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# IS SPORT LOSING ITS INTEGRITY?

RICHARD H. MCLAREN\*

## I. INTRODUCTION: SPORTING INTEGRITY WILL IT SURVIVE?

The integrity of sport is vulnerable to the relentless intrusion by a minority of individuals who promote or engage in the use of gambling or performance enhancing drugs (PEDs). Those individuals are challenging sports administrators to act in a forceful and meaningful way that has not been the hallmark of professional sport in these areas to date. Deliberately inept and unwilling administrators, not wishing to upset the *status quo*, allow gambling and drugs to thrive in their sports. At the same time, the cases arising from gambling and drugs are revealing weaknesses in the dispute resolution system's ability to cope with the legal cases coming forward for adjudication dealing with corruption. The current arbitration model is, in some respects, not up to the challenge. The effect of inadequate pursuit of existing regulation and its lack of administration enforcement, when combined with ineffective adjudication, are leading to an erosion of sporting integrity.

These forces are gnawing away at the public image and respect of sport and are the greatest threats to the continuing commercial success of professional sport.<sup>1</sup> The problems languish in the background of sport and struggle to receive the attention and willingness of sports administrators to eradicate them. A culture of fame and admiration, combined with profits and wealth, seems to matter above all else, particularly in professional sport. The victim of this lack of attentiveness to the erosion of the integrity of sports will likely eventually claim the jobs of the very persons who ignore these phenomena. Baseball players are expected to deliver more home runs and superlative pitching; sprinters and swimmers to shatter world records; cyclists

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1. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 11–15 (2007) [hereinafter MITCHELL REPORT].

to climb every mountain faster. These expectations give rise to the impressions in athletes that their natural abilities are not enough; PEDs become part of the solution by which expectations are realized. Sports administrators, like ostriches burying their heads in the sand, do not want to know how all these athletic achievements are being accomplished. Gambling has a similar insidious effect on athletes and the integrity of sport and reflects an evolution akin to that for PEDs.<sup>2</sup>

Private-sector and government-run gambling websites send a message to the public at large that betting is acceptable. Not only do government Internet gambling websites make it seem morally acceptable to bet, they may also attract citizens who may not have otherwise gambled. The growing avalanche in betting is resulting in unforeseen attempts at corrupting athletes to increase profits. It must be recognized, however, that what athletes do in respect to gambling is, like drugs, a microcosmic reflection of the larger society in which we all live. The problem for sport is that, as the moral standards of the past hold less sway than a generation ago, this erosion of standards is negatively affecting the integrity of sport when athletes and others connected to sport gamble on their sport. This leads to temptation to fix sporting results or corrupt interim stages of a sporting event to enhance the gambling profits. The manner in which gambling is being dealt with by sport reflects a parallel process to that which has been going on with the use of PEDs. PEDs are used by athletes despite the risks that such substances are not only physically dangerous to the athlete but also have ripple effects for the athletes' lives and work beyond sport. PEDs cause youth to see corruption as necessary to succeed. Fans lose faith in the authenticity of results.<sup>3</sup> Those athletes who gamble are dissatisfied with the financial rewards of their chosen activity and look to augment their income. Different forces drive the athlete to be corrupt, but the effects of PEDs or gambling are similar on the integrity of sport. Those individuals associated with gambling and the delivery of drugs for use by athletes are often linked to larger units of organized crime,<sup>4</sup> thus putting the athlete in harm's way, perhaps unintentionally. Thus, there is an increasing need to regulate corruption, keep sporting events clean, and restore and build

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2. See *It's Just Not Cricket: Sport of Gentlemen Rocked by Fixing Allegations*, THEWESTERNSTAR.COM, Aug. 29, 2010, <http://www.thewesternstar.com/Canada---World/Sports/2010-08-29/article-1707495/Its-just-not-cricket%3A-Sport-of-gentlemen-rocked-by-fixing-allegations-/1>.

3. The Mitchell Report on the use of PEDs in Major League Baseball notes that the use of drugs causes fans to question baseball records and encourages youth to use PEDs. MITCHELL REPORT, *supra* note 1, at 11–17. The health risks involved in PEDs have more serious effects on adolescents. *Id.* at 4–17.

4. See ADAM LEWIS & JONATHAN TAYLOR, SPORT: LAW AND PRACTICE 843–44 (2008).

public confidence in professional and elite sport.

International sporting federations and government programs, with the leadership of the World Anti-Doping Agency (WADA), have begun a commendable job of regulating the drugs area. In WADA's short history, fashioning a single international doping regime that effectively harmonizes the rules of sporting federations to govern the use of PEDs is a laser light beacon of significant accomplishment. In the last five years, integrity units have been established in many professional sporting associations and, to a far lesser extent, in nonprofessional international sports federations to investigate and eradicate corruption in the sport. Still, there are challenges when administering these regimes. One reason these difficulties arise is that the regulatory agencies and participating sporting federations are nongovernmental organizations and are part of a private system that very jealously guards control over its affairs and activities.<sup>5</sup> Such organizations lack the power to compel non-athletes to comply with the rules. They also have limited authority to collect information other than blood and urine samples from athletes during in-competition and out-of-competition testing. Thus, to be effective, at times, the private system needs significant assistance from the public authorities to pursue corrupt individuals. The coming challenge is to knit the approach of both sets of authority together without taking away the control of sport by sport officials and their accompanying federations.

## II. THE GROWTH OF PERFORMANCE ENHANCING DRUGS

Some skeptics argue that doping has always formed a part of sports and, therefore, anti-doping regimes can never eliminate the use of drugs in sport. One commentator even refers to anti-doping efforts as “a denial of the reality of contemporary sport.”<sup>6</sup> It is believed that doping in sport can be dated back as far as Ancient Greece.<sup>7</sup> But, a history of usage does not compel acceptance. Doping regimes are mainly the responsibility of national sporting federations operating under the regulations of their respective International Federations (IFs). National federations must also comply with the rules of their National Anti-Doping Organizations (NADO) and frequently delegate their responsibilities in respect of PEDs to those bodies. WADA harmonized the

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5. Indeed, many IFs establish their operating legal entity in Switzerland as a Swiss Association so as to have the benefit of the principle of association autonym at the heart of the Swiss law on associations.

6. Ellis Cashmore, *Doping Scandal: Stop Testing and Legalize All Drugs*, in WRITING ARGUMENTS: A RHETORIC WITH READINGS 641 (John D. Ramage et al. Eds., 7th ed. 2007).

7. LEWIS & TAYLOR, *supra* note 4, at 843.

international standards for doping by developing the WADA Code (the Code). However, the best rules on the planet still require rigorous and effective administration to have the desired effect and fundamentally depend upon education for deterrence. The Code effectively harmonizes and synchronizes rules between sporting federations that are signatories<sup>8</sup> when the provisions are mandatory, but problems in administration arise when provisions are permissive,<sup>9</sup> and the whereabouts rules are under attack, mainly from professional sport. When the rules are drafted to incorporate NADOs, problems still arise, as a regime on paper is useless without proper enforcement. No one will care about the rules if chances are slim that they will ever apply. To be an effective deterrent, a reasonable portion of athletes must be tested in and out of competition, and the sanctions must be meaningful. However, this said, one should never lose sight of the real deterrent. Education of athletes is ultimately the most effective deterrent, backed up by a rigorous doping regime and legal sanctioning.

