

"HARM, ATHLETES' RIGHTS AND DOPING CONTROL"

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In the following paper an attempt is made to provide practical solutions regarding doping control and athletes' rights in Canada, focusing on the current situation in which there are bans and testing, even though some question the justification of those bans. An explanation of the moral implications of doping control protocols, indicating the tension between these protocols and athletes rights, is provided. The discussion of this tension presents a variety of different perspectives and provides a basis for the recommendations that may begin to deal with the issue.

It is helpful to first make a distinction which has not been made anywhere in the current literature on this topic, it is the distinction between the types of drugs and practices for which testing is required. Broadly speaking, a banned substance or practice may be intended to enhance performance on the day of competition or to enhance training. Performance-enhancing substances such as, stimulants, depressants, narcotics, etc., can, with some degree of reliability, be tested at the competition site, but certainly not all of the banned performance-enhancing substances can be tested for accurately. For example, just this past year the IOC added a new drug to the list for which they know there is no possibility of testing. Until now, this in-competition testing has been the primary form of testing. However, athletes may use a training-enhancing substance, for example, anabolic steroids. The use of a sophisticated drug regime, with the discontinuation of the training-enhancer prior to competition, renders the detection of these compounds extremely difficult at the time of competition notwithstanding the contemporary use of endocrine profiles etc.. The logical problem is that one can only test, or allow to compete, those with a long history of previous tests. In-competition testing is thus seen to be largely ineffective against training-enhancing drugs, and current trends appear to indicate an increasing use of training-enhancers. To detect training-enhancers, out-of-competition testing is essential. Also, to prevent athletes from using masking techniques to hide their drug use, the testing must be unannounced. These considerations are the basis for introducing random unannounced out-of-competition mandatory testing (RUT).¹

Generally, privacy of person is viewed as an important value in North American society, particularly so in the United States. Privacy as a value, however, can not stand alone. It is supported by and grounded in a complex of more basic notions, those of autonomy, individual integrity (in the sense of inviolability) and freedom, both the 'freedom from' and the 'freedom to'. For the sake of brevity, the value that privacy defends will be called autonomy. This conception of autonomy will encompass the liberal notion of freedom from constraint or coercion imposed by others.

In the context of this paper we are interested in the relationship between an autonomous individual and other agencies, in particular the state. Under what circumstances can the state, or other agencies, interfere with the autonomy of its members? The general answer to this question, as mentioned above, is traceable directly to Mill who wrote that, "the sole end for which mankind are warranted, collectively or individually, in interfering with the liberty of any of their number, is self-protection."² This general answer of course, gets interpreted in

different ways in different countries and indeed in the Canadian context in different provinces. What will count as sufficient harm to warrant the self protection of interference with personal liberty varies from national tradition to national tradition. Generally in the US, protection of individual liberty is highly valued, in Canada less so (witness the acceptance of mandatory retirement justifiable according to the courts even within the Charter of Rights and Freedoms) and in Quebec even less so, witness the invocation of the “notwithstanding” clause of the Charter to uphold the sign law.

If we value autonomy as expressed in this liberal western tradition of freedom, then an interference with individual liberty, such as a urine analysis for a drug test will need to be justified or permitted. The alternatives are to justify the imposition of a test against the testers will, on the basis perhaps of some overwhelming public interest or protection of others or to gain the testers permission or consent. The standard approach has been to licence the intervention with the athlete’s permission. In Canada this has been done through the “Athlete Agreement” a contract signed by athletes in order for them to receive state support usually referred to as “carding.”

Based on the individual liberty perspective, an intervention, such as a drug test, must be justified by its advocate. An intervention can be justified two ways. First, intervention can be justified by an overwhelming need to pursue other moral values, i.e. the moral value of privacy is superseded by some other moral value, such as harm to others.³ Second, intervention can be justified by permission. Therefore, if consent is gained for an intervention, then that individual has waived his or her right to privacy. The way this is done in Canada for the current testing that goes on, is the requirement that all carded athletes must sign a contract agreeing to the testing (and many other things) in order to get their funding.

The suggestion that there is an overwhelming public interest that could supersede the assumption of privacy is implausible. Such an interest in public safety was postulated when a previous Canadian Transport Minister, Doug Lewis, proposed the introduction of random drug testing for workers in the transport industry. The proposal was amended, since public interest sufficient to justify the random testing of transport workers and pilots was not perceived to exist. However, the principle of overwhelming public interest in safety is accepted in the case of random roadside breath testing for alcohol use, (RIDE programs). If the public interest in safety is insufficient to justify random testing of transport workers, then the public interest in doping free sport is likely to be insufficient to justify random testing of athletes. The case for an overwhelming public interest sufficient to justify RUT for Canadian athletes has not been made yet.

