

1-1-2014

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Recommended Citation

Chaudry, Bilal (2014) "Caught in a Rundown: The Need for a Zero-Tolerance Drug Policy to Bring Integrity Back into Professional Sports and Stop the Spread of Performance Enhancing Drugs into Society," *Hofstra Law Review*. Vol. 43: Iss. 2, Article 8.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol43/iss2/8>

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NOTE

CAUGHT IN A RUNDOWN: THE NEED FOR A ZERO-TOLERANCE DRUG POLICY TO BRING INTEGRITY BACK INTO PROFESSIONAL SPORTS AND STOP THE SPREAD OF PERFORMANCE ENHANCING DRUGS INTO SOCIETY

I. INTRODUCTION

These players will do everything to get into baseball and anything to stay in baseball.

– Bob Costas, *Baseball: The Tenth Inning*¹

Many young athletes in high schools, colleges, and the minor leagues possess a relentless competitive mentality.² These young athletes will do “everything”—even use performance-enhancing drugs (“PEDs”)³—to make it to the professional sports leagues (“The Leagues”).⁴ This competitive mentality is largely influenced by professional players seeking to remain relevant in their respective sports,⁵ doing “anything” to stay active in The Leagues.⁶ There are many

1. BASEBALL: THE TENTH INNING (PBS 2010).

2. See Ryan Calfee & Paul Fadale, *Popular Ergogenic Drugs and Supplements in Young Athletes*, 117 PEDIATRICS e577, e578 (2006) (explaining the growing use of PEDs among young athletes).

3. *Performance-Enhancing Drugs*, DRUG FREE SPORT, <http://www.drugfreesport.com/drug-resources/performance-enhancing-drugs-steroids.asp> (last visited Feb. 15, 2015) (“A performance-enhancing drug is any substance taken by athletes to improve performance. This term is referenced often and typically refers to anabolic steroid use in sports by professional and amateur athletes. Other substances may also be taken to improve performance, including human growth hormone (hGH), stimulants and diuretics.”).

4. See BASEBALL: THE TENTH INNING, *supra* note 1. For the purposes of this Note, professional sports leagues will collectively refer to: Major League Baseball (“MLB”); National Football League (“NFL”); National Basketball Association (“NBA”); and National Hockey League (“NHL”).

5. See Lynn Zinser & Serge F. Kovaleski, *Another Player Receives 50-Game Ban*, N.Y. TIMES, Aug. 23, 2012, at B10 (reporting that Bartolo Colon, a thirty-nine year old pitcher, who pitched in only forty-three games from 2006-2009 was suspended for PED use).

6. See BASEBALL: THE TENTH INNING, *supra* note 1.

reasons why PED use is so widespread in The Leagues—including the highly competitive nature of athletes,⁷ and their enormous contracts, which become more lucrative every year.⁸ PED use hurts not only the individual leagues and players by creating a competitive imbalance,⁹ but also harms young athletes at the high school and college levels, creating a larger, widespread societal problem.¹⁰

PED use has been at the forefront of The Leagues for more than a decade.¹¹ However, players have been using PEDs since the mid-1900s.¹² For years, PED use was The Leagues' best kept secret.¹³ In baseball, homeruns were traveling farther¹⁴ and pitchers' fastballs were reaching speeds never before seen.¹⁵ Football players were getting stronger and tackling more viciously than ever.¹⁶ Basketball players were running faster and jumping higher.¹⁷ Hockey players were playing

7. See *id.* Sportscaster Bob Costas discusses the competitive imbalance PED usage creates. *Id.* Players that are not using PEDs are at a great disadvantage compared to the players using these substances. *Id.* Costas also discusses the added pressure of lucrative contracts upon these players. *Id.*

8. See Sammy Said, *The Top 10 Biggest Contract in Sports for 2013*, RICHEST (Aug. 5, 2013), <http://www.therichest.com/expensive-lifestyle/money/the-top-10-biggest-contract-in-sports-for-2013> (listing the ten biggest contracts in sports for 2013).

9. See BASEBALL: THE TENTH INNING, *supra* note 1 (featuring commentators discussing the competitive imbalance created by the use of PEDs by some players while other players remain clean).

10. See Calfee & Fadale, *supra* note 2, at e578-79 (explaining the widespread use of PEDs amongst youth).

11. See Steve Keating, *Steroid Era Continues to Hang over MLB*, REUTERS (Aug. 5, 2013), <http://www.reuters.com/article/2013/08/05/us-baseball-doping-history-idUSBRE9740X320130805> ("In 2003, BALCO, the little laboratory on the outskirts of San Francisco, became the epicenter of a massive doping scandal that shocked the sporting world.").

12. See BASEBALL: THE TENTH INNING, *supra* note 1 (addressing the use of amphetamines in MLB for decades, and the introduction of steroids in MLB in the 1980s); *infra* Part II.B.

13. See Keating, *supra* note 11. Prior to the "BALCO Scandal," fans were largely unaware of the use of PEDs in The Leagues. *Id.*

14. See R. G. Tobin, *On the Potential of a Chemical Bonds: Possible Effects of Steroids on Home Run Production in Baseball*, 76 AM. J. PHYSICS. 15, 18 (2008) (illustrating how an increase in muscle mass, resulting from PED use, allows players to perform better).

15. See *id.* at 18-19 (concluding that steroids increased pitchers' fastball speeds by approximately four to five miles per hour).

16. See Glenn Dickey, *NFL Overlooking the Impact of Steroids on Concussions*, S.F. EXAMINER (Dec. 17, 2010), <http://www.sfexaminer.com/sanfrancisco/nfl-overlooking-the-impact-of-steroids-on-concussions/Content?oid=2166437> (discussing how the increased strength and speed of NFL players, a product of PED use, might be a cause of the increased concussion rate in the NFL).

17. See Trevor Beal, *The NBA's Greatest Vertical Leaps*, INTERNET BILLBOARDS (June 2, 2011), <http://www.internetbillboards.net/2011/06/02/the-nbas-greatest-vertical-leaps> (listing the highest vertical leaps in NBA history); Mike Bianchi, *David Stern, NBA Better Get Serious About Performance-Enhancing Drugs*, ORLANDO SENTINEL (May 24, 2011), http://articles.orlandosentinel.com/2011-05-24/sports/os-bianchi-nba-performance-enhancing-20110524_1_performance-enhancing-drugs-peds-nba-s-most-valuable (arguing that NBA players benefit from PEDs as they help them jump higher and run faster).

tougher and hitting harder.¹⁸ The record books were being rewritten with unforeseen frequency.¹⁹ Incredibly, these amazing feats went unquestioned because attendance at games was high and revenues were even higher.²⁰ It was not until the late 1980s that the National Football League (“NFL”) became the first league to consider banning PEDs.²¹ Nevertheless, the issue of PED use remained largely overlooked for years to follow.²² Although The Leagues have implemented more stringent policies,²³ PED use remains rampant among all professional sports.²⁴

18. See GEORGES LARAQUE, *GEORGES LARAQUE: THE STORY OF THE NHL’S UNLIKELIEST TOUGH GUY* 132-33 (2011) (stating how PEDs help NHL players fight for longer periods of time and in a more intense fashion).

19. See BRIAN TUOHY, *THE FIX IS IN: THE SHOWBIZ MANIPULATIONS OF THE NFL, MLB, NBA, NHL AND NASCAR* 186-92 (2010) (describing the time period in MLB after the 1994 players’ strike when homerun records were being shattered); *supra* notes 14-18 and accompanying text.

20. See TUOHY, *supra* note 19, at 186-92. After the 1994 players’ strike in MLB, there was an obvious need to get fans back to the stadiums and regenerate interest in the game; the best way to do that was to have players hit homeruns. *Id.* MLB overlooked PED use in order to attract fans back to the sport. *Id.*

21. See David R. McDuff & David Baron, *Substance Use in Athletics: A Sports Psychiatry Perspective*, 24 *CLINICS SPORTS MED.* 885, 892 (2005). The use of PEDs in the NFL led to urine testing in 1987 and eventually sanctions in 1989. *Id.*

22. See *BASEBALL: THE TENTH INNING*, *supra* note 1. Many say the height of the steroid era was in the late 1990s and early 2000s, a decade after the NFL implemented its first policy. *Id.*

23. See *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association*, NAT’L HOCKEY LEAGUE art. 47, 190 (2013) [hereinafter *NHL Collective Bargaining Agreement 2012*], available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPa_2013_CBA.pdf (testing players randomly for a maximum of three times during training camp, the regular season, and playoffs, and an additional two times during the off-season); *Major League Baseball’s Joint Drug Prevention and Treatment Program*, MAJOR LEAGUE BASEBALL 35 (2006) [hereinafter *Joint Drug Agreement*], available at <http://mlb.mlb.com/pa/pdf/jda.pdf> (increasing the suspension for a first violation to 80 games, a second violation to 162 games, and a third violation to permanent suspension); *National Football League Policy and Program for Substances of Abuse*, NAT’L FOOTBALL LEAGUE 1 (2014) [hereinafter *NFL Policy and Program 2014*], available at https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/Drug_SOA_Policy_9-29-14.pdf (“The cornerstone of this Policy is the Intervention Program. Under the Intervention Program, Players are tested, evaluated, treated, and monitored for substance abuse. Players who do not comply with the requirements of the Intervention Program . . . are subject to the established levels of discipline set forth in this Policy.”); *NBA Collective Bargaining Agreement*, NAT’L BASKETBALL ASS’N art. XXXIII, 430-31 (December 2011) [hereinafter *NBA Collective Bargaining Agreement*], available at [http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA\(2011\)_newversion_reflectsJeremyLinRuling_May30_2013.pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_newversion_reflectsJeremyLinRuling_May30_2013.pdf) (levying a 20-game suspension for a first violation, a 45-game suspension for a second violation, and a permanent suspension for a third violation).

24. See, e.g., Will Brinson, *Broncos Linebacker Von Miller Suspended Six Games by NFL*, CBS SPORTS (Aug. 20, 2013, 5:02 PM), <http://www.cbssports.com/nfl/eye-on-football/23239586/von-miller-suspended-6-games-by-nfl> (noting the 6-game suspension of NFL player Von Miller for violating the NFL’s PED policy); Jason Brough, *Toews on PEDs: ‘The More Tests the Better,’* NBC SPORTS (Aug. 14, 2013, 2:14 PM), <http://prohockeytalk.nbcsports.com/>

Governmental efforts to resolve the PED issue have consistently fallen short of being effective.²⁵ In the past, Congress attempted to pass legislation²⁶ and proposed various solutions to urge and encourage The Leagues to make their drug policies more stringent.²⁷ However, neither congressional efforts, nor The Leagues' stricter policies, have made an impact on the players' use of PEDs.²⁸ The inadequacies of the current systems are apparent from the recent Biogenesis Scandal²⁹ in Major League Baseball ("MLB"), as well as several other PED-related controversies arising throughout The Leagues.³⁰ These scandals and controversies illustrate that PED use is still a widespread, ever-growing issue in society, which must be resolved through a collaborative effort between the government and The Leagues.³¹

This Note argues that the only way to completely rid The Leagues of PED use, and thereby alleviate the detrimental effects of PEDs on youth and society, is for the government and The Leagues to work together to implement a zero-tolerance policy.³² A zero-tolerance policy implementing a lifetime ban for the first offense will replace the current progressive discipline approach employed by The Leagues,³³ which

2013/08/14/toews-on-peds-the-more-tests-the-better (mentioning NHL player Jonathan Toews's statement that "it would be naïve" to think that no player in the NHL is using PEDs); Alex Kennedy, *Hedo Turkoglu of Magic Suspended for Steroid Use*, USA TODAY (Feb. 13, 2013, 9:04 PM), <http://www.usatoday.com/story/sports/nba/2013/02/13/orlando-magic-hedo-turkoglu-nba-suspended/1917161> (reporting a 20-game suspension of NBA player Hedo Turkoglu for violating the NBA's PED policy); Jim Peltz & Stephen Bailey, *The 13 MLB Players Suspended for Violating Banned-Substances Rules*, L.A. TIMES (Aug. 5, 2013, 5:20 PM), <http://www.latimes.com/sports/la-sp-0806-mlb-suspended-players-20130806,0,559942.story#axzz2iSkZvUZ8> (reporting that thirteen MLB players were suspended for violating the league's drug policy in 2013).

25. See CHARLES A. SANTO & GERARD C.S. MILDNER, *SPORT AND PUBLIC POLICY: SOCIAL, POLITICAL, AND ECONOMIC PERSPECTIVES* 175-77 (2010) (noting the failed attempts by Congress to pass legislation to reduce the use of PEDs in professional sports); *infra* Part III.C.

26. See SANTO & MILDNER, *supra* note 25, at 175-77; *infra* note 218 and accompanying text.

27. See SANTO & MILDNER, *supra* note 25, at 175-77; *infra* Part III.C, E.

28. See SANTO & MILDNER, *supra* note 25, at 175-77; Bryan E. Denham, *Government and the Pursuit of Rigorous Drug Testing in Major League Baseball: A Study in Political Negotiation and Reciprocity*, 2 INT'L J. SPORT MGMT. & MARKETING 379, 384-87 (2007) (criticizing Congress's approach to PEDs in professional sports); *supra* note 24 and accompanying text.

29. See Barry Svrluga, *Biogenesis Scandal Shows Baseball Has Not Put Its Drug Problems Behind It*, WASH. POST, Aug. 6, 2013, http://www.washingtonpost.com/sports/nationals/biogenesis-scandal-shows-baseball-has-not-put-its-drug-problems-behind-it/2013/08/06/2341bb58-fee0-11e2-9711-3708310f6f4d_story.html (reporting on the MLB Biogenesis Scandal).

