

**GUILTY UNTIL PROVEN INNOCENT, AND THEN, STILL  
GUILTY: WHAT THE WORLD ANTI-DOPING AGENCY  
CAN LEARN FROM THE NATIONAL FOOTBALL  
LEAGUE ABOUT FIRST-TIME ANTI-DOPING  
VIOLATIONS**

RYAN RESZEL\*

**ABSTRACT**

This comment will argue that effective punishment for an athlete's violation of an anti-doping policy should consider that athlete's intent and that the World Anti-Doping Agency (WADA) should amend the World Anti-Doping Code (Code) to include a more graduated punishment scale, similar to the scale currently implemented by the NFL. The revised Code would not allow athletes to completely avoid punishment for unknowingly ingesting a banned substance. However, the punishment would give athletes the benefit of the doubt after first-time violations and would not place their careers in jeopardy when it is clear there was no intent to use a banned substance. Although the NFL's sixteen-game schedule does not directly correlate with the schedules of sports such as cycling or swimming, this Comment will demonstrate that an equivalent to the NFL's initial four-game suspension could be used in cycling, swimming, and other Olympic sports as well.

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## INTRODUCTION

On September 29, 2010, the International Cycling Union (Union Cycliste Internationale, hereafter UCI) reported that a urine sample taken from three-time Tour de France champion Alberto Contador contained detectable amounts of the banned substance clenbuterol, a “weight-loss and muscle-building drug.”<sup>1</sup> Contador claims the substance appeared in his urine because of tainted beef that he ate during a rest day on the Tour.<sup>2</sup> Despite the alleged accidental ingestion of the banned substance, the UCI could strip the cyclist of his most recent title and impose a two-year suspension.<sup>3</sup>

Contador would not be the first high-profile international athlete to face a suspension for accidental use of clenbuterol.<sup>4</sup> In 2008, Jessica Hardy, a world record holder in the 100-meter breaststroke, tested

<sup>1</sup> Juliet Macur, *Positive Test for Contador May Cost Him The Tour Title*, N.Y. TIMES, Sept. 29, 2010, <http://www.nytimes.com/2010/09/30/sports/cycling/30cycling.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; Although the Spanish cycling federation has cleared Contador of all charges, it made this “hugely contentious decision” under intense political pressure. Politicians such as Spanish Prime Minister Jose Luis Rodriguez Zapatero publically defended Contador, saying there was no reason to sanction him. Nevertheless, WADA and the UCI have appealed the Spanish federation’s decision to “sport’s highest court,” the Court of Arbitration for Sport (CAS). See generally Juliet Macur, *Spain Supports Contador in Fighting Drug Charges*, N.Y. TIMES, Feb. 14, 2011, <http://www.nytimes.com/2011/02/15/sports/cycling/15contador.html>; Barry Ryan, *Contador Calls on UCI and WADA to Believe in Their Anti-Doping System*, CYCLING NEWS, Mar. 1, 2011, <http://www.cyclingnews.com/news/contador-calls-on-uci-and-wada-to-believe-in-their-anti-doping-system>; Juliet Macur, *Contador’s Doping Case Postponed Further*, N.Y. TIMES, July 26, 2011, <http://www.nytimes.com/2011/07/27/sports/cycling/contadors-doping-case-postponed-further.html>.

<sup>4</sup> Macur, *supra* note 1.

positive for the same banned substance.<sup>5</sup> Although Hardy proved the presence of clenbuterol resulted from a tainted nutritional supplement, she was suspended for one year, and WADA attempted to increase the suspension to two years.<sup>6</sup> The one-year suspension coupled with another International Olympic Committee (IOC) rule threatened her chances of competing in the upcoming 2012 Summer Olympics.<sup>7</sup>

Contador and Hardy's stories contrast sharply with that of Houston Texans linebacker Brian Cushing. After a rookie season in which he compiled 133 tackles and 5 sacks, Cushing received the Associated Press' Defensive Rookie of the Year award for his outstanding play.<sup>8</sup> However, months later the NFL revealed Cushing had tested positive for the banned substance HCG in October of 2009.<sup>9</sup> Cushing claimed the hormone, which increases the body's production of testosterone, appeared in his body naturally, rather than through ingestion as the NFL suggested.<sup>10</sup> Despite testing positive for the banned substance, Cushing retained his award.<sup>11</sup> The NFL suspended him without pay for the first four games of the 2010 season for violating the league's performance-enhancing drug policy.<sup>12</sup>

Under WADA's World Anti-Doping Code, which both the UCI and the IOC have adopted, "it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body."<sup>13</sup> Furthermore, "it is not necessary that intent, fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation."<sup>14</sup> In other words, when an athlete takes a vitamin or drinks a

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<sup>5</sup> Karen Crouse, *For Swimmer, Ban Ends, but Burden Could Last*, N.Y. TIMES, Aug. 7, 2010, <http://www.nytimes.com/2010/08/08/sports/08hardy.html>.

<sup>6</sup> *FINA Backs Out of Jessica Hardy Appeal; WADA Continues Appeal*, SWIMMING WORLD, July 2, 2009, <http://www.swimmingworldmagazine.com/lane9/news/21554.asp>.

<sup>7</sup> Crouse, *supra* note 5. *See generally IOC Declares Jessica Hardy Eligible*, ESPN.COM, Apr. 28, 2011, <http://sports.espn.go.com/oly/news/story?id=6444781>.

<sup>8</sup> Vinny Ditrani, *Brian Cushing is NFL's Defensive Rookie of the Year*, THE RECORD, Jan. 5, 2010, available at [http://www.northjersey.com/sports/010510\\_Brian\\_Cushing\\_is\\_NFLs\\_top\\_defensive\\_rookie.html](http://www.northjersey.com/sports/010510_Brian_Cushing_is_NFLs_top_defensive_rookie.html).

<sup>9</sup> Judy Battista, *Texans' Cushing Denies Taking Drug That Prompted Suspension*, N.Y. TIMES, May 13, 2010, <http://www.nytimes.com/2010/05/14/sports/football/14nfl.html>.

<sup>10</sup> *Id.*

<sup>11</sup> Judy Battista, *In Revote, Cushing Keeps Award*, N.Y. TIMES, May 12, 2010, <http://www.nytimes.com/2010/05/13/sports/football/13drugs.html>.

<sup>12</sup> Michael S. Schmidt, *Drug Use May Cost Cushing N.F.L. Rookie Award*, N.Y. TIMES, May 10, 2010, <http://www.nytimes.com/2010/05/11/sports/football/11drugs.html>.

<sup>13</sup> World Anti-Doping Agency [WADA], *World Anti-Doping Code 2009*, at 19 (2009), available at [http://www.wada-ama.org/rtecontent/document/code\\_v2009\\_En.pdf](http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf).