Thus, we are left with getting consent to test. Generally an intervention escapes culpability, and is not considered to be an invasion of privacy, if consent is given. Therefore, if a testing agency sought and received a valid consent, the interference caused by RUT would be permissible. But there are problems with consent.

Problems with Consent

For a consent to be valid, it has to be freely given (i.e. without coercion), informed and made by a person competent to consent. Consent, like privacy, does not stand alone. It is assumed here, that the requirement of consent, for example, for medical

intervention, is grounded in the desire to protect and promote autonomy. The discussion of autonomy centres on the rights of an individual to make choices and to have control of his or her own life. These rights have corresponding duties. If you have a right to be left alone I have a duty not to interfere. The limits of these rights and duties could equally as easily have been approached from the standpoint of duties rather than the rights. Kant's discussion of autonomy is couched in these terms. For Kant respect for autonomy entails that one cannot treat others as means but as ends only. What does this mean? One obvious meaning is that one cannot "touch" or interfere with a person without that person's permission. If you touch someone without their permission you violate their integrity, which in turn, violates their autonomy. Veatch, in A Theory of Medical Ethics, puts it like this:

From the standpoint of one committed to the principle of autonomy, consent is required independent of the calculations of consequences if a person is to be touched, if privacy is to be invaded, or if the person is to be used in research, therapy, or preventative medicine, if a person is to be treated as an end and not as a means only, then permission is needed when that person is brought into the professional medical nexus.⁴

Veatch is here emphasizing that if one takes any action that involves another person, in order to prevent the possibility of treating that person as a means rather than an end in themselves one must first seek their permission. The principle of autonomy, however, is stronger than this. The requirement of permission before interference could be met by simple assent to a minimal physical description of the procedure to be followed. This, however, would not be sufficient to satisfy the positive aspects of autonomy. Acquiescence is not autonomous choice. For example, it is possible to argue that the current method of gaining consent from Canadian athletes to test them is invalid because they are told if they do not sign, they do not get any money, and they will be ineligible for selection to Canadian teams, so they acquiesce. Further, a stronger claim regarding this method of gaining consent, would be that athletes living below the poverty line are actually coerced into signing because they cannot continue to compete without financial aid, unlike the more wealthy athletes. This does not mean, however, that a person cannot autonomously choose to forego either information or indeed the decision making itself, ie. let the coach decide. It might be argued that it is perfectly acceptable for a person to request that someone else make a decision for them. What is not acceptable is for the coach or team physician to assume athlete compliance and merely present a course of action for acquiescence.

However, to satisfy the stronger aspects of autonomy a person must make decisions which affect his or her welfare. The athlete, therefore, is the person who has to decide if he or she will follow the procedure. To satisfy the demands of autonomy the athlete cannot simply acquiesce to the procedure chosen by the coach or team physician, he or she must actively choose the procedure in the first place. Respect for autonomy thus requires that the consent doctrine has two distinct parts. The first, and weaker, requirement is that one cannot act upon, or interfere with, anyone else

without their permission. If one does, one breaches the area of inviolability which is an integral part of personal integrity and autonomy. The second, and stronger, requirement is that a person should make all decisions that pertain to his or her welfare, indeed that he or she should be the one who decides just what it is which comprises his or her welfare. As a final word on the way autonomy may ground consent, if the model assumed in the coach/physician/athlete relationship is contractual, the model itself presupposes that the contractors are autonomous. One cannot enter into a binding contract unless one is an autonomously acting agent.

Autonomy and the Limits of Consent

Information

The information component of consent has assumed such a mighty hold on analyses of the doctrine that it is now almost impossible to use “consent” without the word “informed” preceding it. The requirements of autonomy is of help here because the information component of consent has to be sufficient to allow the athlete to make a decision. Thus, the standard of disclosure must be centred around the understanding of the athlete. The standard of disclosure of information should, therefore, be subjective, based on the requirements of the athlete concerned. This is a hard standard to meet. As an alternative, Veatch suggests that, as a matter of course, all information required by a “reasonable person” should be routinely imparted. The right to information is thus seen to be limited by the demands of the preservation of autonomy. Further, if we take autonomy seriously we can see that the right to information is not inalienable. Autonomy gives one the right to make one’s own decisions, even if those decisions are viewed as irrational. We can therefore, choose how informed we wish to be, in order to make our choice. Autonomy, in and of itself, demands only that one’s choices are voluntary, not necessarily informed. It is the voluntary aspect that captures the most important part of the consent doctrine if it is based on autonomy.

