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IS THERE A STEROIDS PROBLEM? THE PROBLEMATIC CHARACTER OF THE CASE FOR REGULATION

LEWIS KURLANTZICK*

With all the hullabaloo about Barry Bonds and the recent drug testing agreement in Major League Baseball, isn't it time to take a serious look at the issues involved in steroid use by athletes? In fact, the seemingly simple question of the proper treatment of steroid use in professional athletics is highly complicated. That complexity reflects a mix of controverted justifications, enforcement mechanisms that implicate privacy interests¹ and

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1. While players' privacy interests are often quickly discounted, the concern, in fact, is a substantial one. JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 125 (1997). The technological and physical intrusiveness into a person's body and biological functions in the procedures for collecting samples is obvious. In the case of required urinalysis, the sample is generally produced "under direct observation." *Id.* at 129. This procedure also involves the "physical and psychological intrusion of urinating on demand." *Id.* Moreover, analysis of "urine samples may reveal . . . physiological facts about the party being tested"—information with no relevance to the testing regime's objectives—that he may well not want shared with others. *Id.* Exposures of this sort, in turn, "raise . . . privacy questions concerning [the] acquisition, storage, use, and distribution of the information." *Id.* In light of these privacy values, an apt question, one which receives insufficient attention, is whether existing or proposed schemes are unnecessarily intrusive. *Id.* at 130. In any case, respect for these values requires attention to "precautions to protect privacy and minimize error." *Id.* at 142.

Tests can reveal information about conditions such as diabetes, epilepsy, heart trouble, and manic depression. *Id.* at 129. Disclosure of such information not only can be embarrassing, but can lead to discrimination, employment loss, and financial loss. *Id.* at 130. Of course, even if there is no disclosure, the revelation to testing personnel itself is problematic. *Id.* at 129-30. Similarly, in the case of those whose tests produce false negatives, privacy with respect to "control over the information is paramount, as

feature an inverse relationship between expense and reliability, and historically untrustworthy national and international enforcement authorities.²

At the core of the debate, though, is the matter of rationale. What are the justifications proffered for a ban on steroid use? Probably most common is the “unnatural” performance-enhancing quality of these substances. This rationale, apparently simple, is, in fact, hardly free of difficulty. The problem is that over time the ingestion by athletes of a large range of supplements and “restorative” substances,³ the use of novel training methods and diets, and, of course, advances in equipment have all “enhanced” performance. A difficulty lies in articulating a convincing distinction between these enhancers and steroids. If the claimed difference is rooted in a notion of naturalness, we presently have no convincing explanation of why some substances, including synthetic vitamins, are considered “natural” and others, including naturally occurring hormones, are considered “unnatural.” This task of differentiation may be not only difficult but also impossible, as the debates on this topic among philosophers of sports suggest that composition of a satisfying distinction between permissible and impermissible substances may be beyond our powers of conception and articulation.⁴ There appears to be no moral distinction between the various “natural” and “unnatural” assists to performance.⁵ And the absence of such a distinction underlines the ambiguity of

the implications for their reputation, employment, and freedom may be grave.” *Id.* at 134. A testing regime, then, must include “detailed guidelines . . . to protect the confidentiality of the information gained from tests.” *Id.* at 143. In fact, there is an interaction between privacy concerns and test accuracy, as inaccuracy heightens threats to privacy. *Id.* at 130. Thus, it may make sense to insist on “more vigilance and control over the information gathered from the tests and place more weight on requiring privacy protection, when there is a high probability that the information is mistaken.” *Id.*

2. See PAUL WEILER & GARY ROBERTS, *SPORTS AND THE LAW* 1056-61, 1067, 1078-79 (3d ed. 2004) (highlighting the International Amateur Athletic Federation’s failure to follow its own drug testing guidelines and procedures in the case of Butch Reynolds, an American track and field star, and Olympic judging scandals).
3. Indeed, the distinction between restorative and additive drugs is unclear. See Norman Fost, *Banning Drugs in Sports: A Skeptical View*, HASTINGS CENTER REP., Aug. 1986, at 5-6. See generally Thomas H. Murray, *The Ethics of Drugs in Sport*, in *DRUGS & PERFORMANCE IN SPORTS* 11, 13 (Richard H. Strauss ed., 1987) (explaining that it is difficult even to define clearly what we mean by “drug”).
4. See, e.g., ROBERT SIMON, *FAIR PLAY: THE ETHICS OF SPORT* 72, 80 (2d ed. 2004) (noting that no clear definition distinguishes the kind of performance-enhancing drugs sports officials want to prohibit from the legitimate use of vitamins or allergy medicine; the term “natural” too vague and open-textured to be of help in this area).
5. See, e.g., Fost, *supra* note 3, at 7.

a moral evaluation of drug use and of the meaning of our cultural notion that the "right" way to obtain success is through hard work.

