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**An alternative solution to lifting the ban on doping:
Breaking the payoff matrix of professional sport
by shifting liability away from athletes**

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1. Introduction

Doping in sport is widespread and shows little sign of abating. Only in 2016 in the run up to the Olympics did we witness several doping scandals.

The excellent movie “The program” by Stephen Frears (2015) based on David Walsh’s book “Seven deadly sins” (2013) ends with a sentence from Lance Armstrong defending himself in front of the United States Anti-Doping Agency (USADA) after his demise: “*From a fan perspective, you need to have a winner, and I feel like I won those 7 titles*” (Tour de France 1999 to 2005).

Lance’s point is that in an environment in which everybody is doping, there still is somebody who is faster than the others. This seems also to be the final take-home message of the movie, and is supported by empirical data around our reactive attitudes of blame and resentment for doping in professional sport (Atry 2012; 2013). The movie ends on the notes of Leonard Cohen’s immortal song “Everybody knows”, and with an unanswered question: *If everybody knew about the Program in cycling, then is Lance Armstrong alone to blame?*

In this paper I first address the question of who is to blame in doping in sport. I then analyse the argument that lifting the ban on doping would be a solution to the widespread problem of doping in sport, and reject the argument on the basis that there would still be incentives for athletes to continue taking performance-enhancing substances secretly. Finally I propose an alternative solution based on shifting the liability for doping away individual athletes to those stakeholders who in a specific professional sport context hold most power and control over them.

2. Who is to blame?

Empirical data suggest that athletes often dope as a result of extreme psychological pressure: they feel they have no alternative (King & Robeson 2007; King and Robeson 2011) to remain in the ‘game’. Alex Zuelle, for example, a former Swiss professional cyclist who rode for the Festina team and who tested positive for erythropoietin in 1998 (Landau 2013), said:

“Everybody knew that the whole peloton was taking drugs and I had a choice. Either I buckle and go with the trend or I pack it in and go back to my old job as a painter. I regret lying but I couldn’t do otherwise”. (Hamilton and Coyle 2013, p.100)

Hence, while choosing not to participate in doping is theoretically possible, in practice it can be extremely costly for the athletes, as it can amount to giving up being competitive, or even leaving the profession.

This lack of alternatives (or, to be fair, existence of alternatives which would lead though to exiting the profession) is recognised by the public. Athletes are severely constrained in their choices.

WADA works on the premise of strict liability, which means that athletes are deemed guilty whether or not they realised that they had taken a banned substance (paragraph 2.2. WADA Code).

However, there are several empirical although anecdotal data showing that fans do not hold athletes as the only ones responsible for doping behaviours; quite on the contrary, the teams, sports-physicians, and more recently in the cases of state-sponsored doping, authorities are held co-responsible for doping.

Atry and co-authors have developed the concept of “emotion cultures” or “emotion subcultures” in sport as social-affective states that have normative influence on individual athletes (Atry et al, 2012). These “emotion cultures” do not involve only individual athletes, but also other stakeholders in sport (e.g. fans, sponsors, coaches, managers, medical support teams, etc.). Within an emotion culture, norms and “reactive attitudes” (Strawson 2008) as regard to rule violation / doping in sport are generated and shaped, and they involve not only the athletes but also all stakeholders in professional sport. For examples, fans are held responsible for “corrupting the spirit of sport” with offensive behaviours (e.g. hooligans); states are (or were) held responsible for encouraging or conniving in doping behaviours (e.g. historical examples of state-sponsored behaviours alongside the most recent Russian case); and sponsors are held responsible for encouraging or condoning (by closing one or both eyes) doping behaviours or other behaviours considered morally unacceptable.

This concept of “reactive attitude” is useful to ground the current discussion that athletes are not the only ones to blame for the continued presence of doping in professional sport. The question to ask is “*Who is to blame?*”, or in other words, “*What is the appropriate target of our reactive attitudes in doping?*”

As argued in a previous paper (Camporesi and McNamee 2014), athletes can be considered ‘guinea pigs’ in a system of unregulated clinical trials, where we have absolutely no data on the real performance enhancing effects of the substances they are taking. Deciding not to dope may often mean the end of a professional career. Responsibility and accountability should be placed on those who hold in place the incentives to continue doping. There are two kinds of incentives at place:

- 1) competitive incentives linked to wanting to gain an edge over the opponent in order to gain:
- 2) financial incentives linked to sponsorship contracts and tournament-prizes or record-breaking

There are also disincentives in place in doping which are:

- 1) fear of getting caught and having to serve a ban (because WADA puts strict liability on the athlete)
- 2) health risks linked to use of performance-enhancing substances which are unregulated

Let’s analyse these in turn to understand the ways in which the incentive structures of professional sport could be changed.

