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Tomas Fitzgerald
The University of Notre Dame, Australia

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Abstract
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Keywords
athletes, ethical, conduct, cheating

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DOPING IN SPORT – SHOULD IT BE A CRIME?

TOMAS FITZGERALD*

I INTRODUCTION

In 2010 the National Rugby League discovered that the Melbourne Storm Rugby League club, had engaged in systematic breaches of the salary cap rules. Across 5 years the club paid players in various ways without disclosing those payments as required under the NRL's rules. Additionally, those payments were covered up by doctored bookkeeping, and in some cases false statutory declarations about compliance with salary cap rules.[1]

In 2013 the Essendon Football Club was investigated by the Australian Sports Anti-Doping Authority for its now notorious supplements program. That program involved the administration of purportedly performance enhancing substances to members of the playing group. The practice was widespread, systematic and involved non-compliance with ordinary record keeping practices, presumably to obscure which substances were taken when and by whom.[2]

Both of these are examples of systematic, deliberate cheating in sport, calculated to gain advantage over rivals. Both were punished severely by the administrators of the respective sporting codes. Yet despite these similarities, only the Essendon supplements scandal has been accompanied by serious and persistent calls for criminalization of the behavior underlying the cheating. [3]

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* Senior Lecturer, School of Law, The University of Notre Dame Australia.

1 Final Report: Storm Salary Cap Investigation. 11 May 2011 http://www.nrl.com/final-report-storm-salary-cap-investigation/tabid/10874/newsid/62723/default.aspx.

2 Andrew Dillion, 'Australian Football League Notice of Charge' 13 August 2013 http://www.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/EssendonFC-notice-of-charges.pdf.

3 Anthony Dowsley, 'Melbourne Storm executives won't be charged with fraud-related offences', Herald Sun (online), 6 May 2011 <http://www.heraldsun.com.au/sport/melbourne-storm-executives-wont-be-charged-with-fraud-related-offences/story-e6frf9if-1226051106194> cf. ABC News Online 'Australians want sports drug use criminalized: survey' 23 March 2012 <http://www.abc.net.au/news/2012-03-24/australians-want-sports-drug-use-criminalised/3910158>; Rueters, 'Doping in sport should be criminalized – Australia head' 12 October 2012 <http://uk.reuters.com/article/2012/10/12/uk-cycing-armstrong-doping-australia-idUKBRE89B09C20121012>; Jarod Lynch, 'Call for drug cheats to be jailed' Sydney Morning Herald <http://www.smh.com.au/sport/cycling/call-for-drug-cheats-to-be-jailed-20121013-27hm0.html> 13 October 2012 (online); see also Rueters, Doping should be criminal offence – Russia chief SBS News 7 February 2015 (online) <http://www.sbs.com.au/news/article/2015/02/07/doping-should-be-criminal-offence-russia-chief>.

This paper considers the ethical and philosophical justifications which underpin suggestions that doping in sport is so egregious a form of cheating that it ought to be criminalized. The paper will outline the two main theories regarding the appropriateness of legislative intervention in citizen's private conduct; the liberal and conservative approaches. Having regard to these theories, the paper will suggest that, compared with other similarly morally culpable forms of cheating, there is little to justify the position that doping is uniquely worthy of criminal sanction. Further and in the alternative an examination of anti-doping legislation proposed in the UK—the Governance of Sport Bill 2014-2015—will demonstrate that aside from the lack of a substantive moral case for the criminalization of doping, there are significant practical difficulties which ought to be considered a pragmatic barrier to such legislation.

II WHEN SHOULD THE LEGISLATURE INTERVENE IN PRIVATE BEHAVIOUR?

Broadly speaking when we consider the proper reach of the criminal law, we are discussing two main approaches.[4] On the one hand liberals contend that there is a sphere of private morality into which the state cannot claim legitimate reach. This position was put perhaps most classically by Mill in his famous formulation in "On Liberty". Alternatively, those who reject the notion that there is some theoretical limit to the legislator's power to intervene in human affairs are commonly styled conservatives who contend that while, in theory, a legislator would make any laws it wishes, in practice there are two significant issue is which bear upon the decision to criminalise certain conduct. The first of such is whether, in words of Lord Devlin the conduct incites in the reasonable man "'real feeling of reprobation', amounting to 'intolerance, indignation and disgust'.[5] The second is a more pragmatic judgement, asking whether it would be functionally impractical to administer such a law. Devlin here gives the example of adultery which, while obviously raising a real feeling of reprobation in the ordinary man, nevertheless would strain the apparatus of the criminal law to breaking point were such conduct to be subject to police investigation and criminal prosecution.[6]

Formulated another way, the famous Wolfendon report into the desirability of the criminalisation of homosexuality and prostitution characterised the issue as such:

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4 Of course, there are a proliferation of alternative views, including most notably the position of the Moral Perfectionists, such as Aristotle, Aquinas and Joseph Raz. Full discussion of the nuances of these theories is outside the scope of this paper. Nevertheless, a brief statement will be made comparing the proposed liberal conclusion with what I take to be a possible rejoinder by moral perfectionists at the conclusion of that section of the paper.

5 Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 17.

