

GOING THAT EXTRA MILE: ARRIVING AT 'EFFICIENT' REGULATIONS FOR DOPING IN SPORT

—TULIKA PAUL*

This paper has as its premise two sets of classifications: that of the sports market into two market models based on the motives of profit maximisation versus win maximisation as well as the classification of doping regulation into regimes of strict liability, safety liability and no liability. The paper uses a 'law and economics' frame of analysis as a lens for critiquing the issues that arise when one looks at the various forms of doping regulations prevalent in the existing sports market.

The paper argues that the use of Performance Enhancing Substances (PES) affects different sports in a dissimilar manner. Building upon this, the paper proposes a framework for identifying which type of regulation is most efficient (where efficiency is defined differently for each market model) for which class of sports. It is an attempt to show how governing bodies of various sports might benefit from re-evaluating their own motives in the current commercialised climate of sport, face up to the new demands that modern sport puts on athletes and then judge which approach towards doping control would best serve their real interests. The paper provides an illustrative roadmap for the governing bodies to determine an 'efficient' regime of doping regulation for their respective sports.

I. INTRODUCTION

"...this just ruthless desire to win, win at all costs truly. Served me well on the bike ... but the level that it went to – for whatever reason – is a flaw. And then that defiance, that attitude, that arrogance, you cannot deny it."¹

* The author is a graduate of the National University of Juridical Sciences, Kolkata.

¹ Oprah Winfrey, *Interview with Lance Armstrong*, YOUTUBE, (Jan. 18, 2013), <http://www.youtube.com/watch?v=e8keHmtBn4k>,

In the above quote, Lance Armstrong captured, perhaps unwittingly, the essence of everything that drives sportspersons to use performance enhancing substances². Although most modern athletic achievements are suspected to have involved the use of Performance Enhancing Drugs (PEDs) Armstrong's infamous fall from grace triggered fresh demands of two kinds: the first endorsed legalising the use of PEDs and the other called for vigorous enforcing of the principle of strict liability to hold the wrongdoers responsible and severely punishable.³ These demands can be located within the Liberal and Paternalistic approaches respectively.

This paper will propose a framework for identifying the most efficient form(s) of regulation in various sports between the two market models based on the motives of win maximisation and profit maximisation. Such a framework may enable the regulatory authorities of various sports to identify the type of regulation that would best serve its interests given the objective of the sport.

In short, the objective of this paper is as follows: since use of PES affects different sports in a dissimilar manner, alternative regulatory mechanisms are required for each 'class' of sports. The essay is an illustrative attempt to determine which type of regulation is most efficient (where efficiency is defined differently for each market model) for which class of sports.

Section II discusses the two approaches that may be used to assess the 'business' of sport. These two approaches gave birth to two 'economic models that can be applied to the class of sport'⁴. Section III focuses on the three main regulatory frameworks for control of doping in professional sports. It discusses the rationale behind each argument and their strengths and weaknesses. Two approaches will be identified to discuss each framework: one is a pragmatic view of the current scenario and the other lends legal and economics tools such as concepts of externalities, transaction costs and cost-benefit analyses to the discussion. Subsequently, it details the method employed to achieve the stated objectives and lists the limitations in the process. Section IV discusses the bases on which a particular regulatory framework will correspond to the market model. Section V looks at the grounds on which different sports

² In this paper the terms PESs, PEDs and 'doping' all refer to the act of using performance enhancing substances and have been used interchangeably. Substances are more general than drugs, but for the purposes of regulation it is the 'performing efficacy' that matters, notwithstanding the form, hence the interchangeable usage.

³ Under a strict liability regime, any punishment would have to be so severe so as to be a deterrent i.e. act as an adverse example – a fine will not be a deterrent for an athlete who earns millions in a year, a season's ban or removal of laurels won as a result of doping might work better.

⁴ SIMON GARDINER, *SPORTS LAW* 52(2001).

can be assigned to a particular market model. It is followed by section VI that connects the theoretical premise outlined in the previous two sections to present a viable framework reconciling the regulatory framework with the different market models vis-a-vis the 'class' of sport. The essay concludes with a look at how an exercise such as the one described above might benefit the discourse on the appropriate and/or efficient methods of doping control.

II. SPORTS MARKET MODELS

For evaluation of the recent developments vis-à-vis use of PES in sports, two approaches have been identified⁵: the 'traditionalist' one denounces the intrusion of commercial interests into the arena of sport. Here the central argument is that success in sports is a mere by-product of its 'true value' which includes *inter alia* character building, fair-play and the joy of playing the game. The growing commercialisation of sport, it is argued, reflects an erosion of such 'true values' of playing a game for the love of the game, instead playing for the riches that winning the game will bring.⁶ This 'true value' is also echoed in the ideals of the Olympic Movement⁷ and, generally, in the rhetoric of many sports governing authorities as pointed by Verow *et al.*⁸

The 'Realist' approach accepts the fact that with satellite television, huge sponsorship deals, real-time worldwide broadcasts, advertising revenues, brand endorsements etc., the so called 'intrusion' of commerce into sports are undeniable facts of the current globalised era and this change is irreversible.⁹ Since it is not possible to turn a blind eye to these developments, proponents of this approach argue, that it would be better to regulate the:

*'competitions in which the participants engage, the commercial agreements they are able to make; the manner in which they can exploit their reputation by sponsorship; merchandising, broadcasting and advertising; the employment of players and managers; their relationships with other commercial organisations both in terms of ownership and individual transactions; the internal market for services within the sport and control they must exert over their venues'*¹⁰

⁵ RICHARD VEROW, C. LAWRENCE & P. MCCORMICK, *SPORTS BUSINESS: LAW, PRACTICE AND PRECEDENTS* (2005).

⁶ *Id.*

⁷ As is evident from their own statement: "The three values of Olympism are excellence, friendship and respect. They constitute the foundation on which the Olympic Movement builds its activities to promote sport, culture and education with a view to building a better world, available at <http://registration.olympic.org/en/faq/detail/id/145>, last seen on 12/12/2015.

⁸ VEROW *et al.*, *supra* note 5, at 2-4.

⁹ VEROW *et al.*, *supra* note 5, at 2-4.

¹⁰ VEROW *et al.*, *supra* note 5, at 4.