Autonomy and Rationality

“Rationality” is by no means a straightforward concept. If the relativist position on rationality advocated by Winch and others is right, then autonomy would need to be assessed by reference to a variety of standards. This poses problems, but the alternative seems to be worse. Much of the thrust of Berlin’s argument in “Two Conceptions of Liberty” is directed against those, who, in adopting a unitary view of rationality, then feel justified in overruling the irrational decisions of others on the basis that this enhances their autonomy. If rationality were a paramount human good, it would not be in the slightest bit difficult to justify paternalism, the very thing the promotion of autonomy seeks to combat.

Autonomy and Competence

The question of competence is sometimes raised in regard to athletes as was demonstrated by Ben Johnson’s lawyer during the Dubin Inquiry (where he began to attempt to prove that Ben did not have the intelligence to understand what was happening around him). Generally speaking, autonomy, like responsibility, is considered to be a dispositional characteristic. One speaks of an individual as

autonomous when one means that, in general, their actions and decisions are their own and under their own control. Autonomy as a concept seems to attach to a life rather than to specific decisions.

Competence, as it is generally used, is a parallel concept that attaches to an individual in respect of a specific decision. So, one could say that a particular person was autonomous, meaning that their decisions generally were their own, but also that, in this instance, they are incompetent to make a specific decision. For example, someone we might be quite happy to call autonomous, may well be incompetent to decide whether or not he or she ought to drive, if that person has been drinking all evening. Autonomy, then refers to a dispositional characteristic of a person whereas, an assessment of competence is made of someone in reference to a particular decision at a particular time. We assume that all adults are autonomous unless we have good evidence to the contrary (which they could not establish for Ben Johnson). With that assumption comes all the rights of an autonomous person. If we deem someone not autonomous they lose the rights associated with autonomy, (such as the right to make one's own decisions) but they gain certain other rights, such as the right to care and protection. The flexibility of response that is lost by considering autonomy as an all or nothing concept is recouped by considering the range of possible responses that accrue when one sees competence as attaching to specific times and decisions.

Consent, Coercion and the Role of Government

Let us now bring this analysis of consent, and the autonomy it is intended to protect, to bear on the current situation surrounding drug testing and consent in Canada. First, the Canadian government has taken specific steps to limit its own intrusion into the privacy of Canadian citizens. The Privacy Act exists, at least in part, to recognize the extreme imbalance in power between governments and individuals. This imbalance renders some requests by governments for permission from individuals inherently coercive. The Privacy Commissioner argues that in seeking permission for RUT, the government would be breaking its own rules established in the Privacy Act and in the Charter of Rights and Freedoms,

One can hope that Mr. Justice Dubin will recognize that athletes should not be forced to abandon their *Charter* rights at the locker room door - no matter how many may be willing to do precisely that in order to compete in their sport. *Charter* rights also apply to federally-funded athletes...random mandatory drug testing of athletes would be found to violate sections 7 or 8, or both, of the *Charter*... On almost all counts, random mandatory testing of athletes would fail to measure up. Thus, not only would such a program fail to comply with the *Charter*, it would, if conducted by Sport Canada, be a violation of the *Privacy Act*.⁵

This interpretation of the Charter and the Privacy Act has not, naturally enough, met with universal acceptance. Justice Dubin himself took the view that the Privacy

Commissioner's views were wide of the mark. We do not need to judge the legal aspect of this argument, however, if we take the view that unreasonable search and seizure provisions of the Charter and the Privacy Act. are. designed to protect autonomy, the position of the Privacy Commissioner is surely right. Government insistence on testing would be coercive and unjustified.