6 Ibid 22.

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[7]

Meyerson in her text 'Understanding Jurisprudence' surveys the literature and summarises the debate as such:

> very few people … believe that the law should not enforce society's moral standards at all. Almost everyone agrees that, for example, the law should prevent people killing one another or cheating one another. The debate is rather between those who think that all of a majority's moral beliefs are, in principle, legitimately transferable into law and those who think that only a sub-class of the behaviour of which the majority disapproves can be rightfully subjected to punishment. It is between those who think there are theoretical limits to the law's enforcement of morality and those who think that there are at most practical limits.[8] (emphasis added)

Ultimately, is the position of this paper that the criminalisation of drugs in sport fails both tests. That is, if we accept that there are theoretical limits—areas of private morality into which the law ought not venture—then it seems like conduct with respect to sport falls within such a sphere, and unlike situations where an existing criminal law is broken in the conduct complained of, there seems no special basis upon which we can reasonably contend that violations of the rules against doping are so uniquely egregious a violation of the rules of sport that punishment sanctioned by the state is warranted. Alternatively, if one accepts the conservative position that there is no theoretical limit to legislator's power there nevertheless remains, it is contended, overwhelming pragmatic reasons for not so criminalising conduct.

III CONDUCT IN SPORT AS A MORAL PROBLEM

Liberal theorists have a proliferation of approaches to determining the appropriate boundaries of private conduct into which the law may not reasonably reach. Most famously Mill suggested that 'harm' was the appropriate yardstick by which a government might determine the appropriate limits of its legislative capacity.[9] By contrast modern liberal thinkers, such as Rawls, have generally considered that a less restrictive principle may be applied, usually they rely on some reference to 'rights', which in some way represent society's shared moral conception.[10] As we will see, Mill's conception of the harm principle informs such second-generation utilitarian bioethicists as Julian Savelesu, who essentially

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7 Report of the Committee on Homosexual Offenses and Prostitution, Chairman Sir John Wolfenden (Cmnd 247), 61. Quoted by Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 2012) 42-3.

8 Denise Meyerson, *Understanding Jurisprudence* (Routledge, 2009) 134.

9 John Stuart Mill, *On Liberty*, (United Kingdom, 1859)

10 Above n 8, 137.

reject any basis for the criminalisation of doping in sport. Those more moderate Liberal theorists who reject the stringent harm principle approach, and instead focus on the broader question of what constitutes society's shared moral sentiment, are potentially able to offer a justification for the criminalisation of doping support. However, to do so they would need to demonstrate that doping is indeed an egregious breach of the standards of our shared moral life.[11]

Clearly, the conduct of athletes has a moral dimension. Consider here the now infamous example of the incident in which the Sydney Swans' Barry Hall punched West Coast Eagle Brent Staker behind play.[12] This is an example of conduct which was both immoral and likely also illegal.[13] However our moral objection to Hall's actions are largely separate from his breach of the rules of AFL. That is, the mere fact that the rules of AFL were broken is not the source of our moral indignation when considering this event.

We must thus distinguish between situations in which an athlete engages in immoral behaviour that happens to coincide with the breach of a sport's rules on one hand and the other behaviour that is immoral *because* it is a breach of the sport's rule. The use of PIEDs is almost by definition the latter as many of the substances prohibited for use in sport are perfectly legal—and morally neutral—for use and possession outside the context of sport. This invites the key question; given that there are many examples of athletes breaching the rules of sport, intentionally or otherwise, which seem to elicit no moral approbation ought we to consider a breach of the rules against doping in sport morally objectionable? Indeed, most breaches of sports rules do not come with suggestions that the breach should be criminalised. For example, the author's long-held position that

11 It is worth noting that this is something of a generalisation, as group of thinkers who constitute 'all those liberals whose criteria for legislative intervention is less stringent than Mill harm principle' is a very broad one indeed. Practical concerns, principally the length of this paper, do not permit an in-depth analysis of each of the particular permutations which these theorists present. It will suffice, I contend, in general terms to note that whatever particular framework they give for determining the limits of a legislative power, they will all to some extent require the finding that doping in sport constitutes an especially problematic breach of some shared moral sentiment possessed by a community. Thus, again in general terms, to the extent that this paper exceeds the position that there is no such especially problematic breach of our shared moral sentiment in doping in sports, this will prove broadly a rational for rejecting the criminalisation of doping in most liberal constructions.

12 Alison Caldwell, *Barry Hall's roundhouse punch could have been lethal* (14 April 2008) ABC PM Transcript http://www.abc.net.au/pm/content/2008/s2216784.htm.

13 In seminal English case, R v Billinghurst [1978] Crim LR 553, the quintessential example of the assault-in-sport phenomenon going before a court, the only live question was whether participation in the sport was implied consent to certain kinds of assault. This general idea, however – that conduct can be implied consent to a certain level of assault – is not unique to sports. Consider the commuter who boards a packed train; the law will imply that the commuter has consented to a certain level of jostling by their fellow passengers, but not – for example – to being slapped.

diving in soccer should subject the offender to criminal penalties is most often met with derision.