<sup>14</sup> *Id.*

protein shake or eats a meal, she risks being held strictly liable for doping even if she had no intention of gaining an athletic advantage.<sup>15</sup> If a banned substance is found in an athlete's "In-Competition" sample, he will be disqualified immediately, and he must forfeit all medals, prizes, or points.<sup>16</sup> A first-time violation results in a two-year suspension for the athlete.<sup>17</sup> Only in the "most exceptional cases" could an athlete expect his or her period of ineligibility to be eliminated.<sup>18</sup>

NFL players who violate the league's performance-enhancing drug policy face only a four-game suspension,<sup>19</sup> and they are not banned from competition immediately.<sup>20</sup> As Cushing's case illustrates, these violators do not have to relinquish any awards or honors, and their teams do not have to forfeit games in which the athlete participated.<sup>21</sup> Because first-time violators can continue playing after serving their suspensions, they get an immediate opportunity to prove they can compete at a high level without the assistance of performance-enhancing drugs.<sup>22</sup>

The NFL's drug policy allows Cushing to shine on football's biggest stage.<sup>23</sup> Yet, even though Contador and Hardy were also first-time violators,<sup>24</sup> the Code governing their sports' respective anti-doping regulations left them wondering when they would be able to compete again.<sup>25</sup> WADA believes it is in the best interests of sportsmanship, fair competition, and athlete safety to maintain strict anti-doping rules.<sup>26</sup> Yet,

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<sup>15</sup> *Id.* Although the Code does not make this specific assertion, it can be inferred from the text of the Code.

<sup>16</sup> *Id.* at 71.

<sup>17</sup> *Id.* at 52.

<sup>18</sup> *Id.* at 55.

<sup>19</sup> Brent D. Showalter, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 658 (2007).

<sup>20</sup> See Battista, *supra* note 9. For example, Cushing did not officially receive his suspension until after the 2009 season concluded. *Id.*

<sup>21</sup> Battista, *supra* note 11.

<sup>22</sup> Michael Ruston, *AFC South: Texans' Cushing ready for new role*, The Sports Network, Oct. 26, 2010, available at <http://www.wkyc.com/news/story.aspx?storyid=155274>.

<sup>23</sup> *Id.*

<sup>24</sup> Macur, *supra* note 1. Contador had never failed a drug test before. At one point in 2006, he was implicated in a "large-scale blood-doping ring in Spain." However, the UCI cleared his name and did not find he committed any wrongdoing. *Id.*

<sup>25</sup> Christa Case Bryant, *Alberto Contador: How Strong is the Doping Case Against Him?*, CHRISTIAN SCI. MONITOR, Sept. 30, 2010, <http://www.csmonitor.com/World/Europe/2010/0930/Alberto-Contador-How-strong-is-the-doping-case-against-him>; Crouse, *supra* note 5.

<sup>26</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 11.

with prohibited substance lists growing longer each year, it is becoming increasingly more difficult for athletes to self-police themselves.<sup>27</sup>

Part I of this paper will provide background information on the origins of WADA as well as the World Anti-Doping Code and how it currently functions in today's international sports world. Part II will briefly discuss the creation of the NFL's performance-enhancing drug policy and will also detail the current policy and how it impacts players today. The juxtaposition of these first two sections will highlight the remarkable differences in sanctions for first-time violators in the NFL and first-time violators subject to the Code. Part III will examine the drawbacks of the WADA model, analyzing both the restrictive language of the Code and the ways in which this language affects athletes who violate the Code. Finally, Part IV will suggest how variations on the NFL model could work effectively in the IOC and UCI. Overall, after a thorough examination of the anti-doping regulations of WADA and the NFL, this Comment will ultimately conclude that WADA, and therefore, the IOC and UCI, should adopt rules similar to those of the NFL for first-time anti-doping violators.

#### **PART I: THE CREATION OF THE WORLD ANTI-DOPING AGENCY AND THE ROLE OF THE WORLD ANTI-DOPING CODE IN INTERNATIONAL SPORTS TODAY**

To promote and coordinate the fight against doping in international sports, the IOC joined with governments, public authorities, and inter-governmental organizations to create WADA in 1999.<sup>28</sup> WADA's formation was largely prompted by doping problems in international cycling which surfaced in 1998.<sup>29</sup> The IOC and governments from around the world provide equal funding for the

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<sup>27</sup> See generally Crouse, *supra* note 5; Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 170 (2006). A study by the IOC found that out of 634 non-hormonal nutritional supplements, 18.8 percent of the supplements purchased in the United States contained at least one anabolic agent that the manufacturer had not listed on the ingredients label.

<sup>28</sup> George T. Stiefel III, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1236 (2008).

<sup>29</sup> *Id.*; During the 1998 Tour de France, officials found large quantities of performance enhancing drugs in a car belonging to one of the French cycling teams. See generally Meredith Lambert, *The Competing Justices of Clean Sport: Strengthening the Integrity of International Athletics While Affording a Fair Process for the Individual Athlete Under the World Anti-Doping Program*, 23 TEMP. INT'L. & COMP. L.J. 409, 414 (2009).

agency.<sup>30</sup> WADA's main objectives include, "scientific research, education, development of anti-doping capacities and monitoring the World Anti-Doping Code."<sup>31</sup> WADA is structured as a Swiss private law foundation with its headquarters in Montreal, Canada.<sup>32</sup>

WADA created the Code to "ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping."<sup>33</sup> The 136-page document contains rules on testing practices and penalties as well as education and anti-doping research.<sup>34</sup> Across the world, approximately 660 sports leagues and organizations have adopted the Code.<sup>35</sup>

As noted earlier, WADA employs a strict liability standard against violators of the Code.<sup>36</sup> Whether an athlete intended to use a banned substance or did so accidentally, he remains responsible for the substances in his body.<sup>37</sup> Under the Code, all athletes accused of taking a prohibited substance by an anti-doping agency or organization are entitled to a hearing before an impartial and fair hearing body.<sup>38</sup>

The hearings verify whether an athlete has violated a rule and also determine appropriate consequences if a violation has occurred.<sup>39</sup> An athlete may hire an attorney to represent him, but the athlete must pay for the attorney's services regardless of whether the athlete is a paid professional or an amateur.<sup>40</sup> Depending on the time and circumstances surrounding the alleged violation, an athlete may take part in an expedited hearing.<sup>41</sup> This would usually occur on the evening before a major event in a competition where knowledge of the individual's use or

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<sup>30</sup> *About WADA*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/> (last visited Oct. 27, 2010).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 11.

<sup>34</sup> *See generally id.*

<sup>35</sup> *Pro Sports Discovering Depth of PEDs; Latest WADA Findings Helping to Open Eyes in North American Leagues*, TORONTO STAR, Oct. 14, 2010, at S7.

<sup>36</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 19.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 48.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 49.

non-use of a banned substance would be critical to determining if he or she can participate.<sup>42</sup>

During a hearing, the agency bringing the claim against an athlete bears the initial burden of proof.<sup>43</sup> “The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel.”<sup>44</sup> This burden of proof “in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.”<sup>45</sup> Anti-doping agencies can establish facts through “any reliable means, including admissions.”<sup>46</sup> To verify the presence of a banned substance in an athlete’s blood or urine sample, the agency or organization must “show that the procedures for collecting, storing and analyzing the biological samples were carried out correctly.”<sup>47</sup> “WADA accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories.”<sup>48</sup>

Once an anti-doping agency has established that an athlete ingested a banned substance “to the comfortable satisfaction of the hearing panel,”<sup>49</sup> the athlete may rebut the presumption by producing information which counters evidence of the positive test.<sup>50</sup> “The standard of proof shall be by a balance of probability.”<sup>51</sup> This standard generally reflects the civil law standard used in the United States.<sup>52</sup>

If a panel determines that an athlete used a banned substance under the Code, the athlete can attempt to get his two-year suspension reduced.<sup>53</sup> However, the athlete must “produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance.”<sup>54</sup> Generally, the greater the chance that the banned substance would have improved the

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 26.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Connolly, *supra* note 27, at 177.

