this approach was partly due to the fact that this represented the status quo. But the reinvigorated commitment to prohibition policy on illicit drugs outside of sport was also highly influential. The parallel strengthening of the prohibition policy on the use of performance enhancing substances in sport was a natural response to the problem of ‘drug abuse’ inside sport.

B Prohibited List and the Prohibited Substances

The adoption of a list of prohibited substances was also reminiscent of illicit drug regulation. A total prohibition with a list of prohibited substances attached in a schedule has been the form of many national drug laws since the Poisons Acts of the nineteenth

126 Dimeo, above n 3, 128.
Moreover, such an approach had been part of international illicit drug regulation since the 1961 *Single Convention on Narcotic Drugs*. An even more significant factor is the contents of the list. Of the six categories listed in the 1967 IOC list (alcohol, amphetamine and ephedrine, cocaine, vasodilators, opiates and cannabis), the large majority of them had been, or were at the time, subjected to the criminal law outside of sport. The list reads much like a schedule from illicit drug laws. This could be, of course, simply a coincidence caused by the fact that the same substances were used in both contexts. However, the role of illicit drug symbolism here is demonstrated by a number of factors considered below.

Firstly, there is significance in what was left out of the IOC *Prohibited List*: there were other substances and methods which had been used to enhance performance in sport, not targeted by these early lists. For example, caffeine and ‘hormones’ were on prohibited lists produced by the CoE and the BASM respectively but did not feature on the IOC list. Similarly, sodium bicarbonate had been studied and used for its ergogenic potential and yet did not make the list. Oxygen therapy and high altitude training were also being experimented with were not included on the list. The fact that these non-illicit forms of performance enhancement were left off the IOC’s first *Prohibited List*, while the drugs which had been subjected to criminal prohibition were all included, demonstrates the

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129 As outlined above, two organisations had produced prohibited lists before the IOC, the CoE and the BASM. These lists also contained a majority of illicit drugs.

130 Many of these substances had been included in earlier definitions of doping, see Chapter One.

131 Perhaps the most significant omission at this stage was anabolic steroids. It is clear that there was growing concern regarding the use of ‘hormones’ in sport and that the IOC was aware of the problem as early as 1960: Arnold Beckett, ‘The Future of the Olympic Movement’ in Ronald S Laura and White W Saxon (eds), *Drug Controversy in Sport: The Socio-ethical and Medical Issues*, 1991 (Sydney: Allen and Unwin) 27. Also, the fact that a statement on steroids accompanied the list shows the IOC’s recognition of steroids as a problem. However, anabolic steroids were not included and they remained legal until the 1970s. In light of the growing concerns regarding the use of these substances in sport, it is telling that anabolic steroids were not viewed in the same way as amphetamines and narcotics; they were not primarily illicit drugs in the way these other substances were.


significance of the view of doping as an illicit drug problem. This is particularly so in light of the lack of scientific basis to these prohibited lists, as discussed in Chapter Two.

The second factor is the adoption of drug tests which had been devised for illicit drug detection. This will be discussed in more detail below but it could be argued that the contents of the lists were largely driven by the availability of drug tests. Since the tests available at the time were illicit drug ones, these were the drugs included on the list. Evidence for this assertion is found in the fact that steroids became prohibited substances once tests were devised. Even the fact that illicit drug tests were considered appropriate for doping agents is testament to the link between doping and illicit drugs. The adoption of a prohibited list could have been delayed until specialist doping tests could be developed. Instead, a list was published containing mostly illicit drugs. Since the need for action was driven strongly by illicit drug symbolism, it is unsurprising that the adoption of such a list would be acceptable in the sports context.

C Drug Testing

Techniques used in drug testing in sport ‘were based on a multitude of analytical procedures primarily developed for the investigation of metabolism, pharmokinetics and toxicology.’ Furthermore, the experts who developed sports drug testing first worked in the detection of amphetamine abuse in wider society: Arnold Beckett, in 1979, wrote:

We at Chelsea College were brought into the sphere of dope control in sport almost by accident. From about 1958 we had been carrying out work on drug distribution and metabolism and elimination in man… We were concentrating especially in the field of sympathomimetic amines and narcotic drugs. This work necessitated the development of analytical techniques for determining very small amounts of drugs and metabolites in biological fluids.

The adoption of such techniques, again, suggests that drug use in sport symbolized drug use in other settings such as the use of illicit recreational drugs. The implications of adopting these kinds of tests in sport will be considered more in Chapter Eight.

135 It is accepted here that the strength of this point relies on other aspects of the symbolism of doping as discussed above and below.


137 Arnold Beckett, ‘Misuse of Drugs in Sport’ (1979) 12 British Journal of Sports Medicine 185, 185. Beckett, when presenting at a conference on his more general detection techniques, was approached by a colleague interested in applying them to the sports context. For some of Beckett’s work outside the field of sport see above n 46. As Dimeo (above n 3, Ch 7) points out, the Italians were working on tests for doping agents at the same time with the specific aim of applying them in sport. While this was much more specifically related to doping, the fact remains that the ideas behind urinanalysis had been around in medicine for a long time and were being applied in the field of drug addiction.
These aspects of the regulatory form provide further evidence of the role of the symbolism of illicit drugs.

VI THE ROLE OF SYMBOLISM IN ALTERNATE EXPLANATIONS

A Stated Rationales

As with most policies, there were a number of reasons given for the developments in anti-doping policy in the 1960s. For instance, the CoE justified their condemnation of doping in 1967 on ‘grounds of health, poor example to the young and that doping was contrary to the spirit of fair play in sport.’

138

In Chapter Five it was pointed out that even the stated rationales for anti-doping in the 1920s was strongly influenced by the symbolism associated with doping. The same is true of the 1960s.

1 Health

Dick Pound claims that in the early 1960s, when the IOC Medical Commission first began its work ‘[t]here is no doubt that the initial concerns were related almost entirely to the health of the athletes.’

139 A number of examples of statements which reveal the health rationale as the primary motivation for the policy are provided below.

- An article published in the IOC bulletin in May 1962 entitled ‘Severe Measures Taken Against Doping in Italia As Well’ ended: ‘Let us save our youths and teach them that the use of toxic products may poison them in the long run. It is the duty of all of us to do so.’

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- Later that year, the same bulletin published an article about the ‘War on Doping in Switzerland’ and included these words: ‘A particularly important problem is that of trainers who, without the slightest knowledge of even the rudiments of medicine,
and with no moral scruples, poison their protégés by making them absorb noxious drugs.\footnote{International Olympic Committee, ‘War on Doping in Switzerland (Cont)’ (1962) No. 80,(November) *Bulletin du Comité International Olympique* 62.}

- In 1962 an article was published in the IOC bulletin written by Professor Giuseppe La Cava. He wrote regarding amphetamines, ‘the most dangerous’ sports drug:

> These indeed only apparently increase the individual’s overall output, by causing the rapid and complete consumption of energy reserves through nervous stimulation. Furthermore, while they eliminate the premonitory sensations of fatigue, they do not eliminate fatigue itself or its toxins; thus the natural signal which distinguishes fatigue, a physiological phenomenon, from exhaustion, a pathological one, fails to appear, with frequently tragic consequences.\footnote{La Cava, above n 60, 53.}

- A 1963 article in the IOC bulletin stated:

> At the present time, sport is affected by a real menace and evil: the practice of doping. It prevails in professional as well as in amateur sport. This evil must be fought. Doping provokes a false feeling of well-being which may lead the athlete to a state of auto-intoxication resulting from the physical effort he has made. It may also cause a physiological intoxication through the taking of a drug having damaging effects on the life and health of the athlete. Drugs capable of increasing the physical and mental output of the athlete should certainly be prohibited.\footnote{Dr. J. Ferreira Santos and Dr. Mario de Carvalho Pini, ‘Doping’ (1963) 81 *Bulletin du Comité International Olympique* 56.}

- In 1966 Albert Dirix, a sports medicine specialist with the Belgian Olympic Committee wrote:

> Doping has always been in the forefront among the present day problems in the field of Sports Medicine. In recent years, this evil has assumed such large proportions both within and outside the world of sport, that it seems absolutely essential to fight against it with every possible weapon; in default, we shall be faced with a problem which has certain analogies with morphomania and alcoholism.\footnote{Albert Dirix, ‘The Doping Problem at the Tokyo and Mexico City Olympic Games’ (1966) 6 *Journals of Sports Medicine and Physical Fitness* 183, 183.}

- In 1969 Sir Arthur Porrit wrote of the practice of doping: ‘It is, in other words, dangerous or toxic. If it were given in such a small dose that it is not toxic it would be quite valueless for the purpose for which it was taken. And this is an essential fact – that doping is a dangerous pastime.’\footnote{Porrit, above n 17, 106.}

The extracts above identify a number of different concerns regarding the effects of performance enhancing substances on the health of the athlete. Firstly, in two of the examples, there is the idea that drugs, particularly stimulants such as amphetamines, posed a real danger of overexertion by disabling the body’s warning system. In one, there is
reference to the addictive nature of doping: the problem of morphomania and alcoholism. There are also several extracts which refer to a general, unidentified danger: ‘toxic’, ‘poison’ and ‘noxious’ being some of the words used in association with doping. The health risks associated with doping were unproven and unclear at the time\textsuperscript{146} (and in many cases still are) and yet it seems there was widespread acceptance of the imminent health dangers of doping. It is clear that another influence was at work, at least part of which was the view of doping as a form of illicit drug taking: references to alcoholism and morphomania make this connection clear. Like the dangers of addiction to recreational drug use, the doping athlete is seen as risking enslavement to the practice of doping. Furthermore, reference to doping agents as a non-specific danger is also driven by the assumption that all doping substances are dangerous drugs, just as all recreational drugs are dangerous ones. As discussed in Chapter Five, the idea that doping was harmful to the health of the athlete was strongly influenced by the clash of images between the drug addict and the Corinthian athlete: one the epitome of health and cleanliness, the other the antithesis of it.

2 \textit{Fairness}

Health was not the only rationale presented for anti-doping policy at this stage; fairness also rated a mention. Bound up in the notion of fair play was the idea of a sporting ethic which was transgressed by doping practices. Some examples of the kinds of statements made in this regard include:

\begin{itemize}
\item ‘Of at least equal importance is the need to try to retain the ideal of pure sporting competition and prevent sporting ideals and values from becoming falsified...doping must be regarded primarily as a sporting and not a medical problem. Doping is unfair in any case, but not necessarily injurious to health. Doping may therefore also be regarded as a dangerous fraud.’\textsuperscript{147}
\item ‘Doping is an evil — it is morally wrong, physically dangerous, socially degenerate and legally indefensible’\textsuperscript{148}
\item Where in the circles of sportsmen and publicity about sport there is argument against doping, emphasis should be laid on the intrinsic objection, namely the unfairness of breaking an agreement in a backward manner. This is stressed by the fact that ineffective and medically harmless artificial means used in an attempt to increase the performance are concerned as dope and therefore rejected as well. It is the ethical and not the toxicological violation that counts for sportsmen.\textsuperscript{149}
\end{itemize}

\textsuperscript{146} Dimeo, above n 3, 108 and 128 for example notes the inconsistent views of scientists on the subject.
\textsuperscript{147} Prokop above n 51, 267-268 in Dimeo, above n 3, 94.
\textsuperscript{148} Porritt, (1965) above n 17, 166.
\textsuperscript{149} Ariens, above n 41, 29.
• The taking of medicinal substances...seems to be a common occurrence in some circles, just as drug-taking appears quite normal to many young people today. In both categories those concerned refuse to make a personal effort by relying on the unnatural ease and artificial source of energy induced by a product which conceals their deficiencies.  

These examples demonstrate a mix of references — fairness, cheating, moral degradation, fraud, unsportsmanlike behaviour — making it difficult to ascertain the precise argument. However, there is certainly the idea that doping is cheating because doping substances cause an athlete to perform far better than normal. The assumption here is that the doping substance has been effective, so effective that it determined the outcome of the competition. In light of the paucity of evidence for this assumption, this kind of belief is somewhat surprising. However, in light of the discussion above regarding the symbolism of doping which associated it with the power of science and drugs, the continued belief in the determinant effects of doping are more understandable.

3 Role Model to Young

As noted above, the CoE’s 1967 condemnation of doping was based on health, spirit of sport and role model to the young. The connection to illicit drug symbolism is clear, the terminology being reminiscent of the ‘war on drugs’. If doping was purely a problem of sports ethics, with no implications outside the sporting context, then this kind of argument should equally apply to all breaches of the rules of sport. The fact that this particular breach was seen as presenting a bad role model suggests that there was a general concern regarding young people taking these substances, not just that sport would be contaminated.

B Other Explanations

There are other potential explanations for the way in which anti-doping policy developed in the 1960s which was not as clearly part of the anti-doping discourse of the time.

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150 Berlioux above n 69, 561-562.
151 See for instance the statements by the BASM to the effect that the only effective and safe way of enhancing performance was through training: British Association of Sports Medicine, above n 58, 109. See also Dimeo, above n 3, 83 for a discussion about research into the efficacy of steroids.
152 Furthermore, the arguments regarding the spirit and ethos of sport were clearly part of the amateur ethos rhetoric which will be considered separately below.
153 Houlihan, above n 7, 130.
154 For just one example see US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Be a Positive Role Model <http://ncadi.samhsa.gov/govpubs/phd711/rolemodel.aspx> at 22 April 2008.
1  **Amateurism**

Amateurism was discussed in detail in Chapter Five. Even though major inroads into the amateur ideal had been made, the issue was still alive in the 1960s.\(^{155}\) As in the 1920s and 1930s, drugs were seen as a real threat to that ideal: ‘it is certain that our present code of amateurism could never bless such all-out efforts.’\(^{156}\)

As discussed in Chapter Five, part of amateurism was the Corinthian ideal of the perfect sporting body. This ideal was also still operative in the 1960s. For example, in the IOC bulletin in 1969 this was published:

> I would prefer to class the athlete as a ‘better race’ on the surface of the earth. The future generations would inherit their characters and therefore a continuity of good human society would be maintained. I would never wish then, that we should be deprived of such fine, healthy persons as a result of doping.\(^{157}\)

The symbolic clash between the image of the ideal sportsperson and the drug addict was even more significant in the 1960s, as fears relating to recreational drug use had become something much more prominent in the public mind.

2  **Role of Scientists**

Another factor which Dimeo regards as essential to the understanding of the history of anti-doping policy at this point is the role of individual scientists and their influence on the ethical debate.\(^{158}\) However, Dimeo also points out that these scientists did not work in an ethical or emotional vacuum; they too were influenced by their idealistic notions of sport: ‘They were proselytisers as well as fanatics.’\(^{159}\) Scientists too, were affected by the clash of images between drug addicts and their ideals of pure sport.\(^{160}\)

3  **Regional Differences**

One aspect of the history of the development of anti-doping policy in the 1960s which needs to be addressed is the regional differences in ‘behaviours, attitudes, institutional

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\(^{155}\) For an example of the distinction between professional and amateur sport in terms of doping see Porritt (1965) above n 17, 166: ‘Not surprisingly, it is the big crowd-attracting professionally sports which appear to produce the worst offenders...but, unfortunately, there have been many well-authenticated cases in quite a number of amateur sports as well.’


\(^{157}\) Oza, above n 73, 211-212. See also Dimeo’s comments regarding this statement, above n 3, 56-57.

\(^{158}\) Dimeo, above n 3, 94ff.

\(^{159}\) Dimeo, above n 3, 95.

\(^{160}\) This clash is particularly clear in light of the number of references to addiction in sources where scientists moralize about doping. It should be noted here that the power of science was also strong in the assumptions of these men too — belief in that power resulted not only in their pushing for total prohibition but also the regulatory approach based on scientific testing.
responses and outcomes’ identified by Dimeo.\textsuperscript{161} Doubtless, Dimeo is correct in his assertion that different nations approached and dealt with the issue in different ways. However, the symbolism discussed above was operational across borders in the 1960s: each approach was influenced to varying degrees by the symbolism associated with doping.

Dimeo demonstrates a major difference between both the level of doping and commitment to anti-doping sentiment in the USA, Britain and Europe at this time. The USA was the country where doping was most common. Dimeo suggests this is because of the American entrepreneurial spirit and the influence of returning veterans.\textsuperscript{162} The US has, until very recently, been accused of being very half-hearted in their anti-doping activities. Britain, on the other hand, Dimeo identifies as being very strong in their anti-doping sentiment even though doping was not as prevalent in the UK.\textsuperscript{163} Dimeo also states that European countries such as East Germany and the USSR were ambivalent to doping at this stage.

Although, of course, these attitudes were a result of a number of factors, one part of the explanation is to be found in the balance between the influence of illicit drug symbolism and other influences such as Cold War political motivations. As outlined above, all nations were keenly aware of the political implications of success at this level of sports competition. Associated with the desire to win political points through international sport was the perception that drugs were needed to compete (driven by the symbolism of the power of drugs). The desire to curb the use of performance enhancing substances in sport would have been naturally hampered if authorities saw the use of such substances as necessary to achieving the all-important sporting victories. Although in the US, illicit drug symbolism and anti-drug, pro-prohibition sentiment was strong — as evidenced by the number of US newspapers in the above examples — it is clear that the desire to win in international sport was stronger.\textsuperscript{164} Thus Cold War fears outweighed the influence of doping symbolism. Support for this contention can be found in the fact that it was not until the Cold War was over that the US became much more pro-active in their anti-doping efforts.\textsuperscript{165}

\textsuperscript{161} Dimeo, above n 3, 122.
\textsuperscript{162} Ibid. 122-123.
\textsuperscript{163} Ibid. 123.
\textsuperscript{164} This is particularly clear in the discussion of the use of steroids in the next chapter.
\textsuperscript{165} It is generally agreed that up until this point, the US was seen as not taking anti-doping seriously despite strong anti-doping rhetoric. See for instance Dimeo, above n 3, 117 quoting one-time IOC president Lord Killanin: ‘However, he remained sceptical about activities in the USA where the authorities were unwilling to address the problem: there were no drug testing facilities in the whole country even by the early 1980s.’ See also Robert Voy
A similar thing can be said of East Germany and the USSR. Cold War political motivations were just as strong and illicit drug symbolism was probably not as influential in these regions since they did not have the same history of prohibition sentiment.

Britain, on the other hand, had not been strongly prohibitionist in its approach to illicit drug policy. Why would anti-doping sentiment be stronger there? Firstly, since it was not one of the political superpowers at the time, Cold War politics did not play as important a role in Britain as the US. Thus, British sports authorities were in a stronger position to deal with the issue free from these political influences. However, as Dimeo identifies, the strength of anti-doping sentiment in Britain can be largely traced to the influence of the amateur ethos in that country. Unlike the US, where the national significance of professional leagues had weakened the importance of the amateur ethos, the ideal image of the Corinthian athlete was still strong in Britain. As discussed above, the clash between the image of the drug addict/user and the ideal athlete was a significant influence in the anti-doping debate. There is good evidence that British attitudes to doping were influenced by drug addiction language. One particular example is provided above: a 1969 reference to the press making British athletes out to be no better than ‘junkies’ and doping as athletes getting their ‘fix’. Furthermore, even in the late 1950s, when pep pills in sport were first reported, the British used the language of drug abuse. For example, the reports discussed above of Dr Herbert Berger’s view that the four minute mile was achieved through the use of amphetamines was reported in much more sensationalist drug related language in The Times than in The New York Times: ‘Dangerous Drug Use by Athletes’, ‘most of the abuse was in boxing’ and “Pep” Drug Charge Awaits
Inquiry'. It is no wonder that the use of such substances was condemned so strongly when their use, seen as a type of drug abuse, appeared so incongruous with the image of the pure athlete. As Dimeo put it:

The influence of amateurism and the traditional public school mentality made drugs seem antithetical to sporting competition. Lord Lonsdale’s view that using stimulants was ‘un-English’ typified a middle- and upper-class understanding of what sport was for and what it was all about.

Thus, even the regional differences in anti-doping sentiment can be seen, at least in part, as due to the varying importance in doping symbolism.

VII CONCLUSIONS

Outside sport, in 1958, the problem of teenage doping in Britain had not yet come to the fore; the pop groups were only just beginning to set national trends among the youth, and the almost open market of pep pills, purple hearts and even narcotics through the coffee bars, strip clubs and ‘love-ins’ was not yet established… Within a few years drug taking spread in Britain, and a black market for pep pills was soon established. Drugs that offset fatigue in all-night jive and rock sessions could easily be tried out to offset fatigue in sport, and be found efficacious…the general permissiveness of society does little to discourage youngsters, whether competing in sport or not, to seek new thrills and experiences.

It is usually the doping-related deaths in sport which are identified as the catalyst for anti-doping policy in the 1960s. On one level the causes of these events are uncomplicated: athletes got sick or died, apparently from the use of amphetamines and other doping products. Something needed to be done. However, as Dimeo points out, the history of anti-doping is complicated and a simplistic cause and effect does not adequately explain the events and decisions.

There are a number of factors, even in these tragic deaths, which need further explanation and demonstrate clearly the role of symbolism. The medical evidence in the two most public cases — Jensen and Simpson — revealed that there were other factors involved in the deaths: Knud Jensen appears to have died of heat stroke, while other contributing factors in Simpson’s death included complications arising from dehydration brought on by the heat and diarrhoea. Yet these stories have been constructed as being simply due to amphetamine use. Why?

170 "Pep" Drug Charge Awaits Inquiry: Dr Berger Silent, The Times (London), 8 June 1957, 5.
171 Dimeo, above n 3, 123.
173 Dimeo, above n 3, 134.
174 Fredericksen, above n 111.
175 Dimeo, above n 3, 128. See also Mignon, above n 39, 231 and Fotheringham, above n 116, 179ff.
Moreover, Knud Jensen’s death has been identified as the first in Olympic history.\(^{176}\) Jensen’s death was actually preceded by the death of the Portuguese marathon runner, Francesco Lazar, at the 1912 Stockholm Olympics.\(^{177}\) Why was this death ignored and Jensen’s death remembered as the first? When rumours circulated that Jensen and his team mates had been given amphetamines, the IOC set up a study on the issue of doping.\(^{178}\) Why was no similar action taken after Lazar’s death? Furthermore the marathon has obvious health implications and, in fact, commemorates an incident in which the runner died.\(^{179}\) Why has such an event had a permanent and elevated position in the Olympics?

The Tour de France is a gruelling event. One rider has claimed:

> The riders reckon that a good Tour takes one year off your life, and when you finish in a bad state, they reckon three years... You can’t describe to a normal person how tired you feel... In 1987, when I finished in a really bad way it took until the end of November to recover, by that I mean until I could wake up and not feel tired as if I had already done a day’s work.\(^{180}\)

Yet when Tommy Simpson died, it was drugs which were blamed, not the strenuous nature of the event. It has been said that the significant factor in Tommy Simpson’s death was that it was televised. Like the televised coverage of the Vietnam War,\(^{181}\) it has been argued that the visual impact of Simpson’s death led to action. But television coverage is only part of the answer. The coverage of Vietnam led to demands that the war be ceased, not a total prohibition on the use of the weapons that caused the carnage. Why did the television coverage of a death in the Tour de France not lead to demands for the cessation of the Tour, rather than of the drugs involved? As Dimeo stated ‘[b]y the time the rationale for anti-doping was firmed up in the 1960s it was the drugs – and wider social misuse of drugs – that were seen as the real culprits.’\(^{182}\) It is a narrow view which focuses only on the use of performance enhancing substances.

Finally, even if the deaths of Jensen and Simpson had been what they have been made out to be — attributable only to amphetamine use — there were also other approaches to

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\(^{179}\) Chicago Daily Tribune, above n 176.

\(^{180}\) Mignon, above n 39, 228.


\(^{182}\) Dimeo, above n 3, 90. He was referring to the wider issue of highly competitive sport but the sentiment is equally applicable in this context.
dealing with the problem. Savulescu, Foddy and Clayton suggest that one alternative to a total prohibition and drug testing is to have medical checks for athletes, their participation relying on satisfaction of health criteria. It appears that this possibility, although it had been utilised previously in the 1912 Olympic marathon in Stockholm, was not even entertained.

It is clear that there were hidden assumptions and attitudes influencing decision making about anti-doping policy. The combination of the symbolism of the power of drugs and the associations between doping in sport and the recreational use of dangerous drugs of addiction in society worked strongly together.

Perhaps the strongest evidence of the role of symbolism is in the changing symbolism associated with amphetamines. When amphetamines were freely available drugs which were viewed in a positive light, anti-doping sentiment was weak. By the end of the 1960s, recreational drug use was a high profile public issue and amphetamines had become illicit recreational drugs. Doping then became an issue. Just as amphetamines had been demonised in the years between the early 1950s and late 1960s, so too doping in sport had been demonised. The seeds of symbolism planted in the 1920s began to grow and bear fruit. This symbolism fed into public fears regarding the use of recreational drugs by rebellious youth in the 1960s.

It was not just that Knud Jensen and Tommy Simpson died. It was not just that they died competing. It was not just that they died enhancing their performance. It was that they died of drugs; the same drugs that were being used in ‘coffee bars, strip clubs and ‘love-ins’: illicit drugs. Their deaths were linked with amphetamines, ‘… possibly the most destructive of the drugs being abused.’ This is the same drug which, about a decade earlier, was labelled as more benign than caffeine.

Anti-doping discourse in the 1950s and 1960s, like the 1920s and 1930s, was dominated by illicit drug symbolism. The links with illicit recreational drugs had set in place a total prohibition on performance enhancing substances in sport in the 1920s. It led to the

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184 Desborough, above n 177, 112.
185 Similarly it has been said that anti-doping was modelled on horse racing: Ferstle, above n 132, 368. There is a need for further explanation as to why horse drug testing was instituted in the 1930s while the introduction of human testing did not happen until the 1960s. Part of the explanation lies in the fact that it was not until the 1960s that drug issue was taken seriously enough to warrant invasion into athlete’s lives.
186 Møller, above n 45.
187 La Cava, above n 60, 53.
188 Weiss and Laties, above n 64, 32.
expansion of that system in the 1950s and 1960s with the introduction of prohibited substances lists and drug testing. Illicit drug symbolism, therefore, had enormous influence in these two time periods. As will be shown in the next chapter, illicit drug symbolism remained operative into the 1970s, but doping and anti-doping discourse was to change significantly, and, with it, the symbolism associated with performance enhancing substances.
CHAPTER SEVEN

SYMBOLISM IN THE ‘SECOND CHAPTER’ OF ANTI-DOPING HISTORY

I  INTRODUCTION

Dianabol, Dianabol
It’s the gateway to fame.
With Dianabol you’ll win them all
Unless the others are using the same.1

Androgenic anabolic steroid use presented the major issue in anti-doping policy in the 1970s.2 The song above demonstrates two ideas which characterised doping discourse in the 1970s: a strong belief in both the power of steroids and the prevalence of their use. Steroids were fundamentally different to the drugs that had been used before in sport: they were not ‘race day drugs’.3 While stimulants and narcotics, which had been used in sport between the 1870s and 1970s, were designed to boost the athlete’s performance on the day of competition because they were substances with a short active life, steroids were designed to enhance long-term strength and were best used in the training period. The issues that steroids raised for anti-doping policy were therefore quite distinct from those that were dealt with in the 1950s and 1960s and discussed in the previous two chapters, warranting treatment in a separate chapter of the thesis.

In light of these differences, the way in which steroids were dealt with by the sporting authorities is particularly telling. Symbolism was equally, if not more, important in the developments in anti-doping policy in the 1970s than in previous time periods. While illicit drug symbolism still played an important role, a new kind of symbolism, one based on nationalist patriotism, began to emerge. Woven into both of these issues was the continuing theme of the power of drugs, but in this era the power of drugs took on an even more sinister aspect than in the 1960s.

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2 Although the correct technical name of anabolic steroids is ‘anabolic androgenic steroids’, ‘steroids’ or ‘anabolic steroids’ will be used here for ease of reference.
This chapter will consider the symbolism of doping in the 1970s and the way in which it influenced anti-doping policy. As with the previous two chapters, the 1970s steroids regulations will be examined, some historical background explored, and then the symbolism of steroids considered. Again, the significance of the regulatory regime will be discussed and the role symbolism has played in other interpretations of this historical period. Conclusions are presented in the final section of the chapter.