Consent and Minors

Another important issue is consent and minors because some of the carded athletes are minors. Any person consenting to an intervention must be competent to do so. It is generally assumed that adults are competent, unless shown to be otherwise, and that minors are not. In the latter case, usually a parent or a guardian may consent to an intervention on behalf of a minor. This has worked well enough in the case of consent to medical treatment designed to benefit a minor. In Canada, however, there have been recent court cases that have ruled that a parent or guardian is not in a position to give consent for interferences related to research that do not have the prospect of direct benefit for the minor. This is usually referred to as "non-therapeutic research." For example, it is currently impossible in Canada to get permission to draw blood from healthy children to establish a "normal" baseline from which to measure abnormal deviations in subsequent tests. Urine testing in RUT has clear similarities to non-therapeutic research on children.⁶ It may therefore be that it is impossible to get a valid consent on behalf of a minor to RUT in Canada at this time. The consequence of this is that a minor, tested in the absence of a valid consent, could be in a position to sue the testing agent for assault, not unlike a case involving touching without consent.

The Scope of Consent

The scope of consent may also be problematic. The inherently coercive power imbalance between an individual and a state agency that requests consent for a drug test has already been alluded to. This imbalance is exacerbated by the possible consequences of the test result. Testing positive for steroid use can ruin an athletic career and, in some cases, destroy a livelihood. This may be viewed as an appropriate result by some given that the purpose of RUT is primarily to deter steroid use. However, the banned list currently contains a variety of drugs used for recreational purposes, in particular, cocaine and marijuana. These substances do not appear to have any training-enhancing properties and their possible performance enhancing properties are irrelevant out-of-competition. In giving consent to RUT, an athlete is consenting to being tested at any time for drugs that have no relation to his or her training, but which do carry the risk of criminal prosecution. The potential consequences of a consent to RUT may have the result that it is impossible for an athlete to give a consent that is genuinely informed.

Other Problems with RUT

A further major problem with random, unannounced out-of-competition mandatory testing, is that it may not be possible to establish a selection procedure for testing that would have, as eligible candidates, all and only prospective national team athletes. For example, it would be unfair if an athlete were able to

avoid testing, perhaps through training outside of the country, or by refusing to accept government support or carding. Examples of this sort of unfairness could lead to challenges to the validity of the entire doping control protocol. Against all of these drawbacks, however, is the most cogent consideration in favour of RUT, that is that one cannot have doping-free sport without it.

In addition, many (the Canadian government, Justice Dubin and Sport Canada) who discuss this topic suggest that “sport is different”. They try to argue that, because of this difference, the limitations imposed by the requirements of consent do not apply. The suggestion is that participation in high performance sport is a privilege, not a right. This distinction is unclear. This may mean that no person has the right to be selected for a national team or for carding support. This is certainly true, but it is also true that there is some obligation to select the best available people for national teams and, barring income tests, for carding too. It could then be argued that the “best available person” means the best person available who abides by the rules of the game, one of which is the requirement that athletes consent to RUT. However the rules of sport, especially the auxiliary ones, are not arbitrary and they are open to moral scrutiny. Just as a rule of eligibility that barred people on the basis of race would be objected to on moral grounds, other rules of eligibility for sport are open to similar moral assessment. If, therefore, RUT is unacceptable on the moral grounds that it invades privacy, it would be unacceptable for there to be a rule of eligibility that required RUT. Sport may well be different, but nothing is so special or different that it can escape moral scrutiny.

There is thus an impasse; the value of privacy indicates that RUT is unacceptable yet, fairer high performance sport may require it, given the current bans on doping.

Possible Solutions: *Athlete-Driven Testing*

All of the discussion so far has been based on the idea that the governing bodies of sport and governments decide on rules and then impose them on those who would play. An alternative is to turn part of the formulation of rules, in particular rules of eligibility, over to the athletes, the ones to whom the rules apply. There is some evidence that the majority of athletes would prefer doping-free sport if it could be guaranteed that the competition is fairer. What is missing is the guarantee, so often athletes feel compelled to take drugs to even-up the competitive playing field.

If athletes agree that they want doping-free sport, and if they also agree that they are prepared to take the necessary steps to achieve the thing they want, then they could be in the position to request an agency to conduct testing on their behalf. Thus, instead of governments and the governing bodies of sport imposing rules, the athletes would set their own rules and request that an outside agency enforce them. Thus, athletes would be limiting their own liberty while their autonomy is clearly unfettered. They take steps to curtail their liberty in the short term in order to preserve or enhance their liberty in the long run. One possible way of constructing this reasoning and decision-making process is to use the Prisoner’s dilemma model.