<sup>48</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 27.

<sup>49</sup> *Id.* at 26.

<sup>50</sup> *Id.*; *See generally* Connolly, *supra* note 27, at 178.

<sup>51</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 26.

<sup>52</sup> Connolly, *supra* note 27, at 175.

<sup>53</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 54.

<sup>54</sup> *Id.* at 55.

athlete's performance, the higher the burden he faces when attempting to demonstrate a lack of intent.<sup>55</sup>

Even if an athlete can prove that she did not intend to use a prohibited substance, few scenarios would warrant a reduction in ineligibility under the Code.<sup>56</sup> For example, a sanction against an athlete could not be completely eliminated if her ingestion of a banned substance resulted from mislabeled vitamin or nutritional substance.<sup>57</sup> Additionally, if an athlete tested positive because a personal doctor or trainer administered a banned substance, her suspension could not be completely reduced.<sup>58</sup> Finally, even if a coach, friend or spouse sabotaged the athlete by placing a prohibited substance in his food or drink, the Code would enforce a period of ineligibility.<sup>59</sup> In fact, the only scenario that the Code explicitly lists as warranting a complete reduction in the two-year suspension is when an athlete sabotages a fellow competitor.<sup>60</sup>

When an athlete establishes that he took a banned substance through no fault of his own, the Code states that "the period of Ineligibility can be reduced, but the reduced period of Ineligibility may not be less than one-half the period of Ineligibility otherwise applicable."<sup>61</sup> Thus, for a first-time violator of the Code, a suspension would still be in effect for at least one year.<sup>62</sup> To receive any reduction, the athlete must show how he came into contact with the banned substance.<sup>63</sup> If an athlete wishes to be reinstated after the period of ineligibility, he must make himself available for a doping test.<sup>64</sup> This includes providing "current and accurate whereabouts information."<sup>65</sup>

Anti-doping agencies, athletes, and even WADA itself may appeal decisions by initial hearing panels to the Court of Arbitration for Sport (CAS).<sup>66</sup> Created in 1984 in response to an increase in international sports related disputes, the CAS provides a forum for athletes and sports

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 56–57.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 57.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 56.

<sup>61</sup> *Id.* at 57.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 58.

<sup>64</sup> *Id.* at 76.

<sup>65</sup> *Id.*

<sup>66</sup> Lambert, *supra* note 29, at 415.

organizations to resolve disputes through arbitration.<sup>67</sup> The CAS generally settles disputes involving disciplinary and commercial issues.<sup>68</sup> This “court” only has jurisdiction if an agreement between two parties states that the CAS shall be used to resolve disputes.<sup>69</sup> The IOC and all Olympic sports federations have agreed to CAS jurisdiction.<sup>70</sup>

## **PART II: THE FORMATION OF THE NFL’S PERFORMANCE-ENHANCING DRUG POLICY AND ITS EFFECTS ON ATHLETES**

The NFL became the first US professional sports league to test for steroids and performance-enhancing drugs when it created a drug policy in 1987.<sup>71</sup> The League began suspending players for violating the drug policy in 1989 and implemented year-round testing in 1990.<sup>72</sup> In 1999, the League announced that first-time violators of the policy would receive a four-game suspension.<sup>73</sup> With the increasing complexity of many performance-enhancing drugs, the NFL has continued to expand its list of prohibited substances.<sup>74</sup> The League banned the use of Ephedra before the Food and Drug Administration (FDA) took action and also outlawed the use of Andro, the drug most-famously taken by baseball slugger Mark McGwire, before Congress labeled the product a controlled substance.<sup>75</sup>

The NFL drug policy is considered to be “the most stringent policy of any professional sports league in the United States.”<sup>76</sup> The League tests all players at least once each year, usually during the preseason or training camp.<sup>77</sup> Players also receive random tests throughout the regular season and up to six times during the off-season.<sup>78</sup>

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<sup>67</sup> *General Information, TAS/CAS*, <http://www.tas-cas.org/history> (last visited on Mar. 2, 2011).

<sup>68</sup> *Types of Disputes Submitted to the CAS*, TAS/CAS, <http://www.tas-cas.org/en/infogenerales.asp/4-3-239-1011-4-1-1/5-0-1011-3-0-0/> (last visited on Mar. 2, 2011).

<sup>69</sup> *Id.*

<sup>70</sup> Lambert, *supra* note 29, at 416.

<sup>71</sup> Steven Silverberg, *Safe at Home? Assessing U.S. Efforts to Protect Youths from the Effects of Performance Enhancing Drugs in Sports*, 35 BROOK. J. INT’L L. 271, 276–277 (2010).

<sup>72</sup> Showalter, *supra* note 19, at 657.

<sup>73</sup> Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes-Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 215 (2009).

<sup>74</sup> Showalter, *supra* note 19, at 657.

<sup>75</sup> *Id.*

<sup>76</sup> Silverberg, *supra* note 71, at 277.

<sup>77</sup> Heisler, *supra* note 73, at 215.

<sup>78</sup> *Id.*

The League tests approximately 1,800 players each year in nearly 10,000 tests.<sup>79</sup> The NFL continues to suspend players for four games for first-time violations of the drug policy.<sup>80</sup> A second violation results in an eight-game suspension.<sup>81</sup> Players receive at least a twelve-month suspension for a third violation.<sup>82</sup>

Like WADA's World Anti-Doping Code, the NFL's Policy on Anabolic Steroids and Related Substances does not include "intent" as an element in violating the Policy.<sup>83</sup> The Policy states, "Players are responsible for what is in their bodies, and a positive test result will not be excused because a player was unaware that he was taking a prohibited substance."<sup>84</sup> Furthermore, under the NFL's Policy, "Having [a] Club's training or medical staff approve a supplement will not excuse a positive test result."<sup>85</sup> "A positive test will not be excused because it results from the use of a dietary supplement rather than from the intentional use of a Prohibited Substance."<sup>86</sup>

Any player that has tested positive for a banned substance under the NFL's Policy is entitled to an appeal.<sup>87</sup> A player seeking an appeal must contact the NFL office within five days after receiving notification of the positive test and pending disciplinary action.<sup>88</sup> The League will schedule an appeal hearing, and the NFL commissioner will preside as "Hearing Officer."<sup>89</sup> An attorney may represent the player, and the NFL Player's Association (NFLPA) may also participate.<sup>90</sup> Under the NFL's Policy, the commissioner or his designee "will issue a written decision, which will constitute a full, final and complete disposition of the appeal,

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<sup>79</sup> Nancy Gay, *Steroids Spotlight Turns to Football*, S. F. CHRON., Oct. 27, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/27/SPG9AM0RPD1.DTL>.

<sup>80</sup> NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 2010, 8, available at <http://images.nflplayers.com/mediaResources/files/PDFs/PlayerDevelopment/2010%20Steroid%20Policy.pdf>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 9.

<sup>83</sup> *See id.* at 6.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 10.

<sup>87</sup> *Id.* at 11.

<sup>88</sup> *Id.* at 21.

<sup>89</sup> *Id.* at 11.