What, then, is so special about doping that it so excites the moral passions of athletes and sports-fans alike? It seems that unlike ordinary rule-breaking in sports the premeditation and deception intrinsic to doping make it a particularly abhorrent breach of the sporting rules. Doping is a calculated dishonest act, and it seems that it is this dishonesty which is at the heart of our objection to the behaviour. However, as we shall see, there are many examples of athletes or sporting organisations engaging in egregious calculated dishonest actions which are not ordinarily subject to calls for criminalization.

In identifying the features that make doping in sport worthy of criminalisation, it is common to point to some type of 'fraud' element. That is, doping in sport is so objectionable as to be worth of criminalization because of the real possibility of financial advantage conferred by the doping.

The criminal law already contains sanctions for such dishonesty offences, in particular fraud and like crimes. One possibility for the state seeking to criminalise doping is to expand or re-define fraud or some like offence. Fraud currently criminalises 'obtaining a benefit, pecuniary or otherwise by deception'.[14] In relation to the existing law on fraud, the definition of 'obtaining a benefit' is already cast fairly broadly. Consider the case of *Moylan v The State of Western Australia,*[15] which held that lying to a person to induce that person to quit their job so that you might then apply for the vacant position was a sufficient 'benefit' to fall within the crime. Notwithstanding this broad interpretation given to the obtaining of a benefit, courts have still required some financial connotation to the fraudulent conduct, see *Bolitho*.[16]

However, there are two key difficulties with pointing to the financial aspect as a foundation for a claim that doping is sufficiently morally objectionable to warrant criminalization Firstly, in many cases the nexus between the doping and the financial advantage is going to be distant, particularly when we consider amateur athletes who are largely unpaid. As such, any justification grounded in financial fraud will substantiate only the criminalisation of doping by professional athletes. This brings us to the second, related point, which is to enquire as to who law is protecting against the financial of doping would be protecting. It seems that

14 *Criminal Code Act 1913* (WA) s409.

15 WASCA 52 [2007] (8 March 2007).

16 Bolitho v The State of Western Australia (2007) 34 WAR 215 - The accused in Bolitho administered a series of injections to the complainant after representing herself to be an orthopaedic surgeon. In fact, she was not. While the deceit may have vitiated the consent given to the assault (that is the injection itself), the Court of Appeal held by majority that deception to administer injections lacked the necessary financial character to be properly categorised as fraud, since no payment was sought for the "treatment".

reference to financial advantage would necessitate justifying criminalisation by reference to protecting the financial interests of corporate sponsors rather than the community's interest in maintaining public morality. This seems prima facie problematic and an insufficient reason to criminalise conduct. If a corporate sponsor objects to the conduct of an athlete it has paid, it seems that private remedies under the law of contract or equity are better suited to the task of redressing those concerns.[17] Indeed, in *Bolitho* the court reasonably objected to the expansion of the fraud charge for fear that all manner of deceitful human conduct might be criminalised. Fraud is about more than dishonesty - it is a species of theft, and the fraudulent activity must deprive a person of some pecuniary benefit they are entitled to. So while we may, in the common parlance, feel 'robbed' by a dope cheat, we the public have not lost something the law deems compensable.[18]

This argument has relied on the possibility of a doping cheat's sponsors and fellow competitors having remedies available to them under civil law. However, one might suggest that peculiarly egregious examples of doping are not compensable by civil law provisions – either in tortious causes of action or under breach of contract – and therefore the force of the criminal law is required to punish behaviour the civil law cannot adequately compensate. This argument essentially contends that there are classes of behaviour deserving of criminal censure precisely because the ordinary mechanisms of civil law – principally the payment of damages be they restitutionary, exemplary or even punitive – are insufficient to redress the wrong suffered by the individuals impacted by the cheating. In these cases proponents of the criminalisation of the use of PIEDs in sport essentially contend that only the additional punishments available to the criminal law are capable of doing justice in particular cases.

When we consider the loss suffered by the individual athletes who are 'beaten' by someone using PIEDs, this argument reaches its zenith. New Zealand athlete Valerie Adams has been outspoken about the anger and betrayal caused by losing out at the London 2012 games to rival and confirmed drug cheat Belarusian shotputter Nadzeya Ostapchuk. Adams noted "A lot of emotions went through me but I think one thing is I never forgave her and I never will... The worst thing

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17 This is typified by the recent civil suit in which Lance Armstrong was ordered to pay some US$13,000,000 in damages to a sponsor, see Lance Armstrong loses court ruling, must pay back $13 million in Tour de France bonuses to sports insurance company (17 Feb 2015) ABC News Online <http://www.abc.net.au/news/2015-02-17/lance-armstrong-loses-ruling-must-pay-back-13-million-dollars/6125146>.

18 An interesting aside is the capacity for persons involved in sport to sue those who dope. Consider here Cadel Evans, Bradley Wiggins, Greg Lemond and Carlos Sastre who are the only Tour de France winners since the mid-80s who have not been involved in a doping scandal. These riders might be able to sue - loss of a chance is recognised as a compensable loss in contract law, see Chaplin v Hicks (1911) 2 KB 786. Nevertheless, it seems that civil redress is the more appropriate remedy here.

about it for me was she took the moment away. That's probably what hurts the most."[19]

Adams' experience puts the case for criminal sanction of PIED use in sport at its highest. The kind of remedies available to individuals under the civil law seem manifestly inadequate to compensate an athlete for the lost opportunity to win an Olympic gold medal – for many sports the absolute pinnacle of achievement.[20] Moreover, an illegitimate win by an athlete who has used PIEDs seems different in kind, and more serious than, an illegitimate win caused by breaking other rules of the sport.