In other words, recognition of intermingling of commercial activities and sport warrants regulatory controls, which in turn can ensure a modicum of 'purity', and not just for addressing the use of PES. For instance, as Gardiner *et al* pointed out, in the evidently commercialised arena of professional sport, there is a chance of growing compromise on the 'requirement of an uncertain outcome'^{11,12} To ensure that the teams are more or less at an equal footing to keep the game interesting, and its viewers, interested, the element of regulation has to be introduced in the sports market: 'If law is the regular form of regulation for market relations and if sport is now essentially commercialised, it needs to be subject to similar regulation'.¹³ An instance in practicality can be seen in the Indian Premier League wherein each team owner can only spend up to a pre-specified amount to buy players for that season. This ensures competitive balance as each team owner can only afford a restricted number of the really expensive (and presumably better) players.

There is thus a need to maintain the marketability of sport in this era of commercialisation. Verow *et al.* have commented (perhaps taking a dig at traditionalists) that 'we have a business of sport and a law of sport. Both are opposed by those who find their very existence 'unsporting'.¹⁴

These alternative, if not opposing frameworks of the 'Traditionalists' and the 'Realists', pave way for the formulation of two economic theories on the nature of competition in a sports market, as propounded by C. Gratton and P. Taylor.¹⁵

The authors first define their sports market and illustrate where exactly the various stakeholders of a sport market are situated and their relationships with each other. This can be better understood with the help of the following diagram:

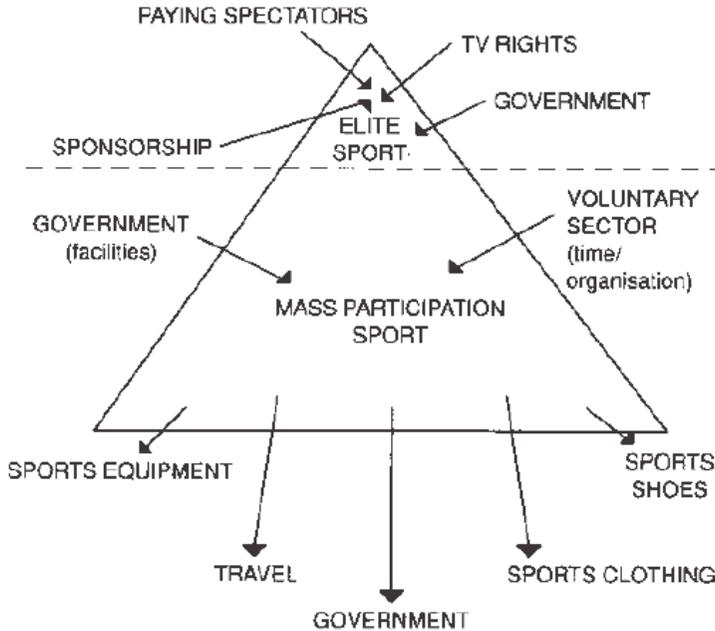
¹¹ SIMON GARDINER, JOHN O'LEARY, ROGER WELCH, SIMON BOYES & URVASI NAIDOO, *SPORTS LAW* (2010).

¹² In a win-maximising league, team owners would vie for the best players, the best unit. This will eventually result in the better players being concentrated in a few teams. Even though this will result in stronger teams, there will not be the element of uncertainty when matches are being played. If the fan knows that one team is clearly better than the other, there will not be much viewer interest, which will ultimately lead to a market collapse due to structural reasons as the consumers (in this case, the viewers) will no longer be interested in the product (sport for entertainment). This is the unique pre-requisite of the sports market that the element of an uncertain outcome is absolutely vital for the market to survive. See, SIMON GARDINER *et. al.*, *SPORTS LAW* 210-211 (4th ed., 2012).

¹³ GARDINER *et. al.*, *id.*, 211.

¹⁴ VEROW *et al.*, *supra* notes, at 2-4.

¹⁵ CHRIS GRATTON & PETER TAYLOR, *ECONOMICS OF SPORT AND RECREATION* (2000).



Their economic model differentiates between various sports (or classes thereof) on the basis of the given goal of the 'firm' in the sports market, i.e. into win-maximisation and profit-maximisation, which are associated with the traditionalist and the realist approach respectively.¹⁶

The central aim of the win-maximising league is excellence in sporting achievements, with profits being treated like a side-effect - an externality. 'Even in football most professional clubs [may] make a loss in the long run'.¹⁷ Such unsustainable buying practices arise because of 'competitive balance'¹⁸ always being worse in a win-maximising league than in a profit-maximising one.¹⁹ The end result will be a market collapse because the unique requirement of uncertainty of outcome (in a sports market) will not be satisfied.

¹⁶ As summarised in GARDINER et al., *supra* note 12, at 220.

¹⁷ GARDINER et al., *supra* note 12, at 220.

¹⁸ 'Competitive balance is a term that refers to a number of aspects of competition, the ultimate barometer of competitive balance is the winning percentage. Competitive balance or comparable playing strength of teams should be indicated by winning percentages that are neither high nor low. Competitive balance should also be indicated by changing rankings of teams within conferences. The champions and doormats of a league should change from year to year'. Randall W. Bennett & John L. Fizez, *Telecast Deregulation and Competitive Balance: Regarding NCAA Division I Football*, 54(2) AM. J. OF ECON. & SOC. 187 (Apr., 1995).

¹⁹ Kesenne(2004) summarised in Andreff, Wladimir, *Major Contemporary Issues in Sports Economics*, ENCYCLOPAEDIA OF LIFE SUPPORT SYSTEMS, <http://www.eolss.net/Sample-Chapters/Co5/E6-28-14.pdf> (last seen on 12/12/2015).

In the profit-maximising case, many instruments²⁰ are used to ensure a better competitive balance to guarantee the uncertainty of outcome and hence expected to generate higher profits to cater to the primary aim of the profit-maximising league.

These two models are based on the motivation of the league – whether the sporting league in question seeks to maximise wins or profits. What form of regulation will be most efficient in which league shall be the focus of the essay in the subsequent chapters.

As an illustration to supplement the aim of this essay, it may be helpful to note the work of Foster, who postulated five models of the sports market and put forth the corresponding forms of regulation best applicable to each model.²¹ These are:

First, the Pure Market Model, which treats sport like any other business. The central ideology is that the market will regulate itself, and ‘the predominant legal instrument is the contract’; second is the Defective Market Model, which recognises the flaw in the first model²² and suggests that competition law be used to ensure a functional market; third, the Consumer Welfare Model, that recognises that if regulation is through contract only (as in the first model), there will be unequal bargaining power between contracting parties and the form of regulation required would be protective legislation to promote greater public interest; fourth, the Natural Monopoly Model, which advocates that the sports market conforms to a natural monopoly with a single seller, unique product and entry barriers; and finally, the Socio-Cultural Model, which rejects all assumptions behind the Pure Market model and advocates for minimum intervention of market ideals and proposes basic safeguards to protect the true values of sport.²³

Moving back to the two primary market models based on the motives of win maximisation and profit maximisation, the discussion now shifts to the various frameworks that may be used regulate the use of PEDs in sport.