II 1970s STEROIDS REGULATION

Even by 1967 anabolic steroids were beginning to be an issue for sports officials. The 1967 International Olympic Committee’s (IOC) Prohibited List, set out in Chapter Six, included a statement saying that steroids were regarded as being within the definition of doping. The statement read in part:

Summary on anabolic steroids

Anabolic steroids have been increasingly used in sport since at least 1963. Their effect is to facilitate muscle building by utilising ingested protein to a maximum. By using these drugs in conjunction with a high protein diet and strengthening exercises, a dramatic increase in body weight and strength can be achieved. The advantages that such changes can have to sporting activities requiring power are obvious.

The drug is taken during the training period, that is to say not at the time of a championship or meeting.

The harmful side effects are few. Basically, in the male, they are:

1. Jaundice.
2. Fluid retention (leading possibly to increased blood pressure).
3. Impotence.
4. Failure or reduction in spermato genesis.
5. Acne.

In the female:

6. Hirsutism.
7. Menstrual disturbances.

In adolescence:

8. Stunted bone growth.

Because the drug is not taken at the time of a championship or meeting detection is difficult. Detection, however, is theoretically not impossible. The details of detection would require the close co-operation of an expert endocrinologist with specialized laboratory facilities. Probably the most informed department in Britain on this subject is that of Professor Prunty of St. Thomas Hospital.4

The prohibition on the use of steroids by the IOC was introduced in the 1970s.\(^5\) Exactly when this prohibition was instigated is difficult to pinpoint since there are a number of different dates suggested in the various accounts.\(^6\) Technically it could be argued that steroids were actually included on the IOC Prohibited List in 1967 for, although they did not appear on the actual list with the other prohibited drugs, Item Three on the list stated: ‘The I.O.C. considers that the use of anabolic steroids (except for medical purposes) constitutes “doping” from the Olympic viewpoint.’\(^7\) However, the preponderance of opinion seems to be that it was the mid 1970s when steroids were banned in Olympic Sports. Other sports federations had prohibited steroids in the years previously as well.\(^8\)

Whatever the date of the prohibition, by 1976 steroid testing had been introduced.\(^9\) The IOC was the first sports organisation to introduce steroid testing\(^10\) and the tests to be used were those introduced in the British Journal of Sports Medicine in 1974. The details of the testing were elucidated by the head of the IOC Medical Commission, Prince Alexander De Merode, at the October meeting of the IOC of the same year\(^11\) and it was

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\(^5\) It seems that the IAAF (International Amateur Athletics Federation as it then was) were the first to prohibit steroids (1970) although it was not possible at that stage to take action on the prohibition due to deficiencies in testing: Arnold Beckett, ‘Problems of Anabolic Steroids in Sport’ (1976) Nov-Dec(109-110) Olympic Review 591, 597. Beckett states that the IOC banned the use of steroids in 1974. However, one article from The Times newspaper from 1970 suggests that the IOC had banned steroids before 1970. The article states: ‘the official world record holder in the shot, Randy Matson, of the United States, has admitted to me that he took steroids before they were banned by the International Olympic Committee’. Neil Allen, ‘Official Wants to Ban Shot Event’, The Times (London), 15 April 1970, 14. This could be referring to the statement on steroids in 1967. It should also be noted here that the focus of this chapter will be on Olympic sport since the IOC has been the focal point (although not necessarily the leader) for anti-doping policy up until the creation of the World Anti-Doping Agency (WADA).

\(^6\) Paul Dimeo, A History of Drug Use in Sport 1876-1976: Beyond Good and Evil, 2007 (London: Routledge), 112 states that the IOC added them to their Prohibited List in April 1974 after experimental steroid testing was carried out at the 1974 Commonwealth Games in Christchurch. Hunt, on the other hand, dates the inclusion of steroids on the list as May 1977: Thomas M. Hunt, ‘Sport, Drugs and the Cold War: The Conundrum of Olympic Doping Policy, 1970 - 1979.’ (2007) XVI Olympika: The International Journal of Olympic Studies 19, 28. Beckett and Cowan state ‘the work [of developing a test for steroids by Raymond Brooks] became sufficiently advanced so that the IOC Medical Commission was able to include anabolic steroids amongst the banned classes in April, 1975’: A H Beckett and DA Cowan, ‘Misuse of Drugs in Sport’ (1979) 12(4) British Journal of Sports Medicine 185, 189. Beckett and Cowan provide the details of the listing but do not cite the meeting at which this decision was made while Hunt quotes Prince Alexander de Merode as saying ‘the reason for this is that the progress of the scientific work proposed gives complete guarantee as to the accuracy of the results that can be obtained: Hunt, this note, 28.

\(^7\) International Olympic Committee, above n 4, 34.


\(^9\) It is not surprising that the actual prohibition is unclear since the IOC was not a legally sophisticated organization at this point in time. The point has been made previously that Dick Pound claims that it was not until the 1990s that the IOC Medical Code became a legal document: Dick Pound, Inside the Olympics, 2004 (John Wiley and Sons: Mississauga), 69.

\(^10\) Dimeo, above n 6, 113.

announced in the media that these tests would be used at the next Olympic Games.\(^{12}\) There was some experimentation with the tests at the 1970 and 1974 Commonwealth Games in Edinburgh and Christchurch but no sanctions applied at that stage.\(^{13}\) The prohibition on steroids was therefore first operational at the 1976 Olympic Games in Montreal and ‘led to five further disqualifications including medal winners.’\(^{14}\)

There is little to suggest that the adoption of the prohibition on, and testing of, steroids was a controversial issue; a number of sports organisations had prohibited these substances and it seems that the IOC accepted the need to introduce testing as soon as possible, partly from the interest that the public were taking in the issue.\(^{15}\)

The year 1974 also saw a new development in the IOC doping rules. Up until this point the rules against doping were contained in the athlete’s entry form. The IOC minutes formalised them in Rule 26(a) – Medical. It read:

1. Doping is forbidden. The IOC will prepare a list of prohibited drugs.
2. All Olympic Competitors are liable to medical control and examination, in conformity with the rules of the Medical Commission.
3. Any Olympic competitor refusing to take a doping test or who is found guilty of doping shall be eliminated. If the Olympic competitor belongs to a team, the match or competition in question shall be forfeited by the team. After the explanations of the team have been considered and the case discussed with the International Federation concerned, the team in which one or more members have been found guilty of doping may be disqualified from the Olympic Games. In sports in which a team may no longer compete after a member has been disqualified, the remaining members may compete on an individual basis in agreement with the IOC…\(^{16}\)

The need to reformulate the anti-doping rules arose from a perception that the former rule was ambiguous. Lord Killanin in 1974 stated at a press conference: ‘This rule concerning doping is not very clear. We have therefore amended its format without making fundamental modifications to the rule itself.’\(^{17}\) This extract clearly demonstrates that, although the issue of steroids had pushed anti-doping sentiment to a new level of intensity — warranting a reinforcement of the rules — there were to be no fundamental changes to the regulatory scheme established in the 1930s to 1960s.

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\(^{13}\) Neil Allen, ‘Drug Takers Not to be Punished’, *The Times* (London), 17 July 1970, 12 and Terry Todd, ‘Anabolic Steroids: The Gremlins of Sport’ (1987) 14(1) *Journal of Sport History* 87, 98. Todd mistakenly lists Auckland as the host of these games but they were held in Christchurch.

\(^{14}\) Beckett, above n 5, 591.

\(^{15}\) Hunt, above n 6, 21 and Dimeo, above n 6, 112 both relate the story of Avery Brundage asking the IOC Medical Commission in 1971 if a test was ready. Brundage’s interest in the matter in 1969 was apparently aroused by being asked by a journalist how the IOC was going to stop athletes using steroids if they ceased use before competition: Alison Wright, *The Human Factor: Science, Medicine and the International Olympic Commitee, 1900-70* (2004) 7(2) *Sport in Society* 211, 225.


III HISTORIC BACKGROUND

A Sport

As sport became more important and lucrative, there was added incentive to improve athlete’s training and preparation procedures via scientific methods. Unlike the other periods considered so far, this era was characterised by systematic application of these methods on a national basis. The political significance that sport was assuming gave national governments the impetus to contribute to efforts in these areas. There were major developments in many areas of sports science during the 1970s, including the introduction of strength training through the use of weight training, the introduction of talent identification systems and the development of specialised training facilities for potential national athletes.

Another significant development in sport was the increasing international importance of the Olympic Games. The Olympics provided a focal point for international sport like no other event. It was therefore natural for nations harbouring ambitions on the world sports stage to view the Olympics as an opportunity to demonstrate their superiority. Furthermore, there was more money involved in the Olympics through negotiations over television rights and also early sponsorship deals. Although far from the rich and powerful organisation that it is today, the IOC was beginning its transformation from an

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21 National training schemes are often identified with the Eastern Bloc countries such as East Germany but they were also established in Western Countries in the 1970s. For instance, the Australian Institute of Sport (AIS) set up in 1980, was a response by the Australian Federal Government to the lack of medals won at the 1976 Olympics in Montreal by Australian athletes. It was based on the ‘European model’: Australian Government: Australian Sports Commission, History of the AIS <http://www.ausport.gov.au/media/fact_sheets/history_of_the_ais> at 2 May 2008.
23 It was in 1980, when Juan Antonio Samaranch took over as president, that the IOC made a concentrated effort to become more financially viable. However, it is clear that there was some activity in generating income in the 1970s. See Pound, above n 9, 95.
impoverished ‘rich boys club’\textsuperscript{24} to one of the world’s richest and most powerful organisations.

Amateurism continued to be a major issue in Olympic sport in the 1970s. During the 1960s and early 1970s, Avery Brundage was the president of the IOC: ‘A great advocate of amateurism’.\textsuperscript{25} Despite Brundage’s best efforts to maintain the official position of the IOC on amateurs, the introduction of athletes from national institutes — where athletes trained full time — and the involvement of athletes who were paid unofficial endorsements and appearance fees, made the rift between the ideal Olympic athlete and the reality of the situation even wider than in previous generations.\textsuperscript{26} Only three years into the 1980s the IOC were forced to change their rules regarding the participation of amateurs at the Olympics.

However, the greatest characteristic of international sport in the 1970s was the effects of the Cold War: ‘the Olympic Games came increasingly to focus tensions between two nuclear powers with ideologically opposed political and economic structures.’\textsuperscript{27} For instance, when the USSR announced that it would send a team to the 1952 Helsinki Olympics, it was reported in The New York Times:

Soviet Sports said that the Olympics require athletes to “redouble their efforts to heighten their mastery in order to be fully prepared to meet the strongest athletes in the world and to emerge from this with honor to raise still higher the sports glory of the Soviet fatherland”.\textsuperscript{28}

Headlines in the same paper read ‘Rivalry Between US and Russia to Enliven Helsinki Competition: Cold War of Sport Will Start Simmering When Soviet Claims of World Records Are Put to Stern Test at Olympics’.\textsuperscript{29} As Dimeo notes, with the successes of the Soviet athletes, the USA became more and more determined to fight back on the sporting stage. Later in the Cold War, one athlete was quoted as saying ‘[t]he East-West thing is the big thing now. There’s no more true sport involved’\textsuperscript{30} and:

\begin{thebibliography}{9}
\bibitem{24} Ibid, 139.
\bibitem{27} Dimeo, above n 6, 95.
\bibitem{30} Amdur, above n 1.
\end{thebibliography}
the tragedy is that the drug situation is only part of the real problem. What we have in amateur sport is several power-hungry countries that are still desirous of using the world athletic stage to promote their individual brand of propaganda – rules, morals and athletes be damned.\textsuperscript{31}

Such nationalism took amateur sport to a new level of importance,\textsuperscript{32} with the powers of sport science being harnessed to enhance the nation’s sporting achievements. As Beamish and Ritchie state:

The Second World War and the beginning of the Cold War transformed international, world-class, high performance sport as approaches to training, the use of scientific knowledge to enhance performance and the resources directed towards the pursuit of the liner record changed dramatically…two of the central reasons [for what Roger Bannister described as ‘a strange period in the history of sport’ where ‘every country seeks to enhance national prestige by physical achievements’] were the strategic political objectives that particular national leaders held and the concomitant increased allocation of resources directed to world-class sport.\textsuperscript{33}

In 1970 Dr Georg van Opel wrote the following words, which give a taste of the flavour of Olympic Sport at that time:

There is no longer any room at the Olympic Games for the development of free individuality and for contests among free persons. The political comparison of nations in the sports field has brought by force the transformation of the lover of sport (amateur) into the national athlete and puppet in the struggle of power politics. The step-by-step adaptation to the national passion for self-assertion in sport is the gradual loss of freedom and human dignity in sport. The national athlete is an agent commissioned by the state, a man enslaved by his mission, a manipulable tool to the state and propaganda. The national athlete must train and win.\textsuperscript{34}

\textbf{B \textit{World}}

The tensions on the sporting field created by the Cold War were obviously part of a much wider social phenomenon which characterised the 1970s. As dominant as these political issues were, there were other issues in the wider social setting which had some effect on sport and anti-doping policy in the 1970s.

The increasing use of recreational drugs by young people in the 1960s continued into the 1970s, as did the backlash against it. This resulted in a continued pattern of increasing criminal penalties for illicit, recreational drug use. Parents of teenagers were still vitally concerned about the drug habits of their children and such concerns obviously had a huge

\textsuperscript{31} Ibid.
\textsuperscript{32} Beamish and Ritchie, above n 3, 427 state ‘[i]rrespective of the motivation, the Soviet Union and later East Germany and other Eastern bloc countries invested heavily in the development of well-funded sport systems and put particular emphasis on the development of applied sport science.’
\textsuperscript{33} Beamish and Ritchie, above n 3, 424.
\textsuperscript{34} Georg van Opel, \textit{International Olympic Committee Executive Board Minutes}, 3-4 October 1970 cited in Dimeo, above n 6, 115.
impact on their attitudes towards drug use in sport. The 1970s image of a drug user appears to have been similar to the late 1960s, with a strong association between drug users and the rock and roll and rebellious youth cultures. The hippie movement of the 1970s, strongly associated with psychoactive (and illegal) drugs, was also a major concern for many people. The characterising features of this movement were a rejection of traditional living and an adoption of alternative lifestyles.

Attitudes to science had also begun to change. It was not that science was viewed as lacking power; it was the motivation behind the power that was a concern. As Beamish and Ritchie point out, as a result of the experiences of the Nazi experiments in World War II (WWII) and the role of science in the nuclear arms race of the Cold War, science was no longer seen as the beneficial force it was once viewed to be. Similarly, Dimeo suggests that catastrophes such as those caused by the drug, thalidomide, had affected public opinion regarding the danger of medical drugs.

Thus in the 1970s there were political tensions arising from the Cold War, concerns about recreational drug use and a rejection of the modernist optimism about science and drugs. All of these affected the symbolism associated with doping.

C Anti-Doping

1 Doping in the 1970s

In order to understand anti-doping in the 1970s it is necessary to first understand the history of the development and spread of steroids in the 1950s and 1960s. Researchers such as Yesalis and Hoberman have documented the early experiments into the use of male hormones to enhance physical performance, but most agree that it was the mid 1950s before testosterone was first used as a performance enhancing substance in competitive sport on any scale. At the 1952 Olympics, it was alleged by the US weightlifting team

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35 They argue that Nazi atrocities, as well as the bombing of Hiroshima and Nagasaki and other aspects of WWII ‘[a]ll demonstrated the catastrophic reality of the unrestrained, systematic application of scientific, instrumental-rationality in the quest for victory: Beamish and Ritchie, above n 18, 782.

36 Dimeo, above n 6, 88. Note also that these changes in attitude to science coincided with the social changes which have been identified as postmodernism which rejected the ‘[e]nlightenment-inspired view of objective truth’: Encyclopaedia Britannica Online: Library Edition, Ethical Relativism and Postmodernism (2008) <http://www.library.eb.com/all/eb/print?tocId=242044&fullArticle=false> at 23 July 2008.


39 Dimeo, above n 6, 72, notes that there is anecdotal evidence to suggest that the first use of steroids in sporting competition was by Californian bodybuilders. He makes the point, which will be referred to later in this chapter,
coach that the team from the USSR was using ‘hormone stuff to increase their strength.’

This allegation was confirmed by Dr John Ziegler, the doctor for the US weightlifting team at the 1954 World Championships. Upon returning to the US, Ziegler worked with Ciba Pharmaceuticals to develop a drug which would use the strength benefits of testosterone while limiting the unwanted androgenic effects. After trialling them himself, Ziegler introduced the drug to three weightlifters. Although the results of these experiments were inconclusive, Bob Hoffman, coach to the American weightlifting squad for the 1960 Olympics, was persuaded to try some members of his squad. The subsequent achievements of these athletes led to news about the efficacy of steroids spreading.

At the 1960 Olympics Games in Rome, steroid use was apparently limited to the Soviet strength athletes and a few American weightlifters, while at the 1964 Games most strength sports were involved. By the 1968 Mexico Olympics, use had spread to other track and field events to such an extent that an unofficial survey by Dr Tom Waddell, a US athlete, estimated that over one third of the US Olympic team had used steroids at the 1968 pre-Olympic training camp. The use of these drugs accelerated and a similar survey taken by (then) discus world champion, Jay Silvester, at the 1972 Munich Olympics revealed that two thirds of those athletes questioned had previously used steroids. By 1978 the steroids expert, James Wright, estimated that over 90 percent of athletes in strength-related sports were using steroids. There is also evidence that steroids were being used in the less strength-dependent sports such as track and swimming.

that Western accounts of the history of anabolic steroids construct the development of these drugs as a response to Eastern Bloc use of hormones in sport thus associating these sinister drugs with Communist states.


Dimeo, above n 6, 74 argues that there is evidence that Ziegler was not simply responding to the use of these hormones by the USSR athletes but that he and Ciba Pharmaceuticals had been (unethically) experimenting with the use of testosterone before 1954.

That is, the masculinising effects such as enlargement of the prostate which, as Ziegler reported, had meant that the Russian athletes had to be catheterized in order to empty their bladders: Bob Goldman, Death in a Locker Room: Steroids and Sports, 1984 (South Bend: Icarus Press), 1-2; Charles E Yesalis, Stephen P Courson and James E Wright, History of Anabolic Steroid Use in Sport and Exercise in Charles E Yesalis (ed), Anabolic Steroids in Sport and Exercise (2nd ed) 2000 (Champaign: Human Kinetics), 54.

See Todd, above n 11, for a good explanation of how the effect of steroids became well known. Again, Dimeo, above n 6, 76 states that Ziegler had been experimenting with testosterone on weightlifters in 1952 as well.

Dimeo, above n 6, 76.

Todd, above n 13, 94 and Dimeo, above n 6, 73-74.

For a detailed narrative of the spread of anabolic steroids in both Olympic and professional sport see Dimeo, above n 6, 76-82.

Yeslais et al, above n 42, 54.


This much is clear from the evidence which has emerged regarding the state-controlled doping in East Germany: see Werner Franke and Brigitte Berendonk, ‘Hormonal Doping and Androgenization of athletes: a secret program of the German Democratic Republic Government’ (1997) 43(7) Clinical Chemistry 1262 generally.
It is alleged that after the instigation of steroid testing at the Olympics in 1976 (see below), many athletes turned to testosterone to aid their performances. Testosterone could not be detected at this stage, and thus could serve as a replacement for steroids at the time of competition. The use of testosterone for this purpose was documented in the former East German doping programme, State Plan 45.\(^{50}\)

2 The Introduction of Steroid Testing

One important part of the history of steroid regulation was the apparent lag between official knowledge of the use of these substances and the extension of the prohibition on doping to cover them.\(^{51}\) It is clear that the IOC knew about the issue of steroids in the early 1960s\(^ {52}\) and that by 1967 the issue was important enough to warrant a statement by the IOC. Further evidence of the growing concern over steroid use is provided by Dimeo who relates a number of media reports in the early 1970s regarding the use of steroids in sport. Particular interest was taken in athletes who were willing to admit use.\(^ {53}\) In addition, during the late 1960s and early 1970s, a number of studies and conferences were held to examine the question of whether steroids did, in fact, enhance performance. The results of such studies varied greatly.\(^ {54}\) It was not only the efficacy of steroids which drove concerns over steroids, reports of the health dangers of steroids were a feature of anti-doping discourse at this stage — despite there being a lack of evidence to support such dire warnings.\(^ {55}\)

Despite the assumed dangers of steroids to athletes, it was not until 1976 that steroid testing was introduced into the Olympic Games. The IOC was criticised for slowness in

\(^{50}\) Ibid, 1270ff. See also Nikki Dryden, ‘For Power and Glory: State-Sponsored Doping and Athletes’ Human Rights’ (2006) 13 Sports Lawyers Journal 1 for some details of the effects this system had on the East German athletes.

\(^{51}\) The words ‘apparent lag’ needs some explanation here. From the tone of some commentaries on the history of steroid regulation in sport it appears that there is a perception that the IOC and other sports administrators were slow in introducing steroid testing. For example Todd, above n 11, 96 and Michael Bateman, ‘The Freaky World of a “Steroid Bomb”’ (1973) 68-69(July-August) Olympic Review 262, published first in the Sunday Times (London), 10 June 1973. However, in light of the fact that doping had been going on in sport for centuries and that the substances on the 1967 IOC Prohibited List had been in use in sport for at least sixty years, a ten to fifteen year lag between use and regulation is not significant. The fact that there has been criticism of the IOC over the time it took to prohibit steroids adds to the argument regarding the significance of public opinion and symbolism: see also Dimeo, above n 6, 86 and Hunt, above n 6, 20.


\(^{53}\) Dimeo, above n 6, 80.

\(^{54}\) See Dimeo, above n 6, 83 for a fuller discussion of these discrepancies. As will be discussed later in this chapter, the official position on steroid efficacy until the early 1980s appears to have been that they did not enhance athletic performance.

\(^{55}\) Dimeo, above n 6, 85.
introducing a ban on steroids in their competition. For instance, David P Webster, a
Scottish weightlifter, in 1974, published a pamphlet which read:

I find it distressing that national and international officials will not make a very strong
stand in this matter… For example, why are anabolic steroids not included in the IOC
Medical Commission list of doping substances? The list produced for its meeting in
Munich on 19th May 1971 did not contain anabolic steroids. The fact that at the time it
was difficult to trace the drug should not in my opinion have prevented the inclusion on
such a list. Surely the definition of doping is sufficient to make the use of steroids
illegal.\(^{56}\)

And in an article in the *Sunday Times* (later reproduced in the IOC’s Bulletin) entitled
‘The Freaky World of a “Steroid Bomb”’, Michael Bateman wrote:

The number of athletes who use anabolic steroids to build up strength and muscle like so
many battery-fed hens is increasing at an alarming rate, and the Medical Commission of
the International Olympics [sic] Committee, who have been meeting in Moscow, confess
they don’t know the answer…[s]o the Olympic Committee are left in the absurd position
of turning a blind eye to the coaches and athletes and national executives who encourage
the use of a drug which is used completely against the Olympic sporting ethos.\(^{57}\)

There have been a number of reasons suggested as to why the IOC was ‘slow’ to introduce
steroid tests. Dimeo contends that ‘scientists were too busy arguing about strength effects
and health issues to bother with the technical aspects of testing’.\(^{58}\) Todd suggests:

The first was that throughout most of the sixties the use of anabolic steroids was still little
known to most sports officials. The second, and perhaps more telling reason, was that
there was then no way to test for the presence of such drugs. The IOC was also influenced
by prevailing medical opinion, which maintained that these hormonal substances provided
no athletic advantage….\(^{59}\)

On the other hand, the drug testing expert, Arnold Beckett, was surprised when the IOC
did prohibit steroids on the basis of the new steroid tests since, at the time there were still
some doubts regarding their reliability.\(^{60}\) Furthermore, the ban on steroids was introduced
at a time when official medical opinion held that steroids did not enhance athletic
performance and when the health consequences were unclear.\(^{61}\) Thus, rather than being
tardy in introducing steroid testing, the IOC could actually be seen as being premature in
introducing steroid testing.

\(^{56}\) See Todd and Todd, above n 11, 65.
\(^{57}\) Bateman, above n 51.
\(^{58}\) Dimeo, above n 6, 86.
\(^{59}\) See Todd, above n 11, 96ff.
\(^{60}\) Dimeo, above n 6, 113, states that ‘Beckett was surprised given that “at the time the gas liquid
chromatographic/mass spectrometric methods had not been developed sufficiently.”’
\(^{61}\) American College of Sports Medicine, ‘Position Statement on the Use and Abuse of Anabolic-Androgenic
IV SYMBOLISM

A Steroids as Illicit Drugs

The point has been made above that steroids were a fundamentally different type of drug to those previously used in sport. One difference between steroids and previous doping agents is that steroids had not previously been subject to prohibitions outside sport culture. Anabolic steroids, when introduced to sport in the 1960s, were drugs specifically developed to enhance muscle development. As such, they had limited clinical and therapeutic use outside of sport and no known psychotropic effects which would make them attractive to recreational drugs users. Steroids were therefore ‘medicines’ rather than ‘drugs’ and had not been used as recreational drugs the way in which amphetamines or alcohol had been.

Given the differences, it is even more significant and surprising to find that, like the previous two eras considered, illicit drug symbolism was still a very strong influence in the 1970s. Although steroids were not originally illicit drugs, the discourse surrounding their use in sport adopted much of the same illicit drug language characteristic of doping discourse. Thus steroids came to be seen as illicit drugs in the same way that amphetamines and narcotics were.

Some examples of the language used in discussions of steroid use in the 1970s include:

- ‘Dope Tests to be Carried Out At Christchurch’\(^{62}\)
- ‘Wider Olympic Drug Abuse is Seen: More devious drug abuses are a certainty for the 1980 Olympics at Moscow, according to top medical advisers with the United States Olympic Committee’\(^{63}\)
- ‘Four Athletes Banned as Dope Test War Begins’\(^{64}\)

Chapters Five and Six included a detailed discussion of some of these terms: ‘dope’, ‘dope war’, ‘drug abuse’. The inclusion of these terms, so intimately connected with illicit drugs, demonstrates the role that illicit drug symbolism had in the prohibition of steroids in the 1970s. The connection between the issue of illicit drugs and steroids in the 1970s doping discourse is even more transparent:

\(^{64}\) Cliff Temple, ‘Four Athletes Banned as Dope Test War Begins’, \textit{The Times} (London), 7 November 1977, 12.
Drug Convictions Rise: Prosecutions for drug offences involving heroin, cocaine, opium and cannabis shot up last year...Professor Arnold Beckett, an expert on drugs in sport, yesterday gave a warning of the dangers racing cyclists and heavyweight athletes of the abuse of stimulants. He told the British Pharmaceutical Society Conference at Leeds that anabolic steroids were increasingly used by heavy-weight athletes. These drugs could endanger lives.\(^{65}\)

‘Responsible people in sport are terrified by the use of drugs. At a time when the whole nation is concerned about the use of drugs such a statement is wicked.’\(^{66}\)

In both these extracts, the use of steroids in sport is seen as part of the overall problem of the ‘use of drugs’ and ‘drug offences’, again reinforcing the image of steroids as illicit drugs.

Another significant way in which steroids were identified as illicit drugs relates to the focus on the route of entry of the drug. As was the case with narcotic drugs in the 1920s and 1930s, the various routes of entry for steroids are often mentioned in these articles. The following two examples of media comments will serve to illustrate this point:

- ‘Just as a natural rise in testosterone turns scrawny boys into burly men, steroids administered by patch, pill, needles or salve can dramatically increase an athlete’s bone and muscle mass.’\(^{67}\) and
- ‘Although they have been banned internationally, steroids, which are taken in tablets, and through injections, have remained a major source of controversy.’\(^{68}\)

So strong was the association of pills and syringes, in the sporting context they came to symbolise steroids just as the hypodermic syringe had come to symbolise heroin and other narcotic drugs outside sport. For example, an article in 1972 stated:

John Lear, the British Olympic weightlifting coach posed the question: “How does one deal with a sport in which cheating is so prevalent that it is no longer be considered cheating? My future role as a coach at international level has already been described as that of a ‘needle’ man. It is a role I will continue to reject.”\(^{69}\)

The phrase ‘needleman’ was one which had been used in two articles mentioned in Chapter Five. In the 1920s the term meant someone who injected another with illicit ‘drugs of abuse’. The use of the same term in this context is therefore highly suggestive of the role illicit drug symbolism played in the demonisation of steroids.

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\(^{66}\) Neil Allen, ‘Smith’s Views on Drugs Cause Indignation’, *The Times* (London), 27 November 1972, 10.


\(^{68}\) Amdur, above n 1.

Thus needles, syringes and pills have come to symbolise steroid use more than any other doping agent in sport. And syringes and pills make steroids into an illicit drug in the public mind; a drug like heroin or cocaine.

