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# **The ‘Spirit of sport’, WADA’s Code Review, and the search for an Overlapping Consensus**

## **Abstract**

In this paper we argue for the recognition that anti-doping is in itself first and foremost an ethical position. The current World Anti-doping Code formulation of ‘the spirit of sport’ is an acknowledgement of this point and a rejection of scientific and technicist understandings of the nature of anti-doping itself. We critically review the Code formulations on ‘the spirit of sport’. Based on a theoretical background of various approaches to normative agreement and consensus in a setting of diversity of ‘comprehensive views’ (Rawls 1987), we argue for revision of the Code. Specifically, we argue for a re-formulation of ‘the spirit of sport’ in terms of athlete protection and the preservation of the integrity of sporting competition that could meet requirements on an overlapping consensus among all WADA stakeholders. This is not just a matter of formality and Code acceptance. An overlapping consensus is not a mere *modus vivendi* but a normative consensus based on fair, honest, and transparent discourse in which participants deliberate in a setting of mutual respect and trust, and of ‘decency’ (Walzer 1994), which is a basis for a consensus that cultivates authentic stakeholder commitment.

## **Key words**

‘spirit of sport’, integrity, WADA, Code Review, doping

## Introduction

Within the philosophy of sport, the justification of anti-doping practices has traditionally been based on arguments employing the concepts of ‘health’ and ‘fairness’ (Loland and McNamee 2015). The position of the World Anti-Doping Agency (WADA), enshrined in its principal policy document the World Anti-doping Code (‘the Code’), builds on similar concerns but refers to a more general, normative ideal. In all versions since its inception, WADA makes general ethical remarks at the beginning of its Code relating to the preservation of ‘the spirit of sport’. <sup>1</sup> In support of the main thrust of the Code – the identification of substances and methods that it prohibits – the Code presents three criteria to support potential inclusion on its Prohibited List (PL) of which violation of ‘the spirit of sport’ is one. These criteria have been the core of academic contention. While some scholars have argued for the need for explicit normative premises such as ‘the spirit of sport’ (Loland and McNamee 2016), others have argued for its abolition due to its inoperability (Kayser et al 2007, Kornbeck 2013).

In this essay, we (i) present a critical review of the current WADC ‘spirit of sport’ criterion; (ii) examine more general, ethical perspectives on the possibilities of a global ‘overlapping consensus’ on normative criteria in anti-doping; and (iii) propose a revised formulation of ‘the spirit of sport’ in terms of athlete protection and the preservation of the integrity of sporting competition. This revised version, we argue, could meet requirements of an overlapping consensus among all WADA stakeholders while enabling operational utility in concrete cases.

### **‘The spirit of sport’ of the Code: a critical review**

In the Code, doping is defined as ‘the occurrence of one or more of the anti-doping rule violations (ADRVs) set forth in Article 2.1 through Article 2.10 of the Code.’ These articles list operative definitions of doping such as ‘the presence of prohibited substances in athletes’ samples’, ‘the use of prohibited substances and methods’, and ‘attempts on evading, refusing

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<sup>1</sup> <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>, p. 14. Accessed December 7, 2017. For an overview of the historical background of ‘the spirit of sport’-criterion, see Ritchie (2015).

or failing to submit doping samples’.<sup>2</sup> Despite the fact that the general public equate doping with the first and second listed ADRVs (‘presence of a prohibited substance or its metabolites or markers in an athlete’s sample; use or attempted use by an athlete of a prohibited substance or a prohibited method’) WADA does not specify any hierarchy within their Code. We may conclude, then, that there is no doping-jurisprudential reason why these ADRVs should be privileged. Nevertheless, it is the substances or methods themselves that are the focus of most disputes, alongside a particular jurisprudential mechanism, ‘strict liability’, meaning that athletes are ascribed full and unconditional responsibility for the outcome of doping tests independent on actual negligence or intent to harm (Connolly 2003, Soek 2006, McNamee and Tarasti 2010). Though reasons regarding exculpation may be considered upon appeal, they are consequent to the issuing of an ADRV, following an adverse analytical finding (AAF) and its verification in a second sample test.

These substances and methods are selected based on three more general criteria of which prohibited means and methods must meet at least two:

1. Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;
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*;
3. WADA’s determination that the *use* of the substance or method violates the spirit of sport described in the introduction to the *Code*.<sup>3</sup>

It is worth noting that, although they require conceptual and/or ethical judgments of extent (i.e. of performance enhancement or health risk), the first two criteria are perceived as

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<sup>2</sup> The full list runs: presence of a prohibited substance or its metabolites or markers in an athlete’s sample; use or attempted use by an athlete of a prohibited substance or a prohibited method, evading, refusing or failing to submit to sample collection; whereabouts failures; tampering or attempted tampering with any part of doping control; possession of a prohibited substance or a prohibited method; trafficking or attempted trafficking in any prohibited substance or prohibited method; administration or attempted administration to any athlete in-competition of any prohibited substance or prohibited method; or administration or attempted administration to any athlete out-of-competition of any prohibited substance or any prohibited method that is prohibited out-of-competition; complicity; and prohibited Association. See <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>, pp. 18-24. Accessed December 7, 2017.