3. The pay-off matrix of professional sports: incentives and disincentives to dope

Researchers who study doping in sport have identified a series of factors that explain its continued presence. Many of these can be summarized as the so-called ‘payoff matrix’ that athletes face in professional sports. In other words, the rewards or incentives – the competitive advantage and the financial gains that go with it (and other ‘externalities’ such as fame, and visibility) - continue to outweigh the risks or disincentives of doping, which include not only being caught and punished, but also physical harm (both in the short term, and in the long term) to the athlete.

There are plenty of empirical data to demonstrate that athletes decide the risks are worth it and continue to trade future health problems for short-term competitive advantage. (Waldron and Krane 2005; Krumer and Rosenboim 2011).

Although the prevalence of doping in elite sport is difficult to measure and likely to vary substantially between different sports, according to a recent meta-review (the previous one dating back to 1997) it is estimated to be affecting on average between 14 and 39 %, of athletes (de Hon et al, 2015), with this figure likely to increase significantly if recent state-sponsored doping scandals are taken into account. In addition, the authors note recent revelations by various elite cyclists underlined a discrepancy between true prevalence figures and positive doping tests (about 0.5 % of athletes). This discrepancy is probably not limited to cycling and casts serious doubts on the effectiveness of current anti-doping policies.

In parallel, the true extent of the problem is seldom addressed (even with the Russian doping scandal), and so estimations on doping prevalence tend to vary to a large

degree, starting from ‘few’ to ‘all’ athletes. Similarly, as argued by Camporesi and McNamee (2014), there are absolutely no data on the real performance enhancing effects of many of the substances ingested by athletes that are also included in the Prohibited List. Athletes put their health at risk in the hope – often unfounded – of gaining a competitive advantage. We have referred to this as “enhancing misconception” drawing a parallel with research ethics context of “therapeutic misconception”.

Note, the WADA Code does not require that a substance have a demonstrably performance-enhancing effect for it to be included on the Prohibited List, but only its potential (WADC 2015). That is because there are no clinical studies aimed at establishing the performance enhancing effects of these substances. As a matter of fact, the recent Olympics have given us a display of pseudo-science with the widespread use of ‘cupping’ in swimming as a performance enhancing technology (more probably, only working as a placebo. The same cannot be said of other substances that may pose very real health risks for their athletes) (Colquhoun 2016).

One solution to the current impasse which has been suggested by some scholars would be to legalize doping and make it part of sport. Julian Savulescu has suggested this (most recently, in 2016), with the proviso that drugs be used ‘under medical control’. Competitors would be allowed to take performance-enhancing drugs as long as they were ‘safe’, where the bar of safety “should be set at the level we allow athletes as persons to take risks” (Savulescu 2016). In the same editorial, Savulescu has argued that that “we should shorten, not lengthen, the WADA banned list” and that “we should give up the principles that anything that enhances performance is against the spirit of sport and that the natural/artificial distinction has moral significance” (page 303, 2016).

Rephrasing the proposal in terms of incentives and disincentives, Savulescu’s proposal would amount to the option ‘take openly’ of the prisoner’s dilemma outlined by Holm, which would amount to eliminating the disincentives a) i.e. fear of getting caught, and disregarding disincentive b) i.e. harms to health of the athlete on grounds of a libertarian approach according to which individuals should be free to exercise their own autonomy in terms of what kinds of risks they want to take in their life, be it in the sports context or in another context.

I do not wish to enter here into the discussion of whether lifting the ban on doping would be counter to the spirit of sport or of Olympism. Others before me have successfully objected to Savulescu’s points on grounds that they are flawed (McNamee 2016) or that doping is contrary to excellence in sport (Devine JW 2010). Instead, in this paper I wish to reason from the premise that, even if we were to accept their argument that doping is not contrary – or perhaps it represents the essence – of competitive sport, the solution would not work from a pragmatic point of view.