<sup>90</sup> *Id.*

and which will be binding on all parties.”<sup>91</sup> The player will not begin serving any suspension until the appeal process has been completed.<sup>92</sup>

When a player appeals a positive test result, the NFL has the “initial burden to establish a prima facie violation of the policy.”<sup>93</sup> It is presumed that “the specimen collectors, Independent Administrator, consulting toxicologist, and testing laboratories . . . collect and analyzed the Player’s sample in accordance with the Policy.”<sup>94</sup> A player can rebut this presumption by “establishing that a departure from the Policy’s stated protocols occurred during the processing of his specimen.”<sup>95</sup> The League would have to show that the departure from protocol did not affect the validity of the positive test.<sup>96</sup> Similar to provisions of the Code, the NFL’s Policy requires that a player that has previously tested positive must test negative for all prohibited substances if he hopes to be reinstated by the League.<sup>97</sup>

### PART III: DRAWBACKS OF THE WADA ANTI-DOPING MODEL

#### PROBLEM 1: RIGIDITY IN LANGUAGE

While WADA created the Code to “ensure harmonized, coordinated and effective anti-doping programs at the international level,”<sup>98</sup> the Code has ultimately locked in suspensions for athletes who may have never intended to gain a competitive advantage.<sup>99</sup> Although it failed to do so in the 2009 Code, WADA outlined a general argument in favor of a strict liability standard in testing athletes for performance enhancing drugs in its 2003 version of the Code.<sup>100</sup> The 2003 Code noted that, “It is true that a strict liability test is likely to be unfair in an

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 10.

<sup>98</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 11.

<sup>99</sup> *See generally* Crouse, *supra* note 5; *See generally* Macur, *supra* note 3. Although Hardy’s suspension was reduced to one-year, WADA appealed the initial decision to the CAS, and sought a two-year suspension. WADA may also seek a two-year suspension for Contador.

<sup>100</sup> WADA, *World Anti-Doping Code 2003*, at 9 (2003), available at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf).

individual case such as . . . where the Athlete may have taken medication as the result of mislabeling or faulty advice for which he or she is not responsible.”<sup>101</sup> Despite this unfairness on a case-by-case basis, WADA suggested that some inequality in competition could not be avoided.<sup>102</sup> WADA explained that, “it is also in some sense ‘unfair’ for an athlete to get food poisoning on the eve of an important competition.”<sup>103</sup> However, “just as the competition will not be postponed to await the Athlete’s recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption.”<sup>104</sup>

Although WADA recognizes that its strict liability standard can produce harsh results, it provided several general justifications for the standard. First it noted that, “[t]he vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable Persons, which the law cannot repair.”<sup>105</sup> Next, WADA justified its strict liability standard by stating, “it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors . . . [which] would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.”<sup>106</sup> Furthermore, WADA inferred that permitting athletes who used performance-enhancing drugs accidentally to compete would inadvertently allow more athletes who doped intentionally to participate as well.<sup>107</sup> WADA declared that, “It is likely even intentional abuse would escape sanction for lack of proof of guilty intent.”<sup>108</sup>

WADA claimed in 2003, that “a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of ‘clean’ Athletes and fairness in the exceptional circumstances where a prohibited substance entered an Athlete’s system through no fault or negligence on the Athlete’s part.”<sup>109</sup> As the 2003 Code states, “It is important to

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 8–9.

emphasize that while the determination of whether the anti-doping rule has been violated is based on strict liability, the imposition of a fixed period of ineligibility is not automatic.”<sup>110</sup>

While the “imposition of a fixed period of ineligibility is not automatic,”<sup>111</sup> the current Code would permit an elimination of a suspension only in the rarest of circumstances.<sup>112</sup> An athlete may reduce his sentence only if he can “establish no fault or negligence or no significant fault or negligence.”<sup>113</sup> The Comment section of the Code notes that the rules that would permit either a reduced suspension or a complete elimination of a suspension “are meant to have an impact only in cases where the circumstances are truly exceptional and not [applicable] in the vast majority of cases.”<sup>114</sup> Thus, for WADA to claim that “the imposition of a fixed period of ineligibility is not automatic,”<sup>115</sup> goes against the language of the Code’s Comment section and stretches the truth beyond the strict limits within the language of the Code.

## PROBLEM 2: RIGIDITY IN PRACTICE

Jessica Hardy’s story illustrates the rigidity of WADA’s adherence to the language of the World Anti-Doping Code.<sup>116</sup> In May 2009, nearly nine months after she tested positive for the banned substance clenbuterol, an American Arbitration Association (AAA) panel held that Hardy’s ingestion of the drug had been inadvertent.<sup>117</sup> Following this determination, the AAA reduced Hardy’s suspension from two years to one year.<sup>118</sup>

The International Swimming Federation (FINA) originally appealed the AAA’s decision along with WADA.<sup>119</sup> However, while FINA dropped its appeal shortly after the AAA ruling, WADA stated it

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<sup>110</sup> *Id.* at 9.

<sup>111</sup> *Id.*

<sup>112</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 56.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *World Anti-Doping Code 2003*, *supra* note 100, at 9.

<sup>116</sup> See generally Crouse, *supra* note 5; *FINA Backs Out of Jessica Hardy Appeal; WADA Continues Appeal*, *supra* note 6. Both articles describe Hardy’s positive test for clenbuterol and her legal struggle to return to competition.

<sup>117</sup> See Crouse, *supra* note 5.

<sup>118</sup> *Id.*

<sup>119</sup> *FINA Backs Out of Jessica Hardy Appeal; WADA Continues Appeal*, *supra* note 6.

would appeal “any deviance from a two-year ban for doping.”<sup>120</sup> In the briefs WADA submitted to the CAS, it referred to the two-year suspension as the “ordinary” sanction for an anti-doping violation.<sup>121</sup>

During the arbitration proceeding, Hardy produced evidence that she had conversations with the manufacturer of the supplement before she took the product.<sup>122</sup> She also consulted with her swimming team physician, the United States Olympic Committee (USOC) sports psychologist, and her coach prior to using the supplement.<sup>123</sup> Hardy received assurances from the manufacturer that the supplement she planned to take was pure.<sup>124</sup> She purchased the product directly from the manufacturer.<sup>125</sup> The manufacturer informed Hardy that its supplements were composed of “quality ingredients” and tested by an independent agency.<sup>126</sup> Hardy made sure the product had not been labeled “steroidal.”<sup>127</sup>

Despite all of these efforts taken by Hardy to ensure the supplement she ultimately ingested for eight months contained no banned substances, WADA still argued that the full two-year suspension was appropriate.<sup>128</sup> WADA’s briefs cited the Code, stating that “a reduction of the otherwise applicable period of ineligibility is meant to occur only in cases where the circumstances are truly exceptional.”<sup>129</sup> According to WADA, personally contacting a supplement’s manufacturer to confirm the item’s purity, consulting with coaches and USOC officials, performing extensive online research and then somehow still testing positive for a banned substance did not equate to “truly exceptional” circumstances.<sup>130</sup>

Instead WADA argued that Hardy had not taken enough care to ensure the supplements did not contain a banned substance.<sup>131</sup> In its

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<sup>120</sup> *Id.*

<sup>121</sup> World Anti-Doping Agency (WADA) v. Jessica Hardy & United States Anti-Doping Agency (USADA), Arbitral Award delivered by the Court of Arbitration for Sport, CAS 2009/A/1870, 14, *available at* <http://www.tas-cas.org/d2wfiles/document/4218/5048/0/Award%201870%20FINAL.pdf>.

<sup>122</sup> *Id.* at 5.

<sup>123</sup> *Id.* at 5–6.

<sup>124</sup> *Id.* at 5.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 14.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 5–6.