<sup>3</sup> See <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>, p. 30. Accessed December 7, 2017.

matters of facts underpinned, to a greater or lesser extent, by relevant biomedical research (McNamee 2012, 2015; Loland and Hoppeler 2012, Loland 2018). The third criterion is unquestionably a normative one and based on a view of the value and meaning of sport, of what sport ought to be at its best. It reads:

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, the pursuit of human excellence through the dedicated perfection of each person’s natural talents. it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including:

- 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

Doping is fundamentally contrary to the spirit of sport.<sup>4</sup>

Articulating this normative rationale in the WADC has been significant and pioneering work attempting to characterise anti-doping as an ethical position. Referring to ‘the spirit of sport’ implies acknowledging that anti-doping is not just a technical or scientific matter but an expression of a view of the value of sport. Still, much scholarship and professional discussion has centred on this criterion pointing to its falling well short of an adequate conceptual

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<sup>4</sup> <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>, p. 14. Accessed December 7, 2017.

analysis or even a prescriptive definition.<sup>5</sup> Scholars and anti-doping personnel argued during the last WADA Code Review process (2011-13) that the first two criteria on performance-enhancement and health were sufficient to draw lines between permissible and prohibited substances and methods and determine the PL, and that the latter normative criterion was vague and with little operative force and could be deleted (Kayser et al 2007, Kornbeck 2013). For the first two rounds of the review process this had been recommended, but in the final round the normative criterion was kept.

The critique of the ‘spirit of sport’ criterion is relevant to a certain extent, notably when it comes to vagueness and lack of clear operationalization. On the other hand, McNamee (2012; 2015) has argued that, on logical grounds, conceptual vagueness is intrinsic to all natural languages and does not necessarily prevent agreements in judgement regarding interpretation and application of concepts to particular cases a general philosophical argument. Classic examples in the literature include colour predicates; when, precisely does orange become red?; and Sorites type paradoxes; precisely how many grains of sand are required to form a heap? (Sorenson 2001). With respect to sport examples one might observe that although the rule 12 in football (soccer) prohibit pushing with excessive force, we are nevertheless likely to find much agreement about borderline cases: how much vigour constitutes excess? (Football Association, 2018). Equally, the Union Cycliste International (UCI) stipulates in their constitutive rule 2.3.036 on sprints that “Riders shall be strictly forbidden to deviate from the lane they selected when launching into the sprint and, in so doing, endangering others.” (INRNG, 2010). But just how much of a deviation is required to trigger the rule? With specific reference to anti-doping regulations, one may consider 4.1b of the International Standard for Therapeutic Use Exemptions (TUE) where it states that to obtain a TUE inter alia : “The *Therapeutic Use* of the *Prohibited Substance* or *Prohibited Method* is highly unlikely to produce any additional enhancement of performance beyond what might be reasonably anticipated by a return to the *Athlete*’s normal state of health immediately prior to treatment, following the treatment of the acute or chronic medical condition.”<sup>6</sup> The list of vague terms here is not insignificant: “highly”; “normal”, “immediate”. At each point one can

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<sup>5</sup> See its critics, for example, Foddy & Savulescu (2007), Savulescu, Foddy & Clayton (2004), Levine (2006), and Kayser et al (2007), and Dimeo and Moller, (2017).

<sup>5</sup> For an overview of the debate, see Loland (2018); Loland & Hoppeler (2012), McNamee (2012), McNamee (2014), and our positioning within it (Loland and McNamee (2016).

<sup>6</sup> <https://www.wada-ama.org/en/resources/therapeutic-use-exemption-tue/international-standard-for-therapeutic-use-exemptions-istue>. Accessed September 24, 2018.

reasonably ask what degree of (eg) height, normality, immediacy, and so on will be our cut off point? And so it is with the other two concepts that make up the criteria for the PL : “performance enhancement” (how much how, long lasting, etc) and “health” (which of the many conceptions should be utilised?). Since the PL expert group does not publish its minutes we cannot know precisely how these were operationalised, but some examples may illustrate the challenge.

Imagine having only the criteria of performance-enhancement and health. Suppose that there was clear evidence that a particular method or substance was performance-enhancing, and if there was also clear evidence of potential harm to health, substances and methods should be considered for the PL. But this is too crude. Heavy and sustained training is performance-enhancing and may present a clear risk of harm to athletes’ health in terms of a variety of specific and non-specific conditions and syndromes. Sports such as bobsleigh, boxing, or downhill skiing can lead to serious injury and even death: they are inherently risky endeavours. In other words, the idea that one may resolve problems regarding the interpretation of these criteria by a positivistic reliance on medical or scientifically based criteria is fundamentally flawed.

The simple examples above illustrate clearly that the very notion of anti-doping policy and practice represents an inherently normative stance. Put simply, anti-doping is an value-based position on how sports ought to be pursued – whether in training or competition. The challenge then is not the existence of a normative criterion in the definition of doping, but how clearly this criterion could be articulated and operationalised more explicitly while at the same time constituting a basis for consensus among all stakeholders in global anti-doping work.

### **The idea of an (overlapping) consensus: moral minimalism and thin commitments**

Those committed to the ethical mission of the World Anti-Doping Code, rather than mere subjects of it, should seek to find agreement for the strictures and policies that comprise it and WADA’s related International Standards (eg for Education, Therapeutic Exemption Certificate processes). The achievement of a *modus vivendi*, a ‘mere’ agreement, represented

by the contingent or unprincipled alignment of interests does not necessarily provide an ethical justification.<sup>7</sup>

The challenge presented to global sports administrators and policy makers is a new and significant one with complex political and moral philosophical roots. In many ways, modern ethical theory addresses the challenge of finding common, normative principles in complex multicultural societies with citizens of diverse attitudes, beliefs and values. The philosophical antecedents to this challenge are set in modernity. Early moral philosophical attempts to precisely capture the uniquely demanding rules of conduct were highly ambitious; scholars looked to construct overarching theories that attempted to prescribe impartial universal norms such as in the architectonic theories of Kant and Mill. Political philosophers in more recent times have been, to a greater or lesser degree, more modest in their philosophical ambition. Their self-reflective critical awareness has often driven them to more circumspect accounts of morality, conscious of the theoretical divide between liberal and communitarian worldviews (Mulhall and Swift 1996).