It is not the Code that causes the problems but rather the unwillingness of the sports administrator to attend to the vigorous enforcement of the regime.<sup>10</sup> Marquee athletes increase ticket sales and draw attention to the sport. The short-term effects of poor administration are higher earnings and a bigger fan base. These officials ignore the fact that doping is a major health risk to the athlete and that doping discourages parents to put their youngsters in sports, fearing their child will face the allure of PEDs.<sup>11</sup> As these longer-term effects surface, the integrity of the sport diminishes; repairing this damage will be a very difficult and long process. The other side of the coin is the effective prosecution of those cases that do arise under the Code. The Court of Arbitration for Sport (CAS) is designated as the final appeal body for issues arising out of the Code. However, the arbitration system used by virtually all

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8. As of 2004, all IFs with events in the Olympic Games must be a signatory to the WADA Code.

9. LEWIS & TAYLOR, *supra* note 4, at 894. Conflicting rules between NADOs and IFs create difficulties for the national federations that wish to be compliant with both anti-doping rules. Permissive provisions include testing requirements, sample analysis, results management, and education and research.

10. In March 2010, a steroid scandal at the University of Waterloo in Canada revealed nine players on the university's football team either tested positive or were being investigated for the use of PEDs. After subsequently performing tests throughout universities, the Canadian Interuniversity Sport (CIS) announced a crackdown on the regulation of PEDs, including a reallocation of testing, increasing the amount of football players tested from 5% of football players in Canada. CIS admits that the previous level of testing was not a strong deterrent. Frank Applevard, *CIS Announces New Football Drug Testing Strategy*, CANADIAN UNIVERSITY PRESS, <http://newswire.cup.ca/articles/31872> (last updated Aug. 12, 2010).

11. MITCHELL REPORT, *supra* note 1, at 15–17.

sports and administered at the elite level by CAS is not always able to effectively address some of the difficulties associated with adjudication of such disputes.

The increase in doping cases is not necessarily due solely to an increase in usage of PEDs but is in part a result of advancing testing abilities that detect smaller and smaller amounts of drugs in an athlete's system. Tennis player Richard Gasquet<sup>12</sup> became aware of how meticulous and precise the tests can be after his urine sample, given at an Association of Tennis Professionals (ATP) tournament in Miami in 2009, revealed the presence of cocaine metabolite benzoylegonine. The amount was so minute that the International Tennis Federation (ITF) Doping Tribunal, after hearing expert testimony,<sup>13</sup> found this likely reflected accidental ingestion from kissing a female who had used cocaine and was not reflective of a cocaine user. The fact that the tests are extremely precise only helps identify the presence of a banned substance. As *Gasquet* demonstrates, CAS<sup>14</sup> is not unreasonable in its application of the rules and recognizes that, where an amount is so minuscule, there is a possibility of accidental usage, and CAS is open to hearing expert evidence to prove ingestion was without fault or negligence. However, not every athlete has the financial wherewithal to mount such a challenge and achieve, essentially, exoneration.

Along with this history of usage is a code of silence that remains strong in the doping community.<sup>15</sup> The earliest sign of its intractability was revealed

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12. See Decision in the Case of M. Richard Gasquet (Int'l Tennis Fed'n Indep. Anti-Doping Trib. July 15 2009), <http://www.itftennis.com/antidoping/news/decisions.asp> (first instance decision).

13. The "A" sample contained a trace amount of pure cocaine, which the expert testimony revealed can be excreted from the body only in the first twelve hours after ingestion. For this and other reasons, the science tended to corroborate the story of the athlete. *Id.* at 25–26.

14. Both the ITF and WADA did not accept the stretching of the Doping Code that took place in the first instance case, and they appealed to CAS. See *Int'l. Tennis Fed'n. / Gasquet*, CAS 2009/A/1926, *WADA / ITF & Gasquet*, CAS 2009/A/1930 [hereinafter *Gasquet*]. The CAS accepted the wisdom of the first instance approach and upheld the decision but did so by stretching the WADA Code rule on "No Fault," something the first instance panel refused to do to arrive at a just result. Moreover, in so doing, they destroyed the balance of the first instance case in that it was carefully constructed so that the incident was a first doping offense. The CAS, in stretching the WADA Code to fit the facts into the "No Fault" test, had the unsatisfactory result that, should there ever be a future positive analytical case with this athlete, it will be in effect a first instance case, being the net effect of the provisions dealing with second offenses. It is submitted that this is an undesirable consequence of the approach taken. For a case somewhat akin to this problem when you have a second offense, see the appeal case in *IAAF / USADA & Gatlin* CAS 2008/A/1462 & *Gatlin / IAAF* CAS 2008/A/1461.

15. The perjury charges against professional baseball player Roger Clements will likely make some athletes decide that the code of silence is not all that beneficial to them, particularly when they are required to explain themselves and of necessity get caught up in a web of deceit. Clements was indicted on federal charges for lying while under oath at a hearing before a House Committee of the US Congress about his use of PEDs. Clements' allegedly false testimony obstructed the congressional

with Canadian sprinter Ben Johnson's comments before a judicial inquiry. His confession did not prompt any other athletes to come forward. The rather inept protestations of Roger Clemens to the contrary also provide a bookmark to the code of "deny, deny, deny" and the ring of silence as a defense. There have been few whistle-blowers among those caught doping. Of recent date, the most notable is the American cyclist Floyd Landis,<sup>16</sup> whose allegations exposed the use of PEDs by himself and his team and made allegations against a wide range of professional cyclists, including one-time teammate Lance Armstrong. Landis's information came two years after CAS upheld his suspension.<sup>17</sup> Beyond the problems of punishing individuals whose doping is uncovered in this manner, discussed later in this paper, such confessions and related whistle-blowing are rare and cannot be relied upon to reduce, let alone eliminate, the use of doping in sports. They do point out the fact that sports administrators are not vigilant and effective in administering the doping regimes under their management control. Both the Landis and Gasquet cases also reveal the challenges to the use of arbitration to resolve doping disputes. The original defense is alleged to have cost Landis more than \$2,000,000 USD<sup>18</sup> and cost Gasquet some £500,000 (\$750,000 USD), and the appeals were done *de novo* at further expense. Professional athletes may be able to incur such costs, but most IFs and NADOs are not capable of bearing such

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inquiry. If he is convicted on all charges, Clemens could face up to thirty years in prison. *Roger Clemens Perjury?: Pitcher Indicted on Federal Charges*, HUFFINGTON POST.COM, Aug. 19, 2010, [http://www.huffingtonpost.com/2010/08/19/roger-clemens-perjury-pit\\_n\\_687804.html](http://www.huffingtonpost.com/2010/08/19/roger-clemens-perjury-pit_n_687804.html). For an interesting snapshot of the implications upon one's life that lying to federal authorities can have, see MARION JONES, ON THE RIGHT TRACK: FROM OLYMPIC DOWNFALL TO FINDING FORGIVENESS AND THE STRENGTH TO OVERCOME AND SUCCEED (2010).