Thus anti-drug sentiment and illicit drug symbolism extended to this new type of drug used in sport. The construction of steroids as illicit drugs was, in some ways, a natural step in light of the fact that steroids used the same route of entry into the body. The fact that steroid-related anti-doping discourse used the same language which had characterised discussion of the use of illicit drugs in the sporting context in the 1930s and 1960s, reinforced this association with illicit drugs.

B Cold War Connections

The historical association between steroids and communist countries in the Western press has been so strong that Beamish and Ritchie claim that ‘[s]teroids were more than a Nazi drug: they were also the atomic bomb of the cold war…’ An examination of some of the media reports of steroid use in sport during the last 40 years reveals just how common that link has been. Some facets of the link between steroids and communist athletes will be considered separately below.

1 The Origin of Steroids

The fact that Dr Ziegler developed the drugs in the USA did not stop the Western media from constructing them as ‘communist drugs’. Ziegler claimed to have developed steroids to enable US athletes to keep up with their Soviet counterparts:

The first time I was exposed to anabolic steroid use was during the 1956 World Games. The Russians were using straight testosterone. What caught my attention was the young athletes having to be catheterized… so they could urinate. This procedure is usually used for old men who have prostate trouble. The Russians were abusing the drugs heavily… . I came back to the United States after they won everything, and I told the head of the


After the unification of Germany, many East German coaches moved to China, prompting rumours of drug use among the women’s national swimming team when it won 12 gold medals at the 1994 World Championships in Rome. Onlookers waved syringes at the medal ceremony. Chinese officials attributed the success to rigorous training and a diet boosted by caterpillar fungus and stewed soft-shell turtle.

71 These authors claim that steroids became so greatly feared by Western athletes not only because of links with the Cold War communist countries but because of rumours that the Nazis had used steroids to increase the aggressiveness of their troops in WW II see Beamish and Ritchie, above n 18, 785.
American athletics committees back in the 1950s that Eastern Bloc countries and Russians were going to use every trick to win, especially the strength sports.\textsuperscript{72}

The construction of the development of steroids as a response to use by communist athletes, as Dimeo demonstrates, is an oversimplification and one which he regards as:

\begin{quote}
fitting all too easily with other historical simplifications. People in the West do not want to imagine that Americans and Europeans deliberately set out to cheat in sports. It is easier and cosier to place steroids in the context of exploitative, inhumane, totalitarian regimes. The explanation of why ‘our boys’ felt compelled to take steroids lies almost in a militaristic sense of doing their duty for their country.\textsuperscript{73}
\end{quote}

\section{Steroids and Cold War Rivalries}

Not only were steroids viewed as communist in origin, the \textit{continued} use of steroids by Western athletes was often explained by a need to compete with the suspected steroid habits of communist athletes. Here are three such examples:

\begin{itemize}
  \item Jere Van Dyk, US middle-distance runner from the early 1970s, reported: ‘In the United States, athletes take steroids by choice, but the effect is quite similar to an arms race; if the Soviet throwers are getting so many steroids a day, an American must have pill parity or lose…’.\textsuperscript{74}
  \item ‘The rationalisation in some Olympic sports is that “they” are doing it, “they” being the Communist nations. Some Western athletes make the taking of anabolic steroids sound patriotic, like hoisting the flag.’\textsuperscript{75}
  \item ‘after hearing of some of the things presently happening in Eastern Europe, the West must realize it is years behind in sports medicine. Not wanting to lose in the next Olympics, the West is countering by quickly developing different tests to use for disqualification.’\textsuperscript{76}
\end{itemize}

Western athletes were not viewed as willing culprits in the steroid game, they were coerced into drug use by the communist athletes who were using more and better steroids than the West: ‘If they could be sure East Germany and the Russians aren’t taking anything, our athletes would stop…’.\textsuperscript{77}

\textsuperscript{72} Goldman, above n 42, 1. Preface by Dr John Ziegler.
\textsuperscript{73} Dimeo, above n 6, 86. The point will be made below that steroids were a problem in Western countries as well, and that usage rates were probably similar.
\textsuperscript{76} Ibid.
\textsuperscript{77} Amdur, above n 1.
Furthermore, reports of steroid use by communist athletes were far from neutral in their tone. As will be discussed below, reference was frequently made to the disfiguring side-effects of steroid use: enlarged shoulders, increased body hair, acne and deepened voices, as well as the increased aggression and competitiveness of the steroid-using communist athletes. For example:

We would be in the locker room with these female swimmers... and we would have to check the symbol on the door to make sure we had the right bathrooms. These swimmers – they were huge. They had shoulders like Dallas Cowboys, hair growing all over their bodies. It was quite startling... They would spit on the floor... They would look at you like they wanted to rip your tongue out...  

The intense rivalry of the Cold War was played out on the international sports field, and repeated reports which focussed on these types of behaviours and physical characteristics, made the gulf between East and West athletes seem even wider and increased the tensions between them as the Cold War progressed. Much of that gulf was attributed to steroids. Steroids were definitely part of the Cold (Sports) War. The influence of the Cold War associations and the transforming power of steroids will be discussed below.

3 Cold War Language in Reports of Steroid Use

The final mechanism by which steroids were constructed as primarily ‘communist’ drugs was through the employment of language connected to the Cold War. The steroid issue was described as a ‘chemical technology race’ and imagery of the arms race was also employed. For example:

- ‘In the United States, athletes take steroids by choice; but the effect is quite similar to an arms race...’

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79 For a detailed discussion of the use of sport and the Olympics for political purposes, including the Cold War see James A.R. Nafziger and Andrew Strenk, ‘The Political Uses and Abuses of Sports’ (1977-1978) 10 Connecticut Law Review 259. Evidence of the view of sport as a political platform can be seen in the reports in The New York Times regarding Russia’s reentry into the Olympic Games in 1952. Newspapers in the USSR were said to exhort athletes to ‘emerge from this with honour to raise still higher the sports glory of the Soviet fatherland’; ‘Russia Announces Plan to Enter Select Teams in 1952 Olympics; Cites Only Helsinki Events, Calling for All-Out Effort to Raise the Sports Glory of the Soviet Fatherland’, The New York Times (New York), 28 December 1951, 24. It was also reported that another Soviet newspaper declared that sport in bourgeois countries, and especially the United States, was utilized as a means of “preparing cannon fodder for a new, aggressive war...” In contrast, in the Soviet Union, said Izvestia, sports played a role in the struggle for friendship and security of people – for peace for the whole world’: Salisbury, above n 22.
80 As early as 1951 the rivalry of the international powers in sport was recognized as an extension of the Cold War and the term ‘Cold War of Sports’ was used: ‘Rivalry Between US and Russia to Enliven Helsinki Competition’, The New York Times (New York), 6 July 1952, 53.
81 Amdur, above n 1.
82 Stuller, above n 74.
• ‘International Olympic Committee drug testing is about as effective as international nuclear arms control….our Soviet and other Eastern European Olympic adversaries have employed modern pharmacology to achieve their avowed battleground of sport’ and

• ‘Nuclear arms-limitation advocates have wisely come to the realization that our greatest chance for salvation from annihilation is through world-wide dissemination of the scientific truths about the dangers of nuclear weapons’.83

Sometimes a fight between good and bad science was set up. One article from 1996 read: ‘Women swimmers, too, suffered immeasurably from the freakish performances of the East German lab rats before the Berlin Wall fell’.84

It was the East, whose scientists developed steroids, verses the West, whose scientists worked on developing tests to detect steroid use. As quoted above:

After hearing of some things presently happening in Eastern Europe, the West must realize it is years behind in sports medicine. Not wanting to lose in the next Olympics, the West is countering by quickly trying to develop different tests to use for disqualification.85

4 Conclusions on Steroids as ‘Communist’ Drugs

It is little wonder that Beamish and Ritchie claim that steroids were the ‘atomic bomb’ of the Cold War. Steroids came to be so closely linked with communist countries by the Western press that these drugs, like the people who (allegedly) used them, were something to be feared and beaten. The feared chemicals needed to be controlled and the technological race won by the powers of good scientists in the West.

C The Transforming and Dehumanising Power of Steroids

The power of drugs was a theme in the symbolism of doping in the 1960s and was equally apparent in the 1970s. Like the 1950s and 1960s, there was still a strong belief in the power of drugs but it was now viewed with more suspicion:

There were stories of women who had morphed into masculine forms and tales of ghoulish medical conditions, all after the athlete’s body had been used as toxic pumps to turn out gold medals. Anabolic steroids, that was the culprit they said.

No one should dismiss the anecdotes – some of which conjure images of bubbling beakers in a dark basement…86

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The change in attitude was attributable to a number of factors. As stated above, events of WWII had changed views of science. An even more significant development was a subtle shift in the view of the effects of drugs in sport. Whereas the debate about the use of stimulants in the 1960s saw the transforming power of drugs as affecting the performance of the athlete, in the 1970s steroids were viewed as transforming the athlete themself. The reported changes created by steroids were not simply physical changes; the whole athlete somehow became an artificial person.\(^87\) One athlete stated: ‘I could either go on steroids or quit completely. I decided to quit completely. It wouldn’t have been me throwing, it would have been a completely different organism. There would have been no personal challenge in it.’\(^88\)

Other examples are set out below.

- It will be a case of whether the public wants to see a natural performance, or to be entertained by clones and human robots…”\(^89\)
- Months before disgraced sprinter Ben Johnson was exposed at the Seoul Olympics, Moneghetti saw the Canadian super-star at an event in Perth. Says Moneghetti, 32: “We were in the same room, and I watched, fascinated, as he stood there and was dribbling down his chin. At the time I didn’t understand what it was all about but later a friend told me it was the side effects of drugs. When he was caught at the Games the following year it all made sense.”\(^90\)
- Women swimmers, too, suffered immeasurably from the freakish performances of the East German lab rats before the Berlin Wall fell. Now the same allegations have been levelled at China, which produces rough-stroking women with titanic strength.\(^91\)
- But that alone cannot possibly explain how they could have a whole bunch of swimmers improve dramatically in waves, just like the East Germans. The ones here are different than in Barcelona, and we probably won’t see the same in Atlanta.”\(^92\)

In these extracts, steroids are seen as changing innocent, healthy athletes into lifeless, yet powerful athletic machines. The athlete loses their individuality and they become one insignificant segment in an army of machines. They appear subhuman: they no longer have normal emotions, ethics, psychological frailty or sexuality.\(^93\) At the same time, they are superhuman in their athletic capacity.

\(^87\) Lord Killain, one time president of the IOC, in 1983, said this concerning steroids, commercialization and politicalisation of sport: ‘The Olympic ideal is to create the complete person – not an artificial one: Dimeo, above n 6, 117.

\(^88\) Randy Harvey, 'Experiment with Steroids is Frightening to Her', \textit{Houston Chronicle} (Houston), 5 February 1989, 16.

\(^89\) Andrew Byrne, 'Synthetic Games', \textit{The Sydney Morning Herald} (Sydney), 2 June 1995, 13.

\(^90\) Ibid.

\(^91\) Wells, above n 84.


\(^93\) For a discussion of the sexual aspect of steroid symbolism see Michael Burke, 'Drugs and Postmodern Female 'Identities' - a response to Tara Magdalinski' (1998) 15 \textit{Bulletin of Sport and Culture} 25 and Michael Burke,
As will be discussed below, the effectiveness and side effects of steroids have been vastly overstated. The question then needs to be asked: why was such a picture accepted by the public? The use of language and the emphasis on unusual side-effects was certainly a mechanism of dehumanisation in these articles. However, there were three main factors creating an environment in which the message found fertile ground. Firstly, little was known about steroids since they were a relatively new drug. Unlike cocaine, heroin and strychnine — which were known in sport since before the turn of the century — there was little history attached to steroids within sport. Moreover, steroids were not at this time ‘illicit’ recreational drugs and their use outside sport was limited to increasing growth and strength in unusual disease states. The other major doping agents of the time had a much wider range of uses and thereby were much more familiar to the public. The public, therefore, had not been exposed to information about the use and abuse of steroids. This allowed an aura of mystery to be created around them. These drugs, therefore, provided fertile ground for the seeds of speculation, rumour, scandal and hysteria. Secondly, as noted in the previous chapter, when steroids first captured international attention — the 1960s — society was characterized by a thorough belief in the power of science. Finally, the process of linking steroids to athletes from socialist political systems served to exploit the mistrust and misunderstandings created by the Cold War.

The linking of steroids with athletes from communist cultures, where the athletes looked and acted differently, allowed steroids to come to be seen as chemicals which transformed the athlete into an automaton programmed to excel in sport for the sinister goals of the communist leaders. Brigitte Berendonk, famous for her role in exposing the East German doping system, said this: ‘The GDR, the system that I escaped from, had created monsters. These were not real people, just engineered experiments.’ The reference to unusual characteristics of steroid users was particularly notable in reports of suspected steroid use in communist athletes. As was seen above, the reporting

94 Morphine, opium and cocaine had all been used in patent medicines before the turn of the century. Alcohol was, of course, freely used in most western countries by this time while amphetamines had been sold over-the-counter as weightloss pills during the 1950s.

95 Ungerleider, above n 78, 11. It is interesting to note that Berendonk was, herself, subjected to the East German doping regime and thus was one of these ‘engineered experiments’. This, of course, reflects that use of steroids can lead to an athlete feeling very different within themselves but also shows the symbolism surrounding the drugs since it is unlikely that Berendonk really viewed herself, or any of the other doped athletes, as ‘not real people.’ This is not to say that steroids do not have any negative or dangerous side effects or that the use of substances such as this on unknowing minors is not legally, ethically and morally unacceptable. The point is simply that the linking of steroids to communist systems in the Western press led to a fear and hatred of steroids which goes far beyond their pharmaceutical properties.
of the use of steroids by these athletes, particularly the East Germans, was often accompanied by a recitation of the athlete’s unusual physical characteristics (wide shoulders, body hair, deep voices) and the serious and ‘aggressive’ behaviour:

- “Most of the East German women swimmers are built just like men” said Mrs Boglioli [US Olympic swimmer] at a news conference in West Long Beach, N J. “They’re all just huge girls who are muscular and strong and have hair all over their bodies. Personally, I wouldn’t like to look like them. I hope US girls never have to start taking steroids and male hormones in order to compete.”

- The East Germans appear far more serious, politely deferring much of their private thinking to coaches.

- Hard-faced female pachyderms the communists had prepped for the weight events. All sorts of unusual musculature…

A similar tendency has been noted by Magdalinski, regarding the way in which the Chinese women swimmers were pictured in the 1990s.

Figure 1 presents a distorted image of a Chinese swimmer, which has been deliberately widened to overemphasise the size of the athlete and her musculature. Her shoulders are enormous and she appears to almost burst from the confines of her swimsuit. The identity of the swimmer is not revealed; her identity is immaterial for she simply is representative of a faceless, centralised, undifferentiated system where individual needs are subsumed to the collective, an image typical of Western representation of the communist world.

The emphasis on these unusual aspects of the body and behaviours of these alleged steroid users reinforced the idea that steroids were to blame for creating ‘monsters’ who showed no emotion and whose bodies and minds had been ‘chemically manipulated’ for political ends. The relationship between belief in the power of steroids and the effect of such caricatures can be represented in diagram form below in Figure 4.

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97 Amdur, above n 19.
Thus, the transforming and dehumanising power of steroids was produced by the mistrust of science and drugs which had begun in this era and also closely connected with the anti-communist symbolism of steroids.

**D Conclusions on Symbolism**

There were three major symbols at work in doping discourse relating to steroids in the 1970s. The first was the adoption of illicit drug symbolism: by the use of illicit drug language and an emphasis on the use of syringes and pills, steroids became a drug to be feared in society in the same way as cocaine and heroin. The second aspect of symbolism was the ongoing image of drugs as extremely powerful and evil agents. This fed into the idea that steroids were capable of transforming athletes into monsters with superhuman powers but subhuman qualities. By far the most obvious and, perhaps influential, symbolism was their construction as communist drugs. The association between drugs and communist athletes not only contributed to the idea that steroids created monsters but had the more direct effect of making steroids something to be condemned and controlled.
V SIGNIFICANCE OF THE REGULATORY MODEL

The point has been made that the regulatory model adopted in relation to doping was one which was based on the illicit drug model. In the 1920s this meant a total prohibition. In the 1960s, the extra dimension of drug testing was added, again based on the illicit drug tests.

In the 1970s, steroids were slotted into the already existing regulatory regime. However, steroids were fundamentally different substances to the doping agents that came before them. Stimulants, narcotics, alcohol and the other drugs which were included on the first prohibited lists were short-acting drugs, the ingestion of which aimed to enhance performance on the day on which it was taken. Steroids were long-term drugs which were used in training. There is great significance in the fact that the same regulatory system was used for the control of steroids as other agents. It reinforces the argument that steroids were viewed in the same light as other doping agents. If doping agents, including steroids, were illicit drugs, then illicit drug regulation should be applied. The further implications of using this model for steroid testing will be considered in Chapter Nine.

VI OTHER EXPLANATIONS

As with each of the previous eras considered, there are other interpretations of the developments in anti-doping policy at this point in time. It was previously argued that in the 1960s the predominate rhetoric of anti-doping policy related to the health of the athlete. By the 1970s, there had been a subtle shift in emphasis. Health was still a major concern but arguments about the unfairness of doping were equally important at this point. Issues relating to amateurism were also still evident, although not as explicit as in the 1920s and 1960s. Again, it is possible to see the influence of symbolism at work in these alternate explanations.

A Health

Much time was devoted in both academic and popular publications to the health dangers associated with the use of steroids by athletes. Some examples are set out below.

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An article in *The Times* in 1972 entitled ‘Drugs Put British Athletes Health at Risk’ read:

> How nutsy must one be to risk liver damage, testes atrophy, prostate and kidney damage and potential cancer? They don’t tell you about the Texas discus-thrower who’s now neither a man nor a woman. Or a bald 14-year-old bodybuilder in Connecticut. Or the Arkansas shot-putter who will be dead by the time you read this…

A 1974 article in the IOC bulletin read ‘[t]hese substances are in no way without pathological side effects and for that reason are often considered as doping agents.’

In 1975 the British Association of Sports Medicine (BASM) held a special symposium on steroids in sport, the editorial of their journal stating:

> In the past few years, developments in complicated biomedical techniques, increasing awareness of the hazards of overdosage of hormones, and a spread of the use of steroids by athletes, have justified this association in organising another symposium on doping, this time devoted to the use, abuse and detection of anabolic steroids in sport.

And one of the articles in that journal read: ‘I am left in no doubt about the vital necessity of stamping out the use of anabolic steroids by our athletes, in the interests of their own health and well-being.’

An article by Dr Jacques Pellizza, printed in the IOC bulletin in 1973 stated:

> the athlete who uses — and frequently misuses — anabolic steroids is liable to terrible after-effects… To close let us also point out that a male athlete using anabolic substances always runs the major risk of causing a prostatic tumour due partly to the dose and partly to the individual susceptibility. This last factor is impossible to predict and so-called “medical” supervision is unable as yet to detect it…

In 1976 Beckett wrote in the IOC bulletin:

> Biochemical studies demonstrate side effects of Anabolic Steroids [sic] such as gonadal and pituitary suppression, and hepatic and prostatic involvement. In addition, psychological effects should be considered. The muscle bulk increase due to Anabolics [sic] is due mainly to water retention.

The potential health dangers of steroids were a legitimate and significant issue to consider. However, the point has been made by a number of authors that the health consequences of steroids were often overstated with little evidence to support these exaggerated claims.
Early in the 1970s there seemed to be a balance in the views expressed about these health dangers. Later in the 1970s there was a growing clamour from ‘scaremongers’.\(^\text{108}\) Even today the evidence for the health implications of the use of steroids remains largely anecdotal; sound long term studies on their effects are still lacking.\(^\text{109}\)

It is important to consider the question of why such an overstatement of health dangers did not raise strong and prominent objections. Part of the explanation lies in the influence of the symbolism identified above. Firstly, it is clear from the above discussion that steroids were identified as illicit drugs. Thus, steroids must also be exceptionally dangerous substances. It would therefore be natural to highlight any possible dangers of the drugs. Secondly, the view of steroids as powerful, transforming and dehumanising substances fed these concerns: drugs which make healthy athletes into artificial monsters simply must leave some permanently defacing marks on the athlete.

More pivotal still was the association of steroids with communist regimes. As Dimeo points out, the idea that steroids were ‘communist’ drugs correlated with Westerner’s views of the nature of totalitarian governments.\(^\text{110}\) Beamish and Ritchie’s study of the role of Cold War anxieties in steroid discourse provide particularly valuable insights:

> The emerging threat of Communist totalitarianism and the remarkable and rapid success of east bloc athletes engendered a fear that in its quest for world domination, the USSR would use the same coldly calculating, instrumental-rationality that the Nazis had exploited in their quest for world supremacy.\(^\text{111}\)

> [Steroids] were also the atomic bomb of the Cold War – the unprincipled use of science to further political goals without apparent concern for human consequences...the fear of dictatorial control of human beings in the unrestricted pursuit of power had become even more ominous in view of the use of raw power by Russia throughout most of its history.\(^\text{112}\)

Thus, in popular Western view, it would stand to reason that communist governments, which saw the individual as expendable in the national cause, would use drugs which had dire consequences for the user. Again, this would lead to a focus on and exaggeration of any potential side effects.

Thus each of the symbolic associations identified above had some contributing part to play in the health explanation for the prohibition on steroids.

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\(^\text{108}\) Dimeo, above n 6, 110.
\(^\text{110}\) Dimeo, above n 6, 86.
\(^\text{111}\) Beamish and Ritchie, above n 18, 782.
\(^\text{112}\) Ibid, 785.
B  Level Playing Field

The role of symbolism can also be seen in the idea that the prohibition of steroids was based on the argument that they affected the fairness of sporting competition. As noted above, this argument became even more important in the 1970s than in the 1960s. Some examples of the kind of arguments focussing on the ‘cheating’ aspect of steroids are provided below:

• “The suggestions [that British athletes should take drugs to compete] is irresponsible and amoral — and I rather imagine illegal. It is a contradiction of sport. Taking drugs is a deliberate breach of the rules which athletes agree to accept. It is cheating…”¹¹³

• ‘How does one deal with a sport in which cheating is so prevalent that it is no longer considered cheating?’¹¹⁴

• ‘Apart from making a joke of Olympic records in the field events…’¹¹⁵

However, in a similar way to the health argument, the fairness argument was often overstated in the steroids debate of the 1970s.¹¹⁶ It has been noted a number of times in this thesis that drugs are assumed to have such a marked effect on athletic performance that they are assumed to be the single reason for an athlete’s success, even though there is often little empirical evidence to support these ideas.¹¹⁷ This is particularly true of steroids. These doubtful assumptions are clearly demonstrated in the examples above even though the statements were made at a time when the ergogenic properties of steroids were severely in doubt.¹¹⁸

¹¹³ Mr Arthur Gold, secretary of the British Amateur Athletics Board and overall manager of the British athletics team in Munich quoted in Allen, above n 66.
¹¹⁴ Railton, above n 69, 20.
¹¹⁵ Bateman, above n 51, 264.
¹¹⁶ Dimeo, above n 6, 128-129.
¹¹⁷ Beckett, above n 5, 593, states ‘[t]here is conflicting information about the effectiveness of anabolic steroids to improve performance.’
¹¹⁸ Commentators have made the point that there was a certain level of mistrust among athletes of the medical establishment in their continued insistence that steroids did not enhance performance, since athletes could clearly see the evidence for their ergogenic effects in users. However, the focus here is on the official rhetoric about steroids. Officially there was no evidence for steroids aiding performance and yet officially there was concern about their effect on the fairness of competition. This is obviously a contradiction within anti-doping discourse but the relevant question here is why would such a contradiction arise?: see Dimeo, above n 6, 84-85 and Lawrence K Altman, ‘New ‘Breakfast of Champions’: A Recipe for Victory or Disaster?’ The New York Times (New York), 20 November 1988, 1. It is also interesting to note the outcome of Jay Silvesters’ unofficial survey of athletes, printed in the IOC Bulletin, which stated that 65% of athletes thought that anabolic steroids improved performance. This was in 1974 when medical opinion was against this idea. Although this survey was not likely to be statistically accurate it does suggest that athletes had different ideas from their medical advisers: International Olympic Committee, above n 48, 172.
The symbolism considered above helps to explain why the fairness issue was overstated in such a way. There was the strong belief in the power of drugs, particularly in the ability to harness this power in a sinister way. Thus the public and athletes alike were willing to reject the empirical evidence presented to them by the scientific world and continue in their firm belief that steroids worked, the belief in the power of drugs outweighing their trust in science.

There was also the Cold War association. Beamish and Ritchie put it succinctly:

> Although there was no doubt that the Soviets had some fine athletes, the success of Communist athletes ‘had’ to be attributable to something more. Rumours quickly spread that their success rested heavily on the cold and calculated use of male hormones and these rumours touched upon some of the deepest anxieties of the post-war western-psyche…\(^{119}\)

In looking for an explanation for the success of their enemy — which did not accept the superiority of their system — it was natural to overplay the role of steroids. Not only were they associated with communist countries, they also served as a symbol of the inhumane methods associated with those systems.

\[C\] **Amateurism**

There is evidence of some vestiges of the image of the ideal amateur sportsperson in the steroid debate of the 1970s:

- “If we are going to compete, it’s best that the USOC (United States Olympic Committee) find a doctor who understands sports medicine”, said Willye White. “If we're going to compete against synthetic athletes, we must become synthetic athletes”\(^{120}\).

- Dr John B Anderson, the head physician for America’s Olympic delegation at Innsbruck and Motreal, warned yesterday that efforts to manipulate the lives of athletes by beating the medical testing machines and computers of the International Olympic Committee would be intensified between now and 1980s. …opponents insist that intensive research into drug-related areas destroys the spirit of amateurism and is not worth the price for success.\(^{121}\)

- Whatever spirit of amateurishness there was in the Olympics seems to have vanished years ago. Prof. Beckett’s pamphlet, Doping; which he produced for the Munich Olympics, lists an amazing range of drug abuses in sport….Professor Beckett’s own view of sport is happily amateurish…\(^{122}\)

- During a recent question-and-answer session on the future of the Olympic movement, Monique Berlioux, the secretary of the International Olympic Committee, was asked to name the committee’s greatest challenge in the next 20 years. Challenges, not challenge, Mrs Berlioux said: “the growing influence of politics and sport”, she replied, “and the manipulation of athletes with drugs and the fabrication of an artificial human being.”\(^{123}\)

\(^{119}\) Beamish and Ritchie, above n 18, 784.

\(^{120}\) Amdur, above n 19.

\(^{121}\) Amdur, above n 63.

\(^{122}\) Bateman, above n 51, 266.

Again, symbolism had a role to play in this issue as well. The contrast between the image of the illicit drug user and the ideal Corinthian amateur was still very much in operation. In many ways this contrast was exaggerated in the steroid issue since, as noted above, steroids not only altered the performance of the athlete but were seen as altering the athlete themselves: steroids had the power to dehumanise the user, making them into a monster rather than the ‘better race on the surface of the earth’.  

VII DISCUSSION: THE STEROID MYTHS AND THE PUZZLE OF STEROID REGULATION

It is important to consider the impact of the symbolism of steroids in anti-doping discourse. It has been demonstrated above that symbolism has played a role in many of the explanations for anti-doping policy in the 1970s. From the above discussion it has also become obvious that there are a number of anomalies in doping discourse in the 1970s relating to steroids. In fact doping discourse led to a number of steroid myths. Furthermore, there is one fundamental puzzle relating to steroid regulation which needs some explanation. Again, the symbolism of steroids can help to explain this puzzle. In this section myths of steroid discourse arising from the influence of the symbolism discussed above will be considered and the role of symbolism in explaining the fundamental puzzle of anti-doping policy.