The general problem in moral and political philosophy of articulating reasonable pluralism is of course magnified in the development of any global policy, such as the possibility of human rights discourses amid the clash of liberal and communitarian political cultures (Kymlicka 1991). The form that this consensus might take is contested. We briefly sketch four conceptions in the political philosophy of Habermas, Rawls, Walzer, and Taylor, before turning our sights on how their scholarship might better help in revising the normative justification of anti-doping as found in the Code. These conceptions could also shape debates better as WADA attempts to move into a more consensual mode for their legitimation in the global drive for ethical sport.

Jurgen Habermas has been at the forefront of the development of what is referred to as 'discourse ethics' in which moral issues are discussed in open and rational ways in a quest for common agreement. Among the scholars we briefly survey, his ambitions are more ambitious, if not so much in content then certainly in their procedural requirements. Habermas seeks to articulate the conditions for social coordination in societies where there is

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<sup>7</sup> One might query whether the current dispute and (dis-)agreements over the eligibility of Russian athletes and the Russian Anti-Doping Agency are precisely expressions of such a *modus vivendi*.



no unitary metaphysical view of the world that each member of that society accepts. He sets out normative principles to which individuals with different metaphysical views of the world can assent.

The Habermasian view of an ideal communicative situation has developed over the decades of his scholarship and has had impact in direct and indirect ways in the discourses on public institutions and policies (White 1995). A legitimate normative discourse has to take place based on certain procedures in which there is a mutual recognition and respect between participants who are motivated to accept the better argument, in which no relevant arguments are excluded, and in which there are no asymmetrical power structures (Habermas 1995). Disputants are committed to following the arguments where they lead. It has a clear democratizing agenda, attempting to reconcile modernity with classically developed universalistically-driven conceptions of morality and rationality. It is for these reasons his mature stance has been labelled 'post-metaphysical'. For Habermas, public opinion may steer but ought not determine normative conclusions in the public sphere. Importantly, he calls for much closer dialogue between philosophers and social scientists. In our present context, ideally, all stakeholders (for example, athletes, leaders, sport organizations, public authorities, fans and informed supporters) would be obliged to engage in an open, honest and rational discourse on relevant rules and regulations determining conduct in anti-doping matters, in relationships neither saturated nor driven by considerations of power.

A significant body of secondary scholarship has emerged in relation to various aspects of Habermas' work, but notably there is criticism of his ideal-perspective. Ideal communicative situations are not realizable in practice. Critics argue that we must recognise in political deliberation that functional discourses ought to take into account the impact of different power structures and interests to a significant extent (White 1995). Habermas' mature writing appeared to withdraw from idealised speech demands, to recognise the particular appeal of life history and tradition, though, at root, his universalist defence of human dignity showed his idealistic commitments. On these grounds, though Habermas's position appears apt to describe the more democratising processes of WADA's reforms such as opening up to increased input from stakeholders, it is not clear that anything remotely like a decision-procedure emerges in a form suitable for complex international policy spheres such as anti-doping.

The explicit idea of an overlapping consensus arises in the writing of the of the leading political philosopher John Rawls. Withdrawing from his early metaphysical claims about the ordering of any just (i.e. fair) society, Rawls' later work became more explicitly anchored in, and explicitly advocating, the political traditions of liberalism (Rawls 1987; 1993; 1999).

One philosophical construction that emerged became a source of hope for achieving agreement in conditions of deep conflict across the political divide. In complex societies with individuals and groups holding a variety of diverse and, to a certain extent, contrasting 'comprehensive doctrines' (i.e. substantive or 'thick' political, religious and cultural visions), agreements can be reached on just rules and regulations and a common basis for interaction. The goal of such efforts would be to achieve an 'overlapping consensus'. In political processes and public debate with stakeholders who justify their arguments with appeal to public values and standards, laws can be established that can cohere with a variety of comprehensive doctrines. One example can be laws that protect and promote the right to religious freedom that can be accommodated within both religious and secular perspectives. To Rawls, an overlapping consensus is the stable and lasting route to establish and preserve unity and stability given the fact of reasonable pluralism in democratic societies (Rawls 1993).

Communitarian thinkers such as Charles Taylor and Michael Walzer have, in their own way, aimed at a similar goal of consensus but have attempted to avoid what appeared to be a hidden liberalising of that concord.<sup>8</sup> Walzer attempted to articulate something like this position in relation to justice from a communitarian standpoint (Walzer 1987; 1994). He argued that there was no 'moral Esperanto' (indeed that Esperanto was always closer to European languages than others anyway), and that what he labelled 'moral minimalism' was

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<sup>8</sup> We record the fact that we do not discuss the work of Alasdair MacIntyre here, and this might seem to the reader to be something of a lacuna. Some words of justification are therefore required. MacIntyre (1981), much celebrated in the philosophy and ethics of sports, had argued against the malaises of modernity and for a return to the ethics of virtue, cultivated in social practices that were tradition bound and formed part of the narrative of one's life. Both he and Taylor argued for the necessity of shared ideas, values and ends for the stability of society and the pursuit of the good life. Critically, this for MacIntyrean followers of sports has means the cultivation of certain human excellences or 'internal goods' (Brown, 1992; MacIntyre, 1981; McNamee, 1995). 'Internal goods' can only be achieved when one has committed oneself to the norms of practices and the authoritative voices of them. In specific social practices such as sport, there is the possibility of more or less tacit commitments to standards of excellence in spite of participants holding diverse and to a certain extent even contradictory 'comprehensive doctrines'. Sporting games are played in meaningful ways involving players from all over the world. Hence there might be a potential in anti-doping in a MacIntyrean approach when it comes to articulating views on the integrity of sport. A normative consensus on global anti-doping policy however involves more general norms and values and requires probably procedures along the Rawlsian and Walzerian lines sketched above.

always to be drawn from *among* our values and commitments, not somehow standing above or apart from them.

