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SAFE AT HOME? ASSESSING U.S. EFFORTS TO PROTECT YOUTHS FROM THE EFFECTS OF PERFORMANCE ENHANCING DRUGS IN SPORTS

INTRODUCTION

By the summer of 1998, baseball had finally risen from the ashes of the 1994 players strike that had resulted in a shortened season and the first ever cancellation of the World Series.¹ It was 1998 when a nation of baseball fans was once again captivated, particularly by the epic competition unfolding between Mark McGwire and Sammy Sosa, both of whom were in hot pursuit of Roger Maris' thirty-seven-year single-season home run record.² That year also marked the beginning of a stretch of three straight World Series championships for baseball's winningest and most popular franchise, the New York Yankees.³ And then, in 2001, Barry Bonds had the nation's spotlight as he obliterated McGwire's homerun record,⁴ and the Yankees came within one inning of a fourth-straight championship,⁵ their epic playoff run helping New York and the rest of the country recover from the tragic events of September 11 only two months earlier.⁶ Three years later, Roger Clemens won an unprecedented seventh Cy Young award, becoming the oldest player to ever receive the prestigious honor.⁷ Baseball was once again America's pastime.

The next year, however, saw baseball's ultimate fall from grace. In 2005, many of the game's greatest players, including both McGwire and Sosa, were subpoenaed by the United States Congressional House Government Reform Committee to respond to allegations of widespread use of performance enhancing drugs ("PEDs") throughout the game.⁸ An

1. Murray Chass, *Baseball; No Runs, No Hits, No Errors: Baseball Goes on Strike*, N.Y. TIMES, Aug. 12, 1994, at A.1.

2. Murray Chass, *Fans, Poll Says, Are Back, Back, Back*, N.Y. TIMES, Sept. 25, 1998, at D.1.

3. ESPN.com, *MLB World Series Winners*, <http://espn.go.com/mlb/worldseries/history/winners> (last visited Aug. 2, 2009).

4. Selena Roberts, *Bonds Hits 73rd Homerun, Then Ponders Free Agency*, N.Y. TIMES, Oct. 8, 2001, at D.3.

5. JOE TORRE & TOM VERDUCCI, *THE YANKEE YEARS* 156 (2009).

6. *Id.* at 146-48.

7. Jack Curry, *Clemens May Take 7 Cy Youngs and Go Home*, N.Y. TIMES, Nov. 10, 2004, at D.1.

8. Maria Newman, *McGwire, at Steroids Hearing, Says He Won't Discuss the Past*, N.Y. TIMES, Mar. 17, 2005, available at <http://www.nytimes.com/2005/03/17/sports/>

internal investigation commissioned by Major League Baseball, which released its findings in 2007, named ten members of the 2000 World Championship team as PED users.⁹ Bonds has since been indicted on perjury charges following his potentially dishonest testimony regarding his use of steroids,¹⁰ and similar charges may soon be levied against Clemens in the wake of his heavily publicized confrontation with his former trainer before Congress.¹¹ Suffice to say, a dark shroud has fallen over many historic baseball records in the eyes of fans who have become skeptical of their heroes' once remarkable athletic accomplishments.¹²

While McGwire and Sosa remain in baseball purgatory,¹³ Major League Baseball has ostracized Clemens and Bonds as it scrambles to restore its image and regain the trust of its fan base. Although it boasts a new drug testing policy,¹⁴ Major League Baseball's efforts to shuttle in a new era of superstars have largely failed. In the past year alone, two of the most influential members of this next generation of supposedly "clean" superstars have been linked to PEDs; one by admission (Alex

baseball/17cnd-ster.html; see Duff Wilson, *McGwire Offers No Denial At Steroid Hearings*, N.Y. TIMES, Mar. 18, 2005, at A.1.

9. 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 (2007), available at <http://files.mlb.com/mitchrpt.pdf>; Baseball-reference.com, 2000 New York Yankees Batting, Pitching, & Fielding Statistics, <http://www.baseball-reference.com/teams/NYY/2000.shtml> (last visited Sept. 29, 2009).

10. Michael S. Schmidt, *Barry Bonds Is Indicted for Perjury Tied to Drug Case*, N.Y. TIMES, Nov. 15, 2007, available at <http://www.nytimes.com/2007/11/15/sports/baseball/15cnd-bonds.html>.

11. Katie Thomas & Michael S. Schmidt, *Congress May Single Out Clemens for Investigators*, N.Y. TIMES, Feb. 26, 2008, at D.4.

12. Joshua H. Whitman, Note, *Winning at All Costs: Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 U. ILL. L. REV 459, 460 (2008).

