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Catching Conspirators: How Can International Organizations Counter State-Sanctioned Doping After Scandal at the Sochi Olympics?

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CATCHING CONSPIRATORS: HOW CAN INTERNATIONAL ORGANIZATIONS COUNTER STATE- SANCTIONED DOPING AFTER SCANDAL AT THE SOCHI OLYMPICS?

*Thaddeus Cwiklinski**

ABSTRACT

In 2016, Grigory Rodchenkov, then the foremost scientist in Russia's Anti-Doping Agency, fled to the United States and blew the whistle on a state-sanctioned doping scheme. Under Rodchenkov's guidance, hundreds of Russian Olympians had used performance-enhancing drugs, spurring Russia's success at the 2014 Olympic Games in Sochi. Then, these athletes were given a "clean slate" as Russian government agents replaced every single athlete's sample in the Moscow Anti-Doping Centre.

In response, the World Anti-Doping Agency conducted an investigation revealing a conspiracy of massive proportions. The Court of Arbitration for Sport considered banning Russia for four years, but then halved the penalty to two years and permitted the marginally diluted "Russian Olympic Committee" to compete at Tokyo in 2021 and Beijing in 2022 anyway. Despite international condemnation of Russia's actions and an extensive international framework for disciplining individual athletes who dope, there is no comparable framework for punishing the conspirators behind doping scandals, who frequently evade consequences.

This Note argues that for meaningful change, the international community needs to use new methods to hold conspirators liable, especially criminally. First, this Note describes how doping has infiltrated Olympic competition at practically

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every Olympic game throughout history, and how in the modern era there is no shortage of mechanisms for disciplining individual athletes. Then, this Note examines the roles of the World Anti-Doping Agency and the Court of Arbitration for Sport in preventing doping in international competition. Finally, this Note considers the implications of solutions such as a blanket ban on countries engaged in doping scandals or the creation of an international tribunal with the authority to hold conspirators criminally liable.

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INTRODUCTION

How should international anti-doping organizations respond when two key ingredients of a country's Olympic success are drugs and deception? In a May 2016 interview with *The New York Times*, Grigory Rodchenkov, the foremost scientist in the Russian Anti-Doping Agency and the head of the Moscow Anti-Doping Centre, blew the whistle on a systematic Russian doping

program.¹ Known as “Operation Sochi Resultat,” which loosely translates to “the Sochi operation to achieve positive results,”² the program helped fuel Russia’s tremendously successful Olympic program at the 2014 Sochi Winter Olympic Games and became an impetus for Russian doping in numerous other international athletic competitions.³ A German documentary aired shortly after Sochi that made sweeping claims that as many as 99% of Russian athletes at Sochi used, or were using, performance-enhancing drugs.⁴ While shocking, this projection is likely not as exaggerated as it seems. When asked in a 2017 interview how many Russian athletes doped at Sochi, Rodchenkov flatly responded “all of them.”⁵

Rodchenkov’s revelation shined an international spotlight on the impact of state-sponsored doping and necessitated a response from international bodies that govern doping such as the World Anti-Doping Agency and the Court of Arbitration for Sport.⁶ These international governing bodies’ efforts to counter the Russian doping conspiracy and to deter future doping conspiracies by solely sanctioning individual athletes have only been partially successful.⁷ Some argue this is because these efforts

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1. Rebecca R. Ruiz & Michael Schwartz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html> [perma.cc/W2A8-GYWB].
 2. Tina Maglakelidze, *Reading Between the Lines: An Intercultural Pragmanalysis of Icarus*, AM. U. CORE, <https://edspace.american.edu/atrium/portfolio-item/maglakelidze-tina-reading-between-the-lines/> [perma.cc/3X5G-B8JP]; ICARUS (Impact Partners Jan. 20, 2017).
 3. Ruiz & Schwartz, *supra* note 1.
 4. *Secret Doping Dossier: How Russia Produces Its Winners* (ARD television broadcast Dec. 3, 2014).
 5. ICARUS, *supra* note 2.
 6. For background on the Court of Arbitration for Sport and the World Anti-Doping Agency, see *General Information*, CT. ARB. FOR SPORT, <https://www.tas-cas.org/en/index.html> [https://perma.cc/QY3N-NTLQ]; *Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> [https://perma.cc/PZ76-95LH].
 7. Antoine Duval, *The Russian Doping Scandal at The Court of Arbitration for Sport: Lessons for the World Anti-Doping System*, 16 INT’L SPORTS L. J. 177, 196 (2017); Michael S. Straubel, *Doping*

have been too lenient in punishing Russia,⁸ while others claim that discipline has been ineffectively applied, allowing dopers to slip through the cracks of an international regulatory framework as members of the Russian Olympic Committee.⁹

In analyzing the impact of statewide doping conspiracies, this Note consists of three parts. Part I provides historical context for doping at the Olympics and past approaches to sanctioning Olympic dopers, details how Rodchenkov revealed the largest known Olympic doping scandal in history,¹⁰ discusses the rationales underlying doping control, and explores the implications sanctions have for current individual athletes. Part II examines current international bodies and the potential impact of recent controversial legislation to influence Olympic doping sanctions. Finally, Part III explores possible methods for international governing bodies to combat statewide doping conspiracies that are both formidable and fair, considering the possibility of blanket bans as well the feasibility of an

Due Process: A Critique of the Doping Control Process in International Sport, 106 DICK. L. REV. 523, 571 (2002).

8. Saroja Cuffey, *Passing the Baton: The Effect of the International Olympic Committee's Weak Anti-Doping Laws in Dealing with the 2016 Russian Olympic Team*, 42 BROOK. J. INT'L L. 665, 687 (2018).
9. Yana Pashaeva, *We Will ROC You: How Russia Benefited from Olympic Doping Ban*, SLATE (Aug. 3, 2021, 5:45 AM), <https://slate.com/technology/2021/08/russia-roc-olympics-ban.html> [<https://perma.cc/D64R-BVD8>].
10. Some speculate that international cycling competitions have had a more extensive history of doping than the Russian scandal of 2016. While cycling has been adversely affected by doping, the Russian scandal of 2016 is distinct from international cycling because the Russian doping scandal involved a broader underlying conspiracy. Further, following the 1998 "Festina scandal"—a scandal where numerous Tour de France cycling teams were exposed for doping—there began a "decline of the period of team-organized doping in professional cycling" which "ushered in the beginning of a new period, one that showed advances in the fight against doping in sport." V. Lentillon-Kaestner, *The Development of Doping Use in High-Level Cycling: From Team-Organized Doping to Advances in the Fight Against Doping*, 23 SCANDINAVIAN J. MED. & SCI. SPORTS 189, 189 (2011). In comparison, there has been little indication of advancement in anti-doping measures responding to statewide doping conspiracies.

international tribunal attaching criminal liability for doping violations.

While other recent articles also focus on the implications of the Russian doping scandal,¹¹ this Note advocates for the WADA and CAS to attempt novel solutions to address doping conspiracies. Namely, this Note proposes that WADA, the CAS, and other influential international anti-doping organizations should emulate the purposes set forth in the United States' Rodchenkov Anti-Doping Act of 2019 to implement an international scheme to hold non-athletes behind statewide doping conspiracies criminally liable, perhaps encouraging the creation of an international tribunal with the power to impose criminal penalties on doping conspirators. This Note argues that if alterations to the current disciplinary approach do not make penalties on doping conspirators at least as consequential as penalties on individual athletes, then the current disciplinary approach will fail to deter future doping conspiracies, leaving the door open for further erosion of the integrity of the Olympic Games.

I: HISTORY: DOPING AT THE OLYMPICS, AT SOCHI, AND INTERNATIONAL ANTI-DOPING RESPONSES

A. *Doping Regulation at the Olympic Games*

Artificial performance enhancement has infiltrated all Olympic games in the modern era, and likely all Olympic games before then.¹² In the 1960 Rome Olympic games, Danish cyclist Knud Jensen collapsed and died mid-race from what was initially deemed a cerebral hemorrhage brought on by heatstroke.¹³ After several of Jensen's teammates experienced similar collapses, a

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11. See, e.g., Duval, *supra* note 7; Cuffey, *supra* note 8; Anthony G. A. Shaw, *The 2012 and 2014 Olympic Doping Scandals: A Critical Analysis of the Effectiveness of Anti-Doping Mechanisms in Sports Law and the Necessity of Global Unity and Rehabilitation in Enforcing Anti-Doping Measures*, 10 BEIJING L. REV. 671 (2019).
 12. Early reports of using banned substances stretch back as far as the third century. B.C. Rudhard Klaus Muller, *History of Doping and Doping Control*, in HANDBOOK OF EXPERIMENTAL PHARMACOLOGY 1, 2 (Peter Hemmersbach & Detlef Thieme eds., 2010).
 13. THOMAS HUNT, DRUG GAMES: THE INTERNATIONAL OLYMPIC COMMITTEE AND THE POLITICS OF DOPING 6 (2011).

Danish cycling team trainer admitted to providing Jensen and his teammates with Roniacol, a drug designed to improve blood circulation.¹⁴ The use of Roniacol and stimulants was a recognized, even if illicit, practice among cyclists at the time.¹⁵

Prior to the 1960 Rome games, the International Olympic Committee¹⁶ had distanced itself from taking on a prominent role in doping regulation, citing the need to protect itself from the “organizational, financial, and legal consequences of such a role.”¹⁷ The Jensen tragedy changed that, spurring the IOC to shift its approach towards taking a more central role in propagating a unified anti-doping regime; the IOC created a list of prohibited substances applicable to all Olympic athletes, not just cyclists.¹⁸ While international sports federations such as the International Amateur Athletics Federation¹⁹ had compiled lists of prohibited substances in the past, there had never before been a uniform list of prohibited substances for all Olympic sports.²⁰ The IOC list became critical to doping regulation at the Olympics, and the IOC continued to propagate the list for four decades before ceding the role to WADA in 2004.²¹

14. *Id.*

15. *Id.*

16. The “guardian” of the Olympic Games and leader of the Olympic Movement, the International Olympic Committee collaborates with athletes and shareholders, as well as public and private authorities such as the United Nations and other international organizations. *Overview*, INT’L OLYMPIC COMM., <https://olympics.com/ioc/overview> [<https://perma.cc/5PJV-8HJC>].

17. HUNT, *supra* note 13, at 7.

18. Alan R. Verne, *Doping, Ethics, and the Sport Physician*, 12 CURRENT SPORTS MED. REP. 283, 283 (2013).

19. The IAAF is an organization responsible for governing international track and field competition and was one of the earliest international sporting federations to have an anti-doping framework in place. The IAAF’s first list of prohibited substances was created in 1928. *Id.*

20. Albert D. Fraser, *Doping Control from A Global and National Perspective*, 26 THER DRUG MONIT 171, 171 (2004).

21. *The Prohibited List*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-prohibited-list> [<https://perma.cc/YL8S-TU6Q>].