Walzer contrasts his view with the idea that there is no neutral starting point for moral and political theorizing, and draws support from Hampshire (1989: 72) who defends the search for a ‘thin notion of minimal procedural justice ... the conditions of mere decency’.

Likewise, minimalism for Walzer is ‘less the product of persuasion than of the mutual recognition among the protagonists of different fully developed moral cultures’ (Walzer 1994: 17). He puts the point more forcefully against liberals:

Cultural pluralism is a maximalist idea, the product of a thickly developed liberal politics. Minimalism depends on something less: most simply, perhaps, on the fact that we have moral expectations about the behaviour not only of our fellows but of strangers too. (Walzer 1994: 17)

He speaks of the process not as some ethereal rational deduction but of a ‘ramshackle affair’ (Walzer 1994: 18), acknowledging the messiness of genuine, not idealized, political and moral discourse. Whether this is enough to get ‘decent’ debate off the ground in terms of women’s rights, labour rights, aboriginal rights, family law, or for that matter, anti-doping, is a source of ongoing conjecture and dispute.

We have said that what all principled positions should seek to avoid is a mere *modus vivendi*; a temporal or contingent alliance that might be arbitrary or lacking robustness or coherence. Habermas, Rawls, Taylor and Walzer all emphasize the possibility of consensus on particular schemes of conduct and interaction in diverse societies. An open and ‘decent’ discourse on norms and values can provide the ground for binding relationships characterized by mutual recognition of rights and duties. In our present context, it is reasonable to believe that compliance will be enhanced where parties have come to agreements on minimal commitments. Set against this background, what are the possibilities for global consensus on the normative justification of anti-doping?

### **Overlapping consensus and the World Anti-doping Code review process**

We turn our attention now to the formal processes of the 2020 Code reform. In an era where WADA has tried to secure greater compliance, in the wake of the Russian doping saga, the current *status quo* shows little resemblance with unconstrained discourse aiming at overlapping consensus as it looks more like a strained stand-off.<sup>9</sup> Presenting a detailed argument, Dimeo and Møller (2018) point to that the anti-doping campaign as a whole is in a crisis and needs critical rethinking to avoid collapse. Walzer's conception of minimalism makes a point of some power: pluralism and unconstrained communicative discourse is the outgrowth of a particular historical political culture. It is too thick: that is to say, it is inseparably connected to a liberal doctrine or perspective. We are left wondering whether attempts to achieve a genuinely overlapping consensus, rather than paring thickness back to thinness, are doomed to failure?<sup>10</sup>

To answer this question, it is important first to query whether our present concern is with quite such deep matters as, for instance, universal franchise and the commitments of various United Nations universal declarations. We are, after all, talking about sport, a family of rule-bound practices, where conformity to the rules is a precondition of participation.<sup>11</sup> Of course, visible identification with (as opposed to commitment to) universal notions of dignity, respect and so on are instantiated in ideals such as Olympism, or policies such as those of the international and European soccer federations' (FIFA and UEFA) wearing of badges on sports clothing and stadia marketing. By contrast, more substantive ethical and political obstacles to consensus exist in areas such as excluding women from certain sports based on 'gendered' considerations alone (Andersen and Loland 2016); the wearing of 'immodest' female sports clothing that might offend certain religious positions (Benn et al 2010, Benn et al 2011, Morgan 1998); or the International Association of Athletic Federation's (IAAF) insistence on compulsory hormonal (testosterone) depletion of female athletes who are

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<sup>9</sup> Though as we write, it appears, amid controversy and dispute, that an apparent *modus vivendi* enabling Russian participation in international sporting events is imminent.

<sup>10</sup> The terms 'thick' and 'thin' are widely used in moral and political philosophy. Although it is not an unambiguous dichotomy, philosophers' distinctions between thin and thick moral concepts (Williams, 1985). Thin ones such as 'dignity', 'justice', 'respect', 'right' and 'wrong' and so on are thin. Who, after all wants to deny agents their dignity or justice or treat them without respect. Their content is minimal to the point that they can command widespread assent. Other concepts of evaluation have greater local content. Notions such as 'brutality', 'complicity', 'courage', 'disgust', 'modesty', 'treachery' are thicker and more determinate but, as Williams notes, they are all concepts of a certain moral specificity, that are 'determined by what the world is like' (1985:129).

<sup>11</sup> Whether the anti-doping rules are logically constitutive of the sport is not a matter of agreement in the sport philosophical literature. It has been claimed that anti-doping rules are better thought of as auxiliary rules (Meier, 1985).

diagnosed with hyperandrogenism (Karkasis et al 2012, Franklin et al 2018, Camporesi and McNamee 2018, Schultz 2012). We maintain that, in general, anti-doping does not face these levels of difficulties; almost every nation on the planet has signed the UNESCO charter for clean sport.<sup>12</sup> And, such is the power of international federations and the International Olympic Committee (IOC) and the International Paralympic Committee (IPC), almost every country in the world has signed up to the WADA Code.