<sup>131</sup> *Id.* at 14–15.

briefs, WADA criticized Hardy, stating that, “Instead of being rightly suspicious with food supplements, Ms. Jessica Hardy chose to trust blindly a sponsor that commercializes nutritional supplements described as enhancing muscle growth.”<sup>132</sup> Furthermore, “as an experienced, top-level athlete and being fully aware of the danger of food supplements, Ms. Jessica Hardy should have been particularly vigilant.”<sup>133</sup>

WADA asserted Hardy “could realize by a simple check on the Internet that the description of the food supplements offered to her was alarming.”<sup>134</sup> WADA also detailed that “despite clear signs of danger, Ms. Hardy did not get the supplements tested.”<sup>135</sup> According to WADA, Hardy should have “conducted further investigations” beyond contacting the manufacturer.<sup>136</sup> The agency did not specify what type of “further investigations” a then-21-year-old should have conducted in her spare time between swimming practices and Olympic tryouts.<sup>137</sup>

On May 21, 2010, the CAS rejected WADA’s appeal and ruled in favor of Hardy, limiting her suspension to the one year she had already served.<sup>138</sup> The CAS found that the circumstances of Hardy’s case were, in fact, “truly exceptional.”<sup>139</sup> The CAS panel noted that despite the arguments presented by WADA, Hardy had “made the research and investigation which could reasonably be expected from an informed athlete wishing to avoid risks connected to the use of food supplements.”<sup>140</sup>

Although WADA had requested the full two-year suspension, the CAS panel ultimately ruled that, “imposing now on Hardy the period of ineligibility requested by WADA would mean on the one hand to apply a sanction too harsh and on the other hand apply a sanction which does not find sufficient basis in the rules.”<sup>141</sup> Thus, it appears that in practice, WADA sought a period of ineligibility for Hardy that was not even supported by WADA’s own rules in the Code.<sup>142</sup> The CAS panel

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<sup>132</sup> *Id.* at 14.

<sup>133</sup> *Id.* at 15.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See id.*

<sup>138</sup> *Jessica Hardy Fends off WADA Appeal, IOC Rule 45 Decision Still in Limbo*, SWIMMING WORLD, May 21, 2010, <http://www.swimmingworldmagazine.com/lane9/news/24201.asp>.

<sup>139</sup> WADA v. Jessica Hardy, *supra* note 121, at 32.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 33.

<sup>142</sup> *Id.*

even wrote “the consequences following from [WADA’s] requests appear to be particularly harsh and disproportionate.”<sup>143</sup>

WADA’s reaction to Alberto Contador’s positive test for the banned substance clenbuterol also indicates a “guilty until proven innocent” mentality that stems largely from the organization’s strict adherence to the language of the Code.<sup>144</sup> While a Dutch professor and expert in clenbuterol stated that “contaminated food is, scientifically speaking, the most probable explanation” for Contador’s contamination,<sup>145</sup> WADA explicitly dismissed Contador’s claims that he could have tested positive for clenbuterol because of tainted meat.<sup>146</sup> David Howman, director general of WADA, questioned how Contador could prove the meat he ate contained clenbuterol.<sup>147</sup> These statements were made just one day after the head of WADA’s anti-doping lab in Belgium admitted contaminated food products could potentially lead to testing positive for clenbuterol.<sup>148</sup>

Although Howman’s comments may seem harsh, particularly when experts disagree on the validity of Contador’s claims, his statements reflect WADA’s stringent adherence to the language of the Code.<sup>149</sup> As mentioned earlier, the Code states that “to justify an elimination or reduction, the Athlete or Other person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel, the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance.”<sup>150</sup> Additionally, “the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.”<sup>151</sup> Therefore, as Howman suggested, Contador faces a difficult challenge in proving he

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<sup>143</sup> *Id.* at 34.

<sup>144</sup> The author bases this assertion on comments provide by WADA’s Director General David Howman. See Nigel Wynn, *WADA Dismisses Contador’s Clenbuterol Claims*, CYCLING WKLY., Oct. 14, 2010, <http://www.cyclingweekly.co.uk/news/latest/503106/wada-dismisses-contador-s-clenbuterol-claims.html>.

<sup>145</sup> Alasdair Fotheringham, *Contador Case Splits Experts’ Opinions*, CYCLING WKLY., Oct. 6, 2010, <http://www.cyclingweekly.co.uk/news/latest/502242/contador-case-splits-experts-opinions.html>.

<sup>146</sup> See Wynn, *supra* note 144.

<sup>147</sup> *Id.*

<sup>148</sup> Alasdair Fotheringham, *How Does Clenbuterol Testing Work?*, CYCLING WKLY., Oct. 13, 2010, <http://www.cyclingweekly.co.uk/news/latest/503068/how-does-clenbuterol-testing-work.html>.

<sup>149</sup> See generally *World Anti-Doping Code 2009*, *supra* note 13, at 52–60.

<sup>150</sup> *Id.* at 55.

<sup>151</sup> *Id.*

did not intentionally ingest clenbuterol.<sup>152</sup> However, instead of remarking how difficult it will be for Contador to avoid a two-year suspension,<sup>153</sup> even as a top scientist claims accidental ingestion is the most probable reason for ingestion of the banned substance,<sup>154</sup> WADA should be reforming its rules to ensure that mere accidents do not lead to prolonged and unnecessary suspensions for athletes.

#### **PART IV: INCORPORATING ELEMENTS OF THE NFL ANTI-DOPING POLICY INTO THE WADA CODE**

##### **SECTION 1: OUTLINING THE REVISION**

In a perfect world, the determination of whether an athlete used, or intended to use, a performance-enhancing substance would be decided by an impartial jury of the athlete's peers.<sup>155</sup> Yet, in the real world, such a framework is practically impossible because sports leagues and organizations must sometimes make immediate decisions about an athlete's eligibility for upcoming events.<sup>156</sup> Proving an athlete's intent or lack of intent to use a banned substance would be particularly difficult in a trial-type setting.<sup>157</sup> As the notes to the 2003 Code illustrate, "a requirement of intent would invite costly litigation that may well cripple federations—particularly those run on modest budgets—in their fight against doping."<sup>158</sup> Finally, WADA is not alone in its application of strict liability.<sup>159</sup> Both the NFL and Major League Baseball hold athletes

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<sup>152</sup> Wynn, *supra* note 144.

<sup>153</sup> *See id.*

<sup>154</sup> Fotheringham, *supra* note 145.

<sup>155</sup> This policy would reflect an individual's Constitutional right to a trial by jury. *See* U.S. CONST. amend. VI.

<sup>156</sup> This is particularly true in international events such as the Olympics where an athlete may participate in multiple events on consecutive days.

<sup>157</sup> *See World Anti-Doping Code 2003, supra* note 100, at 9. The author relies on the general principle in the Code that litigation to determine an athlete's intent could involve high costs. Additionally, one can easily imagine the impracticality of assembling a group of athletes during a competition and asking them to serve on a jury or panel when they would rather prepare for their upcoming events. Finally, lawyers operating under tight time constraints would likely experience difficulties when assembling the evidence necessary to provide definitive proof as to an athlete's intent to use or not use a banned substance.

<sup>158</sup> *Id.*

<sup>159</sup> *See* NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 2010, *supra* note 80, at 6.

strictly liable for what substances enter their bodies.<sup>160</sup> Thus, given the current limits of testing technology, it appears inevitable that strict liability must play some role in any anti-doping policy.

