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Citar este artículo como: Claudio Tamburrini (2013): WADA's anti-doping policy and athletes' right to privacy, *Fair Play*. *Revista de Filosofía, Ética y Derecho del Deporte*, vol. 1, núm.2, pp. 84-96

RECIBIDO: 23/8/2013
ADMITIDO: 25/9/2013

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Abstract

In accordance with the World Anti-Doping Agency's (Wada) Anti-doping Code, athletes are regularly tested for forbidden doping substances in connection with sport competitions. Their samples are stored for long time, in case new doping detection techniques are developed in the future that might allow finding forbidden substances not detectable at present. As Wada's ambition is not only to have clean competitions, but also clean athletes, different measures need to be implemented to facilitate testing in-between competitions as well. One of them is making sportspersons fill a form to inform doping controllers about their whereabouts, so that they can reach the athletes and make them undergo unannounced tests.

Wada's anti-doping policy has been widely criticized for violating athletes' right to *privacy*. However, this debate is often carried out as if it was crystal clear what kind of right this supposed athletes' right to privacy is. In this article, the notion of privacy is characterized as a previous step to asking in which regards Wada's anti-doping policy might turn out to be problematic from the point of view of privacy protection. A preliminary conclusion reached is that the right of privacy is not a single right, but rather a cluster of rights, each one designed to protect different areas of our lives, and each one derived in its turn from other, more fundamental rights. A further conclusion to be advanced in this article is that Wada's whereabouts policy cannot be condoned by any of the moral philosophical approaches traditionally discussed in connection with privacy.

Key words: privacy, anti-doping, WADA

"De acuerdo con las normas de la Agencia Mundial Antidopaje (Siglas en Inglés: WADA), los atletas, en el marco de las competiciones deportivas, son regularmente evaluados para comprobar si han consumido sustancias dopantes prohibidas. Sus muestras se almacenan durante mucho tiempo mientras se desarrollan técnicas de detección de dopaje que podrían permitir la búsqueda de sustancias prohibidas no detectables en la actualidad. Pero como la ambición de WADA no es sólo contar con competiciones limpias, sino también tener a los atletas limpios, diferentes medidas deben ser implementadas para facilitar las pruebas también en las competiciones. Una de ellas consiste en que los deportistas llenen un formulario para informar a los controladores antidopaje de su paradero, para que así puedan llegar a los atletas y someterlos a pruebas sin previo aviso.

La política antidopaje de la Wada ha sido ampliamente criticada por violar el derecho a la intimidad de los atletas. Aun así, este debate es a menudo llevado a cabo como si hubiese una clara delimitación del referido derecho a la intimidad de los atletas. En este artículo, la idea de intimidad está caracterizada como paso previo a la pregunta referida a si la política antidopaje de la Wada podría resultar problemática desde el punto de vista de la protección de intimidad. Una conclusión preliminar es que el derecho a la intimidad no es un derecho aislado, sino un grupo de derechos, cada uno dirigido a proteger diferentes áreas de nuestras vidas, y cada cual derivado a su vez de otros derechos más fundamentales. Otra conclusión en este artículo es que la política del paradero de la Agencia Mundial Antidopaje no puede ser tolerada por cualquiera de los enfoques filosóficos morales tradicionales discutidos en conexión con la privacidad"

Palabras clave: intimidad, anti-dopaje, WADA

1. *The problem*

In accordance with the World Anti-Doping Agency's (Wada) Anti-doping Code, athletes are regularly tested for forbidden doping substances in connection with sport competitions. Their samples are stored for long time, in case new doping detection techniques are developed

in the future that might allow finding forbidden substances not detectable at present. As Wada's ambition is not only to have clean competitions, but also clean athletes, different measures need to be implemented to facilitate testing in-between competitions as well. One of them is making sportspersons fill a form to inform doping controllers about their whereabouts, so that they can reach the athletes and make them undergo unannounced tests.

Wada's anti-doping policy has been – widely, I would say - criticized for *violating athletes' right to privacy*. However, this debate is often carried out as if it was crystal clear what kind of right this supposed athletes' right to privacy is. This is far from being the case. As Judith Jarvis Thompson stated in her seminal paper from 1975, "[p]erhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is".[1] Almost thirty years later, things do not seem to have improved so much in this regard. So, it seems as if we need, if not a definition, at least a characterization of what this presumed right to privacy might be thought to cover. Let us do this conceptual homework by asking in which regards Wada's anti-doping policy might turn out to be problematic from the point of view of privacy protection.