Gradually, doping became of greater concern to the IOC, and at first, it did so in unusual ways. At the 1968 Winter Olympics in Grenoble, Swedish pentathlete Hans-Gunnar Liljenwall became the first—and only, as of those games—Olympian to be retroactively stripped of his medals for doping.²² Liljenwall’s violation? Drinking two beers before the shooting portion of the pentathlon to “calm his nerves.”²³

In the decades between the Liljenwall case and the creation of WADA in 1999,²⁴ high profile doping cases began to garner greater public attention as some of the most successful Olympic athletes were exposed for doping.²⁵ At the 1976 Olympic Games in Montreal, IOC testing produced some of the first positive tests for anabolic steroids.²⁶ Although the 1980 Olympics in Moscow—somewhat dubiously—did not have any positive tests for anabolic steroids, the late 1980s and 1990s introduced a booming anabolic era derived from the increased usage of anabolics by Olympic athletes, the improved abilities of international anti-doping organizations to detect steroid usage, or a combination of the two.²⁷ Although WADA took on a preeminent role in harmonizing countries’ anti-doping policies in 1999, Olympic doping still occurs regularly in the 21st century through new techniques.²⁸

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22. DANIEL M. ROSEN, *DOPE: A HISTORY OF PERFORMANCE ENHANCEMENT FROM THE NINETEENTH CENTURY TO TODAY* 37 (2008).
 23. *Id.*
 24. *Who We Are*, *supra* note 6.
 25. See Claudia L. Reardon & Shane Creado, *Drug Abuse in Athletes*, 5 *SUBSTANCE ABUSE AND REHABILITATION* 95, 97 (2014).
 26. Kenneth D. Fitch, *Androgenic-anabolic Steroids and the Olympic Games*, 10 *ASIAN J. OF ANDROLOGY* 384, 386 (2008).
 27. Jeffrey A. Black, *The Anabolic Steroids Control Act of 1990: A Need for Change*, 97 *DICK. L. REV.* 131, 132 (1992); Aleksei Alekandrov et al., *The 1980 Olympics are the ‘Cleanest’ in History. Athletes Recall How Moscow Cheated the System*, *RADIO FREE EU R.* (July 22, 2020, 1:55 PM), <https://www.rferl.org/a/the-1980-moscow-olympics-rank-as-the-cleanest-in-history-athletes-recall-how-the-u-s-s-r-cheated-the-system-/30741567.html> [https://perma.cc/E5TZ-QAKW].
 28. Doping since 2000 is no longer notable for the brazenness of violators, but rather for the elaborate and intricate methods violators use in order to keep taking substances while avoiding positive tests. David Ewing Duncan, *So Long, Lance. Next, 21st-*

B. How Rodchenkov Rigged Sochi

Under Rodchenkov's guidance, Operation Sochi Resultat used elaborate procedures to foil both in-competition testing and out-of-competition testing.²⁹ To improve athletic performance in-competition, in the days and hours before Olympic events, Rodchenkov and his associates provided athletes with a specialized "cocktail" containing alcohol and three kinds of performance-enhancing drugs.³⁰ Athletes were instructed to swish the cocktail around their mouths to absorb the drugs under their tongues without actually allowing the drugs to enter their digestive systems, thereby gaining short-term performance-enhancing benefits while still preventing the drugs from being easily detected.³¹

Rodchenkov and his associates designed an even more elaborate procedure to hamper out-of-competition testing. At the Russian Anti-Doping Agency lab, agents from the Federal Security Service of the Russian Federation swapped out athletes' tainted urine samples through a tiny "mousehole" drilled into the wall of the laboratory.³² Then, through a painstaking process, laboratory workers cracked the sample lid, removed the tainted sample, swapped in a clean sample in the place of the tainted one, and attached a new lid.³³ The sample containers themselves were

Century Doping, N.Y. TIMES (Jan. 19, 2013), <https://www.nytimes.com/2013/01/20/sunday-review/so-long-lance-here-comes-21st-century-doping.html> ("Today's dopers . . . [administer] microdoses of enhancers that quickly clear the body . . . [and use] natural versions of growth hormone and erythropoietin that cannot be easily differentiated from an athlete's own onboard supplies . . . [avoid] testing when possible, and tim[e] the use of banned substances to appear clean.") [<https://perma.cc/6ZHH-WGUT>].

29. *The Russian Doping Scandal: Protecting Whistleblowers and Combating Fraud in Sports*, 115th Cong. 3 (2018) (statement of Jim Walden, Attorney for Dr. Grigory Rodchenkov).
30. *Id.*
31. *Id.*
32. Rebecca R. Ruiz et al., *Russian Doctor Explains How He Helped Beat Doping Tests at the Sochi Olympics*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/interactive/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?mtrref> [<https://perma.cc/7249-GDLG>].
33. Rachel Axon, *Report: Russian Doping in Sochi Involved Swapping Out Urine Samples*, USA TODAY (May 12, 2016, 2:18 PM),

designed to break upon removal of their lids, theoretically making tampering an impossibility, but the FSB engineered a device that only broke sample lids and replaced them with new ones once the swap was complete.³⁴ After news of the scandal broke in 2015, WADA officials went to Rodchenkov's Moscow laboratory to reassess the Russian Olympic team's B-samples.³⁵ Every single sample had evidence of tampering.³⁶

By most measures, Operation Sochi Resultat was a success for the Russian Olympic Team. At Sochi, Russia dominated the medal count, winning twice as many medals as it had at the 2010 Vancouver Winter Olympics.³⁷ Russian athletes topped the podium with virtually no failed drug tests.³⁸ Despite speculation from some sources in the international media,³⁹ the scope of cheating in Russia's Olympic program mostly remained under wraps.⁴⁰ Rodchenkov's revelation changed everything.

<https://www.usatoday.com/story/sports/olympics/2016/05/12/report-russian-doping-sochi-swapping-out-urine-samples/84283054/> [<https://perma.cc/8WAY-EESG>].

34. 115th Cong., *supra* note 29, at 4; Rebecca Ruiz, *Mystery in Sochi Doping Case Lies with Tamper-Proof Bottle*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/sports/russia-doping-bottles-olympics-2014.html> [<https://perma.cc/ZY6F-YHZY>].
35. "B-sample" refers to an athlete's second urine sample collected whenever the athlete is tested for performance-enhancing drugs. To sanction an athlete for a doping violation, both samples must test positive, so by switching in clean samples for all of its athletes' B-samples, Russia eliminated the possibility of its athletes experiencing the two-sample failure necessary to be banned from competition. 115th Cong., *supra* note 29, at 3-4.
36. ICARUS, *supra* note 2.
37. World Anti-Doping Agency v. Russ. Anti-Doping Agency, Ct. Arb. Sport, Case No. 2020/0/6689, ¶789 (Dec. 17, 2020); *Medal Tracker-Overall*, ESPN, <https://www.espn.com/olympics/winter/2014/medals> [<https://perma.cc/DGU3-HZ4K>].
38. John Walters, *How Russia Got Away With Doping Until It Didn't*, NEWSWEEK (July 21, 2016, 12:13 PM), <https://www.newsweek.com/how-russia-got-away-doping-until-it-didnt-482709> [<https://perma.cc/4AJ8-Q9ZL>].
39. *E.g.*, *Secret Doping Dossier: How Russia Produces Its Winners*, *supra* note 4.
40. Walters, *supra* note 38.

Before he blew the whistle on the Russian doping operation, Rodchenkov was working with American filmmaker Bryan Fogel on a documentary about the ease of thwarting doping tests.⁴¹ Rodchenkov designed a doping program to boost the athletic performance of Fogel, an avid amateur cyclist.⁴² Then, Rodchenkov would subject Fogel to doping tests equivalent to those administered to professional cyclists, which Fogel would easily pass, allowing him to compete at a marquis amateur cycling event as a “clean” athlete.⁴³ After the race, Fogel planned to use his personal experience to expose the flaws of international anti-doping safeguards.⁴⁴

In November 2015, WADA issued a report that tugged at some of the loose threads in Russia’s blanket of secrecy over its anti-doping program, and threatened to implicate Rodchenkov as head of the Russian Anti-Doping Agency laboratory.⁴⁵ After heading to the U.S. under the guise of working with Fogel, Rodchenkov spoke to *New York Times* reporters in May of 2016.⁴⁶ Within days, the *Times* published an exposé that sent shock waves through anti-doping organizations and international sporting federations.⁴⁷ Rodchenkov became a pariah in his home country.⁴⁸ Two of Rodchenkov’s former colleagues, Dr. Vyacheslav Sinev and Dr. Nikita Kamaev, both of whom had at one point headed the Russian Anti-Doping Laboratory and had been integral to rigging drug tests at Sochi, died within the span of eleven days, allegedly from “heart attacks.”⁴⁹ Although both were relatively young and in good health, no autopsies were

41. ICARUS, *supra* note 2.

42. *Id.*

43. *Id.*

44. *See id.*

45. Sophie Gilbert, *Icarus: A Doping House of Cards Tumbles Down*, THE ATLANTIC (Aug. 6, 2017), <https://www.theatlantic.com/entertainment/archive/2017/08/icarus-review-netflix/535962/> [<https://perma.cc/7CM4-EQQS>].

46. GRIGORY RODCHENKOV, THE RODCHENKOV AFFAIR: HOW I BROUGHT DOWN PUTIN’S SECRET DOPING EMPIRE 248-249 (2020); Ruiz & Schwirtz, *supra* note 1.

47. *See* Ruiz & Schwirtz, *supra* note 1.

48. *See* RODCHENKOV, *supra* note 46 at xi-xii.

49. *Id.* at xii-xiii.

conducted.⁵⁰ Rodchenkov, fearing for his life, never returned home, and is currently in a U.S. witness protection program in an undisclosed location.⁵¹ His family remains in Russia.⁵²

C. *Rationales Behind Doping Regulation*

In debates concerning doping, several core arguments resurface. Arguments favoring regulating doping include: ensuring fair competition, protecting the health of athletes, and preventing harm to the public—in other words preventing fans invested in the success of a team or an athlete from devaluing the sport due to concerns about doping.⁵³

Fair competition is the most common justification for regulating doping. Traditionally—although not always in practice—the Olympic Games have been regarded as a level playing field where athletes may distinguish themselves from other competitors fairly.⁵⁴ This concept of a “level playing field” incentivizes the regulation of doping; doping damages fair competition by allowing some athletes to gain advantages beyond what they can attain through their natural talent and hard work.⁵⁵ The prevailing logic is that such a practice is intuitively unfair and damaging to the integrity of sports.⁵⁶ Further, at the

50. *Id.*

51. *Id.* at ix.

52. Julia Ioffe, *Russia's Retaliation Against a Doping Whistleblower*, THE ATLANTIC (Jan. 24, 2018), <https://www.theatlantic.com/international/archive/2018/01/russia-doping-rodchenkov/551183/> [<https://perma.cc/YDX9-J6HQ>].

53. Jeff Cisyk, *Why It Is Necessary to Regulate Doping in Sports*, VOX (July 15, 2015), <https://voxeu.org/article/why-it-necessary-regulate-doping-sports> [<https://perma.cc/YVK4-UM3U>].

54. *See generally*, Loek Groot, *An Olympic Level Playing Field? The Contest for Olympic Success as a Public Good*, 55 J. ECON. & ECONOMETRICS 25 (2012) (discussing the fair ideals of the Olympics).