A Steroid Myths

1 Steroids Make Winners

(a) The Myth

For years there has been a curtain drawn across locker rooms of world class athletes. Athletes who went behind the curtain emerged bigger, stronger, faster, and most of all winners. But there were only glimpses of what lies behind the curtain, whispers and sometimes angry accusations. Then, last September, the curtain was thrown open when Ben Johnson, the world’s fastest human, the world-record holder in the 100 meters was stripped of his Olympic gold medal at Seoul…

Ken Patera, a US weightlifting champion referring to his Russian rival said in 1971: ‘Last year, the only difference between me and him was that I couldn’t afford his pharmacy bill.

\[\text{Dr GM Oza, ‘Athletes, Doping and Olympism,’ (1969) 19(30 May) Olympic Review 209, 212.}
\[\text{Ken Stephens, ‘Steroids: A Weighty Problem, Effective Solutions Demand Strong Action Taken by Nations’, The Dallas Morning News (Dallas), 23 April 1989, 1b.}\]
Now I can. When I hit Munich next year, I’ll weigh in about 340 pounds, maybe 350. Then we’ll see which are better – his steroids or mine.\textsuperscript{126}

Taking steroids, it is assumed, will automatically change a mediocre athlete into a ‘winner’. For example, one article in the 1970s stated: ‘Basically athletes who use stimulants, steroids, painkillers, etc are looking for an easier or quicker road to success.’\textsuperscript{127} It is possible to see such an assumption at work in many public discussions of suspected steroid use by athletes who have shown rapid and large improvements in performance. The message is clear in the case of the East German female athletes.\textsuperscript{128} After revelations of systematic doping in the German Democratic Republic (GDR) came to light, there were widespread calls for the women to have their medals removed and the medals given to the ‘real winners’. Australian runner, Raelene Boyle — who believes that she ‘lost to drugs’ — and Australian swimmer, Lisa Curry-Kenny, were among those who were the ‘rightful winners’.\textsuperscript{129} The American press made similar claims: \textit{The New York Times} stated that Shirley Bastoff, a great US swimmer in the mid 1970s, ‘would have won four gold medals and would have broken four world records if the playing field was level.’\textsuperscript{130}

It is clear, then, that the public are convinced that steroids create winners.

\textit{(b) The Evidence}

It is surprising how little is actually known about the effect of anabolic steroids on athletes. Despite a number of empirical studies, knowledge regarding the effects, side effects and patterns of use of steroids is relatively limited. As Bahrke and Yesalis state:

> Although the vast majority of the athletic community accepts that anabolic steroids enhance exercise capacity and performance, and although there is far more research on the performance-enhancing effects of anabolic steroids than any other performance-enhancing substance except perhaps amphetamines, the extent to which enhancement occurs and the factors influencing such effects remain incompletely understood and documented.\textsuperscript{131}

Similarly public health researcher Campbell Aitken states:

> Interestingly, while there is no doubt among athletes that steroids do improve performance, few studies have been conducted to determine whether this is the case, and

\textsuperscript{126} \textit{Los Angeles Times}, ‘Easy Opponent’ cited in Todd, above n 13, 95.
\textsuperscript{127} Power, above n 85.
\textsuperscript{128} Suspicions which, in the most part, appear to have been justified given the evidence which has now come to light in Germany.
\textsuperscript{130} Roger Cohen, ‘Doctor Tells of Issuing Steroids to East Germans’, \textit{The New York Times} (New York), 7 July 1998, C4. Although this myth is particularly poignant in the case of steroids the point should be made here that the assumption is operative in the case of most doping agents. See discussion of \textit{Quigley v UIT} in Chapter Eight.
\textsuperscript{131} Bahrke and Yesalis, above n 109, 35.
their findings are equivocal. For practical purposes, given the documented willingness of athletes to use steroids, we have to assume that they really do work.  

Even within stereotypical steroid discourse there is internal inconsistency which negates such an idea. It has been claimed by many within elite sport that steroid use has, at various times, reached ‘epidemic proportions’, since many athletes are unwillingly coerced into using steroids because ‘everyone else is doing it’.  

If steroid use is as widespread as it appears, then it simply cannot be that using steroids will automatically make an athlete a ‘winner’. Steroids cannot be the difference between winning and losing if a number of competitors in the field will also be using steroids. As Yesalis observes:

If you’re not close to it, you don’t know how powerful some of these substances are. It’s not the difference between finishing first and finishing sixth. It’s the difference between finishing first and not even being invited to the meet. You can’t afford to give away that kind of edge.

One particularly compelling example relates to the performance of the East German female swimmers in the 1976 Montreal Olympic Games. What is generally overlooked is the fact that at this stage, the East Germans were the only nation who had a comprehensive strength training regime for their female athletes. In fact, in the 1976 Olympic Report it was reported with surprise that ‘the East German coaches accept the principle that women

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133 For a good example of these kinds of sentiments see Goldman, above n 42, 18ff. Bob Goldman, in his book *Death in the Locker Room*, quotes a number of prominent people from the sporting world regarding the number of athletes who use steroids under the heading ‘The Steroid Epidemic’, 18ff.


135 It could be that steroids are assumed to directly create medal winners, as many of the above references appear to suggest. Alternatively, the argument may be and relate to an increased chance of winning. If this is the case then this argument regarding the internal inconsistency of the doping debate is less applicable since the (perceived) increased chances of winning a medal remain until all competitors in the competition are taking steroids. (This may be the case if, as suggested above, athlete need to use steroids simply to be able to compete in the same competition). Regardless of which assumption is underlying these comments, steroids are clearly viewed as the determinative factor in the competition. This view is taken despite the lack of scientifically rigorous studies to support such claims and steroids are singled out when other equally credible explanations — such as weight training (discussed below) — exist. This thesis argues that symbolism can provide an answer to why such assumptions are operative.

136 John Maher, ‘Steroid du jour: In a World Rife with Designer Drugs, Nandralone is a Straight-off-the-rack Number that is Showing up in More of Today’s Olympic-Caliber Athletes’, *Austin American-Statesman* (Austin), 1999, C1.
can be subjected to almost as much stress in training as the men.\textsuperscript{137} The \textit{Chicago Tribune} gave more details:

“In East Germany the men and women athletes are treated the same”, Schramme (the head of the East German swimming programme) said during a recent news conference, explaining the country’s formula for success. He really means it: East German women swimmers carry the same workout schedule as the men and spend as much as 25 per cent of their training in out-of-the-water programs such as weightlifting and other body-building exercises.

By contrast, Shirley Bastoff of Mission Viejo, Cal., who is considered America’s top woman swimmer, works out five hours daily. Only about 30 minutes, or roughly 10 per cent of her time, is spent with weights, and the lifting is more diversion than serious conditioning.

Many American women athletes, particularly swimmers, say they will never adopt serious weight-training methods, that the effects of seeing themselves with broader shoulders would create further complications in a social life already inhibited by rigid practice schedules.\textsuperscript{138}

By the 1980s and 1990s elite swimming programmes around the world stressed the importance of weight training.\textsuperscript{139} Research since the 1970s has shown that strength training can have performance enhancing effects in swimming and most elite swimming programmes utilise such methods.\textsuperscript{140} Weight training could have been as significant, if not more so, than the use of steroids in the success of the East German athletes.\textsuperscript{141}

In light of the lack of certainty regarding the extent to which steroids can enhance athletic performance, the claims that steroid use ensures success and the implications that steroids are the reason behind unexpectedly heroic athletic performances are, at best, unproved.

2  \textbf{Steroids Use Leads to Serious Medical Complications}

\textit{(a)  The Myth}

The ergogenic effects of steroids were not the only aspect of steroid-related discourse that was not backed by scientifically rigorous evidence. Throughout the history of the use of steroids in sport there has been a strong focus on the dangers of steroid use. This has been discussed above.

\begin{itemize}
  \item \textsuperscript{138} Amdur, above n 19.
  \item \textsuperscript{139} See for instance Hirofumi Tanaka, David L Costill, Robert Thomas, William Fink and Jeffrey Widrink, ‘Dry Land Resistance Training for Competitive Swimming’ (1993) 25(8) \textit{Medicine and Science in Sports and Exercise} 952.
  \item \textsuperscript{140} S Girold, D Maurin, B Dugue, JC Chatard and G Millet, ‘Effects of Dry-land vs Resisted-and Assisted-sprint exercises on Swimming Sprint Performance’ (2007) 21(2) \textit{Journal of Strength and Conditioning Research} 599.
  \item \textsuperscript{141} Timothy Jon Curry and Matthew A. Salerno, ‘A Comment on the Use of Anabolic Steroids in Women's Olympic Swimming’ (1999) 34(2) \textit{International Review for Sociology of Sport} 173 and James Riordan and Jinxia Dong, ‘Chinese Women and Sport: Success, Sexuality and Suspicion’ (1996) (China Quarterly) 145, 130. Both these articles present factors other than steroids which can explain improvements in athletic performance.
\end{itemize}
(b) The Evidence

Leading researchers agree that very little is actually known about the long term effects of steroid use, despite the fact that a number of health problems have been associated with steroid use by the popular press in the past. One thing that these authors agree on is the fact that the more serious side effects of steroid use have been very rare — only one or two reported cases. Aitken contends:

The number of health problems associated with steroids might lead one to think that using steroids is extremely dangerous, but in fact the more serious of these effects have been observed in only one or two case studies, while others, such as gynaeacoma, are common but essentially cosmetic.

Bahrke and Yesalis agree: ‘Although anabolic steroid use has been associated (mainly through case reports) with a number of adverse and even fatal effects, the incidence of serious effects thus far reported has been extremely low.’

In his book, The Practical Use of Anabolic Steroids with Athletes, Robert Kerr, a Californian physician, who openly admitted prescribing steroids and other performance enhancing drugs to athletes, wrote:

You’ve heard the guys at the gym talking about those terrible side-effects from “steroids”. You know – the liver or kidney failure or the baldness, or even worse…the sterility. Let me say that in sixteen years of working with anabolic steroids and thousands of patients, I’ve never seen any of these side-effects happening to any of my patients. Now, I don’t mean that these medicines are absolutely safe – like any medication, there is always a chance for side-effects. But in my practice they have thus far been extremely remote.

If, as discussed above, steroid use is widespread, it is obvious that the number of serious complications of steroid use in no way matches, or even represents, the presumed number of athletes presumed to take steroids. As a Swedish coach pointed out in 1984: ‘[steroids] have been used, and sometimes abused, by 20 million people since 1960, and I am wondering: Where is the damage?’

142 Aitken, above n 132, 220 and Bahrke and Yeaslis, above n 109, 41.
143 Aitken, above n 132, 220.
144 Bahrke and Yeaslis, above n 109, 41. Similarly Hoffman and Ratamess state that ‘…evidence indicates that most known side effects are transient…’ and that a cause and effect relationship has not been shown between steroids and their reputed serious adverse effects: Jay R Hoffman and Nicholas A Ratamess, ‘Medical Issues Associated with Anabolic Steroid Use: Are They Exaggerated?’ (2006) 5(2) Journal of Sports Science and Medicine 182, while Kicman states that ‘…it is important not to overstate the medical risks associated with anabolic steroid use’: AT Kicman, ‘Pharmacology of Anabolic Steroids’ (2008) 154 British Journal of Pharmacology 502, 518. Maxwell J Mehlman, Elizabeth Banger and Matthew M Wright, ‘Doping in Sports and the Use of State Power’ (2005) 50 Saint Louis University Law Journal 15, 30 conclude that there is a ‘lack of definitive data on long-term anabolic steroid use’ and that the dangers of the use of these substances has been ‘exaggerated.’
3 Steroids Were ‘Communist’ Drugs

(a) The Myth

The characterising of steroids as ‘communist’ drugs has been discussed extensively above.

(b) The Evidence

After the early 1990s it was difficult to maintain that steroids were purely an Eastern Bloc problem. Testimonies in the Dubin enquiry and similar enquiries in the UK and Australia clearly revealed that steroid use was a firmly entrenched practice in a large number of Western countries as well. As Voy and Deeter wrote in 1991:

We know that the Soviets and East Germans used drugs to aid performances on the playing fields for years. We must also remember, however, that the appeal of anabolic-androgenic steroids has always been global. Indeed, Western athletes (as exposed in part by the Ben Johnson affair) have always been equally active in the anabolic-androgenic steroid scene.

And they still are. Moreover, in 1984, Voy claimed that US athletes were even greater users of performance enhancing drugs (including steroids) than athletes from those countries which formed the communist bloc: ‘Our abuse of (performance enhancing) drugs in this country is actually a little higher than in the Eastern Bloc countries.’

Another distinction that is commonly made between steroid use in the East and West relates to the level of freedom of choice in the use of steroids. It is commonly recognised that many athletes in the former communist states did not take steroids willingly. Evidence from the former East Germany demonstrates as much, in that steroids were administered to athletes without an explanation of the nature of the substance, and often to child athletes. In distinct contrast to this, there is a common perception that athletes in the West have always had complete freedom in their choice to use steroids. This difference in

147 Dick Patrick, ‘Steroids Unmasked; Ben Johnson's Coach Testifies Abuse Widespread; Coach Paint Stark Picture of Elite Use’, USA Today (Washington), 2 March 1989, O1C. Charlie Francis, the coach of Ben Johnson, testified to the effect that steroids were widely used in USA, Canada, USSR, Great Britain, East and West Germany, New Zealand and Cuba. For a good summary of the Black Report in Australia and the Coni report in the UK, see Barrie Houlihan, Dying to Win: Doping in Sport and the Development of Anti-Doping Policy, 1999 (Strasbourg: Council of Europe), 141-143.


150 Note here that some maintain that many of the older East German athletes were aware of the doping programme but chose to turn a blind eye to it: see Phillip Sherwell, ‘Sports Drugs Turned This Woman Athlete into a Man’, The Sun Herald (Sydney), 18 January 1998, 45.
the level of choice regarding steroid use is another way in which steroids have been characterised as ‘communist’ drugs.\footnote{See for example Cohen, above n 130: ‘Athletes from many other countries including the United States have been found to have taken steroids, but the apparently systematic nature of the East German program, and its extent, remain without obvious parallel.’}

There is, of course, a huge ethical, moral and legal distinction between the situation of steroid use in fully-informed adult athletes, and the administration of steroids to under-age athletes without their knowledge. However, the characterisation of Western athletes as completely ‘free’ in their choice of steroids can be challenged, on the basis that steroid use in athletes is often ‘coerced use’ due to the various pressures on athletes.\footnote{One recurring theme of the doping debate is that athletes continually feel that they have no choice but to take drugs (particularly steroids) in order to compete at an elite level: Murray, above n 134, 24; Dave Anderson, ‘New Drug Epidemic: Steroids’, \textit{The New York Times} (New York), 10 July 1988, S6; Thomas Murray, \textit{In Search of the Spirit of Sport} (2007) <http://www.wada-ama.org/rtecontent/document/PlayTrue_Issue3_2007_Murray_En.pdf> at 9 January 2008; Michael T Kaufman, ‘Rise in Steroid Use Seen as Side Effect’, \textit{The New York Times} (New York), 29 September 1988, B18. For example, when there were rumours that more sensitive and accurate testing for all drugs (including steroids) was going to be used at the 1983 Pan-American Games in Caracas, a large number of athletes pulled out of the competition, including US athletes. \textit{The New York Times} reported that Lee Evans, US athlete and then world record holder in the 400 metres, said of the incident: ‘I think the Pan Am Games will be looked upon with a sigh of relief by the athletes…They will no longer feel pressured into taking potentially dangerous substances to remain competitive’: ‘Food, Not Drugs’, \textit{The New York Times} (New York), 1 September 1983, B17.} Furthermore, it seems that steroid use in the East and West arose from similar motivations. Although it seems that many athletes feel they had little choice in the matter, commentators such as Fost and Parry claim,\footnote{Norman Fost, ‘Banning Drugs in Sport: A Skeptical View’ (1986) 1986(August) Hastings Centre Report 5, 7 and Jim Parry, \textit{Ethics and Doping} School of Philosophy, University of Leeds, <http://www.blues.uab.es/olympic.studies/doping/doping1.htm> at 28 February 2005. In presenting this kind of argument Black and Pape make an exception for athletes from the communist countries, implying that these athletes had no choice but to take steroids (again reinforcing the link between steroids and communist athletes): Terry Black and Amelia Pape, ‘The Ban on Drugs in Sports: The Solution or the Problem?’ (1997) 21(1) \textit{Journal of Sport and Social Issues} 83, 91. The discussion above suggests that this may have oversimplified the situation in some cases.} in perhaps an unworldly way, that no athlete is forced to take steroids, since there is always a choice not to participate in elite sport at all.\footnote{The fact that some athletes chose to leave the sports programmes because of steroids proves this point. One example of an East German athlete who refused to take the steroids given her by her coach is Renate Neufeld Spassov who later defected to the West: see John Vincour, ‘East German Tale of Tyranny’, \textit{The New York Times} (New York), 11 January 1979, D17.} Leaving aside the athletes who did not suspect that they were being given steroids, just like their Western counterparts, athletes in East Germany did have a choice whether to be involved in elite sport.\footnote{Leaving aside the athletes who did not suspect that they were being given steroids, just like their Western counterparts, athletes in East Germany did have a choice whether to be involved in elite sport. In both situations the motivating factor was similar: the glory of winning and the material rewards that accompanied it. The material wealth that accompanies athletic achievement in the West is a familiar phenomenon. Perhaps less well known is the fact that excellence in athletic performance was rewarded in East Germany in a similar way, though perhaps not on the same scale: ‘If they wanted their careers “and to remain at their top-ranking government schools”’, athletes had no alternative but to take the drugs...}
(many steroids) despite concerns about side-effects including liver-problems.\textsuperscript{156} Thus, the characterisation of steroids as ‘communist drugs’, due to perceived forceful administration of the drug by communist leaders, is also based on questionable assumptions.

\textbf{B \hspace{1em} The Puzzle of Steroid Regulation}

A number of points have been made that, when considered together, make the prohibition on steroids in the early to mid 1970s difficult to understand on a purely rational basis. Firstly, the point has been made that at the time steroids were regulated in sport, the official medical opinion was that ‘there is no conclusive scientific evidence that extremely large doses of anabolic-androgenic steroids either aid or hinder athletic performance’ and ‘[t]he administration of anabolic-androgenic steroids to healthy humans below the age 50 in medically approved therapeutic dosages does not of itself bring about any significant improvements in strength, aerobic endurance, lean body mass, or body weight.’\textsuperscript{157}

Given the fact that steroids were viewed as ineffective to give a performance advantage at the time, it seems puzzling that the sports community should be so strongly united on the issue of prohibiting steroid use. The IOC was able to add them to their \textit{Prohibited List} without any apparent debate. As Pat Connolly said:

the credibility gap between doctors, researchers, administrators, officials, athletes and couches has become as wide as the grand canyon. The gap began when steroids were banned even though doctors were still insisting that they (anabolic steroids) were placebos. We banned a placebo?\textsuperscript{158}

It has been noted above that both the health rationale and the fairness/cheating rationale was overstated in doping discourse at that time.

It is clear that the regulatory model which had been previously adopted and extended to cover steroids was not one that was going to appropriately deal with the issue of steroid use. Also clear was the fact that the IOC and other doping authorities were keenly aware of the action of steroids\textsuperscript{159} and that \textit{in-competition} testing alone was not going to deter the use of steroids in training.

\textsuperscript{156} Glenda Korporaal, ‘Lying, Cheating and Winning’, \textit{The Sydney Morning Herald} (Sydney), 11 October 1997, 38.

\textsuperscript{157} American College of Sports Medicine, above n 61. It was not until 1984 that the American Academy of Sports Medicine changed its position on steroids to accept that they had some muscle building effect: American College of Sports Medicine, ‘The Use of Anabolic-Androgenic Steroids in Sport’ (1984) 19(5) \textit{Medicine and Science in Sports and Exercise} 534. This position was not simply an American one; it reflected the opinions of the majority of sports physicians in that era: see HA Haupt and Rovere GD, ‘Anabolic Steroids: a Review of the Literature’ (1984) 12(6) \textit{American Journal of Sports Medicine} 469, 469.


\textsuperscript{159} This will be discussed in more detail in Chapter Nine.
An article in *The Times* in 1973 stated:

> The claim of an infallible detection test has been met with some skepticism in sporting circles where it was pointed out that the steroid treatment can be halted weeks or even months before an event and the taker could still be reaping the benefit when all traces of the drug had been expelled from the body.\textsuperscript{160}

And, in 1976, Professor Arnold Beckett wrote:

> The problem of preventing anabolic steroid misuse is different from the one involving stimulant drugs. If the latter are taken just before a competition, they will give a positive result in a urine sample taken immediately after the sporting event. However, a competitor may take anabolic steroids during training, and then discontinue their use two to three weeks before a particular event; a urine sample collected at the event may not show a positive result even though the competitor may still be having an advantage at least in weight from the drug misuse.\textsuperscript{161}

In 1976, Prince de Merode, head of the IOC Medical Commission, wrote:

> In view of the very nature of doping with anabolics, which are usually administered during training and not necessarily in direct connection with a competition, it will be necessary to define the mechanisms by which this test can be carried out in a framework other than the actual competition (without, however, excluding the possibility of tests during competition). This, however, raises very considerable difficulties, whose organisational and financial aspects are not the least formidable by any means.\textsuperscript{162}

The final factor which adds to the puzzle of steroid regulation lies in the fact that steroids were prohibited before an accurate detection test was available for them. It has been said that the IOC did not prohibit steroids until the mid 1970s partly because they were waiting for a test by which they could enforce such a ban.\textsuperscript{163} However, as Dimeo points out, dope testing specialist, Arnold Beckett, ‘was surprised’ when the IOC prohibited steroids in 1974 ‘given that “at the time the gas and liquid chromatographic/mass spectrometric methods had not been developed sufficiently.”’\textsuperscript{164}

Thus when steroids were prohibited it was not clear that they actually enhanced performance, and their dangers were unproven. Furthermore, the prohibition was brought in before there were accurate testing procedures for steroids and the testing regime adopted was clearly inappropriate for the way in which steroids were used.

Many of these anomalies have been examined above and it has been shown that steroid symbolism is one of the reasons behind the adoption of steroid prohibition and testing in

\textsuperscript{160} 'Dope Tests to be Carried Out at Christchurch', *The Times* (London), 28 November 1973, 11.
\textsuperscript{161} Beckett, above n 5, 597.
\textsuperscript{162} Prince Alexandre de Merode, 'Doping Tests at the Olympic Games in 1976' (1979) 135 *Olympic Review* 10, 16. This article was also published as Prince Alexandre de Merode, 'Doping Tests at the Olympic Games in 1976' (1979) 19 *Journal of Sports Medicine and Physical Fitness* 91.
\textsuperscript{163} Beckett, above n 52, 28 and Todd, above n 11.
\textsuperscript{164} Beckett, above n 5, 597.
this environment. However, the combination of these factors also reveals the strong role that public opinion played in the regulation of steroids. Given the powerful symbolism at work and the IOC’s historic awareness of public opinion, it comes as no surprise that authorities were eager to do something about the problem of steroids.

C  
Conclusions: Myths and Puzzles

This discussion on the myths and puzzles of steroid regulation demonstrates that the symbolism of steroids is not just a theoretical phenomenon but had significant practical effects on anti-doping policy in the 1970s. It is also further evidence of the fact that public opinion has played a major role in the developments in anti-doping policy — even in situations where official opinions were contrary to public opinion.

VIII Conclusions – Steroid Symbolism

From the beginning, the Olympic Games have been an intense, deliberately manipulated medium of powerful cultural images, mythology, symbols and meanings, so it is not surprising that words such as ‘drugs’, ‘banned list’ and ‘steroids’ carry potent, symbolic significance which reaches well beyond the precise objects these nouns represent.\(^\text{165}\)

The last three chapters of this thesis have been devoted to exploring the symbolism associated with words such as ‘drugs’, ‘banned list’ and ‘steroids’ and the effects symbolism had in the development of anti-doping policy. This chapter has concentrated on the symbolism associated with steroids in doping discourse in the 1970s.

The main point of this chapter is that steroids were fundamentally different to the doping agents previously known in sport. These drugs were developed specifically for sporting application and thus had never had an application in recreational, illicit drug use. Steroids were not ostensibly illicit drugs.

Furthermore, steroids were training drugs, whereas the previous doping agents had been short-term drugs, used only on race day. Steroids, on the other hand, did not have to be used at the time of competition, their use could be stopped a few weeks out from competition and the athlete would still be able to gain advantage from their (supposed) benefits.

Steroids were different, but much of the symbolism associated with them was not. Steroids, despite their history, became seen as illicit drugs both through the use of illicit

\(^{165}\) Beamish and Ritchie, above n 18, 778.
drug language and the strong association between steroids and the paraphernalia associated with illicit recreational drugs. The symbolism of drugs as powerful agents was clearly a theme of 1970s doping discourse but the power of steroids was now seen as extremely dangerous and negative, transforming innocent athletes into artificial monsters.

The most powerful symbolism of steroids was the connection between steroids and communism. In narratives about the origin of steroids, the reasons given for steroid use by Western athletes and the explanation of their effects, they were characterised as drugs used by communist athletes. This symbolism had a number of effects, from the demonisation of steroids to the emphasis on cheating and the exaggeration of their negative health effects.

So, in the 1970s sports authorities were presented with a new drug and new issues to deal with in anti-doping policy. The development and use of these substances presented an opportunity to rethink and revise the whole anti-doping approach. No rethinking or revision was undertaken. Instead, the same approach was applied and the existing model extended to steroids. A new drug was here but no new approach was taken.

The decisions about performance enhancing substances in sport made in this decade provide some of the most poignant examples of the influence of symbolism in anti-doping policy. The strong influence of symbolism can help to explain some of the seemingly futile steps which were taken to deal with the new problem of steroids in sport, since many of the developments were driven more by fear created by the symbolism of steroids than by rationality.

Similarly, many of the puzzling aspects of modern anti-doping policy highlighted in the first part of the thesis can also be explained by the influence of symbolism. The next part of the thesis, Part III, will explain exactly how symbolism has created the confusions in anti-doping policy today. The next chapter will begin with an analysis of the role of symbolism in creating the problems identified in Chapters One, Two and Three.
PART III: THE ROLE OF SYMBOLISM IN ANTI-DOPING HISTORY

CHAPTER EIGHT

SYMBOLISM: THE SOLUTION

I INTRODUCTION

As previously mentioned, the framework of this thesis can be compared to a mathematical algorithm: the first three chapters set up the problem. The second part — the symbolism chapters — is equivalent to the working out of the problem. This chapter is like the statement of the ‘solution’, while the final chapter will be the ‘QED’ at the end, the statement which shows the proof is complete and describes the implications of what has gone before.

In the last three chapters a number of aspects of the symbolism associated with the use of performance enhancing substances in sport have been presented. In Chapter Five it was argued that in the 1920s and 1930s the use of performance enhancing substances in sport was strongly symbolic of illicit drug use and this symbolism was highly influential on the adoption of a total prohibition on performance enhancing substances. Although the rationale for anti-doping policy at that stage was couched in terms of amateurism, the symbolism of doping also had a part to play in that issue. This helped to tip the balance in favour of a total prohibition rather than unrestricted access or other forms of regulation.

Chapter Six demonstrated the symbolism associated with doping in the 1960s. Performance enhancing substances represented the power of science and drugs; this power was largely viewed as neutral of positive in the 1950s and early 1960s. More importantly, the link between illicit recreational drug use and doping was even stronger in the 1960s than in the 1920s. This is particularly the case with amphetamines; changing attitudes towards these substances was demonstrative of the change in society’s attitudes towards doping agents in general. Between the 1950s and late 1960s, amphetamines went from being useful and effective medical aids to dangerous and evil recreational drugs associated with the rebellious youth of the 1960s. Simultaneously doping went from being a
relatively benign practice to a dangerous and evil ‘cancer’ in sport.¹ Finally, in Chapter Seven, it was demonstrated that the power of science was seen in a much more suspicious light than earlier decades and steroids were now viewed as being capable of changing normal, healthy athletes into supercharged inhuman robots. But the most important aspect of the symbolism associated with steroids in the 1970s was the links made with athletes from communist countries, making steroids not only something to be wary of but something to be feared, controlled and prohibited.

In the early part of the thesis it was argued that, despite the fact that anti-doping policy appears to attract such consensus presently, there are many ambiguities and difficulties lying beneath the calm exterior. On the closer analysis presented in Chapters Two and Three, it becomes apparent that two fundamental issues are still unclear: what exactly is doping and why do we prohibit it? The task of this chapter is to demonstrate how the symbolism presented in Chapters Five, Six and Seven provides explanation for many of the ambiguities of the anti-doping war identified in the first three chapters. In order to cogently explain how symbolism helps to explain these ambiguities, the symbolism discussed in the previous three chapters will be condensed into three types of symbolism. This will be demonstrated in the first section of this chapter. In the next section of the chapter the issues raised in each of the first three chapters will be re-examined and the question of how symbolism helps to explain these ambiguities will be considered.

II THE THREE LAYERS OF SYMBOLISM

Although, of course, the picture presented by the symbolism of doping is highly complex, the analysis of the last part of the thesis reveals three broad areas of symbolism operating which can be summarised into three main types — doping as a medical drug, doping as illicit drugs and specific symbolism. These types are represented as layers in the diagram below in Figure 5.