2. *What kind of right?*

What kind of right is the right to privacy?

(1) To begin with, it could be said that athletes' *bodily integrity* is violated by the very invasive nature of samples *collection*. Particularly regarding gene doping, it has been argued that in order to perform testing, it will be difficult to avoid taking tissue samples from athletes.[2] But even traditional doping testing amounts to an intrusive practice in that it requires athletes to hand over bodily fluids to the testers.

(2) Second, depending on how athletes' samples are *stored*, doping testing might also be said to violate their *self-ownership*, in particular regarding their own bodies. This is specially related to the fact that, once athletes get their bodily fluids or tissue samples extracted by testing officials, they no longer dispose of them and have actually no saying at all on their future uses. The European Commission has for instance expressed its concern with the fact

[1] "The Right to Privacy", *Philosophy and Public Affairs*, Vol. 4, No. 4, (Summer, 1975), pp. 295-314. Quotation gathered from p. 295.

[2] See, for instance, Wells, D.J., Baoutina et al. and Guescini et al.

that athletes' samples are kept too long in Wada's repositories (for 8 years, according to Wada's International Standard on the Protection of Privacy and Personal Protection).[3]

(3) Third, it is also objected that Wada's anti-doping policy violates athletes' *right to an intimate sphere*, free from the unwanted intrusion of other persons (what is usually called "the right to be left alone"). In relation to this latter aspect, the strongest criticism stems from the athletes themselves. Thus, the European Elite Athletes Association, which represents approximately 25 000 sport practitioners said in a communiqué that although "clean athletes have almost universally declared themselves willing to submit to testing in the workplace", […] they are "extremely sensitive about the invasion of their homes by anti-doping officials".[4] The background of this critique is obviously the unannounced tests performed at any time of the day.

(4) Fourth, there is a considerable risk that *confidentiality* might be broken in the process of *gathering*, *storing* and *analysing* athletes' samples. Presumably athletes have a right not to get sensitive information about, among other things, their physiological and genetic constitution disclosed to others without their consent. With samples being sent over for analysis to different laboratories, there is a latent risk that sensitive information about the athletes might end up in the wrong hands. (I will further develop this argument when discussing Wada's justification of anti-doping procedures below).

(5) Finally, related to both how athletes' samples are *collected* and *transferred*, Wada's procedures might be *offensive* to test subjects. First we have the fact that samples are gathered by means of intrusive and invasive procedures. Just think about a scenario in which you are required to give a urine sample in the presence of a doping controller, with the explicit demand of exposing your genitals. Then we also have the troublesome circumstances in which out-of-competition testing is conducted. Athletes are awaked at any time of the night, compelled to submit an urine or blood sample, risking to get private details about their life styles, company preferences, inclinations, etc., uncovered in front of the doping controllers. This also might be experienced by some people as a humiliating treatment that falls short of

[3] See Directive 95/46 EC. Proportionality (or rather the lack thereof) regarding the sanctions attached by Wada to violations of the "whereabouts rule" is also a central concern of the European Commission.

[4] See http://www.euathletes.org

respecting individuals' above mentioned *right to be left alone* in her very private, personal sphere.

Furthermore, also the disclosure of sensitive details about donors' and their relatives' propensity to develop certain diseases might be experienced by them as humiliating. The public exposure of someone's genetic propensity to develop certain diseases could be experienced by the persons affected as harmful to their reputation and good name.

When reflecting on all these matters, it is crucial that we do not focus our attention on how a sophisticated Western-liberal person would react when confronted with such exposure. Rather we have to be aware that doping controls are universally performed, and that they reach – or, rather, affect - sport practitioners living in much less tolerant social and political realities than the ones we have the fortune – if that is a fortune – of living in.

So, a preliminary conclusion that we might reach is that the right of privacy as a matter of fact is not a single right, but rather a cluster of rights, each one designed to protect different areas of our lives. These different particular rights are in their turn derived from other, more fundamental rights. We have seen, for instance, *the right to self-ownership* manifested in individuals' prerogative to dispose of their own body as they please, included the right to dispose of their own bodily parts. Such a right might be said to be derived from a more fundamental property right.

Then we have also *the right to self-determination*, grounded on the value of autonomy and respecting individuals' capacity of pursuing their own projects, goals, etc., in life. This right is expressed, among others, by the demand that, as long as we do not affect others negatively, we should be left alone to live our lives as we please.