III. REGULATORY FRAMEWORKS TO CONTROL THE USE OF PEDS IN PROFESSIONAL SPORTS

There are three major principles for the regulation of doping by sportspersons. In this section, the pros and cons of each argument will be discussed.

²⁰ Tools used include salary caps and collective selling of broadcasting rights and team merchandise (GARDINERET al., *supra* note 12, at 2-3).

²¹ Foster (2004) summarised in GARDINERET al., *supra* note 12, at 224.

²² The flaw being that free markets ultimately lead to the elimination of weaker units, and because of the distinctive requirement of competitive balance in sports, free markets will fail.

²³ Foster (2004) summarised in GARDINERET al., *supra* note 12, at 224.

A. The Paternalistic Argument for Strict Liability

The paternalist argument assumes that an athlete's choice to do the right thing is impaired in face of the demands of elite professional sports²⁴. The case for using the principle of strict liability is based on the validity of this assumption.

a. Arguments in favour

1. 'Protecting athletes from themselves'

In 1982, the famous Goldman survey²⁵ asked almost 200 athletes if they were willing to take an undetectable Performance Enhancing Drug that would guarantee them success in their respective sports but would also result in their death within five years, and over 50% of the participants responded in the affirmative.²⁶ This startling revelation makes it clear that a substantial number of athletes value excelling at their sport more than the length of their life span. This serves as an example of a very high rate of discount i.e. the present time is valued much higher than the discounted value of benefits to be accrued in the future for a competitive athlete.

Four principal reasons have been identified in the literature to explain this perversely competitive bent of mind of professional athletes:

- 1) The most apparent and compelling reason is, simply, the millions of dollars in brand endorsements and advertising deals that a 'successful' sportsperson starts earning by virtue of his/her achievements.²⁷
- 2) Anderson argues that athletes have a 'real-time relationship with their body, i.e. they are primarily concerned with what they can push their body to do *now*' (emphasis added).²⁸ A possible result may be that they push themselves too far and that may lead to serious health problems and even untimely death.
- 3) Some sportspersons succumb to the pressures of elite professional sports: the cost of failure, social expectations, strength of the

²⁴ The author has restricted the discussion to elite levels only because that is where the stakes are highest. The motivation for doping during an Olympic event is invariably higher than at a local level.

²⁵ As summarised in JACK ANDERSON, *MODERN SPORTS LAW* 148 (2010).

²⁶ This goes to show that in the mind of a competitive sportsperson, winning takes precedence over survival.

²⁷ GARDINER, *supra* note 4, at 297-330.

²⁸ ANDERSON, *supra* note 25, at 149.

competitors - these factors weigh heavily on their minds, and may motivate them to use PEDs.²⁹

- 4) Whitman postulates from the perspective of behavioural law and economics that the 'winner's bias' is the reason that athletes deviate from the 'rational-choice'³⁰ assumption in economics:

*'The winner's bias hypothesises that certain people, many of them athletes, when faced with a choice between either guaranteeing themselves victory, even if combined with the threat of harm, or protecting themselves from that harm, but leaving uncertain their chances at victory, will generally choose the former.'*³¹

Thus, since the capacity of elite professional sportspersons of choosing 'right' over 'wrong' is hampered, the governing authority must assume this responsibility.

2. *Protecting the Integrity of Sport*

This argument postulates that since the use of PEDs extends an unfair advantage to the athlete concerned, a clean athlete is handicapped in an unfair manner. It has also been argued that doping by some athletes may affect other competitors' decision to use the same.³²

Similarly, 'demonstration effects' can also occur among amateur athletes and teenagers, who may 'identify these drugs with the achievement, popularity, and wealth enjoyed by their heroes'.³³

3. *The morality question*

An additional moral question often pitched is whether a participant can truly claim victory if it has been achieved through the use of PEDs. Given

²⁹ ANDERSON, *supra* note 25; GARDINER, *supra* 4.

³⁰ "In rational choice theories, individuals are seen as motivated by the wants or goals that express their 'preferences'. They act within specific, given constraints and on the basis of the information that they have about the conditions under which they are acting". John Scott, *Rational Choice Theory in UNDERSTANDING CONTEMPORARY SOCIETY: THEORIES OF THE PRESENT* (G. Browning, A. Halcli, & F. Webster eds., 1st ed., 2000).

³¹ Joshua H. Whitman, *Winning At All Costs: Using Law & Economics To Determine The Proper Role Of Government In Regulating The Use Of Performance-Enhancing Drugs In Professional Sports*, U.I.L.L. L. REV. 459-503, (2008), <http://illinoislawreview.org/wp-content/ilr-content/articles/2008/1/Whitman.pdf>.

³² GARDINER, *supra* note 4, at 297-330.

³³ Whitman, *supra* note 31, at 461.

that the sport's heroes are society's heroes³⁴, should a sportsperson performing on the strength of PES be elevated to the exalted status of a sportshero?³⁵

Needless to say, the lure of money and fame also remains quite the motivator for the sportspersons to go that extra mile; that unhealthy, illegal, extra mile.

In sum, there is the concern that if doping is not controlled and actively discouraged, it will ultimately lead to a scenario where it's not the athletes who would compete over their athletic prowess; rather, it'll be their pharmacists who compete over who can cook up the most effective cocktail of drugs.³⁶

b. Critiques

This section now looks at some criticisms advanced to question the effectiveness of the paternalistic approach.

1. Cost-Benefit Analysis of Implementation

It has been observed that the costs of research for drug testing and the efforts of monitoring, collecting and examining samples are naturally very high.³⁷ When these are pitted against the low number of positive results³⁸ (most likely, due to the ingenuity of current medical practitioners) and the low severity and availability of sanctions, the cost of apprehending dopers is prohibitively high in the medium-long term.³⁹

While the severity and availability of sanctions has increased since 2010 under the 2015 World Anti-Doping Code, the cost of testing is still extremely high.⁴⁰ It also needs to be acknowledged that the World Anti-Doping

³⁴ Maria Sharapova's acceptance of a provisional ban for testing positive for use of a drug in the Prohibited List is just the most recent example. Christopher Clarey & Mike Tierney, *Maria Sharapova Admits Taking Meldonium, Drug Newly Banned by Tennis*, NEW YORK TIMES, March 7, 2016, <http://www.nytimes.com/2016/03/08/sports/tennis/maria-sharapova-failed-drug-test.html>,

³⁵ GARDINER, *supra* note 4, at 314.

