

THERAPEUTIC USE EXEMPTIONS AND THE DOCTRINE OF DOUBLE EFFECT

Without taking a position on the overall justification of anti-doping regulations, I analyse the possible justification of Therapeutic Use Exemptions (TUEs) from such rules. TUEs are a creative way to prevent the unfair exclusion of athletes with a chronic condition, and they have the potential to be the least bad option. But they cannot be competitively neutral. Their justification must rest, instead, on the relevance of intentions to permissibility. I illustrate this by means of a set of thought experiments in which only an athlete's intentions vary. I argue that the Doctrine of Double Effect sheds some light on TUEs and illustrate this by applying different readings of the DDE to the thought experiment. This underpins a justification of anti-doping exemptions very different from than the approach adopted by the World Anti-Doping Agency (WADA). I argue for three changes to bring TUEs in line with this understanding: rewriting of the regulations, transparency, and a greater role for athletes in determining what exemptions are allowed, and when.

Keywords Therapeutic Use Exemptions, Doctrine of Double Effect, Doping, Anti-Doping, Intentions, Strict Liability, PEDs

In September 2016 the Russian sports hackers Fancy Bears released the confidential hacked files of Bradley Wiggins and Chris Froome, both British winners of the Tour de France. The records showed that Wiggins and Froome had both raced under Therapeutic Use Exemptions (hereafter TUEs) which had allowed them to use drugs on the proscribed list maintained by the World Anti-Doping Agency (WADA). Wiggins, in particular, had gained a TUE for using corticosteroids on three different occasions to treat asthma related conditions. Reactions in the British press, both national and the cycling press varied. Some argued that Wiggins had sailed close to the wind and that he had abused the TUE regulations. Others suggested that he had acted within the rules, and had done nothing wrong. Team Sky, and Wiggins himself, made both of these latter claims.¹ Bradley Wiggins was interviewed on the Andrew Marr show on 29th September 2016 about the corticosteroids:

Marr: Now, the trouble with this particular drug is that lots of people say it is also a performance enhancer. David Millar said it was the most potent drug that he's ever taken.

Wiggins: Yeah, but... I think... they were abusing that drug, and this was to cure a medical condition. (2016)

The set of anti-doping regulations and practices adopted by WADA has included a set of provisions for TUEs since 2005. The origins of TUEs are found in the work of the International Olympic Committee (IOC) medical committee in the late 1980s and early 90s.² TUEs allow the use of substances and methods that would otherwise be prohibited because of their performance-enhancing effects. In this paper I examine some possible justifications of such exemptions. In doing so, I will pick through some of the guidelines in order to attempt a rational reconstruction (Habermas 1979) of the arguments, since no carefully worked out moral analysis has been published.

I will argue that the justification of exemptions based on therapeutic use is, with some caveats, a matter of intentions. And this is important because the rhetoric surrounding anti-doping regulation in general reflects an exclusion of intentions, and a central role for the principle of strict liability (McNamee and Tarasti 2010). I argue that, in this area, this is a mistake. If we view TUEs in a different light, justified primarily by intentions, then certain conclusions follow about their regulation

The Problem

TUEs are a special case of a growing phenomenon in public policy: a 'rule and exemption' approach (Barry 2001). On this approach, a rule is applied, but an exemption is available for a set of special cases. We must ask what it is about these supposed special cases that makes them morally distinctive. A simple answer is that the general rule, universally applied, seem to give the wrong result. Take, for example, the UK law requiring motor cyclist to wear helmets which was introduced in 1971 and revised in 1976 by the introduction of an exemption for Sikhs. Whether or not this exemption is justified, it is the reason given - religious observance - that must do the justificatory work.

There are striking similarities between some of the arguments around TUEs and arguments about cultural exemptions. For example, at an early stage of the controversy in the 1970s that led to an exemption for Sikhs, Lord Widgery ruled against an exemption:

No-one is required to ride a motor cycle. All that the law requires is that if you do ride a motor cycle you must wear a crash helmet. (Poulter 1988, 293)

Sikhs were not required to ride motorbikes, so the exemption did not hold, or, at least, so ruled Widgery. Equally, it might be argued, no-one is required to take part in elite sport. But if you do, you must not take banned substances.

The case for a rule and exemption approach must sit between two positions: on one hand the case for uniformity must be strong otherwise the solution ought to be to remove the rule. On the other hand, it must not be too strong, otherwise there is no case for exemptions. Everything that counts for the strictness of the ban on PEDs counts against the provision of exemptions. How can this middle way be justified? In order to answer this question, we need to look at a regulatory world without TUEs.