55. Eugen Dimant & Christian Deutscher, *The Economics of Corruption in Sports: The Special Case of Doping 3* (Harv. L. Sch. Edmond. J. Safra Working Paper, Paper No. 55, 2015), https://www.researchgate.net/publication/317823523_The_Economics_of_Corruption_in_Sports_The_Special_Case_of_Doping [<https://perma.cc/BX3Y-FB6X>].

56. *Id.*

Olympic games, athletes with unfair advantages may siphon off medals from clean competitors, an issue that international anti-doping organizations are acutely focused on preventing.⁵⁷

A second rationale for doping regulation is to protect the health of athletes.⁵⁸ Common methods of doping include the use of human growth hormone, erythropoietin or “blood doping,” anabolic steroid usage, and gene doping. Using any of these methods can have both immediate and lingering side effects for athletes.⁵⁹ Human growth hormone users may experience short term symptoms ranging from hyperglycemia to carpal tunnel syndrome, while more chronic symptoms may include ongoing fatigue and muscle pain.⁶⁰ Long-distance athletes such as cyclists and athletes who engage in erythropoietin doping to improve the oxygen-carrying capacity in their blood create a risk of allergic reactions, blood clots, strokes, and cancer.⁶¹ Gene doping and anabolic steroids also have potential side effects.⁶² Although it is still early to determine the adverse side effects gene doping may have for humans, some speculate that it is poised to become “the future of doping,” and preliminary trials show an increased morbidity rate.⁶³ Regardless of the method of doping, athletes

57. Karen Krouse, *Clean Athletes, and Olympic Glory Lost in the Doping Era*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/01/sports/olympics/shirley-babashoff-swimming-montreal-olympics-medals.html> [<https://perma.cc/5L3Z-R9MT>].

58. Cisyk, *supra* note 53.

59. Interestingly, Rodchenkov remains a staunch critic of the concept that doping is harmful to athletes’ health. Rodchenkov writes, “[t]raining at the Olympic level puts significant strain on the body. Steroids reduce fatigue and trauma and can help muscles recover more quickly. I am not aware of any studies concluding that these substances are harmful in moderate dosages, and I know plenty of athletes who used them for years and have lived long and healthy lives.” RODCHENKOV, *supra* note 46, at 86.

60. V. Birzniece, *Doping in Sport: Effects, Harms, and Misconceptions*, 45 INT’L MED. J. 239, 242 (2015).

61. *Id.* at 243.

62. *Id.* at 245.

63. *Id.* at 244; Cierra Newman, *The Future of Doping: What Is Next?*, MEDIUM (Feb. 18, 2020) <https://medium.com/lancearmstr ongdeceit/the-future-of-doping-what-is-next-5d2fe42f986>

who participate in a doping program for an extended period of time may suffer debilitating chronic consequences.⁶⁴

A third rationale focuses on an economic incentive to regulate doping. According to Professor Christian Deutscher and research fellow Eugen Dimant of Bielefeld University, doping in sports “distorts” fair competition by creating negative externalities “not only on the individual level (i.e., lasting health damages) but also frictions on the aggregate level, for example the loss of media interest, and erodes the principle of sports.”⁶⁵ Given athletes’ status in society as “role models,” the harm of doping may lead to fans distrusting and no longer supporting the institutions that enabled athletes to dope.⁶⁶

In a similar vein to Deutscher and Dimant’s argument, although not in the form of condemnation, University of Chicago law professor Richard Posner argues that the regulation of doping is a question of consumer preference, which is ultimately the driving force that causes team owners, leagues, and athletes to take action against doping.⁶⁷ Posner argues that in cases where consumer preferences favor doping and “spectacle” over sport, fans’ interests may dictate athletic organizations’ responses and even prompt them to encourage doping.⁶⁸ Others speculate that since national audiences want to see the best performances from athletes, as athletes approach the limitations of what can be attained by the human body naturally, doping makes sense

[<https://perma.cc/7EEW-4GQZ>]; D.J. Wells, *Gene Doping: The Hype and the Reality*, 154 BRIT. J. PHARMACOLOGY 623, 627 (2008).

64. *Effects of Performance-Enhancing Drugs*, U.S. ANTI-DOPING AGENCY, <https://www.usada.org/athletes/substances/effects-of-performance-enhancing-drugs/> [<https://perma.cc/2MQA-8L34>].
65. Dimant & Deutscher, *supra* note 55, at 3.
66. *Id.* at 13.
67. Posner writes, “So suppose it turns out that the ‘crowd’ actually prefers spectacle to sport—that people want to see bionic football players collide with each other, or genetically-altered runners race at 50 miles per hour, or basketball players nine feet tall as a result of doping with human growth hormone? So what (apart from health concerns, discussed below)?” Richard A. Posner, *In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping*, 57 DUKE L. J. 1725, 1738-1739 (2008).
68. *Id.* at 1737, 1739 (“[I]f the gains from doping are great enough and the likelihood of detection is small enough, it may be rational to dope.”).

commercially.⁶⁹ Traditionally though, Olympic organizers and fans alike still consider doping damaging even as the Olympics become increasingly commercialized, in part because doping violates “the spirit of the sport” foundational to the Olympics.⁷⁰

D. Individual Athletes and Doping Repercussions

On an individual level, penalties on athletes who commit doping violations are often steep. Since 2019, the landscape of international Olympic competition continues to shift due to performance-enhancing drug bans, recreational drug bans, and even “whereabouts failures” when an athlete is not in the location where they have claimed they will be available for randomized unannounced testing.⁷¹ As seen in the pivotal 2005 case *U.S. Anti-Doping Agency v. Montgomery*, it is unnecessary for athletes to actually test positive for a prohibited substance for them to be sanctioned—there is no bright-line rule for the imposition of a ban based on a positive test.⁷² Additionally, athletes who are

69. *Ethics Guide: For Legalisation*, BBC, <https://www.bbc.co.uk/ethics/sport/debate/for.shtml> [<https://perma.cc/476D-E2ML>].

70. Richard Pound, *The Olympics and the Paradox of Commercialization*, HARV. BUS. REV. (Aug. 6, 2012), <https://hbr.org/2012/08/the-olympics-and-the-paradox-o> [<https://perma.cc/82JJ-8LWT>].

71. Christian Coleman’s case is an example of stringent repercussions for whereabouts failures. Coleman, a United States sprinter and the world record holder in the indoor 60-meter dash, missed three doping tests at the location where, months in advance, he claimed he would be present. Coleman’s missing three spontaneous tests led the Athletics Integrity Unit to ban him from competition for two years even though he never failed a drug test. On appeal, the CAS reduced Coleman’s ban by six months, which still prevented Coleman from competing at the Tokyo Olympics in 2021. See *Christian Coleman: World 100m Champion Has Two-Year Ban Reduced by Six Months*, BBC (Apr. 16, 2021), <https://www.bbc.com/sport/athletics/56769937> [<https://perma.cc/3PJ9-DPGM>].

72. Tim Montgomery was an American track and field sprinter and one-time world record holder who, despite never testing positive for prohibited substances, received a four-year ban from the CAS for his connection to a doping conspiracy organized by the Bay Area Laboratory Cooperative. A raid of BALCO under a search warrant produced hundreds of documents, samples of banned substances, and government agents took statements by officials such as the organization’s vice president. The evidence was enough to incriminate Montgomery and impose a substantial ban from future

caught doping and disciplined likely make up only a small fraction of those who are actually taking performance-enhancing substances, and attempts to detect dopers are often unsuccessful.⁷³

In 2013, an anonymous *New York Times* study asked track and field athletes who competed at the 2011 IAAF World Championships⁷⁴ and the 2011 Pan-Arab games⁷⁵ whether or not the athletes had doped in the past year.⁷⁶ Based on the number of admissions in the study, researchers concluded that at least 29 percent of the competitors who competed used performance-enhancing substances within the last year, although the percentage was likely even higher.⁷⁷ WADA's doping tests of these athletes revealed only a two percent positivity rate.⁷⁸ This statistical difference reflects the reality that current anti-doping protocols cannot adequately address the majority of doping cases, let alone doping's underlying causes.

Despite the low rate of detection, the consequences of doping carry significant implications for Olympic athletes, frequently preventing them from competing during the prime of their careers, costing them sponsorships, and forever marring their

competition. U.S. Anti-Doping Agency v. Montgomery, Trib. Arb. Sport, CAS 2004/O/645 ¶¶ 1, 3, 5 (2005) (Campbell & Leaver, Arb.), https://www.usada.org/wp-content/uploads/CAS-Decision_Tim-Montgomery_Dec-20051.pdf [<https://perma.cc/HAH4-R3TS>].

73. Jon Hamilton, *Bid to Catch Olympic Dopers May Fail*, NPR (July 10, 2008, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=92426973> [<https://perma.cc/REB2-WB2D>].

74. Rolf Ulrich et al., *Doping in Two Elite Athletics Competitions Assessed by Randomized-Response Surveys*, 48 SPORTS MED. 211, 212 (2018), <https://doi.org/10.1007/s40279-017-0765-4> [<https://perma.cc/2QZP-JLS6>].

75. *Id.*

76. Tim Rohan, *Anti-Doping Agency Delays Publication of Research*, N.Y. TIMES (Aug. 22, 2013), https://www.nytimes.com/2013/08/23/sports/research-finds-wide-doping-study-withheld.html?hp&_r=0 [<https://perma.cc/F5EE-8FND>].

77. *Id.*

78. *Id.*

legacies.⁷⁹ Some athletes, such as gymnasts, often have short-lived careers to begin with, making a doping violation career-ending.⁸⁰ While the cases of numerous high-profile professional athletes and Olympians—such as Lance Armstrong,⁸¹ Ben Johnson,⁸² and Marion Jones⁸³—have become synonymous with the idea of justice being administered to cheaters and the anti-doping framework “working,” oftentimes the stories of athletes facing sanctions are more mundane.⁸⁴ The American distance runner Shelby Houlihan, for example, failed a drug test and is facing a ban of several years, which ultimately barred her from the

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79. See *The Consequences of Doping*, DRUG FREE SPORT N.Z., <https://drugfreesport.org.nz/substances/the-consequences-of-doping/> [https://perma.cc/Z82R-5ZWG].
80. See Alex Gladu, *Female Gymnasts Don't Have the Luxury of Aging*, BUSTLE (July 19, 2016), <https://www.bustle.com/articles/172254-what-age-do-gymnasts-retire-its-a-lot-younger-than-you-might-think> [https://perma.cc/95MH-Q2U4].
81. See generally JULIET MACUR, *CYCLE OF LIES: THE DOWNFALL OF LANCE ARMSTRONG* (2014) (discussing the doping-related downfall of Lance Armstrong).
82. Ben Johnson was a Canadian Olympic gold medalist and world record holder – for all of 48 hours. Johnson tested positive for stanolozol shortly after his record-setting victory at the 1988 Seoul Summer Olympics. He stripped of his medals and given a lifetime ban from international track and field competition by the IAAF. Because of the controversy, the 1988 Seoul final was later dubbed “the dirtiest race in history.” HUNT, *supra* note 13, at 62; RICHARD MOORE, *THE DIRTIEST RACE IN HISTORY: BEN JOHNSON, CARL LEWIS AND THE 1988 OLYMPIC 100M FINAL* 117, 297 (2012).
83. Marion Jones was one of the most decorated American track and field athletes of all time. She won five medals (three gold and two bronze) at the 2000 Summer Olympics in Sydney, all of which were revoked by the IOC. In addition to being banned from the Olympics for life, Jones received one of the harshest punishments for doping of any athlete in the modern era—she was sentenced to six months in prison for lying to federal investigators. *IOC Strips Jones of All 5 Olympic Medals*, NBC (Dec. 12, 2007, 9:00 AM), <https://web.archive.org/web/20080218091719/http://nbcsports.msnbc.com/id/22170098/> [https://perma.cc/YFD3-4WWT].
84. Warren Cornwall, *Niche Sports and the Doping You Don't Hear About*, OUTSIDE (Nov. 20, 2015), <https://www.outsideonline.com/health/training-performance/niche-sports-and-doping-you-dont-hear-about/> [https://perma.cc/5MST-LQM7].