Figure 5: Pyramid of Symbolism

The first layer of symbolism, called here ‘performance enhancing substances as medical drugs’, refers to the way in which performance enhancing substances have been identified as ‘drugs’ at the most basic level. ‘Drugs’ in the medical sense, despite the previously mentioned disenchantment with science characteristic of the post-modern movement, are still viewed by most of the population as powerful substances which can change the biological makeup of a person. As ‘drugs’ in this sense these substances take on all the power of medical science.

The belief in the power of drugs has been at work throughout the ‘war on doping,’ and it is one of the most basic assumptions at work in anti-doping policy. If performance enhancing substances were not powerful ‘drugs’ which had the ability to alter an athlete’s performance, then there would be no concerns about the level playing field or unfair advantages. Any substances which athletes chose to ingest would have been viewed in the same light as some of the early doping attempts and would attract the same level of

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scepticism. These chemicals would be placed in the same category as the superstitious activities of sportspeople: for example Australian Test cricketer, Steve Waugh, always took a lucky red hanky to the crease when batting.

The second layer of symbolism is the connection between performance enhancing substances and illicit, recreational drug taking. This symbolism arises from a number of sources. Firstly, the substances involved in doping have traditionally been ‘illicit drugs’. This was particularly true at the beginning of anti-doping efforts, where almost all substances used for boosting athletic performance had been subjected to criminal prohibitions in the recent past and were recognised as ‘narcotics’ or ‘stimulants’. Even in the 1960s, the large majority of substances on the first prohibited lists were illicit drugs and connected with the growing illicit drug culture of the late 1960s. By the 1970s these prohibited lists had grown to include non-illicit substances which were legally available either with or without a prescription. But, by this stage, the link between illicit drugs and performance enhancing substances had been well established. Today there is still a huge overlap between illicit recreational drugs and prohibited performance enhancing substances. So when athletes are reported as using performance enhancing substances, the public imagines them as engaging in activities that look exactly like illicit drug taking.

The final layer of the symbolism which has been explored in this thesis has been labelled ‘performance enhancing substances as sports drugs’ in the diagram and refers to the specific symbolism associated with the various substances and methods on the prohibited list. Two very important substances in this layer are anabolic steroids and amphetamines; the specific symbolism associated with these drugs has therefore also been examined.

None of these layers would be enough to drive anti-doping policy in isolation; they operate together in a highly complex web of interaction. If performance enhancing substances were just seen as medical drugs, then it is doubtful as to whether there would be any perceived need to prohibit their use. Instead, any performance enhancing effect would be treated as other performance enhancers in sport — such as equipment and nutrition — while any dangers to the health of the athlete could be controlled by medical professionals, as is done in medical practice every day. If performance enhancing substances were only perceived as illicit recreational drugs, then it is unlikely that there would be a separate prohibition on them in sport. Instead, the issue would simply be part of the ‘war on drugs’ and dealt with from a criminal enforcement perspective. And finally, if performance enhancing substances were seen as simply sports drugs, and there was no influence of the
‘medical drugs’ symbolism, then it is unlikely that the belief in their power would be strong enough to warrant a prohibition. The diagram which separates these layers is therefore somewhat misleading in that respect, but it certainly assists in clarifying these three forces at work. The true picture is really more like a conglomerate rock than a sedimentary one.

Thus the three layers of symbolism work together to contribute to making prohibited substances ones to be feared and hated. Having examined these three layers it is now possible to examine how this symbolism has contributed to creating some of the major difficulties in anti-doping policy today.

III QUESTIONS RAISED IN CHAPTER ONE

A Why is There Such Strong Consensus in Anti-Doping Policy?

Given the difficulties and uncertainties of anti-doping policy identified in Chapters Two and Three, the strong consensus that anti-doping policy presently attracts requires some explanation. There are many contributing factors creating the consensus but part of the explanation is found in the symbolism of doping.

At a very general level, it is clear that anti-doping policy is not a rationally based system but that public opinion and strong emotions have played a major role in the development and continuance of anti-doping policy. These powerful emotions are largely driven by the symbolism of doping. This leaves little room for rational argument and attempts to introduce logic and rationality into the debate are often ineffective. It is very difficult to swim against the tide of public opinion and accept and approve doping, however, since symbolism has created such strong feelings in the public. Objections to anti-doping policy are viewed with great suspicion and the proponent of such an argument is viewed as a betrayer of the good fight against this dangerous evil.

These general comments can be illustrated by reference to some of the specific symbolism of doping. Steroids are a particularly good example of two of the three layers of symbolism at work: medical drugs and sports drugs. Since steroids were seen as being capable of turning good, healthy athletes into sub-human automatons — due largely to medical drug symbolism — arguing that there is little evidence to support their dangerous reputation is unlikely to attract much favourable attention. Such an argument would be dismissed as a mere failure of scientists to prove what is so blatantly clear from newspaper
articles which describe the physical changes apparent in steroid users. How could you argue that a drug with such dehumanising powers was safe to use? Furthermore, given the strong association between communist regimes and steroids — the specific symbolism of steroids or ‘sports drug’ symbolism — in the 1970s arguing that steroid use should be allowed would have been very difficult and could even have been seen as sympathising with communist regimes. These were communist drugs, why would anyone else want to allow their use except to help the ‘enemy’ win political points? A dissident would need to be very confident of their position to object to the prohibition of steroids with such images being associated with them.

B  Why So Serious About a Leisure Activity?

The point was made in Chapter One that sport, whether elite or social, is essentially a leisure activity for the majority of the public. The public outrage that is elicited by the issue of the use of performance enhancing substances in sport is out of all proportion with the importance of sport in the normal spectator’s life. One reason for the passion involved is, of course, the growing importance of sport in general, particularly with regard to the patriotism and the money involved. Apart from these factors though, the symbolism of doping plays a major role here, particularly the second level of symbolism in the symbolism pyramid above.

Having seen the significant role that illicit drug symbolism has played in the development of anti-doping policy, it now becomes clear that the public response to ‘doping’ is not just a response to ‘doping’; it is also, and primarily, a response to the issue of illicit drug use in society. The use of performance enhancing substances in sport is taken seriously because illicit drug use is taken seriously.

C  Why Are All Substances Treated the Same Under Anti-Doping Law While They are Treated in a Different Way in the Media?

As has been discussed in previous chapters of the thesis in respect to the World Anti-Doping Code (WADA Code), there is now only one prohibited list for all sports and one set of sanctions applying to that list. Although there are exceptions, such as the Specified Substances provisions in Article 10.3 of the Code, a doping violation in relation to any

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3. It is recognized that many spectators do feel that sport is an extremely important part of their lives — one only has to witness the riots and hooliganism at football matches to be aware of this. However, the argument here is that, in terms of the effects on the spectator’s human needs such as food and shelter and even for their well-being, elite and spectator sport is not necessary.

4. The reason why this is the case is beyond the scope of this thesis but the work of the drugs politics school, referred to in Chapter Four, is noted here.
substance or method on the WADA Code Prohibited List will automatically result in the imposition of a two year or life time sanction, depending on the number of previous offences by the athlete.\(^5\) In previous anti-doping policies there was sometimes a graduated schedule of applicable sanctions according to the type of substance involved: the lighter sanctions being applied to substances such as pseudoephedrine.\(^6\) This approach has since been dropped in the Code, and universal sanctions have been adopted, not just for all sports but for all substances. Since the specified substances provisions only apply where the athlete is able to prove that their use of the specified substance was not intended to improve their performance, the intentional use of a stimulant such as ephedrine or nikethamide is treated exactly the same as the intentional use of a steroid. Moreover, all substances on the WADA Code Prohibited List are subject to disqualification from the event to which the positive drug test applied, whether the use of the substances was inadvertent or not, and it is only the ongoing suspension which varies according to whether the specified substances or exceptional circumstances provisions apply.\(^7\) Essentially all substances are treated the same under the WADA Code, differential treatment being the exception rather than the general rule.

But the various prohibited substances are not treated the same by the public in the discussions surrounding the issue of performance enhancing substances in sport. As mentioned in Chapter One, the way in which the media/public reacted to the use of steroids by Ben Johnson is a far cry from the treatment of the use of Digesic by Australian swimmer Samantha Riley\(^8\) or diuretics by Australian cricketer Shane Warne.\(^9\) To draw an even more revealing comparison, it was recently revealed that Carl Lewis — whose rivalry

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\(^5\) WADA Code, Article 10.1 and 10.2. The 2007 changes to the WADA Code will increase the distinction between substances as all but anabolic steroids and a few other substances will be specified substances under the code and therefore be open to the application of the new Article 10.4. Thus, this ambiguity of doping law has been largely corrected. However, as noted in Chapter One, the ambiguity which existed for a number of years is significant in demonstrating the role of symbolism. Furthermore, since the specified substances provision only applies to situations where athletes can show that they did not have any intent to enhance performance, all other doping cases will be treated under the normal sanctioning provisions in Article 10 (assuming no exceptional circumstances apply). The argument therefore still applies to the revised Code.


\(^7\) WADA Code, Article 10.3 and 10.5.

\(^8\) T Magdalinski, 'Drugs Inside Sport: The Rehabilitation of Samantha Riley' (2001) 17(2) Sporting Traditions 17.

with Ben Johnson added so much drama to the 1988 Seoul Olympics doping scandal —
failed a doping test in the 1988 US Olympic trials. He tested positive for the stimulants
ephedrine, pseudoephedrine and phenylpropanolamine. These revelations have had little
impact on the positive, ‘clean’ image that Carl Lewis has maintained for the last decade.
If the public distinguish between different substances in this way, then why isn’t this
reflected in the law?

This can be explained by reference to the operation of a number of different effects of
symbolism, tending on one hand to treat all substances the same and on the other to
distinguish between them. As will be discussed later in relation to the justification for the
strict liability offence, once the use of performance enhancing substances was identified as
‘drug use’, then all substances on prohibited lists took on the symbolism of a ‘medical
drug’ — the powerful life-altering magical potion which represents the power of modern
science. On this basis all ‘drugs’ on the list are assumed to have that power, so powerful
are they that they must be the determinative factor in the competition. This is one of the
underlying assumptions behind universal sanctions attached to all prohibited substances:
one drug always a drug!

Symbolism also had other effects here which tend to distinguish between different
substances. Firstly anything that looks like an illicit drug is more likely to be demonised
than a mere ‘medical’ drug: thus by reason of the second layer of symbolism, (i.e. illicit
drug symbolism) amphetamines will be more heavily censured than asthma medications.
Furthermore, the amount and kind of specific, ‘sports drug’ symbolism associated with the
particular drug will also determine the treatment of athletes who use that substance. As
discussed in Chapter Seven, anabolic steroids are particularly ‘steeped in symbolism’. It
is therefore no surprise that users of anabolic steroids — or similar training drugs such as
human growth hormone (hGH) — are subjected to the most public resentment, while the
users of prohibited substances with less emotive symbolism attached are not subjected to
the same level of vehemence. For instance, the use of caffeine by athletes is not viewed
with anywhere near the same level of censure as anabolic steroids. One has only to
compare the public reaction to the news of the disqualification of the Australian athlete,

10 Jacqelin Magnay, Carl Lewis's Positive Test Covered Up (2003)
11 Director Barry R McCaffrey, Combating the Use of Drugs and Doping in Sport (1999)
12 Desmond Manderson, 'Symbolism and Racism in Drug History and Policy' (1999) 18 Drug and Alcohol Review
179, 180.
Alex Watson, from the Barcelona Olympics to that of Ben Johnson to see the difference: Watson drank coffee while Johnson took steroid pills/injections. And yet both were disqualified by the International Olympic Committee (IOC). Coincidentally, coffee, being something that ‘non-drug-users’ regularly consume, has little negative symbolism attached.\footnote{Leaving aside the fact that caffeine in the form of pills is not seen in the same light. This will be discussed below.}

Why is Intentional and Unintentional Use of Performance Enhancing Substances Treated in a Different Way by the Public But Not by the Law?\footnote{The 2007 amendments to the Code have increased the opportunity for consideration of the role of the intention of the athlete by reason of increasing the number of specified substances. However, this only applies to the ineligibility period and not the initial disqualification.}

The fact that the prosecuting side in a strict liability doping case is not required to prove intent on the part of the athlete certainly lessens the investigative load on the anti-doping body and subsequently lessens the enforcement burden. The desire to make enforcement of anti-doping policy easier for the ‘doping police’ provides an explanation for why unintentional doping and intentional doping are treated the same at law. But it does not explain why society is content to allow this equal treatment to occur. Since the public debate surrounding the issue makes it clear that the two types of use are perceived very differently, the acceptance of the severe treatment of unintentional drug use needs some explanation.

One significant factor in this explanation lies in the power of symbolism at all levels and the complex interaction between them; so strong is that power that even the smallest hint of the presence of such a substance in the body of an athlete is enough to stir action. Whether it is by reason of the power of drugs in what I have termed medical drug symbolism or the repulsion felt against it due to the sport drug symbolism identified above, the law cannot tolerate the smallest trace of performance enhancing substances. This will be explored further in the second part of this chapter.

Research Questions: Why So Much Confusion?

It is fairly clear that one of the answers to the research question of why anti-doping policy is characterised by so much confusion is that this is a natural outworking of the way in which the policy has developed. Again, although there are a number of factors contributing to this confusion, symbolism plays a highly influential role here. Rather than being a well considered response to the problem of performance enhancing substances in
sport, it is clear that emotional factors were often more important than rational ones in anti-doping decision making. Furthermore, the discussion in Chapters Five, Six and Seven reveals that, although there was some consistency in the symbolism of different eras, each era had its own special emphasis and there were a number of levels of symbolism at work at any given time. The outworking of this mix of symbolism was to create a confused combination of ideas about doping which are very difficult to unravel.

IV QUESTIONS RAISED IN CHAPTER TWO: THE DEFINITION OF DOPING

A Theoretical Definition Versus Operational Definition

In Chapter Two it was argued that there is a wide gap between the theoretical definition of doping as elucidated in the doping discourse and the operational definition as set out in anti-doping codes. The theoretical definition of doping largely involves intentional conduct: when the public think of doping they think of an athlete trying to ‘cheat’ by intentionally using prohibited substances. However, the theoretical definition is extended to cover inadvertent use of an effective doping agent — one which would enhance performance. Thus, in some cases, people are willing to think of ‘doping’ as including an athlete who accidentally takes a prohibited substance which could have had a determinative effect on the competition. On the other hand, the operational definition as defined in the WADA Code excludes the athlete’s intent from the enquiry; only the presence of the prohibited substance is relevant. Where the real difficulty lies is in the extended operational definition of ‘doping’: situations where there is no intent — inadvertent doping — and also no effect on the performance of the unfortunate athlete. Although this situation is far from what we think of as ‘doping’, it is punished as such in anti-doping law.

There are, of course, some practical reasons why the strict liability approach has been taken in anti-doping law: the reduction of the enforcement burden for the ‘doping police’. However, these practicalities would never have been accepted as reasonable justification for such a strong approach had it not been for the serious view attached to doping; just as only serious illicit drug offences are seen a sufficient warrant for such ‘reverse onus’ or strict liability rules in place of the standard criminal law. Symbolism helps to explain not only why doping has been taken so seriously but also why this gap between the theoretical
definition and operational definition has been accepted as reasonable. The reason has largely to do with a difference in the layers of symbolism involved. The most convenient way to explain this difference is to consider the symbolism involved in each definition.

1. Theoretical Definition

It is clear that the theoretical definition of doping is driven by the idea of ‘cheating’: the athlete intentionally trying to gain an unfair advantage over their fellow competitors. The assumption behind this view is that the use of drugs gives such an advantage. The point has been made a number of times that the presumed advantage is often overstated and that the assumption is largely driven by the ‘medical’ symbolism of the power of drugs — power to transform the athlete from an average competitor to a superhuman. But there is another layer of symbolism needed to explain why such an attempt would be seen as so morally degenerate. This is largely explained by the next layer of symbolism in the above pyramid: illicit drug symbolism.

The most explicit references to the moral degeneracy of doping arose in the 1960s. It was argued in Chapter Six that this negative view of doping had largely to do with the illicit drug symbolism evident in doping discourse at that time. Since doping was akin to illicit drug taking, the same moral implications applied. The discourse from which the theoretical definition of doping arises is characterised by similar rhetoric as the 1960s discourse: references to drug addiction, roles models and dangers of drugs abound.

The influence of illicit drug symbolism had another effect: it led to the further alienation of drug use in sport due to the conflict between the image of the Corinthian athlete and the illicit drug user. In Chapter Five it was argued that the clash between the image of the perfect amateur athlete and the illicit drug user went a large way to explaining why drug taking was assumed to be so totally opposed to the amateur ethos in sport; why taking drugs was taking sport too seriously. This view helps to explain the wide acceptance of the ‘extended’ definition of doping: the polluted body of the athlete must be removed from the competition whether the athlete was morally innocent or not.

Furthermore, the theoretical definition which focuses on ‘cheating’ has also been influenced by the view of doping in the 1970s when there was a greater focus on fairness and the level playing field. The point was made in Chapter Seven that these ideas were particularly strong in light of the tensions of the Cold War: with such strong rivalries between East and West it was no surprise that the drugs which were symbolically linked to
athletes from the ‘other side’ were viewed as morally degenerate and a form of cheating. Thus the language of morality and intent, which began with the ‘illicit drug’ layer of symbolism, was overlaid with ‘sports drug’ symbolism specifically related to steroids and the morality associated with the rivalries of the Cold War in sport affected the theoretical definition of doping.

Thus the theoretical definition of doping has been most greatly affected by the middle and upper layers of the symbolism pyramid: performance enhancing substances as illicit drugs and sports drugs.

2 Operational Definition

In direct opposition to the theoretical definition, the operational definition relies totally on a factual matter: the presence of the prohibited substance in the sample of the athlete. There are two possible situations in which the operational definition is significant: firstly where there is a prohibited substance in the athlete’s sample which probably did enhance their performance; and, secondly, where there was a prohibited substance in the athlete which did not enhance performance in any way.

(a) Inadvertent Doping with Potentially Ergogenic Substances

The first situation is that of inadvertent doping with effective, or potentially effective, doping agents. It may seem logical to argue that if the substance involved could have had an effect on performance, then the athlete should be prohibited. But this is not the end of the story. Disqualification and subsequent suspension from further competition assumes that the doping agent was the only significant differential in the competition: that drugs, and drugs alone, are to blame for the result of the competition. Such reasoning is best demonstrated by the famous defence of the strict liability doping rule by the Court of Arbitration for Sport (CAS) in the case of Quigley v International Shooting Union (UIT). 15

This judgement is useful for demonstrating a number of aspects of symbolism at work, so a short summary of the case and the relevant judgement will be set out before the discussion continues.

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(i) **Quigley v UIT: the Court’s Reasoning**

The case arose out of an international skeet shooting event in Cairo in April 1994 which was held over two days. After day one, Quigley was placed second but he developed a temperature and coughing fits during the night. The hotel doctor prescribed antibiotics and cough medicine and, after Quigley and the team coach showed him a copy of the IOC *Prohibited List*, he (wrongly) assured them that the medications did not contain prohibited substances. After winning the competition, Quigley’s drug test showed ephedrine, a prohibited substance which came from the cough medicine he had been prescribed.

The case before the court turned on whether the relevant anti-doping rules defined the offence of doping as a strict liability rule or not. The significance of the case arises from a particular passage in which the court considered the justice of the strict liability rule and concluded that it was acceptable for doping policies to be based on the approach:

> 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 on 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.

> Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness 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.\(^\text{16}\)

In accepting the appropriateness of the strict liability rule definition of doping, the court drew an analogy between the case of inadvertent doping and the situation where an athlete contracts a sudden illness rendering them unfit to participate in competition. In both cases, the court stated, the loss must lie where it falls. The court reasoned that to do anything to resolve the misfortunes of the one athlete would create greater unfairness for the many athletes who have not suffered the misfortune. The core concern regarding inadvertent doping was the potential effect on the fairness of the competition. It was assumed that by allowing the inadvertent doper to compete with a doping substance in their system,

\(^{16}\) Ibid, 193.
unfairness was created for the rest of the cohort of competitors since they had to compete against a ‘supercharged’ athlete.

This kind of reasoning was also evident in comments made by the CAS panel in *C v FINA*:

> It would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents for whatever reasons. “The result of the event has indeed been objectively vitiated and, consequently, the intention of the author is irrelevant.”

Similar attitudes have been expressed by academic commentators: ‘Further, there can be no objection in principle from disqualifying anyone who has won a race with the aid of drugs, even though he, she or it was entirely innocent in the matter. The fact remains that the advantage has been gained – and, in objective terms, unfairly.’

It was also accepted by the court that to require sporting federations to prove intent on the part of ‘doping’ athletes would be too costly and would therefore render them almost useless to enforce anti-doping rules. This has been the heart of the argument for continual adherence to the strict liability rule in the face of some harsh criticism. As has been noted above, this is a practical reason to do with enforcement which has only gained acceptability through the influence of symbolism in making the issue of doping seem such an important one.

**(ii) The Assumptions of the Quigley Reasoning and the Role of Symbolism**

There are a number of interesting and significant assumptions at work in the court’s reasoning, but two are particularly significant for this discussion.

It was assumed that every prohibited substance or method found in every athlete will be so effective that it will vitiate the results of the competition. This is a false assumption. As has been stated a number of times, the efficacy of many substances on the *WADA Code Prohibited List* is lacking, making such an assumption difficult to maintain. Moreover, further difficulty in this assumption is found in the operation of the new criteria for inclusion of substances on the *Prohibited List*. Since to be considered for inclusion on the *WADA Prohibited List* a substance/method only has to satisfy two out of three criteria


(health, performance enhancement and the spirit of sport), there is a distinct possibility that a substance can be prohibited without proof of ergogenic potential. Thus, even if all substances in the past were effective in all situations — which we know is not the case — in the future this may not be true. The aspect of symbolism which assists in maintaining such an assumption is the first level of the symbolism pyramid set out above: ‘medical drugs’ — since drugs are such powerful agents, they must be the reason for the doping athlete’s success. This belief, established in the 1920s and 1960s when science and drugs were viewed as extremely powerful, was reinforced by the Cold War tendency to look for reasons for sporting success other than the predominance of the other side’s political system (demonstrating the specific level of symbolism ‘sports drugs’). Thus, the reasoning behind the legal or operational definition of doping, has been strongly affected by this view of the prohibited substances: the famous legal defence of the theoretical definition of doping has been affected by the bottom and top layer of the symbolism pyramid.

Perhaps less obviously, the analogy made comparing the case of inadvertent doping to the case of food poisoning on the eve of a competition also provides an example of the operation of symbolism. The analogy has some short-comings. There are some similarities between the case of food poisoning and inadvertent doping — in that the athlete is not at fault in either case and both will be ruled out of the competition — but the argument fails to recognise that the two situations arise for very different reasons. Food poisoning is the true result of the vicissitudes of life (and not human rules) and renders the athlete disabled from competition. On the other hand, disqualification for inadvertent doping is simply the result of the very rule which is sought to be justified by the argument. Inadvertent doping would not result in any misfortune if there was no doping rule or if the doping rules were not strict liability ones. As such, the misfortune in inadvertent doping is merely a creation of the rule itself. Drawing a comparison between these two situations is clearly based on an assumption that doping rules, and the strict liability rule, is part of the natural order of things.

Why would the strict liability approach be viewed as so natural? The assumption is, to a large degree fuelled by the adoption of the illicit drug model in anti-doping policy. Rather than tailoring a regulatory approach to the unique circumstances of sport doping, the imagery and association of illicit drugs in doping led the authorities to adopt a total

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19 This is an example of the logical fallacy of arguing in a circle where one assumes the truth of the proposition one is wishing to prove. See discussion in Chapter Three.
prohibition and drug testing model which was characteristic of illicit drug laws. Having identified performance enhancing substances with illicit drugs from the earliest times of anti-doping policy, it became natural to adopt the regulatory approach used in illicit drug control. This model includes the strict liability approach making intent irrelevant. So strong is the link with illicit drugs that even in an argument which seeks to justify such an approach, the rightness of the approach is assumed.

Thus, the operational definition of doping has also been influenced by what I termed the middle layer of symbolism — illicit drug symbolism.

(b) Inadvertent Doping with Non-Ergogenic Substances

The role of symbolism is even clearer in the situation where athletes are punished for doping when they did not have the intent to dope and the substance had no effect on their performance. Despite the lack of the factors which are usually present in situations normally viewed as ‘doping’, the athlete is punished for doping. So strong is the response to the presence of performance enhancing substances that any trace of any drug in the system of the athlete is seen as problematic. It doesn’t matter if it is not unfair or unhealthy in that particular situation. If doping policy was based on the rationales examined in Chapter Three, then these things would matter: if based on health or fairness then the effect of the drug would be relevant. The fact that the mere presence of the drug is enough to condemn the user suggests that there is something other than these rationales at work.

It is argued that it is predominantly the middle layer of symbolism that is at work. The close links between performance enhancing substances and illicit drugs made ‘doping’ into an absolute evil. And such a monstrous evil requires harsh treatment in order to effectively deal with the issue and symbols involved. Just as the surgeon may need to cut away some healthy flesh in order to remove a cancerous tumour from a patient, so some practices which are not ‘doping’ may need to be punished in order to deal with the ‘cancer’ of doping. A radical problem needs a radical treatment.

Proof of the role of illicit drug symbolism is seen in the similarity with illicit drug laws in this regard. Illicit drug laws do not concern themselves with the effect of the drug on the particular user, only whether that substance was present. It is hardly surprising that a system based on illicit drug symbolism, as anti-doping policy is, similarly ignores the
effect of the drug. In both cases what is more important is the emotional response to reminders of illicit drugs, the true effect of the ‘drug’ is a side issue.

In a less obvious way, specific steroid symbolism — particularly their dehumanising effects — may have had influence here as well. The image of a ‘clean’ athlete accidentally ingesting a substance which could turn them into a monstrous super-athlete produces a similarly radical solution. So those substances need to be removed from sport even if they have no effect on the fairness of competition and are not the subject of immoral ‘cheating’.

(c) Theoretical Definition Versus Operational Definition

It can be seen from the discussion above that the layers of symbolism identified in the symbolism pyramid have all contributed to the theoretical and operational definitions of doping. The fact that similar symbolism is involved may make it surprising that the two definitions would differ so much. However, the gap between the two arises mostly from the interaction between the three layers of symbolism. The theoretical definition of doping unsurprisingly focuses on the morality of drug use and is driven largely by the middle and upper level of symbolism: illicit drug symbolism and specific sports drug symbolism. The source of the theoretical definition, being mostly anti-doping discourse and rhetoric, naturally tends towards the most sensationalist images. The operational definition, springing mostly from case law and doping codes, is less sensational but equally affected by symbolism. On the one hand the operational definition is firstly based on the ‘medical drug’ symbolism, making all drugs powerful in all situations and therefore making drug taking automatically objectionable for destroying the level playing field. Secondly, the strict liability approach is largely the result of the adoption of the illicit drug model in the 1920s, due to the role of illicit drug symbolism. The operational definition is extended further to cover non-effective doping substances largely through illicit drug symbolism where even a trace of a ‘drug’ needs to be dealt with radically.

B Doping Definition Within Doping Discourse

In Chapter Two, three doping related incidents were reviewed where athletes had taken various substances in an effort to increase their performance. None of these practices were prohibited by the rules of sport, but each of them were subjected to public scrutiny and found to violate the public’s sense of what is acceptable performance enhancement and what is not. The public reaction was puzzling in light of the legal status of the practices.

20 This is leaving aside the practical reasons mentioned above.
involved. The point was made that such a strong reaction demonstrates the confusion over which substances should be included on the WADA Code Prohibited List and which should not. The confusion over doping definition again demonstrates the influence of symbolism. In fact, public discourse, particularly that found in the popular press, is a useful place to examine the role of symbolism since rationality and logic provide such little restraint in these forums. What can be seen in this debate, therefore, is the purely emotional realm of doping. The emotions aroused by such ‘doping’ incidents are no doubt due to a number of factors, but symbolism is one extremely powerful influence.

The most powerful symbolism in these events was that of illicit drug use. Two aspects of the discussion are particularly significant: firstly, the focus on the route of entry of the drugs; and, secondly, the similarities between the role model argument in the illicit drug and doping debate.