We reason on the basis of Holm’s approach that doping ‘under medical control’ even if ‘theoretically possible’, would be impossible in practice. In this sense I am adopting a pragmatic and not idealist solution to an ethical issue in sport. I will briefly recapitulate Holm’s argument before proceeding to spell out my alternative solution to lifting the ban on doping.

To the best of my knowledge Holm (2007) was the first to apply the game theoretical analysis to the case of doping in professional sport. He spells out in this context the four options typical of the classic game theory problem also known as the ‘prisoner’s dilemma’ where the four options would be the following:

- 1) take and hide
- 2) take and tell
- 3) don’t take (reject) and hide
- 4) don’t take (reject) and tell

The first option is the current scenario where athletes take performance-enhancing substances secretly. The consequences of this scenario are (more or less likely, given that there are no data on the real effects of most substances included in the Prohibited list) gaining a positional performance advantage, with the risk of possibly untreatable side effects.

The second option is the one advocated by Julian Savulescu, i.e. take performance enhancing substances in the open, in a medically regulated regime. The consequences of this scenario are gaining possibly an absolute performance advantage, although not a positional one, as in this scenario the drug or substance is available to all athletes. In Holm’s words, the ‘take and tell’ scenario leads to a ‘competitive status quo’, i.e. things don’t change much, only the bar is raised for everybody, with of course different results as they start from different starting points. The risk of side effects is diminished as doping is put under a medical context and hence regulated and controlled.

The third option, ‘don’t take (reject) and hide’ is not instantiated in the world of professional sport as it would amount to not take performance enhancing substances, and not doing so in the open. The competitive status quo would also be preserved, with no side effects.

Finally, the fourth option, ‘don’t take (reject) and tell’ would amount to what we usually refer to as being a ‘clean athlete’, with all the disadvantages that go with it in the current system of widespread doping, i.e. a competitive disadvantage, although with no side effects from the substances. The fourth option is undesirable as clean athletes are regularly cheated out of medals by doping athletes (as happened to Andrew Steele and fellow teammates from Team GB at Beijing in 2008) (Rian and Ingle 2016). A reinstatement of a medal cannot make up for change of direction in life that the loss of the medal was responsible for, including the lack of financial support that would have made possible a professional career for the athlete.

Holm’s analysis focuses only on the first option, ‘take and hide’, and spells out the two possible scenarios that would take place were a ban on doping to be lifted. In the first scenario, athletes have access to data on the effectiveness and side effects of the performance enhancing substances; while in the second scenario athletes get impartial advice from the sports doctor about when and how to dope. Importantly, Holm argues that in both scenarios, athletes would still have incentives to cheat, and a two-tiered system of doping (under a medical context and of secretive doping) would ensue. This would happen because athletes would have strong incentives to keep doping practices secretive in order to maintain an exclusive use on a drug, and therefore a competitive

advantage over fellow athletes. Secretiveness is an integral part of achieving and maintaining competitive advantage in any context (see, for example, Dufresne et al. 2008), hence for professional athletes the option “take and hide” would remain the rational choice if doping were legalized.

To be clear, this is not because doping would still be ‘risky’ for the health of the athletes (we are reasoning on the premise that individuals should be free to take whatever risk they want as long as it pertains to their own body) but because doping under a medical context would not eliminate the incentives to dope i.e. gaining a competitive advantage, and the financial rewards associated with it.

In Savulescu’s instance of putting doping under a medical context, although the current disincentives of fear of getting caught would be eliminated, there would still be incentives to take other performance-enhancing drugs secretly (‘take and hide’) without sharing with fellow competitors in order to continue having that crucial competitive advantage which is necessary to win and gain the external financial benefits. For example, if we were to lift the ban on EPO, there would still be incentives to undergo genetic enhancement which is more difficult to detect and would achieve the same end by different means that cannot be detected when looking at haematocrit level. The same argument applies to other instances of lifting the ban on a particular substance: athletes would still have incentives to experiment with other performance-enhancing substances (or ‘supposedly’ so, as without hard data resulting from clinical trial we cannot know whether the performance enhancing effects are only expected or real) for which there is no test that can detect them. If we do not know what we should be testing for, we will have no tests for a particular substance.

That is why, as long as the payoff matrix of professional sport remains unchanged, lifting the ban on doping would not lead to ‘safe doping’ under medical supervision, but would instead result in a two-tiered system of doping, where athletes would take some performance enhancing substances in the open in a medically controlled and regulated way, but would continue to take other, potentially dangerous for their health, performance-enhancing substances secretly, in order to maintain a positional performance advantage over fellow competitors.