In the absence of TUEs, an athlete with a chronic condition treatable only with a banned substance faces an invidious choice. They can take the substance and abandon elite sport. Or they can decide not to use the banned substance and suffer health and competitive loss. In the long term they are likely to abandon elite sport because the competitive loss is likely to be unsustainable.

How bad are these two options? Quite bad. Athletic identity is performative so making performance impossible undermines identity. Competition may be the athlete's livelihood. Depriving an athlete of their identity and livelihood is a very high a price for something that is not the athlete's fault. It looks as if this is unfair,³ on a standard pre-theoretic understanding of fairness that involves getting what we deserve.

One response to such concerns is merely to shrug one's shoulders and opine that life is tough. Here is the ruling of the Court for Arbitration in Sport (CAS) in *Quigly v UIT* in a related context; a case of the accidental absorption of a prohibited substance:

...it is also in some sense unfair for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of a banned substance will not be lifted in recognition of its accidental absorption. The 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. (1995, 6)

There is sleight of hand at work here. What the law can and cannot repair, is precisely what is at issue. Sports regulations may partly reflect underlying natural facts about the world, but they are also in part, constructions, and they can be constructed in different ways. The analogy made in the Quigley case suggests three cases: an athlete who contracts food poisoning, an athlete who has accidentally absorbed a banned substance and an athlete with a chronic condition treated with a banned substance. In each of the three cases, it looks as if 'the vicissitudes of competition create unfairness.'

Competitions take place under rules, and the unfairness in question ought to tax the ingenuity administrators and regulators, rather than be shrugged off. Take the case of Isaac Makwala at the 2017 IAAF World Championships. Makwala was barred from participating in the heats for the 200m, because he was held in quarantine as a result of an outbreak of Norovirus. Yet he was allowed to run a special solo 200m, in which he qualified for the final. The moral is obvious: in these case of admitted unfairness, we ought to look and see whether a reform of the rules can reduce unfairness, without creating more unfairness. It may, or may not, be possible. Can athletes be given another chance? Throwing one's hands up in the manner of *Quigley*, is, at best, premature and at worst, perpetuates

an injustice. In these sorts of cases, regulatory creativeness is the appropriate response: constructing an option which is more just, and less harmful, than the options available to the athlete who suffers from unfairness.

A Solution

In this particular case, Ken Fitch put his regulative creativity to work. The answer seems straightforward: introduce a straightforward, practical, fair system of TUEs, from which no competitive advantage follows. An athlete can remain in elite sport and is as competitive as they would have been without the chronic condition. Such a system would restore fairness, and would be justified under the 'No Harm, No Penalty' principle (Berman 2011). Unfortunately, matters are not so simple.

The guidelines covering TUEs have evolved, as one might expect. Importantly, the second condition for the award of a TUE has changed over three versions. The first version is Fitch's outline submitted to the Medical Committee of the IOC in 1991, in which the critical second condition read as follows:

No enhancement of performance could result from the administration of the prohibited substance as medically prescribed (Fitch 1991) (Fitch 2013, 815)

The second version, issued in the 2011 code, read:

The Therapeutic Use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition (WADA 2011, 14)

The third and current version of the WADA TUE Standard issued in January 2015 significantly changed this same clause to:

The Therapeutic Use of the Prohibited Substance or Prohibited Method is highly unlikely to produce any additional enhancement of performance beyond what might be anticipated by a return to the Athlete's normal state of health following the treatment of the acute or chronic medical condition' (WADA 2015, 10)

We can see progressive refinements of the constraint that therapeutic use must give no performance advantage. The refinements amounts to a relaxation of the clause. Cases that failed under version one and two would pass on the 2015 version. The first two changes in 2011 are to make the performance advantage relative to a baseline (of 'normal health') and epistemic ('...might be anticipated...'). The second change, in 2015 is to make it probabilistic ('...highly unlikely...') that there is no performance advantage. This relaxation indicate the presence of a deep problem: Fitch and his colleagues are likely to have a great deal of trouble in formulating rules designed to prevent athletes from deriving performance enhancement, by taking drugs that are proscribed because of their performance enhancing effects. TUEs cannot leave the competition untouched: they cannot be competitively neutral.