³⁶ ANDERSON, *supra* note 25, at 151.

³⁷ Whitman, *supra* note 31, at 461.

³⁸ In the 2011 Olympics, the positive tests accounted for less than 3% of all samples tested. UKAD Anti-Doping Fact Sheet—OlympicSports, http://www.olympic.org/documents/reference_documents_factsheets/fight_against_doping.pdf, (last seen on 12/12/2015.)

³⁹ ANDERSON, *supra* note 25.

⁴⁰ 'The anti-doping system, under the guidance of WADA, costs at least \$228 million per year, mostly to cover the cost of performing about 270,000 doping tests.' W.Maennig, *Inefficiency of the anti-doping system: cost reduction proposals*, 49(9) SUBST USE MISUSE 1201-5 (2014), <http://www.ncbi.nlm.nih.gov/pubmed/24832718>.

Authority (WADA)⁴¹ not only incurs monitoring costs for testing of athletes, but also for supervising all its accredited laboratories, the list of Prohibited Substances⁴², as well as the National Anti-Doping Authorities (NADA) which fall within its jurisdiction.⁴³

Even with the increasingly severe sanctions that athletes face if caught doping, the WADA itself has acknowledged in a 2013 report that ‘To date, testing has not proven to be particularly effective in detecting dopers/cheats’.⁴⁴ It has been noted that steeply increasing the number and frequency of tests that athletes are required to go through (as the WADA has done) has not led to a significant increase in positive findings of doping; either athletes are not doping that often or, as is more likely, testing is not particularly successful at catching dopers.⁴⁵

This fact of a low probability of actually getting caught for use of PEDs results in a situation akin to a classic prisoner’s dilemma for the athlete, as opined by Haugen:

*‘The inherent deficiencies in the current anti-doping system are such that they present athletes with a prisoner’s dilemma: although athletes would clearly be better off in a dope free world, the advantages of taking PEDs so outweigh the likelihood of getting caught that the system works to ensure that athletes continue to engage in a ‘cheating game’.*⁴⁶

To use an illustration, when the likelihood of doping is defined as a function of ‘p’= no. of tests; ‘n’= no. of events in a season; and the amount of prize money, then tennis presents itself as one of the worst packages: a

⁴¹ According to its official website, ‘The World Anti-Doping Agency (WADA) was established in 1999 as an international independent agency composed and funded equally by the sport movement and governments of the world. Its key activities include scientific research, education, development of anti-doping capacities, and monitoring of the World Anti-Doping Code – the document harmonizing anti-doping policies in all sports and all countries.’

⁴² ‘The *Prohibited List* shall identify those *Prohibited Substances* and *Prohibited Methods* which are prohibited as doping at all times’ is part of Article 4 of the WADC.

⁴³ As per the Report of the WADA Working Group on Anti-Doping Cost, January 1, 2014, <https://www.wada-ama.org/en/resources/finance/report-of-wada-working-group-on-anti-doping-costs> (last seen on 14/12/2015.)

⁴⁴ Working Group Established Following Foundation Board Meeting, *Report To WADA Executive Committee On Lack Of Effectiveness Of Testing Programs*, (May 18, 2012), <https://wada-main-prod.s3.amazonaws.com/resources/files/2013-05-12-Lack-of-effectiveness-of-testing-WG-Report-Final.pdf>.

⁴⁵ Aaron Hermann & Maciej Henneberg, *Exposing dopers in sport: is it really worth the cost?*, THE CONVERSATION, August 14, 2013, <http://theconversation.com/exposing-dopers-in-sport-is-it-really-worth-the-cost-16464>.

⁴⁶ Haugen (2004) quoted in ANDERSON, *supra* note 25, at 157.

low ‘p’, large ‘n’ and a huge amount of prize money, incentivise doping on a large-scale.⁴⁷

In summation, when governing bodies of any sport are looking for a cost effective model of doping control, it must be kept in mind that implementing a strict liability model is very expensive without yielding corresponding efficacy in actually apprehending dopers.

2. *Public Cynicism*

When a sports person achieves an extraordinary level of excellence, the feat is greeted with as much suspicion as enthusiasm from fans. And when somebody is caught for using PEDs, the public views it as just another athlete who was unlucky enough to get caught; as one man being punished for the sins of the sport.⁴⁸ In the ‘law and economics’ framework, this phenomenon is seen as a negative externality: Whitman posited that when a ‘highly visible athlete’ makes the choice to use PEDs, the public’s loss of confidence in the integrity of the sport acts as a negative externality to his decision to use PEDs.⁴⁹

3. *Leading to more Harm than Good*

Prohibition of popular PEDs might spur the athletes to take riskier and/or more experimental and untested drugs which may be more harmful for the athlete. The strict liability regime may have similar consequences as that of the ‘Prohibition Era’ misadventure of the USA wherein the authorities realised that prohibiting alcohol consumption only aggravated the problem.⁵⁰

B. The Soft Paternalism Argument for Regulated Drug-Use or Safety Liability

The term ‘soft paternalism’ or libertarian paternalism refers to ‘an approach that preserves freedom of choice but authorises both private and public institutions to steer people in directions that will promote their welfare’.⁵¹ It argues for a middle ground between the paternalistic extreme of enforcing total control with the threat of severe sanctions and allowing a free reign of individual desire under the liberalism extreme.

⁴⁷ Nicolas Eber & Jacques Thepot, *Doping in Sport and Competition Design*, 65(4) LOUVAIN ECON. REV. 445 (1999).

⁴⁸ ANDERSON, *supra* note 25.

⁴⁹ Whitman, *supra* note 31, at 476.

⁵⁰ ANDERSON, *supra* note 25, at 159-160.

⁵¹ Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93(2) AM. ECON. REV. 175-179 (2003), <http://econweb.ucsd.edu/~jandreon/Econ264/papers/Thaler%20Sunstein%20AER%202003.pdf>.