30. See *supra* note 24.

31. See *infra* Part III.

32. See *infra* Part IV.A.

33. See, e.g., NBA Collective Bargaining Agreement, *supra* note 23, at 430-31. The NBA, in a similar fashion to the other three leagues, observes a progressive discipline approach where a player is suspended for 20 games for the first offense, 45 games for the second offense, and dismissed from the league and "disqualified from any association with" the league or any of its teams for a third offense. *Id.*; see also Joint Drug Agreement, *supra* note 23, at 35 (implementing an

suspends a player for a certain number of games for a first or second violation, and suspends the player indefinitely for a third violation.³⁴ An effective way to implement the zero-tolerance policy is to create a hybrid-agency, comprised of The Leagues' representatives and President-appointed government representatives.³⁵ This hybrid-agency will promote uniformity throughout The Leagues by creating and enforcing a unified PED policy, conducting PED testing, and adjudicating matters arising out of players' suspected and proven PED use.³⁶

Part II of this Note defines PEDs and discusses their effects on athletes.³⁷ It then provides a brief history of PED use in The Leagues.³⁸ Part II further examines the transformation of each league's drug testing program over the years.³⁹ Finally, it summarizes the insufficient PED-prevention methods currently enforced by The Leagues.⁴⁰ Part III highlights the increasing need for government intervention due to the growing use of PEDs by high school and college athletes.⁴¹ Part III also explains the negative effects of PEDs on The Leagues, the players, and society as a whole.⁴² Moreover, Part III details Congress's failed attempts to regulate PED use in The Leagues, including the Bay Area Laboratory Co-operative ("BALCO") Scandal,⁴³ *The Mitchell Report*,⁴⁴ and the proposed Acts that failed to pass the House and the Senate.⁴⁵ In addition, Part III recounts the recent Biogenesis Scandal and the lack of owner accountability in The Leagues.⁴⁶ Finally, it describes the United

80-game suspension for a first offense, 162-game suspension for a second offense, and a permanent suspension with the opportunity to apply for reinstatement for a third offense); NFL Policy and Program 2014, *supra* note 23, at 11-19 (describing the stages of violations and the discipline that accompanies each stage); NHL Collective Bargaining Agreement 2012, *supra* note 23, at 191-92 (implementing a 20-game suspension for a first offense, a 60-game suspension for a second offense, and a "permanent suspension" with the opportunity for reinstatement for a third offense).

34. See *infra* Part II.C; *supra* note 33.

35. See *infra* Part IV.B.

36. See *infra* Part IV.B.

37. See *infra* Part II.A.

38. See *infra* Part II.B.

39. See *infra* Part II.C.

40. See *infra* Part II.C.

41. Calfee & Fadale, *supra* note 2, at e578-79, e581; see *infra* Part III.A.1.

42. See *infra* Part III.A.

43. See Keating, *supra* note 11; *infra* Part III.B.

44. See GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL SR-1 (Dec. 13, 2007) (reporting, through extensive interviewing and investigation, how and why the PED problem emerged in MLB); *infra* Part III.C.

45. See Denham, *supra* note 28, at 384-87; *infra* Part III.C.

46. See *infra* Part III.D.

States Anti-Doping Agency (“USADA”),⁴⁷ and why its particular program—which has worked well for the Olympics and other international sports—will not work for The Leagues.⁴⁸ Part IV argues that The Leagues should implement a unified zero-tolerance policy with government assistance.⁴⁹ Part IV proposes that the government should contract with The Leagues to establish a quasi-governmental hybrid-agency to determine rules and regulations for the testing and monitoring of PEDs in The Leagues, conduct the testing for PEDs,⁵⁰ and adjudicate matters arising out of possible PED use in The Leagues.⁵¹ Part IV further addresses the possible constitutional challenges that will be faced by the proposed hybrid-agency.⁵² Part IV then reasons why this solution will succeed where others have failed.⁵³ Part V concludes this Note and reiterates why a zero-tolerance policy in The Leagues, and government intervention through a hybrid-agency, is critical in resolving the PED use issue.⁵⁴

II. PERFORMANCE ENHANCING DRUG USE IN PROFESSIONAL SPORTS

PED use in sports is not a recent phenomenon.⁵⁵ Athletes have used PEDs to gain a competitive edge for over a century.⁵⁶ Subpart A details the increased sophistication of PEDs and outlines their dangerous effects on athletes’ health.⁵⁷ Subpart B summarizes the history of PED use in sports.⁵⁸ Subpart C considers how the drug programs in The Leagues

47. See *USADA’s Anti-Doping Programs*, U.S. ANTI-DOPING AGENCY, <http://www.usada.org/about/programs> (last visited Feb. 15, 2015).

48. See Laura S. Stewart, Comment, *Has the United States Anti-Doping Agency Gone Too Far? Analyzing the Shift from ‘Beyond a Reasonable Doubt’ to ‘Comfortable Satisfaction,’* 13 VILL. SPORTS & ENT. L.J. 207, 228-36 (2006) (arguing that the standard of review being implemented in the USADA proceedings is unfair for the athletes); *infra* Part III.E.

49. See Jeff Seidel, *Jhonny Peralta Probably Returning, But MLB Needs Lifetime Ban to Get Rid of PEDs*, DETROIT FREE PRESS (Sept. 20, 2013, 3:44 AM), http://hosted2.ap.org/PASCR/72917a5e85e24b6f8e667afce1dda249/Article_2013-09-20/id-07fb4ec199c0423c49ef006b382a1924 (arguing that MLB needs a lifetime ban to eliminate PEDs); *infra* Part IV.A.

50. See, e.g., KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, *THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS* 2 (2011) (defining quasi-governmental entities as entities with “some legal relation or association” with the government); *infra* Part IV.B.

51. See *infra* Part IV.B.

52. See *infra* Part IV.C.

53. See *infra* Part IV.D.

54. See *infra* Part V.

55. See DANIEL M. ROSEN, *DOPE: A HISTORY OF PERFORMANCE ENHANCEMENT IN SPORTS FROM THE NINETEENTH CENTURY TO TODAY* 1 (2008).

56. See *id.*

57. See *infra* Part II.A.

58. See *infra* Part II.B.

have evolved to combat PED use, and how the violators have remained a step ahead of the enforcers.⁵⁹

A. Performance Enhancing Drugs and Their Effects

There are six main categories of banned PEDs: (1) anabolic-androgenic steroids;⁶⁰ (2) hormones and hormone releasing substances;⁶¹ (3) masking agents;⁶² (4) stimulants;⁶³ (5) blood doping;⁶⁴ and (6) gene doping.⁶⁵ When used by athletes, PEDs provide several unfair physical

59. See *infra* Part II.C.

60. *DrugFacts: Anabolic Steroids*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/anabolic-steroids> (last visited Feb. 15, 2015) ("Anabolic steroids' is the familiar name for synthetic variants of the male sex hormone testosterone. The proper term for these compounds is *anabolic-androgenic steroids* (abbreviated AAS)—'anabolic' referring to muscle-building and 'androgenic' referring to increased male sexual characteristics."); *The World Anti-Doping Code: The 2014 Prohibited List International Standard*, WORLD ANTI-DOPING AGENCY 2-3 (May 17, 2014), <https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-Revised-2014-Prohibited-List-EN.PDF> [hereinafter WADA Doping Code 2014]. Anabolic steroids are the most commonly used PEDs in The Leagues. *Performance Enhancing Drugs*, *supra* note 3.

61. See Shayna M. Sigman, *Are We All Dopes? A Behavior Law & Economics Approach to Legal Regulation of Doping in Sports*, 19 MARQ. SPORTS L. REV. 125, 157-57 (2008). The author describes some of the common hormone and hormone releasing substances. *Id.* Erythropoietin ("EPO"), regulates the production of red blood cells. *Id.* at 151. Human Growth Hormone ("HGH") stimulates growth and cell reproduction. *Id.* at 152. Insulin is used by the body to convert glucose in the blood to glycogen, and when used in conjunction with growth hormones, it can increase muscle mass. *Id.* at 155. Moreover, "[b]eta blockers, also known as beta-adrenergic antagonists, block the body's receptors for epinephrine (adrenaline) and norepinephrine (noradrenaline), hormones that are part of the sympathetic nervous system." *Id.* at 156. When consumed, these substances can increase muscle mass and help players heal quicker. *Id.* at 153-54; see also WADA Doping Code 2014, *supra* note 60, at 4-5 (listing various banned common hormone and hormone releasing substances).

62. See Sigman, *supra* note 61, at 157 ("Masking agents are drugs that are capable of hiding the presence of other impermissible substances."); WADA Doping Code 2014, *supra* note 60, at 5-6.

63. See NICOLETTE P. CONTI & PAULA JOHANSON, *DRUGS & CONSEQUENCES: THE TRUTH ABOUT AMPHETAMINES AND STIMULANTS* 4 (2012) ("Stimulants (also called uppers) are drugs that speed up the mind and body. Amphetamines are one kind of stimulant. They increase activity in the nervous system and cause a number of physical and psychological changes."); Sigman, *supra* note 61, at 158 ("[Stimulants] increase alertness, counter fatigue, increase competitiveness, and suppress appetite. This class includes substances such as amphetamines, ephedrine, and cocaine, which are all highly addictive."); WADA Doping Code 2014, *supra* note 60, at 8-9.

64. See JENNIFER L. MINIGH, *SPORTS MEDICINE* 116 (2007) ("Blood doping . . . involves either a blood transfusion of red blood cells or administration of drug erythropoietin, which pharmacologically increases red blood cell mass. Blood doping improves an athlete's ability to perform endurance exercise and reduces physiological strain."); Sigman, *supra* note 61, at 160 ("Blood doping refers to the practice of using transfused blood or red blood cells to increase the number of red blood cells available to carry oxygen from the lungs to the muscles.");

65. See MINIGH, *supra* note 64, at 62 ("Gene therapy is the insertion of genetic material into an individual's cells or tissues to treat disease."); Sigman, *supra* note 61, at 162 ("Gene therapy is a nascent medical field that refers to the insertion of a new gene—a functional one—into human cells to correct the DNA for some defective, malfunctioning, or absent gene."). Gene doping, the newest form of PEDs, gives players similar advantages as the other PEDs. Sigman, *supra* note 61, at 163.

and physiological advantages, by exponentially increasing mass, strength, speed, mental competitiveness, pain threshold, alertness, and self-confidence.⁶⁶ Moreover, players are using more sophisticated PEDs and techniques to recover from injuries up to six times faster.⁶⁷ Many players have even admitted to using human growth hormone (“HGH”)—a type of PED that stimulates muscle repair and cell reproduction⁶⁸—in order to return to playing their sport quicker after an injury.⁶⁹

Despite the short-term positive effects of PEDs,⁷⁰ they are extremely damaging to a player’s health in the long-term.⁷¹ PED use can cause lung cancer, heart failure, diabetes, tumors, and many other negative side effects.⁷² The use of PEDs not only harms the players using them, but it can also indirectly harm the other players on the field.⁷³ In the NFL, player concussions have become a glaring problem,⁷⁴ and the use of PEDs might be a major factor for the increased number of incidences.⁷⁵ In the National Hockey League (“NHL”), players are permitted to engage in physical fights during the game,⁷⁶ and since PEDs enable players to become physically numb and can cause rage, there is a

66. See Sigman, *supra* note 61, at 146-47.

67. See Simon Doessing et al., *Growth Hormone Stimulates the Collagen Synthesis in Human Tendon and Skeletal Muscle Without Affecting Myofibrillar Protein Synthesis*, 588 J. PHYSIOLOGY 341, 348-49 (2010) (explaining how HGH decreases recovery time); Sigman, *supra* note 61, at 147; see also Michael S. Schmidt, *Pettitte Confirms Mitchell Report and Says He Used H.G.H.*, N.Y. TIMES, Dec. 16, 2007, at G1 (discussing New York Yankees’ pitcher Andy Pettitte’s use of HGH in 2002 to recover quicker from elbow surgery).

68. See Sigman, *supra* note 61, at 153-54; see also Schmidt, *supra* note 67 (reporting that Andy Pettitte admitted to using PEDs).

69. See Schmidt, *supra* note 67.

70. See *supra* notes 66-69 and accompanying text.

71. See MINIGH, *supra* note 64, at 114; Sigman, *supra* note 61, at 148-49.

72. See MINIGH, *supra* note 64, at 114. Some of the common side effects of PED use include: Long-term risks include liver damage (including cancer, failure, or both), jaundice, renal failure, hypertension, elevated LDL (bad cholesterol) and decreased HDL (good cholesterol), damage to the heart’s left ventricle and acne. Steroid use can also bring about mood swings, including manic phases and euphoria, periods of extreme aggression or violence (often referred to as ‘roid rage [sic]), paranoia, anxiety, and depression. In addition, there are sport-specific injury risks that also stem from continual AAS use, such as cramps and torn muscles and the like.

Sigman, *supra* note 61, at 148-49.

73. See Dickey, *supra* note 16.

74. See Jason M. Breslow, *For the NFL, Focus on Concussions Yields Mixed Results*, PBS (Sept. 24, 2013, 12:20 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/about-concussion-watch-2>. During the 2012 NFL regular season, a total of 160 players reported either head injuries or concussions. *Id.*

75. See *id.* (explaining the increased head injuries in the NFL and the horrific effects of such injuries down the road such as brain damage, dementia, memory loss, and depression); see also Dickey, *supra* note 16 (drawing the connection between steroid use, which results in bigger, stronger, and faster players, to the increased concussion rate in the NFL).