Consider here Diego Maradonna's infamous 'Hand of God' handball in the 1986 FIFA World Cup semi-final against England. In that case, Maradonna deliberately used his hand to knock the ball into the goal, contrary to the rules of soccer giving Argentina a 1-0 lead, and ultimately being decisive in their 2-1 victory. It is undenied that Maradonna knew his play was outside the rules of the game and that he deliberately conspired with his team-mates to mislead the referee about his rule-breaking. Indeed, Maradonna himself has admitted as much in interviews, as Mark Bechdel recounts, "Figuring the goal would be waved off, his teammates stood around instead of celebrating. A panicked Maradona told them, "Come hug me or the referee isn't going to allow it.""[21] Interestingly, Bechdel's commentary on the matter – which grudgingly respects Maradonna's gumption – draws a bright line between on-field attempts to mislead the referee and the use of PIEDs. He notes, "Look, there are umpires and referees on the field for a reason: to enforce the rules. If you are a professional athlete …whose livelihood depends on your ability to produce …and you think you can put one past those officials, you've got to try. Again, I'm not saying take HGH"[22] outlining at least a gut-reaction argument for a distinction between on-field cheating and the use of PIEDs.

By focusing on the distinction between on-field and off-field cheating we can deal with some of the criticisms that might be raised in relation to the argument presented above. While Maradonna and Ostapchuk's cheating had similar effects – in one case denying England a reasonable shot at a World Cup Championship and in other denying Adam's receipt of an Olympic gold medal – the distinction, eluded to by Bechdel, appears to be whether there is a mechanism for dealing

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19 Valarie Adams hits out at Ostapchuk in London', 3 News (online), 26 July 2013 <http://www.3news.co.nz/VIDEO-Valerie-Adams-hits-out-at-Ostapchuk-in-London/tabid/415/articleID/306432/Default.aspx#ixzz2wIB3kn1l>.

20 Of course, loss of a chance is a compensable damage under the civil law, however that damage is redressed through monetary compensation, which in most cases will be cold comfort to an athlete denied their opportunity – at Olympic glory – see above n19.

21 Mark Bechtel, 'The right way to cheat' *Sports Illustrated* (online), 24 August 2005 http://sportsillustrated.cnn.com/2005/writers/mark_bechtel/08/24/daily.blog/index.html.

22 Ibid.

with the cheating within the context of the game. Had the referee been more observant, Maradonna's 'goal' would never have been allowed, so despite his active attempts to deceive the referee the cause of the loss to the English team was only partly Maradonna's. Without the referee's failure there would have been no loss suffered. The reality of even professional sports is that referees make decisions, correctly or incorrectly, and accepting those decisions is a requisite part of how any game is adjudicated.

PIED use, however, is a different category of cheating behaviour precisely because there is no effective mechanism for its detection within the context of the game itself. While a particularly forgiving fan might understand Maradonna's attempts to deceive the referee on the pitch as a part of the game, the distinction drawn by Bechdel seems to be that cheating by means of PIED use falls outside the scope of disputes adjudicable within the game and therefore a peculiarly egregious violation because there is no mechanism to rule on it.

We can then narrow the claims of those who support criminalisation of PIED use to being justified in circumstances where there is loss to another specific athlete or group of athletes which cannot be adequately compensated by civil remedies and that loss is caused by conduct which cannot be adjudicated within the rules of the game per se. The question, then, is whether this more restrictive and specific justification for the criminalisation of PIED use in sports is sufficient.

In answering this question, we might consider whether other classes of behaviour fall into this category, and whether we consider that such behaviour ought reasonably to be censured by the criminal courts. That is, is there cheating that can be engaged in which cannot be adequately compensated by civil remedies and which is not adjudicable within the context of the game and would we consider this kind of cheating to invite the full force of the criminal law? One example of cheating behaviour which fits this description are breaches of rules regarding salary caps in team sports or player eligibility in sport more generally.

Consider here the case of the Melbourne Storm Rugby League club, which engaged in systematic breaches of the salary cap rules. Across 5 years the club paid players in various ways without disclosing those payments as required under the NRL's rules. Additionally, those payments were covered up by doctored bookkeeping, and in some cases false statutory declarations about compliance with salary cap rules. Indeed, the matter was referred to Victorian Police and ASIC for investigation, however ultimately little came from those investigations, with the Victorian Police declining to continue to investigate allegations of fraud as, according to a statement issued by Victoria Police, "We have decided not to

pursue this line of enquiry as to do so would be extremely resource intensive and there is a high probability it would not result in any charges being laid."[23]

The Storm salary cap breach matter is instructive because it, too, caused widespread outrage in the community. Additionally, those clubs beaten by Melbourne Storm reasonably felt that they had been robbed of the opportunity to compete on a level playing field, and that monetary redress was cold comfort by way of compensation. It was also systematic, widespread cheating with deliberate and specific attempts to cover the cheating up. Further, there was no way within the context of the rules of the game of Rugby League for the referees to assess and penalise the infraction, so there was no shared fault which was the operative cause of the loss to competing teams, as there was in the 'Hand of God' case. Nevertheless, it seems that there was no general community sentiment that salary cap breaches per se ought to be criminalised. Indeed, an assessment was made by Victoria Police that with respect to the possible criminal activities actually engaged in – specifically fraud and making false statutory declarations – that it was simply not in the public interest to continue with the investigation even in respect of those possible breaches of the existing law. It seems difficult in these circumstances to claim that the public good would be served by criminalising the salary cap breach itself when the consensus view appears to be that potentially committing crimes in order to achieve that breach is not sufficiently serious to warrant the expenditure of public funds in pursuit of possible criminal proceedings.