Olympic trials in 2021.⁸⁵ She argues that her positive drug test is attributable to a tainted burrito, although at her hearing expert witnesses cast doubt on the likelihood of the burrito she received from a food truck being the culprit.⁸⁶

Occasionally, innocent athletes may also risk bearing the brunt of sanctions due to far-fetched accusations and can only clear their names through elaborate, time-consuming, and stressful processes.⁸⁷ For example, the Olympic sprinter Gil Roberts had to go through extensive steps at his hearing before the United States Anti-Doping Agency to clear his name after testing positive for a banned substance.⁸⁸ Over the course of an athletic career of nearly a decade, Roberts passed each of the fifteen drug tests he had been administered.⁸⁹ Then, in 2017, Roberts tested positive for a trace amount of probenecid, a substance on WADA's prohibited list.⁹⁰ Probenecid is not considered a performance-enhancing drug but rather a "masking agent" that aids in preventing the detection of performance-

85. At the hearing, expert witnesses noted that the banned substances in Houlihan's sample were not attributable to the type of pork typically found in a burrito because such substances could only potentially come from uncastrated boar meat, atypical in the U.S. food supply chain. Expert witnesses also noted that the concentrations of banned substances in Houlihan's sample were too disproportionate to be attributable to the ingestion of boar meat. *World Athletics v. Shelby Houlihan*, Ct. Arb. Sport, Case No. 2021/O/7977, ¶¶ 79, 109 (2021).

86. *Id.* at ¶¶ 102-4.

87. See Andy Brown, *Anti-Doping's Biggest Secret: Not All Athletes Are Guilty*, SPORTS INTEGRITY INITIATIVE (July 19, 2021), <https://www.sportsintegrityinitiative.com/anti-dopings-biggest-secret-not-all-athletes-are-guilty/> [<https://perma.cc/7CAQ-K9BX>].

88. See Final Award, *U.S. Anti-Doping Agency v. Roberts*, No. 01-17-0003-4443, Am. Arb. Ass'n 25 (2017) (Thomas, Arb.).

89. *Id.* at 1.

90. *Id.*

enhancing drugs.⁹¹ A positive test for probenecid triggers a baseline penalty of a two-year ban from competition.⁹²

Appearing before the United States Anti-Doping Agency, Roberts was required to prove that his ingestion was not the product of doping but rather the result of his girlfriend, who took a medication containing probenecid just hours before officials came to Roberts' door to administer the test.⁹³ Roberts' defense entailed using expert witnesses and giving an extremely precise documentation of the frequency, time, and duration of his passionate encounter with his partner, as well as the revealing a significant, and arguably intrusive, portion of her medical history.⁹⁴

Notably, the current international framework for sanctioning athletes who use performance-enhancing drugs and athletes who use non-performance-enhancing drugs features little distinction between the two very different types of violations.⁹⁵ Until 2021, recreational drug violations were still grounds for WADA's default two-year recommended ban.⁹⁶ WADA has since reduced the ban to a 1-3 month period to prioritize catching athletes who use banned substances to cheat.⁹⁷ Detection of an athlete's use of a recreational drug may not trigger as significant a ban as would

91. *Id.* at 10, 22 (explaining that to succeed in masking it must be taken in large doses on the odor of two to five grams). *See also The Prohibited List*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-prohibited-list> [<https://perma.cc/3VAQ-UWS4>].

92. *United States Anti-Doping Agency v. Roberts*, No. 01-17-0003-4443, Am. Arb. Ass'n 18 (2017) (Thomas, Arb.).

93. *Id.* at 4 (discussing the girlfriend's consumption of probenecid and subsequent kissing of her boyfriend, Roberts).

94. *See id.* at 2-6, 20-21.

95. Anahad O'Connor, *Can Marijuana Make You a Better Athlete?*, N.Y. TIMES, <https://www.nytimes.com/2021/07/11/well/move/marijuana-olympics-ban.html> (July 31, 2021) [<https://perma.cc/XQ U5-9P6C>].

96. *WADA Reduces Penalties for Recreational Drug Use*, CAN. BROAD. CORP. (Oct. 2, 2020), <https://www.cbc.ca/sports/olympics/athletes-union-welcomes-wadas-revised-rec-drug-list-1.5747656> [<https://perma.cc/6L3J-DQKD>].

97. *Id.*

detection of a performance-enhancing drug, but the repercussions for the individual athlete may nevertheless be steep.⁹⁸

Sha'Carri Richardson⁹⁹ is an example of one such athlete. In June of 2021, Richardson won the U.S. Olympic Trials in the 100-meter dash and was considered a medal contender on the world stage.¹⁰⁰ Within days of her victory, Richardson tested positive for cannabis she admitted to using to cope with the death of her mother.¹⁰¹ Cannabis is enumerated on WADA's list of banned substances.¹⁰² Richardson was given a thirty-day ban which, ultimately, prevented her from competing in the Tokyo Olympics in 2021.¹⁰³ Her case has brought WADA's sanctions on non-performance-enhancing drugs into focus and led to public pressure for WADA to reassess its ban on cannabis and other non-performance-enhancing drugs; however, WADA's current ban on cannabis will remain intact until at least the end of 2022.¹⁰⁴

E. State Conspiracies and Doping Repercussions

Even the possibility of an athlete committing a doping violation or failing to adhere to testing protocols may be grounds for discipline.¹⁰⁵ In contrast, the recent Russian doping scandal shows that sanctions are imposed neither swiftly nor severely,

98. O'Connor, *supra* note 95.

99. *Id.*

100. Kevin Draper & Juliet Macur, *Sha'Carri Richardson, a Track Sensation, Tests Positive for Marijuana*, N.Y. TIMES, <https://www.nytimes.com/2021/07/01/sports/olympics/shacarri-richardson-suspended-marijuana.html> (July 6, 2021) [<https://perma.cc/W4V6-JN8K>].

101. *Id.*

102. *The Prohibited List: Cannabinoids*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/prohibited-list> [<https://perma.cc/FL2J-EJE9>].

103. Draper & Macur, *supra* note 100.

104. Bill Chappell, *Anti-Doping Group Will Review Cannabis Ban After Sha'Carri Richardson's Suspension*, NPR (Sept. 15, 2021, 8:12 AM), <https://www.npr.org/2021/09/15/1037286650/wad-a-world-anti-doping-review-ban-cannabis-shacarri-richardson> [<https://perma.cc/6LZJ-JS3V>].

105. *Christian Coleman: World 100m Champion Has Two-Year Ban Reduced by Six Months*, *supra* note 71.

even when an entire state upholds a doping conspiracy.¹⁰⁶ Indeed, in response to the Russian doping scandal, the Court of Arbitration for Sport reduced its initial penalty on the Russian Olympic program from a four-year ban to a two-year ban and, within that time, allowed Russian athletes to compete at the Tokyo Olympics in 2021 as the “Russian Olympic Committee.”¹⁰⁷ The CAS claims that despite the reduction in penalties, its two-year ban “should not be read as any validation of the conduct of Russian Anti-Doping Agency or the Russian authorities.”¹⁰⁸ Even so, it has offered little justification for or explanation of the reduction.¹⁰⁹ Further, even the highest-ranked officials from Russia still find loopholes to avoid any real consequences. Russian President Vladimir Putin, considered an “official” and therefore banned from attending Olympic competition by the CAS’s two-year ban, still attended the opening ceremony of the 2022 Beijing Winter Olympics as an honorary guest of Chinese President Xi Jinping.¹¹⁰

Sanctioning a country like Russia for a doping conspiracy is uncharted territory for international sports federations whose experiences imposing sanctions occur almost exclusively on individual bases.¹¹¹ Several substantial difficulties arise, including issues regarding time required to investigate, the scope of the investigation, and the difficulties of prosecuting violations based

106. *See generally* World Anti-Doping Agency v. Russ. Anti-Doping Agency, Ct. Arb. Sport, Case No. 2020/0/6689 (Dec. 17, 2020) (exemplifying the severity of sanctions for state-backed doping conspiracies).

107. *Id.* at ¶ 753.

108. Tariq Panja, *Russia’s Doping Ban Is Cut to a Largely Symbolic Two Years*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/sports/olympics/russia-doping-wada.html> [<https://perma.cc/5F6Z-RDEW>].

109. *Id.*

110. Andrew Keh, *Why Are Russians in Beijing if Russia Is Banned for Doping?*, N.Y. TIMES (Feb. 11, 2022), <https://www.nytimes.com/article/russian-doping-olympics-ban.html> [<https://perma.cc/H73J-PGRQ>].

111. Rachel Axon, *Sports Federations Face Obstacles in Sanctioning Russian Athletes*, USA TODAY, <https://www.usatoday.com/story/sports/olympics/2016/12/27/mclaren-russian-doping-sanctions/95874000/> (Dec. 28, 2016, 1:25 AM), [<https://perma.cc/XW3Z-PE6Y>].

on non-analytical findings.¹¹² While prosecuting an individual athlete is usually a relatively straightforward procedure—when an athlete tests positive they are often immediately banned from competition and can have an expedited hearing within months¹¹³—a statewide conspiracy composed of thousands of such violations can understandably take years to pursue.¹¹⁴ Further, sanctioning each athlete who commits a violation still fails to take into account the numerous state officials who orchestrated the conspiracy in the first place.¹¹⁵

In addition, a primary reason that regulating doping is so difficult is that under the current international anti-doping framework, countries themselves are largely responsible for regulating doping violations internally.¹¹⁶ While numerous countries have adopted WADA's standards, adopting standards alone is meaningless if countries deliberately decline to enforce them. In short, WADA's objectives rely heavily on countries abiding by its standards domestically and not just making an empty pledge to abide by them. At Sochi in 2014, for example, where Grigory Rodchenkov was Russia's ultimate authority for testing according to WADA policies, mere adoption did not entail compliance.

Though the revelation of the doping scandal at Sochi impacted public perception of doping scandals and has spurred

112. *Id.*

113. United States Anti-Doping Agency v. Roberts, No. 01-17-0003-4443, Am. Arb. Ass'n 2 (2017) (Thomas, Arb.).

114. See *WADA Statement on Court of Arbitration Decision to Declare Russian Anti-Doping Agency as Non-Compliant*, WORLD ANTI-DOPING AGENCY (Dec. 17, 2020), <https://www.wada-ama.org/en/media/news/2020-12/wada-statement-on-court-of-arbitration-decision-to-declare-russian-anti-doping> [<https://perma.cc/U2HJ-HNJD>].