76. See LARAQUE, *supra* note 18, at 131.

higher risk of serious injury.⁷⁷ Additionally, players using PEDs are bigger and stronger, which results in excessive injuries when they are involved in such altercations.⁷⁸

The harmful effects of PEDs are no longer limited to The Leagues.⁷⁹ A more serious problem is the use of PEDs by amateur athletes.⁸⁰ This often results in drug overdose and, in an increasing amount of cases, death.⁸¹ The damaging effects of PEDs are severe and can often be life-threatening.⁸² Therefore, it is imperative to employ a permanent solution to protect athletes at all levels.⁸³

B. The History of Performance Enhancing Drugs in Sports

PED use in sports can be traced back to the 1860s in sports such as cycling and swimming.⁸⁴ By the 1930s, amphetamines—a type of PED that provides athletes with increased energy⁸⁵—became popular in sports and among soldiers during World War II;⁸⁶ and, by the 1950s, the use of a new type of PED, anabolic steroids,⁸⁷ became popular in professional weightlifting.⁸⁸ Unfortunately, at the time, people were generally unaware of the negative effects of PEDs, and viewed PEDs as a scientific breakthrough.⁸⁹

Then, in the 1960s, anabolic steroids were introduced to The Leagues, when the San Diego Chargers of the American Football

77. See *id.* at 132-33; Sigman, *supra* note 61, at 148-49.

78. See LARAQUE, *supra* note 18, at 131-33.

79. See Calfee & Fadale, *supra* note 2, at e578-79.

80. See Amy Brittain, *Strong at Any Cost: Five Deaths in 19 Months Linked to Steroids, Lowen's Pharmacy*, NJ.COM (Dec. 12, 2010, 7:30 AM), http://www.nj.com/news/index.ssf/2010/12/strong_at_any_cost_five_deaths.html (reporting the deaths of five people caused by steroid overdose); Ariana Hunt, *Steroid Use Can Lead to Physical and Psychological Problems*, INDIANAPOLIS RECORDER (Apr. 10, 2008, 12:00 AM), http://www.indianapolisrecorder.com/health/article_24ccfc00-1832-576c-ab85-8428d273322c.html (explaining that the effects of unsupervised steroid use can be irreversible).

81. See Brittain, *supra* note 80.

82. *Id.*

83. See *supra* notes 79-82 and accompanying text.

84. See ROSEN, *supra* note 55, at 2. In the 1860s, Dutch canal swimmers in Amsterdam used stimulants in competition. *Id.*

85. See *supra* note 63.

86. See ROSEN, *supra* note 55, at 2-3.

87. See *supra* note 60.

88. See ROSEN, *supra* note 55, at 3, 26.

89. See *id.* at 1. PEDs were not always looked upon as harmful and dangerous substances: In the nineteenth century and the early twentieth century . . . [i]f a new drug or a potion could help an athlete run or cycle or swim faster than his opponents, many people saw no problem with the athlete using it. Science and medicine were viewed as ways to improve life, and for athletes, that meant doing better in competition.

Id.

League⁹⁰ (which has since merged with the NFL) hired Alvin Roy as its training coach.⁹¹ Roy had previously worked with the American weightlifting team, where he provided the athletes with “dianabol,”⁹² a type of anabolic steroid that increases muscle mass and strength.⁹³ The use of anabolic steroids quickly made its way into MLB in the late 1960s⁹⁴ when baseball players began training with weightlifters.⁹⁵ Tom House, a former MLB player, “was secretly working out at a gym—against his manager’s orders”—when he asked local weightlifters what they used to get so big; they told him that they used dianabol.⁹⁶ House subsequently admitted that he began using dianabol in 1969.⁹⁷ However, the use of amphetamines in MLB can be traced back even further to the late 1940s.⁹⁸ While amphetamines help players concentrate and stay energized, amphetamines do not have the same physical effects as anabolic steroids.⁹⁹ Nonetheless, The Leagues have banned both

90. See *The AFL*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/history/decades/1960s/afl.aspx?print=yes> (last visited Feb. 15, 2015). In 1959, the American Football League (“AFL”) was organized by Dallas businessman Lamar Hunt. *Id.* The AFL began play in 1960. *Id.* The first cities to support a team in the AFL were Dallas, Denver, Houston, Los Angeles, Minneapolis, and New York. *Id.* Eventually, in 1970, the NFL and the AFL merged to form what is now known as the NFL. *Id.*

91. See ROSEN, *supra* note 55, at 27-28.

92. See *id.*; *Dianabol (Methandrostenolone)*, ASS’N AGAINST STEROID ABUSE, <http://www.steroidabuse.com/Profiles/Dianabol.html> (last visited Feb. 15, 2015) (“Dianabol or Dbol as it is also known is the common trade name for the anabolic steroidal hormone Methandrostenolone. Methandrostenolone carries with it highly anabolic traits as well as moderate androgenic traits which allow it to be well-suited for both strength and size.”).

93. See ROSEN, *supra* note 55, at 27-28. Alvin Roy used his knowledge of steroids, which he obtained when he was affiliated with the U.S. weight lifting team, to help the football players train harder and become stronger. *Id.*; *Dianabol (Methandrostenolone)*, *supra* note 92.

94. See *id.* at 37.

95. See *id.* at 37-38; McDuff & Baron, *supra* note 21, at 891-92.

96. See ROSEN, *supra* note 55, at 38; Ron Kroichick, *House a ‘Failed Experiment’ with Steroids*, S.F. GATE (May 3, 2005, 4:00 AM), <http://www.sfgate.com/sports/kroichick/article/House-a-failed-experiment-with-steroids-2637503.php>. In an interview, Tom House admitted that he used steroids along with many of his teammates. *Id.*

97. See ROSEN, *supra* note 55, at 38. House also admitted that in his estimation, around six to seven players on every team were using steroids. *Id.* “‘I pretty much popped everything cold turkey,’ House said in a phone interview. ‘We were doing steroids they wouldn’t give to horses. That was the ‘60s, when nobody knew.’” Kroichick, *supra* note 96.

98. See ROSEN, *supra* note 55, at 2-3 (revealing that “[a]mphetamines came into wide use during the Second World War”); see also JIM BROSNAN, *THE LONG SEASON* 47-48 (2002) (recounting MLB pitcher, Jim Brosnan, admitting that he used amphetamines to get through the long baseball season).

99. See McDuff & Baron, *supra* note 21, at 888 (“Despite the lack of strong scientific evidence of a positive effect on athletic performance, amphetamines quickly became the most popular ergogenic aids, because of their demonstrated and perceived positive effects on self-confidence, mood, attention, aggression, and energy.”); see also Matt David, *Should MLB Fans Be as Outraged About Amphetamines as Steroids?*, BLEACHER REP. (Mar. 28, 2010), <http://bleacherreport.com/articles/369878-mlb-should-we-be-as-outraged-about-amphetamines-as->

substances, along with other PEDs, as they provide players with an unfair competitive advantage.¹⁰⁰

C. Each League's Efforts and Inadequacies Concerning Performance Enhancing Drugs

The Leagues face common problems with their current drug programs: (1) the testing is inadequate, and many players escape undetected;¹⁰¹ (2) the progressive discipline approach implemented by The Leagues provides little incentive for players to abide by the drug program;¹⁰² (3) the confidentiality of these proceedings, which is crucial in such sensitive cases and is vital for the maintenance of players' reputations, is many times sacrificed;¹⁰³ and (4) these programs rely heavily upon the Commissioners' discretion,¹⁰⁴ which can result in arbitrary decisions that the players must appeal in arbitration, and often times seek judicial intervention, in order to assert their rights.¹⁰⁵ In each league, appeals are adjudicated through an arbitration process, where an impartial third-party arbitrator, agreed upon by the Commissioner and

steroids (discussing the difference between amphetamines and steroids).

100. See Joint Drug Agreement, *supra* note 23, at 9-13 (listing all the prohibited substances in MLB).

101. See Svrluga, *supra* note 29. None of the thirteen players that were suspended tested positive for PEDs. *Id.* This shows that although they were using banned substances, their drug tests were negative. *Id.*

102. See Paul White, *Johnny Peralta's Contract with Cardinals Draws Scrutiny*, USA TODAY (Nov. 25, 2013, 6:05 PM), <http://www.usatoday.com/story/sports/mlb/2013/11/25/jhonny-peralts-reaction-to-cardinals-contract/3708135> (highlighting the outrage of some players upon MLB player Johnny Peralta's new \$53 million contract, after recently being suspended for PED use).

103. See Dayn Perry, *MLBPA: Biogenesis Leaks Interfere with Investigation*, CBS SPORTS (Jul. 11, 2013, 11:17 AM), <http://www.cbssports.com/mlb/eye-on-baseball/22721023/mlbpa-releases-statement-on-biogenesis-leaks> (describing how the leaks of confidential information about players to the media is a concern for Michael Weiner, the former Major League Baseball Players' Association ("MLBPA") President, and that such leaks can result in difficulties during the investigation); Steve Phillips, *If Names Are Released, Reputations Might Be Ruined*, ESPN (Apr. 29, 2007, 5:39 PM), <http://sports.espn.go.com/mlb/news/story?id=2853067> (explaining that once a player is linked to PEDs, his reputation is ruined forever).

104. See, e.g., MAJOR LEAGUE CONSTITUTION art. II, §§ 1-2 (1921), available at <http://www.bizofbaseball.com/docs/MLCconstitutionJune2005Update.pdf>. The Commissioner is the Chief Executive Officer of the league. *Id.*

105. See, e.g., Mike Axisa, *A-Rod Suing MLB and Bud Selig, Yankees Team Doctor*, CBS SPORTS (Oct. 4, 2013, 10:37 AM), <http://www.cbssports.com/mlb/eye-on-baseball/24001081/report-alex-rodriguez-is-suing-mlb-claiming-a-witch-hunt> (reporting the lawsuit Alex Rodriguez had filed against MLB, Bud Selig, and the New York Yankees team doctor regarding his 211-game suspension); Doug Farrar, *Two Broncos Players Sue the NFL Over PED Suspensions*, YAHOO! SPORTS (Mar. 13, 2012), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/nflpa-releases-statement-on-broncos-ped-suspensions?urn=nfl,wp20435 (reporting on a lawsuit that two Denver Broncos players filed against the NFL for violating the drug policy).

the Players' Association,¹⁰⁶ rules on the matter.¹⁰⁷ Although the arbitrators are impartial, they must follow the rules and regulations established by that particular league.¹⁰⁸ Furthermore, arbitrators may be terminated without cause.¹⁰⁹ Essentially, the Commissioner or the Players' Association may terminate an arbitrator if they are unsatisfied with the arbitrator's decision.¹¹⁰ If a player is displeased with the result of the arbitration, the player may appeal to a federal court.¹¹¹ However, an arbitration award is almost impossible to vacate or set aside,¹¹² and even when vacated, the dispute is merely remanded back to the arbitration process with the same initial inherent limitations.¹¹³

1. Major League Baseball

The first efforts to ban PEDs in MLB date back to 1971, when Bowie Kuhn, then Commissioner of MLB, requested that players follow the federal laws regarding drug use.¹¹⁴ Despite such a request, PED use

106. See, e.g., *History of the Major League Baseball Players Association*, MLBPLAYERS.COM, <http://mlb.mlb.com/pa/info/history.jsp> (last visited Feb. 15, 2015). A Players' Association is a labor union of players that represents players during collective bargaining negotiations, and any other matters arising out of the collective bargaining agreement. *Id.*; see also NFL Policy and Program 2014, *supra* note 23, at 24 (providing the arbitration panel selection process).

107. See, e.g., *Grievance and Arbitration Procedure and Special Procedures with Respect to Disputes Involving Player Discipline*, NAT'L BASKETBALL ASS'N COLLECTIVE BARGAINING AGREEMENT art. XXXI, 326-27, available at <http://www.nbpa.org/sites/default/files/ARTICLE%20XXXI.pdf>; Joint Drug Agreement, *supra* note 23, at 45; NFL Policy and Program 2014, *supra* note 23, at 24; NHL Collective Bargaining Agreement 2012, *supra* note 23, at 110; see also BLACK'S LAW DICTIONARY 119 (9th ed. 2009) ("Arbitration: A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.").

108. See, e.g., Joint Drug Agreement, *supra* note 23, at 46.

109. See Bob Nightengale, *MLB Fires Longtime Arbitrator Shyam Das*, USA TODAY (May 14, 2012, 8:50 PM), <http://content.usatoday.com/communities/dailypitch/post/2012/05/shyam-das-mlb-arbitrator-fired-ryan-braun/1#.Umq-OvkU-So> (reporting that MLB fired arbitrator Shyam Das for his decision to disregard Ryan Braun's positive drug test because of a technicality).

110. See 2012-2016 Basic Agreement, MAJOR LEAGUE BASEBALL 42 [hereinafter Basic Agreement], available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf; see also Nightengale, *supra* note 109 (examining MLB's firing of long time arbitrator Shyam Das).

111. See, e.g., Chris Greenberg, *A-Rod Statement Denies PED Use, Promises to Fight MLB Ban in Federal Court*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2014/01/11/arod-statement-suspension-ped-court_n_4582249.html (discussing how Alex Rodriguez is planning to appeal the arbitration decision banning him for 162 games in federal court).

112. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001) ("Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings.").

113. See *id.* (holding that even when an arbitration award is vacated, it must be remanded back to the arbitration tribunal with directions).

114. See Controlled Substances Act, 21 U.S.C. § 844 (1970) (requiring a prescription for the use of anabolic steroids). The policy did not explicitly list any banned substances, however, it required players to follow the federal laws at the time. David Epstein, *The Rules, the Law, the*

in MLB was not explicitly banned until 1991, when then-Commissioner Fay Vincent sent a memorandum to every team explicitly banning all illegal drugs from MLB.¹¹⁵ In 1997, Vincent's successor, Bud Selig, reiterated this memo by asserting "that any players violating the policy 'risk permanent expulsion from the game.'"¹¹⁶ However, official drug testing did not begin in MLB until 2003, when the testing was added to the Major League Baseball 2002 Basic Agreement.¹¹⁷ This was a substantial step because previously, the Major League Baseball Players' Association ("MLBPA") was extremely reluctant to accept any form of random drug testing.¹¹⁸ This breakthrough was attributed to heightened public awareness of PED use in sports, and increased public pressure to eliminate PED use from MLB.¹¹⁹

The new Major League Baseball Joint Drug Agreement ("Joint Drug Agreement"),¹²⁰ negotiated between Commissioner Selig and former MLBPA President, Michael Wiener, might be the most comprehensive drug program among The Leagues; yet, PED use remains common in MLB.¹²¹ Under the updated Joint Drug Agreement, a player is suspended 80 games for a first violation, 162 games for a second violation, and permanently for a third violation.¹²² However, if permanently suspended, the player may apply for reinstatement, which is subject to the Commissioner's discretion.¹²³

The Joint Drug Agreement contains an extensive list of prohibited substances, requires blood testing to detect PEDs such as HGH, which is

Reality: A Primer on Baseball's Steroid Policy Through the Years, SPORTS ILLUSTRATED (Feb. 16, 2009), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1151761/index.htm>.