The use of a hypodermic syringe to inject multivitamins in the Mark French case was a powerful reminder of the use of such equipment in the use of illicit recreational drugs such as heroin. The concern was not so much what was in the injection, but the act of injecting itself. These kinds of images were strong in the French case, the focus was on the allegations of a ‘shooting gallery’ at the Australian Institute of Sport facility rather than the use of the prohibited substance (equine growth hormone). Similarly, the use of caffeine pills by athletes holds reminders of the use of other pills such as party drugs like amphetamines and ‘ecstasy’. What’s more, the fact that footballers were prominently involved in the caffeine pill controversy no doubt fuelled these associations: reports of the use of party drugs such as ecstasy and other stimulants by footballers are common in the media. Similarly, the use of an intravenous drip in the Cannavaro case, although often associated with medical treatment in hospitals, involves equipment and anatomical structures which are similar enough to hypodermic syringes to elicit the same emotional response.

One other aspect of the public debate over these incidents needs comment, namely that taking caffeine pills sends a ‘bad message’ to youth. The language of this argument is extremely reminiscent of the ‘war’ on illicit drugs, a common feature being concern about

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\(^{21}\) As evidenced by the Anderson’ report, great exception was taken to the use of such equipment by athletes: The Honourable Robert Anderson QC, Second Stage Report to the Australian Sports Commission and to Cycling Australia 27 October 2004 (2004) <http://www.dicta.gov.au/?a=16787> at 30 August 2005, 21. See Chapter Two, page 71, footnote 115, for full quotation. See also Chris Cooper, ‘Drugs and Ergogenic Aids to Improve Sport Performance’ (2008) 44 Essays in Biochemistry 1, 5, who argues that ‘[h]istorically, doping agencies seem to have had a bias against injectable compounds, possibly because of the link to illegal street drugs …’.
what kind of message illicit drug use sends youth. The use of the same language as the ‘war on drugs’ adds power to the rhetoric of the ‘war on doping’ and the similarity in language reinforces the fact that the roots of anti-doping policy are to be found in the ‘war’ on illicit drugs.

Of particular note in these three incidents is that all were assumed to involve effective performance enhancers, even though none of the substances actually appeared on the WADA Code Prohibited List. There is obviously also a strong element of the first layer of symbolism — ‘medical drugs’ — so strong is the belief in the power of drugs that the public debate is not rooted in doping definition as decided by the authorities. There was also much talk of cheating in the discourse: ‘This is, I suppose, bordering on cheating. If it’s not on the list it’s not cheating, but it’s bordering and it’s saying well, let’s take every step now,’ [World Anti-Doping Agency director-general David Howman].

This kind of language suggests that as soon as the substance involved is identified as a drug — in a medical sense — it is immediately assumed that the drug has the power to determine the outcome of a competition even if that substance has not been determined to be ‘cheating’.

The emotional response to these ‘doping’ incidents, based as it is in symbolism, is entirely consistent with the way in which the prohibited list has developed over the years — with little logic or consistency.

C Doping Definition Within the Prohibited List

The point has been made previously that the IOC Prohibited List grew in an unprincipled manner, ‘like Topsy’ in Dick Pound’s words. He argued that the reason for this less than systematic approach was that the IOC Prohibited List was basically a reflection of the research interests of the scientists involved. No doubt this is part of the explanation. However, as Dimeo points out, the scientists involved in studying doping were not doing so in a vacuum, they also were affected by emotional factors. It is clear that not only were they affected by their view of sport — and the symbolism of the ‘pure’ amateur — but also by the public sentiment generated by symbolism relevant to the substance involved. The influence of symbolism can be seen most pointedly in the substances included on the early prohibited lists and the addition of steroids to these lists in the 1970s.

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23 Dick Pound, Inside the Olympics, 2004 (Mississauga: John Wiley and Sons), 57 - 58.
24 Dimeo, above n 2, 102.
It has been noted that the first prohibited lists were dominated by drugs which already had an identity as illicit recreational drugs. Obviously, part of the reason that these particular substances were chosen was because they were regarded as common doping agents. But the fact that there were many other substances/practices which could have, and had been in the past, viewed as ‘doping’ agents shows that there was another factor at work: the identification of performance enhancing substances as ‘illicit drugs’. Moreover, it is significant that all the substances which appeared on the first prohibited lists were ‘drugs’ (rather than food substances, oxygen or altitude training). Doping, then, was largely about illicit drugs.

Symbolism also played a major part in the addition of anabolic steroids to prohibited lists in the 1970s. Clearly that the decision to add steroids to the IOC and other lists was driven by something other than pure scientific rationality, since steroids were added to the list before adequate tests were available and at a time when scientific opinion was against their usefulness as a doping agent. All levels of the symbolism, particularly the ‘medical drugs’ and specific ‘sports drug’ symbolism, worked together to produce public fear and revulsion of steroids.

There was also a significant secondary effect of symbolism on prohibited lists. This secondary effect has operated even on substances which don’t have powerful specific symbolic associations. Two good examples are caffeine and Neoton (discussed above), as neither are identified as illicit recreational drugs. The IOC Prohibited List was not based on sound scientific evidence about the ergogenic effects or health dangers of the substances. Rather, it grew as a response to a number of factors, including scientific research interests and public opinion created/ reinforced by symbolism. From the beginning of such lists, there was no clear guide as to how a substance was determined to be appropriate for inclusion. Confusion reigned supreme. In this confusion, public opinion was a particularly powerful force: any performance enhancing substance that elicited the appropriate public reaction was open to prohibition. Thus, as public opinion filled the void of scientific rigour, the symbolism which had influenced the beginning of the prohibited list continued to act as a major influence on the development of the list.

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The parallel with illicit drug regulation is noted here. Many commentators have made the point that there seems little logical reason for treating one substance as an illicit drug and not another, and that the reason some drugs have been prohibited relates more to what they ‘represent’ than anything else. So, here, the symbolic significance of the ergogenic aid cannot be overlooked.  

V QUESTIONS RAISED IN CHAPTER THREE: ANTI-DOPING RATIONALES

A The Specific: Symbolism in Each Anti-Doping Rationale

The commonly presented rationales for anti-doping policy were discussed extensively in Chapter Three. The point was made there that none of these arguments are entirely acceptable as a justification for anti-doping policy. Furthermore, the number of justifications which have been presented actually seems to undermine the strength of the policy as it suggests that, perhaps, the approach is incapable of justification, a conclusion that some commentators have come to. Without wishing to suggest that symbolism is the only reason that these justifications have worked at any level the influence of the symbolism examined in the previous chapters has certainly added to the credibility of the rationales. For it is possible to distinguish the effects of symbolism in the arguments presented for anti-doping policy. Each justification will be briefly covered below.

1 Health

The role of symbolism in the health argument has been discussed in Chapters Five, Six and Seven. Essentially, despite a lack of reliable scientific evidence to support such claims, doping has been cast as an extremely dangerous habit and doping agents as a major threat to the health and well-being of the athlete. The most influential level of symbolism here is the illicit drug one.

27 When the basis for prohibiting a substance or method is unclear and the WADA Code Prohibited List is largely at the mercy of changes in public sentiment, it is not surprising that the list would be developed in such an unregulated way. Once the process of increasing the list was started off in this way, it became difficult to take any other approach. This hangover from the past unprincipled approach to the IOC Prohibited List is still present in the WADA Code in the form of the ‘spirit of sport’ clause which is the third criteria for determining when a substance will be considered for inclusion on the WADA Code Prohibited List (Article 4.3). The inclusion of this vague notion as a criterion for developing the list allows substances to be included on the list which are not performance enhancing.
It was argued in Chapter Five that part of the reason for this view in the 1920s was the clash between two images: the ideal of the ‘amateur’ athlete and the image of the ‘illicit’ drug user. This clash of images persisted through to the 1960s where the imagery of illicit drug use became even stronger as the language of ‘drug addiction’ crept into anti-doping discourse. On many occasions during the 1960s there was very little distinction made between the use of illicit drugs in recreational settings and the use of drugs in a sports setting. Thus, the image of the drug addict and the health dangers commonly associated with that image was particularly strong in the 1960s anti-doping rhetoric. Additionally, the specific ‘sports drug’ imagery of steroids as dehumanising agents, common in the 1970s, added to the health fears. By the 1970s, no longer was the major health danger of doping an overdose or drug addiction, but the potential side effects of drugs which created inhuman monsters.

2 Level Playing Field

Similarly, the level playing field argument or fairness of competition has been discussed in Chapters Six and Seven. Despite a lack of reliable evidence to support the notion, anti-doping discourse justified the prohibition on the basis that the use of such substances created an unfair competition since the playing field was not level. Again, the major type of symbolism involved was the illicit drug symbolism. In Chapter Six it was argued that this view owed much to the belief in the power of drugs as effective aids to performance, a belief which was particularly strong in the modernist world. In the 1970s the connection between steroids and communist athletes (the third level of the symbolism pyramid) added to the argument for the level playing field. The assumption was that the successes of the Cold War enemy must have been attributable to mysterious substances which appeared to change athletes from human to superhuman before their very eyes.

3 Spirit of Sport

This is the first justification which has not been specifically addressed in Chapters Five to Seven. It was contended in Chapter Three that the rationale of the spirit of sport was a vague notion which was a composite of other arguments such as fairness and unnaturalness. However, in identifying the underlying symbolism there is little need to break the idea down into its constituent parts since it is clear that the terminology was borrowed from the symbolism of amateurism. The amateur spirit or ethos of sport, as discussed previously, encapsulated the ideas of play for play’s sake, gentlemanly
behaviour and the downgrading of effort. The point has been made a number of times that the image of doping in sport clashes with the image of amateurism, mostly because of the images of illicit drug use associated with doping. This clash helps to explain why doping would be seen as the antithesis of the spirit of (amateur) sport.

4 **Role Models**

This argument was discussed in Chapter Six as it was a prominent basis for anti-doping policy in the 1960s. The role model argument is largely a response to the illicit drug symbolism associated with sport in the 1960s: the perceived danger of athletes, and consequently, their adoring young fans, becoming drug addicts.

5 **Medical Ethics**

This argument for the prohibition on doping in sport is a slightly unique one in that such an argument is much less driven by the symbolism discussed in this thesis than the others.

Even so, the argument seems to be based on the idea that it is unethical to prescribe drugs to healthy patients rather than unhealthy ones. This is not devoid of the influences of symbolism. To start with, the image of the healthy athlete — a questionable assumption based in the image of the ideal amateur — is often implicitly juxtaposed against the idea that by supplying drugs to athletes they are no longer healthy. This is obviously not accurate, particularly when an athlete is the recipient of good medical care. The argument is influenced by the image of the unhealthy illicit drug user. This is made clear in the idea that athletes, having been started on drugs by their doctor, will then go on to become addicts when their medical supervision ends. A similar idea is that it is unethical for doctors to treat athletes with drugs which are potentially dangerous to their health. The danger argument is partly a result of the second and third layer of symbolism: the image of illicit drug use and the transforming and dehumanising aspects of steroid use.

6 **Coercion**

The idea of coercion was discussed in Chapter Seven as it was characteristic of the anti-doping debate in the 1970s. A number of symbolic associations are clearly at work in the argument that doping should be prohibited because it forces athletes who would rather not take performance enhancing substances to take them.

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Firstly, the fact that athletes believe in the power of the drug to aid performance to such an extent that they believe that they cannot compete without it, a belief largely attributable to ‘medical drug’ symbolism, rather than any good evidence. Secondly, the point was made in Chapter Seven that the idea of coercion was strongly associated with the link between steroids and the competition between Eastern and Western Bloc countries: in order to compete, Western athletes felt the need to use the same powerful drugs that their communist competitors were understood to be using.

Furthermore, the coercion argument assumes that there is something wrong with an athlete being coerced into using drugs — as opposed to being coerced into training full time or giving up a social life. In these arguments it is generally not made explicit what is wrong with the coercion, but one can surmise that it is related to the idea of the health dangers of drugs. Again, the symbolism of illicit drugs and specific steroid symbolism, which focuses on the dehumanising power of steroids, are at work.

7 Unnaturalness

One of the most prominent arguments for the prohibition on doping is the idea that the use of such substances is unnatural.

Again, it usually not made explicit why unnatural equates with ‘bad’. The symbolism of doping reveals why this may be the case. The rhetoric about the ‘natural’ athlete is closely tied with the amateur ethos: the amateur ideal was to excel at sport relying on nothing but natural talents. To label something ‘unnatural’ was therefore to label it as going against the concept of the pure amateur. Drugs, whether medical or illicit, were not ‘natural’ because they were a product of science. The drug user was therefore equally tainted as unnatural. Furthermore, the association of dehumanisation of the athlete with steroid use added to the clash of symbolism between the natural amateur and the unnatural doping agent. Thus the naturalness argument is influenced by all three levels on the symbolism pyramid proposed earlier.

8 Competition Between Athletes, Not Pharmacists

A related concept is the idea that athletic competition should be a competition between athletes not pharmacists. The point was made in Chapter Three that one can only assume

that the reason for this is that pharmaceutical assistance would not come within the definition of the ‘natural’ athlete.

Thus, as above, all levels of symbolism are at work here.

9  **Image of Sport**

The argument for the prohibition of doping based on the image of sport argument is similar to the concept of the ‘spirit of sport’ but much wider: it is not limited by any previous notion of what sport should be about or like. The argument therefore simply relies on the idea that there is something about the use of performance enhancing substances which negatively affects the way the public feels about sport.

Being such a wide concept, there is plenty of room in the image of sport argument for symbolism to play a role as, indeed, all aspects of symbolism presented in the last three chapters do. Firstly, there is the contradiction between the image of the clean sportsperson and the drug addict: images of drug addiction and illicit drug users certainly detract from the image that sports authorities attempt to present for their ‘product’. Secondly, the moral degeneracy associated with illicit drug use has been a strong theme in the anti-doping debate and the view of athletes as something other than morally ‘healthy’ detracts from the healthful image desired by sports promoters.

Perhaps even more significant is the specific symbolism associated with steroids, the third level on the pyramid. To have elite sport associated with drugs which turn natural athletes into artificial robots produces such revulsion in the public mind that the image of sport is greatly at risk. When coupled with the association between steroids and communist athletes, it is clear why, at least in the Western world, it was thought that steroids may ruin the image of sport.

It was argued in Chapter Three that the image of sport is the most compelling among the rationales for anti-doping policy. One reason for the power of this argument is its recognition that, regardless of the lack of comprehensive ethical or moral justification, doping still elicits very powerful emotions and, on that basis, must be dealt with. This argument has the capacity to recognise and accept the power of the symbolism of doping.
Illegal Activity

The argument for anti-doping policy which is based on the discouragement of illegal activity relates only to the drugs on prohibited lists which are also illegal by the national laws of the applicable country.\(^3\)

As has been argued, most of the drugs on the WADA Code Prohibited List which are illicit drugs are clearly there largely as a result of the symbolism of illicit drugs rather than their actual potential to enhance performance. The role of symbolism here is clear. Moreover, steroids were made illegal as a result of their status within sport. Thus, the symbolism which led to their prohibition in sport also indirectly led to their illegal status.

B The General: The Ambiguities of Anti-Doping Rationales

The discussion above demonstrates that symbolism has had a role to play in each of the arguments presented for anti-doping policy. However, the discussion in Chapter Three also posed a number of more general issues and difficulties relating to the anti-doping rationales. Symbolism can also help to explain these.

1 Why Are There So Many Rationales For Anti-Doping Policy?

Of course, the primary reason that anti-doping policy has so many rationales or justifications is due to the lack of one consistent and acceptable ethical justification for the policy. However, the fact that it is possible to present so many justifications for the one policy is somewhat remarkable. The ability to find so many justifications for one policy is obviously due to a number of factors, but can be attributed to some degree to the symbolism of doping. As demonstrated above, each layer of the symbolism pyramid has contributed in a different way to the development of these rationales. Such a mixture of symbolism will naturally produce a number of arguments in favour of anti-doping policy.

2 Why Does No Rationale Completely Satisfy?

Clearly, arguments which are largely based on symbolism have a strong emotional element to them. Since symbolism has had such a large influence in the development of these arguments, it is no surprise that each argument fails to stand up to more rational criticism.

\(^3\) These are largely the illicit recreational drugs, with the possible exception of steroids. Distribution and importation of steroids is illegal in many countries. For instance, ‘[t]he possession, use and supply of steroids, other than by prescription from a medical practitioner, dentist or veterinarian is illegal throughout Australia as is unauthorised importation’: Australian Institute of Criminology, *Illicit Drugs and Alcohol: Drug Types: Steroids* (2008) <http://www.aic.gov.au/research/drugs/types/steroids.html> at 13 May 2008.
3 Why Does Anti-Doping Policy Attract Such Strong Support?

The deficiencies identified in each of the anti-doping rationales naturally leads to the question of why such a policy receives the universal support outlined in Chapter One.

It is suggested here that the answer is simply that strong emotions are aroused by doping, largely because of its associated images. Of foremost importance is the identification of the issue of doping within the framework of the wider issue of drugs in society. The point has been made that doping is not just about sport or fairness; it is about the recreational use of illicit drugs in society. Since drugs in society cause extremely strong emotions, so does doping in sport. Of course, the fact that the rhetoric used in doping discourse is of the same emotional tone as the anti-drug discourse assists in producing these strong emotions, as does the specific symbolism of the various performance enhancing substances. The image of performance enhancing substances as ‘medical drugs’ helps to legitimise the present anti-doping approach as it gives a more rational look to the total prohibition by viewing prohibited substances as threatening the fairness of sport.

With such strong emotions being aroused, it is natural for there to be an equally strong response to the issue. As will be discussed in the next chapter, the way in which doping has been dealt with is particularly suited to dealing with the emotional reaction, thus explaining why such strong support for anti-doping policy is available today.

4 Why Do We Prohibit Doping?

The important question that Chapter Three raised was why, then, do we prohibit doping: if the anti-doping rationales do not adequately explain anti-doping policy, what does? Being the second of the fundamental ambiguities that this thesis seeks to explain, this will be discussed in the concluding section of this chapter but, unsurprisingly, the argument will be that it is largely due to the symbolism involved.

VI CONCLUSIONS

As Dimeo points out, the history of the development of anti-doping policy is an extremely complex one.\textsuperscript{31} And, like most policies, the reason behind its development is multifactorial. This thesis focuses on one particular explanation and argues that the symbolism of doping was a powerful force that should not be ignored. Symbolism can

\textsuperscript{31} Dimeo, above n 2, 134.
assist in explaining some of the very basic ambiguities of anti-doping policy which were introduced in the first three chapters of the thesis. Many have been considered at some length before, but below the conclusions are summarised in point form for clarity.

A Why the Confusion in Anti-doping Policy?

- Because anti-doping has been strongly influenced by emotions elicited by the symbolism of doping.
- This symbolism taps into fears in society which are not necessarily rational.
- Different symbols have affected different aspects of anti-doping discourse and different time periods in anti-doping history — this contributes to confusion as assumptions from the past continue to operate in the next time period.

B What Is Doping?

- This is a much more complex question than it appears because it depends primarily on the public response to the symbolism of doping.
- Any drug or practice which produces the appropriate negative gut reaction can be ‘doping’.
- ‘Doping’ is anything which produces the appropriate public response because it fits with the types of symbolism identified in the last few chapters. Anything that looks like illicit drug taking in sport, any type of performance enhancement which clashes with ideals of natural athletes, any sports drug is seen as powerful, or dehumanising.

C Why Do We Prohibit Doping?

- This is a much less complex question than it appears.
- We prohibit doping because we don’t like what it symbolises.
- The interaction between aspects of symbolism is very complex.

VII THE FINAL QUESTION

This chapter has provided a detailed explanation of how the symbolism identified in the previous chapters has worked to produce some of the characteristics of anti-doping policy
today: the confusions and difficulties, as well as some of the attempts at answering those ambiguities.

There is one final question to be answered and that is: so what? In other words, what are the ultimate effects of such symbolism and what is the significance of having an anti-doping policy which is based not on a rational, logical and systematic approach to the issue but on emotional influences such as symbolism? The next chapter will discuss this question.
CHAPTER NINE

SYMBOLISM AND BEYOND

‘There is no such thing as public opinion, just published opinion.’ (Winston Churchill).¹

‘Laws that do not embody public opinion can never be enforced.’ (Elbert Hubbard).²

‘There is nothing that makes more cowards and feeble men than public opinion.’ (Henry Ward Beecher).³

I INTRODUCTION

Public opinion has a bad reputation. It is seen as irrational, emotional and illogical, all of which are assumed to be bad things. There is also an implicit assumption that policy based on public opinion must be bad policy. The argument of this thesis could be assumed to be culminating in such a conclusion. It has not, however, been my aim to suggest that anti-doping policy is intrinsically unacceptable because of its strong roots in public opinion. In fact, the task of this chapter is to consider that very question: does it matter that anti-doping policy has been strongly influenced by public opinion? The answer to this question is ‘not necessarily’.

In democratic societies, where government theoretically represents the wishes of the people, it stands to reason that public opinion should have a role in the development of public policy.⁴ A policy based on public opinion is therefore not necessarily bad. However, the legitimacy of public opinion may rest on the source of that opinion. It is possible for public opinion to be created by well informed, reasonable discussion. It is also possible for it to be based on other things. Since the argument of this thesis is that anti-doping policy is based on symbolism, the pertinent question for this chapter is whether this is a legitimate basis for the public opinion which has shaped anti-doping policy over the last century.

⁴ Anti-doping policy is now a universal policy. Thus, many countries that do not embrace the democratic tradition also have the same policy. However, most of the countries which were heavily involved in the evolution of anti-doping policy were of this political persuasion.
It has been argued in Chapter Eight that the influence of symbolism has created confusion and ambiguity in anti-doping policy today; even the most foundational issues of doping definition and fundamental rationales for the policy are still very unclear. Although it may not be an entirely satisfactory situation to have a policy marked by such fundamental ambiguities, the existence of such ‘untidiness’ does not automatically discredit the whole policy. For in many ways the ambiguities identified in Chapters One to Three are theoretical problems which may not necessarily detract from the efficacy of anti-doping policy.

The question of whether the role that symbolism played in the history of anti-doping policy weakens that policy is therefore still very much open for debate. As discussed in Chapter One, anti-doping policy now attracts almost universal support and on the surface appears to be an extremely well accepted and approved approach to the problem of performance enhancing substances in sport. Thus, on one level it seems that anti-doping policy is a ‘good’ one despite its entangled and inauspicious historical roots.

Despite this high level of contemporary public support, anti-doping policy is not immune to criticism. It is possible to identify a number of operational problems with modern anti-doping policy, as critics have done. Many of these criticisms can be traced back to the way in which anti-doping policy has developed, largely through public opinion based on symbolism. This chapter will consider these operational difficulties and argue that the pattern of regulation that developed in the three critical time periods considered in previous chapters has led to many of these operational problems. The aim of the examination is to show that symbolism has led to a number of unacceptable problems in anti-doping and thus basing this particular policy on symbolism is problematic and inappropriate.

In the subsequent discussion, the pattern of regulation which developed is described as ‘reactive regulation’. The pattern is summarised in the diagram set out below in Figure 6:

**Figure 6: The Reactive Regulation Model**

The chapter is divided into six sections. The first demonstrates the reactive regulation pattern at work by revisiting the history of anti-doping policy in the three time periods described in the Chapters Five to Seven. The next section identifies some major
operational issues with modern anti-doping rules and explains how the reactive regulation pattern led to these problems. The fourth section discusses the ultimate effects of symbolism. In the fifth section, a discussion of whether there is a better model of regulation for anti-doping policy is provided. The final section discusses how the reactive regulation pattern might affect the future of anti-doping policy.

II THE REACTIVE REGULATION PATTERN AT WORK

The reactive regulation pattern has been set out above. The beginning point is the symbolism associated with doping and the model ends with what has been termed ‘reactive’ regulation. The term ‘reactive’ is used in contrast to ‘proactive’ regulation which would be a more thoroughly considered, evidence-based regulation. The reactive nature of the regulation is seen in the intermediate steps where public opinion created by symbolism creates a negative image and public relations problem for sport and sports authorities. In an attempt to preserve the image of sport, or later ‘the product’, sports authorities reacted to the public sentiment surrounding doping by regulating the use of performance enhancing substances in sport.

The reactive pattern emerged to some degree in the 1920s and 1930s but was fully engaged in the 1960s and 1970s. Below each era will be considered in order to demonstrate the steps of the pattern at work.

A The 1920s and 1930s

It was concluded in Chapter Five that in the 1920s and 1930s there were two points of view on the use of performance enhancing substances which were fairly evenly matched. On the one hand these substances were viewed in a positive light and there was some optimism surrounding their potential to enhance human performance. On the other was the view of performance enhancing substances as a dangerous and potentially addictive form of cheating. It is clear from the work of researchers such as Dimeo and Hoberman that, although some of these negatives attitudes to doping had been expressed, doping was not a big issue and there was no overwhelming attitude against the use of ergogenic substances in sport. The fact that anti-doping rules began in this era is therefore somewhat surprising and leads to the question of why anti-doping policy developed at this time. It must be

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5 For example some of the steps involved in a proactive type of regulation might still involve public opinion but the response to such public opinion would involve the commissioning of studies (eg feasibility and impact studies) and widespread representative public consultation.
admitted here that there is little evidence of what drove sports authorities to make rules in the 1920s. Given the relative marginality of the issue, it seems the momentum did not come entirely from within sport; there must have been extrinsic factors which affected attitudes of sports authorities. A number of hints can be gained from the history of anti-doping regulation which demonstrate the reactive regulation pattern at work.

1 **Symbolism**

The main symbolism involved at this stage was illicit drug symbolism: performance enhancing substances were viewed in the same light as ‘narcotics’ and other illegal ‘stimulants’. The evidence for this is largely in the language used to describe ‘doping’ and the type of substances involved.

2 **Public Opinion**

Although it appears that doping in sport was not a major issue in society,\(^6\) a few hints can be found which point to the issue having some attention given it, at least in sports circles. When reporting on the IAAF’s (International Amateur Athletics Federation as it then was) discussion before passing the 1928 rule on doping, *The New York Times* described the issue as ‘debative’, suggesting that there was some public interest in doping.\(^7\) The use of the colloquial terms ‘doping’ and ‘stimulants’ to describe the use of performance enhancing substances also suggests that there had been some previous discussion of the use of these substances, at least enough to generate a familiarity with the subject and a link with illicit drugs. Furthermore, it is clear that illicit drugs were a major issue in society, particularly given the influence of the Temperance Movement and the alcohol prohibition. It is probable that public interest in the matter was a direct result of the public interest in ‘dope’ outside sport.

3 **Negative Image for Sport**

As Dimeo points out, there had been a little public comment about doping in sport which saw doping as both dangerous and morally degenerate. For example:

> And the general effect of drug taking, and especially the use of drugs belonging to the caffeine and cocaine class, is distinctly bad. We believe that the medical profession ought


\(^7\) The very fact that the IAAF debated and decided to make a rule about the issue may also indicate some public interest: Wythe Williams, ‘Parade of Athletes Will Mark Opening of Olympics Today: Olympic Athletes Parade Today’, *The New York Times* (New York), 28 July 1928, 9.
seriously to warn those with whom they come into contact professionally against the use of such things.\footnote{8}

Moreover, the construction of doping as an issue of professionalism is indicative of the negative impact on the image of sport. As discussed in Chapter Five, the symbolism of illicit drugs clashed with the image of the ideal amateur sportsperson. Clearly doping was seen as detracting from the image of amateur sport, an ethos which was strenuously defended right up until the 1970s. The negative connotations of drug use in sport can be seen in a speech by Pierre de Coubertin in the 1920s when he condemned doping as demonstrative of a ‘venal attitude’ toward sport.\footnote{9}

Since, at this stage, the focus of anti-doping was on amateur sport,\footnote{10} the public relations issue was not to do with protection of monetary investment as it is today. However, this does not mean that sports authorities were not interested in the way in which sport was perceived by the wider public. Although, again, there is little evidence to suggest that public relations was identified as a major issue for sports organisers, it is clear that the amateur ethos did hold wide public appeal\footnote{11} and authorities were keen to maintain the amateur image.

4 \textit{Reactive Regulation}

As mentioned above, it is clear that the regulations on doping introduced in the 1920s and 1930s did not arise from an overwhelming tide of undivided opinion against the use of performance enhancing substances in sport. Rather, there were two equally balanced opinions of these practices. Therefore the mere fact that such a rule was introduced at all during this period provides support for the argument that these laws were essentially a reaction to outside factors. Furthermore, the type of regulatory model chosen reinforces the idea that what was being reacted to was the image of illicit drug use within sport. Although it appears that public opinion may not have had a major role to play at this point, clearly the desire to protect the amateur ethos was operational. It was largely the clash of image between the symbolism of amateurism and the symbolism of doping which led to

\footnotesize{\textsuperscript{8} Dimeo, above n 6, 26.}
\footnotesize{\textsuperscript{10} As discussed in Chapter Five, the use of performance enhancing substances was known in professional sport but was not a major issue.}
\footnotesize{\textsuperscript{11} The very fact that a distinction was made between amateur and professional sport reveals the public interest in the status of the athlete.}
this kind of reaction by sports officials. The reaction was to the issue of drug use outside of sport rather than to doping per se.