The challenge for proponents of the criminalisation of PIED use in sports is to distinguish as between systematic off-field cheating incidents like salary cap breaches on the one hand and systematic off-field cheating in the form of PIED use on the other. The two appear, prima facie, to have very similar features and to fit into the same essential category of deceitfulness in sport which causes a loss to another specific person or class of persons which is not manageable by application of the on-field rules. Given these similarities it would appear very odd indeed to insist that one form of cheating be subject to criminal sanction and the other not merely by reference to the fact that one advantage is obtained by lying about the spending of money and the other by lying about the taking of certain substances. This distinction alone seems to be insufficient to justify bringing to bear the very serious consequences of the criminal justice system on one infraction and not the other.

One alternative for proponents of PIED criminalisation is to insist that all infractions that fall within the features of this objectionable behaviour be criminalised, since they are all essentially the same species of immoral conduct

[23] Anthony Dowsley, 'Melbourne Storm executives won't be charged with fraud-related offences', Herald Sun (online), 6 May 2011 <http://www.heraldsun.com.au/sport/melbourne-storm-executives-wont-be-charged-with-fraud-related-offences/story-e6frf9if-1226051106194>.

which the law ought to censure. Such an argument, I contend, would unreasonably extend the sphere of criminal law into activities which it ought not to be in the business of censuring. Without claiming that criminalisation of PIED use in sports necessarily entails a requirement to criminalise, infra, salary cap breaches, the hiring of ineligible players, 'tanking',[24] and so forth, it does seem genuinely odd to contend that only one member of a class of essentially equivalent mendacious behaviour should be singled out for special and much more harsh treatment. Further we might reasonably consider that bringing to bear the force of the criminal law for the 'crime' of salary cap breaches per se, or tanking per se, is an unwarranted use of the extremely serious consequences of criminal punishment. While it may well be that Valarie Adams cannot be adequately compensated for her loss of a moment of Olympic glory by civil law remedies, we must question whether this fact alone is sufficient to ground a claim that criminal sanctions ought thereby to follow.

For these reasons it is contended that arguments to criminalise doping in sport on the basis that it is sufficiently immoral to warrant the intervention of the legislature and criminal sanction are not sufficient. Even if a liberal thinker were to contend that doping was relevantly a breach of the rights of other citizens or the community generally, moral coherence seems to demand that such a position will also necessitate the criminalisation all sorts of similarly objectionable conduct in sports. It is the suggestion of this paper that the unique focus on calls for criminalisation of doping evidences that there is not a strong shared moral sentiments with respect to other kinds of cheating in sport, such as salary cap breaches. Given such a lack, one might query whether the general moral objection to doping in sport is a genuine response to the egregious nature of the conduct, or a knee-jerk response to a number of high profile instances.[25] It may

[24] That is, deliberate and systematically losing matches in order to achieve a more favourable outcome either in terms of future 'draft picks' of players as in AFL, or in terms of ranking for finals matches as in the scandal that gripped Olympic Badminton in the 2012 London Games when a number of teams tried to avoid unfavourable draws in the knockout rounds by attempting to deliberately lose their matches, see Paul Kelso 'Badminton pairs expelled from London 2012 Olympics after match-fixing scandal' *The Telegraph* (online), 1 August 2012 <http://www.telegraph.co.uk/sport/olympics/badminton/9443922/Badminton-pairs-expelled-from-London-2012-Olympics-after-match-fixing-scandal.html>.

[25] This is not to say that such a response to high-profile doping is inappropriate. One might reasonably be appalled by the conduct of for example Lance Armstrong. However, the author suggests that such high-profile dope cheats are frequently also morally objectionable for a whole host of other reasons. Indeed, Lance Armstrong is an instructive example of a man whose morally reprehensible conduct extends far beyond his doping. It may well be that the community response to doping which has been coloured by their, again quite reasonable, moral objection to persons like Lance Armstrong.

well be that our moral objection to doping in sport is a mile wide but an inch deep.[26]

However, as noted above conservative thinkers may contend that the law might reasonably criminalise such conduct merely on the basis that it offends the majority's general moral sentiments, regardless of the separate question whether said moral sentiment is within what Meyerson calls the 'theoretical' limit the legislature's powers. It follows, that we must now consider if any pragmatic difficulties arise in relation to attempts to criminalise the use of PIEDs in sport.