16. Marion Jones confessed to her failings as an athlete while not implicating others. See generally JONES, *supra* note 15. Her confessions did not alter results of the USA relay team at the Sydney Olympics. See *Anderson, Clark, Miles-Clark, Edwards, Gaines, Hennagan, & Richardson / IOC*, CAS 2008/A/1545. This was initially the situation for the men's US relay, where team member Jerome Young's drug use and ineligibility at the 2000 Games resulted in the team losing their medals, which CAS reinstated. See *USOC / IOC & IAAF CAS 2004/A/725*. But in 2008, after team member Antonio Pettigrew confessed to using PEDs at a trial against team coach Trevor Graham, the athletes were once again stripped of their medals. Juliet Macur, *I.O.C. Strips Gold From 2000 U.S. Relay Team*, N.Y. TIMES, Aug. 3, 2008, at SP7. Despite infamous usage of PEDs over at least five seasons, American baseball player Barry Bonds is still being considered as a possible Hall of Fame member for 2013, as the election requirements are silent on the use of PEDs. *Future Eligibles*, NATIONAL BASEBALL HALL OF FAME, <http://baseballhall.org/hall-famers/rules-election/future-eligibles> (last visited Mar. 11, 2011).

17. See *United States Anti-Doping Agency v. Landis*, Case No. 30 190 00847 06 (Sept. 20, 2007), available at [http://www.usantidoping.org/files/active/arbitration\\_rulings/landis%20final%20\(20-09-07\)%20\(3\).pdf](http://www.usantidoping.org/files/active/arbitration_rulings/landis%20final%20(20-09-07)%20(3).pdf). The decision was appealed to CAS. See *Landis / USADA*, CAS 2007/A/1394.

18. Juliet Macur, *Landis's Positive Doping Test Upheld*, N.Y. TIMES.COM, Sept. 21, 2007, [http://www.nytimes.com/2007/09/21/sports/sportsspecial1/21landis.html?ref=floyd\\_landis](http://www.nytimes.com/2007/09/21/sports/sportsspecial1/21landis.html?ref=floyd_landis).

costs in prosecuting a case at first instance and then having to redo the case again on appeal.

### III. THE NEED TO REGULATE THE USE OF PEDS

Clean athletes want a level playing field when competing, which translates into a desire to eradicate doping in their sport that is not always shared by the sport administrator despite protestations to the contrary. Although it is certain PED usage is more prominent than the current number of cases or analytical positives from the laboratories reveal, it remains a fact that use is by a minority of athletes. The sports administrator who is lax in the administration of the sport's doping regime is not looked upon with admiration by the athletes and will increasingly experience the scorn of the public. Athletes want fair results and, therefore, want to ensure a drug-free playing field. Winning athletes who do not dope want their results to be worthy of admiration, not skepticism and innuendo. The suspicion that now enshrouds every dramatic sports result is an indication of the loss of integrity for sport. That loss of integrity damages the reputation of both dopers and clean athletes<sup>19</sup> and sullies the image of sport. Doping scandals in international sport have received significant media attention that is eroding the perception of sport.<sup>20</sup> A strict doping regime that is properly adhered to and administered will work to remove the stigma from sports that have been previously tainted by doping scandals. Unless authorities vigilantly monitor doping by the few bad apples, public perception will be that professional sport is overrun with dopers.

The "Spirit of Sport" is explicitly part of the Code. This term was developed as a way to further justify regulation of doping in sport. Arguments that refer to protecting the Spirit of Sport are arguments about protecting integrity and honor and rewarding natural abilities, sound training, and hard work. Cheating destroys these values. Rather than develop a moral argument as a reason to regulate corruption, this allows doping violations to be

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19. See DANIEL M. ROSEN, *DOPE: A HISTORY OF PERFORMANCE ENHANCEMENT IN SPORTS FROM THE NINETEENTH CENTURY TO TODAY* 116 (2008). In a chapter entitled "Is Everyone Doping?," Rosen claims the increase in frequency of drug use, the confession of those athletes who previously denied allegations, and the spread of doping in almost every sport puts a strain on fans belief in athletes. Public skepticism and media attention dates back to the early 1980s, with Peter Lawson of Manchester Guardians famously saying, "Unless something is done soon, international sport will be a competition between circus freaks manipulated by international chemists." FRED C. PAMPEL, *DRUGS AND SPORTS* 4 (2007).

20. In cycling, the American team and the Spanish team have had to deal with cases from WADA. Athletics has had an image of doping since Ben Johnson, and it remains with scandals continuing up to the 2000 Games with Marion Jones and the men's relay team. The backlash of this press is that Jamaican runner Usian Bolt and swimming hero Michael Phelps are constantly confronted with malicious speculative allegations of doping.

justifiably pursued without starting a debate over whether officials should be regulating moral and ethical issues. Although the values that are encompassed in the Spirit of Sport are often linked to morality, protecting them is not a moral issue. All sports embody this spirit; therefore, to keep competition operating on a level, drug-free playing field, the Spirit of Sport must be upheld.

Regulation of sport is also justified by viewing doping as fraud. Professional sporting events have a large amount of prize money.<sup>21</sup> Players' high rankings lead to an increase in popularity and marketability. As a result, more than prize money is up for grabs, as sponsorship, athlete endorsement contracts, and ad campaigns are also at stake. Cheating to obtain these results is comparable to other economic crimes, such as insider trading in the financial world, and many believe those who cheat ought to be prosecuted just the same.<sup>22</sup>

#### IV. INDEPENDENT INVESTIGATIONS

After shot-putter C.J. Hunter was sighted at the 2000 Sydney Games, seemingly with athlete accreditation despite being banned from the sport for doping, the International Association of Athletics Federations (IAAF) filed a complaint against the national federation, USA Track and Field (USATF), for withholding information about testing. An independent international inquiry report revealed that the USATF did not conceal any of Hunter's tests, but the report did reveal that USATF did not always follow procedures and was slow to report positive findings. This included noncompliance with its regulations and deadlines for testing, as well as failure to provide proper whereabouts information to the IAAF.<sup>23</sup>

The lack of enforcement is prominent in professional sports. A U.S. Congressional Committee held hearings to examine the use of anabolic

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21. PGA tournament purses range from \$3,000,000 to \$8,000,000, with first place at the U.S. Open winning \$1,350,000. Tennis also has large amounts of prize money, with the purse at the four Grand Slam tournaments being in excess \$9,000,000, each, the winners each earning over \$1,100,000.

22. In *Meca-Medina v. Commission of European Communities*, the European Court of Justice vacated the CAS award on the basis that it had economic implications because the swimmers were banned from participating in their profession; any attempt to separate sport from employment was artificial. See generally Case C-519/04, [2006] E.C.R. I-06991. Emeritus WADA President Dick Pound believes dopers should be suspended from "work" even where doping is characterized as an economic issue, stating, "You have a right to work, but if you're cheating you do not have the right to work as a cyclist. It is an economic crime as well as a sports crime." Dick Pound interview with Velonews. Interview by Charles Pelkey, VeloNews, with Dick Pound, President, World Anti-Doping Agency (Dec. 24, 2004), available at [http://velonews.competitor.com/2004/12/news/velonews-interview-wadas-dick-pound-2\\_7332](http://velonews.competitor.com/2004/12/news/velonews-interview-wadas-dick-pound-2_7332).