115. Sarah Teetzel, *Sharing the Blame: Complicity, Conspiracy, and Collective Responsibility in Sport*, 36 Acta UNIVERSITATIS PALACKIANAE OLOMUCENSIS GYMNICA [ACTA UNIV. PALACKI. OLOMUC., GYMN.] 85, 89 (2006).

116. *WADA President Calls on Governments to Implement Sanction Framework for UNESCO's International Convention Against Doping in Sport*, WORLD ANTI-DOPING AGENCY (Oct. 26, 2021), <https://www.wada-ama.org/en/news/wada-president-calls-governments-implement-sanction-framework-unescos-international-convention> [<https://perma.cc/RW87-JWB9>].

calls for a stronger international response, the lack of consequences for state officials continues to plague international competition today. For example, the 2022 Beijing Olympics will likely be remembered for a new doping scandal: the controversial CAS decision to allow Russian figure skater Kamila Valieva to compete despite failing a drug test revealing a banned heart medication with performance-enhancing benefits.¹¹⁷ In some ways, the CAS decision should be lauded for its efforts to ensure that the brunt of the punishment does not fall on Valieva, a fifteen-year-old who undoubtedly did not devise her own doping regimen.¹¹⁸ Still, although the CAS condemned the Stockholm laboratory that processed Valieva's test late and revealed the results during the Olympics, it remains unclear who, other than Valieva, and perhaps the rest of the Russian figure skating team, will face legal repercussions.¹¹⁹ Eight years after Sochi, the Valieva scandal stokes the flames of the same burning issue: how should participants in doping conspiracies who enable athletes be held responsible?

While no known international doping incident is comparable in scale to the Russian doping scandal of 2016, the scandal is reminiscent of state-sponsored doping that came to light in East Germany in the 1980s.¹²⁰ According to Professor Stephen Adair of the University of Technology Sydney, the fact that the East German doping scandal "involved state-sponsored doping . . . [and] pressure on athletes to conform to a doping regime" as well

117. *Trimetazidine Olympic Case Revives Memories of Grigory Rodchenkov and ROC Scandal*, NBC, <https://www.nbcnewyork.com/news/sports/beijing-winter-olympics/trimetazidine-olympic-case-revives-memories-of-grigory-rodchenkov-and-roc-scandal/3552408/> (Feb. 14, 2022, 12:34 PM) [<https://perma.cc/S4M-GR4Q>].

118. Tariq Panja, *'None of This Is the Fault of the Athlete,' CAS Panel Writes in Valieva Report*, N.Y. TIMES (Feb. 17, 2022), <https://www.nytimes.com/2022/02/17/sports/olympics/kamila-valieva-competes-figure-skating-russia-doping.html> [<https://perma.cc/2HJ3-U5XK>].

119. *Id.*

120. Peter Theodosiou, *Russian Doping Scandal 'Equivalent to East Germany in the 1980s'*, SPECIAL BROAD. SERV. NEWS, <https://www.sbs.com.au/news/russian-doping-scandal-equivalent-to-east-germany-in-the-1980s> (July 25, 2016, 8:43 PM) [<https://perma.cc/T4FF-UK7M>].

as the fact that the initial whistleblower “faced extortion from authorities” for “unpatriotic” behavior illustrate the parallels between East Germany’s doping machine and the more recent Russian doping machine.¹²¹ The East German doping scandal is notable to an analysis of the Russian doping scandal for several other reasons.

The first of these reasons is that athletes who participated or were coerced into doping decades ago now widely experience long-term health problems, which suggests a distinct possibility of ongoing health problems for the hundreds of Russian Olympic athletes who have doped in the last decade.¹²² Andreas Krieger, who competed for East Germany as a woman in the shot put, recounts how he¹²³ was given steroids as early as age sixteen and still feels the aftereffects to this day, while the swimmer Martina Gottschalk recounts having to take “little blue pills with sweetened tea”—likely anabolic steroids—with every meal.¹²⁴ Decades later, Gottschalk still experiences stomach and gallbladder issues.¹²⁵ Numerous other athletes from East Germany continue to experience chronic side effects, and in the early 2000s, many of these athletes sued the heads of the East German athletic program for the physical harm they suffered as the hands of the organizers of the state-sponsored doping program.¹²⁶

The second reason the East German doping program is relevant to the Russian doping scandal is that, similar to the scandal in Russia, the East German scandal was all-encompassing, infiltrating numerous Olympic sports in which the country fielded a team.¹²⁷ Prior to 1989, a minimum of 6,000 but

121. *Id.*

122. See Annette Tuffs, *Doped East German Athletes to Receive Compensation*, 324 BRIT. MED. J. 1544, 1544 (2002).

123. Use of he/him pronouns is intentional to reflect Krieger’s gender identity. STEVEN UNGERLEIDER, *FAUST’S GOLD: INSIDE THE EAST GERMAN DOPING MACHINE* 139-40 (2001)

124. *Doping Scandal Reaches Court*, BBC (May 2, 2000, 11:13 AM), <http://news.bbc.co.uk/2/hi/europe/733155.stm> [<https://perma.cc/RF8F-FYHP>].

125. *Id.*

126. *Id.*

127. MIKE DENNIS & JONATHAN GRIX, *SPORTS UNDER COMMUNISM: BEHIND THE EAST GERMAN ‘MIRACLE’* 84 (2012).

likely closer to 10,000 East German athletes were administered banned substances.¹²⁸ In comparison, according to a German documentary that aired just months before news of the Russian doping scandal broke in 2015, as many as 99% of Russian athletes under Rodchenkov were taking banned substances.¹²⁹

Although the exact number of doping violations that occurred is unknown, the number of doping violations is still staggering.¹³⁰ After Sochi, the Russian Olympic team had 13 medals revoked.¹³¹ Rodchenkov's personal testimony seems to corroborate the 99% figure as well; when asked the proportion of Russian athletes who had been doping, Rodchenkov responded "all of them."¹³² Finally, the East German doping program led to unprecedented Olympic success.¹³³ Much like Russia's success at Sochi, at the 1976 Montreal Olympics, East Germany doubled its medal count from the previous summer, collecting 90 overall medals, 40 of them gold.¹³⁴

The East German scandal is distinguishable from the Russian doping scandal in one important aspect: individual Russian athletes appear to voluntarily decide whether or not to dope with more regularity than former East German athletes. Former East German athletes report promising young athletes being administered steroids as young as eight years of age,¹³⁵ and athletes being administered drugs without their knowledge.¹³⁶

128. *Id.*

129. *Secret Doping Dossier: How Russia Produces Its Winners*, *supra* note 4.

130. See Nick Zaccardi, *List of Russia Olympic Medals Stripped; New Sochi Medal Standings*, NBC (Nov. 27, 2017, 3:09 PM), <https://olympics.nbcsports.com/2017/11/27/sochi-olympic-medal-standings-russia-medals-stripped-doping/> [<https://perma.cc/E4TG-D5KK>].

131. *Id.*

132. ICARUS, *supra* note 2.

133. Craig R. Whitney, *East German Olympic System a Success*, N.Y. TIMES (Dec. 20, 1976), <https://www.nytimes.com/1976/12/20/archives/east-german-olympic-system-a-success-east-germanys-olympic-system.html> [<https://perma.cc/KW2Z-MTGT>].

134. *Id.*

135. DENNIS & GRIX, *supra* note 127, at 82.

136. *Id.*

Some speculate that it is likely that individual dopers fully comprehended what they were doing, especially given the methods Rodchenkov's lab adopted.¹³⁷ For instance, a Commission on Security and Cooperation in Europe report suggests that Russian athletes being unaware of consuming banned substances is highly implausible, prompting one of the commission's members to say, "people don't swish things around in their mouth and spit it out for no reason."¹³⁸

PART II: INTERNATIONAL GOVERNING BODIES AND SIGNIFICANT LEGISLATION IMPACTING DOPING

A. WADA and the CAS

WADA and the CAS are two of the most influential international anti-doping bodies.¹³⁹ Each has been at the forefront of the anti-doping struggle for the past several decades.¹⁴⁰ WADA was established in November of 1999, pursuant to the World Conference of Doping in Sport in Lausanne earlier that year.¹⁴¹ Originally proposed by the IOC, the concept of creating an international anti-doping organization soon gained the support of international sporting federations and domestic anti-doping organizations throughout the world.¹⁴² Every few years, WADA

137. 115th Cong., *supra* note 29, at 14.

138. *Id.*

139. *History of the CAS*, CT. ARB. FOR SPORT, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> [<https://perma.cc/43ZD-WGER>]; *The World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/world-anti-doping-code> [<https://perma.cc/4ZW8-HCMG>].

140. *Who We Are*, *supra* note 6.

141. *Lausanne Declaration on Doping in Sport*, WORLD ANTI-DOPING AGENCY, https://www.wada-ama.org/sites/default/files/resources/files/lausanne_declaration_on_doping_in_sport.pdf [<https://perma.cc/F2HT-QLX9>].

142. Arne Ljungqvist, *A Brief History of Anti-Doping*, 6 MED. SPORT SCI. 1, 1 (2017). WADA was established in 1999 just in time for the 2000 Summer Olympics in Sydney, and its creation prompted the U.S. to form its own anti-doping organization, the United States Anti-Doping Agency, just one year later in 2000. *Independence and History*, U.S. ANTI-DOPING AGENCY,

creates and promulgates the World Anti-Doping Code, a consistent set of rules and regulations that provides a basis for dozens of countries' anti-doping programs around the world.¹⁴³ The WADA Code helps create a uniform framework for regulating athletes in international competition.¹⁴⁴ The WADA Code's objectives are designed to reflect eight international standards related to doping such as the International Standard for Testing and Investigations and the International Standard for Laboratories.¹⁴⁵ Since its creation in 1999, WADA has become increasingly influential, and following the UNESCO International Convention Against Doping in Sport's entry into force in 2007, 191 countries ratified the treaty, thereby adopting the anti-doping provisions of the WADA code, effectively allowing WADA policies to govern the entire world.¹⁴⁶

With regards to its sanctions, in articles 9 and 10 of the Code, WADA aims to strike a balance between two seemingly contrary objectives: to preserve the certainty and consistency of penalties imposed for Code violations while simultaneously allowing for the flexible application of these penalties.¹⁴⁷ As of the latest version of the Code, propagated in 2015, a key rationale for increased flexibility in administering penalties is that default sanctions such as a two-year ban on athletes who test positive do not take into account the diminished level of culpability of athletes who negligently ingest performance-enhancing substances.¹⁴⁸ In doing away with strict liability sanctions, such an approach benefits

<https://www.usada.org/independence-history/> [<https://perma.cc/N6VK-AHU4>].

143. *The World Anti-Doping Code*, *supra* note 139, at 11.

144. *Id.*

145. *Id.*

146. *International Convention Against Doping in Sport*, UNESCO, <https://en.unesco.org/themes/sport-and-anti-doping/convention> [<https://perma.cc/BSG7-Q8ZV>]. See *World Anti-Doping Agency v. Russian Anti-Doping Agency*, Ct. Arb. Sport, Case No. 2020/0/6689, ¶ 753 (Dec. 17, 2020).