IV THE PRACTICAL DIFFICULTIES IN CRIMINALIZING DOPING IN SPORT

A The Governance of Sport Bill 2014-2015 UK

The calls to criminalise use of PIEDs in sport in the Australian context are not unique. Indeed the United Kingdom is currently considering a bill which would have the effect of;

> moving in line with leading European countries, where a criminal offence would be committed where an athlete knowingly takes a prohibited substance with the intention of enhancing his or her performance, or where a member of an athlete's entourage encourages or assists an athlete in taking such a substance. Both the criminal offence and any current sporting sanction would apply simultaneously to doping offences. This aims to ensure drug-free sport and a level playing field among athletes.[27]

The bill's sponsor, former Olympic silver medalist Lord Moynihan has previously advocated legislation which would criminalise the supply of PIEDs to athletes in the context of the 2012 London games. In both cases those bills proposed to criminalise the supply to an athlete of any substance on the WADA banned list.[28] Indeed, one of the explicit rationales for legislation allowing police to search the

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[26] While acknowledging that a much fuller treatment would be required, in the reward terms one might reasonably suspect that an argument of this style would prove similarly problematic for those moral perfectionists who might attempt to justify the criminalisation of doping in sports on the grounds that such a law might foster virtue generally. Prima facie it would seem that they too would need a clear distinction between the doping and other kinds of cheating conduct in sports, or alternatively be put in a position where coherence would demand the criminalisation all similarly egregious conduct.

[27] Nigel Boardman and Tina Winzer, *Lord Moynihan – Private Members Bill "The Governance of Sport"* (11 June 2014) Slaughter and May Website <http://www.slaughterandmay.com/news-and-recent-work/recent-work/recent-work-items/2014/lord-moynihan---private-members-bill-the-governance-of-sport.aspx>.

[28] Governance of Sport Bill [HL] 2014-2015 http://services.parliament.uk/bills/2014-15/governanceofsport.html, cf. 'UK Bill to criminalise doping and allow police drug searches' (1 January 2010) World Sports Law Report <http://www.e-comlaw.com/world-sports-law-report/article_template.asp?Contents=Yes&from=wslr&ID=1190>.

premises of a person suspected of supplying a PIED to an athlete what that many of the drugs on the WADA schedule are not ordinarily a crime to possess. As such, Lord Moynihan reasoned that police needed enhanced powers in order to obtain a warrant to search a premise where they suspected that a drug on the WADA banned list, but not otherwise prohibited possession by the criminal law, might be being held for future supply to an athlete. Similar laws already exist in parts of Europe most notably in Austria.[29]

The first objection, on practical grounds, to the implementation of such a legislation is that its impact has the potential to be incredibly Draconian. This is because the ambit of who constitutes an 'athlete' for the purposes of the legislation is drawn very broadly. Indeed this is a necessary feature of such legislation. Legislation which only criminalised the use of PIEDs with respect to "professional" athletes would be deeply problematic to administer. This is because in many sporting codes the path to participation in the elite levels of support is not clearly distinct from amateur or club level participation. Take for example the sport of wrestling, which has a venerable tradition. Participation in the Olympic Games depends on a country having an athlete win at one of the designated qualifying competitions.[30] However the athletes whose victory secures a place for an Australian in international competition does not necessarily guarantee that they will be the competitor who contests that place. Participation in the Australian Olympic team requires successful placing at one of a number of national events, principally the Australian National Wrestling Championships.[31] These national events comprise both weight categories in which Australia has successfully attained a spot in the highest levels of international competition, and others in which it has not. At any given national competition different weight classes will attract very different athletes.

The Australian National Wrestling Championships held in Western Australia in 2012 are an excellent example of this phenomenon. In that competition the then 60 kg weight category was being contested on the basis that the winner was entitled to compete on behalf of Australia at the 2012 Olympic games. However, no other weight category was. As a result, the backgrounds of athletes competing at the same competition varied dramatically. As might be expected the 60 kg weight category was contested by a number of very serious and very competitive

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29 Jaan Murphy, Where in the world is doping a crime? Research Paper No 6, Parliamentary Library, 24 April 2013) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2013/April/Where_in_the_world_is_doping_a_crime_doping_in_sports_pt_6>.

30 FILA, *Qualification System – Games of the XXX Olympiad* (June 2011) <http://www.fila-official.com/images/FILA/documents/jeux_olympiques/110620_London_2012_Qualification_System_EN.pdf>.

31 Wrestling Australia Inc., *2012 Australian National Wresting Championships* Perth (4 February 2012) <http://www.wrestling.com.au/wp-content/uploads/2012_Nationals_Info.pdf>.

athletes with a history of success at the highest levels of competition, including the eventual winner Farzad Tarash, whose top-two placing at the African and Oceania Qualifying Tournament had opened the Olympic place for an Australian athlete.[32] While technically amateur competitors, many athletes in this weight class considered wrestling to be, if not their primary source of income, then certainly their primary career goal. By contrast, at the same event, there were many athletes whose participation in sport wrestling could only reasonably be described as recreational. Qualification rules for the tournament were determined by the state body which oversaw a wrestler's particular jurisdiction. The rules for the hosting state, Western Australia, did not require that an athlete had won or indeed placed at any competition whatever. As a consequence, a number of wrestlers participated in a national competition—notionally a competition which might have led to qualification for the Australian Olympic team—with an extremely limited background in sport.