Do international treaties and conventions amount to an overlapping consensus? Or are they more like a coercive offer: sign up or you will be denied access to international markets, trade agreements, state funds, marketing and sponsorship opportunities and so on? Certainly, any sport or state that rejected WADAs global framework *tout court* would be viewed, in sporting terms, as a pariah state. And Russia, rightly or wrongly was afforded this status despite ongoing challenges between the Court of Arbitration for sport, the IOC and the IPC.

To a certain extent, answers can be found by looking into WADA's call for stakeholder viewpoints in their Code revision processes. Where before WADA had simply determined policy without recourse to stakeholders, in the 2012-14 Code review and revision they engaged for the first time in comprehensive stakeholder dialogue. WADA President, Craig Reedie, during the early part of his tenure remarked that "I wanted WADA to be both collaborative and impactful. If we are collaborative, we can work closely with all ADOs to meet the challenges we face, and do so through a culture of openness and transparency." (Reedie 2015). Equally, its then General Secretary, David Howman, wrote: "The greatest benefit derived from all these events was that WADA was able to hear the areas of concern, and challenges faced from all stakeholders. WADA has listened and responded to these concerns." (Howman 2015)

Undeniably, WADA reached out to all doping stakeholders from government signatories to the Code, to International Federations, National Anti-Doping Organizations, and the academic community to receive their views. In their 3<sup>rd</sup> Code review process since 2009, WADA claims it is seeking to strengthen anti-doping policy by increased stakeholder engagement in more democratic vein, having instituted (and now repeating) a two-year, three

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<sup>12</sup> See <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> Accessed June 4, 2018.

phase, process, originally undertaken in the 2014 Code review. Whether such an official call reaches to all stakeholders is a point that has been challenged. In their study of how individual and team athletes cope with and relate to their own use of banned substances, Boardley et al (2015) talk of mechanisms of ‘moral disengagement’. Others go further to claim that the anti-doping movement is some conspiratorial alliance between WADA, law enforcement authorities, event organisers, and global media (Dimeo and Møller, 2014). Anti-doping organisations (including International Federations) might respond that they all have athlete commissions though the extent to which these are the product of participatory democracy might be questioned. Moreover, there may be practice-communities, like bodybuilding, with other norms to doping usage that may be unlikely to engage in these formal processes (Boardley et al, 2015). Still, what is clear is the existence of such entities along with the global and well-advertised call for contributions from all quarters to join the discussion of Code reform. Whether that is sufficient is a moot point.

A further point must also be noted. The demands of an open and democratic normative discourse entail a level of accountability that in turn rests on transparency. One difficulty in the previous 2012-14 process was the failure of WADA to publish how stakeholder contributions were discussed, accepted, rejected, modified and so on. Insofar as an overlapping consensus is the goal, transparency of reasoning, and agreement as to the processes of the PL operation and its contents is required. At the moment, it is limited to consultation followed by authoritative conclusions reified into the Code.

On a pragmatic point, therefore, we believe that WADA should not only highlight changes to the Code, but also make clear where such revisions came from, and why they were accepted. And, of course, WADA should elsewhere make clear where revisions were not accepted and why. These simple revisions of process would make progress in the direction of an overlapping consensus for the Code review process in general.

But what about the specific ethical content enshrined in the very justification of anti-doping itself? Can references to ‘the spirit of sport’ serve as a basis for an overlapping consensus among all stakeholders in the anti-doping domain?

As emphasized above, reaching consensus on operational definitions of doping in terms of particular substances and methods based on considerations of performance-enhancing effect and potential harm, is, at least to a certain extent, matters of scientific research, facts or at

least our best approximations of truth claims. Certainly, explicitly normative premises are ‘thicker’ and have less prospect for an overlapping consensus as they are linked to social, cultural and moral values. If normative premises of anti-doping are closely associated to substantive values and visions, or specific norms and values, such as those of amateurism and or Olympism, the possibility for consensus is reduced. Even though the list of values has been included in all previous versions of WADA’s Code, it represents a particular, ‘thick’, ideal, view of sport. Is it possible to ‘thin’ them down (somehow) to reconcile competing views of anti-doping policy generally and the spirit of sport specifically and thus provide a base for an overlapping consensus among WADA stakeholders?

### **‘The Spirit of Sport’ – a revised version**

The Preamble to the current Code opens with the following sentences: ‘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, the pursuit of human excellence through the dedicated perfection of each person’s natural talents, it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport...’.

The notion of intrinsic and instrumental values in sport has spawned a considerable literature (Coalter 2007, Giulianotti and Walsh 2002, McNamee 1994, McNamee 1995, Parry Martinkova 2013). It represents a general problem in axiology and moral philosophy. Elite sports, which the WADA code governs, are inextricably linked to what have been called ‘external goods’ (Macintyre 1981) such as wealth, status, adulation, power, and so on. Yet even the world’s greatest athletes speak of their love for the game in and of itself. As indicated above, merely asserting an Olympic and amateur view of the intrinsic value of the holistic perfection of natural athletic talent is, however, problematic. It seems to resurrect a Victorian notion of the leisured gentleman athlete; a conception of sport that could be called anachronistic and ill-suited to the ethical task of regulating sport in an increasingly commercialised environment.