Although the constraints of time and limited funding warrant the use of strict liability in an anti-doping scheme,<sup>161</sup> this framework must be balanced with the inherent unfairness facing those athletes who inadvertently or accidentally ingested a banned substance through no fault of their own. There is little, if any, dispute that WADA's Code unfairly punishes athletes such as Hardy and Contador.<sup>162</sup> In fact, the Code itself admits as much, stating that "a strict liability test is likely to be unfair" in certain individual cases.<sup>163</sup> Yet, the Code fails to mitigate the effects this unfairness could have on athletes and merely infers that some amount of unfairness cannot be avoided.<sup>164</sup> It may be impossible to eliminate unfairness altogether when using a strict liability anti-doping test.<sup>165</sup> However, as the NFL's Policy illustrates, leagues and federations can temper the inherent unfairness in a strict liability scheme by limiting the duration of the initial penalty imposed upon the athlete.<sup>166</sup>

To provide greater fairness to athletes who unintentionally ingest a banned substance while still adequately punishing those athletes who used performance-enhancing drugs intentionally, WADA should eliminate its standard two-year suspension for first-time anti-doping violations.<sup>167</sup> Instead, a first-time violator of the Code should be suspended for a defined number of upcoming events in his or her

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<sup>160</sup> *Id.*; See MAJOR LEAGUE BASEBALL, JOINT DRUG PREVENTION AND TREATMENT PROGRAM, at 9–11, available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

<sup>161</sup> See generally *World Anti-Doping Code 2003*, *supra* note 100, at 9.

<sup>162</sup> The Code obviously does not specifically mention Hardy or Contador. The author relies on the general principle illustrated in the Code that unfairness exists. See *id.* Furthermore, the facts that: (1) WADA sought a two-year suspension for Hardy even after she produced ample evidence that she ingested clenbuterol accidentally and (2) WADA may seek a two-year suspension for Contador even though he may have ingested clenbuterol accidentally through tainted meat, support the author's assertion. See generally *WADA v. Jessica Hardy*, *supra* note 121, at 32; See *Fotheringham*, *supra* note 145.

<sup>163</sup> *World Anti-Doping Code 2003*, *supra* note 100, at 9.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 2010, *supra* note 80, at 8–9. The author bases this assertion on the fact that the NFL employs a graduated system of punishment for players who violate the Policy.

<sup>167</sup> See generally *World Anti-Doping Code 2009*, *supra* note 13, at 56. Although this section of the Code certainly does not discuss revisions based on the NFL's Policy, the author relies on the general principle that only in the rarest of circumstances will athletes' suspension be reduced or eliminated under the current Code.

particular sport. This framework would reflect the NFL's Policy where players receive a four-game suspension for first-time violations.<sup>168</sup> Under the revised Code, athletes would still have the opportunity to appeal their suspensions, but these appeals would face the same stringent limitations contained in the current Code.<sup>169</sup> Second-time violators would receive a mandatory two-year suspension.<sup>170</sup>

Because cyclists and swimmers do not have a sixteen-game season as NFL players do,<sup>171</sup> the Code would establish general penalties for particular sports. For example, in 2011, the UCI World Tour, in which Contador competes, consists of twenty-six races.<sup>172</sup> Under the revised Code, rather than facing a potential suspension of two years, Contador would be suspended for the first seven events after his positive test for clenbuterol was reported. In years that the Olympics or World Championships occur within the time period of the suspension, under the revised Code, the cyclist would also be prohibited from participating in these events.<sup>173</sup>

Some sports might only have a few events each year.<sup>174</sup> If these sports followed the NFL Policy and suspended first-time violators for roughly one-fourth of the season, the athletes might only be prohibited from competing in one or two competitions.<sup>175</sup> Therefore, in sports where athletes compete in fewer than ten events each year, first-time violators will receive a six-month suspension. The purpose of the six-month

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<sup>168</sup> NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 2010, *supra* note 80, at 8.

<sup>169</sup> See *World Anti-Doping Code 2009*, *supra* note 13, at 78–84.

<sup>170</sup> *Id.* at 52. Because it is unlikely that athletes would inadvertently ingest two different banned substances at two separate times, there is a reduced need to protect second-time violators from the harsh two-year suspension currently reserved for first-time violators.

<sup>171</sup> 2010-2011 UCI Road Calendar, UNION CYCLISTE INTERNATIONALE, <http://www.uci.ch/templates/UCI/UCI2/layout.asp?MenuId=MTUyMjQ&LangId=1> (last visited Jan. 4, 2011); Calendar, FINA, [http://www.fina.org/H2O/index.php?option=com\\_jevents&task=year.listevents&Itemid=356](http://www.fina.org/H2O/index.php?option=com_jevents&task=year.listevents&Itemid=356) (last visited Mar. 3, 2011).

<sup>172</sup> UNION CYCLISTE INTERNATIONALE, *supra* note 171.

<sup>173</sup> For example if a cyclist tested positive for a banned substance on June 8, 2012, he would be suspended for the following seven races. Additionally, because the Summer Olympic Games will occur in late July and early August of 2012, the cyclist would also be prohibited from participating in the games.

<sup>174</sup> See, e.g. *Short Track Speed Skating Calendar*, INT'L SKATING UNION, <http://www.isu.org/vsite/vnavsite/page/directory/0,10853,4844-182959-200177-nav-list,00.html> (last visited Sept. 3, 2011). In World Cup Short Track Speed Skating only six events were scheduled in 2011.

<sup>175</sup> See *id.*

suspension is to ensure the athletes in sports with only a few competitions each year experience roughly the same penalty as those athletes in sports with many annual competitions.<sup>176</sup> On an individual, case-by-case basis, a six-month suspension for a short-track speed skater may be more severe than a seven-race suspension for a cyclist.<sup>177</sup> However, while equality in punishment is certainly a goal of the revised Code, the primary purpose of the revision is to ensure that athletes who unintentionally ingested banned substances are not subjected to potentially career-altering or career-ending two-year suspensions.<sup>178</sup>

The revised Code will also contain a brief provision on competitions in which athletes participate in multiple events. An example of such an event would be a swimming competition where an athlete might race in the 50-meter freestyle, the 100-meter freestyle, and the butterfly. In such a scenario, athletes might want to count certain events as events they were suspended for even if they never had any intention of competing in the events before they tested positive test.<sup>179</sup> For this reason, under the revised Code, the entire competition, not each individual race, will represent one event.<sup>180</sup>

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<sup>176</sup> Although each athlete will not experience the same suspension length, the objective of the revision is to ensure athletes experience equivalent punishments. In the case of sports where events are grouped together in relatively short periods of time, dopers might inadvertently benefit from a six-month ban. For example if a winter-sport athlete tested positive for a banned substance in April, he might miss only a few competitions even if he served the six-month suspension from April through October. Therefore, in sports with only a few events clustered together in a brief span of time, the revised Code would contain a provision that a first-time violator must be suspended for at least one competition, even if that competition takes place the following year.

<sup>177</sup> While the short-track speed skater would be suspended for six months of competition, the cyclist may only be suspended for three months of actual competition. Because World Cup short-track speed skating events take place largely in just five months, a first-time violator could potentially miss an entire season depending on the time of the positive test. However, this *de facto*, one-year suspension would not be as severe as a two-year suspension. Additionally, the skater could miss significantly less events than the cyclist as well. See generally INT'L SKATING UNION, *supra* note 174.