This illustrates a key problem with attempting to distinguish between amateur athletes who we might reasonably expect would be subject to any law prohibiting the use of PIEDs; that is athletes with a serious intention to compete at the Olympic Games and those amateur athletes who do not, prima facie, seem to warrant such strict penalties. Any legislation which sought to define an 'athlete' for the purposes of prohibiting the use of PIEDs would almost necessarily need to encompass athletes of all kinds who might participate in such competitions, creating a problem whereby a large class—indeed perhaps the majority—of persons whose behaviour is captured by this law are not the person is whose behaviour is being targeted.

Indeed, the definition of "athlete" given in the governance of sport bill is as follows:

> Athlete means any person who competes at any level in a sport under the jurisdiction of a governing body of sport.[33]

The definition of 'governing body of sport' is similarly broad, and would in practical terms cover almost any participant in any organised sporting activity.[34] To meet the definition a governing body must be a direct or indirect recipient of government funding and meet one of a number of criteria which include selecting regional sports teams or exercising disciplinary authority.

So, for example, to take an Australian body which would meet the definition of 'governing body of sport' under the proposed UK bill, consider Western Australian Flying Disc Association (WAFADA), the organisation responsible for

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32 Australian Olympic Committee, *Australia and Olympic Wrestling* <http://corporate.olympics.com.au/sports/wrestling>.

33 Ibid.

34 Explanatory Notes, *Governance of Sports Bill [HL]* <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0020/15020.pdf>.

the promotion of the sport of Ultimate Frisbee in Western Australia. That organization selects members and teams for participation in the Australian Ultimate Championships.[35] It also receives funding from the Department of Sport and Recreation in order to meet its strategic and operational plan.[36] These two criteria would suffice for it athletes to be captured under any legislation drafted in the terms of the proposed UK bill. Consequently any WAFADA athlete who consumed any substance listed in the WADA prohibited list would be guilty of a crime, under the proposed bill. This is not to detract from the obvious skill, dedication and athleticism of Ultimate athletes. However it does demonstrate a group of people—particularly recreational participants in Ultimate —who would be captured by this legislation who prima facie would not seem to earn any peculiar moral reprobation by virtue of the use of substances on the WADA banned list.

Thus, even if we assume for the sake of argument that the use of PIEDs by athletes who have a serious intention of participating at the elite levels of a well recognised sport is a serious enough moral offence that we ought to consider criminalizing it, the same rationale cannot be said to extend to participants in sport who are engaging securely for social or enjoyment reasons, with no expectation whatever of success at the highest levels, let alone remuneration for that success. The need for legislation to be drafted broadly enough to capture both kinds of athletes, because both kinds of athletes will be participating in the same competitions, means that persons for whom the participation in sport is surely recreational will be subject to criminal sanction for the use of PIEDs. Indeed, if Australia were to adopt a bill similar to that proposed by Lord Moynihan the supply of a PIED to such an athlete, or use by that athlete, no matter how amateur, would be criminalized. Given that such legislation necessarily require the banning of all substances on the WADA list, the journeyman amateur athlete is placed in a very different position. Again, to return to the proposed Governance of Sport Bill currently before the UK House of Lords, one finds a definition of "prohibited substance" which in any substance on the WADA banned list as updated from time to time.[37]

So firstly, the athlete will need to appraise themselves of the WADA list. It is not clear that ASADA's attempts at raising athlete's consciousness of which substances are on WADA list yet extends to the journeyman amateur athlete. Secondly, there are many substances who have perfectly ordinary therapeutic benefits and would be prescribed as a matter of course for common medical

35 WAFDA, *Western Regionals* 2015 (2014) WA Ultimate Website <www.waultimate.com/component/content/article/2-pages/140-western-regionals-2015>.

36 WAFDA, *Who is WAFDA?* WA Ultimate Website <http://www.waultimate.com/wafda/who-is-wafda>.

37 Explanatory Notes, *Governance of Sports Bill [HL]* <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0020/15020.pdf>.

complaints which are banned with respect to use by athletes. Two examples are diuretics, used to treat high blood pressure, Polycystic ovary syndrome and kidney disorders on the one hand and stimulant drugs commonly used in the treatment of ADHD on the other. Both are prohibited substances on the WADA list.[38] The use of such substances for their ordinary therapeutic benefit would be criminalised even with respect to journeyman amateur athletes.

With respect to criminalization generally, ignorance of the law is no defence.[39] and legislating to take account of circumstances where amateur athletes are ignorant of the banned nature of substances they are taking for an ordinary therapeutic effect seriously compromise the legislation's goal of capturing use of such PIEDs by athletes more commonly envisaged as those who are engaged in 'doping'. Allowing a defence of ignorance would encourage athletes to remain wilfully blind to the substances they ingested or otherwise used. Of course this is not in keeping with the goals of banning PIEDs in the first place, and is certainly not a feature of any contemporary legislative or other methodology for prohibiting the use of such substances in competition.[40] An athlete's claim that they were unaware they were ingesting or otherwise using PIEDs has never been a defence to being found to be in contravention of anti-doping rules, for obvious reasons.