Finally, we could also speak about *a right to security*, embodied in the recognition that individuals have a justified demand not to be exposed to adverse effects that might follow from others having access to, or use of, personal and sensitive information about themselves.

Now, against the athletes' demands quoted above, and also against each and every one of the restrictions and safeguards expressed by the numerous derived rights the right to privacy seems to be composed of, it could be rebutted that *rights can after all be waived* and, most

important, that *athletes have (more or less explicitly) consented to be tested*. Former Wada Director Richard Pound has clearly stated this point of view:

> "[Sport] is governed by rules that, however artificial or arbitrary they may be, are freely accepted by the participants. Why a race is 100 or 200 or 1,500 metres does not really matter. Nor does the weight of a shot… the number of members on a team or specifications regarding equipment. Those are the agreed-upon rules. Period. Sport involves even more freedom of choice than participation in society. If you do not agree with the rules in sport, you are entirely free to opt-out, unlike your ability to opt-out of the legal framework of society. But if you do participate, you must accept the rules."[5]

Pound's argument is a strong one, as it focuses on the fact that rights seldom can be taken to be absolute and non-overridable. To be the bearer of a particular right can be understood as a demand on others that implies that they have to perform something concrete that concerns the right bearer, as for instance when we say that individuals in a welfare state have a right to public health care. Usually we refer to this kind of rights as positive rights.

A right can also be seen, not as creating a positive obligation on others to provide us with certain things or services, but instead as a constraint imposed on their conduct. The bearer of this kind of negative right is therefore entitled not to be interfered with in her pursuit of her life projects, goals, etc., unless s/he consents to that or there are other-regarding reasons to interfere.

The right to privacy is more reasonably seen as a constraint on the actions of others intended to safeguard (at least part of) our physical and psychological integrity. It is, as such, a negative right, as the alternative of requesting others to take active steps to improve our privacy appears as too demanding.

Strength

But which strength does this right have? To say that athletes' right to privacy is just one among a number of *prima-facie* prerogatives recognised to individuals would be too weak an interpretation, even for Wada. But Pound is right in that privacy cannot be seen either as an absolute right, never to be trumped by another competing claim. Think, for instance, of the

[5] This statement was made at the annual meeting of the American Association for the Advancement of Science (AAAS) in Seattle, Washington, on 11 February 2004. See http://www.wada-ama.org/en/newsarticle.ch2?articleId=188938, for the full transcript of Pound's remarks.

widely recognised right that legally competent patients possess to refuse medical treatment they, for some reason, don't want to undergo. In that case, there is no competing claim that might in the end turn the balance in favour of submitting the patient to compulsory treatment. Patients' right to refuse treatment is therefore an *absolute*, *non-overridable* one, in a way that the right to privacy is not, and this includes of course athletes' right to privacy.

Rather, privacy should be considered as an absolute right which can sometimes be overridden by stronger competing claims. So, the most reasonable interpretation of the right to privacy in bio-ethical contexts is that of an *absolute though overridable right*. And this is also the kind of approach chosen by Wada to sustain their testing policy. I will return to this later on in this article.

3. *Legitimacy*

Let us now turn to the *legitimacy* of this supposed consent of athletes to be tested at any time, in whatever circumstances they might find themselves to be. *Is it a valid consent*?

I am inclined to answer this question negatively, mainly for two reasons. The first one has to do with the information athletes possess when deciding to waive their right to privacy. Wada's anti-doping policy is much too directed to emphasizing the risks of using certain forbidden substances and training methods, and too little focused on possible ways to prevent, or at least reduce, potential harmful effects of this use. So, to say the least, it could be stated that athletes' consent to get their privacy invaded by doping controllers rest on the (false) assumption, based on Wada's biased information, that giving up their privacy is the only way to reduce doping harm.

Having said this, we should not forget that many athletes actually believe that the achievement of a "doping-free sports" outweighs the privacy invasion they have to endure in order for testing to be possible. The problem is that these athletes have been taught to think so during many years by coaches and sport governing bodies. Thus there are reasons to believe that even those athletes who support the privacy intrusive conditions imposed upon them by Wada might do so without first engaging in critical reflection on the consequences of their acting outside the world of sports.