There are three main reasons for this. First, we should remember the knife-edge nature of some sporting success. At the 1990 Paris-Roubaix bike race the winner, Eddy Planckaert, won the race in a sprint finish against second placed Steve Bauer. The margin of victory was tight: estimated at one

centimetre. So Planckaert's performance over the 165.5 km race was 0.0000000000000001% better than Bauer's. It is implausible that any performance enhancement input could be calibrated to this degree of accuracy, yet that is the difference between the winner and second.⁴ Taking the second version of TUE regulation, we know that a TUE may be granted if the enhancement is what is anticipated as a result of a return to 'normal health'. But can that counterfactual threshold be determined to anything like the degree necessary? It seems unlikely, to say the least. At the same time, the stakes are high: getting the performance enhancement slightly wrong is a *pro tanto* harm/injustice in both directions. Suppose the performance enhancement is slightly over the counterfactual threshold: then, obviously there is a *pro tanto* competitive harm to other competing athletes. But also, if the performance enhancement is below the counterfactual threshold then a *pro tanto* competitive harm falls on the athlete with a chronic condition.

Second, human bodies respond in different ways to PEDs in a way that is not predictable. Here, I want to pick up on a point made by Simon, but to a slightly different end. Simon points out that the ways a drug affects performance varies across athletes: 'Jones should not defeat Smith because Jones's body processes steroids more efficiently than Smiths. We want the winner to be the best athlete, not the individual whose body is best attuned to a performance enhancing drug.' (Simon, Torres, and Hager 2015, 102). This variability in adaptation is a widely recognised physiological phenomenon, which compounds the problems for implementation of the TUE regulation.

Third, this variability of adaptation points to a wider epistemic vagueness. We do not know, with the required degree of accuracy, what sporting performance would result from a 'return' to normal health. Is this normal health species-typical? Athlete-typical?⁵ There are no controls available for an individual athlete (leaving aside identical twins), and even in the case of identical twins, the plurality of factors that determine athletic performance would prevent us getting the required degree of accuracy.

Picture an actual playing field, on adjustable stilts. Suddenly, the playing field is tilted up against one group of athletes. They may just leave the field, or struggle on. But the playing field can be rebalanced, by readjusting the stilts. This is a big job, and we have to fire up a steam engine in order to rebalance things. The engine starts to level the playing field but it also emits huge clouds of smoke, which obscure our vision, and wrap it in fog. It is almost certain that the field is *more* level than it was. We can perhaps make out the bare outline through the smoke. But we cannot see clearly, and lack fine grained level adjustments to get it right to 0.0000000000000001%. We can never see with precision - in High Definition, if you like - whether the field is precisely level.

At the root of this problem is the banal observation that performance enhancing drugs tend to enhance performance. They will have performance enhancing consequences for whatever reason they are taken. TUEs concern a particular use: specifically, the therapeutic use of performance enhancing drugs, not their direct consequences, and they will enhance performance an irreducibly vague *bit*. And if this argument is correct, we can reach an interim conclusion that an approach to therapeutic use exemptions of performance enhancing drugs that relies on performance enhancing drugs either not enhancing performance, or enhancing performance by exactly the right amount, will fail.

To review, I have argued that the proscription of some drugs used for treating athletes with a chronic condition constitutes an injustice to those athletes, similar to the problems faced by athletes who contract food poisoning, and athletes who unwittingly absorb a banned substance. The task of

regulators is to see if there is a way in which these injustices can be avoided. The first way of attempting this is the use of TUEs as developed under the WADA code, but this relies on a degree of precision that is unavailable.

Rethinking TUEs

Let us then reconsider the basic idea of a TUE and the basic idea of its abuse. What seems to matter is not giving an athlete a milligram too much, or a milligram too little, but why they are being treated or seeking treatment in the first place. The justification of TUEs needs to find a place for the common moral intuition that intention is relevant to permissibility: that is, to some version of the Doctrine of Double Effect (hereafter DDE).

The Doctrine of Double Effect is so called because it concerns two sets of effects that follow from an act: effects that are direct intended, and side effects which are not intended, but are foreseen. The DDE says that there is a morally significant difference between these sets of effects. When someone acts, we can distinguish between effects that they mean to bring about, and effects that they don't mean to bring about, but foresee. The effects that they do mean to bring about give them reason for acting: they act in order to bring about the effects that they intend. In contrast, the effects that they do not intend, but merely foresee, do not give them any reason to act. Indeed, they might regret the fact that their action has these unintended effects.

The DDE works on the distinction between these two sets of effects. The general idea is that an act can sometimes be justified, even if the agent foresees that it will have bad consequences, provided that these consequences are unintended. As a result the Doctrine of the Double Effect sometimes allows some actions that might otherwise be ruled out. Therein lies its applicability to the case of TUEs. In particular, the DDE suggests that two actions with the same consequential profile may differ in permissibility, the difference arising from the structure of intentions. I do not have the space in this paper to give a fully articulated account of the Doctrine of Double Effect and recent debates about its status and interpretation,⁶ though I will touch on some of those debates in what follows.