13. Both former players have retired from baseball and are currently eligible to be inducted into the Hall of Fame, but neither player has garnered sufficient votes for induction. The National Baseball Hall of Fame and Museum, Hall of Fame Voting: Baseball Writers Election, http://web.baseballhalloffame.org/hofers/voting_year.jsp?year=2009 (last visited Aug. 2, 2009).

14. The current punishment for a first positive test is a fifty-game suspension. The Office of the Commissioner of Baseball & Major League Baseball Players Association, Joint Drug Prevention and Treatment Program 17 [hereinafter Joint Drug Prevention and Treatment Program], <http://mlbplayers.mlb.com/pa/pdf/jda.pdf> (last visited Aug. 2, 2009).

Rodriguez),¹⁵ and another by failing a league-sponsored drug test (Manny Ramirez).¹⁶ This new era of drug testing in professional sports does not mean the game has rid itself of its ugly past. It means only that it has become harder for players to cheat. Now, the question to be asked is: why are professional athletes going to measures as extreme as using women's fertility drugs¹⁷ to cover up their continued use of PEDs, despite the strict testing regime in place?

Success in professional sports is often accompanied by notoriety and extreme wealth, which only add to the competitive nature of the industry. Athletes seek to gain advantages by hiring personal strength coaches, engaging in high intensity training programs, and monitoring their diets closely.¹⁸ The use of chemical substances to augment training and diet programs can exaggerate the benefits the athletes derive.¹⁹ The principle objective in sport has always been victory, but now, in this modern era, maximizing individual performance is equally important, and a majority of athletes use some form of legal, natural, or artificial means to enhance their athletic performance.²⁰ Dietary supplements, for example, may improve athletic performance, but they do not create an unfair advantage as they are widely available and are not known to induce the growth or strengthening of muscle tissue or to cause other biological effects that can be directly attributed to athletic success.

In an attempt to achieve greater on-field performance, however, some athletes are willing to use illicit PEDs that their sports' governing bodies have banned. When competing at the highest levels of professional sport, there is little difference between competitors in terms of pure skill.²¹ Only the smallest percentage of athletes will advance to the professional level and succeed by exhibiting superior athletic abilities in comparison

15. Tyler Kepner, *Rodriguez Admits to Using Performance Enhancers*, N.Y. TIMES, Feb. 9, 2009, available at <http://www.nytimes.com/2009/02/10/sports/baseball/10rodriguez.html>.

16. Michael S. Schmidt, *Manny Ramirez Is Banned for 50 Games*, N.Y. TIMES, May 7, 2009, available at <http://www.nytimes.com/2009/05/08/sports/baseball/08ramirez.html>.

17. Ramirez was caught using "human chorionic gonadotropin . . . a fertility drug for women that men can use to generate production of testosterone after they have stopped using steroids." *Id.*

18. Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 834 (2006).

19. *Id.* at 835.

20. Matthew J. Mitten, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 797 (2006).

21. Haagen, *supra* note 18, at 834.

to their opponents.²² For this reason, “marginal advantages are likely to produce substantial competitive gains.”²³

Even if athletes are being tested for PEDs, the prospect of international fame, immense wealth, and the desire to achieve life-long dreams may outweigh the deterrence capacity of the anti-doping polices. Even Olympic-caliber athletes will feel the draw of PEDs in order to improve their chances at a gold medal. Canadian sprinter Ben Johnson, who was once known as “The Fastest Man in the World” (a title given to the world record holder in the 100 meter dash)²⁴ and who was named the Associated Press Male Athlete of the Year in 1987,²⁵ was stripped of his world record and 1988 Olympic gold medal when he tested positive for the prohibited substance Stanozolol following the race.²⁶ Doping scandals have also plagued the world renowned Tour de France, as 2006 winner Floyd Landis was stripped of his title when his urine sample tested positive for the presence of a prohibited PED.²⁷ And that same year, cycling superstars Jan Ullrich and Ivan Basso were among *several* cyclists barred from competition because they failed drug tests even *before* the race began.²⁸ These athletes competed in their respective events, well aware of the drug testing mechanisms in place. Still, athletes will continue to use PEDs because the prospects for victory and the associated personal and economic benefits justify the risk of being caught.²⁹

As professional sports leagues bitterly debate the imposition of new drug testing policies that fall outside the scope of the current testing program that was approved as part of their active collective bargaining agreement (“CBA”), new PEDs are being developed in laboratories and

22. *Id.*

23. *Id.*

24. Alex Altman, *Brief History: The World's Fastest Human*, TIME, Aug. 31, 2009, at 14.

25. Associated Press, *AP Male Athlete of the Year*, USA TODAY, Dec. 21, 2007, http://www.usatoday.com/sports/2007-12-21-2365825514_x.htm.