Second, and now related to athletes' right to security mentioned above, Wada is most probably promising more than it can deliver, particularly regarding athletes' and their relatives' right not to get sensitive information about their genetic constitution disclosed. The European Commission has expressed its concern about the fact that Wada gathers all doping-related information in its database ADAMS (Anti-Doping Administration and Management System) in Canada, and performs then onwards transfers of athletes' information to laboratories around the world for the analysis of doping tests. These laboratories are often located in destination countries with much less strict data protection legislation than the one implemented within the EU. And even in those countries outside the EU in which we find the same kind of legislation, legal regulations might be deficiently implemented. Related to this, in a report written by the EU Data Protection Working Party, it is clearly stated that this data procession cannot simply be founded on the consent of the data subject.[6] I think the reasons for this position have been properly developed when discussing Pound's move.

In relation to this point, it is important to point out that reassuring Wada's contractual demands on these laboratories to respect privacy won't be enough. Not only that appropriate legal mechanisms to enforce these dispositions might be lacking in some countries; even accepting that the risk of confidentiality violations might be minimized by Wada's contractual impositions, the amount of harm risked by the athletes and their genetic relatives if these safeguards, for some reason, don't work suggests we are facing a highly problematic situation. Given how samples are transferred to different laboratories once they are gathered by Wada officials, there is a considerable risk that athletes' demand on confidentiality will fail to be honoured.

This objection is particularly troublesome if we reflect on the fact that the majority of doping testing will be performed in countries whose democratic traditions and legal guarantees are miles away from reaching a European level. In the absence of appropriate legislation, the results obtained from samples analysis might be used in those countries to discriminate against donors/athletes by insurance companies, employers or even the authorities.

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[6] Article 8, paragraph 5 of Directive 95/46 EC.

Athletes' consent to be tested might also prove to be invalid because of the context in which it is required. We should recall that the kind of consent Wada demands from athletes has no resemblance at all with the voluntary and freely decided consent given by, for instance, bio-banking donors in general. Simply failing to correctly complete the where-about forms usually results in one-year suspension from competition. In that regard, it is no overstatement to say that Wada directs to athletes an offer they can't refuse, at least if they wish to remain active within their professional areas. "Submit to doping procedures, otherwise…" is too much of a threaten to be able to speak of consent. Pound's characterization of athletes' consent as freely given is therefore, to put it mildly, inaccurate.

To neutralize all these objections, some WADA-prone authors have argued that "sport is different". Participation in high-competitive professional sports is not a right but a privilege. Accordingly, the imposition of otherwise unjustifiable conditions is acceptable as a precondition of participation in sport competitions.

This view is not tenable. First, the "sport-is-different" argument seems to justify the imposition of any rules, no matter how arbitrary or questionable. Second, there is no reason to suppose, much less to postulate, that athletes leave their human rights at the locker room when they enter the playing field.[7] In the same way as athletes are not released from their moral and legal obligations at the very moment they start competing (they are for instance not allowed to intentionally kill a rival to win a game), they are not deprived either of their fundamental moral rights. Thus, sports might actually not be that different after all.

4. *The moral foundations of privacy*

The obvious legal foundation of athletes' alleged right to privacy is that this right is part of current European legislation. But what are the moral philosophical fundaments athletes might refer to in order to support their claim to get their privacy protected?

Let us first start by one ethical approach which is seldom discussed in this context, namely the so called *ethics of honour*. What would this line of thought say about (i) taking biological samples from athletes in a coercive setting, (ii) without making the necessary arrangements to

[7] See on this argument Schneider, A. and Rupert, J.L."Constructing Winners: The Science and Ethics of Genetically Manipulating Athletes", *Journal of the Philosophy of Sport*, Vol. XXXVI, Issue 2, 2009, p. 198.

guarantee sensitive data won't be disclosed to others, and (iii) paying unannounced visits to sportspersons any time of the day?

Regarding the first aspect, I think there is little doubt that supporters of this ethical approach would reject being submitted to this kind of forced testing. They won't condone either a practice that might lead to disclosing confidential information about oneself to others without the authorization of the individuals tested. Even stronger, if possible, would the opposition of the ethics of honour be against a policy that implies getting one's most intimate sphere invaded by controllers who would, unintentionally but nonetheless inevitably, come to know intimate details about the kind of life you conduct within the four walls of your home.

From the point of view of *autonomy*, the picture is more complicated. According to a positive interpretation of autonomy, being submitted to choices like "Abide to these procedures, otherwise…" no doubt reduces the range of actions open to athletes. In that regards, Wada's anti-doping regulations might on good grounds be said to constrain athletes' behaviour repertoire.