Considering the proposed bill specifically we can see that attempts to deal with this issue have raised two complications. The first is that on the face of the bill all use of prohibited substances is criminalized. This is despite the fact that there remains the possibility of an athlete obtaining a therapeutic use exemption or TUE for the use of an otherwise banned substance. No provision for an athlete with a TUE in relation to a prohibited substance is given in the Bill.

Secondly, the bill introduces an intention element which would fall foul of many of the objections raised above. The wording in Bill is "if he or she knowingly takes a prohibited substance with the intention, or one of the intentions, of enhancing his or her performance".[41] One may suggest that the introduction of this limiting provision reflects the need for the criminal law to only punish conduct which is intentional in some way, or contains the necessary 'mens rea' component. However as noted both aspects of this limiting test have the capacity to render such legislation, functionally, a toothless tiger. Consider here the example of a member of the now notorious Essendon Supplements Program. Given that participants were unaware of the substances they were taking, and

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38 WADA, *Prohibited* List (20 September 2014) WADA Website <https://www.wada-ama.org/en/resources/science-medicine/prohibited-list>.

39 See, for example, *Criminal Code Act 1913* (WA) s22.

40 ASADA, *Athlete Testing Guide* (June 2012) 1, <http://www.asada.gov.au/publications/athlete_guides/asada_athlete_testing_guide_2012.pdf>.

41 Explanatory Notes, *Governance of Sports Bill [HL]* <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0020/15020.pdf 16(2)>.

were informed that such substances were 'quasi-legal' it seems that prosecution is unlikely to be successful.[42]

Thus in practice the criminalisation of doping is finds itself on the horns of a dilemma. We either allows defences of ignorance and lack of intention in order to account for lower moral culpability of athletes who fall into these, and in doing so weaken legislation attempting to so criminalise use by professional athletes to the point where it is unworkable. Alternatively, we disallow such defences and leave ourselves in a situation where a great deal of persons break the law unknowingly, and in circumstances in which the ordinary person might reasonably question whether they had any moral culpability in so doing. Both of these scenarios provide deep pragmatic, as much as theoretical, problems for the justification of such laws. That is, we might reasonably object to laws that are strong in theory, but toothless in practice on the grounds that they make a mockery of the seriousness of the state intervening to criminalise certain conduct and generally bring our system of justice into disrepute. As well we might reasonably object to laws drafted so broadly with the intention of capturing serious offences that in practice criminalise trivial behavior. Such laws may, in the court of public opinion, dramatically undermine the intention of the legislation, at least in so far as it is grounded in expressing the community's deep opprobrium for a certain class of doping offence. (Instructive here is the broad feeling that Shane Warne's ban for a doping offence was over the top.[43] If such sentiment exists with respect to a highly paid professional athlete testing positive to a substance which was prohibited by WADA, but which had an ordinary therapeutic use, one might reasonably expect that a string of prosecutions targeting journeyman amateur athletes for similar breaches may blunt the public's appetite for harsh penalties for doping offences.)

It is this which returns us to the dilemma which is at the heart of this paper; the lack of a sufficiently seriously overarching moral objection capable of sustaining calls to criminalize of doping in sport. If we do not think that ignorant use of PIEDs, or use which lacks an intention to enhance performance, is sufficient to bring to bear the criminal law, then we must be identifying those features – principally intention and deception – as critical when we determine what class of cheating in sport is so morally egregious that it deserves criminal sanction. However, as noted above there are many examples of cheating sport which carry both knowledge of the use of a prohibited method and an intention to use that method to obtain an advantage which do not seem to be so morally egregious as to warrant criminal sanction. Indeed, few if any are calling for their

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42 James Heathers, *Supplementary reading: why was there no red flag at Essendon?* (22 August 2013) The Conversation <https://theconversation.com/supplementary-reading-why-was-there-no-red-flag-at-essendon-17350>.

43 Mary Gearin, *Warne penalty fuels anti-doping code* debate (24 February 2003) The 7:30 Report <http://www.abc.net.au/7.30/content/2003/s791850.htm>.

criminalization, and the UK's proposed Governance of Sport Bill does not, for example, criminalise salary cap breaches of the kind engaged in by the Melbourne Storm. At the heart of the matter it seems that in the absence of a good conceptual distinction between doping and non-doping types of premeditated, deliberately concealed cheating which is not remediable within the context of the game, we must concede that it is conceptually incoherent to single out doping among this class of breaches of sporting ethics for specific criminalization.

V Conclusion

There are few jurisprudes indeed who would contend that moral outrage should be co-terminous with criminality. In this case, it has been shown that there are good reasons – pragmatic and otherwise – for declining to criminalise doping, even despite our quite reasonable outrage at extreme cases of sporting deceit, such as Lance Armstrong's. Even taken at its highest, the idea that doping interferes with the excellences of sport does not give us sufficient moral purchase upon which to reasonably ground criminal liability for doping. Considering doping as an offence against the other competitors in the sport, it does not appear that there are sufficient reasons to treat doping differently from other classes of improper behaviour in sports for the purposes of bringing to bear the criminal law. It may be that we – the morally outraged public – will need to console ourselves that dope cheats are already stripped of their titles, their credibility and their goodwill, and that the desire to add criminal sanction to injury is perhaps a bridge too far.