It will help to start with an area in which intuitions are quite strong. Perhaps, if we could identify a clear abuse of TUEs then this might shed some light on their justification. In his momentous confessional, Tyler Hamilton writes:

Another way to hide was through the use of TUEs ... the team doctors would invent some phantom problem – a bad knee, a saddle sore, and write a note allowing you to use cortisone or some similar substance. The only trick to it was remembering what made up ailment the doctor had given you – was it your right knee that was supposed to be injured, or your left knee? Before races, I'd sometimes check the paperwork to make sure I knew which knee to complain about if the testers happened to ask. (Hamilton and Coyle 2013)

At first sight, it is the phantom problem that is morally suspect. Suppose Hamilton got caught out: he complained of pain in the wrong knee. This would indicate that the use of cortisone was intended not for addressing a condition, but for enhancing performance. But it is not the absence of the condition that is itself key, but what this indicates about intentions.

Suppose Adam, Ben and Colin are competitive endurance triathletes. Adam is very fit, and very tired, almost all of the time. The tiredness that Adam experiences causes him problems in his personal life, so he visits his doctor and gains a referral to a sleep clinic. There, he undergoes a Multiple Sleep

Latency Test (MSLT), and is diagnosed with an underlying sleep condition: idiopathic hypersomnia. This is a condition closely related to narcolepsy and is treatable with medication by some of the drugs that are at the forefront of discussions about cognitive enhancement: Modafinil, Ritalin, and Dexamphetamine. All three are stimulants, and on WADA's proscribed list. Intending to address the non-athletic problems caused by his idiopathic hypersomnia, Adam takes Modafinil, which is effective in addressing the day to day problems caused by his condition. Like most stimulants, though, it also causes weight loss. The weight loss that Adam experiences as a result of this treatment is not an intended outcome, though it is foreseen. For endurance running, and long distance triathlon, weight loss enhances performance (up to a point).

Ben is also fit, and also very tired, almost all of the time. He puts his tiredness down to his formidable training regime, and seeks to ameliorate his tiredness, in order to maintain his training volume. He also wants to lose weight, so he does an internet search, (or contacts a corrupt medical practitioner) and orders exactly the same stimulants as those prescribed to Adam. He takes the same dose of Modafinil, and it has the same consequences. Ben manages to stay awake more easily and this means he is not forced to reduce his training time. He also secures the intended performance benefits from the associated weight loss.

At this point, it looks as if there are two key morally relevant differences between Adam and Ben. Adam has an underlying condition, and takes his medication in order to address that condition. Ben has no underlying condition and takes his medication in order to enhance his performance. It might seem straightforward to suggest that Ben is like Tyler Hamilton and that he exhibits a similar form of impermissible behaviour.

But suppose that, unbeknown to Ben, he also has idiopathic hypersomnia. His tiredness is partly down to his underlying undiagnosed medical condition. Ben misattributes his fatigue, and consequently he is not diagnosed with the underlying condition. If he had presented himself to his doctor, he would have been referred for an MSLT test. Then, he would have been diagnosed with idiopathic hypersomnia and received a prescription for Modafinil.

If this is the case, then almost everything that is true of Adam is also true of Ben: they both have an underlying medical condition, they both take proscribed performance enhancing substances, and they both experience performance gains as a result. Physiologically speaking, Adam and Ben are identical, and in every other relevant way, the consequential profiles of the actions of Smith and Jones are the same. The only distinction between them is their intention with respect to Modafinil. This is the distinction that is highlighted by the DDE – the distinction between performance enhancing effects that are directly intended and provide reasons for actions, (in the case of Ben) and side effects that are foreseen but not intended (in the case of Adam). We know, *ex hypothesi* that for Adam the performance enhancing effects of Modafinil are incidental to his taking of Modafinil: he would take it even if it did not have the performance enhancing effects. For Ben, the opposite is true. He takes Modafinil because of its performance enhancing effects, and would not take it if he believed that it had no performance enhancing effects.

However, here is a problem case. Colin, a third triathlete, has idiopathic hypersomnia and knows it. Using Modafinil will bring him to approximately normal health and confer a competitive advantage through weight loss. However, Modafinil gives Colin a headache, which is mild but sufficient to dissuade him from taking it, absent the expectation of the competitive benefit that might be conferred. But with the extra incentive of the competitive benefit, Colin takes Modafinil in exactly the

same dosage as Adam and Ben. Is his taking of the Modafinil only directed at the competitive benefit? No, the competitive benefit is necessary but not sufficient for Colin taking Modafinil, and in this respect he differs from Ben. Colin wants to exploit his diagnosis for competitive advantage, but, unlike Ben, he would not take Modafinil in the absence of a diagnosis of hypersomnia. That, he thinks, would be cheating.