23. See BARRIE HOULIHAN, DYING TO WIN 174-76 (2002).

steroids and human growth hormones by players in Major League Baseball (MLB). A follow-up investigation began after the revelations and controversy arose from the sports nutrition center Bay Area Laboratory Co-operative (BALCO). The Mitchell Report is a lengthy document detailing PED usage in MLB and was meant to be the beginning of the end of the “steroid era” and close the door on that period of baseball history. The Mitchell Report confirmed that PEDs are a major threat to the game, revealing eighty-nine players connected to doping by using informant testimony and other supporting documents. The Mitchell Report prompted some reaction from MLB, but it may not have been enough. Most of the recommendations were at least given the appearance of having been adopted. The creation of the report was a late reaction to a problem MLB was aware of before the independent report. MLB had many sports administrators, referred to earlier, who were willing to turn a blind eye to what was going on. Although an independent report can expose PED usage and provide recommendations for an effective doping program, it is only a waypoint to solving the problem. Such reports are expensive; IFs and national federations do not have the resources to perform such investigations. Baseball officials’ benign approach<sup>24</sup> let the problem of steroids in the sport thrive until an independent investigation was necessary and unavoidable if the American Congress was to keep from legislating a change that would have caused baseball to lose control of its sport in this dimension.

#### V. GROWTH OF GAMBLING<sup>25</sup>

Gambling has gone through a period of accelerating growth and acceptance in the first decade of the twenty-first century. Gambling is at the heart of cultural norms that are inconsistent throughout the world. Some cultures forbade it, others frowned upon it but to a degree tolerated it, and other cultures assumed it would go on and had no interest in forbidding it. In the past, repercussions for gambling were very serious, with the possibility of imprisonment for certain gambling-related offenses. The excitement and financial rewards that gambling presents and offers are at the root of its popularity; however, they are also the root of the negative consequences of

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24. The report uncovered that, in 2004, during the federal BALCO investigation, the Major League Baseball Players Association (MLBPA) and the Commissioner’s Office had suspended testing for part of the season and those players involved in the federal investigation may have been warned of upcoming tests. The MLBPA justified this notification as a matter of protecting confidentiality and integrity. MITCHELL REPORT, *supra* note 1, at 24–28.

25. Some of the ideas and data for this section of the paper came from an unpublished writing credit done by a researcher of mine and student in my Law and Sport class. I am indebted to Ryan Abrahamson, Western JD 2012, for his assistance and input in this segment of the paper.

gambling for sport and its integrity. Although affluent people were the major participants in gambling, there were strong links to both loose morals and organized crime. Gambling had a sleazy reputation. Today, there appears to be a strong connection between sports wagering and corruption in sport.

The global acceptance of gambling, exemplified by the number of government-run gambling operations, further corroborates this gambling evolution and avalanche of betting. The Province of Ontario, Canada, will controversially start offering online gambling in 2012, provided by the provincial government-owned Ontario Lottery and Gaming Corporation, with the main published motivation being the lucrative profits available.<sup>26</sup> In Canada, net gambling revenues totaled \$11.8 billion in 2003.<sup>27</sup> It is estimated that gambling in the United States reached almost \$73 billion dollars in 2004.<sup>28</sup> By 2009, there was \$2.57 billion legally bet on sports in the state of Nevada alone, and Americans illegally bet approximately \$380 billion in total.<sup>29</sup> In 2007, nearly half of America's population and over two-thirds of Britain's participated in some form of gambling. A UK gambling commission report determined that the UK gambling market was £84 billion in 2006–07.<sup>30</sup> A recent study by *Foreign Policy* estimated that the entire Asian gambling industry, both legal and illegal, is \$450 billion USD per year.<sup>31</sup> In 2009, Las Vegas "raked in gambling revenues of \$10.4 billion and Macau \$14.7 billion."<sup>32</sup> Recent trends show that gambling is gaining further acceptance and becoming even more mainstream. Although there are some protests to the Ontario government's recent acceptance and management of online gaming,<sup>33</sup>

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26. Naomi Parness, *OLG to Bring Online Gambling to Ontario in 2012*, CTVNEWS.COM, Aug. 12, 2010, <http://www.ctv.ca/CTVNews/Canada/20100810/ontario-online-gambling-duncan-100810/>.

27. *History of Gambling*, PROBLEMGAMBLING.CA, <http://www.problemgambling.ca/EN/AboutGamblingandProblemGambling/Pages/HistoryOfGambling.aspx> (last visited Aug. 11, 2010).

28. *Id.*

29. *Sports Wagering*, AMERICAN GAMING ASSOCIATION, Sept. 8, 2010, [http://www.american-gaming.org/Industry/factsheets/issues\\_detail.cfv?id=16](http://www.american-gaming.org/Industry/factsheets/issues_detail.cfv?id=16). Sports gambling is regulated through state and federal legislation and is legal in the state of Nevada as well as in Delaware, Montana, and Oregon. Of the four states, only casinos in Nevada maintain sports books enabling wagering on a single sporting match.

30. UK GAMBLING COMMISSION, *INDUSTRY STATISTICS 2008–2009 3* (2009), available at <http://www.gamblingcommission.gov.uk/pdf/industry%20statistics%202008-2009%20-%20August%202009.pdf.pdf>.

31. DECLAN HILL, *THE FIX: SOCCER AND ORGANIZED CRIME* 55 (2008).

32. John Fasman, *Shuffle Up and Deal*, THE ECONOMIST, July 8, 2010, available at <http://www.economist.com/node/16507670>.

33. Section 202 of the Criminal Code of Canada makes it an offense to record or register bets, book-make, or sell a pool. Canada Criminal Code, R.S.C., ch. C–46, § 202 (1985). However, there is not an outright ban of wagering in sport because section 207(1)(a) of the Criminal Code allows a provincial government to run a lottery scheme. Canada Criminal Code, R.S.C., ch. C–46, § 207(1)(a)

the overriding opinion is that, in tough economic times, taxing gambling can help turn around a struggling economy.<sup>34</sup> This growth of government gambling sites that compete with offshore operations means that the push by a few to corrupt athletes and officials will increase and the connection between sports wagering and corruption will expand. If sports administrators bring the same less-than-vigilant attitude and approach to regulation of gambling and sports betting as they have shown towards doping issues, there will be considerable effects on the integrity of sport.

## VI. THE NEED TO REGULATE GAMBLING

Gambling on sporting events can take several different forms. A punter can choose to place a bet on a betting exchange platform or through a “bookie.” The sports betting platform operator takes no risks and merely allows the prospective punter, through the exchange, to find another person with whom to make a bet. In contrast, the bookie takes on a risk with the punter. Bookies typically have limits on the amount of any single bet in order to ensure their own solvency.<sup>35</sup> The bookie industry, where it is legally allowed, is regulated and does not generally cause a problem for sport.<sup>36</sup> It is the illegal bookie, frequently contacted through the Internet, who poses the

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(1985). Section 207(4) defines a lottery scheme. Canada Criminal Code, R.S.C., ch. C-46, § 207(4) (1985). The wording of the legislation has led the provincial government in Ontario and British Columbia and the maritime provinces through Atlantic Lottery Corporation to opiate sports gaming programs that involve betting on more than one sporting event.

34. In the United States, the Professional and Amateur Sports Protection Act of 1992 (the PASPA) makes sports gambling illegal across the USA. 28 U.S.C. §§ 3701-3704 (2011). The four states of Delaware, Montana, Nevada, and Oregon are grandfathered in the legislation because they operated sports wagering schemes before the legislation was enacted. Oregon and Delaware are permitted to run a sports lottery, and Montana is permitted to run sports pool betting. Delaware attempted to expand its sports wagering on individual sporting events but lost in a ruling by the Court of Appeals for the Third Circuit. *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

35. One of the complaints of the regulated bookies is that the betting platforms tend not to have limits on the size of bets because they are merely a facilitator finding both sides of the bet. Thus, these platforms can be the source of money laundering and other corrupt activities.