In the context of this essay, it is submitted that there is an inherent contradiction in the way 'we ask athletes to push their bodies to the limit for our enjoyment but simultaneously threaten them with severe sanction for availing themselves of any pharmaceutical assistance'.⁵² To address this, the argument of 'soft paternalism' is advanced which campaigns for a more sympathetic understanding of why athletes resort to doping and provides players the opportunity to pick a welfare-oriented alternative without snatching away their freedom over personal autonomy.⁵³

a. Arguments in Favour

Anderson argued that there are five important advantages in the soft paternalism approach over the current regime of strict liability: '[...] greater equity among participants; the ethical position of sports physicians; an athlete's informed consent in taking a PED; the easing of current administrative burdens and legal vulnerabilities; and greater flexibility in dealing with future administrative burdens and legal vulnerabilities'.⁵⁴

Whitman offered a few economic justifications for the active involvement of the state in the form of an external governing authority by stating the following three reasons:

- 1) The potentially prohibitive transaction and enforcement costs of the collective bargaining process.⁵⁵
- 2) The adverse impact on the youth and growing public distrust of the integrity of sport (as discussed above) as negative externalities, which exist because 'the scales upon which the athletes weigh their decisions are undeniably tipped in favour of the pursuit of athletic achievement'. Here, government intervention would lead to internalisation of the social costs of the athletes' choices.
- 3) 'Winner's bias' (discussed above) also highlights the role of the law in 'de-biasing' the sportspersons.⁵⁶

These economic justifications seek to show that if there were to be some sort of a law based government intervention to implement and enforce a soft paternalism regulatory structure, it could be more fiscally efficient than the current strict liability structure prevalent in most sports.

⁵² ANDERSON, *supra* note 25, at 154.

⁵³ ANDERSON, *supra* note 25.

⁵⁴ ANDERSON, *supra* note 25, at 164.

⁵⁵ The total cost of negotiating on such a controversial issue given the number of players, leagues, team owners, national interests, all juxtaposed in opposing concerns is monumentally high (Whitman, *supra* note 31).

⁵⁶ Whitman, *supra* note 31, at 495.

Further, the critiques for strict liability as a principle discussed in the previous sub-section also serve as a validation for safety liability: '[t]he economic goal of any program regulating PEDs in professional sports should not be to completely eradicate their use, but rather to achieve a socially optimal level of PED use'.⁵⁷ It has also been argued that this optimal level can be arrived at through regulated drug use. This follows from the Coasian tenets that the imposition of laws in some situations can 'lubricate' the bargaining process by lowering the transaction costs.⁵⁸

b. Critiques

The literature on this approach is still in its nascent stage and cites the same reasons for not letting authorities allow regulated drug use as are offered to justify the need for a strict-liability regime, i.e. those of diluting the integrity of sport and being morally questionable. It is also believed that regulating drug use will not guarantee that athletes won't, still, look for other, riskier ways to enhance their capabilities through use of PESs other than what has been sanctioned.

As an illustrative example, even though the sport of cycling allowed monitored use of Erythropoietin (commonly called EPOs), the sport continues to be rankled by scandal after scandal related to doping (starring ingenious new methods like blood doping)⁵⁹; the most shattering of all, perhaps, being the admissions of Lance Armstrong, seven time champion of the Tour de France.

C. The Liberalism Argument for No Liability

The liberals advocate legalization of use of PEDs and advance the following justifications:

- 1) Rules of any game change according to changing times, according to what the regulating authority thinks that the sport may need.⁶⁰ The argument advanced, therefore, is simple: if the rule says that drug-use is cheating, but most athletes do it anyway, and the public is aware of this, then why not change the rules, legalise doping and do away with

⁵⁷ Whitman, *supra* note 31, at 472.

⁵⁸ Whitman, *supra* note 31, at 469.

⁵⁹ ANDERSON, *supra* note 25.

⁶⁰ As evidenced by the frequently changing rules in all forms of international cricket.

the stigma of drug-users (who get caught) being labelled cheaters⁶¹.⁶² It is, after all, well within the purview of the regulating authority to change the rules of the game.

- 2) An additional reason is that if the regulatory authority were to legalise doping, it would encourage the development of more effective and safer drugs and not more undetectable drugs.⁶³
- 3) Further, as a person has the authority to do what s/he wishes with, or to, her/his own body, an athlete may choose to trade a health-risk element in favour of that extra element of speed, strength or endurance. Employing the concept of personal autonomy, it is argued that the pursuit to stop these practices is unlikely to yield tangible results.⁶⁴
- 4) Finally, an extension of the previous argument is the assertion that when a player chooses to take PEDs, s/he causes no harm to any other person. An individual's right to indulge in an activity which causes no harm to other people cannot be infringed merely on the basis of high-sounding (but arguably vague) ideals like 'maintaining the integrity of sport'.⁶⁵

D. Critiques

The critiques of this approach, as discussed here, are rooted in the flavour of Paternalism.

It is argued that the assertion of personal autonomy fails quite clearly given the empirical evidence documenting the impaired/biased ability of a player to make supposedly 'objective' choices. If a player is not 'rational' enough to value his life more than the outcome of his sport of choice, then his decisions are not in his best interests.⁶⁶

The argument related to 'not causing any harm to others' also draws criticism on the account that it does cause harm to other competitors who do not partake in the use of PEDs, and therefore face unfair, if not artificial, competition.

⁶¹ Currently, use of PESs is considered to be cheating in sports. But the society already recognises that doping has become a widespread phenomenon in modern sport. There is an implicit acknowledgment of the public in doping-related matters, which is evidenced by the fact that every new sporting achievement is accompanied by rumours of doping.

⁶² J. Savulescu, B. Foddy & M. Clayton, *Why we should allow performance enhancing drugs in sport*, BJS PORT MED (2013), <http://bjssportmed.com/content/38/6/666.full.pdf>.

⁶³ *Id.*

⁶⁴ ANDERSON, *supra* note 25.

⁶⁵ ANDERSON, *supra* note 25.

⁶⁶ ANDERSON, *supra* note 25; GARDINER, *supra* note 4; Whitman, *supra* note 31.

The suggestion that the rules of the game be changed to legalise drug-use falls flat when weighed against the negative externalities of health risks, the risk of trickle-down to young amateur enthusiasts and saving the spirit of sport, however vague the concept may seem to be.⁶⁷

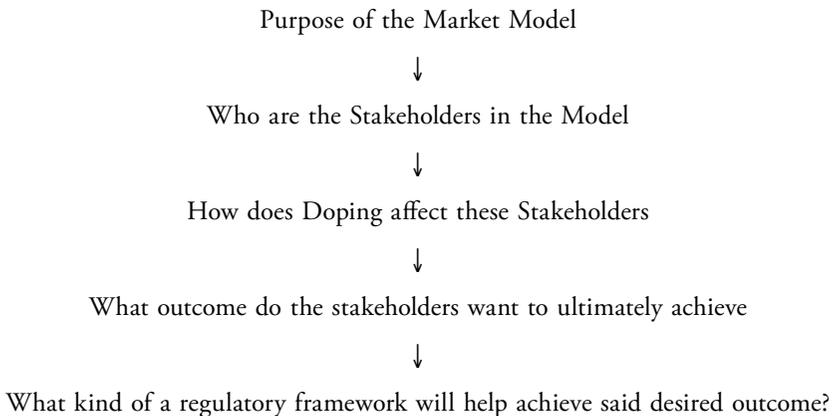
IV. METHODOLOGICAL FRAMEWORK

It is apparent from the literature reviewed heretofore that there are various models on the form of regulation in different kinds of sporting markets. Then there are separate models for the regulatory framework to follow so as to become the most effective way to control the incidence of doping in elite sports.