5. An alternative solution to lifting the ban on doping: changing the pay-off matrix

The solution to lift the ban on doping and put doping under a medical context targets primarily the disincentives to dope – namely, fear of getting caught and health risks – and only tangentially addresses the incentives to dope (gaining competitive advantage and financial rewards for top performance).

How might we change the incentives to doping instead?

A first way of changing the financial rewards would be to change the financial incentives in professional sport.

The great majority of elite athletes – mind you, elite athletes, not all athletes - do not receive a steady income and struggle to make ends meet through sponsorships and

other part-time incomes. Indeed, in many sports such as track and field, the average income of the athlete is quite low. They rarely receive stipends from the sport's governing body and in the US, for example, the annual income (mostly through donations and gifts) for elite track and field athletes is only around \$8,000-\$10,000 above the national poverty line of \$11,880. On average, for each event, only five of the top 10 American athletes make more than \$15,000 per year (Rudnitsky 2016). As put by Moran (2016), "For many elite U.S. athletes like Achtenberg, pursuing their sport is an expensive, full-time proposition that leaves them in precarious, or even dire, financial situations."

That is why they need sponsorship money to survive; that is why there are such strong incentives in place to break world records (Moran G 2016). Many athletes live on sponsorships (which often come with clauses about performance, injury, number of races, etc.) in absence of a steady income. Of course it goes without saying that sponsorships are given preferentially to male, good-looking athletes (preferentially white) (Topping 2012; Desbordes 2015) and to certain sports, making it difficult for the 'average' elite athlete to make a living. Health insurance and stipends are offered to only a very limited number of top-notch competitors. To survive, most Olympic athletes are "forced to cobble together an income made up of prize money, apparel contracts, grants and part-time work" (Rudnitsky 2016). Not all athletes have it that bad, but on average track and field athletes have quite a hard time making ends meet. Put simply, if an athlete is not the top of the top in his or her class or sport, he or she will struggle financially.

I believe that sports federations need to seriously reconsider the ways in which professional sports can be made sustainable in the long term, so that athletes can have the financial security that is currently only associated with sponsorship money. I leave for another paper or other scholars to elaborate on the ways on which this could be done.

Secondly, as I have argued above, we can start with the intuition (echoed in Atry's concept of reactive attitudes) that athletes should not be the only ones held responsible for doping.

Atry et al (2013) has attempted a preliminary outline of a theoretical framework for broadening the scope of responsibility in doping behaviours, drawing on Strawson's (2008) relational concept of agency. He argues: 'It seems reasonable to assert that the nature of asymmetries in power relations between individuals (e.g. coercion or manipulation) could significantly affect responsibility-seeking/assigning processes' (Atry 2013: 45-6). I have argued before along similar lines in Camporesi and McNamee (2014) where I have outlined the ways in which athletes are vulnerable subjects in a system of unregulated clinical trials, characterised by lack of transparency, lack of visibility and lack of accountability for those who hold power. Having established that the concept of shared participatory responsibility for doping has a first intuitive basis, which can be observed in our social practices of emotional cultures as described by Atry, the next question is: *What is the appropriate target of our reactive attitudes in doping?*

The answer to this question, , we would first need a stakeholder analysis (Brugha et al 2000) to understand who the relevant stakeholders are for each team, athlete entourage, or sport. WADA could require teams or individual athletes and their entourages to submit something akin to a classic organizational chart, showing who reports to whom, who pays whom, and who makes decisions for whom. Resources would need to be allocated to perform such investigations.

The next step would be to assign liability to the appropriate stakeholder(s). Here, the individuals identified through a stakeholder analysis *as possessing the most power or control over the athlete* should become the target of our reactive attitudes in doping, and *should be held personally liable for the doping of the athlete(s) under their control*.

A far-fetched proposal? Less than it may seem at first glance.

A quote from Dr Michael Ashenden, former adviser to the World Anti-Doping Agency and the director of the research organization, recognises the systematic nature of doping enterprise

“In recent years, the anti-doping movement has recognized the need to look upstream of sophisticated dopers toward the traffickers and facilitators who form an integral component of doping networks [...] My opinion is that networks should be seen to comprise not just those who directly aid and abet dopers, but also those support staff, agents and sponsors who choose to turn a blind eye rather than undertake due diligence.” (Gatti 2013)

It is also worth noting the 2015 Revision of WADA’s Code includes a clause according to which if in the same team two athletes are found to be doping, the upstream influences need to be investigated. (WADC 2015). However, what I am suggesting in this paper is a much more radical proposal.