36. Despite that fact, the IOC has prohibited the London Olympic Games Organizing Committee (LOGOC) from having any sponsorship agreement with any potential gambling sponsor. IOC Director of Legal Affairs, Howard Stupp made this statement at the *C5 European Sports Law and Business 2010 Conference* held in Geneva, Switzerland, on October 19 and 20. This feature demonstrates the level of caution that the IOC has engaged in when dealing with betting associated with the Games. At the Olympic Games in Beijing in 2008, the IOC had used the Early Warning System of FIFA to monitor gaming activity and then progressed in 2010 to the use of its own in-house monitoring system for the Winter Olympics in Vancouver. Pâquerette Girard Zappelli, Secretary, IOC Ethics Commission, Presentation at the *C5 European Sports Law and Business 2010 Conference* (Oct. 19–20, 2010); *see generally Conference Proceedings*, C5-ONLINE.COM (UK), [http://www.c5-online.com/conference\\_proceedings.htm](http://www.c5-online.com/conference_proceedings.htm) (last visited Feb. 20, 2011).

threat to sport. The market for wagering on sport events in the United States is \$380 billion bet illegally, compared to the legal market of \$2.57 billion.<sup>37</sup> The profitability of the activity has attracted global operators and, with them, organized crime. In response to the popularity of online gambling, the United States passed the Unlawful Internet Gambling Enforcement Act of 2006<sup>38</sup> (UIGEA). That legislation does not make it illegal to place a wager online but prohibits anyone engaged in the business of betting to accept funds in the form of credit, electronic fund transfer, check, or any form of financial transaction in relation to unlawful Internet gambling.<sup>39</sup> This legislation did lead to the downfall of Tradesports.com, which ceased operation in November 2008, but the fight against online sports gambling is far from won.

Illegal bookies often have access to athletes through a variety of ways. For instance, Australian cricket stars Shane Watson and Brad Haddin were approached by a suspected Indian gangster with ties to illegal bookmakers in 2009. Australian captain Ricky Ponting stated

We've had instances in the past couple of years where blokes have come up to players in bars and wanted to talk about what is happening, and strange phone calls going through to the (hotel) rooms . . . We know what to do and we do it. We let the team manager know straight away and the ICC [International Cricket Council] is informed from there. You have to be so careful with everything you do now, everyone you meet, everywhere you go.<sup>40</sup>

Many illegal bookies in the cricket world are based in India and have also been causing issues for the legal bookmakers. In the overtly corrupt world of gambling on cricket, there have been issues with illegal bookies that have caused legal bookmakers to take action. Aamir Sohail, the former captain of the Pakistan cricket team, has stated that illegal bookies are able to influence matches as they are unencumbered by the taxes and sponsorship obligations that legal bookmakers are faced with.<sup>41</sup> "Aamir is convinced that 'legal' bookmakers like Ladbrokes, William Hill, and Bet Fair got sick and tired of

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37. *Sports Wagering*, *supra* note 29.

38. 31 U.S.C. §§ 5361–5367 (2011).

39. § 5363.

40. *Aussie Stars Targetted by Illegal Bookies: Report*, THE TIMES OF INDIA, Aug. 31, 2010, available at <http://timesofindia.indiatimes.com/sports/cricket/top-stories/Aussie-stars-targetted-by-illegal-bookies-Report/articleshow/6466043.cms>.

41. Khalid Hussain, *It's a Battle Between Illegal and Legal Bookies: Aamir Sohail*, ARABNEWS.COM, Sept. 24, 2010, <http://arabnews.com/sports/article145314.ece>.

the fact that illegal bookies were [enjoying the majority of] worldwide gambling profits and nobody was doing anything about it.”<sup>42</sup> He stated, “Legal bookmakers must have been losing millions of pounds each year because of manipulation of the illegal bookmakers.”<sup>43</sup> Many involved with sport place the blame squarely on illegal bookies and their network. Sporting associations integrity units and anti-corruption units have been greatly ineffective against the illegal bookies; however, with the added attention of the legal bookmakers, the international sporting community is beginning to understand the extent of the issues caused by the illegal bookies and are getting on board to fix the problem.<sup>44</sup>

Gambling through non-regulated bookies is the primary source of the problem. The match does not have to be fixed by the corruption of participants. There are interim points in many sports where betting may occur, for example, on the outcome of one set in the tennis match, or tie breakers or deuce games, or who will obtain the first corner kick or yellow card in a soccer match. Of course, some sports lend themselves to this type of gambling because there are well-recognized interim points that can be bet upon.<sup>45</sup> Another aspect of the gambling challenge to sport arises from the match-fixing or point-shaving activities of corrupt players. Such conduct changes the risk profile in favor of the corrupting bookie and enables both athlete and bookie to prosper from their corrupt activity.

## VII. MATCH FIXING AS CORRUPTION

Several sports have reports of gambling and match fixing by athletes, team officials, and referees and have legal decisions associated with such matters. In professional tennis, there have been several investigations into the conduct of players, usually prompted by suspicious wagers or unusually large amounts of betting on games.<sup>46</sup> In 2007, there was a media firestorm surrounding

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42. *Id.*

43. *Id.*

44. *Id.*

45. See European Sports Security Association Homepage, ESSA, <http://www.eu-ssa.org> (last visited Mar. 11, 2011); see also 9th Annual iGaming Conference and Expo, EIGEXPO.COM, <http://www.eigexpo.com/essab> (last visited Mar. 11, 2011).

46. For instance, there has been an investigation launched into a July 2010 tennis match between Richard Bloomfield and Christophe Rochus. Bloomfield won in straight sets, even though he was ranked No. 552 in the world and Rochus was ranked No. 160. Bloomfield became the 1-8 favorite shortly after capturing the first set. When more than 1£ million were bet on this low priority, low exposure game, suspicions were aroused, and the investigation was launched. *Betting Investigation into Briton Richard Bloomfield's Clash with Christophe Rochus*, THE DAILY TELEGRAPH (London), July 9, 2010, available at <http://www.telegraph.co.uk/sport/tennis/atptour/7880995/Betting-investigation-into-Briton-Richard-Bloomfields-clash-with-Christophe-Rochus.html>.

Russian tennis player Nikolay Davydenko.<sup>47</sup> There was an abnormally large amount of money, roughly \$7 million USD, bet on a match between fourth-ranked Davydenko and eighty-seventh-ranked Martin Vassallo Arguello.<sup>48</sup> Davydenko retired from the match, which Arguello was leading, as a result of an aggravated left foot injury.<sup>49</sup> Following more than a year of investigation, Davydenko and Arguello were cleared of match-fixing,<sup>50</sup> but stories of match-fixing and gambling issues in tennis became widespread.