Yes, as Aristotle observed long ago, all instrumental valuing must ultimately reduce to things that are of intrinsic value (Sparshott 1996). We can only go on valuing activities as means to ends for so long before we realize that what we pursue ultimately are things that are of value

in themselves such as happiness or human flourishing. What is required is not simply an assertion of the need to preserve what is of intrinsic value in sporting competition. Rather, what is needed both in anti-doping policy and practice – through the rationale for the Code itself - is an appropriate balance between publically shared concerns in terms of the means of the pursuit of victory, concern for athlete welfare, and a respect for the integrity of the sporting competition. Those who deny the external goods or the instrumental valuing of sport are naive to the reality of elite sport. Those who pursue only the external goods, who value only those benefits, are cynical, and uncommitted to the ethical pursuit of victory. WADAs ethical rationale must respect the fact that elite sports are undeniably ‘mixed goods’; a complex of inherent and instrumental value (Dixon, 2018; McNamee 1994, 1995).

Secondly, within all previous versions of the Code, reference to ‘the spirit of sport’ is conjoined with the notion of Olympism. Olympic values represent a powerful ethical conception of sport and includes reference to important ethical notions such as the preservation of human dignity, the (instrumental) use of sport for peace, and so on. In general, it is a vision of sport that we endorse. On the other hand, Olympism has been the object of considerable critical scholarship (Loland 1995, da Costa 2006, McNamee 2006, Parry 2006, Reid 2015). It is not a timeless essence of certain sports forms, nor is it a publically shared view, but rather a socially and historically conditioned ideal that finds its specificity in several different conceptions. The WADC, with the aim of being a global and harmonized anti-doping tool, seems an inappropriate instrument in which to articulate a singular vision of ethical sport. Moreover, although Olympism may be thought of as an ideal in all sports, Olympic sports are a selection of sports for the summer and winter games. And though their selection varies at each Olympic Games, to a minor degree, we cannot fail to observe that not all sports are Olympic sports, yet all sports are supposed to ascribe to the regulatory practices of the Code.

What would an alternative formulation, constructed to a larger extent as a basis for an overlapping consensus, look like? As a first point, we re-state that anti-doping is a normative position and a choice between values. Secondly, these norms and values have to be described with reference to publicly shared value views and without recourse to ‘thick concepts’, noted above, publicly shared views can deal with the notion of protection of athletes from (certain)



harms and the preservation and promotion of competition integrity.<sup>13</sup> Collecting key concepts and phrases from the discussion above, then, an alternative formulation could run as follows:

*Anti-doping is an ethical position based on a vision of the spirit of sport. Anti-doping programs seek both to protect the health of athletes and to provide the opportunity for athletes to develop and express their athletic abilities and capacities without the use of specified pharmacological and biomedical performance enhancing substances and methods. Anti-doping programs seek to maintain the integrity of sport with doping-free sporting competitions and environments.*

There is still need for further explanation. As said above, there are several forms of harm in sport of which some are considered acceptable and others not. Competitive sports are associated with certain norms and values based on which these distinctions are made. What are these norms and values, and how can they be expressed programmatically and as a source of a potential overlapping consensus?

In the current Preamble, this is solved with a description of a series of values. The critique here is that the list of values is too loose and too general and lack operative utility. They certainly do not provide a definition as some scholars seem to have assumed (Foddy and Savulescu 2004). It might be assumed that they indicated the kinds of concepts that instantiated what good sport looked like: e.g, 'excellence in performance'. In other cases, they seemed to play limits on the goals of participation: Health; Character and Education. Most substantively, they seemed to identify behavioural criteria (in ethical terms: virtues) of sporting conduct: Ethics, Fair play and Honesty; Dedication and Commitment; Respect for Rules and Laws; Respect for Self and other Participants; Courage. Even here, however, there appeared to be no underlying logic of their inclusion or hierarchy or coherence. The list is an ad hoc mixture of thin and thick concepts. It seems, at best, that the indicated values might inform an ethical conception of sport.

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<sup>13</sup> We do not comment here, but simply acknowledge, the obvious point that all anti-doping organization must be charged with responsibilities to develop and implement education and prevention programs for athletes, including youth, and those with medical and welfare responsibilities in support of athletes. See <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>, p. 14. Accessed December 7, 2017.

In the absence of a robust rationale for their inclusion, we conclude (as others before us) that this disparate list should be removed from the Code. It has no utility for complex line drawing when considering items for the PL. Note, however, that this is not in any way to undermine the importance of the constitutive concepts for sports ethics generally, nor anti-doping, specifically. It is simply to recognise that, as they presently stand, they appear arbitrary and disconnected from specific policy tools such as the Code or the PL. Of course, an alternative might be to present a comprehensively worked out ethical position on sporting conduct, but this seems difficult as a basis for an overlapping consensus. Nor is it required for such consensus. Our proposal is an approach that departs from the particular nature of sport.

Although performance ideals are interpreted in many ways in various social and cultural settings, there are still possibilities for publicly shared views centred on the integrity of sporting competition. A first step could be an analysis of existing rules and regulations and an examination of the logic of competitive sport. Each sport is defined by its constitutive rules. In soccer, there is a rule against using one's hands to control the ball (goalkeepers notwithstanding). In alpine skiing, there is a rule on passing through the 'gates' and not around them. A shared understanding, or what is often called an 'ethos', of a sport is a premise for meaningful participation and competition. Rules of various sports are governed by international federations in which technical committees make decisions on what they consider to be in line with the nature and 'spirit' of their sport, and what is not. Interestingly, discourses around innovation in practice and technology in sport stimulates reflection upon the norms and values expressed in playing or performing in them (Loland 2015).