A second justification for disapproval rests on a concern for the athlete's health. Yet, assuming that accurate information is available and therefore ignorance of any physical risk of steroid use is not present, this rationale is problematic, at least for competent adults. Athletes are in a position to make a decision about what behavior is in their best interest, to weigh the risks and benefits according to their own values.⁶ And a paternalistic rule that attempts to prevent the athlete from harming himself runs counter to the important values of independence and personal choice.⁷ Moreover, it is likely that the feared harm is neither life-threatening nor irreversible.⁸ Presumably, under this health rationale, if performance is enhanced by substances that cause neither short-term nor long-term harm to the athlete, these substances should not be banned.

A third justification, though more intricate and less often voiced, is more promising. This justification is rooted in a concern for a form of "coercion" in the athlete's decision-making and his inability to coordinate a response without outside intervention. If one person is perceived to have an advantage in using a drug, others may feel compelled to use it in an effort to try to stay even. That use decision is not necessarily troubling, any more than the initial decision to engage in a risky sport. After all, the athlete can choose to forego the opportunity and any attendant risks.⁹ However, if a

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6. See generally M.D. Burke, *Drugs in Sport: Have They Practiced Too Hard? A Response to Schneider and Butcher*, 24 J. PHIL. SPORT 47 (1997) (arguing that organizational interference with liberty limits actions of athletes whose techniques, tactics, or training methods test limits of what athletic community regards as acceptable practice; historically, what at first appear to be violations of game's ethos may eventually be viewed as brilliant innovations and become part of orthodoxy).
 7. See Murray, *supra* note 3, at 17-18 (articulating a thoughtful, though ultimately unpersuasive, argument that a ban on steroid use constitutes an act of justified paternalism).
 8. See generally THOMAS MORAWETZ, *THE PHILOSOPHY OF LAW* 170-71 (1980) (justifying paternalistic laws only to protect persons against considerable and irreversible harm). Norman Fost has expressed doubt about the sincerity of this justification in a universe where the risks of competing in the sport itself often far exceed the risks of the drugs causing concern. See Fost, *supra* note 3, at 5-6. Thomas Murray has justly noted that this criticism is flawed and that it is not disingenuous to allow these on-field risks and yet deny athletes the opportunity to decide whether to assume the risks posed by performance-enhancing drugs: "To say that because some risks remain we have no business trying to minimize unnecessary additional risk is like saying that because people get hurt in auto accidents there is no point in providing safety equipment like seat belts or in requiring people to wear them." Murray, *supra* note 3, at 16-17. Yet when one hears the frequent expression of moral outrage about the use of steroids, Fost's observation resonates on some level.
 9. The question here is whether placing athletes who prefer not to use steroids in a

large percentage of participants in a particular sport would choose not to use steroids if left to their own independent decisions, but feel pressured to use them in order to remain competitive with users, a case can be made for intervention in the form of a rule banning (or limiting) use. In light of the large number of potential users, the costs of individuals contractually establishing an advanced arrangement that would serve the collective interest of assurance of non-use would be prohibitive. Thus, a rule here could be seen as a response to a problem of coordination that the interested parties cannot resolve themselves.¹⁰ Under this justification, the athletes' situation can be seen as analogous to that of the fishermen who will "overfish" and excessively deplete the stock in the absence of a legal rule limiting the permitted catch. The coordination function, though, need not be effected by public intervention.¹¹ Indeed, in the case of all the major

position where they have to either abandon any realistic chance of experiencing their sport's external rewards or endanger their long-term health by taking drugs is an illegitimate imposition. Compare Nicholas Dixon, *Rorty, Performance-Enhancing Drugs, and Change in Sport*, 28 J. PHIL. SPORT 78, 80-81 (2001), and SIMON, *supra* note 4, at 77-79, with Fost, *supra* note 3, at 7 (imagine a pro football player who argues that he is being coerced into risking knee injury; he is free to refuse the opportunity and its risks with no loss of anything to which he is entitled). Catlin and Murray's postulation—"[t]he athlete remains free to choose whether or not to violate the rules of the sport as their [sic] competitors are doing, but is not free to pursue his . . . dream with confidence that the best athlete will win"—is conclusory, as the very question up for debate is whether the rules should include a prohibition on drug use. Don H. Catlin & Thomas H. Murray, *Performance-Enhancing Drugs, Fair Competition, and Olympic Sport*, 276 J. AM. MED. ASS'N 231, 237 (1996). The analytical risk in using "coercion" so broadly in this context is that it winds up deprived of any moral force. See SIMON, *supra* note 4, at 75-76.