Indeed, assigning liability to those who wield power over the athlete(s), entourage, or team would be practically possible: there are regulations and laws in other contexts that could serve as a model.¹ After the Enron scandal of 2001, for example, in which the large US company lied about its finances, the US Congress passed a law called the Sarbanes-Oxley Act that makes the top managers of a publicly traded company *personally liable* for any financial fraud that their company commits (Sarbanes-Oxley Act 2002)².

¹ I gratefully acknowledge legal scholar Jeffrey J. Knuckles for having suggested to me the comparison with the Sarbanes-Oxley Act.

² The Sarbanes-Oxley Act of 2002 was passed to curb false financial reporting to the US Security and Exchange Commission by publicly traded companies. In essence, both the Chief Executive Officer (Ceo) and Chief Financial Officer (Cfo) of the company are subject to fines totalling \$5 million and/or 20 years in prison for falsely certifying the financial statements. Likewise, external corporate auditing firms which advise public companies are liable for complicit misstatements of financial information. The sweeping reach of the Act touches even senior managers at the reporting company, their law firms, and internal auditors. So pervasive is the Act that, though not required, its guidelines for accurate reporting have been extended to the "best practices" of foundations, private companies, and non-profit organizations.

Applied to sports, we could envision regulation that holds the team owner, manager, or even the manager from the sponsoring company in charge of the sponsorship contract, personally liable if any team member or athlete is found to be in violation of a doping rule.

Some will object that with a proposal to make owners, managers, and other stakeholders personally liable for athlete doping we are freeing individual athletes from personal responsibility for the choices they make regarding doping. While I recognise that individual athletes retain moral responsibility for their own actions even if under duress or psychological pressure, I think it is important to distinguish for the purposes of a policy proposal between moral responsibility and holding someone responsible/accountable, as outlined by Shockley (2007).

While we could devise a way to leave some moral responsibility to athletes e.g. them from competing for a certain amount of time (Camporesi & Knuckles 2013), this is not what I aim to do in this paper. Here in I am advocating for a policy proposal aimed at changing the payoff matrix that makes doping possible and widespread in professional sports, and *not* going after the individual athletes who dope. In order to do so, I argue for adopting a pragmatic approach that asks the following question: *Can we bring about positive consequences in the world by holding particular individuals in positions of power responsible?*

I think we can, and we should. That is why I am advocating that we should decide that, for the purposes of a policy proposal to reform WADA's strict liability clause, that are shifting liability for doping away from athletes. To be absolutely clear, this would not mean that athletes would cease to not morally responsible (Shockley 2007) in the sense of being 'blameworthy', for doping but only that we would decide not to hold athletes accountable for doping on consequentialist grounds.

In Strawson's words (2008), our reactive attitudes of resentment/blame in doping should be shifted away from athletes to those who really hold the power and control in the system. Intuitively, this seems to be an appealing shift.

5. Conclusions

The problem of doping in sport is not about to go away any time soon.

There are financial incentives in place that incentivise doping and there are data that show that doping is often a systematic, organised enterprise (either at team level, or at state-level). Athletes are vulnerable actors in a payoff matrix where their choices are often seriously constrained: either they dope, or they drop out of the professional system because they cease to be competitive.

The main question to be answered today in professional sports is whether doping's repressive anti-doping policies do not have greater negative consequences for society. While some have suggested legitimizing safe doping under medical control, in this paper I have argued that doing so will do little to prevent clandestine use of dangerous performance-enhancing substances. As an alternative to lifting the ban on doping I

have suggested that athletes should not be held liable for doping, and that liability for doping should be shifted to those individuals who wield power over athletes in a specific context of professional sport (this would be determined in a case-specific fashion after having performed a context-specific stakeholder analysis)

Of course, the details of how to assign liability to appropriate stakeholders would have to be spelled out in practice and would differ for each individual sport. I can claim no expertise in the matter and the ways of how to do that would have to be carefully thought through a team-work of legal scholars, policy makers and with the input of philosophers of sport. The assumptions though, I think, are sound and there are the premises upon which to start to seriously think about how to do so in practice.

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