115. See Epstein, *supra* note 114. The memorandum prohibited the use and possession of any illegal drugs or controlled substances, including steroids, if the players did not have a prescription. *Id.*

116. See *id.*

117. See *id.*; see also 2003–2006 Basic Agreement, MAJOR LEAGUE BASEBALL 161–64, available at http://bizofbaseball.com/docs/2002_2006basicagreement.pdf (adding official PED testing to the MLB drug program).

118. See Paul D. Staudohar, *Baseball Negotiations: A New Agreement*, MONTHLY LAB. REV., Dec. 2002, at 15, 20. The MLBPA agreed to steroid testing on a trial basis for 2003, however, it did not agree to testing for other substances such as illegal drugs or other PEDs. *Id.*

119. See *id.*; see also SANTO & MILDNER, *supra* note 25, at 173–74 (discussing the increased urgency to rid professional sports of PEDs after the BALCO Scandal).

120. See generally Joint Drug Agreement, *supra* note 23.

121. See Svrluga, *supra* note 29.

122. See Nathaniel Vinton, *MLB Adds Better Drug Tests, Longer Bans and Postseason Ineligibility for Offenders*, N.Y. DAILY NEWS (Mar. 28, 2014, 7:19 PM), <http://www.nydailynews.com/sports/i-team/mlb-adds-better-drug-tests-longer-bans-postseason-ineligibility-article-1.1738443> (explaining MLB's updated punishments for PED violations).

123. See Joint Drug Agreement, *supra* note 23, at 35.

undetectable through urine testing,¹²⁴ and enforces a strict liability policy by holding players accountable for banned substances within their bodies regardless of intent.¹²⁵ Players are responsible for knowing the banned PEDs and making sure they are not exposed to them.¹²⁶ Unfortunately, even with these measures, the Joint Drug Agreement has proven to be inadequate, not only with respect to drug testing, but also in issuing proper punishments.¹²⁷ This is evident in the recent Biogenesis Scandal, where zero out of the thirteen players suspended actually tested positive for PEDs,¹²⁸ and in Commissioner Selig's arbitrary decision to suspend New York Yankees' third baseman Alex Rodriguez for an unprecedented 211 games, which was later reduced to 162 games after an arbitration hearing.¹²⁹ Although the Joint Drug Agreement is considered the toughest in The Leagues, it has its deficiencies.¹³⁰

2. National Football League

The NFL began testing for PEDs in 1987—long before MLB¹³¹—and issued its first suspensions in 1989.¹³² However, in this ever-evolving world of PEDs, the NFL's drug policy remained virtually unchanged for almost twenty years.¹³³ In 2007, the NFL and the National Football League Players' Association ("NFLPA") agreed on the new, tougher, National Football League's 2010 Policy and Program for Substances of Abuse ("NFL Drug Policy").¹³⁴ Most notably, the NFL

124. See Joe Halverson, *MLB Blood Testing Will Detect More than Just HGH*, INT'L BUS. TIMES (Jan. 14, 2013, 4:20 PM), <http://www.ibtimes.com/sportsnet/mlb-blood-testing-will-detect-more-just-hgh-1014402> (noting that MLB has become the first league to conduct HGH testing).

125. See Joint Drug Agreement, *supra* note 23, at 46. The strict liability clause states: "The Commissioner's Office is not required to otherwise establish intent, fault, negligence, or knowing use of a Prohibited Substance on the Player's part." *Id.*

126. See *id.*

127. See Svrluga, *supra* note 29.

128. See *id.*

129. See Greenberg, *supra* note 111.

130. See Jennifer Laaser & John Fauber, *Baseball's Drug Testing: Thorough or Easily Thwarted?*, J. SENTINEL (July 14, 2013), <http://www.jsonline.com/news/health/up-to-20-major-league-players-to-be-suspended-but-not-because-of-stringent-tests-b9939132z1-215413631.html> (arguing that although MLB's drug program is considered the toughest in professional sports, it is still inadequate).

131. See Nancy Gay, *Steroids Spotlight Turns to Football*, S.F. GATE (Oct. 27, 2006, 4:00 AM), <http://www.sfgate.com/sports/article/Steroids-spotlight-turns-to-football-2548741.php>.

132. See *id.*

133. See *Timeline: A Century of Drugs and the Athlete*, USA TODAY (Mar. 1, 2007, 12:29 AM), http://usatoday30.usatoday.com/sports/2007-02-28-timeline-drugs-athlete_x.htm?loc=interstitialskip [hereinafter *Timeline*].

134. See Associated Press, *NFL to Test for More Performance-Enhancing Drugs*, ESPN (Jan. 24, 2007), <http://sports.espn.go.com/nfl/news/story?id=2741136> (reporting the NFL's new PED policy).

Drug Policy added Erythropoietin testing, increased the number of players randomly tested, and levied stricter fines.¹³⁵ In 2014, the NFL and the NFLPA agreed to new updates to the NFL Drug Policy.¹³⁶ The most significant improvements the NFL made to its new drug policy were the additions of HGH testing and the enlistment of an independent arbitrator to hear appeals.¹³⁷ The NFL follows a progressive disciplinary system and observes a strict liability standard similar to MLB.¹³⁸ Although the NFL issues frequent suspensions in accordance with its drug policy¹³⁹—similarly to MLB—the NFL’s testing and adjudication procedures are inadequate for many of the same reasons.¹⁴⁰ This is evident by a lawsuit filed and settled by two Denver Broncos players against the NFL, for being suspended despite never failing a drug test.¹⁴¹ The NFL alleged that the urine samples provided by the players were non-human, which is a separate violation of the NFL Drug Policy, but nonetheless deemed a “failure.”¹⁴² The mere possibility that the players were able to submit non-human samples, or that the NFL has mistakenly determined human samples to be non-human, is yet another example of the testing inadequacies of the NFL’s drug program.¹⁴³

3. National Basketball Association

Although MLB and the NFL have recognized PED use as a major issue within their respective leagues, the National Basketball Association (“NBA”) and the NHL continue to turn a blind eye to the issue.¹⁴⁴ The

135. See *id.* EPO is a hormone that regulates the production of red blood cells. Sigman, *supra* note 61, at 151.

136. See Jeff Gray, *NFL Releases Details of New Drug Policy*, SB NATION (Sept. 19, 2014, 5:05 PM), <http://www.sbnation.com/nfl/2014/9/19/6559533/nfl-new-drug-policy-details-nflpa> (explaining the updates the NFL made to its drug policy).

137. See *id.* NFL has also added an extra 2-game suspension for players that use masking agents to cover up their PED use. *Id.*

138. See NFL Policy and Program 2014, *supra* note 23, at 17, 27.

139. See, e.g., Brinson, *supra* note 24; Farrar, *supra* note 105.

140. See *supra* notes 101-13 and accompanying text.

141. See Farrar, *supra* note 105.

142. *Id.*

143. *Id.*

144. See IBTimes Staff Reporter, *Bulls' Derrick Rose: NBA Has a Steroids Problem*, INT'L BUS. TIMES (May 22, 2011, 6:00 AM), <http://www.ibtimes.com/bulls%E2%80%99-derrick-rose-nba-has-steroids-problem-644189>. Former NBA Commissioner David Stern, when asked about steroid use in the NBA, stated: “It’s not a problem at the present time that we think we have.” *Id.* However, when Derrick Rose, a point guard for the Chicago Bulls, was asked about steroid use in the NBA, he said: “It’s huge, and I think we need a level playing field, where nobody has that advantage over the next person.” *Id.* From this comparison, one can infer that Rose, who is in the locker rooms and who likely knows more about player activity behind the scenes, is concerned that PED use is affecting the NBA, while Stern is content with the NBA’s revenue stream. *Id.*; see also Kathy Kiely, *Focus on NBA, NHL to Improve Drug-Testing Policies*, USA TODAY (Nov. 15, 2005,

NBA failed to add steroids to its banned substance policy until 1999.¹⁴⁵ The testing was also quite inconsistent amongst all players, as it only tested veterans once a year,¹⁴⁶ and rookies four times a year.¹⁴⁷ Moreover, the new Anti-Drug Program, which came into effect in 2012, is only a slight improvement.¹⁴⁸

Under the new NBA Anti-Drug Program, a first offense results in a 20-game suspension, a second offense results in a 45-game suspension, and a third offense results in a permanent suspension with an option for reinstatement after two years.¹⁴⁹ However, a player may only be reinstated after he has acquired the Commissioner's and the Players Association's approval.¹⁵⁰ In addition, the players can only be tested a maximum of four times during a season, which is better than the previous agreement—only testing veteran players once during the entire year—but is still far too infrequent.¹⁵¹ Furthermore, the NBA Anti-Drug Program does not include blood testing or HGH testing.¹⁵² Because of the infrequent testing and lack of HGH testing, NBA's Anti-Drug Program lacks the sophistication of MLB's and the NFL's programs, which, as previously mentioned, have proven inadequate to rid The Leagues of PEDs and give players proper due process.¹⁵³

11:38 PM), http://usatoday30.usatoday.com/sports/basketball/nba/2005-11-15-nhl-nba-drug-testing-sidebar_x.htm (arguing that both the NBA and the NHL lack strong PED policies).

145. See *Timeline*, *supra* note 133. This timeline shows that the NBA and the NHL did not add PEDs to their drug policies until the late 1990s and early 2000s, respectively. *Id.*

146. See Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle – A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs That Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 132 (2006) (mentioning that veterans—players with more than one year of service time in the NBA—were only allowed to be tested once a year under the old policy).

147. See *id.* (comparing the old NBA drug policy to the new one).

148. See *id.* at 133; see also *Nothin' But Net: NBA Drug Policy Barely Adequate*, FOX NEWS (Aug. 29, 2013), <http://www.foxnews.com/sports/2013/08/28/nothin-but-net-nba-drug-policy-barely-adequate> (arguing that the NBA's drug policy is barely adequate since there is no blood testing, and other than the four random times the players are drug tested, all other testing requires reasonable cause).

149. See NBA Collective Bargaining Agreement, *supra* note 23, at 430-31, 435.

150. *Id.* at 436.

151. See *id.* at 419; *Nothin' But Net: NBA Drug Policy Barely Adequate*, *supra* note 148 (emphasizing the inadequacy of the NBA drug program). In addition to the random testing, the NBA may test a player if the NBA or the Players' Association has reasonable cause to believe that a player is engaged in the use of a banned substance. NBA Collective Bargaining Agreement, *supra* note 23, at 416-17; see also Fortenberry & Hoffman, *supra* note 146, at 132 (comparing the NBA's old testing policies to the newer ones).

152. See *Nothin' But Net: NBA Drug Policy Barely Adequate*, *supra* note 148.

153. See *id.*; *supra* Part II.A.1-2.

4. National Hockey League

The NHL expresses a similar lack of urgency, with players expressing their concern over inadequate PED testing standards.¹⁵⁴ The NHL did not begin testing for PEDs until 2005.¹⁵⁵ While the NHL previously had a banned substance list, it did not mandate testing, and thus, the system was wholly ineffective.¹⁵⁶ Similar to the NBA, the NHL's current testing is too infrequent, as players are only tested three times a year.¹⁵⁷

Under the current NHL policy, a first offense results in a 20-game suspension, a second offense results in a 60-game suspension, and a third offense results in permanent suspension from the league.¹⁵⁸ Players have the option to reapply for reinstatement after serving a two-year suspension, at the Program Committee's discretion.¹⁵⁹ The NHL also observes a strict liability standard and does not accept lack of intent as a defense to a PED violation.¹⁶⁰ However, the NHL's policy of minimal off-season testing and its lack of blood and HGH testing have rendered its policy extremely ineffective.¹⁶¹

Because the NHL has not had a high-profile scandal involving PED use, many people assume that PED use is not common in the NHL.¹⁶² However, Georges Laraque, a former Montreal Canadiens player, in his autobiography, *Georges Laraque: The Story of the NHL's Unlikeliest Tough Guy*, reveals the widespread use of PEDs in the NHL.¹⁶³ He also expresses his concern for player safety, since the NHL is the only league that allows player fights.¹⁶⁴ PED use by players is extremely dangerous, not only because of its physical effects, but also because of its mental

154. See Brough, *supra* note 24 (expressing NHL player Jonathan Toews's concern over low testing standards in the NHL).

155. See *Timeline*, *supra* note 133.

156. See Fortenberry & Hoffman, *supra* note 146, at 135 ("The closest thing the NHL had to a steroid policy at the start of the steroid controversy was the NHL's Substance Abuse and Behavioral Health Program ('SABHP') which was created in 1996. If a player voluntarily participated in that program, he was not disciplined.").

157. See NHL Collective Bargaining Agreement 2012, *supra* note 23, at 190. The players are only tested three times a year. *Id.* However, similar to the NBA, the NHL also has reasonable cause testing procedures. *Id.* at 190-91.

158. *Id.* at 191-92.

159. *Id.* at 192.

160. *Id.* at 193.

161. See Sean Sarcu, *Could the NHL Have a Performance Enhancing Drug Problem?*, HOCKEY WRITERS (Mar. 3, 2014), <http://thehockeywriters.com/nhl-performance-enhancing-drug-problem>. Washington Capitals player Nicklas Backstrom was not allowed to play the gold medal game for Sweden during the 2014 Winter Olympics because he failed an International Olympic Committee drug test. *Id.*

162. *Id.*

163. See LARAQUE, *supra* note 18, at 132-33.

164. *Id.* at 131-33.

effects, such as aggression and rage.¹⁶⁵ This illustrates the pressing need for a more comprehensive PED program in the NHL.¹⁶⁶

III. GOVERNMENT ATTEMPTS TO FIX THE PROBLEM AND THE IMPORTANCE OF GOVERNMENT INTERVENTION

I'm on steroids, what do you think? Who do you think I am? I'm a baseball player, baseball players take steroids. How do you think Bonds hits all his home runs? How do you think all these guys do all this stuff? You think they do it from just working out normal?