147. PAUL DAVID, *A GUIDE TO THE WORLD ANTI-DOPING CODE: THE FIGHT FOR THE SPIRIT OF SPORT* 330 (3d ed. 2017).

148. *Id.*

athletes— like Gil Roberts¹⁴⁹— whose positive doping tests are the result of honest mistakes. According to CAS Arbitrator and Drug-Free Sport New Zealand Counsel¹⁵⁰ Paul David, the shift demonstrates WADA’s intent to impose tougher penalties to target “real cheats” instead of accidental ones.¹⁵¹ Although WADA’s primary focus since its inception in 1999 has been to create and enforce doping regulations on athletes who attempt to cheat, based on the circumstances, WADA has begun to recognize a gradient of culpability for athletes who commit violations.¹⁵²

With the exception of WADA, the CAS is the most well-known and far-reaching anti-doping governing body in the world.¹⁵³ It serves as the highest international authority for sports-related controversies, effectively functioning as “the Supreme Court of sports.”¹⁵⁴ Unlike WADA, the CAS has the ability to penalize athletes and, on rare occasions, entire Olympic teams.¹⁵⁵ Despite its authority over violators, the CAS does not utilize principles of criminal law to sanction violators.¹⁵⁶ Rather, it

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149. United States Anti-Doping Agency v. Roberts, No. 01-17-0003-4443, Am. Arb. Ass’n 25 (2017) (Thomas, Arb.).
150. Drug Free Sport New Zealand was created by the New Zealand Sports and Drug Agency Act of 1994 and is New Zealand’s preeminent anti-doping body dedicated to “implement[ing] and apply[ing] the World Anti-Doping Code in New Zealand.” *Our Organisation*, DRUG FREE SPORT N.Z., <https://drugfreesport.org.nz/about-us/our-organisation/> [<https://perma.cc/5BWU-YE4S>].
151. DAVID, *supra* note 147, at 328.
152. Shaun Creighton & Mitchell Scott, *Unintentional Doping in Sports Law Cases Clarified*, MOULIS LEGAL (Aug. 9, 2021), <https://moulislegal.com/knowledge/unintentional-doping-in-sports-law-cases-clarified> [<https://perma.cc/HB7N-VBQK>].
153. Ian Blackshaw, *ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center*, 24 MARQ. SPORTS L. REV. 1, 2 (2013).
154. Jennifer R. Bondulich, *Rescuing the “Supreme Court” of Sports: Reforming the Court of Arbitration for Sport for Sport Arbitration Member Selection Procedures*, 42 BROOK. J. INT’L L. 275, 279 (2016).
155. *See generally* World Anti-Doping Agency v. Russ. Anti-Doping Agency, Ct. Arb. Sport, Case No. 2020/0/6689 (Dec. 17, 2020) (exemplifying the CAS’s ability to penalize entire Olympic teams).
156. DAVID, *supra* note 147, at 19-20.

approaches doping cases as civil proceedings with disciplinary implications and leaves it to national courts to hold violators criminally liable.¹⁵⁷ Ironically, this civil approach may leave athletes with fewer protections than a criminal approach would when they are before the court.¹⁵⁸ Athletes in CAS proceedings are not meant to receive the same level of procedural protections during hearings that criminal defendants theoretically receive at trial and during investigations because of the graver consequences associated with a criminal conviction.¹⁵⁹

Yet, given the gravity of a doping violation and a potential ban from the sport, the protections afforded to an athlete in a hearing in front of the CAS generally do have a few of the same protections as would a criminal defendant.¹⁶⁰ The methodology the CAS uses in adjudicating doping cases is sometimes referred to as a “quasi-criminal approach.”¹⁶¹ In some ways, the quasi-criminal approach serves as a safeguard for individual athletes who face steep penalties in a hearing before the CAS. While the CAS may use a traditional “preponderance of evidence”¹⁶² standard of proof for less serious offenses, for more serious offenses, the CAS may implement a burden of proof just shy of the elevated criminal “beyond a reasonable doubt standard of proof”—a quasi-criminal standard.¹⁶³ The CAS, in the case of *Potylitsyna v. IOC*, has also elucidated this standard of proof as a “comfortable satisfaction” test which affords the CAS a level of flexibility in how it disciplines individual athletes.¹⁶⁴

157. *Id.* at 20.

158. Shaun Star & Sarah Kelly, *A Level Playing Field in Anti-Doping Disputes? The Need to Scrutinize Procedural Fairness at First Instance Hearings*, 21 INT’L SPORTS L. J. 94, 98 (2021).

159. DAVID, *supra* note 147, at 20.

160. Star & Kelly, *supra* note 158.

161. *Id.*

162. See Carlos Bugeja, *The Standard of Proof in the Court of Arbitration for Sport*, AZZOPARDI BORG & ASSOCS. LEGAL (Mar. 1, 2019), <https://abalegal.eu/tascas-standardofproof/> [<https://perma.cc/6B7W-EG6Q>].

163. *Id.*

164. A “comfortable satisfaction test” is generally considered to fall anywhere above the “preponderance of the evidence standard” of proof and the “beyond a reasonable doubt” standard of proof traditionally associated with civil and criminal proceedings. The

Neither WADA nor the CAS, however, are immune from criticism. A common critique of the CAS is that it fails to reflect the interests of individual athletes.¹⁶⁵ This is in part because in CAS proceedings, unlike in the proceedings of other courts of arbitration, parties lack substantial influence during the appointment of arbitrators that hear their cases.¹⁶⁶ Instead, the proceedings of CAS, like WADA, are heavily influenced by international sporting federations such as the IOC, as CAS arbitrators are selected from a closed list approved by these federations.¹⁶⁷ Again, considering the quasi-criminal nature of CAS hearings, many athletes would prefer an actual trial by a jury of their peers rather than arbitration where they have no influence over the arbitrators.¹⁶⁸

B. *The Rodchenkov Anti-Doping Act*

In recent years few, if any, pieces of domestic anti-doping legislation have had as controversial of an impact on the existing international anti-doping framework as the Rodchenkov Anti-Doping Act of 2019.¹⁶⁹ The RADA enables the United States to exercise extraterritorial jurisdiction¹⁷⁰ over out-of-state offenders

level of proof necessary to meet a comfortable satisfaction standard may be raised or lessened depending on the particular circumstances of the case at hand. *Potylitsyna v. Int'l Olympic Comm., Ct. Arb. Sport*, Case No. 2017/A/5432, ¶¶ 672-76 (Feb. 1, 2018).

165. Rosanna Ryan, *What's Wrong with WADA and the Court of Arbitration for Sport?*, ABC, (Jan. 11, 2016, 5:05 pm) <https://www.abc.net.au/radionational/programs/breakfast/whats-wrong-with-wada-and-the-court-of-arbitration-for-sport/7081534> [<https://perma.cc/PE6C-RD7X>].

166. *Id.*

167. *History of the CAS*, *supra* note 139.

168. *See* Ryan, *supra* note 165.

169. Rodchenkov Anti-Doping Act of 2019, 21 U.S.C. §§ 2401-04.

170. *Id.* Without consent from the territorial state or nationality, extraterritorial jurisdiction is often viewed as a breach of international law. This is in part because a national does not receive adequate notice when another country exercises extraterritorial jurisdiction unless the “law mirrors or replicates the law of the place of the activity.” Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1334 (2014). *See also* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An*

to impose jail time and levy fines of \$250,000 on individuals and \$1,000,000 on multiple people or entities who are involved in a doping conspiracy.¹⁷¹ If such a violation occurs, the U.S. can impose forfeiture penalties on violators as well.¹⁷²

As the RADA entered into force only recently in December 2020, there has been little time to assess its effects and information about its long-term impact is somewhat speculative, and many countries are wary of its potential effects.¹⁷³ Out of all the international anti-doping organizations and sports federations, the IOC responded the most positively to the Act, yet its reception was still lukewarm at best.¹⁷⁴ In a statement, the IOC lauded the objectives of the RADA, while still cautioning the U.S. that a prosecutorial approach to doping cases should be applied in a harmonized, global fashion instead of granting one state extraterritorial judicial authority.¹⁷⁵ The IOC also suggested that the U.S. take disciplining dopers one step further by extending the World Anti-Doping Code to apply to NCAA collegiate athletics.¹⁷⁶

In contrast to the IOC, while WADA's goals loosely align with the RADA's purpose—deterrence of doping and the disciplining of doping conspiracy participants—WADA officials question the means of the RADA's imposition as well as its broader international implications.¹⁷⁷ Holding non-athlete

Intersection Between Public and Private International Law, 76 AM. J. INT'L L. 280, 282 (1982) (“[C]ourts of all nations should indulge in a presumption against the extraterritorial impact of law.”).

171. Rodchenkov Anti-Doping Act of 2019, 21 U.S.C. §§ 2402-03.

172. *Id.* at § 2403.

173. Rick Maese, *Behind New Law, the FBI Is Getting into Anti-Doping, But Not Everyone Wants the Help*, WASH. POST (Apr. 9, 2021, 8:26 AM), <https://www.washingtonpost.com/sports/2021/04/09/fbi-sports-corruption-rodchenkov-act/> [<https://perma.cc/3R7X-Z7E5>].

174. *IOC Statement on the Rodchenkov Act*, INT'L OLYMPIC COMM. (Mar. 12, 2020), <https://olympics.com/ioc/news/ioc-statement-on-the-rodchenkov-act/#> <https://olympics.com/ioc/news/ioc-statement-on-the-rodchenkov-act/#> [<https://perma.cc/AKD3-2ZRK>].

175. *Id.*

176. *Id.*

177. *WADA Statement on U.S. Senate's Passing of the Rodchenkov Anti-Doping Act*, WORLD ANTI-DOPING AGENCY (Nov. 17, 2020),

participants in state doping conspiracies criminally liable is difficult enough as is, but critics of the RADA allege that to also allow one country—the United States—to impose criminal liability in any international doping conspiracy that even tangentially relates to United States athletes, broadcasters, and sponsors affords the U.S. a disproportionate amount of power and circumvents the anti-doping framework WADA has put in place over the course of the past two decades.¹⁷⁸ Such an Act, say WADA officials, will damage uniformity of international regulations and perpetuate doping by discouraging whistleblowers from coming forward in the first place for fear of prosecution.¹⁷⁹

The lasting impact of the RADA remains to be seen. Meaningful in principal, the RADA contains potential pitfalls such as creating international inconsistency in doping regulation, and lack of international support will likely make enforcing the RADA untenable.¹⁸⁰ But, even if it proves impracticable and only nominally significant to the international struggle to counter state doping conspiracies, the RADA still underscores a material need in international anti-doping law: the ability to swiftly and effectively prosecute government officials, scientists, and intermediaries who orchestrate doping behind the scenes, not just individual athletes who commit a doping violation.¹⁸¹ But can WADA and the CAS achieve these goals within their current approaches? If not, could the international community devise a mechanism where numerous countries collectively impose criminal liability for doping conspiracies to prevent a single country from exercising this significant power? A unified international approach to holding doping conspirators criminally liable would likely prove far more effective than a fragmented one.