Other tennis players have reported incidents where they have been approached and offered financial compensation to participate in corrupt practices. Gilles Elsener and Dmitry Tursunov both claim to have encountered such unwanted approaches with bribe offers to match-fix. Neither took part in any corrupt activity, and both reported the issue to the necessary authorities. In professional tennis, part of the rulebook deals with the obligations of players concerning gambling matters. There are some measures in place to forbid interaction between professional athletes and known gambling professionals. For example, a man who identified himself as a professional gambler approached Russian player Ekaterina Bychkova through her blog and offered financial compensation for her participation in a match-fixing scheme. Bychkova rejected his offer and ceased communication; however, she failed to report the incident, an offense under the Uniform Tennis Anti-Corruption Program.<sup>51</sup> Penalties under this program are fines up to \$250,000 and lifetime bans. Bychkova was fined \$5,000, and a thirty-day suspension was imposed on her in a decision of the Anti-Corruption Hearing Officer.<sup>52</sup> Later that same year, Daniel Koellerer, an Austrian pro tennis player, was given a fine of 15,000 € and a three-month suspension (both sanctions were suspended for two years on the condition of no further infraction of the rulebook) for having betting odds on tennis matches on his

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47. *Davydenko Cleared of Match-Fixing*, BBC SPORT, Sept. 12, 2008, <http://news.bbc.co.uk/sport2/hi/tennis/7612536.stm>.

48. *Id.*

49. *Id.*

50. *Id.*

51. See *Bychkova v Prof'l. Integrity Officers*, a decision under the Uniform Anti-Corruption Program of professional tennis dated January 8, 2010. Press Release, Tennis Integrity Unity, Decision in the Case of Ekaterina Bychkova (Jan. 8, 2010) available at [http://www.sonyericssonwtatour.com/SEWTATourArchive/Archive/PressReleases/2010/01\\_08\\_Bychkova\\_Decision.pdf](http://www.sonyericssonwtatour.com/SEWTATourArchive/Archive/PressReleases/2010/01_08_Bychkova_Decision.pdf).

52. Press Release, Tennis Integrity Unit, *supra* note 51. Still, it is not illegal for tennis players to associate with suspicious individuals. Yevgeny Kafelnikov, Marat Safin, and Andrei Medvedev were photographed with Alimzhan Tokhtakhounov, a suspected mobster from the Soviet republic of Uzbekistan. Richard H. McLaren, *Corruption: Its Impact on Fair Play*, 19 MARQ. SPORTS L. REV. 15, 18 (2008).

personal website.<sup>53</sup> The player and his manager admitted to the offenses, and the manager was given a twelve-month suspension of credentials and access to any event with a similar two-year suspended sanctions.<sup>54</sup>

For some athletes, the financial compensation that can accompany participation in corrupt gambling in their sport is too much to refuse because the earnings of many professional athletes, outside of the marquee players, are small in comparison to the large first and second place finishers' purses. Several tennis players have been suspended or sanctioned for betting generally in their own sport and otherwise on the Internet. Although no professional tennis player has been sanctioned or accused of betting on the tennis player's own matches, players have been sanctioned for betting on professional tennis. Alessio Di Mauro was the first player to be sanctioned for betting, having made 120 bets with an online bookmaker involving approximately 340 ATP matches, as well as bets on football games.<sup>55</sup> Di Mauro claimed to have never placed bets on a tennis match in which he competed.<sup>56</sup> In an effort to encourage confessions and participation in anti-corruption initiatives, CAS reduced the first instance sanction of \$60,000 USD and a nine-month suspension to seven months and \$25,000 USD.<sup>57</sup> There are further examples of professional tennis players who have been sanctioned for gambling infractions.<sup>58</sup>

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53. *Koellerer Disciplined by Tennis Integrity Unit*, ITFTENNIS.COM, Aug. 19, 2010, <http://www.itftennis.com/abouttheitf/news/newsarticle.asp?articleid=21609>.

54. *Id.*

55. *Di Mauro / ATP Tour Inc.* CAS 2007/A/1427, at 2.

56. *Id.*

57. *Id.* at 9.

58. Potito Starace made five bets on professional tennis totaling \$130 USD, while Daniele Bracciali made approximately fifty bets, each of \$7 USD. Neither player bet on matches that they participated in; Starace was suspended for six weeks and fined \$30,000 USD, while Bracciali was banned for three months and fined \$20,000 USD. *Players Bet on Tennis, But Not Their Own Matches*, ESPN.COM, Dec. 27, 2007, <http://sports.espn.go.com/sports/tennis/news/story?id=3165719>. Giorgio Galimberti bet on tennis matches 401 times on 1796 matches. William Weinbaum, *ATP: Galimberti Bets Included Wagers on Own Matches*, ESPN.COM, Feb. 19, 2008, <http://sports.espn.go.com/sports/tennis/news/story?id=3253331>.

Frantisek Cermak and Michal Mertinak were also sanctioned for betting on professional matches that were not their own. Both players received suspensions and fines for their infractions. *ATP Suspends Doubles Titlists Cermak, Mertinak for Betting*, ESPN.COM, July 21, 2008, <http://sports.espn.go.com/sports/tennis/news/story?id=3498511>. Moreover, Mathieu Montcourt was suspended for eight weeks and fined \$ 12,000 USD after the ATP determined he bet on matches. *Montcourt Suspended 2 Months, Fined \$12K for Betting on Matches*, ESPN.COM, Aug. 8, 2008, <http://sports.espn.go.com/sports/tennis/news/story?id=3525837>; see also *Montcourt v. Ass'n of Tennis Prof'ls*, CAS 2008/A/1630. Finally, Federico Luzzi bet 273 times on 836 matches; however, Luzzi was determined to have bet on one of his own matches. Luzzi placed one €3 bet on himself to win, but the ATP found no evidence of any attempt by Luzzi to affect the outcome of any tennis match.

Whether it is a coach, manager, official, or referee, participants other than players can greatly affect the outcome of a sporting competition. Tim Donaghy, a former National Basketball Association (NBA) referee, was caught making picks on sixteen games he officiated during the 2006–07 season following an investigation conducted by the Federal Bureau of Investigation. Donaghy bet on thirty to forty games that he officiated in each of the three prior seasons and had disclosed information regarding player injuries and which referees were assigned to specific games to people betting on NBA games.<sup>59</sup> He was eventually sentenced to a prison term of fifteen months and ordered to pay \$217,266 USD in restitution for conspiracy to commit wire fraud by denying his employer the intangible right to his honest services and conspiracy to transmit wagering information.<sup>60</sup>

Donaghy's conduct as an NBA official has had and will continue to have lingering effects. There are rampant stories about corruption in the NBA, and Donaghy has furthered this speculation with his own allegations about rampant gambling by referees and other individuals, including league executives, general managers, referees, and players. The NBA has a history of gambling controversies,<sup>61</sup> and as a result, the league has strict rules that prohibit gambling. Donaghy has described various examples of improper interactions and relationships between referees and other league officials, "claiming league officials would tell referees that they should withhold calling technical fouls on . . . star players because doing so [could] hurt ticket sales and television ratings."<sup>62</sup> Donaghy has been linked to organized crime, and his actions have served to demonstrate the further erosion of integrity in sport.<sup>63</sup>

The sport of soccer has had a number of issues surrounding match-fixing, and there is an ongoing investigation that started in 2010, wherein "at least 250 football matches in nine countries are suspected of manipulation."<sup>64</sup> The

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*Luzzi Fined \$50,000, Suspended 200 Days*, ESPN.COM, Feb. 29, 2008, <http://sports.espn.go.com/sports/tennis/news/story?id+3271281>; *see also* file at CAS 2008/A/1529.

59. LAWRENCE B. PEDOWITZ, REPORT TO THE BOARD OF GOVERNORS OF THE NATIONAL BASKETBALL ASSOCIATION (2008), *available at* [http://hosted.ap.org/specials/interactives/\\_documents/100208nba\\_pedowitz.pdf](http://hosted.ap.org/specials/interactives/_documents/100208nba_pedowitz.pdf).