It should be noted that the effects of such a reaction were fairly limited, since the regulations had little or no operational force. However, the pattern of regulation was established for the next significant period in anti-doping history. Additionally, the reactive regulation pattern set up the identification of doping as an illicit drug issue.

B The 1950s and 1960s

There still appears to have been two strands of thought regarding doping in sport at this time: one which saw performance enhancement through the use of ‘drugs’ as positive; and another which viewed it extremely negatively. Unlike the 1920s and 1930s, however, the two strands of thought were more chronological than simultaneous: in the early 1950s anti-doping sentiment was not as strong as in the 1960s. This change in view can be attributed largely to the changing symbolism of doping. The outcome of such changes was the eventual adoption of the first lists of prohibited substances in sport and the introduction of drug testing at athletic competitions. Again, an analysis of the history of this time period demonstrates the reactive regulation pattern at work.

1 Symbolism

The main symbolism of the 1960s was the power of science, doping agents as illicit drugs, and the changing view of amphetamines from innocent ‘pep pills’ to evil drugs of addiction.

2 Public Opinion

In Chapter Four a number of pieces of evidence were provided to show that public opinion had a powerful influence on sports officials, or at least on the International Olympic Committee (IOC). Many of these events took place in the 1950s and 1960s. For example, there were a number of articles in the IOC bulletin in this time period which set out reports on doping published in the public press or by other organisations such as the newspaper L’Equipe and public figures such as Pope Pius XII. In 1963 it was recognised in this bulletin that the popular press had contributed to the identification of doping as a problem

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12 Since there were little operational effects, the 1920s will not be considered below in terms of the impact of the reactive regulation model on anti-doping policy today.

in sport.\textsuperscript{14} Furthermore, in 1968 measures were taken to ensure that the press had details of the work of the IOC Medical Commission.\textsuperscript{15} All this is powerful evidence that public opinion was significant to the IOC, particularly regarding the issue of performance enhancing substances in sport.

3 \textit{Negative Image for Sport}

It was not until later that concerns regarding the negative impact on the image of sport caused by doping were explicitly articulated. However, it is clear that doping was perceived to have a negative impact on the image of sport. The clash between the amateur ideal and the image of illicit drug use was even more poignant in this period than in the 1920s. As sport became more politically important with the Cold War, the fight to maintain the amateur ethos intensified. It is clear from the rhetoric of the day that the use of performance enhancing substances by athletes was viewed as a very negative thing for sport:

\begin{quote}
I would prefer to class the athlete as a ‘better race’ on the surface of the earth. The future generations would inherit their characters and therefore a continuity of good human society would be maintained. I would never wish then, that we should be deprived of such fine, healthy persons as a result of doping.\textsuperscript{16}
\end{quote}

The image of amateur sport included purity, health and the observance of rules; the amateur athlete was the epitome of health — physical, moral and psychological. The evil and danger of doping obviously detracted from these healthy images. With amphetamines being the main doping agent, the association between these substances and the rebel youth movement also produced an image of sport seen as incompatible with this amateur ideal.

The point was made above that in the 1920s the issue of drugs in sport was targeted to amateur sport and, as such, the motivation to preserve the image of sport was not one of protection of monetary investment. By the late 1970s and early 1980s this had changed as sport became big business. The 1960s was something of a transition era in that some money was beginning to come into sport, mostly in the form of governmental investment to promote the national image through sport. But in many ways the image of sport was more a political than financial issue. Nevertheless, there was still a desire to maintain the ‘image’ of sport — a concept which involves an impression held by the public — as found

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{14} International Olympic Committee, 'Doping, the International Olympic Committee and the Press' (1963) 84(November) \textit{Bulletin du Comité International Olympique} 59.
\item \textsuperscript{15} International Olympic Committee, 'The Work of the Medical Commission' (1968) 10 \textit{Olympic Review} 263.
\item \textsuperscript{16} Dr GM Oza, 'Athletes, Doping and Olympism,' (1969) 19(30 May) \textit{Olympic Review} 209, 211-212. See also Dimeo’s comments regarding this statement, above n 6, 56-57.
\end{itemize}
\end{footnotesize}
in the amateur ideal and protect what sport was supposedly all about. As discussed above, the evil of doping had the potential to infect the public image of sport and this needed to be dealt with.

4 Reactive Regulation

The reactivity of the regulatory efforts in the 1960s becomes clear when the type of regulation is considered: a total prohibition with a list of prohibited substances and accompanying drug testing is typical of illicit drug regulation. Moreover, the drug testing regimes used were not specific to sport and were developed for the detection of illicit substances in a wider context. One of the scientists who introduced drug testing into the sporting arena was Arnold Beckett, whose earlier work had been in the development of detection methods for application in the identification and treatment of drug addiction. He and his associates had published a number of works on the detection of amphetamines and other substances in human bodily fluids. Houlihan recognises that the adaptation of these tests for sport was a relatively simple exercise: ‘Whereas tests for amphetamines and most other stimulants were easy and cheap to devise as they merely required the adaptation of existing analytical procedures…’

It is clear from these factors that doping regulation in 1967 was heavily influenced by an illicit drug model of regulation. Sports officials did not come at the issue afresh and reinvent the wheel. Instead they adapted a model that they were already familiar with in the illicit drug model. As Houlihan writes, ‘[t]he IOC and most major international

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17 For instance, Monique Berlioux ‘Doping, Drugs and Sport’ (1969) 25(October) Olympic Review 561, 563 in the IOC Bulletin in 1969 wrote: ‘Let us quote Bil Gilbert again, with the example he gives us of golf and of the “image” one should have of a champion and a sport… This is also the kind of image that an Olympic competitor should create.’

18 The IOC anti-doping regulations were a slightly different format in that the general prohibition was part of a declaration by the athlete on the entry form for the Olympic Games. Even so, the pattern of a general prohibition with an associated list of prohibited substances is still clear.


20 Barrie Houlihan, Dying to Win: Doping in Sport and the Development of Anti-Doping Policy, 1999 (Strasbourg: Council of Europe), 133. Maxwell J Mehlman, Elizabeth Banger and Matthew M Wright, ‘Doping in Sports and the Use of State Power’ (2005) 50 Saint Louis University Law Journal 15, 24, suggest that the availability of drug tests determined the contents of the first IOC Prohibited List in 1967. Although no doubt this was a significant factor, the evidence provided in this thesis reveals that the situation was more complex and that illicit drug symbolism also played a role.
federations have, not surprisingly, relied on policy instruments which directly parallel those developed to combat recreational drug use.\textsuperscript{21}

It is clear from the above discussion that illicit drug symbolism not only fuelled the regulatory developments of the 1960s but also provided the model for regulation. The question that arises at this point is whether this was an acceptable or appropriate model.

Since public opinion relating to the use of the ergogenic substances was so inextricably tied in with illicit drug symbolism, adoption of a regulatory form which the public was familiar with and comfortable applying to illicit drugs would be widely acceptable. The symbolic influence of illicit drugs was equally met by the application of a regulatory model with similar symbolism attached.

This is not to say that this form of regulation was entirely appropriate or suited to the issue. Leaving aside the question of whether a total prohibition on performance enhancing substances was the best type of approach, the question needs to be considered whether this regulatory model was appropriate for the intended job, i.e. could it ensure that such substances were not used in sporting competition? At this point the theory and practical realities need to be separated. The fact is that when drug testing was first introduced to the Olympics there were a number of factors inhibiting its effectiveness. These factors included the lack of accuracy of the tests, the limited number of substances tested, the confusion over the jurisdiction of the organising bodies, as well as the lack of resources available for detection and enforcement.\textsuperscript{22} Thus, on a practical level, this type of regulation was unlikely to work.

However, the type of regulation adopted could have theoretically dealt with the issue of doping as it stood at that stage. Since the IOC Prohibited List in 1967 included only short term, day-of-competition drugs, accurate testing on the day of competition could potentially detect — and therefore deter — athlete drug use. At that time, the aim of drug testing in sport was similar to illicit drug testing; the focus of attention was to determine what drug was affecting the subject at a particular moment in time, rather than what might have been used over the last few months. Thus for the 1967 IOC Prohibited List, in-competition testing, although fraught with practical difficulties, at least in theory could have effectively deterred the use of prohibited substances.

\textsuperscript{21} Ibid, 103.
\textsuperscript{22} See Houlihan, above n 20, 132ff for a good discussion.
Even in 1967, however, it was clear that a new kind of drug was on the horizon. Comments attached to the 1967 *Prohibited List* regarding anabolic steroids noted that detection of such drugs would be difficult ‘[b]ecause the drug is not taken at the time of a championship or meeting.’ This prophecy proved correct: it was not long before the shortcomings of applying in-competition testing to steroid use became apparent.

In conclusion, the IOC’s prohibition of performance enhancing substances in sport in 1967 was stimulated to a large degree by public opinion against the use of such substances, particularly amphetamines, which flowed out of the associated symbolism. The type of regulation chosen paralleled the type of regulation applied to illicit drugs and was seen as appropriate for this very reason. Although the *Prohibited List* as it stood at that stage may have, in theory, been effectively enforced by the adoption of in-competition testing, it was clear, even at that stage, that ergogenic substances in the future would not be. The regulation in 1967 was therefore a reaction to the symbolism of illicit drugs and, although not inappropriate at the time, it was short-sighted since it did not deal with the issue of training drugs which were already in use in international sport. It was really a band-aid solution to ease public concern generated by a fear of illicit drugs within the sporting context.

In practice it was not even that.

C   The 1970s

The 1970s was the era in anti-doping policy where the pattern of reactive regulation was the most obvious. The decision to prohibit steroids can be seen as premature and even inappropriate: it was certainly not a well researched response to the phenomenon of steroid use in sport. Steroids therefore provide an extreme example of the way in which anti-doping policy developments have been reactive in nature. Additionally, it is possible to perceive the effects of the two previous eras in establishing anti-doping systems based on the illicit drug model as a result of this pattern of reactive regulation.

1   Symbolism

The major symbolism involved in the 1970s was the influence of illicit drug symbolism, the transforming and dehumanising power of steroids and steroids as ‘communist’ drugs.
2  
Public Opinion

The point has already been made that there were a number of instances in which the IOC showed its concern for public opinion in relation to the issue of the use of performance enhancing substances. One such example was an article from the Sunday Times which was reprinted in the IOC bulletin in 1973, criticising the IOC for their lack of steroid testing.23 Another article printed in the IOC bulletin in 1974 stated:

On 1st September 1966 at the official reopening session of the Liège Court of Appeal, Mr. Jean Constant, Attorney General at the aforesaid court, stated as follows: “The reason I have decided to talk to you today about doping is that my official duty requires me — in accordance with Napoleon’s edict — ‘to make a speech on a subject suited to the occasion.’ Now, while I was writing these lines, the press, radio and television showed unceasingly that the ‘subject suited to the occasion’ would at least have the merit of being topical. Day after day, in fact, they took turns in telling the world, in priority over the news of the war in Vietnam, that doping was rife among sportsmen.”24

This demonstrates that in the 1970s the IOC was still well aware of the tide of public opinion and that this was understood to be of such significance that it warranted printing this article in their journal. With so many emotional opinions being published on the topic it would have been impossible for the IOC not to be aware of public opinion on the topic.

3  
Negative Image for Sport

No sports official would wish their sport to be associated with such things as illicit drugs, superhuman monsters or the plethora of medical problems which had been attributed to steroid use. Furthermore, with the new emphasis on the level playing field and ‘cheating’ aspects of doping, there was now an added focus on the impact of steroids on competition. For example, the article from the Sunday Times mentioned above included a passage which stated that steroids ‘ma[de] a joke of Olympic records in the field events…’. 25

The 1970s also brought concerns about the impact of the politicalisation of sport which negatively impacted on the image of sport. For the defenders of the amateur code, sport was to be played for the joy of it and not for political point scoring. Although the amateur era in Olympic history was fast coming to a close, sports officials still held on to these values. It was pointed out in Chapter Seven that the image of the steroid user clashed with the amateur ideal. Not only was this the case, but the issue of steroids was intrinsically linked with the politicalisation of sport through the connection between steroid use and

25 Bateman, above n 23, pp ref.
communism. The problem that these two factors created for amateur sports is clear in the passage below.

During a recent question-and-answer session on the future of the Olympic movement, Monique Berlioux, the secretary of the International Olympic Committee, was asked to name the committee’s greatest challenge in the next 20 years. Challenges, not challenge, Mrs Berlioux said: “the growing influence of politics and sport”, she replied, “and the manipulation of athletes with drugs and the fabrication of an artificial human being.”

It is clear from the above that steroids were perceived by the IOC to create a very negative image for sport.

Although there was an increasing amount of money involved, it was not really until the 1980s that the Olympic Games became a truly commercial enterprise. Thus at this stage, the public relations issue was still not related to money so much as a desire to protect the image of clean, politically neutral sport. With the increasing political importance of amateur international sport, and the Olympics in particular, it now mattered much more which nation the winner represented. Accordingly, the desire to maintain fair competition also increased in importance. The increasing emphasis on the level playing field argument in doping discourse suggests that in the 1970s there was a greater focus on how sporting competitions appeared. Sport needed to be seen as a fair contest between nations and the use of steroids potentially prevented that view from flourishing.

4 Reactive Regulation

It is evident that public opinion was strongly against steroid use in sport and that the IOC was keenly aware of this sentiment. So strong was the suspicion and concern that the IOC and sporting federations were put in a position where politically they needed to ‘do something’. The reaction from the authorities was to include steroids in their drug testing protocols and add steroids to their prohibited lists.

Why is it appropriate to describe such actions as ‘reactive regulation’? It was nine years between the first official recognition of steroids as ‘doping’ by the IOC and their operational prohibition. Moreover, steroids were not added to the IOC Prohibited List until sometime after the IOC was criticised for having failed to prohibit them already. These facts do not seem to suggest impulsive, reactionary activity on the part of the IOC.

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27 Dick Pound, *Inside the Olympics*, 2004 (Mississauga: John Wiley and Sons Canada Pty Ltd), Chapter 6, 139ff.
However, it must be kept in mind that steroids were first ‘prohibited’ by the IOC in 1967 and officially added to the list in 1976, long before the official medical opinion concerning their efficacy for performance enhancement was changed. At that stage steroids were officially placebos.

The fact that medical opinion held that steroids were ineffective for enhancing performance has been pointed to as evidence of the lack of credibility the medical fraternity held in this issue. Another way of looking at it is that is shows the sheer power of public opinion over the IOC and other sports organisations. Medical opinion was based on scientific studies\(^28\) while public opinion was created from sensational anecdotal reports. And yet the IOC chose to listen to public opinion over medical opinion.\(^29\)

The way in which the IOC chose to deal with the issue probably seemed like the natural and sensible way to go about it. They already had regulations, a list of prohibited substances, and a drug testing system in place. It seemed obvious to simply add steroids to this system. But this move did not address the different issues that steroid use involved. The system, as it stood, involved in-competition testing. Steroids were not ‘in-competition’ drugs; it was possible to discontinue their use before competition but maintain the strength gains that had already been achieved through their use.\(^30\) By simply extending the coverage of in-competition testing to include steroids, there was no way that this type of regulation was going to effectively deter steroid use outside competition. In-competition testing for steroid use on its own was never going to deter steroid use in sport at all.

This is the point in history at which the issue of doping changed. No longer were the drugs involved short-acting drugs, steroids were the first of the long term, training drugs. It is not surprising that the model adopted for performance enhancing substances in the 1960s, when the prohibited substances were primarily ‘illicit’ drugs, was not appropriate for steroids. Illicit drug testing was not concerned with what the subject had taken in the weeks and months before the testing took place, except possibly as an indicator of

\(^{28}\) Whether these studies were reliable and reproducible or not is beside the point here, the fact is that there was at least some kind of evidence to support medical opinion while public opinion was based on hear-say and anecdotes.

\(^{29}\) It could be argued that the IOC was responding merely to health concerns regarding steroids and did not care whether steroids enhanced performance or not, the rhetoric suggests otherwise.

\(^{30}\) It will be assumed here that steroids do work to enhance strength. It is possible that the IOC chose to adopt the approach they did, knowing that it was next to useless to test for steroids at the time of competition because they were convinced that steroids did not enhance performance. This would have been particularly underhanded as it would have had the appearance of doing something to satisfy the public while not really doing anything to deal with the issue. Such a well-planned approach seems a little incredible; it is more likely that the IOC acted on the assumption that the substances might aid athletic performance.
addiction to the detected drug. Steroids were not ‘illicit’, nor were their actions in the same category of illicit drugs, since the short term effects of steroids were practically irrelevant to the performance issue. The differences between steroids and the other performance enhancing substances should have provided a clear indicator to sports officials that the issue of performance enhancing substances in sport was no longer simply a part of the illicit drug issue, it was beginning to develop its own particular concerns and characteristics which needed to be dealt with from a new perspective.

There has been much criticism levelled at the IOC for their failure to deal with the ‘new’ issues that steroid use brought. It is clear that the IOC was aware of the difference between steroids and other doping substances. The Dubin commission was particularly scathing in their attacks in this regard:

Despite knowing the fallacy of in-competition testing, as they have for many years, the medical commissions of sport organisations such as the IAAF and the IOC have taken no steps to make the fallacy more widely known. By failing to do so they have given the impression that their competitions are fair and that their laboratories cannot be fooled. 31

It is easy to be critical of the IOC’s activities in many areas. 32 It is possible, however, that the decision to adopt in-competition testing for steroids was not a part of a deep conspiracy to allow athletes to continue to use steroids in order to maintain the status of their events in terms of sporting excellence. It may have been partly driven by the fact that the IOC’s budget for drug testing would not extend to out-of-competition testing at that time. It may also have seemed incongruous to expect athletes to undergo drug testing at any time of the year for an ‘amateur’ contest which took place only once every four years. Additionally, there was still confusion over what role the IOC had in anti-doping policy — where the IOC’s responsibility ended and the International Federations’ began. Added to this confusion were the loud calls for action by the public. With all these factors in the mix, it is not surprising that the IOC opted to simply extending their existing policy rather than initiate a new form of regulation. 33

33 Given the IOC’s later cynical approach to the issue of doping, as evidenced by their failure to sanction many athletes and their part in covering up positive drug tests, this is perhaps taking the sympathetic view of the organisation too far: see Robert Voy and Kirk Deeter, Drugs, Sport and Politics, 1991 (Champaign: Leisure Press) and Simson and Jennings, above n 32, 184ff.
Whether the IOC’s activities were motivated by ignorance, practical difficulties or a cynical desire to simply look like they were doing something, the fact is that the form of regulation chosen was inappropriate for detecting steroid use and thus for deterring the use of these substances in athletes.

In summary, the extension of the system of prohibition and in-competition testing which had been established for the IOC’s *Prohibited List* in 1967 was both premature and inappropriate. The move was premature from a scientific perspective in that there was no evidence at the time that steroids did enhance performance and the medical opinion of the time held that they were mere placebos. A more measured response to the issue would have been one which was based on good research into the ergogenic potential of the drugs and/or the dangers to the health of the athlete. The symbolism of steroids can explain why a form of regulation which was so problematic from either the scientist or lay-person’s perspective was adopted and accepted by the public. The fear generated by the symbolism of steroids was so strong that the public demanded action on the part of the IOC. So ingrained was the system of prohibition and drug testing that the natural reaction for the IOC was to simply extend this to steroids, despite the fact that this would not deal with the issue. The added advantage of this move was that it would quickly satisfy the public craving for action because it would symbolically deal with the issue. The image of sport was at stake and it would not wait for a measured approach. The quick-fix band-aid solution did the job. At least for a time.

### III  THE MAJOR ISSUES IN ANTI-DOPING POLICY AND THE REACTIVE REGULATION PATTERN

Having demonstrated the fact that anti-doping rules were largely reactionary in nature, the point has now been reached where it is necessary to consider whether this is problematic or not. In this section a number of the most difficult issues in anti-doping policy today will be described and it will be explained how the pattern of reactive regulation has contributed to the creation of these difficulties.

#### A  *The Strict Liability Offence*

The strict liability rule in doping has been discussed in Chapters Two and Eight. It is unnecessary to go into detail here except to make the point that the strict liability rule has attracted much criticism regarding the justice of the anti-doping rules. Cases where
athletes have been penalised for doping through no real fault of their own give rise to these types of criticisms.\textsuperscript{34}

The role of symbolism in creating this situation has been discussed in Chapter Eight. The only additional point to make here is that the reactive regulation pattern presented above, instigated in the 1960s and expanded in the 1970s, meant that the adoption of the strict liability offence was a natural part of anti-doping policy since that was the approach taken to illicit drug policy as well.

B \hspace{5mm} \textit{Invasion of Privacy}

Another criticism of anti-doping policy relates to the invasion of privacy that drug testing represents. Not only is private information about the athlete revealed through analysis of their bodily fluids, but the process of providing a urine sample is both humiliating and dehumanising.\textsuperscript{35} Another incursion into privacy arises from the fact that athletes can be called on for drug testing at any time during the night or day.\textsuperscript{36} The fact that athletes have to provide information regarding their whereabouts every day of the year also greatly limits their freedom.\textsuperscript{37}

All of these invasive aspects of anti-doping policy can, again, be traced to the adoption of the illicit drug regulatory model. The problem arises from the fact that the same model has been applied to quite different situations. Whether right or wrong, it seems that there is a willingness to subject suspected drug users to humiliating and invasive procedures when the information that will be revealed relates to the commission of an offence, i.e. possession and use of an illegal substance. In so far as the substance involved in the potential doping case is also an illegal substance, as many on the list are, this is no more problematic than in illicit drug policy. However, there are many other substances on the \textit{WADA Code Prohibited List} which are not subject to the criminal law. The same level of humiliation and violation are not appropriate for the use of drugs such as over-the-counter drugs. And yet no distinction is made between the two types of drugs in anti-doping policy.

\textsuperscript{34} Even so-called ‘negligence’ where athletes supposedly are at fault such as \textit{Puerta v ITF} CAS 2006/A/1025, do not appear to have been reasonably preventable by the athlete.

\textsuperscript{35} Antonio Buti and Saul Fridman, \textit{Drugs, Sport and the Law}, 2001 (Mudgeeraba: Scribbler’s Press), 133.


and the same procedures are applied to both situations. The blame falls squarely on the adoption of the illicit drug model of drug testing and its application to circumstances quite different to those the model originally targeted.

C  **Failure of Drug Testing and Waste of Money**

A number of factors have been blamed for the apparent failure of drug testing, including the fact that doping pharmacology is far beyond the science of testing and that, until recently, the athletes had enough warning of impending drug testing to hide the traces of drug use. The issue can also be viewed in terms of the adoption of the illicit drug model. This model is intrinsically confrontational rather than cooperative: authorities try to catch athletes using prohibited substances while athletes try to hide their doping practices. This sets up an inevitable cat and mouse game which will always lead to a win-lose situation. If another model of regulation had been adopted, akin to the ‘harm-minimisation’ policy for illicit drugs, then drug testing may not exist or, if it did, the purpose could be non-punitive. Non-punitive testing — which could contribute constructively to the health of athletes by giving valuable information about their health status — would remove the incentive to hide doping and therefore put an end to the eternal game of hide and seek.

A related point is the argument that pouring money into the system of drug testing is a waste of money, given the lack of efficacy involved in the process. A vast majority of drug tests are negative. Whether or not negative drug tests indicate innocence on the part of the athlete, it can be argued that the money spent on doping tests could be much better spent on education, health monitoring and so on. But because of our commitment to the total prohibition model with punitive drug testing, anti-doping without drug testing can simply not be imagined.

D  **The ‘Fallacy’ of In-Competition Testing and the Problem of Out-of-Competition Testing**

As previously discussed, as far as steroids are concerned, in-competition testing is almost totally ineffective. Furthermore, even from the beginning of steroid testing by the IOC it

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38 As will be discussed below, there are other possible approaches which are much less confrontational such as the suggestion by J Savulescu, B Foddy and M Clayton, 'Why We Should Allow Performance Enhancing Drugs in Sport' (2004) 38(6) British Journal of Sports Medicine 666 regarding testing for health.

39 For an example of these kinds of arguments see Alex Wodak and Timothy Moore, *Modernising Australia's Drug Policy*, 2002 (Sydney: UNSW Press) generally.

was recognised that in order to effectively test for steroids at the Olympics, a system of out-of-competition testing would need to be set up. And yet it was not until the mid 1980s that this kind of testing was actually instigated by any sports organisation. Criticism has been levelled at the IOC for not introducing these types of tests: the Dubin enquiry characterising it as an intentional misleading of the public. Thus, much emphasis has been placed on out-of-competition testing as being the only effective way to test for steroids.

However, the concept of out-of-competition testing is not entirely unproblematic. As mentioned above, the requirement for athletes to be constantly available for testing poses a large intrusion into the ability of athletes to lead a normal life, since the athlete is potentially always ‘on duty’ and ready to go through the humiliating process of drug testing. If the athlete does not comply with the requirements of out-of-competition testing they commit an anti-doping offence.

Out-of-competition testing is also extremely burdensome in terms of resources for anti-doping authorities. Such an expensive programme would need strong evidence to support its efficacy. There is, of course, no such evidence and since there are many other ways athletes are able to circumvent testing, out-of-competition testing is unlikely to be the finite answer it is presented as.

Although potentially more effective than in-competition testing, out-of-competition testing may have more negative effects than positive. The perceived need for out-of-competition testing arose from the adoption of the illicit drug model of regulation. Once an inappropriate drug testing model was adopted for steroids — i.e. one designed for detecting short-acting drugs — it became clear that this regime would not catch steroid use. The necessity of extending testing beyond the time of competition arose and, along with it, the associated problems. Had anti-doping policy been rethought at the time of consideration of the steroid issue, a more appropriate model for dealing with steroids could have been introduced.

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42 Jim Ferstle, ‘The Evolution and Politics of Drug Testing’ in Charles E Yesalis (ed), Anabolic Steroids in Sport and Exercise (2nd ed), 2000 (Champaign: Human Kinetics) 363, 372 provides some history on out-of-competition testing which appears to have begun in the UK. It seems that there was no coordinated international out-of-competition testing until the creation of the World Anti-Doping Agency (WADA).
43 Dubin, above n 31, 397.
44 World Anti-Doping Code (WADA Code), Article 2.4.
E  Unsupervised Use of Drugs with Potentially Dangerous Side Effects

A number of commentators have pointed out that many of the health dangers associated with the use of performance enhancing substances in sport arise from the fact that they are used inappropriately and without medical supervision. The fear of being sanctioned forces athletes to go ‘underground’. Thus, again, these problems mainly arise from the confrontational and punitive approach that came from illicit drug policy.

F  The Politics of Anti-Doping Policy

There have been a number of commentators who have pointed out the influence of politics on the effectiveness of anti-doping policy. Positive drug tests have been covered up and not dealt with according to the rules. This is a legitimate argument. However, if the system was not based on the illicit drug model with its punitive and confrontational character, there would be much less motivation for such cover-ups to occur. Furthermore, doping is seen in an extremely negative light — largely due to the symbolism of doping. If this was not the case, there would be no perception that public knowledge of the use of such substances by sports stars would give sport a negative image, thus removing the need to cover up such practices. Essentially, if doping was not such a powerfully emotional issue then the conspiracies and cover-ups would disappear.

G  Destruction of Reputations

A similar argument can be made for the problem of the destruction of reputations that doping allegations cause. A recent example of this phenomenon is the allegations of drug use by Australian swimmer Ian Thorpe. When these rumours arose, Thorpe publicly announced that his reputation had already been tarnished by the leaked information about his abnormal testosterone levels. This demonstrates the seriousness of doping allegations.

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48 One example is the initial treatment of the Tunisian swimmer, Oussama Mellouli by his national swimming federation. The Tunisian swimming federation sanctioned him with only a reprimand and a warning after he was discovered to have taken a banned stimulant. This case was appealed to the Court of Arbitration for Sport and the swimmer received an 18 month suspension. He went on to win the gold medal in the 1500m freestyle event at the 2008 Beijing Olympic Games: USA Today, CAS Suspends Tunisian Swimmer Mellouli for 18 Months, Still Eligible for Olympics (2007) <http://www.usatoday.com/sports/2007-09-11-3697913355_x.htm> at 8 September 2008.
and the sensationalism attached. Even when such allegations are baseless, the effect on an athlete’s reputation can be long-lasting and extremely negative. Again, these problems largely arise from the regulatory model — the cops and robbers approach to anti-doping policy. Any news of a potential doping case is now seen as a scandal and therefore a great news story. If doping was not seen in the same light as illicit drugs it is doubtful whether such sensationalism would attach to these practices.