Should it be permissible for Adam to use Modafinil but not Colin? Both have the qualifying condition, and both know it. Both know that the act falls under a description that an agent in his situation could perform permissibly. But their actual intentions differ. In order to work out the answer, we need to turn to closer interpretation of the DDE.

There are two interesting candidate answers. The first is to say that it is permissible for Adam but not for Colin. This would be the answer on an ‘actual intentions’ interpretation of the DDE. On this account, the permissibility of an action depends on the actions of an actual, concrete person – the ideas in her head at the time. This interpretation is criticised by James Rachels, Judith Jarvis Thomson and, more recently, T.M. Scanlon (Rachels 1994, Thomson 1999, Scanlon 2008). Perhaps Rachels puts the point most clearly: ‘a pure heart cannot make a wrong act right, and neither can an impure heart make a right act wrong.’ (Rachels 1994, 142).

But an ‘actual intentions’ account is defended⁷ by McMahan (McMahan 2009) and Wedgwood (Wedgwood 2011), and I want to rehearse part of their arguments here. Wedgwood argues that the DDE does not rest on a ‘thin’ theory of action according to which an act is something which is distinct from the intentions and plans of the agent. Rather, the DDE is best interpreted as involving ‘thick’ actions, ones that are enmeshed in intentions. Utilising this thick theory allows us to respond to Colin when he asks us whether he may take the Modafinil. We should say to Colin: ‘Do not choose to take the Modafinil solely for its performance enhancing effects. That would be morally impermissible. Rather, choose to take it to relieve your hypersomnia. Having made that choice, execute it.’ Not only does this reading capture some of our intuitions about the contrast between Adam and Colin, it is also answer-giving, and so action-guiding, on what Colin should do.

The second answer is to say that taking the Modafinil is permissible for both Adam and Colin. This answer can also be explained in terms of a reading of the DDE. According to Fitzpatrick (FitzPatrick 2012b) what matters for the DDE is not whether a particular action with these concrete intentions, is justified. Rather, the DDE is a constraint on act types that are permissible on a given justification:

It is a condition of adequacy on any justification of A that a *good* agent could act *well* in performing A for the reasons given in J (FitzPatrick 2012a)

On this account, both Adam and Colin have a justification (J: that I am entitled to take Modafinil to counteract my hypersomnia) open to them – they have hypersomnia, and are entitled to act on that knowledge, by taking Modafinil. A good agent could act on the justification available to Adam and Colin, and take Modafinil to address their hypersomnia. Ben, on the other hand, cannot act well in taking the Modafinil to address his hypersomnia, because he is unaware of it, and therefore cannot act on the basis of reasons present in J. On the Fitzgerald account, intentions play a more structuring and abstract role in the argument.

Whether we adopt the ‘actual intentions’ or the ‘intentions as a constraint’ account, it should be clear that there are significant moral differences between Adam, Ben, and Colin, which point to the

justificatory role of intentions in a discussion of TUEs. On both accounts, the justification of actions comes from intentions, though they operate in significantly different ways.

An Objection Answered

I turn now to an objection to and a modification for this justificatory role for intentions. The objection is that TUEs cannot *just* be about intentions. Whilst intentions might make a difference, so do many other matters, such as the size of the performance enhancement in question. What we ought to advocate then, is a kind of ‘threshold intentionalism’ such that, within a certain limit, intentions make a difference to the justification of TUEs, but beyond that, the sheer size of the performance enhancement means that it is unjustifiable, regardless of the intentions of the athlete. I have argued, above, that trying to decide on TUEs by looking at the exact percentage improvement that the treatment offers is an unworkable approach, and this is true, but within limits. If an athlete has a chronic condition, and the only available treatment confers a 20% improvement in their athletic performance, then this seems wrong, regardless of intentions. There is a threshold, where the advantage is so great and the harm to other competitors so large, so as obviously to distort the competitive nature of the sport, and at this point no amount of good intentions can remedy the situation. However, conceding this objection does not pose a significant problem for a DDE interpretation of TUEs. Rather, DDE thinking allows for the possibility that the good at which an act is aimed is not worth the foreseen consequences; in this case, the huge competitive advantage to the athlete.