<sup>178</sup> The current two-year suspension does not provide total equality in the severity of punishment across multiple sports. As the notes to the current Code state, "in those sports where an athlete's career is short, a two-year Disqualification has a much more significant effect on the Athlete than in sports where careers are traditionally much longer." *World Anti-Doping Code 2009*, *supra* note 13, at 52.

<sup>179</sup> For example, a swimmer that excels in the butterfly but sometimes competes in freestyle events might argue that not participating in all freestyle events would "count" as events that he sat out for his suspension. In reality, however, the swimmer may never have had any intention of competing in any of the freestyle events.

<sup>180</sup> In other words, even though an athlete might have sat out three individual races that she would have swam in, these races do not count as individual suspensions. Not participating in the entire competition would count as one suspension.

**SECTION 2: THE BENEFITS OF THE REVISION**

Reducing the suspension of first-time violators of the Code would provide a better balance between protecting the innocent and punishing the guilty.<sup>181</sup> Under the Code's current framework, athletes who unintentionally ingest banned substances must overcome an almost insurmountable burden to receive any reduction in their sentences.<sup>182</sup> If WADA would give athletes such as Hardy the benefit of the doubt when they produce ample evidence that the use of the performance enhancing drug was unintentional, a revision might not be necessary. Yet, WADA has continued to pursue two-year suspensions even when athletes have painstakingly attempted to follow the rules.<sup>183</sup> In a homicide trial, no prosecutor would charge a defendant with intentional homicide when it was clear the defendant had no intent to harm the victim or any other individual. Thus, the revision to the Code would prevent WADA from embracing the role of the overzealous prosecutor when pursuing suspensions against anti-doping violators.

The suggested revision to the WADA Code would also better protect those athletes who lack the necessary funding or capacity to prove their innocence.<sup>184</sup> While Hardy could trace the origin of clenbuterol to a nutritional supplement,<sup>185</sup> other athletes, including Contador, may not be able to definitively determine how the banned substance entered their system.<sup>186</sup> Although Contador contends that clenbuterol entered his system through tainted meat he ingested<sup>187</sup> and a clenbuterol expert has stated that such an occurrence could have resulted in a positive test for the drug,<sup>188</sup> WADA has essentially dared Contador to try to prove his theory.<sup>189</sup>

In determining the length of Contador's suspension, one could assume he is a cheater who intentionally used clenbuterol in an effort to

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<sup>181</sup> See *World Anti-Doping Code 2009*, *supra* note 13, at 52. Currently all athletes are presumed to have intentionally ingested a banned substance, because almost all athletes are subject to the two-year suspension for their first-violation.

<sup>182</sup> *Id.* at 56–57.

<sup>183</sup> See *WADA v. Jessica Hardy*, *supra* note 121, at 32–34.

<sup>184</sup> Ryan, *supra* note 3. (statement of Contador) (“I haven’t calculated the cost, but it’s very high, truly a sea of money.”)

<sup>185</sup> Crouse, *supra* note 5.

<sup>186</sup> See Macur, *supra* note 1.

<sup>187</sup> *Id.*

<sup>188</sup> Fotheringham, *supra* note 145.

<sup>189</sup> See Wynn, *supra* note 144.

enhance his athletic performance. Therefore, it would follow that he should be suspended for two years.<sup>190</sup> Conversely, one could also assume Contador trusted his training staff to provide him with uncontaminated meat and that he had no intent to ingest a banned substance in the pursuit of victory. In this case, it could be argued that Contador is innocent of any wrongdoing and should not face a suspension.<sup>191</sup> Because Contador's true intent remains a mystery at this time,<sup>192</sup> the suggested revision to the Code provides a third option that balances between the two extremes.

The suggested revision to the WADA Code also acknowledges that athletes do not act alone when training for competition.<sup>193</sup> Coaches, trainers, physicians, nutritionists, and even sports psychologists may work with athletes on a day-to-day basis.<sup>194</sup> Athletes trust these individuals to provide them with reliable information and guidance as they strive to reach their greatest potential.

Yet, under the current Code, WADA requires athletes to be not only responsible for their own actions, but for everyone working with them as well.<sup>195</sup> As the notes to the Code state, athletes certainly hold some responsibility when determining who they associate with.<sup>196</sup> Nevertheless, requiring athletes to check and re-check whether vitamins or nutritional supplements contained banned substances with multiple coaches, trainers, and doctors places an incredible burden on the competitors.<sup>197</sup> The revision to the Code would shorten the suspension of athletes like Hardy who have made diligent efforts to ensure the supplements they use are pure and free from banned substances.<sup>198</sup> At the same time, the revision protects those athletes who may have naively relied on the advice of trainers and coaches without thinking twice about the ultimate consequences.

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<sup>190</sup> See *World Anti-Doping Code 2009*, *supra* note 13, at 52.

<sup>191</sup> Macur, *supra* note 3. Many in Contador's home country of Spain believe the cyclist has done nothing wrong.

<sup>192</sup> See generally Fotheringham, *supra* note 145; Wynn, *supra* note 144. Scientists and anti-doping experts have differed on the feasibility of Contador's explanation that tainted meat caused the presence of clenbuterol in his system. Some claim Contador's story is possible given the amount in his system, while others claim it is not.

<sup>193</sup> See *WADA v. Jessica Hardy*, *supra* note 121, at 5–6.

<sup>194</sup> *Id.*

<sup>195</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 57.

<sup>196</sup> *Id.*

<sup>197</sup> See *WADA v. Jessica Hardy*, *supra* note 121, at 5–6.

<sup>198</sup> See *id.*

### SECTION 3: POTENTIAL CRITICISMS OF THE REVISION

Critics of the revised Code would most likely focus on the significant decrease in the suspension for first-time violators. WADA could argue that anything less than a two-year suspension would encourage more athletes to take the risk and use banned substances to boost athletic performance.<sup>199</sup> WADA might also contend that suspending an athlete for a designated number of upcoming events only serves as an insignificant warning that would not deter dopers from using banned substances.<sup>200</sup>

Yet, as one scholar noted, the creation of the Code and advancements in testing technology have not necessarily reduced the number of athletes using performance-enhancing drugs.<sup>201</sup> If the current Code and continued sophistication in drug detection have not curbed the use of banned substances by athletes, then it follows logically that the Code's two-year suspension may have failed to adequately deter athletes from doping.<sup>202</sup>

Additionally, numerous Code penalties besides the two-year suspension already deter athletes from using banned substances. Even though first-time violators under the revised Code would not face a two-year suspension, their results from the event that produced the positive

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<sup>199</sup> Although the Code does not detail why a two-year suspension was chosen for all first-time violations, WADA has sought to ensure that this two-year penalty is imposed. As illustrated in the arbitration of *WADA v. Jessica Hardy*, WADA pursued the two-year suspension on appeal even when FINA dropped its appeal and when Hardy illustrated that she had taken significant effort to avoid ingesting a banned substance.

<sup>200</sup> Silverberg, *supra* note 71, at 280. WADA has raised similar arguments before. For example, when Major League Baseball implemented a ten-day suspension for first-time violators of its steroid policy in 2005, the then-WADA chairman referred to the suspension as "'a complete and utter joke,' and 'an insult to the fight against doping in sport, an insult to the American public and to the game itself.'"