60. *See* United States v. Donaghy, 570 F. Supp 2d 411 (E.D.N.Y. 2008).

61. *See e.g.*, Ira Berkow, *The Temptations of a Man of Integrity*, N.Y. TIMES, May 31, 1992, at S9.

62. Letter from Atty. John F. Lauro, to Honorable Carol Bagley Amon (June 10, 2008) (Re: United States v. Timothy Donaghy) *available at* <http://assets.espn.go.com/media/pdf/080610/donaghy03.pdf>.

63. Similar assertions have been made against the UEFA and FIFA organizers of football. *See* HILL, *supra* note 31.

64. Nicolas Bonassi, *Updates on Sports Law*, INSIGHT: SPORTS LAW NEWSLETTER (Lenz &

CAS rendered its first ever award in a match-fixing case arising out of an investigation by Union of European Football Associations (UEFA).<sup>65</sup> In that case, the football club Pobeda was banned for eight years from UEFA competitions, and the president of that club was banned for life from any football related activities for his part in a match-fixing affair, which came to light after a UEFA investigation brought on by notice of unusual betting patterns.

How athletes become involved in corruption is a topic of concern for those trying to preserve the integrity of a sport. The corruption that was unearthed in international cricket is a perfect example of the timeline of a match-fixing scheme because it shows how a corrupt scheme can be hatched and also demonstrates how deeply gambling may affect a sport. In 1996, Mohammad Azharuddin, former captain of the Indian national cricket team, introduced Hansie Conje to Indian bookmaker Mukesh Gupta. During a test in Kanpur in 1996, Gupta asked Conje to persuade his team to throw the match. Conje says he spoke to no one and received money for doing nothing. In the infamous Centurion Test against England in 2000, he received £5,000 and a leather jacket for contriving a win for Nasser Hussain's tourists when a weather-affected draw looked certain. Conje then asked two teammates to underperform in a one-day international at Nagpur.<sup>66</sup> These players later received six-month bans, despite never receiving money for their participation. Conje was given a lifetime ban from the sport; he challenged this, but it was dismissed.<sup>67</sup> Conje's actions were based upon bribes he received from bookkeepers looking to increase their chances at big gambling wins. More recently, a match between Pakistan and England, played August 29, 2010, is being investigated as a result of suspicions of corruption. Scotland Yard police have questioned two players over allegations that they accepted money from gamblers to deliberately bowl (throw) no-balls at certain points during the match. *News of the World* secretly filmed undercover reporters,<sup>68</sup> posing as front men for an East Asian gambling cartel, in discussion with a man it identified as London-based businessman Mazhar Majeed. Majeed appears to

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Staehelein, Geneva Switz.), Nov. 2010, at 9.

65. *FK Probeda et al / UEFA CAS 2009/A/1920*.

66. Peter Robinson, *Cronje Remains an Outcast*, ESPN CRICINFO, Oct. 17, 2001, <http://www.cricinfo.com/ci/content/story/109086.html>.

67. *Id.*

68. In an article in the Daily Telegraph, the ICC is reported it was considering using its own undercover agents to approach players. See *International Cricket Council Could Use Undercover Agents to Fight Corruption in Sport*, THE DAILY TELEGRAPH (London), Oct. 19, 2007, available at <http://www.telegraph.co.uk/sport/cricket/news/8074370/International-Cricket-Council-could-use-undercover-agents-to-fight-corruption-in-the-sport.html>.

accept £150,000 (\$244,600 USD) to make sure no-balls are bowled at certain times during the match. Majeed was arrested as authorities began to investigate the claims after players Mohammad Asif and Mohammad Amir appeared to overstep the line from which they must bowl behind exactly when Majeed said they would.<sup>69</sup> Asif and Amir, along with test skipper Salman Butt, have been provisionally suspended and have appealed their bans; at the time of writing, the case was under adjudication.

Such incidents, and many more that could be cited, do suggest that sport and its integrity are under threat from illegal bookmaking. A number of responsible IFs, such as the International Cricket Council (ICC), the International Federation of Football Association (FIFA), the International Olympic Committee (IOC), and the ITF, are not sitting idly by and have created integrity units to deal with the attack to their sport coming from corrupt book makers. The incidents suggest the need for regulation both by IFs, games organizers, and possibly governments taking the matter away from the private world of sports federations and moving it into the public domain of law enforcement. We need to turn now to the private sport standard forum for imposition of discipline upon members and the arbitration and dispute resolution mechanisms to impose the disciplinary sanctions on members.

## VIII. THE PRIVATE ARBITRATION SYSTEM

### A. *Analytical Cases: Landis*

Blood and urine tests are used to determine whether or not an athlete is doping. The ability to perform these tests is the most powerful tool that sporting administrators have to protect sports from corruption. The authority to test athletes is in the WADA Code, and IFs have incorporated these rules into their anti-doping policies. Still, abnormal findings in these tests can lead to lengthy and expensive adjudication, which the current sports arbitration system has trouble paying for. An example of this is the case of American cyclist Floyd Landis, which was an extensive review of the laboratory testing system used by the Laboratoire National de Dépistage du Dopage (LNDD) and the alleged mistakes that were made throughout the testing process. The review was intended to establish the incompetency of the French laboratory and besmirch, if not destroy, the international drug testing system. These claims culminated in a two-day discovery process that discussed outstanding issues surrounding discovery and the production of LNDD's documentation. The issues included additional testing of Landis's sample, reprocessing of

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69. *It's Just Not Cricket*, *supra* note 2.

data, and appointing a scientific expert who would supervise the extraction of the electronic data files for use in rerunning the results.<sup>70</sup> At the first instance level of this case, Landis requested massive amounts of documentation and testing. For this analytical case, the issues regarding the laboratory were the focus. The cost of the American Arbitration Association (AAA) hearing and the subsequent CAS appeal was enormous for both Landis, who required donations to afford the case, and the arbitration system. The arbitration system is not set up to handle cases of this magnitude. With the advancement of technology and the complex testing mechanisms necessary to determine whether or not an infraction has been committed, these hearings are heading away from simple analytical cases to cases that scrutinize every detail at an unaffordable cost.

### *B. Non-Analytical Cases: Valverde*

If the investigation does not result from a positive analytical finding from a sample given in accordance with a sporting federation testing procedure, adjudication can be difficult, as the authority to test does not exist beyond the in- or out-of-competition rules. Therefore, athletes can refuse to provide a blood sample during cases against them. This lack of authority made for a complicated case when Spanish cyclist Alejandro Valverde was accused of doping.<sup>71</sup> As part of the evidence in a Spanish criminal investigation, a blood bag was suspected of being that of Valverde. The International Cycling Union (UCI) requested that the Spanish Cycling Federation (RFEC) commence proceedings against Valverde based on the blood bag obtained as evidence by the Spanish authorities. After the RFEC did not take action against him, WADA and UCI filed an appeal with CAS requesting a doping violation be found.