So far, only a single conspirator has been charged under the RADA, and the case is still unresolved.¹⁸² Nigerian sprinter

<https://www.wada-ama.org/en/news/wada-statement-us-senates-passing-rodchenkov-anti-doping-act> [<https://perma.cc/8A9R-5ZD8>]

178. *Id.*

179. *Id.*

180. *Id.*

181. Rodchenkov Anti-Doping Act of 2019, 21 U.S.C. §§ 2401-03.

182. Gus Garcia-Roberts, *Texas Man Charged with Providing Performance-Enhancing Drugs to Olympians*, WASH. POST, <https://www.washingtonpost.com/sports/olympics/2022/01/12/er>

Blessing Okagbare's positive test for human growth hormone and an incriminating chain of text messages exposed Eric Lira, a Texas-based naturopathic therapist, for providing Okagbare with human growth hormone and EPO.¹⁸³ While Okagbare was swiftly banned from competition for ten years—effectively forcing retirement for the 33-year-old athlete—Lira's fate is still uncertain, but he may face up to fifteen years in prison.¹⁸⁴ What's more, this case is unlikely to be controversial internationally; since Lira is a United States citizen, the RADA is merely being applied domestically.¹⁸⁵

The recent high-profile Russian figure skating doping scandal at the 2022 Olympics, however, may permit the United States to extend the RADA's influence over non-citizens for the first time. Russian figure skater Kamila Valieva's recent positive test for banned substances is viewed by some as a "case in point" for the necessity of the RADA.¹⁸⁶ How capably WADA and the CAS respond to this scandal may prove pivotal in whether the United States' implementation of the RADA gains traction internationally. If countries and international anti-doping organizations like WADA intend to prevent the United States from policing the world of doping conspiracies, they will have to take steps to address the concerns that led to the RADA's passage: the ability of doping conspirators to evade detection, no matter the scale of the conspiracy.

ic-lira-blessing-okagbare/ (Jan. 12, 2022, 5:13 PM)
[<https://perma.cc/UR3W-3WE5>].

183. *Id.*

184. Andrew Golden, *Nigerian Sprinter Blessing Okagbare Receives 10-Year Ban in Doping Case*, WASH. POST (Feb. 18, 2022, 11:54 AM), <https://www.washingtonpost.com/sports/2022/02/18/blessing-okagbare-doping-ban/> [<https://perma.cc/B2SS-XGQN>].

185. Garcia-Roberts, *supra* note 182.

186. Eddie Pells, *Russian Skater's Entourage Could be Prosecuted Under New U.S. Law*, NBC (Feb. 14, 2022), <https://www.nbcnewyork.com/news/sports/beijing-winter-olympics/russian-skaters-entourage-could-be-prosecuted-under-new-us-law/3552477/> [<https://perma.cc/5TAD-4LYZ>].

III. COUNTERING STATEWIDE DOPING CONSPIRACIES

For effective change that stops countries from flouting WADA's Code, the current international anti-doping framework needs to shift towards disciplining doping conspirators with the same vigor that it disciplines individual athletes. While no direct solution emerges, two potential avenues for change are through the imposition of automatic doping bans when countries reach a benchmark of violations and the creation of an international tribunal to impose criminal penalties on doping conspirators.

A. A Benchmark Theory of Sanctions

A tempting solution to the issue of state-sanctioned doping could be the automatic triggering of a sanction on a country's entire Olympic program once that country reaches a certain benchmark of doping violations. In 2016, WADA advocated for such an approach to completely ban Russia from the Rio de Janeiro Olympic Games.¹⁸⁷ The IOC declined to adopt WADA's solution, and given the proximity to the Olympics, permitted the Russian Olympic Committee to participate.¹⁸⁸ The appeal of a blanket ban approach is its simplicity in theory; the CAS would apply sanctions one time and one time only without any future alterations such as reducing its four-year ban on Russia's Olympic team.¹⁸⁹ For example, if 20% or more of the members of an Olympic team commit a doping violation, then the entire team would receive a default four-year ban, making it certain to miss the next Olympics. While certainly a harsh penalty, default bans, if objectively applied based on a percentage of dopers, could perhaps lead to less controversy than current statewide doping bans.

A blanket ban approach, despite its apparent objectivity, still has some glaring flaws that would very likely make it difficult to implement. One flaw in such an approach is that a country's entire Olympic program could be penalized for the actions of a singular sports team; for example, if every member of the Russian

187. Fabien Ohl et al., *Fight Against Doping as a Social Performance: The Case of the 2015-2016 Russian Anti-Doping Crisis*, 15 CULTURAL SOCIO. 386, 395 (2020).

188. *Id.*

189. World Anti-Doping Agency v. Russ. Anti-Doping Agency, Ct. Arb. Sport, Case No. 2020/0/6689, ¶ 753 (Dec. 17, 2020).

track and field team tested positive for a banned substance while no Russian athlete in any other sport tested positive, the sheer number of track and field athletes would be enough to trigger the overall ban and impose sanctions on innocent individual athletes.¹⁹⁰ Another criticism of a blanket ban is that individual athletes—including clean athletes as well as dopers—are already most affected by doping sanctions, and individual athletes are the most likely to be affected by blanket bans which would not lead to the detection or prosecution of organizers of doping conspiracies.¹⁹¹ The number of detected dopers within a country may also not reflect the actual number of athletes who dope, particularly if the country is trying to conceal internal doping, which could end up punishing countries that comply with anti-doping investigations and rewarding countries who are better at evading them.¹⁹² Finally, the percentage of athletes who dope that triggers a blanket ban could be an arbitrary line to draw, particularly considering that the number of athletes who test

190. While the possibility of every single athlete in a nation's Olympic team in one specific sport doping and all of the nation's other athletes being completely clean is improbable, some sports such as cycling do have a disproportionate number of dopers. Doping has infiltrated virtually all Olympic sports — even sports not commonly associated with doping such as table tennis have seen an increase in positive doping tests in recent years. Peter Sullivan, *What Sports Have the Worst Doping Problems?*, FOREIGN POL'Y (June 29, 2013, 6:00 PM), <https://foreignpolicy.com/2013/06/29/what-sports-have-the-worst-doping-problems/> [<https://perma.cc/XPZ6-7H6Z>]. The concept of one sport constituting more than 20% of a nation's Olympic team's athletes is not too far-fetched either. The United States had 627 athletes qualify for the Tokyo Olympic Games in 2021, 128 of which were track and field athletes. *See U.S. Olympic Team Roster: Athletes Qualified for Tokyo Games*, NBC (June 12, 2021, 5:30 AM), <https://olympics.nbcsports.com/2021/07/12/tokyo-olympics-team-usa-athlete-roster/> [<https://perma.cc/7AY4-WH4Y>].

191. *Blanket Ban on Dope-Tainted Nations 'Unjust'- Olympians*, REUTERS (Dec. 15, 2015, 9:47 PM), <https://www.reuters.com/article/us-athletics-corruption-olympians/blanket-ban-on-dope-tainted-nations-unjust-olympians-idUSKBN0TY08I20151215> [<https://perma.cc/PQC2-NAKQ>].

192. *See generally id.*

positive for banned substances is often significantly smaller and not proportional to the overall number of athletes who dope.¹⁹³

So, a blanket ban disciplining athletes based on a percentage of athletes appears to be an impractical solution. Yet, general statistics regarding the percentage of athletes who dope, the severity of violations, and the likelihood of doping athletes evading detection suggest that were the CAS and WADA to implement a consistent penalty triggered by objective conditions, it could greatly reduce state-sponsored doping, or at least prevent countries engaged in the most egregious forms of state-sponsored doping from competing in international Olympic competition.¹⁹⁴

Of course, every doping violation is not necessarily the byproduct of a broad underlying conspiracy. It is important to note that in some instances athletes may in fact dope by themselves or have a relatively small number of corrupt doctors, scientists, and officials who are complicit in their doping, such as the case first recognized blood doping violation at the 1980 Summer Olympics in Moscow.¹⁹⁵ Frequently, the greatest enablers of doping may not even be scientists, lab officials, or shadowy governmental operatives behind closed doors, but rather athletes' coaches.¹⁹⁶ But, the capability of international and domestic

193. *WADA: 1 in 10 May Be Doping*, ESPN (Feb. 7, 2012), https://www.espn.com/olympics/story/_/id/7550694/wada-says-research-indicates-1-10-athletes-doping [https://perma.cc/6BN5-RULE].

194. Piers Edwards, *WADA to Consider Banning Countries for Doping Offenses*, CNN (Aug. 18, 2015, 5:38 PM), <https://edition.cnn.com/2015/08/18/sport/athletics-reddie-blanket-ban-doping/> [https://perma.cc/H95G-8Y4Q].

195. ARTHUR J. SYTKOWSKI, *ERYTHROPOIETIN: BLOOD, BRAIN, AND BEYOND* 187 (2004).

196. A notorious example of a corrupt coach is Alberto Salazar, who founded and headed the elite American distance-running group called the Nike Oregon Project since its inception in 2001. Salazar is currently serving a four-year ban after several of his former athletes and an assistant coach exposed a system whereby Salazar helped athletes get prescriptions for drugs they didn't need in order to boost their performances. According to one former athlete, Salazar kept a "medicine chest" of questionable pills and supplements in the program's headquarters. Matt Hart, *This Doesn't Sound Legal: Inside Nike's Oregon Project*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/sports/ni>

governing bodies to discipline individual athletes and the coaches who work with these athletes on a daily basis does not pose anywhere near the logistical difficulty of catching and disciplining all of the officials involved in large-scale doping conspiracies.¹⁹⁷

B. Creating an International Court to Prosecute Doping Conspirators Criminally

As discussed previously,¹⁹⁸ U.S. legislation such as the RADA has created controversy internationally because it effectively allows one country to attach criminal liability and prosecute doping conspiracies throughout the world.¹⁹⁹ Traditionally, WADA and the CAS have never imposed criminal liability—WADA creates its code as a set of guidelines that 191 countries have adopted,²⁰⁰ while the CAS makes violators, primarily athletes, civilly liable.²⁰¹ However, the actions of noncompliant countries, such as Russia, show that guidelines and civil liability are not enough if the worst perpetrators of doping conspiracies continue to avoid attaching criminal liability to domestic violations and cover up extensive conspiracies.²⁰² The RADA addresses this problem, but it does so in a way that fails to sufficiently address the international implications of doping

ke-oregon-project-alberto-salazar-dathan-ritzenhein.html
[<https://perma.cc/W6XM-5CMG>].

197. See Eddie Pells, *Most Troubling is Russia's Reaction to Scandal*, AP (Dec. 10, 2016), <https://apnews.com/article/843414bfe396451193c86bb283f0462d> [<https://perma.cc/QM9T-YWXS>].

198. See Maese, *supra* note 173.

199. *WADA Statement on U.S. Senate's Passing of the Rodchenkov Anti-Doping Act*, *supra* note 177. See also Rebecca R. Ruiz, *U.S. Lawmakers Seek to Criminalize Doping in Global Competitions*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html> [<https://perma.cc/4TRQ-JY99>].

200. *International Convention Against Doping in Sport*, *supra* note 146.