The challenge of the use of performance-enhancing substances and methods transcends particular sports. International agreements regarding anti-doping require a wider consensus among sporting communities and public authorities. Is it possible to articulate more general norms and values characterizing competitive sport as a whole in this respect?

A closer look at sport's rule systems demonstrates that they are designed, at least to a certain extent, to cultivate performances of the kind which individuals and teams can exert significant impact and for which they can be held responsible (Loland 2002). One example is attempts to compensate for inequalities in what we may call system strength. In most sports, there is standardization of equipment and limited access to in-competition coaching and medical expertise. The primary interest is in measuring athlete and team abilities and skills

and not the strength of support systems or quality of equipment. In addition, most sports have classification schemes in which biological sex, body mass and age are critical criteria.

Women do not compete with men in sprint races, heavyweight boxers do not fight lightweight competitors. Again, the rationale seems to be to compensate for inequalities which athletes cannot really control or impact in any significant way.<sup>14</sup> Statistically speaking, men have a stronger genetic predisposition to develop higher capacity for explosive power than their otherwise equivalent female counterparts. Boxers can be assigned responsibility for their fitness and technical and tactical skills, but not for their height or reach.

This does not mean that sporting games are perfect expressions of fairness. Indeed, as the dispute over hyperandrogenism illustrates, classification issues are not always clear.<sup>15</sup> Moreover, examining the relationship between sporting success and system strength leads to relatively clear conclusions (Boscher et al 2014). Strong financial, scientific and technological systems breed winners. Still, the argument here is that the normative structure of sporting rule systems is centred around the ideal of equal opportunity to perform, and most ethical debates in the field (including doping) relates to fairness in one way or the other.

In other words, a shared goal of sporting games, found in the set up and normative structure of sport, seems to be *to measure, compare and rank athletes and teams according to sets of abilities and skills that are broadly within their sphere of impact and responsibility*. In this way, athletes and teams can be identified with their performances, performances are in this sense expressions of who they are; of their background, of their efforts in developing their talents, of their motivation, their mental strength and resilience, et cetera. Performances can be seen as unique expressions of the individual and the team, that is, as authentic performances (Loland 2018).

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<sup>14</sup> In this regard, the IAAF policy against hyperandrogenism seems misplaced, perhaps even an affront to the dignity of the athlete who is born with condition but forced to undergo hormonal depletion (Camporesi and McNamee, 2018).

<sup>15</sup> For example, there is classification in a series of sports in which biological sex does not really matter, such as in shooting and sailing. On the other hand, classification according to body size could be applied outside of combat sports and weight lifting, for instance in sports such as basketball and volleyball in which body height is crucial to performance. However, this does not necessarily indicate a lack fair equality of opportunity-ideals in sport, but rather a demonstration of the lack of principled application. For critical discussions of fairness in sport, see Loland (2002, 151 ff) and Murray (2009). Similarly, in European soccer the wealthiest clubs - Real Madrid, Manchester United, Barcelona, Juventus - tend to win national and international series and tournaments. There is a sense in the football community that the situation is unfair. Although being criticized in terms of its effectiveness (Peeters and Szymanski 2014), the European Soccer Federation (UEFA) has launched a so-called Financial Fair Play-initiative to even out gross club inequalities in wealth (Franck 2014). The equality of opportunity ideal exerts impact.

Turning again to the use of performance-enhancing pharmaceutical and biomedical substances and methods, this normative idea can be operationalized and serve as a critical criterion in line drawing issues. Enhanced performance is no longer only an expression of an athlete's development of talent but, in addition, of manipulating their physiology. More often than not, doping is associated with assistance from medical and/or scientific expertise to which a degree of responsibility for the performance can be attributed. In their defence of anti-doping, Malloy et al (2007) talk of protecting athletes' 'physiological authenticity': Pharmaceutically enhanced performance is not a genuine expression of the performer, but of an expert system beyond. There is a parallel here in the wide-spread idea of doping as 'unnatural' (Loland 2018). As it is said in anti-doping: The athlete is not 'clean', and consequently the performance in question is not 'true'.

In other words, we point to a kind of naturalised recognition of struggle against limits imposed both by embodied and regulative limits. We have noted above how rules limit the means of victory. Anti-doping rules of course are among them. This idea of natural limits can be operationalized in biological terms (Loland and Hoppeler 2012). Biologically speaking, training is utilization of the phenotypic plasticity of the human organism as developed in evolution. This is 'natural' adaptation to training and leads to performance-enhancement. Doping substances overruns natural adaptation and interacts directly with their biological targets. They can be efficient and actually life-saving in situations of illness in which natural adaptation fails. In sport, however, they diminish athlete and team responsibility and hence authenticity of performance. As argued above, these are qualities that are cultivated in the set-up of sporting games, and doping use corrupt the integrity of sporting competition.

This interpretation of the normative structure of sporting games does not mean that we are removing all blurred lines and grey zones in anti-doping policy. That is an unachievable goal. Still, and to a larger extent than a list of values, it represents a regulative idea or norm which can be used operatively in ethically challenging cases. The discourse of what can be accepted or not accepted becomes clearer, and disagreements are easier to locate and make judgements upon.