IV THE ULTIMATE EFFECTS OF SYMBOLISM

So far a number of issues in anti-doping policy have been raised, both theoretical (Chapter Eight) and operational (this chapter) which can be characterised as a direct result of the effects of symbolism. In Chapter Eight the effects of symbolism were direct; in this chapter the focus has been on the indirect effects of doping symbolism through the reactive regulation pattern.

The ultimate effects of symbolism can be summarised as creating a system which:

- Involves an unclear definition of ‘doping’: the way in which we talk of doping is very different to the way in which we punish it and there are no clear guidelines as to which substances and practices should constitute ‘doping’.
- Lacks a clear rationale for its existence: it is not clear why we prohibit doping.
- Uses a system of strict liability which punishes athletes for inadvertent doping even when there was no performance enhancement gained.
- Subjects the athlete to humiliating and invasive procedures and pours resources into drug testing procedures which are not effectively deterring the use of performance enhancing substances in sport.
- Requires athletes to be available 24 hours a day, 7 days a week for drug testing.
- Produces an environment in which corruption and cover ups flourish and conspiracy theories abound.
- Produces public scandals when athletes are accused of doping.

considered legal action in response but this did not eventuate: ‘Legal Action Over Drug Claim ’, Geelong Advertiser (Geelong), 25 June 2007, 1. John Marshall and Amy Catherine Hale, ‘Will The New WADA Code Plug All the Gaps? Will There Be By-Catch?’ (2008) 1-2 The International Sports Law Journal 37, 39, claim that with the introduction of the concept of the ‘atypical finding’ in the revised WADA Code such information leaks are less likely. Nevertheless, any allegations that are made will continue to be extremely damaging.
By far the most significant effect of symbolism is the inappropriate application of a regulatory model designed to deal with illicit recreational drug use. Sports officials did not come at the issue of ‘drug use’ in sport afresh and re-invent the wheel. Instead they adapted a model that they were already familiar with in the illicit drug model. It is not surprising that this would be the model taken on, nor that the model appeared acceptable. Since public opinion relating to the use of the ergogenic substances was so inextricably tied in with illicit drug symbolism, adoption of a regulatory form that the public was familiar with and were comfortable applying to illicit drugs, would be widely acceptable. The symbolic influence of illicit drugs was met by the application of a regulatory model with similar symbolism attached.

The inappropriateness of the system becomes clear when steroids are considered. Day-of-competition testing was never going to detect or deter with steroid use since they were used primarily in training in the months before competition started. The IOC and medical experts were aware of this as early as the 1960s and yet no system was developed to deal with this problem. Instead the band-aid solution of the 1960s was stretched to cover the new and very different wound. It is no wonder that steroid testing has very rarely picked up steroid use by athletes, since, until recently, authorities were essentially testing at the wrong time. Given that the inadequacies of such testing were clear even before it was instituted, the question does arise as to whether drug testing was ever intended to adequately deter steroid use at all. The fact that the adoption of these tests ever ‘fooled’ the public into thinking that the IOC and other organisations were dealing with the problem can be attributed to the symbolism of steroids: they were still viewed as illicit drugs, so applying illicit drug testing seemed an appropriate step to deal with the issue. The subsequent introduction of out-of-competition testing, although a positive step, has problems of its own and simply builds on the same model of illicit drug symbolism (instead of responding to the issues presented by the modern doping agents). As long as a system designed for an entirely different type of situation is used, the authorities will always be a few steps behind the doping athlete. The final question, therefore, is whether there is a system which is more appropriate to deal with the problem of doping.

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50 Out-of-competition testing is now part of the WADA Code, Art 5.1.1.
V BEYOND SYMBOLISM: IS THERE A BETTER WAY?

In considering whether there is better approach, the first point to consider is what exactly ‘better’ means. ‘Better’ in this context could mean ‘more rational or logical’, ‘more effective’ or ‘fulfilling the purposes more completely.’

A If ‘Better’ Equals ‘Rational’

There is little doubt that it would be possible to have a more rational system of dealing with performance enhancing substances in sport. In fact, a number of alternative systems have been suggested which correspond more closely with the stated rationales of anti-doping policy. One option is having no regulation at all and allowing unlimited access to any and all performance enhancing substances — mostly in combination with harm reduction strategies.51 It is claimed that the advantages of this approach is that athletes would then have equal access to such substances and that this would level the playing field. Since performance enhancing substances are relatively inexpensive forms of performance enhancers (or would be if they were not prohibited), the difference between rich and poor athletes would be much less significant.52 Additionally, it is thought that free access to legal drugs would ensure that athletes used these substances under medical supervision, thus making the use of these substances much less dangerous. If the effect of allowing free access to the prohibited substance is as predicted, then it would, indeed, be a more rational system. It would take away the differential access issue and also allow the health of the athlete to be monitored and maintained, dealing with both the level playing field and the health issue in doping.

An associated suggestion for alternative regulation is that proposed by Savulescu, Foddy and Clayton.53 These authors argue that the level playing field justification for anti-doping policy is inconsistent with the very nature of elite sport which rests on the inequalities of genetics and training. They claim that the only legitimate concern is the health of the athlete. They suggest that the best way to ensure the health of the athlete is by checking health parameters rather than the presence of specific substances. If an athlete fails any of the medical checks then they would not be allowed to compete. Something similar has


52 This, of course, is based on the assumption that prohibited substances do, in fact, work to improve athletic performance: Savulescu, Foddy and Clayton, above n 38; Terry Black, 'Does the Ban on Drugs in Sport Improve Societal Welfare?' (1996) 31 International Review for Sociology of Sport 367.

53 Savulescu, et al, above n 38.
been used in the sport of cycling, where competitors are not permitted to participate if their PVC level — packed cell volume which reflects the concentration of red blood cells — is higher than 0.5.\textsuperscript{54}

Medical checks are not an entirely new idea. The marathon rules of the Stockholm Olympic Games in 1912 stated that all competitors had to have a medical certificate in order to compete in the event.\textsuperscript{55} The suggested system is also akin to pre-employment medical checks which are extremely common in the employment setting. Given the professional status of many athletes now, this seems an appropriate way of dealing with the issue. It is a more rational approach in that it addresses the health issue in a practical way by directly checking on the athlete’s health parameters rather than assuming that testing will indirectly affect the health of the athlete and that a prohibition on performance enhancing substances will ultimately ensure their health.

This appears to be the extent of suggestions in the literature as to alternative forms of regulation which would be a ‘better’ way to deal with the issue of performance enhancing substances in sport. There are other possibilities though, a couple of examples of which are explored below.

To be more appropriate than the present one, a system would need to include responses to the various substances and methods based on sound scientific research, rather than the associated symbolism. The process by which decision making is made in policy formation is therefore significant. The most rational approach would be to carry out well-designed studies on the effects and side effects of the various substances. Decision making about what is and what is not doping would then be based on accurate information rather than anecdotes.\textsuperscript{56} It is quite possible that the information revealed from such studies could determine how each substance should be treated; if no ergogenic or dangerous health effects are found, then the use of the substance could be permitted. If a certain level of ergogenic effect is found but no health risk, then the substance could be allowed up to a certain concentration.

\textsuperscript{54} Savulesc, et al, above n 38, 667.
\textsuperscript{56} Although with the creation of WADA there has been an increasing emphasis and support for further research into doping, most focuses on the development of new and better detection techniques. The WADA website states ‘WADA is committed to increasing the volume of research dedicated to developing new and improved detection methods for performance enhancing substances and methods.’ Most of the WADA-sponsored research projects are these kinds of projects: World Anti-Doping Agency, Science and Medicine: Research (2008) <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=531> at 8 August 2008.
As was explored in Chapter Three, one of the main problems with the anti-doping system is the lack of consistency in the rationales. This inconsistency, and the number of different rationales which have been promoted, have led to the situation where no single rationale covers all the substances on the prohibited lists. For example, the argument that the anti-doping rules are based on a desire to protect the level playing field fails to adequately cover some substances included on these lists which are not performance enhancing, marijuana being an obvious example. And the argument that anti-doping policy is based on a desire to protect the health of the athlete does not adequately account for the prohibition of seemingly innocuous substances such as pseudoephedrine and caffeine, which pose no more risk to athletes than they do to ordinary people.

An alternative system, not yet considered in the literature, would aim to overcome this rational/ethical problem by creating a layered system where prohibited substances are separated on the basis for their inclusion on a prohibited list: either they are dangerous, unfair, both or neither. The treatment of each category could be tailored accordingly. Dangerous substances could be controlled by way of health testing using a variant on the suggestion made by Savelescu et al.\textsuperscript{57} If the athlete does not pass these health tests then they are not fit to participate and they would be excluded from competition. There would be need be no further implications, since the aim is not to punish but to protect. If, by the time of the next competition, the athlete is able to pass the health checks then they are free to participate since they are fit for competition.

The class comprising ‘unfair’ substances could be the subject of more punitive sanctions.\textsuperscript{58} If there is evidence of the use of a prohibited performance enhancing substance — through drug testing or other means — and there was either intent or performance effect, then the athlete would be excluded from competition. If there is no evidence of effect, and it is an inadvertent doping situation, then no further sanction need attach to the doping incident. Further sanctions could be applied if there is also evidence of intent to ‘cheat’.

This kind of layered system may be more burdensome for the anti-doping authority to prove and would therefore be of questionable workability, but it would overcome some of the problems with the present system. Furthermore, such graded regulatory schemes have been employed before in relation to drugs; this is the basis of the various ‘schedules’ in the

\textsuperscript{57} It could be more specifically related to the substances on the particular list by the tests correlating with one identifiable side effect of each drug on the list

\textsuperscript{58} This suggestion assumes that the level playing field argument for a total prohibition on performance enhancing substances in sport, considered in Chapter Three, has some legitimacy. As discussed in Chapter Three, this argument has some significant flaws but these will be put to side at this point for the sake of the argument.
old Poisons Act model where substances are categorised into different schedules and varying regulations apply to these schedules accordingly.59

These are just two suggestions as to ways in which the system could be made more rational. It is not necessarily being claimed here that all, or even any, of these systems are practically or logistically possible, just that these kinds of systems would be more rational.

B If ‘Better’ Means ‘Effective’

‘Better’ could also mean ‘effective’ or ‘fulfilling the purposes more fully’. It has been argued that the present system of drug testing is ineffective, no more than ‘sham’. In fact some argue that rather than decrease the use of performance enhancing substances the present system encourages such use — prohibited lists serving as a virtual shopping list for athletes by identifying certain substances as ergogenic.60 When considering how anti-doping policy could be made more effective, what immediately springs to mind is the usual arguments about better funding,61 more and better drug testing,62 more education programmes63 and changes to the WADA Code Prohibited List64 — to either exclude or include substances which are deemed inappropriate.65 It is possible that any and all of these suggestions could help to detect more incidents of performance enhancing substances and the methods athletes use and even deter the use of such substances in sport.

Whether these changes would make for a more ‘effective’ policy depends on how the purpose or intended result of anti-doping policy is defined. If the purpose is to catch more athletes using prohibited substances, then more and better tests might achieve that. If the purpose is to deter the use of such substances, then more and better tests might indirectly achieve that. Alternatively these tests may result in athletes changing to new, undetectable drugs. If the purpose is to protect the image of sport, then probably the most effective way of doing this is not to pour resources into detection. It would be better to pour resources

59 See Terry Carney, ‘The History of Australian Drug Laws’ (1981) 7 Monash University Law Review 165, 182 for more details. In some ways the revised WADA Code has done this to some extent in the Specified Substances provision (Art 10.3) since some substances will be subject to these provisions and some will not.
61 Eg Ibid, above n 42, 375.
64 So that it reflects evidence-based research for example: David Mottram, ‘Does the International Olympic Committee (IOC) List Need Updating?’ (1999) 27(1) Sports Medicine 1, 8 and Melethil, above n 63, 75.
65 Ibid.
into areas other than drug detection and to ensure that there was no publication of instances of prohibited substance use. The image of sport is created by public knowledge, therefore if the single desire is to protect that image, public knowledge of doping should be limited. If the purpose is to protect the athlete, then the health checks suggested above would be a good starting point.

And so the same problem arises again. The ultimate purpose of anti-doping policy is not clear. It may be to stop the use of prohibited substances but for what purpose? Health? Fairness? Morality? Preserving natural competition? Moreover, the reason for the lack of clarity regarding the ultimate purpose of anti-doping policy is that it is based on the need to respond to public fears spawned from the symbolism associated with various doping substances.

When this is kept in mind, the answer to the question of whether there is a better way becomes clearer. The answer is probably ‘no.’ For the system that we have in place has developed to respond to the symbolism of doping and it obviously does so effectively. The public seem to accept that the current system is dealing with the issue of performance enhancing substances in sport, or at least is capable of dealing with the problem were enough resources and support available. The public acceptance of the present anti-doping system appears to provide an answer to why the drafters of anti-doping policies have continued to persist with strategies which experts agree do not effectively deter the use of performance enhancing substances in sport. This is particularly true of in-competition and announced drug testing but also relates to the question of drug testing itself.

This thesis has argued that the issue of drug use in sport is a highly symbolic one. A symbolic problem needs a symbolic solution. In drug testing such a solution is to be found. Drug testing has a powerful symbolism of its own: it represents the power of ‘good’ science — the drug testers — contrasted with the power of ‘bad’ science — the dopers. No other way of dealing with the issue has the same elements so suited to dealing with the visual imagery of drug use. The public believe in drug testing just as they believe in the power of performance enhancing substances.

The system therefore seems to have effectively dealt with the fears of the public about the use of these substances in sport. If the purpose of anti-doping policy is to convince the public that the issue is being dealt with, then the present system seems to be highly effective.
Is there a better system? There are a number of more rational systems, fairer systems and more logical systems but there is probably no more effective system from the symbolic viewpoint.

VI CONCLUSION AND THE FUTURE OF ANTI-DOPING POLICY

Public opinion has always been, and continues to be, fundamentally important in anti-doping policy. Although often not made explicit, many of the pivotal decisions in anti-doping policy have come about largely as a response to public outcries over practices in sport which offend public sentiment. The focus of this thesis has been on the main driver of public opinion in doping: symbolism.

Manderson has argued: ‘I do not wish to argue for a moment that the symbolic association …was the sole reason for the development of drug prohibition; only that symbolic meaning and association is an important element in accounting for social change’.66 Similarly, I am not claiming that symbolism is the sole reason for the development of anti-doping policy, merely that it is an important element in understanding anti-doping history. And focussing on the symbolic meaning of performance enhancing substances is by no means denying that throughout the history of anti-doping efforts there have been many well-intentioned stakeholders who have been motivated by the health of the athlete or the perceived need for moral reform. Focussing on the symbolism of doping agents equally does not deny the serious medical consequences that some doping agents have. Symbolism, however, provides the missing key to why this particular danger in sport has been viewed as so unacceptable while other dangers are overlooked or even embraced by the sports-watching public as adding to the spectacle of modern sport.

A The Thesis Argument

The thesis began by identifying a number of key issues in anti-doping policy which remain ambiguous, unacceptable or puzzling. It was argued that, although on the surface modern anti-doping policy appears to be settled and universally acceptable, the surface appearance is deceiving. Anti-doping policy is, and always has been, far from unproblematic; even the most basic issues are questionable. In Chapter Four it was argued that the explanation for

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both the confusion that exists in anti-doping policy and the development of the policy itself was to be found in non-rational factors such as the role of public opinion. Evidence was there provided of the importance of public opinion in the workings of the IOC. Chapter Four posed the question of what drove public opinion and, drawing a parallel with the work of Desmond Manderson in the field of illicit drug policy, the task of the thesis was set up: to consider the role of symbolism in the development of anti-doping policy.

The next Part of the thesis provided a symbolic analysis of the history of anti-doping policy in three significant time periods: the 1920s/1930s, the 1960s and the 1970s. Although the analysis proved very complex, three aspects of the symbolism of doping were identified: the power of drugs, links with illicit drugs, and symbolism associated with specific substances such as amphetamines and steroids.

Chapter Eight brought the discussion back to the ambiguities of anti-doping policy and demonstrated how the symbolism identified in Chapters Five to Seven had worked to produce the confusion in anti-doping policy. It was argued there that the confusion arises mainly because anti-doping policy has been largely driven by public opinion generated by symbolism. The definition of doping is confused because whether a substance is deemed to be a doping agent will depend on a number of symbols working together to produce public revulsion. Similarly, it is not clear why doping should be prohibited because this, too, has been highly influenced by the symbolism of doping agents rather than rational argument.

The diagram of reactive regulation\(^{67}\) presents a fuller explanation of why performance enhancing substances have been prohibited. As anti-doping policy developed, this pattern of reactive regulation was repeated in each era. In the 1920s and 1960s, that pattern led to the adoption of an illicit drug model of regulation. In the 1970s that model was expanded to cover steroids, despite the fact that the system was not able to effectively deal with the new generation of performance enhancing substances, the training drugs. In the 1970s anti-doping policy faced a cross road, new issues arose but no new ways of dealing with the problem were adopted. The chance was missed. As steroid use increased and more ‘training drugs’ arrived on the scene, it became increasingly clear that the system was not effectively deterring use of these substances. Problems like this provided an opportunity to head back to the drawing board and come up with a better system of dealing with these issues. Instead, the system in which so much had been invested, was, again, extended to

\(^{67}\) See Figure 6, page 285.
begin out-of-competition testing where the athlete was required to be prepared for testing at any time of the year. The problems of privacy and limits on freedom which this kind of approach imposes on athletes have been largely swept aside. Why did the IOC and other sports organisations ‘get away’ with such an ineffective system? Because steroids ‘looked’ like illicit drugs, an illicit drug model appeared to present an adequate solution. This has never been the case, but drug testing has powerful symbolism of its own and seems to assuage the fears of the public.

The next part of this chapter considered the question: so what? Does it matter that the regulatory system for anti-doping was largely brought about by a reaction to the symbolism of doping? In this particular situation it has been shown that it does matter, for the reactive pattern of regulation has led to a number of significant operational difficulties in anti-doping policy. From the very beginning, the adoption of the illicit drug model of regulation was questionable. In the 1970s its application to steroids clearly demonstrated its insufficiencies. Those inadequacies persist today.

Amphetamines and steroids have been chosen for this analysis because they epitomise the doping debate of their particular era. It has been argued here that the major reason for the prohibition of performance enhancing substances in sport is the public response to the symbolism of these substances. The same explanation can be given for why the prohibition on performance enhancing substances has continually attracted so much public and government support, despite the lack of consistent, ethically defensible, rationales to justify it. For the passions which gave rise to the initial prohibition have been continually reinforced throughout the history of anti-doping efforts. Moreover, as new performance enhancing substances have come into vogue, new layers of symbolism have been added to the mix. The use of EPO (erythropoietin) or hGH (human growth hormone) or THG (tetrahydrogestrinone), and even gene doping, all have their own specific symbolism attached.68

Although this thesis does not consider in detail the symbolism surrounding each of these substances, it should be pointed out that since the development of steroids most new doping agents can be classified as training drugs rather than the short-acting substances which the drug testing system was originally established to deal with. EPO, hGH and the designer steroids are just three examples of substances which are utilised for their long-

68 For example, the debate surrounding gene doping in sport adds an extra dimension to the dehumanisation and naturalness argument
term effects rather than their immediate effects at the time of competition. Therefore, the arguments presented here about the effect of symbolism in applying an inappropriate model to the new problem of training drugs also apply to these substances.

The final section of the thesis asked the question of whether there is a better way to regulate doping. Is it possible to move beyond symbolism to a more rational way of regulating the use of performance enhancing substances in sport? Although a number of possible regulatory strategies exist which would provide a more rational response to the problem, the point was made that this does not necessarily make these strategies better. It was concluded that if the term ‘better’ means more effective or better at fulfilling the purposes of anti-doping policy, then it is doubtful that a ‘better’ system could be discovered. This is because the present system provides the appearance of dealing quite adequately with the fears the public hold about the use of performance enhancing substances in sport and thus adequately addresses the symbolic significance of doping and doping substances/practices.

1 The Future of Anti-Doping Policy

Having come to this conclusion it is now possible to make some comments about how symbolism and the pattern of reactive regulation might affect the future of anti-doping policy. There are two significant aspects here: the apparent swing towards the use of other kinds of evidence in proving doping and the potential of gene doping.

In the last decade there appears to have been a subtle change in detection and enforcement methods. Not only is there an increased involvement of national law enforcement bodies but there is also a greater emphasis on proving doping through the ‘non-analytical positive’. This evidence, which is basically anything other than a positive drug test, has been used in the Bay Area Laboratory Co-operative (BALCO, discussed in Chapter Two) investigation and there are indications that anti-doping authorities are now beginning to focus more on this kind of evidence than in the past.

This, however, does not mean that drug testing is now a thing of the past. At this point in time, the emphasis seems shared between drug testing and other forms of proof. The question therefore arises: to what extent will non-analytical positives displace the

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For details of the actions of these substances see Charles E Yesalis and Michael S Bahrke (eds), Performance Enhancing Substances in Sport and Exercise, 2002 (Champaign: Human Kinetics) Chapters 5, 9 and 26.

traditional form of detection? If anti-doping policy is largely driven by symbolism, then the symbolism of drug testing must be compared to the symbolism of non-analytical evidence. We have seen that illicit drug style testing is a highly symbolic, and therefore aesthetically acceptable, form of detection for a problem which has always been linked to illicit drug use. It is questionable whether other ways of detecting doping are symbolic enough, or involve the right kind of symbolism, to be perceived as equally useful in dealing with the issue. The use of law enforcement bodies and the images of drug-bust type raids seen in recent years in the Tour de France, and the actions of Australian Customs officials in catching Chinese swimmers with growth hormone in 1998, certainly all have the right imagery associated with them. Manderson says this of drug raids in the illicit drug context:

Consider the strange ritual, the display by police or customs officers in drug seizures. Nothing could be more futile than the parade of a boatload of cannabis or a few kilograms of heroin secreted in condoms. But what if the point of these displays is not to destroy but to heighten our anxiety? The televised drug haul, though trivial in terms of actual law enforcement, offers us physical proof of the existence of this threat, and of its evil power in the world.  

However, given the reaction to the use of non-analytical evidence in the BALCO investigation as outlined in Chapter Two, it appears that there is a long way to go before the non-analytical proof has anywhere near the appropriate level of symbolic significance to ‘effectively’ replace drug testing.

The second major issue facing anti-doping policy today is the problem of gene doping or genetic manipulation of athletes. Gene doping is a new technology which has the potential to be, although probably has not yet been, applied to athletic performance. There are many forms of genetic research which could have potential impact on athletic performance but some of the most obvious involve similar physiological mechanisms to the use of EPO or hGH:

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Gene doping really is the next step in the potential armoury of the athlete who wishes to enhance their performance, from taking drugs or substances such as steroids or things like Erythropoietin, or human growth factor, and that’s simply replacing that procedure with one where they get the extra growth hormone or the EPO into their system by some sort of genetic method, or actually putting it into their body so that genetically their body is programmed to reproduce itself. And of course the advantage of that is that there are no other factors involved that can then be detected by some sort of urine or blood test.\footnote{Radio National, \textit{Sports Factor: Gene Doping} (2001) \texttt{<http://www.abc.net.au/rn/talks/8.30/sports/stories/s435073.htm>} at 14 July 2008.}

This is often done by way of a one-off injection of a virus carrier.\footnote{Wells, above n 72, 624.}

There has been some interest in the issue by sports officials to date, with a number of conferences being held in the last few years to discuss it. As Miah points out, the IOC and World Anti-Doping Agency (WADA) so far have treated the issue very much akin to doping; Miah claims that WADA has been ‘overly focussed upon the ‘doping-like’ comparison.’\footnote{Andy Miah, ‘Gene-Doping: Sport, Values and Bioethics’ in J. Glasa (ed), \textit{The Ethics of Human Genetics}, 2003 (Strasbourg: Council of Europe) 171, 177.} Accordingly, under the 2008 \textit{WADA Code Prohibited List}, gene doping is a prohibited activity where its use is non-therapeutic.\footnote{\textit{WADA Code 2008 Prohibited List}, Article M3.} However, at present no testing is available for gene doping and it appears unlikely that there will be any effective test in the near future.\footnote{Harridge and Velloso, above n 72, 136 argue that a test will be very difficult to develop. For the latest developments in this regard see Anna Baoutina, Ian A Alexander, John E J Rasko, Kerry R Emsile, ‘Developing Strategies for Detection of Gene Doping’ (2008) 10 \textit{Journal of Genetic Medicine} 3.} This is one of the major issues that anti-doping authorities will face with gene doping. Furthermore, gene doping, despite the fact that in many ways it can mimic the action of already known doping agents, is very different to all previous doping substances and methods. One significant difference for the purposes of this argument is that gene doping can involve only one treatment but can still have long term effects. The one-off application is obviously not on the day of the competition but some time previous to competition. Thus gene doping may have some common traits with the 1960s doping agents in that it involves one-off application while also sharing certain characteristics with steroids in that the effect would be a long term (training) one.

Like steroids in the 1970s, gene doping provides another opportunity for anti-doping officials to go back to the drawing board and consider the issue of performance enhancing substances and methods in sport afresh. In order to deal appropriately and adequately with the issue of gene doping, there appears to be a need for a completely new approach. But will this happen? The history of anti-doping policy suggests that it may not: steroids also presented that opportunity but it was not taken advantage of. However, like all the other
drugs and methods which went before, whether gene doping is appropriately dealt with will depend largely on how the issue is *constructed* in public debate and the symbolism which becomes attached to it. We saw in Chapter Seven that although steroids were not illicit drugs, they were seen as (and eventually became) such. Similarly, gene doping is very different to illicit recreational drug use. Given the past history of symbolism in doping, it is probable that it still may be constructed as part of the same issue: the symbolism of doping may adapt to cover this totally new development. If that happens, then there may well be no real change in the present approach, just minor adaptations to maintain the appearance of an adequate response. If, however, gene doping proves to be significantly different to other forms of doping, this would make the application of illicit drug symbolism unworkable. In that case, a major change in approach could be coming.79

2 Concluding Remarks: The Future

Anti-doping policy is fraught with confusion and ambiguity, even in the most basic and fundamental issues. To look at anti-doping policy today, with its universal code and a level of governmental agreement and cooperation not often seen, it is easy to assume that no such problems exist. The degree of consensus is largely a result of unity in public opinion regarding the issue of performance enhancing substances in sport. This unity of public opinion is, in turn, largely a result of the power of symbolism in doping discourse.

Whether this calm surface of consensus will remain in the face of new issues such as gene doping will very much depend on the way in which the symbolism of gene doping plays out. One thing is certain: symbolism will continue to play a key role in the development of anti-doping policy and, as long as it does, the regulation of performance enhancing substances and methods in sport will continue to be of a reactive nature.

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79 If Miah, above n 76, is correct, then it appears that WADA and the IOC are already constructing the issue in familiar terms by focusing on the comparisons to traditional forms of doping.
EPILOGUE

In the name of all competitors, I promise that we shall take part in these Olympic Games, respecting and abiding by the rules that govern them, in the true spirit of sportsmanship, for the glory of sport and the honour of our teams, committing ourselves to a sport without doping and without drugs.¹

As millions of people around the world sit and watch the representative athlete take the Olympic oath to uphold the ideal of doping and drug-free sport, the person at home on the couch thinks that the issue is clear-cut. Doping is clearly wrong. It is cheating. It is a fundamental moral issue. Anti-doping policy therefore seems a rational policy based on the issues surrounding unacceptable performance enhancement in sport.

This thesis has shown that anti-doping policy is far from rational and that the rationales presented for anti-doping policy cannot adequately explain why we prohibit the use of performance enhancing substances in sport. In fact, far from being a cogent policy responding to a clear moral issue, anti-doping policy is fraught with inconsistency and irrationality. The reason: anti-doping policy is based on something much more instinctive than rational argument. Our gut feeling of horror at images of doping in sport is based largely on the symbolism associated with doping and doping agents. Anti-doping policy is really a response to these gut instincts.

Rationale or rationalisation? Most certainly modern anti-doping policy is a rationalisation.

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