– Rob Garibaldi, *Revolution in the Bleachers: How Parents Can Take Back Family Life in a World Gone Crazy Over Youth Sports*¹⁶⁷

To rid The Leagues of PEDs, government intervention is crucial, as evidenced by the above quoted young athlete who began using steroids at age sixteen, and eventually committed suicide at age twenty-four because of the mental effects of steroids.¹⁶⁸ It is necessary for many of the same reasons that The Leagues' current policies are inadequate,¹⁶⁹ and because the effects of PEDs are no longer confined to The Leagues.¹⁷⁰ Subpart A discusses how PED use is affecting society, with an alarming trend among youth.¹⁷¹ Additionally, it explores the need for better management of the PED use issue for the players and The Leagues themselves.¹⁷² Subpart B focuses on the BALCO Scandal and its importance in the fight against PEDs.¹⁷³ Subpart C explains how, despite congressional efforts to resolve the PED use issue in the past, Congress has fallen short of making any significant impact.¹⁷⁴ Subpart D addresses the Biogenesis Scandal and the lack of owner accountability, further illustrating the inadequacies of the current programs.¹⁷⁵ Finally,

165. See *id.* Laraque discusses how PEDs desensitize the players, resulting in the players not feeling pain, and thus, fighting longer and harder. *Id.*

166. See Kiely, *supra* note 144.

167. See REGAN MCMAHON, *REVOLUTION IN THE BLEACHERS: HOW PARENTS CAN TAKE BACK FAMILY LIFE IN A WORLD GONE CRAZY OVER YOUTH SPORTS* 87 (2007) (internal quotation marks omitted).

168. See Svrluga, *supra* note 29 (arguing that the recent Biogenesis Scandal is proof that current testing in MLB is inadequate); *infra* Part IV (suggesting that a hybrid-agency with government oversight is necessary to rid professional sports of PEDs).

169. See *supra* Part II.C.

170. See MCMAHON, *supra* note 167, at 86-87, 92-94 (explaining how PED use in young athletes has become an epidemic).

171. See Calfee & Fadale, *supra* note 2, at e578, e581; *infra* Part III.A.

172. See *infra* Part III.A.

173. See *infra* Part III.B.

174. See *infra* Part III.C.

175. See *infra* Part III.D.

Subpart E provides a brief overview of the USADA and explains why it is not a viable solution for The Leagues.¹⁷⁶

A. *Why Is Such Reform Necessary?*

PED use in sports is a serious epidemic that is becoming more evident as the various negative effects of PEDs are discovered.¹⁷⁷ While the use of PEDs is not a recent phenomenon, it is particularly dangerous in today's society.¹⁷⁸ With The Leagues being more competitive than ever, and the pressure to perform being at an all-time high, the use of PEDs has trickled its way down to amateur athletes in high schools and colleges across the country.¹⁷⁹ Fueling this epidemic are all of The Leagues' current PED programs, which lack the sophistication that can be achieved with a unified PED policy and program.¹⁸⁰ Because PED use has become an epidemic, the time to take serious action against PED use is now; and, to make this action effective, a collaborative effort between the government and The Leagues is necessary.¹⁸¹

1. Effects of Performance Enhancing Drugs on Society

PED use is no longer confined to professional sports.¹⁸² Many high school and college athletes use PEDs, as well.¹⁸³ In fact, as of 2006, PED use was about eleven percent among high school males, and about three percent among high school females.¹⁸⁴ Children as young as nine years of age are using PEDs.¹⁸⁵ Regrettably, PED use results in the deaths of amateur athletes throughout the country.¹⁸⁶ The first step in preventing these tragedies is providing governmental oversight at the professional level.¹⁸⁷ Young athletes are watching their heroes and idols hit massive

176. See *infra* Part III.E.

177. See MCMAHON, *supra* note 167, at 89-90 (explaining that the effects of PEDs on youths can be more severe than on adults); *supra* Part II.A.

178. See MCMAHON, *supra* note 167, at 88-89; see *infra* Part III.A.1.

179. See *supra* notes 1-10 and accompanying text (discussing Bob Costas's view of the competitive nature of MLB); see *infra* Part III.A.1.

180. See *supra* Part II.C; *infra* Part IV.A.

181. See *infra* Part III.A.1; *infra* Part IV.B.

182. See, e.g., Jeffrey A. Crossman, Comment, *Mark McGwire Does It, So Why Can't I? High School Student Use of Dietary Supplements and the Failure of DSHEA*, 28 CAP. U. L. REV. 617, 620-29 (2000) (exploring various factors that have caused an increase in the use of PEDs by amateur athletes, such as pressure from parents and coaches, and professional athletes as role models who use PEDs).

183. See Calfee & Fadale, *supra* note 2, at e578-79, e581.

184. See *id.* at e581.

185. See *id.*

186. See Brittain, *supra* note 80.

187. See MCMAHON, *supra* note 167, at 88 (noting that often when young athletes use PEDs, it is because they hear about their role models in The Leagues using PEDs); *infra* Part IV.

homeruns, tackle opposing players with brute force, make backboard-shattering dunks, and take faster slap shots.¹⁸⁸ The allure of such fame motivates young athletes to achieve a level of performance which many times can only be achieved through PED use.¹⁸⁹

2. Effects of Performance Enhancing Drugs on The Leagues

Government intervention will protect The Leagues' interests, as well.¹⁹⁰ Currently, PED issues are resolved through an arbitration process, and can eventually lead to litigation involving the Commissioner or the league as a party.¹⁹¹ These arbitration hearings and lawsuits place an unnecessary burden on The Leagues and their respective Commissioners, as well as the courts of law.¹⁹² PED disputes distract the league Commissioners from other important league matters and tie up the courts with issues that can be resolved elsewhere.¹⁹³ Furthermore, these proceedings cause an unnecessary rift between the players and their respective leagues.¹⁹⁴

3. Effects of Performance Enhancing Drugs on the Players

Due to the various ways The Leagues are mishandling the PED epidemic, players lack faith and trust in the current systems and repeatedly question the procedures.¹⁹⁵ Over the past fifteen years, there have been numerous leaks of confidential information to the media

188. See *supra* Part I. President George W. Bush discussed the effect of PED use in The Leagues on young athletes: "The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message—that there are shortcuts to accomplishment, and that performance is more important than character." SANTO & MILDNER, *supra* note 25, at 174.

189. See Calfee & Fadale, *supra* note 2, at e578 (arguing that the use of PEDs by professional athletes is one of the leading causes for the growing PED use in high school and college athletes).

190. See Bryan Hoch, *A-Rod Files Lawsuits Against MLB, Doctor*, MLB.COM (Oct. 4, 2013), http://losangeles.dodgers.mlb.com/news/article/nyy/alex-rodriquez-files-lawsuit-against-major-league-baseball-commissioner-bud-selig?ymd=20131004&content_id=62459560&vkey=news_nyy (reporting that Alex Rodriguez is suing MLB, Bud Selig, and a New York Yankees team doctor).

191. See *id.*

192. See *id.*; see also Matt Schiavenza, *Bud Selig's Misguided, Last-Minute Push Against Steroids in Baseball*, ATLANTIC (June 13, 2013, 8:43 AM), <http://www.theatlantic.com/entertainment/archive/2013/06/bud-selig-misguided-last-minute-push-against-steroids-in-baseball/276776> (arguing that Commissioner Selig's focus is solely on PEDs and that the recent Biogenesis Scandal has been extremely time consuming for Commissioner Selig).

193. See Hoch, *supra* note 190; Schiavenza, *supra* note 192; *infra* Part IV.B.

194. See, e.g., Greenberg, *supra* note 111.

195. See, e.g., Hoch, *supra* note 190. In response to the St. Louis Cardinals signing Johnny Peralta to a four-year, \$53 million contract, Brad Zeigler, a relief pitcher for the Arizona Diamondbacks and a Player Representative for the MLBPA, tweeted: "We thought 50 games would be a deterrent . . . Obviously, it's not. So we are working on it again." White, *supra* note 102. Peralta had previously been punished by MLB for violating MLB's PED policy. *Id.*

regarding the identities of players accused of violating drug policies.¹⁹⁶ PED use is an extremely sensitive and serious issue, and the confidentiality of the entire investigation process is crucial.¹⁹⁷ Player identities have been leaked before they are provided proper due process.¹⁹⁸ The need for fixing this problem is evidenced by the fact that identities of players who have ultimately been deemed “clean” have been leaked alongside the identities of players that did in fact use PEDs.¹⁹⁹ Although each league’s PED policy contains a confidentiality clause, they are seldom enforced.²⁰⁰ This is a serious infringement on the players’ privacy rights, who trust and allow The Leagues to collect samples of their blood and urine, only to have that information leaked to the media.²⁰¹

B. The BALCO Scandal

The BALCO Scandal²⁰² changed the landscape of PEDs in professional sports forever.²⁰³ It brought the often underground and overlooked PED issue to the front pages of newspapers.²⁰⁴ BALCO was a small supplement clinic in California, owned and operated by Victor Conte,²⁰⁵ who provided PEDs to MLB, NFL, and track and field athletes.²⁰⁶ The federal government commenced an investigation into the BALCO clinic in 2002, focusing the investigation on alleged money

196. See David Adelsberg, Note, *Did the MLBPA Strike Out? An Analysis of Union Liability in Major League Baseball's Anonymous 2003 Steroid Testing*, 28 CARDOZO ARTS & ENT. L.J. 695, 703-04 (2011) (discussing the issue of leaked player names in the media after anonymous drug testing); see also Perry, *supra* note 103 (stressing how leaked player names harm the integrity of the Joint Drug Agreement).

197. See Adelsberg, *supra* note 196, at 697-700, 703-04.

198. See Perry, *supra* note 103.

199. See James Wagner, *Nationals' Gio Gonzalez Cleared in Biogenesis Case*, WASH. POST, Aug. 5, 2013, http://articles.washingtonpost.com/2013-08-05/sports/41093861_1_biogenesis-mlb-investigators-gio-gonzalez (reporting that MLB pitcher Gio Gonzalez, who was initially named in the Biogenesis Scandal, never used PEDs).

200. See, e.g., Joint Drug Agreement, *supra* note 23, at 26-33; NBA Collective Bargaining Agreement, *supra* note 23, at 411-13; NFL Policy and Program 2014, *supra* note 23, at 6-8; NHL Collective Bargaining Agreement 2012, *supra* note 23, at 194. But see *supra* notes 195-99 and accompanying text (exploring the confidentiality issue concerning PED testing).

201. See Adelsberg, *supra* note 196, at 697-98, 703-04.

202. See MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROID SCANDAL THAT ROCKED PROFESSIONAL SPORTS* 263 (2006). In 2003, the BALCO Scandal exposed how prevalent PED use was in professional sports, especially through publication of the grand jury testimony of MLB players Jason Giambi and Barry Bonds. *Id.*

203. See *id.*; McDuff & Baron, *supra* note 21, at 892.

204. See FAINARU-WADA & WILLIAMS, *supra* note 202, at 263.

205. See *id.* at 1.

206. *Id.* Athletes from all different sports were linked to the BALCO Scandal, from Olympic gold medalist Marion Jones to MLB superstar Barry Bonds. *Id.* at 1, 263.

laundering and illegal drug sales.²⁰⁷ However, the investigators quickly discovered that many superstar athletes were clients of Conte.²⁰⁸ Soon after, Mark Fainaru-Wada and Lance Williams of the *San Francisco Chronicle* exposed the secrets of BALCO in groundbreaking articles and eventually through their book, *Game of Shadows: Barry Bonds, BALCO, and the Steroid Scandal that Rocked Professional Sports*.²⁰⁹

The BALCO Scandal was the first step in uncovering the underworld of PEDs in professional sports.²¹⁰ It emphasized the pervasive nature of PED use in The Leagues.²¹¹ Although the BALCO Scandal shed tremendous light on the PED issue, it has been more than a decade since the scandal, and no league has since implemented a meaningful solution to eliminate PED use.²¹²

C. *The Proposed Acts and The Mitchell Report*

After the BALCO Scandal exploded in 2003, the federal government felt pressured to step in and repair baseball (often referred to as “America’s game”).²¹³ Although the federal government indicted Conte, its power over MLB and its players was limited.²¹⁴ In response to this lack of power, Congress has made numerous attempts at passing bills, to no avail.²¹⁵ While Congress failed to pass adequate legislation, bad publicity and pressure from the government and fans led

207. See ROSEN, *supra* note 55, at 128.

208. See *id.* at 129.

209. See generally FAINARU-WADA & WILLIAMS, *supra* note 202; Michiko Kakutani, *America’s Game, America’s Scandal*, N.Y. TIMES, Mar. 23, 2006, at E1.

210. See Kakutani, *supra* note 209.

211. See *id.*

212. See *supra* Part II.C.

213. See SANTO & MILDNER, *supra* note 25, at 174 (describing the pressure faced by the government and The Leagues after the BALCO Scandal).

214. See ROSEN, *supra* note 55, at 129-30; see also SANTO & MILDNER, *supra* note 25, at 176 (explaining how the acts proposed by the Senate and the House of Representatives failed to pass and were only able to convince MLB and its players to agree to more rigorous PED testing).

215. Clean Sports Act of 2005, S. 1114, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109s1114is/pdf/BILLS-109s1114is.pdf>. (proposing to “protect the integrity of professional sports and the health and safety of athletes generally by establishing minimum standards for the testing of steroids and other performance-enhancing substances by professional sports leagues”); Drug Free Sports Act, H.R. 3084, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109hr3084rh/pdf/BILLS-109hr3084rh.pdf>. (directing “the Secretary of Commerce to issue regulations requiring testing for steroids and other performance-enhancing substances for certain sports associations engaged in interstate commerce”); Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109s1334is/pdf/BILLS-109s1334is.pdf>. (making it “unlawful for a professional sports league to organize, sponsor, endorse, promote, produce, or recognize a professional sports event without adopting and enforcing a testing policy” that met the requirements in the Act).