A much-used example is the difference between technologically constructed hypoxic environments (CHE) and the use of erythropoietin (EPO) (Loland and Hoppeler 2012). Both

have the effects of enhancing the haematocrit levels of the blood. In CHE, athletes adapt systemically, and their ‘natural’ physiology is challenged. It becomes important to ‘listen to the body’ and adjust exposure to altitude in beneficial ways. EPO on the other hand overruns biological adaptation systems and enhances haematocrit levels on a short-term basis. Systemic adaptation is not involved which is also the case why EPO use can be dangerous and, in severe cases, deadly. In other words, based on the premise above, CHE is acceptable (although not necessarily recommendable as it can be seen as part of a problematic technologization of sport) whereas EPO use is not.

The question now, then, is whether we propose a ‘thinner’ version of ‘the spirit of sport’ than the one found in the current WADA Code. One could argue that, in our elaboration of the logic of sport and of athletic excellence, we are approaching thick theories of sport, in this case with a clear liberal, Eurocentric flavour. Ideas of athlete and team responsibility of performance, and hence of authentic performance, constitute the core of the notion of athletes as role models, central to virtue-ethical accounts of sport broadly derived from Aristotle (Devine 2011; McNamee 2008, 2013; Murray, 2007; Reid 2015) seen broadly as the perfection of athletic talent towards excellence. Nussbaum expresses this point particularly well:

‘... the Greeks ... praise outstanding athletic performance as a wonderful instance of human excellence. ... But clearly, such activity has point and value only relatively to the context of the human body, which imposes certain species-specific limits and creates certain possibilities of movements rather than others. To excel is to use those abilities especially fully, to struggle against those limits especially successfully.’ (1990: 372)

And later:

‘Human limits structure the human excellences, and give excellent action its significance.’ (1990: 378)

Even if our argument has resonance in individualist Western cultures, however, we would argue that this can be the case in other cultures as well such as the Chinese with a stronger emphasis on collective values and with a view of the athlete as a representative of the

systems (Brownell 2005). Our argument is an inductive one: analysing more closely the rule systems of sport, we have articulated what we consider to be its characteristic normative structure. With its global expansion, it is reasonable to assume that this structure also fits into other ‘comprehensive doctrines’ than those of liberal democracies. As long as an overlapping consensus is possible on rules on standardization (such as equipment, playing surfaces, timings of events and so on), classification and equality of opportunity structures, similar consensus should be possible on a prolongation of the normative structures in terms of anti-doping. Moreover, our biological understanding of the elements of an athletic performance is ‘thin’ as well and can at least be understood and critically examined within more collectivist visions of excellence.

To summarise the formulations above, and as a Preamble justification of anti-doping referring to more general ideals of human excellence, we recommend a revised version of the Code’s ‘the spirit of sport’ account:

*Anti-doping is an ethical position based on a vision of the spirit of sport. Anti-doping programs seek both to protect the health of athletes and to provide the opportunity for athletes to develop and express their athletic abilities and capacities without the use of specified pharmacological and biomedical performance enhancing substances and methods. Anti-doping programs seek to maintain the integrity of sport with doping-free sporting competitions and environments.*

*The purpose of anti-doping policy and practice is to preserve and promote the committed pursuit of athletic excellence in ways that respect the health of athletes and the integrity of sporting competition.*

*The spirit of sport is expressed in how we play true.*

## **Concluding comments**

We started out with problematizing WADA’s justification of anti-doping as expressed in the WADC. We argued for recognition that anti-doping is in itself first and foremost an ethical position. It follows then that a principled justification of anti-doping must be normative.

Although the current WADC formulation of ‘the spirit of sport’ is an acknowledgement of this point, we have argued that the mere presence of an indicative list of values and vague reference to Olympism underdetermined its content while at the same time proving too particular to serve as a basis for common agreement. We then examined various approaches to normative agreement and consensus in a setting of diversity of comprehensive views. We argued for re-formulation of ‘the spirit of sport’ in terms of athlete protection and the preservation of the integrity of sporting competition that could meet requirements on an overlapping consensus among all WADA stakeholders. We argued that this is not just a matter of formality and Code acceptance. An overlapping consensus is a normative consensus based on fair, honest, and transparent discourse in which participants deliberate in a setting of mutual respect and trust, and of ‘decency’. A significant point, then, is that such a consensus tends to cultivate commitment and genuine support.

Based on this understanding, we set out to revise the current ‘spirit of sport’ formulation and proposed the following alternative:

*Anti-doping is an ethical position based on a vision of the spirit of sport. Anti-doping programs seek both to protect the health of athletes and to provide the opportunity for athletes to develop and express their athletic abilities and capacities without the use of specified pharmacological and biomedical performance enhancing substances and methods. Anti-doping programs seek to maintain the integrity of sport with doping-free sporting competitions and environments.*

*The purpose of anti-doping policy and practice is to preserve and promote the committed pursuit of athletic excellence in ways that respect the health of athletes and the integrity of sporting competition.*

*The spirit of sport is expressed in how we play true.*

The re-formulation we propose is programmatic as it is designed as a justificatory Preamble and a rationale for the current WADA Code and the basis of all other WADA policy instruments. We have argued that the formulation has the potential to provide a base for an overlapping consensus on the meaning and justification of anti-doping among all stakeholders. Using a few practical examples, we have argued too that it opens up fruitful and

principled shared deliberation, and that it has a certain operative force and can be of help in line-drawing between acceptable and non-acceptable means and methods. The formulation is proposed formally as a response to the 2021 WADA Code revision committee's call for stakeholder feedback. It remains to be seen whether its alleged qualities will be tested among all stakeholders, and, eventually, if it can stand up to the test for an overlapping consensus.<sup>16</sup>

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