Two examples may help to make this clear. Philippa Foot’s example of merchants who knowingly sell poisonous cooking oil (Foot 1978, 22) is standard in the DDE literature. The fact that the merchants did not intend the deaths of those to whom they sold the poisoned oil makes no difference, says Foot, to their status as murderers. And this, *mutatis mutandis*, seems also to be the underlying argument in the rather sad case brought by the International Paralympic Committee (IPC) and then WADA, against Robert Berger, a paraplegic shooter with life-threatening heart disease, who needed β -blockers. Berger sought a TUE to continue to compete as a Paralympic shooter, but was denied one by the IPC’s TUE committee. CAS judged that the β -blockers meant that ‘...an improved shooting performance, even if not due to changes in cardio-vascular variables such as changes in heart rate, could, indeed will likely, be the result of a reduced neural hand tremor.’ (2010, 535). When the competitive benefit is so clear, then questions about intentions are overridden. There was no suggestion that Berger was somehow exploiting his paraplegia and heart condition, but his TUE was still disallowed. So the IPC ended up excluding a para-athlete, in effect, because of his disability and through no fault of his own. A creative regulatory solution simply could not be found. In TUE regulations, as elsewhere, intentions are not all that matters, and this has policy implications, which I will come to shortly. Nonetheless, recall that Adam and Ben are physiologically speaking in an identical situation, and that it still seems that Adam acts permissibly and Ben impermissibly. If this is correct, then the athletes’ intentions are a necessary component in the understanding and justification of TUEs. But there is more to say about those intentions.

A Modification Proposed

In thinking through the justification of TUEs, there are questions about what the regulations ought to say, questions about what acts are, morally speaking, permissible and impermissible, and then questions about how virtuous agents ought to behave when faced with these constraints and

possibilities for acting well.⁸ In his discussion of the DDE Michael Walzer introduces a significant modification, formulating a condition for the justification of an action as follows

The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, and aware of the evil involved, he seeks to minimise it, accepting costs to himself. (Walzer 1977, 155)

Adam does not intend the performance enhancing effects of his treatment. But he can minimise them. Known side effects of Modafinil include weight loss. Adam ought to slacken off on the rigorous dieting to hit ideal race weight which is characteristic of endurance athletes. This is not intended to be a frivolous suggestion. One way of assessing what might be the right course of action here is to ask what a virtuous agent would do, behaving with a degree of moral imagination. A virtuous agent would not behave as Ben has done, even though they end up in the same physiological state as Adam. But neither would a virtuous agent simply 'bracket off' his weight loss. Once he gets to honest competition, he ought not to compensate for the weight loss that arises from his use of a stimulant by, for example, trying less hard, or feeling bad about his enhanced performance, or attaching weights to his body for the duration of the race: this would immediately raise the question: how much weight, and the answer is, as I have argued, unknowable. But he can adopt a rough and ready approach: the point is not, in the mode of the existing TUE regulation, to specify how much cake Adam should eat, to establish a counterfactual condition against which to measure Adam. Rather it is to specify, outside of an anti-doping protocol, how a virtuous athlete ought to behave. He should slack off a bit on the calorie counting as a way of showing good faith.

Some Policy Conclusions

Good faith figures here, because of the nature of the harm. Adam, Ben and Colin gain a competitive advantage which is a harm to other competitors. The athletes who compete against them have a negative right not to be disadvantaged by the use of PEDs. But the directness of the threatening agency in the case of Ben strengthens the negative right. The more direct the threatening agency - the more it is intended - the stronger is the right. (Quinn 1989).

This is a further area where the DDE can provide some guidance. It shows that athletes who use TUEs enact plans in which other athletes are incorporated in a way that can competitively harm them without their consent. But as Quinn puts it:

The DDE rests on the strong moral presumption that those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights ... ought, *prima facie*, to serve the goal only voluntarily. (Quinn 1989, 349)

Athletes should seek exemption only for the purpose of returning to normal health and not for the purpose of gaining any competitive advantage that the substance is likely to confer. But because PEDs cannot be competitively neutral, there will be some fall out. There is an always live but indeterminate possibility of competitive harm to either to the athlete, or to her competitors. However, neither the athlete in receipt of the TUE nor her competitors have acted wrongly, so that it is not clear where any residual harm should fall. But a person can only serve voluntarily in a role as a possible victim of competitive harm if they are aware of that role, and they if they have some say in accepting the role.