To avoid the less than optimal outcome for all that result from self-interested decision making in a Prisoner's dilemma, athletes could collectively request testing to gain an outcome they all in fact want, but which none, can, individually achieve.⁷ In this way, the agency conducting the testing is not acting on behalf of governments or sports bodies, but on behalf of athletes. The government or governing bodies of sport cannot then be seen as interfering in the lives of its citizen athletes.

Minimizing the Athlete's Loss of Freedom

For an athlete-driven system of testing to gain the maximum acceptance by athletes, it should permit only the minimum intrusion required to obtain the desired effect. The desired effect of RUT is to eliminate the use of training-enhancing drugs. Logically, then, one does not need to test for performance-enhancing drugs out-of-competition.

The advantages are that athletes and other interest groups get a system trying to encourage doping-free sport, while athletes retain their freedom, i.e. they request RUT to preserve something they want. The intrusion into athletes' lives is minimized by only testing for training-enhancing substances out-of-competition and government cannot be accused of unfairly interfering in the private lives of its citizens. However, the prerequisites for this model are hard to meet. We would need a proper survey of athletes' opinions on this topic and for a genuinely-athlete driven model to work there would have to be strong support for it among athletes. Governments and National Sport Organizations would be sharing their power in the realm of testing and while they would still be responsible for in-competition testing, they would not have control of RUT. There would need to be a great deal of international cooperation on this topic. It is not clear that athletes from countries which adopted this model would wish to compete with athletes from countries that did not. Further, this proposal does not deal with the problem of consent from minors. However, given the current state of Canadian law, it is not clear that there is a solution to this latter problem. (A committee of The Canadian Medical Association is currently examining this problem from the perspective of consent to non-therapeutic research on minors.)

To institute athlete-driven testing, one would need to involve athletes in the design of the testing protocols and have those protocols approved by the athletes. We would need to develop a list of substances that would be tested for out-of-competition and have athletes approve the list. Alternatively, one could have the athletes retain ownership of the test results and only turn over the results for a reduced list, e.g. anabolic steroids. This athlete-driven testing concept could be developed as a proposal for a model national anti-doping campaign and we could promote the model, in conjunction, for example, with national organizations such as the COA, and with international groups such as the IOC and IFs.

In closing, this has been somewhat tentative. This paper has been written from the position that autonomy and freedom are important, and also from the view that athletes do not want and should not be forced to dope in order to compete on some

semblance of equal footing with the best in the world. I am also all too keenly aware that the desire for victory will push athletes to almost unbelievable lengths. While I am firmly of the opinion that a proper understanding of sporting competition would show that cheating is incompatible with winning, until we have that commitment engraved on the hearts and minds of every competitive athlete, we will have to live with some sort of enforcement of the rules as they currently stand. Our task, therefore, is to make that enforcement as fair and non-intrusive as possible. It is my belief that a form of athlete driven testing could begin to do just that.

NOTES

1. This term was first identified by R. B. Butcher, I explained RUT in full detail in Values and Ethics in Amateur Sport: Morality, Leadership and Education, March, 1991.
2. Mill, John Stuart, On Liberty
3. R. B. Butcher and I discuss the arguments from harm in “The Mesalliance of the Olympic Ideal and Doping: Why They Married and Why They Should Divorce” in Sport...the Third Millennium, eds. F. Landry, M. Landry and M. Yerles, from Proceedings of the International Symposium, May 21-25, 1990, Les Presses De L’Universite Laval, 1991.
4. Veatch, (p.201)
5. Drug Testing and Privacy, The Privacy Commissioner of Canada, 1990 (p.43).
6. Based on information received from the Westminster Institute on Ethics and Human Values.

7.

Traditional Prisoner’s Dilemma Model

Prisoner

A

Prisoner B	confess	stay silent
confess	2yrs. 2yrs.	3yrs. 1/2 yr.
stay silent	1/2 yr. 3 yrs.	1 yr. 1 yr.

Ben Johnson’s Decision Matrix Using Prisoner’s Dilemma Model

Assumptions:

- 1) winning is the most important thing.
- 2) Carl and Ben are equally good (one wins one race and the other wins the next).
- 3) drugs will improve either one’s performance enough to win conclusively if the other doesn’t use them (10 units accrue or are lost as health benefit/detriment).
- 4) drug use is dangerous to either one’s health.

Ben Johnson

Carl Lewis	dope	don’t dope
dope	40 40	10 + 0 100
don’t dope	100 10 + 0	10 + 50 10 + 50

(thanks R.W.Binkley for the connection to the Prisoner’s Dilemma)

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