Commissioner Selig to request former Senator George Mitchell to investigate further into the underworld of PEDs in MLB.²¹⁶ After 21 months of investigation and more than 700 interviews with players, coaches, and other league employees, Mitchell presented *The Mitchell Report*.²¹⁷ *The Mitchell Report* named 86 current and former MLB players that were linked to the use of PEDs.²¹⁸ While some of the names were the same as those disclosed by the BALCO Scandal, many new names surfaced, as well.²¹⁹ Mitchell urged MLB and Commissioner Selig to enforce stricter PED regulations and to create an independent investigation department with legal expertise to address the PED issue.²²⁰ *The Mitchell Report* led to a new Joint Drug Program, which implemented stricter PED regulations, but, as previously mentioned, has failed to effectively reduce PED use in MLB.²²¹

D. *The Biogenesis Scandal and Lack of Owner Accountability*

The Biogenesis Scandal is a prime example of the failure of the PED programs currently employed by The Leagues.²²² The Biogenesis Scandal—now known as the largest PED scandal in MLB history—began in South Florida, where Anthony Bosch, owner of the Biogenesis Clinic, began supplying PEDs to many well-known MLB players.²²³ As a result of the investigation conducted by MLB, thirteen players were suspended for the use of PEDs, though none of the players tested positive for PEDs.²²⁴ Bosch, during an interview with *60 Minutes*, illustrated how easy it was for him and the players to maneuver around the current MLB testing protocol.²²⁵ He explained that a dose of a particular PED, ingested a few minutes before a game, would disappear

216. See ROSEN, *supra* note 55, at 188-89; SANTO & MILDNER, *supra* note 25, at 176.

217. See MITCHELL, *supra* note 44; ROSEN *supra* note 55, at 189.

218. See ROSEN, *supra* note 55, at 189; SANTO & MILDNER, *supra* note 25, at 176-77.

219. See *Players Listed in the Mitchell Commission Report*, ESPN (Dec. 13, 2007, 9:17 PM), <http://sports.espn.go.com/mlb/news/story?id=3153646>.

220. See MITCHELL, *supra* note 44, at 285-90.

221. See Brian Borawski, *BOB: Union and Players Agree on New Joint Drug Agreement*, *HARDBALL TIMES* (Apr. 16, 2008), <http://www.hardballtimes.com/bob-union-and-players-agree-on-new-joint-drug-agreement> (reporting that MLB has adopted several recommendations from *the Mitchell Report*, including an Independent Program Administrator and 600 additional tests per year); see also *supra* Part II.C.1 (highlighting the inadequacy of the current MLB Joint Drug Program).

222. See Svrluga, *supra* note 29.

223. See Steve Fishman, *Chasing A-Rod*, *N.Y. TIMES*, Dec. 9, 2013, at 36, 38-39 (explaining how the information about the suspended players leaked, and the steps taken by MLB and Alex Rodriguez to acquire and suppress the information).

224. See Svrluga, *supra* note 29; see also Peltz & Bailey, *supra* note 24 (listing the thirteen players that were suspended).

225. See *60 Minutes: The Case of Alex Rodriguez* (CBS television broadcast Jan. 12, 2014).

from the player's system before the game ended, rendering the PED virtually undetectable under the current programs.²²⁶

Even in the absence of positive test results, Alex Rodriguez and Ryan Braun faced unprecedented suspensions.²²⁷ Braun received a 65-game suspension, while Rodriguez was given a 211-game suspension.²²⁸ Both of these suspensions were longer than the 50-game suspension prescribed, at the time, by the Joint Drug Agreement for first-time offenders.²²⁹ Although both players had previously been linked to using PEDs, neither had been punished.²³⁰ Braun, who tested positive in 2011, escaped punishment due to a technicality—his urine sample was mishandled; yet another example of the many shortcomings of the current program.²³¹ Rodriguez, who admitted to using PEDs in 2009, never failed a drug test under the Joint Drug Agreement.²³² Therefore, these suspensions for over 50 games appear to be arbitrary and based entirely on the Commissioner's discretion,²³³ causing a lack of trust amongst players in the current drug program.²³⁴

Rodriguez challenged his unprecedented 211-game suspension by not only appealing through the MLB arbitration process, but also by filing three separate lawsuits in federal court.²³⁵ Rodriguez left the arbitration process prior to its completion, claiming that the process was frustrated by Commissioner Selig's failure to report to the hearing and arbitrator Fredric Horowitz's ruling that Commissioner Selig could not be compelled to testify.²³⁶ Horowitz proceeded to rule on the incomplete

226. *Id.*

227. *See* Svrluga, *supra* note 29.

228. *See id.*; *see also* Peltz & Bailey, *supra* note 24 (listing Alex Rodriguez as one of the thirteen players to be suspended as a result of the Biogenesis Scandal).

229. *See* Svrluga, *supra* note 29.

230. *See* SELENA ROBERTS, A-ROD: THE MANY LIVES OF ALEX RODRIGUEZ 168 (2009); Laaser & Fauber, *supra* note 130.

231. *See* Laaser & Fauber, *supra* note 130.

232. *See* ROBERTS, *supra* note 230, at 168; SANTO & MILDNER, *supra* note 25, at 177-78; *see also* Svrluga, *supra* note 29 (emphasizing the fact that all of the players suspended because of the Biogenesis Scandal did not actually test positive for PEDs).

233. *See* Joint Drug Agreement, *supra* note 23, at 40. The MLB Commissioner has complete discretion to suspend a player upon non-analytical evidence for however many games he sees fit. *Id.* The prescribed lengths of suspensions in the Joint Drug Agreement are only for failed drug tests. *Id.* at 35.

234. *See, e.g.*, Greenberg, *supra* note 111.

235. *See* Hoch, *supra* note 190. Rodriguez accused MLB and Commissioner Selig "of conducting a 'witch hunt' and engaging in 'tortious interference' with his contracts and business relationships." *Id.* He also filed a lawsuit against New York Yankees physician Dr. Christopher Ahmad, alleging "'careless and professional negligence' on the part of Ahmad, who is said to have missed a superior labral tear at the left hip, 'thus allowing [Rodriguez] to further injure himself and the necessity for additional surgeries.'" *Id.* (alteration in original).

236. *See* Patrick Rishe, *Blown Call: A-Rod Right to Storm Out of Appeal After Arbitrator Rules*

hearing and lowered Rodriguez's suspension from 211 games to 162 games.²³⁷ After Horowitz announced his decision, Rodriguez stated:

This is one man's decision, that was not put before a fair and impartial jury, does not involve me having failed a single drug test, is at odds with the facts and is inconsistent with the terms of the Joint Drug Agreement and the Basic Agreement, and relies on testimony and documents that would never have been allowed in any court in the United States because they are false and wholly unreliable.²³⁸

This failed arbitration further highlights the flaws of the current Joint Drug Agreement and the lack of proper due process for the players.²³⁹

Under the current program, there is little deterrence against the use of PEDs—Johnny Peralta, who was suspended for 50 games for violating the PED policy, returned to play and was rewarded with a \$53 million contract,²⁴⁰ resulting in outrage from many players in MLB who called for stricter policies that would eliminate the incentive to use PEDs.²⁴¹ This illustrates the growing sentiment among players that, in order to cure the competitive imbalance created by PED use, they should not begin using PEDs themselves, but rather, try to ensure none of their competitors use PEDs.²⁴² Likewise, there is little deterrence for owners to sign possible PED users, since the owners are relieved from paying the suspended player's salary while the player serves his suspension.²⁴³ When an owner awards a PED user a \$53 million contract after his suspension, it is quite apparent that there is a huge incentive for players

for No-Show Selig, FORBES (Nov. 22, 2013, 6:52 AM), <http://www.forbes.com/sites/prishe/2013/11/22/hey-a-rod-this-bud-isnt-for-you-as-independent-arbitrator-horowitz-makes-foul-call> (reporting that Rodriguez left the arbitration unfinished).

237. See Greenberg, *supra* note 111.

238. See *id.*

239. See *id.*; see also Rishe, *supra* note 236 (explaining that the arbitrator ruled that Commissioner Selig did not have to testify in person at the arbitration hearing).

240. See White, *supra* note 102.

241. See *id.*

242. See, e.g., Brough, *supra* note 24; IBTimes Staff Reporter, *supra* note 144; White, *supra* note 102.

243. See FAINARU-WADA & WILLIAMS, *supra* note 202, at 77. In their book, Mark Fainaru-Wada and Lance Williams write that when they began breaking news about BALCO and Barry Bonds's trainer Greg Anderson—who was also rumored to be a PED dealer linked to BALCO—the San Francisco Giants' ownership refused to take any action and continued to allow Anderson access to the clubhouse. *Id.* Such a lack of concern from the owners continues to be a problem. White, *supra* note 102; see Paul White, *Buck Showalter Steamed at Yanks' Possible A-Rod Windfall*, USA TODAY (July 31, 2013, 9:07 PM), <http://www.usatoday.com/story/sports/mlb/2013/07/31/buck-showalter-alex-rodriguez-lifetime-ban-biogenesis/2606313> (reporting that Baltimore Orioles' manager Buck Showalter was angry at the fact that Rodriguez's suspension will allow the New York Yankees to use the money they saved from his contract to sign other players).

to use PEDs, and little deterrence for owners against awarding PED users such lucrative contracts.²⁴⁴

E. *United States Anti-Doping Agency*

Until now, one of the most successful interventions of the government into the PED world has been the formation of the USADA.²⁴⁵ The USADA was created in 2000 after President Bill Clinton formed the White House Task Force on Drug Use in Sports.²⁴⁶ The USADA was designed to regulate the use of PEDs in the Olympics after U.S. athletes were accused of, and criticized for, the use of PEDs.²⁴⁷ President Clinton expressed the seriousness of the steroid issue in an executive order by stating: “The use of drugs in sports has reached a level that endangers not just the legitimacy of athletic competition but also the lives and health of athletes—from the elite ranks to youth leagues.”²⁴⁸

The USADA is a non-governmental agency that operates under Colorado law, and is primarily funded by the federal government.²⁴⁹ The USADA is comprised of five board members who are elected from outside the Olympic system, and five board members who are elected from a pool of former Olympic athletes.²⁵⁰ The USADA enforces the same guidelines as the World Anti-Doping Agency (“WADA”), which oversees “doping”²⁵¹ in international sporting events.²⁵² Under the USADA, any athlete planning to participate in an international event is subject to random drug testing at any time.²⁵³ After an athlete fails a drug test, the results are submitted to the Anti-Doping Review Board, which is comprised of three to five medical, technical, and legal experts, for

244. See Ted Berg, *If MLB Is Serious About Stopping Steroids, Teams Should Be Punished Too*, USA TODAY (Nov. 21, 2013, 11:47 AM), <http://ftw.usatoday.com/2013/11/alex-rodriguez-yankees-peds-steroids-mlb-sanctions> (proposing that to stop PED use, it is essential that the owners should be subject to some kind of sanctions); see also White, *supra* note 102 (relaying the player outrage regarding the contract awarded to Peralta by the St. Louis Cardinals).

245. See *USADA's Anti-Doping Programs*, *supra* note 47.

246. See Exec. Order No. 13165, 3 C.F.R. § 100–02 (2001).

247. See Sarah L. Horvitz et al., *Dopers Are Not Duped: USADA's Assistance to Federal Prosecutions Ultimately Protecting Clean Athletes Is Not State Action*, 19 MARQ. SPORTS L. REV. 39, 43–44 (2008) (addressing the purpose of the USADA).

248. See 3 C.F.R. § 100–02.

249. See Horvitz, *supra* note 247, at 44–45.

250. See *id.* at 45.

251. *Doping*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/doping> (last visited Feb. 15, 2015) (“[T]he use of a substance (as an anabolic steroid or erythropoietin) or technique (as blood doping) to illegally improve athletic performance.”).

252. See Horvitz, *supra* note 247, at 59; World Anti-Doping Agency, World Anti-Doping Code 11–13 (2009), available at http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf.

253. See Horvitz, *supra* note 247, at 45–46.

final review.²⁵⁴ If the athlete is found guilty, he may appeal to an arbitration tribunal whose decision is final, with no option to appeal to federal court.²⁵⁵ Consequences of a violation include disqualification from a particular event, forfeiture of medals, fines, and ineligibility to compete for a certain period of time.²⁵⁶

In 2005, Senator John McCain recommended the USADA as an option for The Leagues.²⁵⁷ Although the USADA is one of the better, more successful models of an anti-doping agency, it is not the best solution for The Leagues.²⁵⁸ Despite MLB and the NFL having paired up with the USADA and the United States Olympic Committee to create the Partnership for Clean Competition²⁵⁹—an organization that conducts PED research—they have refused to adopt the USADA as their primary testing agency.²⁶⁰ The lack of player representation and the significant differences between the Olympics and The Leagues, are two possible reasons why The Leagues have opposed the USADA's involvement.²⁶¹ The Leagues require a more specialized agency, tailored to the unique models of The Leagues.²⁶²

IV. THE CONTRACT AND THE HYBRID-AGENCY

The Leagues have all attempted different methods to combat PED use.²⁶³ However, as past and present controversies have shown, The Leagues have failed to rid themselves of the PED issue.²⁶⁴ The negative effects of PEDs, which were once contained within The Leagues, have

254. See *id.* at 46-47.

255. See *id.* at 47.

256. See *Athlete Handbook*, U.S. ANTI-DOPING AGENCY 33 (2014), <http://www.usada.org/uploads/athletehandbook.pdf>.

257. See Thomas Heath, *McCain Wants USADA to Test Major Sports*, WASH. POST, May 25, 2005, at D2 (explaining Senator John McCain's proposal to The Leagues to adopt the USADA as their PED program).

258. See Stewart, *supra* note 48, at 232-36 (criticizing the USADA for binding athletes to arbitration as the only avenue to challenge a sanction). In order to enforce a lifetime ban in The Leagues, it is crucial that players are afforded proper due process, including an opportunity to appeal to the courts. *Id.*

259. See *About*, PARTNERSHIP FOR CLEAN COMPETITION, <http://www.cleancompetition.org/pages/about.aspx> (last visited Feb. 15, 2015).