It could be interesting to link the two, and study which doping-control mechanism would be more efficient in the given market models where efficiency would also mean different things, under the opposing goals of win-maximisation and profit maximisation. This exercise may also benefit from a stratification of the kinds of sport (individual, team) and how the use of PEDs affects the outcome of each kind differently.

First and foremost, the efficiency criteria for each market model of the Sports Market will be restrictively defined for the limited scope of this essay. Next, the purpose of the market model and the identity of its stakeholders will be discussed.

This will then be reconciled with the effect that a particular regulatory regime is expected to have on doping, based on how strongly the practice of doping affects the various stakeholders. This can be better summarised with the help of a flowchart:



⁶⁷ GARDINER, *supra* note 4; Whitman, *supra* note 31.

In the following section, the focus will be on how strongly doping affects the outcome of the game.

The first level of stratification will be an elementary one, between individual and team sports.

Within individual sports, there will be a classification at two levels:

- i. Sport for the sake of sport and sport for purely entertainment, or in other words, classification based on the *objective* of the sport.
- ii. How *directly* doping affects the outcome of various individual sports.

Within team sports, a distinction will be made between choice examples of sports, based on the number of players actively participating in the game at a given point of time, the level of coordination required between members of the team and how strongly doping by one player can affect the outcome of the entire game.

On these grounds, a few sports (illustrative, and certainly not exhaustive) will be assigned to the market models they more closely conform with.

The fifth chapter will harmonise the sport thus assigned to a particular market model, with the regulatory framework assigned to it in the first chapter. An explanation on how the given regulation is congruent with the respective sport will follow.

LIMITATIONS

First, for ease of analysis only the two extremes of the regulatory approaches (Paternalism and Liberalism) have been considered in further course of this essay. Other authors have pointed out 'Soft Paternalism' executed through the 'Safety Liability' regime as another approach towards doping regulation, but this approach, being the middle ground between the two extremes, will not sit well within the structure of this essay, and hence has been excluded.

This essay is, more than anything, an illustrative attempt at regulation after classification. Only certain examples of sports have been chosen to depict any given genre of sport. The aim of this essay is not to definitively classify various sports, but merely to point out how such a classification may be done and how it may be helpful.

Also, for the sake of simplicity, the number of players involved in determining the efficiency criteria and stakeholders have been limited to the key,

obvious influencers. Other factors, like viewers or amateur players which may be part of the market model (or alternatively, act as externalities to the market model), if not discussed herein, have been excluded.

V. ASSIGNING REGULATORY FRAMEWORKS TO MARKET MODELS

A. Defining Efficiency

For the profit maximising model, efficiency would naturally be a state where the profits of all the key stakeholders are maximised and their costs are minimised. In this model, viewers and amateurs may be treated as externalities. They wouldn't have much influence on how the sport is to be regulated, but nevertheless would constitute the interested parties who get affected by the sport; thus becoming recipients of externalities in the classic sense.

In a win maximising model, efficiency would presumably be a state where the entire operative framework of the regulatory authority is geared towards promoting sporting achievements leading to the propagation of sporting ideals and values of teamwork, fair play and the Olympic ideals of excellence, friendship and respect. In this scenario, profits will be incidental to the sport, they will have no active role to play in determining the appropriate regulatory mechanism. Thus, an efficient outcome would be one which results in a triumph of sporting ideals and (results in) sound achievements in the sports arena.

B. Defining Purpose

The purpose of the profit maximising model is self-explanatory. The profit motive guides all the stakeholders.⁶⁸ The profit motive emphasises the unique requirement of uncertainty of outcome, expressed in all areas where sport and law interact, from player transfer clauses to broadcasting rights. As explained above, maintaining competitive balance is a crucial motivating factor in making the business of sport a profitable one.⁶⁹

The purpose of the win maximising model seems to be to uphold the lofty ideals that may not be relevant in the present times, given the growing and pervasive spread of commercialisation of sport, but they are nonetheless the cornerstone that this model is based upon.⁷⁰ The aim is to preserve and foster the 'spirit of sport' – that abstract idea that encompasses qualities like 'fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rules

⁶⁸ SIMON GARDINER et. al., *supra* note 11, at 220.

⁶⁹ GARDINER, *supra* note 4, at 220-221.

⁷⁰ GARDINER, *supra* note 4, at 220-221.

and laws, respect for self and other *Participants*, courage, community and solidarity'.⁷¹ This is an argument expressly acknowledged by the WADA which follows the strict liability regime of anti-doping control, as is evident from their 'Fundamental Rationale for the World Anti-Doping Code' which states 'Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"... The spirit of sport is the celebration of the human spirit, body and mind...'.⁷²

C. The Various Stakeholders

There are some stakeholders who are common to both market models: athletes and regulatory authorities. However, the distinction would arise in each model with respect to their respective motives.

- Athletes in any sport would first want to win, that is a well-documented feature of an athlete's psyche.⁷³ A second factor determining an athlete's propensity to dope is the 'prize' involved – in a profit maximising scenario, it is the prize money that guides the decision of whether it is worth the risk of doping while in a win maximising scenario it is prestige associated with winning, the honour of the Gold Medal.
- The motivation of the regulatory authority would depend on a variety of factors: what are the professed ideals that the authority states as its own aims; how much revenue is generated through sale of venue tickets; how lucrative are broadcasting the rights; do they receive government funding for their events, and so on. The motivating factor for the regulatory authority can thus vary from a sport to another.

Advertisers and sponsors have a different status in the different market models. In the profit maximising model, sponsors are doubtless stakeholders, an integral part of the sporting league; while they may not be interested in the rules of the game itself, in all surrounding circumstances which have a bearing on their revenue stream (from advertising merchandise capitalizing on fan loyalty, to regulating player transfers and the form of competition in the market) they are key stakeholders.