Policy implications flow from this understanding fairly directly. First, TUEs ought to be published. They cannot but tweak the competitive structure of a sport, and competitors have a right to know about them. To see this, consider who, in the abstract, has the *authority* to grant an exemption from any particular qualifying rule for a competition. It might be helpful to see these as ‘auxiliary rules’ as articulated by Meier.⁹ Who, exactly, is it who may say ‘Yes, you can still compete with us, even though...?’ This is the natural form of the question and the ‘us’ gives it away. The authority to make these kinds of decision rests with competitors. They are farmed out, transferred, alienated to the presiding authorities, but the fundamental source of authority, in Lockean style, sits with the community of the peloton or its analogue. Since this is a question of reasonableness rather than of a technical medical nature, the peloton is quite able, and best placed, to decide. TUEs should be published, and so should the diagnosis of the underlying condition, since this is what provides justificatory force to the TUE.

The central objection to such a scheme arises from concern for the privacy of athletes, particularly over medical records, and the existence of a chronic condition which an athlete might be reluctant to disclose. I do not have the space here to answer such an objection in full. Rather, I want to make clear how an argument for transparency of TUEs would go, in order to see what a counterargument for privacy in this case must establish. Rights to privacy are important, and ought not to be violated. But, to trade on a distinction made by Judith Jarvis Thomson (Thomson 1990), they can be infringed.¹⁰ The suggestion is not that athletes must publish the relevant medical data, but that they must publish the data if they want to be granted a TUE. The granting of a TUE is likely to involve the distribution of indeterminate harms, and transparency is required.

Second, the procedure for granting TUEs ought to be in two stages, one lexically prior to the other. The first is the role performed at the moment by TUE committees at WADA and world governing bodies more generally. This role is to uphold the threshold of the ‘threshold intentionalism’ outlined above. This procedure is lexically prior to a deliberative process amongst competing athletes, who can then make a judgement on the basis of published accounts of medical judgements. There is an incentive for athletes to be inclusive here: anyone of them might need a TUE one day, and there is an incentive to keep a transparent system in place. But, of course, there is also an incentive to withhold consent from those TUEs that look unreasonable.

Third, the TUE regulations operated by WADA ought to be rewritten. In particular, the critical second clause requires amendment by including a ‘moderate’ condition. Large changes in performance can be ruled out medically, in the first round review of a TUE application, but indeterminate, possibly significant moderate changes cannot be ruled out. No greater accuracy can be found, and so it ought not to be pretended.

The system proposed would not necessarily be more or less lenient than the current arrangement. To the extent that the regulations incorporate a ‘moderate’ clause, they are clearly more liberal. But the second process of athletic deliberation might well lead to a more restrictive set of exemptions. The structure suggested here is both more complex than that currently in place, and, of course, more sketchy. And my view is not *Fiat justitia ruat cælum*.¹¹ There may be feasibility constraints which mean modifying or rejecting it. But, when a practice is regarded as ethically suspect, the first thing to do is get the justice of it right, before we consider the practicalities of implementation. And if feasibility constraints mean that it is impossible to reach a just, or near-just solution, then we must say so, as clearly as possible.

¹ It is, of course, important to see that these are two separate claims

² There is an authoritative account by the instigator of TUEs, Kenneth Fitch (Fitch 2013)

³ Throughout this paper I will use 'fair' and 'unfair' and 'just' and 'unjust' in ordinary, pre-theoretical ways. I will also not distinguish rigorously between 'competitive harm' and 'injustice' since, for the sake of the argument here, nothing hangs on these distinctions.

⁴ It might be objected that the precision required of TUEs is merely that required to match to the counterfactual performance of a healthy athlete, not to match to race results. My point, though, is to consider the degree of precision that would leave results untouched so leaving TUEs competitively neutral. That depends on the competition. And the *point* of the second clause is to leave competition untouched

⁵ It is notoriously contentious to say what counts as an enhancement above normal functioning. In their careful account Gyngell and Selgelid give seven different definitions of enhancement and conclude that they are all potentially useful so that there is not a single correct way to define the term. (Gyngell and Selgelid 2016)

⁶ There is an excellent account in FitzPatrick (FitzPatrick 2012a)

⁷ I think successfully

⁸ The sense of playing fast and loose with different Moral Theories is not one that I wish to avoid. For some discussion of an ethical anti-theory position see Chappell {Chappell, 2014 #2923}

⁹ Though I reject his claim that auxiliary rules have 'nothing whatsoever to do with the essence of sport' (Meier 1985)

¹⁰ That is to say, they can be justly overridden. Absolute rights can never be infringed, only violated. But rights to the privacy of one's medical records are not absolute rights.