260. See John Helyar, *Can MLB, NFL and USADA All Get Along in Anti-Doping Coalition?*, ESPN (Jan. 11, 2008, 3:23 PM), <http://sports.espn.go.com/espn/columns/story?id=3191684> (noting the continuous refusal of MLB and the NFL to allow the USADA to control their drug programs).

261. See Stewart, *supra* note 48, at 228-37 (expressing how athletes' rights are lost in the USADA process).

262. See *infra* Part IV.B.

263. See *supra* Part II.C.

264. See *supra* note 24 and accompanying text.

spread into society.²⁶⁵ It is time that The Leagues stop resisting government intervention and team up with the government to establish a working solution.²⁶⁶ Subpart A argues that the most effective way to rid The Leagues and society of PEDs is to adopt a zero-tolerance policy, backed by a contractual agreement between the government and The Leagues, and to establish a hybrid-agency to enforce the zero-tolerance policy.²⁶⁷ Subpart B examines the make-up of the hybrid-agency and explains why a proper appeals process is necessary, and how that goal is to be accomplished.²⁶⁸ Subpart C addresses the constitutional challenges that the hybrid-agency will face.²⁶⁹ Finally, Subpart D concludes by explaining how this solution will appeal to all parties involved, and why this is an effective solution.²⁷⁰

A. Zero-Tolerance Policy

Current systems do little to deter players from using PEDs.²⁷¹ However, a zero-tolerance policy will leave little incentive for players to use PEDs.²⁷² For players, an 80-game suspension in MLB, or a 4-game suspension in the NFL, is a risk worth taking if it means a chance to play in The Leagues and the opportunity to sign a multi-million dollar contract.²⁷³ The choice between not being able to play and taking a chance with PEDs—which will only result in a short suspension—is obvious for many players.²⁷⁴ Therefore, a zero-tolerance policy will significantly reduce, if not eliminate, the incentive to use PEDs.²⁷⁵

While it is important to deter players from using PEDs, it is equally important to disincentivize owners from knowingly signing former PED users to multi-million dollar contracts.²⁷⁶ These types of contracts given to known PED users further encourage PED use by players.²⁷⁷ A major

265. See Calfee & Fadale, *supra* note 2, at e581.

266. Cf. Heath, *supra* note 257 (discussing Senator McCain's attempt to involve the government in PED testing in professional sports).

267. See *infra* Part IV.A.

268. See *infra* Part IV.B.

269. See *infra* Part IV.C.

270. See *infra* Part IV.D.

271. See White, *supra* note 102. Even after being suspended for PED use, the St. Louis Cardinals signed Johnny Peralta to a \$53 million contract. *Id.*

272. See Seidel, *supra* note 49. A zero-tolerance policy will impose a lifetime ban from the sport on any violators of the policy. *Id.*

273. See *id.* The Biogenesis Scandal has proven that the current programs are inadequate to deter players from using PEDs. White, *supra* note 102.

274. See White, *supra* note 102.

275. See *supra* notes 271-74 and accompanying text.

276. See Berg, *supra* note 244; see also TUOHY, *supra* note 19, at 186, 190.

277. See Crossman, *supra* note 182, at 622-26 (arguing that high profile athletes, such as Mark

issue throughout the PED era has been the lack of penalties against owners for their players' behavior.²⁷⁸ Although the owners cannot be held responsible for everything their players do, the owners must play a larger role in PED prevention by performing their due diligence with respect to PED use by their players and in their locker rooms.²⁷⁹ Unlike the current PED programs, under a zero-tolerance policy the owners will not be completely relieved of the banned player's contract.²⁸⁰ Rather, as part of the contract signed between The Leagues and the government, the owner will have to pay the average annual value²⁸¹ of the banned player's contract to the hybrid-agency in order to fund its operations.²⁸² This will force the owners to be more vigilant about the use of PEDs by their players, and much more cautious when signing players to multi-million dollar contracts.²⁸³

Along with the money from the suspended contracts, The Leagues themselves will fund the hybrid-agency.²⁸⁴ Currently, each league funds its own individual PED program.²⁸⁵ However, a joint program will allow each league to spend less, while having a better, more comprehensive program in place.²⁸⁶ This, in effect, will generate an incentive for The Leagues to participate in the joint program and create a quasi-subsidy for The Leagues, since it will cost each league less individually.²⁸⁷

McGwire, influence other players and young athletes to use PEDs).

278. See *supra* notes 243-44 and accompanying text; see also TUOHY, *supra* note 19, at 186, 190 (condemning MLB owners turning a blind eye to PED use in their locker rooms).

279. See Berg, *supra* note 244; see also TUOHY, *supra* note 19, at 186, 190 (reporting that owners had warnings of PED use "well before the steroid issue exploded on the front pages of newspapers").

280. See White, *supra* note 243.

281. Gordon Edes, *The ABCs of AAVs*, ESPN (Mar. 6, 2013, 9:23 AM), http://espn.go.com/blog/boston/red-sox/post/_id/25345/the-abcs-of-aavs. The average annual value of a contract is determined by dividing the total amount of the player's contract with the length of years of the contract. *Id.*

282. See White, *supra* note 243.

283. See White, *supra* note 102. Currently, owners can sign prior PED users to multi-million dollar contracts knowing that if the player is suspended again, they will not have to pay the player, and the team will be able to spend that money for another player. White, *supra* note 243. This eliminates any risk for the owners in signing and rewarding PED users. *Id.*

284. See Michael McCann, *Is the Government Wasting Tax Dollars on Roger Clemens' Trials?*, SPORTS ILLUSTRATED (May 1, 2012), http://sportsillustrated.cnn.com/2012/writers/michael_mccann/05/01/clemens.trial (reporting that people believe the government is wasting useful resources in pursuing the prevention of PED use in sports). This solution will receive widespread acceptance since the hybrid-agency will not require taxpayer money. *Id.*

285. See *supra* Part II.C.

286. See Paul Morosi, *Messy Realities of A-Rod Investigation Might Cost MLB Later*, FOX SPORTS (May 28, 2014, 6:20 PM), <http://msn.foxsports.com/mlb/story/alex-rodriguez-investigation-messy-realities-mlbpa-could-cause-labor-problems-later-011214> (noting the large amount of time and money MLB spent during the Biogenesis investigation).

287. See *id.* It will cost each individual league less to maintain a unified program as opposed to

Therefore, despite the government's role in the program, there will be no added burden on taxpayers.²⁸⁸

B. *The Hybrid-Agency*

The hybrid-agency²⁸⁹ will have a similar structure to the National Labor Relations Board ("NLRB"), consisting of a seven-member Board ("Board"), divisional judges, and investigators.²⁹⁰ Upon a possible failed drug test, investigators will seek to confirm the test results and gather other evidence to help strengthen their case.²⁹¹ Once the investigators confirm the failed drug test, a hearing will be held in front of an Administrative Law Judge ("ALJ").²⁹² The ALJ will adjudicate the matter by considering the test results, other proof against the player, and the evidence presented by the player.²⁹³ If the ALJ finds clear and convincing evidence of the player's guilt, only then will the player be banned.²⁹⁴ During the hearing before the ALJ, both the player and the investigator will be allowed to present evidence in accordance with the Federal Rules of Evidence.²⁹⁵ If the player or the hybrid-agency disputes the ruling, or the process, either party may appeal to the Board.²⁹⁶ After the Board makes its decision, the player or the hybrid-agency

maintaining their own separate programs. Helyar, *supra* note 260 (reporting that a combined venture between MLB, the NFL, and the USADA plans to raise \$10 million in the next four years). This is an example of how successful and effective a joint venture between The Leagues can be. *Id.*

288. See McCann, *supra* note 284. Many believe that the resources used by the government during Roger Clemens' trial were a wasteful use of taxpayer dollars. *Id.*

289. See KOSAR, *supra* note 50, at 2 (discussing quasi-governmental agencies).

290. See *Who We Are*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are> (last visited Feb. 15, 2015) (mentioning that the NLRB consists of a five-member Board, which acts as a quasi-judicial body, the General Counsel, and the Division of Judges).

291. *Cf. id.* The investigators will work from field offices located in each major city where there is a professional sports team.

292. See BLACK'S LAW DICTIONARY 51 (9th ed. 2009) ("Administrative Law Judge: An official who presides at an administrative hearing and who has the power to administer oaths, take testimony, rule on questions of evidence, and make factual and legal determinations.").

293. *Cf. Division of Judges*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/division-judges> (last visited Feb. 15, 2015).

294. See Stewart, *supra* note 48, at 231-32 (describing how USADA's "comfortable satisfaction" standard has rendered players so afraid that they even refrain from eating at restaurants in fear of unintentional doping). Therefore, it is crucial that a standard such as clear and convincing evidence be used. BLACK'S LAW DICTIONARY 636 (9th ed. 2009) (Clear and convincing evidence is defined as: "Evidence indicating that the thing to be proved is highly probable or reasonably certain.").

295. See FED. R. EVID. One of the biggest issues Rodriguez had with the arbitration process was the lack of evidentiary rules. Greenberg, *supra* note 111.

296. *Cf. Unfair Labor Practice Process Chart*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chartprocess> (last visited Feb. 15, 2015). In the NLRB, after the ALJ makes a decision, the Board has the final say to approve the decision or review it further. *Id.*

may further appeal to federal court.²⁹⁷ However, an appeal to a federal court will only be allowed once all other administrative remedies have been exhausted.²⁹⁸

A player facing a lifetime ban must have the option to appeal a decision of the Board, whether the player believes the decision is incorrect, or the player is unsatisfied with the process.²⁹⁹ With the hybrid-agency, the standard of review will be similar to that of an appeal from a federal agency decision.³⁰⁰ This will provide proper due process to the players by allowing them to have their case heard in court without any preconceived notions or biases.³⁰¹ Currently, a player's only practical form of recourse is arbitration; however, as evidenced by various court decisions,³⁰² it is extremely difficult to vacate an arbitration award, rendering an appeal of an arbitration decision virtually meaningless.³⁰³ With the new hybrid-agency, the court will not be constrained to the restrictive high standard for vacating arbitration decisions.³⁰⁴ Although some deference will be given to the hybrid-agency due to its perceived expertise,³⁰⁵ the court will be able to examine cases *de novo*.³⁰⁶

297. See, e.g., *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 960-61 (6th Cir. 1998). All NLRB decisions are appealable to federal court. *Id.*

298. Cf. *Unfair Labor Practice Process Chart*, *supra* note 296. In the NLRB, a Board decision can be reviewed by a court of appeals and the U.S. Supreme Court can review appeals from the court of appeals. *Id.*

299. See, e.g., *Fluor Daniel, Inc.*, 161 F.3d at 960-61.

300. See *id.* at 961. The court reviewed the Board's decision *de novo*. *Id.*

301. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("[E]stablished law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."); BLACK'S LAW DICTIONARY 575 (9th ed. 2009) ("[D]ue [P]rocess: The conduct of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.").

302. See, e.g., *Garvey*, 532 U.S. at 509 ("When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award."); *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62 (2000) (holding that even if the court finds that the arbitrator committed a serious error, the court may not overturn the arbitrator's decision); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[A] court should not reject an award on the ground that the arbitrator misread the contract."); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator.").

303. See *Garvey*, 532 U.S. at 509 ("We recently reiterated that if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'").

304. See *id.*

305. See *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (requiring courts to defer to statutory interpretations made by government agencies charged with enforcing the statutes unless the interpretations are unreasonable).

306. See *Fluor Daniel, Inc.*, 161 F.3d at 961; BLACK'S LAW DICTIONARY 500 (9th ed. 2009)

The hybrid-agency's adjudication structure will be composed of a Commissioners' Committee, comprised of the four League Commissioners, which will appoint the ALJs,³⁰⁷ and the Board, which will consist of seven members.³⁰⁸ The Players' Associations Presidents will elect two of the Board members; an Owners' Committee, consisting of owners' representatives from each league, will elect two members; and, the President of the United States will appoint the remaining three members.³⁰⁹ The Board members will serve three-year terms.³¹⁰ This structure will allow each interested party to have input in the process.³¹¹

After the three-year appointments, the progress of the hybrid-agency will be reevaluated and a new contract between the government and The Leagues will be negotiated.³¹² These short-term contracts will encourage The Leagues to feel comfortable with this new arrangement, and allow frequent evaluations of the program.³¹³ The hybrid-agency will be required to release annual progress reports illustrating its effectiveness to the U.S. President and The Leagues.³¹⁴ After the three-

("de novo: Anew"); see also Stewart, *supra* note 48, at 232-36 (arguing that the arbitration process USADA utilizes is not sufficient and can result in the violation of the athletes' due process rights).

307. See *Division of Judges*, *supra* note 293. The NLRB has a similar make-up to a Division of Judges who "docket, hear, settle and decide unfair labor practice cases nationwide." *Id.*

308. See *The Board*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/board> (last visited Feb. 15, 2015). The NLRB consists of five board members. *Id.*

309. See KOSAR, *supra* note 50, at 1 (explaining the benefits of hybrid-agencies, such as flexibility and freedom from restrictive laws that traditional government agencies need to follow). Having only three government representatives will allow the hybrid-agency to function with minimal governmental interference. *Id.*

310. Cf. Todd A. Curry & Mark S. Hurwitz, Address at the Annual Meeting of the American Political Science Association: Does Accountability Vary? Examining the Tenure of State Supreme Court Justices 7-8 (Sept. 2-5, 2010) (concluding shorter terms increase accountability). Every three years, a new Board will be elected. These shorter terms, compared to five-year terms of the NLRB Board, will allow more accountability and fluidity. *Id.*

311. See *supra* notes 307-10 and accompanying text. Since each league will be represented equally, no one league will receive different or unfair treatment. *Diversity on Boards*, NAT'L COUNCIL OF NONPROFITS, <http://www.councilofnonprofits.org/resources/resources-topic/boards-and-governance/diversity-boards> (last visited Feb. 15, 2015) (explaining the benefits of a diverse board). Additionally, since players will select two of the representatives, this will allow the players to have a say and not leave decisions in the hands of Commissioners and arbitrators. *History of the Major League Baseball Players Association*, *supra* note 106 (reviewing the history of collective bargaining in MLB). Furthermore, the Board members selected by the President will keep a check on not allowing the players to get too much power. See KOSAR, *supra* note 50, at 1 (explaining how a hybrid-agency allows for more freedom, as it is not bound by restrictive laws).