But if we instead focus on another, negative interpretation of (Kantian) autonomy, it might be argued that athletes, though indeed compelled to abide as a condition for being a part of sport competitions, can nonetheless be taken to act autonomously. The alternatives being clearly and straight-forwardly stated by Wada and the sporting authorities, they cannot argue that they have been deceived into participating in the anti-doping programme. Without belief manipulation, their decision will be based on their own authentic preferences, desires, etc. In other words, there would be no autonomy violation to worry about in this case.

However, even in this second sense, we might still wonder whether athletes' choices are not being manipulated after all. Relevant information about the very nature of the practice of doping might have been withheld from athletes; they might also be the object of past and present indoctrination by the official sport culture. I already have touched upon this subject before, no need therefore to dig deeper on this argument. It suffices here to say that whether or not athletes' choice to get along anti-doping procedures is an autonomous one is far from being settled by simply saying – paraphrasing Richard Pound – "well, if you don't like it, then we can opt out!"

Also a (restricted) *communitarian approach* would get into problems here by the same reasons. Some authors, for instance Angela Schneider, tried to substantiate anti-doping programmes with the argument that it embodies the general will of the community of athletes. Besides all the widely discussed problems attached to communitarianism (for instance, what could on these grounds be objected to a community whose common will is to openly discriminate against ethnic or sexually deviant minorities?), it is obvious here that the ideologically biased context in which the choices of the community of athletes are made, without even the possibility of uttering a divergent opinion without risking being suspected of doping, invalidates this supposedly agreed-upon will of the majority of athletes.

Finally, what would utilitarianism say about athletes' waiving their right to privacy, or about a situation in which sport authorities violated it, as a means to achieve a more valuable goal? Well, as known, utilitarians would in principle not be opposed to that, provided the consequences calculus is properly done. But is it?

Two arguments are usually advanced by sport officials to show they got the numbers (the consequences calculus) right. Let us call them (a) the sport essentialist and (b) the public health argument.

According to the former, sport consists of testing athletes' natural and innate capacities, without the interference of artificial improvements of their sporting excellences. The goal of the sporting contest is therefore to celebrate the most excellent among the athletes, the winner in the genetic lottery that made him (it's usually a he!) the best among his pairs. Any deviation from this paradigm is seen as a depravation of the practice of sports and should therefore be fought back. Thus, overriding athletes' right to privacy is a, according to this view, necessary means to secure the essence of sports is not betrayed.

The answer to this argument is nowadays obvious, as it already has been widely discussed in the sport philosophical literature. There is no fixed essence of sports, there is no fixed essence of anything in general; the way sport competitions are conducted is constantly evolving and there is nothing to substantiate the claim that, without anti-doping regulations, some huge value would be lost that would justify violating athletes' right to privacy.

The second argument refers instead to the expected effects of doping practices in the wider population. One could perhaps accept that athletes were submitted to humiliating and invasive practices as part of anti-doping programmes. In that case, this would be a regrettable though necessary cost that has to be paid in order not to risk doping dissemination in society.

There is however no evidence that might even suggest such a phenomenon is taking place, *as a result of elite athletes' doping*. First, the number of professional elite athletes is too low to have any impact on health care budgets, even less to negatively affect how basic services in society are provided. There is no sign either that youngsters might be adopting the same doping habits of some sport stars. As a matter of fact, this is a rather common argument in the doping debate that must so far be considered as totally unsubstantiated. Finally we have the often-referred to phenomenon of gyms doping (mainly, anabolic) sub-cultures. Even if that in the long run might become a public health care issue, it is hard to see how clandestine use of anabolic steroids in private gyms (often motivated by aesthetic reasons) can be related to the pursuit of money, medals and prestige which characterizes a professional sport career.

If my arguments above are correct, then we might conclude that the utilitarian calculus won't condone the violation of athletes' privacy by sporting officials. Nor it would justify athletes in waiving this right either, with the hope of contributing to realize valuable goals, either in sports or in society.

5. *Conclusions*

A conclusion that could be drawn from the arguments advanced in this paper is that we seem to need, if not a definition, at least a characterization of what this presumed right to privacy might be thought to cover. Another related conclusion was that the right of privacy is not a single right, but rather a cluster of rights, each one designed to protect different areas of our lives, and each one derived in its turn from other, more fundamental rights. A further conclusion to be advanced as a consequence of this conceptual analysis is that violating athletes' right to privacy cannot be condoned by any of the moral philosophical approaches traditionally discussed in connection with privacy. Particularly the rejection of Wada's where-about policy by a utilitarian approach suggests this policy should be abandoned. Why keep a morally dubious procedure which renders no factual benefit whatsoever?

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