10. See generally Philip Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797 (1973).
11. There are several bills pending in Congress that dictate a testing and sanction regime for the four major professional sports leagues in the United States. The proposed bills have common emphasis and terms: they call for more sweeping drug testing provisions, reference international standards, and require severe sanctions for violators. See, e.g., Drug Free Sports Act of 2005, H.R. 1862, 109th Cong. The bills raise a serious question of constitutional infirmity. The prime question is whether the legislated program would violate the Fourth Amendment; more precisely, does it dictate an unreasonable search? The detailed prescription of testing, sanctions, and implementation would not be the product of private initiative. Rather, the leagues would comply by compulsion of sovereign authority. See *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 614-16 (1989). Moreover, there is no doubt that the collection and analysis of the samples required by the bills constitute searches of the person and therefore are subject to the Fourth Amendment. See *id.* at 616-18. In addition, there is no obvious compelling governmental interest served by the legislation that would render the intrusion "reasonable." The testing program does not serve the interest of protecting public safety, in contrast to a private employee's

job where deficient performance because of drug use would present a risk of property or personal damage to members of the public using the products or services of that business. Additionally, there is no diminished expectation of privacy on the part of employees due to pervasive regulation of the industry. In sum, a Fourth Amendment challenge to the legislation would rest on firm grounds. See WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* VOL. 2, 445-51 (2d ed. 1987).

The congressional bills stress the achievement of “uniformity.” They dictate uniform testing regimens and sanctions among all professional sports. While the words “uniformity” and “harmony” always carry a positive charge, considered evaluation of any legislative proposal requires us to avoid being seduced by terms instinctively conveying positive values. Harmonization is not necessarily beneficial. See generally ROBERT L. BARD & LEWIS KURLANTZICK, *COPYRIGHT DURATION: DURATION, TERM EXTENSION, THE EUROPEAN UNION AND THE MAKING OF COPYRIGHT POLICY* 191-201 (1998) (explaining that international harmonization of copyright term of protection provides few benefits). Indeed, the bills’ indiscriminating directives reveal a lack of congressional knowledge about, and sensitivity to, the differences between the operations of the various leagues. To take just one example: uniformity of sanctions. A two-year suspension will produce significantly different economic and career effects on players depending on the typical length of a career for a particular sport and a particular position. Similarly, a sanction such as a ten-game suspension will have markedly different financial impact in a sport such as football with a sixteen game season than in baseball with a 162 game season. See generally *Hearing on H.R. 1862 Before the H. Comm. on Energy and Commerce*, 109th Cong. 3 (2005) (statement of Donald M. Fehr, Executive Director of Major League Baseball Players Association, arguing differential treatment appropriate in light of differing levels of culpability); “[d]ifferent sports have different sensitivities to the loss of a player. In baseball . . . the impact is not severe, as even the best player on a team only comes to bat four or five times in a typical game. In basketball . . . the impact is far graver.” Robert L. Bard & Lewis Kurlantzick, *Knicks-Heat and the Appropriateness of Sanctions in Sport*, 20 CARDOZO ARTS & ENT. L.J. 507, 515-16 (2002).

In the end, an examination of drug testing underscores the interrelation of ends and means. Analysis of the amenability of a given problem—here steroid use—to certain approaches to resolution may serve to sharpen an understanding of the problem itself. Given an apparent agreement in the abstract on the issue, the effort to put the agreement into institutional form with attention to the costs, mechanics, and efficacy of implementation, including identification of and respect for values implicated and attention to who decides disputes, by what procedures, under what standards, and with what consequences, may dictate a reshaping not only of the means chosen but also of the ends themselves or an alteration in the expectations for the scheme. If enforcement is ineffective or unfeasible, “the second-best option may be to repeal the rule entirely, fully inform competitors of the risks of steroid use, and let the athletes decide whether or not to take their chances.” See JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 153 (2d ed. 2004) (noting that it is almost impossible to detect blood-doping procedure in the absence of a self-confession); PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 78 (2000). See generally PAUL A. FREUND, *ON LAW AND JUSTICE* 114-15 (1968).