Other than the evidence regarding Valverde's connection to Dr. Fuentes and evidence related to other documentary materials seized during the Spanish investigation, UCI and WADA had no scientific evidence as to whom the blood bag belonged or that Valverde was using prohibited substances. The evidence that finally won the day was obtained by the Italian authorities in *Valverde I*, which launched an investigation under Italian law that permitted Spanish authorities to do what UCI and WADA could not do: obtain a sample portion of the blood held by the Spanish authorities. Provided with that blood sample and urine specimens from prior racing in Italy, the Italian authorities

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70. See *United States Anti-Doping Agency v. Landis*, Case No. 30 190 00847 06 (Sept. 20, 2007), available at [http://www.usantidoping.org/files/active/arbitration\\_rulings/landis%20final%20%2820-09-07%29%20%283%29.pdf](http://www.usantidoping.org/files/active/arbitration_rulings/landis%20final%20%2820-09-07%29%20%283%29.pdf).

71. See *Royal Spanish Cycling Fed. / Int'l Cycling Union*, CAS 2007/O/1381.

were able to match the DNA of the two specimens: urine in Italy and blood from Spain. This rather conclusive evidence, along with other actual witness evidence and documentation that had originally flowed out of Spain to the UCI and was made available in Italy, resulted in an Italian criminal investigation and adjudication. Valverde was suspended for two years from competing in Italian events. He appealed that decision to CAS, and it resulted in the first CAS case (referred to herein as *Valverde I*) involving sanctions for a doping infraction under the jurisdiction of the Italian law on doping.<sup>72</sup>

*Valverde II*<sup>73</sup> then proceeded to a hearing following *Valverde I*, and based upon the evidence in *Valverde I* admitted as part of the proceedings in *Valverde II*, such as the evidence concerning the blood bag containing a prohibited substance and DNA evidence, together with the other evidence from *Valverde I* and *Valverde II*, the Panel concluded that Valverde had committed a non-analytical doping violation under the UCI and WADA relevant doping control rules.<sup>74</sup> *Valverde II* applied a sanction retroactive to the commencement of the Italian sanction and confirmed the two-year suspension.<sup>75</sup> It should be noted that both CAS decisions have been appealed to the Swiss Federal Tribunal on various grounds and, at the time of writing, the results of those appeals were unknown.

The use of the evidence from the Spanish administrative law and Italian criminal proceedings raised international law issues, such as the applicability of a national court order to an international arbitration proceeding, as well as the process by which parties and a subsequent arbitration panel could be constrained on the basis of *res judicata*. Without the evidence of the blood bag from the Spanish proceedings and the ability to test for DNA against the sample collected in Italy, the legal conclusion of the case would have likely been less certain.

What *Valverde I* and *Valverde II* illustrate is that, at least in non-analytical positive doping cases, private associations, such as the UCI and WADA, are without authority to subpoena or compel the gathering of the necessary evidence. They also lack either a protocol or a legal framework within which to request the cooperation of public authorities to provide the information and evidence necessary to satisfy the private arbitration process that a doping infraction ought to be declared. The related problem to that of the public authorities holding necessary evidence is the attempt to obtain the cooperation of an athlete in exchange for a reduced sanction. In those situations, the

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72. *Id.*

73. See generally *WADA & UCI / Valverde & RFEC*, CAS 2007/A/1396 & 1402.

74. *Id.* ¶ 17.1.

75. *Id.* ¶ 19.12.

private sports organization cannot offer the criminal immunity in exchange for the cooperation. Thus, if Valverde had offered to cooperate with Italian authorities, he could have received such immunity if the authorities were satisfied with the cooperation. In countries where the doping infraction is pursued separately from the private arbitration process, the private sports body cannot assist the athlete in his cooperation by promising public authority immunity to prosecution. The moving of at least some non-analytical doping cases involving evidence gathered by public authorities or seeking the cooperation of the athlete in an investigation may well have to be moved out of the private arbitration process and into the public sector for prosecution in order to allow for successful pursuit of the infraction. In the future, it may be the only manner in which the compelling evidence that the private system cannot demand can be appropriately reviewed and evaluated to determine a doping infraction. Thus, without the cooperation of Italian authorities and the Spanish authority's ability to seize evidence, WADA and UCI would not have had the case they ultimately were able to make out.

#### IX. ADJUDICATING GAMBLING CASES

A similar limitation on the private adjudication process shows up in reviewing the jurisprudence to date on the gambling cases. In those cases without an admission on the part of the athlete, the evidence will be too circumstantial to achieve an infraction by adjudication. The public authorities' power to gather evidence is required in the non-admission type of case before the arbitration model will be effective. There is also the further fact that, at the moment, there is no international agency like WADA overseeing and bridging the gap between the individual federations and the overall interests of the sporting community and contributing to the process where private associations do not want to go. WADA contributes to the harmonization and the regulation and adjudication of doping infractions, but there is no parallel organization for gambling. The organizations and integrity units that exist within some countries' sporting agencies and IFs are not doing their job effectively or as completely as is required. Although they purport to be doing a vigilant and necessary job, they may be doing a lackadaisical job on purpose in a misguided desire to protect their brand and sport from the perils of corruption. As noted by Declan Hill, there are many motivations for sporting organizations to avoid bringing this corruption to light.<sup>76</sup> The publicity that is associated with corruption is financially detrimental to the sport's sponsors. Hill recounts a comment from a police officer who was involved with an

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76. Hill, *supra* note 31, at 187.

investigation into actions by former Liverpool FC goalie Bruce Grobbelaar, ““At first, they wanted to help. But as the trial started, the football world banded together and would not help us at all. They wanted the bad publicity to go away.””<sup>77</sup> Often, the integrity units may do the opposite of their intended purpose and make the investigation more difficult for police rather than help them, but they cannot pursue their own private eradication of corruption without the cooperation of the public authorities.

The IOC recently held a seminar in Lausanne, “Sports Betting: A Challenge to be Faced.” The recommendations called for all constituents of the Olympic movement to adopt internal legislation aimed at corrupt gambling activity and to endorse a disciplinary procedure for breaches of these rules and the implementation of communication, education, and prevention programs by all constituents of the Olympic movements.<sup>78</sup> This is similar to the early, halting steps engaged in by the IOC in the doping world. History is now repeating itself in the emerging parallel corruption and threat to the integrity of sport represented by the problems raised by illicit gambling in sport. The IOC also recommended that sporting agencies develop partnerships and collaborate with regional, provincial, and national authorities.<sup>79</sup> The logical step in furtherance of those recommendations is an IF similar to WADA dealing with the threat to the integrity of sport through gambling.

#### X. CONCLUSION

Corruption through gambling and PEDs is challenging the fundamental underpinnings of sporting integrity. The sports fraudster is wrongfully benefitting from this dishonesty, be it through the use of prohibited substances, match-fixing, or other forms of gambling in sport. The will to affect change by vigorous pursuit of these insidious forces does not seem to be present in many sports administrators for fear of damaging the brand or image of their sport. Financial exigencies are also causing the adjudication system in sport to bump up against the limits of the ability of dispute resolution to provide a forum for the resolution of these disputes. Furthermore, in many instances, the information gathered in the course of investigations, which may or may not be pursued by government authorities, is vital to the successful prosecution by private adjudicator of corruption matters. The result is going to have to be more governmental assistance and better cooperation between sports administrators and the various governmental agencies that can help them out.

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77. *Id.* at 187.

78. *Recommendations for the IOC Seminar: Sports Betting: A Challenge to be Faced*, EUROOLYMPIC.ORG, June 24, 2010, <http://www.euroolympic.org/cms/getfile.php?113>.

79. *Id.*

In the area of gambling corruption, the IFs are in immediate need of an international collaborative effort similar in form to that of WADA. If these matters do not change in the near future, sport will indeed lose its integrity.