<sup>201</sup> *Id.* at 298. ("Even when the quantity of positive tests is decreasing, it is naïve to believe athletes are not cheating."). One professor of sports science at the University of Penn State said it "was a folly to think that athletes were not cheating." The same professor said the "drug testing story" was "in general, business as usual." *quoted in* Gina Kolata, *So Far, Drug Testing Has Revealed Only a Few Positives*, N.Y. TIMES, Aug. 16, 2008, [http://www.nytimes.com/2008/08/16/sports/olympics/16doping.html?\\_r=1](http://www.nytimes.com/2008/08/16/sports/olympics/16doping.html?_r=1).

<sup>202</sup> This argument does not warrant steeper penalties for first-time dopers. Instead it implies that some athletes will always try to gain a competitive edge by using performance enhancing drugs, no matter how severe the suspension. Thus, while efforts to improve testing should continually be supported, the innocent should not be made to suffer from increasingly high suspensions because of the acts of the guilty. *See generally* Matthew Hard, *Caught in the Net: Athlete's Rights and the World Anti-Doping Agency*, 19 S. CAL. INTERDIS. L.J. 533, 535–536 (2010).

test would be automatically disqualified.<sup>203</sup> The Code would also require the athlete to forfeit any medals, points, or prizes from the event.<sup>204</sup> Therefore, regardless of whether the Code calls for a suspension in a defined number of upcoming athletic competitions or whether it calls for a suspension of two years, other provisions of the Code will continue to deter athletes from using banned substances.<sup>205</sup>

Besides losing medals and awards, athletes are also deterred from using steroids and other performance-enhancing drugs by the fear of being labeled a cheater.<sup>206</sup> Even after serving her suspension, Hardy experienced anxiety, knowing her identity would always be linked with testing positive for a banned drug.<sup>207</sup> It is unlikely that any reduction in the length of a first-time violator's suspension would eliminate the fear of being branded with the "cheater" label as some competitors have called Hardy.<sup>208</sup>

Another criticism of the suggested revision to the Code would be that it reduces the suspension of numerous athletes who intentionally used banned substances to protect the one or two innocent athletes like Hardy, and potentially Contador, who may have ingested banned substances accidentally.<sup>209</sup> In reality, this argument is the same as those posed above. Intentional dopers are not "getting off easy" under the revised Code. As noted above, simply because an athlete will receive a shorter suspension does not make him or her any less guilty in the public eye or the eyes of his or her peers.<sup>210</sup> Returning to competition more quickly will not bring back the medals and honors that have been stripped away.<sup>211</sup> In short, if those athletes who have used banned substances intentionally still encounter the shame of cheaters, there is no reason not to protect the innocent athletes who did their best to follow the rules.

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<sup>203</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 71.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *See* Crouse, *supra* note 5.

<sup>207</sup> *Id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See World Anti-Doping Code 2003*, *supra* note 100, at 9. (the Code does not specifically mention Hardy or Contador, the author merely relies on the principles of the Code to support the claim).

<sup>210</sup> *See e.g.* Crouse, *supra* note 5; Fotheringham, *supra* note 145; Wynn, *supra* note 144.

<sup>211</sup> *See World Anti-Doping Code 2009*, *supra* note 13, at 71.

## CONCLUSION

To deter athletes from using performance-enhancing drugs, while still protecting innocent athletes who have ingested banned substances unintentionally, WADA should revise the World Anti-Doping Code and implement a graduated scale of punishment similar to the system currently used by the NFL. The Code itself describes the individual unfairness in a strict liability system.<sup>212</sup> As long as WADA continues to pursue a rigid adherence to the punishments listed in the Code,<sup>213</sup> athletes like Hardy and Contador will continue to suffer at the same time NFL stars like Cushing continue to shine.<sup>214</sup>

In an era where “quasi-government agencies,” such as WADA, create new lists of banned substances each year, the individual rights of athletes must be protected.<sup>215</sup> While increasing numbers of skeptics might believe that today’s athletes rely more on pills than skills,<sup>216</sup> this mentality must not skew the basic principles of fairness within today’s international sports laws.<sup>217</sup> Because a strict liability scheme will inherently punish the innocent along with the guilty,<sup>218</sup> WADA should stand up and take action rather than simply sitting on the sidelines and shrugging its shoulders.

If history stands as an indicator, drastic change will not come soon.<sup>219</sup> WADA representatives have argued, and continue to contend,

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<sup>212</sup> See *World Anti-Doping Code 2003*, *supra* note 100, at 9.

<sup>213</sup> As the WADA stated in its briefs in the Hardy case, the two-year suspension stands as the “ordinary” suspension. *WADA v. Jessica Hardy*, *supra* note 102, at 15. Only if circumstances are “truly exceptional” should a suspension be eliminated. *World Anti-Doping Code 2009*, *supra* note 13, at 56.

<sup>214</sup> Crouse, *supra* note 5. Hardy’s Olympic future remained uncertain for several months. She has also struggled to shake the stigma of being labeled a “cheater.” Ryan, *supra* note 3. Contador has experienced intense international scrutiny since his positive test, and he also faces a legal challenge from WADA and the UCI.

<sup>215</sup> See Hard, *supra* note 202, at 535–536.

<sup>216</sup> Robyn R. Goldstein, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT. L.J., no. 1, Fall 2007 at 149, 151.

<sup>217</sup> As noted earlier in the Comment, doing so creates a guilty until proven innocent mentality, contrary to the basic laws of democracy.

<sup>218</sup> See *World Anti-Doping Code 2003*, *supra* note 100, at 9. Although the Code does not make this specific statement, the claim can be inferred from the passage on unfairness to the individual.

<sup>219</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 52. The mandatory two-year suspension for first time violators remained in effect in the 2009 Code. *FINA Backs Out of Jessica Hardy Appeal; WADA Continues Appeal*, *supra* note 6. WADA continued to pursue a two-year suspension for Hardy even after the federation that issued the initial suspension dropped out of the appeal.

that the anti-doping programs of America's sports leagues, including the NFL, remain weak.<sup>220</sup> Yet, when athletes continue to use performance-enhancing drugs despite the Code's two-year suspension for first-time violators,<sup>221</sup> there is no reason for accidental dopers to endure long suspensions along with the true cheaters. It may be inevitable that all athletes who ingest banned substances, whether intentionally or unintentionally, must be called "guilty." Yet, if WADA truly values fairness, equality and the spirit of competition,<sup>222</sup> it must revise the Code and embrace the idea that some of these "guilty" are, in fact, innocent. And innocent athletes do not deserve two-year suspensions.

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<sup>220</sup> Christian Red & Michael Okeefe, *NFL, Congressional Leader Say League Will Start Screening for HGH, but Union Not Ready to Commit*, N.Y. DAILY NEWS, Oct. 14, 2011, [http://articles.nydailynews.com/2011-10-14/sports/30303713\\_1\\_hgh-testing-jeff-pash-human-growth-hormone](http://articles.nydailynews.com/2011-10-14/sports/30303713_1_hgh-testing-jeff-pash-human-growth-hormone). WADA has recently criticized the NFL Players' Association for failing to agree to hGh testing. See generally Juliet Macur, *Still No Deal on Testing for H.G.H.*, N.Y. TIMES, Aug. 24, 2011, <http://www.nytimes.com/2011/08/25/sports/football/nfl-and-union-remain-stalled-over-hgh-testing.html>.

<sup>221</sup> Silverberg, *supra* note 71, at 280.

<sup>222</sup> *World Anti-Doping Code 2009*, *supra* note 13, at 11.