201. *History of the CAS*, *supra* note 139.

202. Sean Ingle, *WADA Acts on Russian Doping But Has it Gone Far Enough?*, THE GUARDIAN (Dec. 9, 2019, 3:10 PM), <https://www.theguardian.com/sport/2019/dec/09/wada-acts-russian-doping-has-it-gone-far-enough-2020-olympics-2022-world-cup> [<https://perma.cc/A2FV-8Z6Y>].

conspiracies felt by many different nations.²⁰³ Therefore, it may be best for many different nations to have a say in attaching criminal liability for these conspiracies instead of just one.

While international anti-doping bodies have previously resisted sanctioning doping criminally, emphasizing the importance of nations prosecuting dopers domestically,²⁰⁴ the lack of domestic accountability necessitates a different approach: the creation of an anti-doping body with broad authority to criminally prosecute the participants in the Russian doping scandal and future state-sponsored doping scandals. In other words, what the world needs is an international anti-doping tribunal that can prosecute all conspirators, not just athletes. WADA has already created guidelines that create a uniform set of provisions for countries' Olympic teams to follow.²⁰⁵ Now, if the domestic civil courts of countries that have adopted these provisions fail to enforce them, the world could create an international criminal tribunal to step in instead. Such an approach would promote fair competition at the Olympics and help ensure that no country can simply refuse to prosecute a statewide conspiracy and allow the perpetrators to evade all accountability.

In the past, UN members considered creating a tribunal to address piracy, a unique criminal issue that, like doping, has broad international implications and is notoriously difficult to prosecute.²⁰⁶ While an international piracy court raises significant concerns of efficiency, expense, and especially capacity,²⁰⁷ several member states strongly advocated for the creation of such a

203. See David A. Baron et al., *Doping in Sports and Its Spread to At-Risk Populations: An International Review*, 6 *WORLD PSYCHIATRY* 118, 119-120 (2007).

204. *WADA Statement on the Criminalization of Doping in Sport*, THE SPORTS INTEGRITY INITIATIVE (Oct. 26, 2015), <https://www.sport-sintegrityinitiative.com/wada-statement-on-the-criminalization-of-doping-in-sport/> [<https://perma.cc/N53N-NPWS>]

205. WORLD ANTI-DOPING AGENCY, *WORLD ANTI-DOPING CODE* (2021).

206. See, e.g., Eugene Kontorovich, *The Piracy Paradox: Political and Procedural Problems with Enforcing Order on the High Seas*, *GEO. J. INT'L AFF.* 107, 109-110 (2012).

207. See Michael Scharf & Mistale Taylor, *A Contemporary Approach to the Oldest International Crime*, 33 *UTRECHT J. INT'L & EUR. L.* 77, 85-86 (2017).

court.²⁰⁸ As piracy in international waters became more prevalent in the late 2000s, countries such as Germany lobbied especially hard for an international piracy tribunal.²⁰⁹ In 2008, German Defense Minister Franz Josef Jung stressed the importance of not relegating such a court's authority to just a few countries.²¹⁰ Rather, said Jung, "international authority" was necessary to avoid a "Guantanamo on the sea."²¹¹ The current international approach to countering piracy—allowing nations who capture pirates to try them—results in a lack of uniformity and an extremely high release rate.²¹²

Unlike piracy, doping is subject to fewer geographical limitations, making the need for an international governing body all the more urgent.²¹³ For example, an American coach might receive steroids manufactured in Russia, provide them to a Canadian athlete who consumes them while doing high altitude training in Mexico, and then the athlete can reap the benefits of doping at competitions throughout Africa, Asia, and Europe. Olympic athletes have especially global careers.

As a means to prevent doping conspiracies that span many countries' borders, it is conceivable that similar influences to those that called for the creation of an international anti-piracy tribunal could become the driving forces for the creation of an international anti-doping tribunal. While the hypothetical creation of an international piracy court offers some insight into the practicality of forming an international anti-doping tribunal, two preeminent world courts provide more concrete guidance.

The CAS's work demonstrates that the world has already effectively adjudicated an array of cases in international sports law,²¹⁴ and the creation of the International Criminal Court

208. Kontorovich, *supra* note 206, at 108.

209. *See Germany Calls for International Piracy Court*, N.Y. TIMES (Dec. 23, 2008) <https://www.nytimes.com/2008/12/23/world/afri-ca/23iht-23germanpirates-FW.18893813.html> [<https://perma.cc/63SW-Y4B8>].

210. *Id.*

211. *Id.*

212. Kontorovich, *supra* note 206, at 109.

213. *See The World Anti-Doping Code*, *supra* note 139.

214. Eric T. Gilson, *Exploring the Court of Arbitration for Sport*, 98 L AW LIBR. J. 503, 504 (2006).

demonstrates that nations of the world have been able to collectively prosecute the most egregious of crimes occurring within member states or which are referred to it by the United Nations Security Council.²¹⁵ An international anti-doping tribunal could operate similarly to the International Criminal Court in that it could have cases referred to it by member states. Unlike the ICC, an international anti-doping tribunal could operate less so as a court of last resort.²¹⁶ Similar efficiency and expense concerns to those for an international anti-piracy court may also arise regarding an anti-doping tribunal. However, the widespread nature of doping conspiracies and their ability to simultaneously affect countries and athletes on different continents means that even domestic courts will be unable to limit efficiency and expense difficulties. Even if nations decide not to create an individual tribunal, another possible solution could be to expand the CAS's authority to include a criminal division for addressing doping violations. The CAS took over the role of hearing anti-doping cases from the IOC disciplinary commission in 2016 by creating a special division;²¹⁷ the creation of a new criminal division for doping conspirators or the empowerment of the current division to decide criminal cases may be the logical next step.

CONCLUSION

Historically, state-sponsored doping has greatly impacted international athletic competition, particularly at the Olympic Games. This will not change in the near future, as both clean athletes and dopers will continue to face discipline on an individual basis as international anti-doping organizations collaborate to suppress doping. Gil Roberts and Shelby Houlihan, assuredly, will not be the last Olympic athletes who must go to extreme lengths to attempt to explain a positive test to overturn

215. Kate Mackintosh, *The USA and ICC: Friends or Foes?*, L.A. LAW., June 2020, at 20.

216. *International Criminal Court*, HUM. RTS. WATCH, <https://www.hrw.org/topic/international-justice/international-criminal-court> [<https://perma.cc/BGQ9-2JGH>].

217. Karolos Grohmann, *CAS to Take Over Doping at the Olympics*, REUTERS (Mar. 1, 2016, 2:22 PM), <https://www.reuters.com/article/uk-olympics-doping-cas-idUKKCN0W351A> [<https://perma.cc/3A6Q-7MN5>].

a career-jeopardizing ban.²¹⁸ Sha'Carri Richardson will not be the last Olympic athlete to face repercussions for the use of a non-performance-enhancing prohibited substance.²¹⁹ Olympic athletes who have taken banned substances as part a state-sponsored program will inevitably continue to suffer chronic health issues like the ones experienced by former East German Olympians.²²⁰ In short, individual athletes will continue to suffer the myriad consequences of doping. Unfortunately, little indicates that the people and organizations who enabled these athletes to dope in the first place will face significant repercussions too.

Despite this, there is still reason to hope that WADA, the CAS, and the international community will take constructive steps to prevent there from being another major doping debacle like the one in Russia.²²¹ Whether these steps come in the form of a blanket ban, the creation of an international anti-doping tribunal, or another approach altogether, what is certain is that for true accountability, change is needed within the current system. As the sophistication of WADA's detection methods improve, so too do the abilities of cheaters to evade detection.²²²

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218. See, e.g., Rebecca R. Ruiz, *American Sprinter Used 'Passionate Kissing' Defense in Doping Case. And It Worked.*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/sports/gil-roberts-doping-kissing.html> [<https://perma.cc/R4YE-Y4UY>]; Alanis Thames, *Did a Burrito Cost an American Runner Her Olympic Dream?*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/sports/olympics/shelby-houlihan-burrito-olympics.html> [<https://perma.cc/6KRZ-NDFZ>].
219. See Kevin Draper & Juliet Macur, *Sha'Carri Richardson, a Track Sensation, Tests Positive for Marijuana*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/sports/olympics/shacarri-richardson-suspended-marijuana.html> [<https://perma.cc/4LEC-JNT2>].
220. Lucas Aykroyd, *Health Consequences of PEDs Continue to Plague Ex-East German Athletes*, GLOB. SPORT MATTERS (Nov. 7, 2019), <https://globalsportmatters.com/health/2019/11/07/ex-east-german-athletes-struggle-with-health-problems-due-to-the-consequences-of-ped-taking/> [<https://perma.cc/R8EM-T2DT>].
221. See Tariq Panja, *Russia Banned From Olympics and Global Sports for 4 Years Over Doping*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/sports/russia-doping-ban.html> [<https://perma.cc/9AKD-K7X3>].
222. Robert Alexandru Vlad et al., *Doping in Sports: A Never-ending Story?*, 8 ADVANCED PHARM. BULL. 529, 532 (2018) (“[A]nti-doping agencies will always be one step behind manufacturers of new

This perpetual game of cat-and-mouse makes it all the more necessary for international governing bodies to combat doping at its initial source. Only a change to the current approach can ensure that conspirators, not just athletes, are the ones caught, prosecuted, and sanctioned.

While the effects of statewide doping scandals on past Olympics are irreversible, this does not mean that the current international framework to combat future scandals is futile. Rather, international anti-doping organizations are excellently-positioned to combat doping; they test athletes extensively already, and still manage to detect thousands of positives.²²³ Future effectiveness of WADA, the CAS, and other international anti-doping organizations' efforts to stop statewide doping conspiracies may hinge on whether these organizations' authority will continue to be confined to detection and imposing civil liability while leaving the attachment of criminal liability for doping conspiracies to domestic governments. The RADA reflects an admirable goal—the criminalization of non-athlete doping conspirators throughout the world²²⁴—but it does so in a manner that could grant one country, the United States, sweeping prosecutorial authority over an issue that has an enormous international impact and should be regulable by multiple nations.

Future scholars should continue to look into the feasibility of an international criminal tribunal dedicated exclusively to combatting doping, using existing international courts as models. Investigators must diligently pursue the root causes of doping as they continue to deal with the aftershock of the Russian doping scandal five years later. In the meantime, individual Olympic fans throughout the world may hope for cleaner, fairer, better competition on the world stage. Yet, if international organizations maintain the status quo and rely only on catching and civilly sanctioning individual athletes but have no ability to hold conspirators criminally liable, international athletic competition will suffer. Without more effective penalties for those who enable

undetectable substances with pharmacological properties similar to those already available on the market.”).

223. WADA's anti-doping efforts are massive. In 2019 alone, WADA took more than a quarter-million samples from Olympic athletes for testing. WORLD ANTI-DOPING AGENCY, 2019 ANTI-DOPING TESTING Figures 6 (2020).

224. Rodchenkov Anti-Doping Act of 2019, 21 U.S.C. §§ 2401-04.

Olympians' tainted successes, the ideal of a level playing field at the Olympics may be reduced to nothing more than a myth, giving way to a morass of false samples, illicit substances, and state-sponsored deceit.