312. See, e.g., Basic Agreement, *supra* note 110, at 1.

313. See, e.g., *id.* The short terms allow MLB and the MLBPA to renegotiate after every four years. *Id.*

314. See *Annual Report*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/answers/annrep.htm> (last visited Feb. 15, 2015). The hybrid-agency will be required to file an annual report, similar to a Form 10-K required by the Securities and Exchange Commission, disclosing the progress of the hybrid-agency in the prior year. *Id.*

year period, the testing procedures, frequency of testing, and other changing aspects of the program, will be renegotiated, while the banned substance list will constantly be updated.³¹⁵ This will allow for a fluent policy that can adapt to the ever-changing world of PEDs.³¹⁶ The negotiations will be similar to the current collective bargaining negotiations—which create league agreements—and will consist of Players' Association Presidents, the Owners' Committee, and President-appointed government representatives.³¹⁷ During negotiations, the Players' Association Presidents and the Owners' Committee will negotiate as usual, and the government representatives will work as the arbiters.³¹⁸ The impartial government representatives will help prevent any league biases, lockouts, or strikes, and will help keep the procedures fair.³¹⁹ The Players' Association Presidents and the Owners' Committee will attempt to come to an agreement, but if they reach an impasse in the negotiations, the government representatives will then make a decision, taking the arguments of both sides into account.³²⁰ The diversity of the group will serve as a check, so no one side becomes too powerful, and the Players' Associations participation will allow the players to maintain a level of control over the process, which is crucial when levying serious penalties that impact players' rights and livelihoods.³²¹

315. See Mark Maske, *HGH Testing of NFL Players to Begin this Month; Welker and Scandrick Eligible to Play Immediately*, WASH. POST, Sept. 17, 2014, <http://www.washingtonpost.com/news/sports/wp/2014/09/17/hgh-testing-of-nfl-players-to-begin-this-month-welker-and-scandrick-eligible-to-play-immediately> (reporting that the NFL and the NFLPA negotiated new terms for their Substance Abuse Program). The negotiations will be similar to the collective bargaining negotiations in The Leagues. See *History of the Major League Baseball Players Association*, *supra* note 106.

316. See *60 Minutes: The Case of Alex Rodriguez*, *supra* note 225 (interviewing Anthony Bosch, the owner of the Biogenesis Clinic). In the interview, Bosch detailed the intricate program he tailored for Rodriguez and the state of the art supplements Rodriguez used. *Id.*

317. See BLACK'S LAW DICTIONARY 299 (9th ed. 2009) ("[C]ollective [B]argaining: Negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits."); Maske, *supra* note 315 (explaining the NFL's and the NFLPA's negotiations).

318. See BLACK'S LAW DICTIONARY 119 (9th ed. 2009) ("[A]rbitrator: One with the power to decide disputes, such as a judge."); Gary Huckabay & Greg Pappas, *Labor Negotiations: What Happens Next?*, ESPN (July 23, 2002), <http://a.espn.com/mlb/columns/bp/1408976.html> (explaining the negotiations process between MLB and the MLBPA, and how the NLRB can act as a mediator in case of an impasse).

319. See Huckabay & Pappas, *supra* note 318. The impartial government representatives will act as an internal NLRB, who can resolve disputes and impasses internally. *Pro Sports Lockouts and Strikes Fast Facts*, CNN (July 28, 2014, 5:12 PM), <http://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts> (reporting the long history of lockouts and strikes in The Leagues).

320. See Huckabay & Pappas, *supra* note 318 (recognizing that the NLRB currently performs a similar role for MLB).

321. See *id.* Instead of having an outside agency like the NLRB resolve issues, the government representatives will be able to resolve such issues internally. *Id.*; see also *supra* notes 309-17 and

C. Constitutional Challenges Faced by the Hybrid-Agency

The hybrid-agency and all its powers and functions will be constitutional.³²² Although the Fourth Amendment³²³ bars a government entity from collecting blood or urine samples from the players working for a private entity, this restriction will not apply here.³²⁴ Because the government will only represent a minority of the Board, and will not fund the hybrid-agency, the hybrid-agency will not be deemed a federal agency.³²⁵ Therefore, the Fourth Amendment, which only applies to government action, will not apply to the hybrid-agency.³²⁶

Government intervention into the private sector has often been frowned upon.³²⁷ However, because MLB is largely exempt from the Sherman Anti-Trust Laws,³²⁸ the government has a heightened responsibility to regulate the league for the players involved.³²⁹ If an athlete decides to play baseball at the highest level in this country, he must play in MLB.³³⁰ It is important that where the government has given MLB such an advantage—to operate without any competition—it must regulate it to ensure these players are not unfairly banned from the only avenue they have to use their unique skills to earn a living.³³¹ The

accompanying text (emphasizing player representation in the hybrid-agency).

322. See KOSAR, *supra* note 50, at 6. The hybrid agency will be characterized as a quasi-governmental agency, and will be able to exist in “the twilight zone” among many other legal quasi-governmental agencies. *Id.*

323. U.S. CONST. amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .”).

324. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 398–400 (1995) (holding that Amtrak was a governmental entity for First Amendment purposes because the government held the authority to appoint majority of its board of directors).

325. See *id.* at 390–91. The Court held that Communications Satellite Corporation was not a governmental entity because the President appointed only a minority of its directors. *Id.*

326. See *Petersen v. City of Mesa*, 83 P.3d 35, 43 (Ariz. 2004) (holding that random drug testing of firefighters violated the Fourth Amendment).

327. See Allen B. West, *Why Obamacare Is Bad for America’s Health*, WASH. TIMES, Mar. 23, 2012, <http://www.washingtontimes.com/news/2012/mar/23/why-obamacare-is-bad-for-americas-health/?page=all> (questioning government intervention in healthcare).

328. See Sherman Anti-Trust Act, 15 U.S.C. § 1 (2012). The Sherman Anti-Trust Act prohibits trusts and conspiracies, in restraint of trade or commerce. *Id.*; *Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208–09 (1922) (holding that MLB is exempt from the Sherman Anti-Trust Act). *But see* Curt Flood Act of 1998, 15 U.S.C. § 26b (2012) (limiting MLB’s anti-trust exemption).

329. See *Flood v. Kuhn*, 407 U.S. 258, 284–85 (1972) (upholding MLB’s anti-trust exemption). The anti-trust exemption allows MLB to exist without any competition from another baseball league, along with other benefits. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 356–57 (1953).

330. See *supra* notes 328–29 and accompanying text.

331. See *Government as the Primary Protector of Our Rights and Liberties*, GOV’T IS GOOD, <http://www.governmentisgood.com/articles.php?aid=19&p=1> (last visited Feb. 15, 2015) (arguing

NFL's tax exemption is another example of the benefits the government has provided The Leagues, further justifying government intervention.³³² Moreover, although the NBA and the NHL do not have the anti-trust exemption like MLB, or a tax exemption like the NFL, there is still a need for the government to regulate The Leagues' dealings with its respective players, as each league is the only avenue for the athletes to play the particular sport at the highest level in this country.³³³ Therefore, government intervention into The Leagues is reasonable, and The Leagues should respect it.³³⁴

Some might question the constitutionality of the government contracting with The Leagues and intervening in this particular private industry.³³⁵ However, because the use of PEDs has spread into American society, the government must intervene and protect its citizens.³³⁶ The government not only has the power to protect its citizens in any way it sees fit, but it also has the duty to do so.³³⁷ Additionally, the government has previously contracted with private parties to perform traditional governmental functions—its agreements with private correctional facilities are one such example.³³⁸ USADA is another example of a government-funded private entity, regulating and adjudicating similar matters as the proposed hybrid-agency.³³⁹ The balance of power between private parties and the government is essential for this proposed solution

that a democratic government is in the best position to protect the citizens' rights).

332. See *The NFL: Big Business with Big Tax Breaks*, NPR (Jan. 18, 2014, 5:00 PM), <http://www.npr.org/2014/01/18/263767372/the-nfl-big-business-with-big-tax-breaks> (explaining the tax-exempt status of the NFL).

333. See Monte Burke, *Average Player Salaries in the Four Major American Sports Leagues*, FORBES (Dec. 7, 2012, 3:29 PM), <http://www.forbes.com/sites/monteburke/2012/12/07/average-player-salaries-in-the-four-major-american-sports-leagues>. To play at the highest level in a particular sport, the players have to adhere to the rules of that particular league. See, e.g., MAJOR LEAGUE CONSTITUTION, *supra* note 104 (stating the rules and regulations of MLB).

334. See, e.g., *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09 (1922); *The NFL: Big Business with Big Tax Breaks*, *supra* note 332.

335. See, e.g., Horvitz et al., *supra* note 247, at 44-45 (explaining how similar work is performed by the USADA, which is deemed a private organization).

336. See *supra* note 248 and accompanying text.

337. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."); see, e.g., National Minimum Drinking Age Act, 23 U.S.C. § 158(a)(1)(A) (2012) (implementing the regulation of the minimum drinking age for the safety of citizens).

338. See *Learn About Us and Our Role in Corrections*, CORRECTIONS CORP. AM., <http://cca.com/about-cca> (last visited Feb. 15, 2015) (noting that the Correction Corporation of America "designs, builds, manages and operates prisons, jails, detention centers and residential reentry centers on behalf of the Federal Bureau of Prisons, Immigration and Customs Enforcement, the United States Marshals Service").

339. See Horvitz et al., *supra* note 247, at 44-45.

to be widely accepted and implemented.³⁴⁰ As previously mentioned, limited government intervention is necessary and constitutional.³⁴¹

The current system has violated many players' rights, such as their right to privacy, and is not capable of protecting their legal rights in the future.³⁴² From players' confidential information being leaked, to players not receiving proper due process before being suspended, players have suffered repeatedly because of the shortcomings of The Leagues' current drug policies.³⁴³ These player rights have been continuously disregarded in the PED investigation and punishment process.³⁴⁴ Therefore, government expertise and support is crucial in handling the PED issue, as the government is most adept at protecting the citizens' constitutional rights.³⁴⁵

D. Why the Proposed Solution Will Succeed Where Others Have Failed

This solution will succeed, while many others have failed, because this solution will appeal to all parties involved.³⁴⁶ First, unlike previously proposed legislation, this contractual agreement, when collectively bargained on, will appear similar to the current programs in The Leagues.³⁴⁷ Second, unlike the USADA, this hybrid-agency will be geared specifically towards The Leagues.³⁴⁸ Third, unlike the current programs in The Leagues, this proposed zero-tolerance policy will eliminate any incentive players might have to use PEDs.³⁴⁹ Finally, this hybrid-agency will allow the players and The Leagues to remain in control, while maintaining limited governmental oversight.³⁵⁰ This

340. See *Axisa*, *supra* note 105. Leaving all the power in the Commissioner's hands has led players to question the system. *Id.*

341. See *supra* notes 322-40 and accompanying text.

342. See *Adelsberg*, *supra* note 196, at 703-04; see also *Perry*, *supra* note 103 (criticizing the player name leaks during the recent Biogenesis Scandal).

343. See *supra* Part III.A.3.

344. See *Adelsberg*, *supra* note 196, at 703-04 (explaining that, in 2003, MLB players only agreed to steroid testing once they were given the assurance that the tests would be anonymous; however, eventually, the names of the players who tested positive were leaked); see also *Perry*, *supra* note 103 (condemning the release of the MLB player names in the media during the Biogenesis investigation).

345. See *Government as the Primary Protector of Our Rights and Liberties*, *supra* note 331 (explaining that it is the government's responsibility to protect its citizens); see also *Adelsberg*, *supra* note 196, at 697-700 (discussing leaked player names during the BALCO investigation in 2003); *Perry*, *supra* note 103 (reporting leaked MLB player names during the Biogenesis investigation in 2013).

346. See *supra* Part IV.B.

347. See *supra* notes 317-21 and accompanying text.

348. See *USADA's Anti-Doping Programs*, *supra* note 47; *supra* Part III.E.

349. See *Berg*, *supra* note 244; *White*, *supra* note 102.

350. See *supra* Part IV.B.

unified zero-tolerance policy and the hybrid-agency will not only reduce PED use in The Leagues, but it will also help reduce the use of PEDs in extremely vulnerable young athletes.³⁵¹ Impressionable young athletes idolize the professional athletes and follow their example.³⁵² Eliminating PED use at the professional level will convince young athletes that they can reach their goals without the help of PEDs.³⁵³

V. CONCLUSION

What once was an issue contained within The Leagues has now permeated into our society.³⁵⁴ PED use is an epidemic that has seen immense growth in recent years,³⁵⁵ and it comes with various health risks, which can result in death.³⁵⁶ To remediate the widespread use of PEDs, government intervention is necessary.³⁵⁷ Since the use of PEDs in The Leagues has led amateur athletes to follow in the footsteps of their heroes,³⁵⁸ the first step in eradicating PED use is to tackle the problem at the professional level.³⁵⁹ Despite the Leagues' various efforts, they have failed to eliminate PED use.³⁶⁰ With the mindset of players and The Leagues changing, now is the time to implement such a unified policy throughout The Leagues.³⁶¹ A zero-tolerance policy backed by a hybrid-agency will be a homerun against PED use.³⁶²

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351. See McMAHON, *supra* note 167, at 87; *supra* Part III.A.1.

352. See Crossman, *supra* note 182, at 622-26; McMahon, *supra* note 167, at 88.

353. See Crossman, *supra* note 182, at 622-26; McMahon, *supra* note 167, at 88.

354. See *supra* Part III.A.1.

355. See Calfee & Fadale, *supra* note 2, at e581; Crossman, *supra* note 182, at 617-18.

356. See Brittain, *supra* note 80.

357. See *supra* Part III.A.

358. See Brittain, *supra* note 80.

359. See *supra* Part IV.A-B.

360. See *supra* Part II.C.

361. See White, *supra* note 102.

362. See *supra* Part IV.

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