In the win maximising model sponsors are incidental to the aim of the game and thus, presumably not the key players in terms of being able having an interest in influencing a regulatory body's stand on doping. In fact, in

⁷¹ World Anti-Doping Code, 2015.

⁷² *Id.*

⁷³ Whitman, *supra* note 31, at 492 (athletes, when faced with a choice between either guaranteeing themselves victory, even if combined with the threat of harm, or protecting themselves from that harm, but leaving uncertain their chances at victory, will generally choose the former).

this model, viewers and amateurs may be counted as significant stakeholders, as they are part of the targeted audience – it is them that the sporting achievements are supposed to inspire, it is them that the sporting ideals are sought to be inculcated in.

D. Manner in which Doping Affects the Key Players and the Ultimate Aim of the Stakeholders

How doping affects athletes themselves, from the viewpoint of the effect on their health, is beyond the scope of this paper. For the purposes of this paper it is only relevant to see how far the act of doping affects the outcome of the game. This question has been dealt with in this section.

How doping affects the regulating authority depends on what the aims of the regulating authority are. If it is solely for entertainment purposes (like in wrestling), then use of drugs leading to more entertainment value, and thus, higher profits, is the desired outcome. If, however, the aim of the regulating authority is to preserve the purity of sport (as enshrined in the motto of the Olympic Movement: *Citius, Altius, Fortius*)⁷⁴, then a stricter stance against doping is the desired outcome. This outcome has arguably been realised with the latest World Anti – Doping Code (WADC) of 2015, which has seriously increased, and in some instances doubled, the sanctions available under the 2009 Code.

How doping affects sponsors and advertisers depends on how consumers react to the use of PEDs. If consumer interest is peaked through better sporting achievements, albeit due to doping, then legalising doping may bring in more revenue as all athletes will take to using performance enhancing substances, which will have a positive impact on the competitive balance of the game. As such more interest will be generated and this will translate into higher revenues.

The influence of doping on viewers and amateurs is akin to a coin that has two sides. On one hand, faith in the ideals of the sport may fall if everybody starts doping, which may lead to fall in the number of followers of the game. For instance in the sport of cycling:

In the short run, the doping scandals have had a disastrous effect on viewer interest in the Tour de France this year. In Germany,

⁷⁴ Latin for 'Faster, Higher, Stronger.' The motto was proposed by Pierre de Coubertin on the creation of the International Olympic Committee in 1894 who said 'These three words represent a programme of moral beauty. The aesthetics of sport are intangible.' The motto was introduced in 1924 at the Olympic Games in Paris, http://www.olympic.org/Documents/Reports/EN/en_report_268.pdf; <http://www.olympic.org/paris-1924-summer-olympics>,

*viewing fell by a massive 43%; in France and other countries, drops of between 20-30% were recorded.*⁷⁵

On the other hand, if doping is legalised, then this may lead to a renewed level playing field, may give rise to an increasing number of extraordinary sporting feats, and thereby peak viewer interest and inspire amateurs to think of doping as part of the sport (which in some sports, it arguably is).

E. Classification of Regulatory Mechanism

What can be surmised from the above discussion is that there can be no cut and dried allocation of a regulatory framework to a market model. There are a number of variables that needs to be considered before choosing a suitable regulation method.

While paternalism and strict liability seem to go hand in hand with the win maximization model, given that both profess a desire to maintain the 'purity' of sport by keeping it clean of unfair means, a watertight classification for the profit maximizing model is difficult, given that most sporting authorities would be unwilling to admit profit as the primary concern. The idea of sport as a marketable commodity just for entertainment's sake is something that only wrestling has managed to market.

For regulating authorities who are (understandably) reluctant to explicitly announce that their main aim is profit, but profit making is a significant part (either as a cause or a consequence) of their organizational and operative design (like professional tennis), the soft paternalism approach enforced through safety liability is a viable option. This allows them to maintain their stand for a healthy, clean sport along with allowing controlled use of certain substances for all athletes so as to not give an unfair advantage.

VI. ASSIGNING SPORTS TO THE MARKET MODELS

It is quite natural that doping affects team sports and individual sports differently. Individual sports will be addressed first.

A. Individual Sports

a. Objective of the Sport

Most sports today are not overtly just for entertainment's sake. Athletics, swimming, boxing, badminton and others are primarily about the sport itself.

⁷⁵ Michael Akinde, *Cycling's Winter of Discontent*, Daily Pleton, (2006), <http://www.dailypleton.com/displayarticle.asp?pk=10162>.

A uniform feature in all of these sports is the belief that competition should be clean – a belief expressed by athletes and their regulating bodies. In stark contrast stands the business of Wrestling. WWE⁷⁶ legalised steroid use in 2006 and has a clear policy on steroid use for its wrestlers.⁷⁷ While this legalisation served financial interests well initially, the profits have been showing a gradual decline: ‘operating income decreased 36% to \$3.2 million as compared to \$5.0 million in the prior year quarter’⁷⁸. It is thus unclear whether legalization of doping leads to long term losses or not.

Alternatively it is clear that the attitude towards doping will be guided by the professed and actual objectives of the regulating authorities of various sports.

b. Degree of Correlation between Doping and Winning

Individual sports like swimming, track events, cycling, are different from sports like tennis, badminton and boxing.

In the former category of sports, the aim is to be the fastest or the toughest – its a question of ability. A swimmer needs to swim as fast as he can and finish first. A sprinter needs to run the given distance in the quickest possible time. He is not concerned with his opponent, his opponent is doing the same task as him, with the same goal in mind, but he is not doing the task against him. The athlete is only concerned with himself.⁷⁹

In the latter category of sports, the player is playing against an opponent. He is actively engaging with the opposite player with the aim to be faster, tougher, and stronger than him. He does not play for himself, he essentially plays against the opponent. This brings an element of a judgment call into the game.

For instance, in a game of tennis, the player can choose to let go of a certain point if he feels he could not have been fast enough to reach the ball in time and the effort expended in trying would be better utilised for the next point. In swimming however, the swimmer just dives in and starts racing, there is no concern, no judgment call required in relation to other competitors.

⁷⁶ World Wrestling Entertainment.

⁷⁷ Substance Abuse And Drug Testing Policy 2006, WORLD WRESTLING ENTERTAINMENT, INC. (“WWE”), http://corporate.wwe.com/company/abuse_policy.jsp,

⁷⁸ Company Financials, OFFICIAL WEBSITE OF WWE, <http://corporate.wwe.com/company/financials.jsp>, (last seen on 16.12.2015).