¹¹ Let Justice be Done though the Heavens Fall

Acknowledgements

I would like to thank Paul Gaffney and two anonymous referees of the Journal of the Philosophy of Sport for helpful comments. An early draft of this paper was presented at the British Philosophy of Sport Conference, University of Sunderland, in April 2015 and I am grateful for comments received from members of the audience on that occasion. I have discussed TUEs and received comments from a large number of extraordinarily helpful colleagues. I would like to thank Alfred Archer, Alex Barber, Mitchell Berman, Andrew Bloodworth, Sophie-Grace Chappell, Sean Cordell, John William Devine, Yuval Eylon, Paul Faulkner, Mike McNamee, Carolyn Price, Mike Townley and Christopher Yorke. They have managed to save me from some errors. The remaining ones are all my own.

Disclosure statement

No potential conflict of interest was reported by the author

Jon Pike

Department of Philosophy, Faculty of Arts and Social Sciences, Open University, Milton Keynes, MK7 6AA UK

J.E.Pike@open.ac.uk

References

2016. The Andrew Marr Show.
- Barry, Brian. 2001. *Culture and Equality*: Polity.
- Berman, Mitchell N. 2011. "'Let 'em Play' A study in the Jurisprudence of Sport." *The Georgetown Law Journal* 99:1325-1369.
- CAS. 1995. *CAS 94/129 USA shooting and Quigly v Union Internationale de Tir (UIT)*.
- CAS. 2010. *CAS 2009/A/1948 Appeal by Mr Robert Berger v World Anti-Doping Agency*.
- Fitch, Kenneth D. 1991. Permission for athletes to use drugs contained in the IOC list of Banned Classes. IOC-MC.
- Fitch, Kenneth D. 2013. "Therapeutic use exemptions (TUEs) at the Olympic Games 1992-2012." *British Journal of Sports Medicine* 47 (13):815-818.
- FitzPatrick, William. 2012a. "The Doctrine of Double Effect: Intention and Permissibility." *Philosophy Compass* 7 (3):183-196.
- FitzPatrick, William 2012b. "Intention, Permissibility and Double Effect 1." In *Oxford Studies in Normative Ethics*, edited by Mark Timmons. Oxford: Oxford University Press.
- Foot, Philippa. 1978. "The Problem of Abortion and the Doctrine of Double Effect." In *Virtues and Vices*. Oxford: Blackwells.
- Gyngell, Chris, and Michael J. Selgelid. 2016. "Human Enhancement: Conceptual Clarity and Moral Significance." In *The Ethics of Human Enhancement*. Oxford: Oxford University Press.
- Habermas, Jurgen. 1979. *Communication and the Evolution of Society*: Beacon Press.
- Hamilton, Tyler, and Daniel Coyle. 2013. *The Secret Race*: Corgi.
- McMahan, Jeff. 2009. "Intention, Permissibility, Terrorism and War." *Philosophical Perspectives* 23 (Ethics).
- McNamee, M. , and L. Tarasti. 2010. "Juridical and ethical peculiarities in doping policy." " *J Med Ethics* 36 ((3)):165-9.
- Meier, Klaus V. 1985. "Presidential Address Philosophic Society for the Study of Sport 1985 Restless Sport." *Journal of the Philosophy of Sport* 12 (1):64-77.
- Poulter, Sebastian. 1988. *Ethnicity, Law and Human Rights: The English Experience*. Oxford: OUP.
- Quinn, Warren S. 1989. "Actions, Intentions, and Consequences: The Doctrine of Double Effect." *Philosophy and Public Affairs* 18:334-351.
- Rachels, James 1994. "More Impertinent Distinctions and a Defense of Active Euthanasia." In *Killing and Letting Die*, edited by B. Steinbock and A. Norcross, 139-54. New York: Fordham University Press.
- Scanlon, Thomas. 2008. *Moral Dimensions: Permissibility, Meaning, Blame*. Cambridge Harvard University Press.
- Simon, Robert L., Cesar R. Torres, and Peter F. Hager. 2015. *Fair Play: The Ethics of Sport (Fourth Edition)*. Boulder: Westview Pr. Monograph.
- Thomson, Judith Jarvis. 1990. *The Realm of Rights*. Cambridge: Harvard Univ Pr.
- Thomson, Judith Jarvis. 1999. "Physician-Assisted Suicide: Two Moral Arguments." *Ethics*:109(3) 497-518.
- WADA. 2011. World Anti-Doping Code International Standard. In *Therapeutic Use Exemptions*.
- WADA. 2015. World Anti-Doping Code International Standard. In *Therapeutic Use Exemptions*.
- Walzer, Michael. 1977. *Just and Unjust Wars*: Penguin.
- Wedgwood, Ralph. 2011. "Scanlon on Double Effect " *Philosophy and Phenomenological Research* 83 (2):464-72.