professional sports leagues a private mechanism, the players' union, exists to effectuate the players' interests, and the union and management can adopt a rule by contract.¹² But, of course, even if this coordination justification is theoretically persuasive, there remains the empirical question of whether the assumption about participant attitudes is accurate.¹³

A decision by owners and players to ban or limit the use of steroids might proceed from a quite different perspective, that of entertainment. That is, the parties are engaged in the joint sale of an entertainment product and consequently the views of their consumers are of critical concern to them. Hence, if present and potential fans are likely to change their preferences with respect to consumption of the sport in the absence of league action against steroid use, it would make sense simply as a matter of sound commercial judgment to take action to avoid this customer alienation. League action would be rooted in a practical concern about the financial implications of athletes with bad images.¹⁴ This rationale for

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12. Caution in the design and implementation of a testing program—indeed, in the construction of any disciplinary regime—is especially appropriate in the setting of baseball, and other professional sports, where the employment effect of a Commissioner's ruling, due to its industry-wide character, is more sweeping than an act of management discipline in a more conventional industry. For example, imagine an experienced Travelers Insurance Company employee who is well-paid but has limited competence outside insurance. Fortunately for him, market forces tend to limit the potential for abusive treatment by his employer and provide him with options if he is maltreated. Employment opportunities at other insurance companies affect Travelers' handling of the employee, and they offer comparable job possibilities if Travelers dismisses him. This market constraint, though, does not operate in professional sports because a Commissioner suspension amounts to a ban on hiring by all employers in the industry.

National and international federations in "amateur" sports perform a similar gatekeeper function. Accordingly, their disciplinary decisions, correct or incorrect, can cause severe consequences to the careers of athletes subject to their jurisdiction. *See, e.g.,* Reynolds v. Int'l Amateur Athletic Fed'n, 841 F. Supp. 1444, 1456 (S.D. Ohio 1992). These athletes have the protection of neither the market nor of a union. Such a collective decision by all members of an industry to exclude a person from work in that business is necessarily troubling. Such behavior implicates not only the values of market efficiency, expressed in the antitrust laws, and employee economic liberty, but also a concern about concentration of power, the establishment of a kind of private government with no constitutional constraints and no input from those who are significantly affected by its decisions.

13. *See generally* Catlin & Murray, *supra* note 9, at 237 (arguing that staunchest supporters of drug testing are the athletes in the Olympic movement). *But cf.* SIMON, *supra* note 4, at 81-82 (arguing that rational and impartial athletes voting behind limited "veil of ignorance" would likely support a rule that steroid use should be prohibited rather than permitted).
14. Whether drug use does, in fact, undermine faith in the integrity of competition is an empirical question without much evidence.

response, though, has nothing to do with concern for athletes' health, preservation of an "even" playing field, or a distinction between "natural" and "unnatural" substances. Rather the decision to condition employment on abstention from use of steroids derives from a judgment about the marketing of the product.

It is unlikely that any legal obstacle stands in the way of union consent to a steroid ban. Such an agreement would not involve the compromise of an unwaivable civil right of employees. Nor would a ban in pursuit of fan demand constitute a response to customer prejudices dictating discrimination on the basis of race or other suspect characteristics. Of course, as noted, that agreement would be rooted in business concerns and not in ethical considerations about the character of the athletic enterprise.

There is good reason to question the prevailing view in the sports community that performance-enhancing drugs are bad and that their use should be banned. Cogent criticisms of the arguments for prohibiting steroid use exist. Recognition of the incoherence of many of these claims and, more generally, that the moral foundations of drug testing in sports are suspect should inform decisions and beget caution about both establishment of testing schemes and the design and implementation of such schemes. Robert Simon has suggested that, *assuming* the lines of argument for and against the view that steroid use is immoral are inconclusive, sports authorities have reasonable grounds to impose a ban, and their decisions, if reached pursuant to a proper process, have normative force.¹⁵ While this perspective has some merit, its persuasiveness is weakened in the not-uncommon situations where—unlike professional sports leagues—the athletes have no representation in the policy-making process that formulates (and executes) governing rules. The NCAA and the IOC are examples of this kind of structure.

15. See SIMON, *supra* note 4, at 86-88, 90.

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