⁷⁹ Wherever in this essay the male pronoun has been used, it is done so simply for ease of grammatical flow. The inclusion of other genders is implicit in the use of the male pronoun wherever it has been applied.

c. How is this relevant to Doping?

Continuing the example of a tennis player, he faces an actual judgment call of whether he wants to dope to develop stronger muscles to be able to hit powerful groundstrokes from the baseline or whether he will forego the added bulk to be faster on his feet and be able to play from all positions of the court, to be able to move to the net quickly enough. This element of a trade-off between different aspects of a game needs to be kept in mind while making a choice on which doping tests to administer.

A swimmer's incentive to dope, however, is clear cut. He needs strength and stamina. A cyclist's incentive to dope is the same. It is argued that in this category of sport, the correlation between doping and winning is comparatively higher.

The lesson here is that all the variables related to the athlete's choices, his/her motivations, need to be considered while developing an effective control mechanism.

B. Team Sport

a. Multiplicity of Influencing Factors

As explained above, in team sports there are a host of factors that need to be studied. These include:

- i. Number of players actively participating in the game at a given point of time.

For instance, baseball is played in teams of nine. But at any given time there is only one player from the batting side in the park. So there is incentive for an individual to dope to be strong enough to hit a home run thereby possibly influencing the outcome of the game. So even though baseball is a team sport with nine players, due to the lesser degree of coordination required between teammates (at least when they're batting), there is a stronger incentive to dope.

- ii. The level of coordination required between members of the team.

In the Olympic Eights Rowing, although the number of players may be higher than basketball, but the level of coordination required is inherently superior. In such a situation, doping by several members of the team will severely advance the odds of winning.

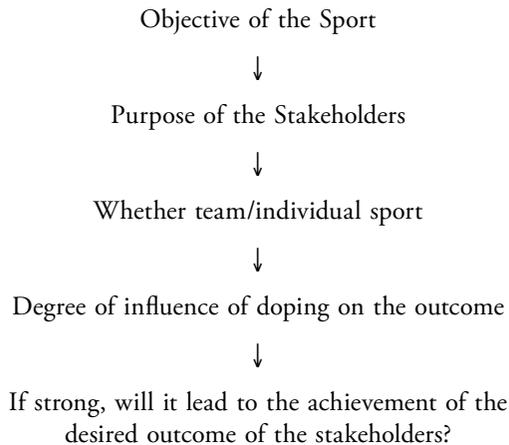
- iii. How strongly doping by one player can affect the outcome of the entire game.

For example, basketball requires five people from each team, lesser the number players on field, better the coordination between the players, since there are only five players involved, even if only one of them dopes, his influence on the overall game will be stronger than one soccer player's in a team of eleven.

These three factors are very closely (and cyclically) related to each other. They show that there are nitty-gritty details at a sport-specific level which influence an athlete's propensity to consume PEDs and the overall effect it has on the sport. A regulatory institution looking to find an efficient way to curb or control doping may benefit from keeping such considerations in mind.

VII. MATCHING REGULATION TO SPORT

To harmonise the sport with the regulatory framework (hereinafter referred to as 'the framework') one first needs to reconcile the objective of the sport (for instance sporting excellence) with the purpose of the stakeholders (maximise wins/profits); then the stratification of different kinds of sport needs to be looked at, along with a judgment as to how strongly doping will affect the outcome of the game itself. This then needs to be reconciled with the broader aim of the stakeholders in mind: what is their desired outcome?



An example may be helpful here. Assuming that the objective of a team sport, say baseball, is win maximization – the team only wants to win, further assuming that the purpose of the Baseball League is profit maximisation (since it would be quite lucrative to exploit the fan base of such a popular sport), and also that doping has a tangible, substantial effect on the outcome of the game:

- If it is seen that the result of doping would generate higher profits (due to increase in viewer interest due to better competitive balance, or breaking previous sports records), then doping in baseball should be legalised.
- If however, it is seen that doping leads to falling revenues, the League would be better off holding dopers strictly liable and outlawing the practice of doping.

This exercise, if done on a larger scale, by each regulatory authority on data from its own sport, might help point them in the direction that they need to take for a determinate stand on doping.

It is conceded that some part of this exercise will be speculative in nature because the effects of doping may or may not be tangible enough to test for viewer interest and revenue generation. However, illustrations from other sports or smaller scale pilot projects to test their models might help ascertain the effect that use of PEDs will have and, following the steps, as laid out hereinabove, should help steer the Regulating Authorities of the sport in question in framing the most 'efficient' position and policy on use of PEDs by their athletes.

VIII. CONCLUSION

Scandals after scandals, allegations after allegations, and denials after denials hit the newspapers every week related to doping in sports, from cycling and tennis and baseball to basketball and swimming and weightlifting and so on. Regulating authorities of respective sports are clearly losing the battle against doping.

It is time to let go of illusions. It is time to let go of the hypocrisy that is apparent when the head of a regulating authority publicly condemns doping and the athlete makes 'Everybody's doing it' claims.

This paper is an attempt to show how regulating authorities might benefit from re-evaluating their own motives in the current commercialised climate of sport, face up to the new demands that modern sport puts on athletes and then judge which approach towards doping control would best serve their interests.

Other questions also surround the discourse on use of PEDs by sportspersons. For instance, in sports, where players have the option of relying on other factors to gain an edge over competitors (bat, swimsuit, other equipment), do the players still deviate from the rational-choice assumption and choose PEDs?

Similarly, it will be interesting to see if the discussion in the preceding chapters can apply when the PED users are racehorses or greyhounds; when the assumption that the drug-user is human is relaxed, would the conclusions of this paper still hold. These remain to be future areas of research.

The revelations regarding Russia's large-scale State sanctioned doping regime⁸⁰ make it clear that the current regime of strict liability as enforced by the WADA is not working – if a country can violate its provisions at an institutional level, this conclusion is not an unfair one to draw. It is obvious that something needs to be changed, be it the meaning of 'cheating' or the punishment for it.

This essay seeks to provide an illustrative roadmap to show how the regulating authorities may benefit from an approach which frames the forms of regulation within the economic models of the Sports Market leading to an efficient outcome serving the interests of all the stakeholders of the game.

⁸⁰ Rebecca R. Ruiz & Michael Schwartz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, NY TIMES, May 12, 2016, http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package_region®ion=top-news&WT.nav=top-news&_r=0. (Dozens of Russian athletes at the 2014 Winter Olympics in Sochi, including at least 15 medal winners, were part of a state-run doping program, meticulously planned for years to ensure dominance at the Games, according to the director of the country's anti-doping laboratory at the time).