26. Michael Janofsky, *The Seoul Olympics: Johnson Loses Gold to Lewis After Drug Test*, N.Y. TIMES, Sept. 27, 1988, at A1.

27. Juliet Macur, *Landis' Positive Doping Test Upheld*, N.Y. TIMES, Sept. 21, 2007, <http://nytimes.com/2007/09/21/sports/sportsspecial1/21landis.html>.

28. John Leicester, *Ullrich, Basso, Barred from Tour de France Amid Doping Scandal; Vinokourov Also Out*, USA TODAY, June 30, 2006, http://www.usatoday.com/sports/cycling/tourdefrance/2006-06-30-doping-scandal_x.htm; John Ward Anderson, *Doping Scandal Rocks Cycling; Several Favorites Banned on Eve Of Tour de France*, WASH. POST, July 1, 2006, at E.1.

29. Haagen, *supra* note 18, at 834.

basements across the nation.³⁰ Some supplements, known as designer steroids are being created specifically to avoid detection methods and are being labeled as dietary supplements by their developers.³¹ Designer steroids are known steroid compounds that have been chemically altered so that they retain the same enhancement effects while becoming undetectable by drug testing laboratories.³² Since the creation of designer steroids does not require complex chemical knowledge,³³ the possibility that they will spread throughout professional sports is undeniable.

In response to the increased international awareness of the use of illegal PEDs, and the individual sporting associations' apparent inability to successfully level the playing field, national governments have taken notice, and, in some cases, have instituted comprehensive national drug testing legislation for professional sports.³⁴ Italy, for example, has adopted legislation to criminalize the use of PEDs in athletic competition, employing heavy fines or the threat of imprisonment to combat doping in sports.³⁵ The United States, on the other hand, has implicitly held that doping in professional sports is a matter to be regulated privately between the leagues and the players' associations through their CBAs.³⁶ For instance, nearly ten proposed bills³⁷ intended to regulate drug testing

30. Ryan Connolly, Note, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 172 (2006).

31. *Id.*; see also Press Release, Food and Drug Administration, FDA Statement on THG (Oct. 28, 2003), available at <http://web.archive.org/web/20041216090017/www.fda.gov/bbs/topics/NEWS/2003/NEW00967.html> (last visited Sept. 13, 2009) ("Although purveyors of THG may represent it as a dietary supplement, in fact it does not meet the dietary supplement definition.").

32. Connolly, *supra* note 30, at 172.

33. *Id.* at 173.

34. Christopher McKenzie, *The Use of Criminal Justice Mechanisms To Combat Doping In Sport*, BOND U. SPORTS LAW EJOURNAL, August, 31, 2007, at 6, <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=slej>. Countries with national legislation include Denmark, France, Germany, Netherlands, Spain, and Sweden. See World Anti-Doping Agency, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Legal-articles-case-law-and-national-laws/> (last visited Nov. 25, 2008).

35. McKenzie, *supra* note 34, at 7; see also *Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping*, Gazz. Uff. (Law) n.294, adopted Nov. 16, 2000, published Dec. 18, 2000, available at <http://www.federnuoto.it/pdf/legge14dicembre2000.pdf>.

36. McKenzie, *supra* note 34, at 1.

37. See sources cited *infra* note 275.

in professional sports, a paramount concern of then President George W. Bush,³⁸ have died on the floor of Congress without sufficient support.³⁹

Doping scandals continue to plague professional sports in the United States because the punishments for a positive test remain relatively minimal.⁴⁰ Without severe threats of heavy fines, potential expulsion from the sport, or even criminal penalties for positive tests, professional athletes will not be sufficiently deterred from using PEDs. This Note will examine foreign anti-doping legislation in order to ascertain whether similar legislation would be viable in the United States. It will then examine whether or not the implementation of such laws would serve as a successful deterrent against the use of PEDs in professional sports. Part I provides background on the mounting issue of doping in sports and explains the rationale for an anti-doping regulation scheme. Part II surveys foreign and international anti-doping legislation and evaluates the legitimacy of criminal sanctions against professional athletes and associated individuals who violate the national anti-doping legislative scheme. Part III assesses the current stance toward anti-doping legislation in the United States and considers the viability of adopting elements of foreign national anti-doping regulation. Part IV contemplates the effects of a de-regulated playing field and urges Congressional consideration of criminal sanctions in the United States. Ultimately, this Note calls for the United States to adopt criminal anti-doping legislation informed by other international regimes in order to combat the use of performance enhancing drugs by professional athletes, lest the U.S. risk being defeated by unscrupulous steroid manufacturers, distributors, and the professional athletes who exploit undetectable biological performance enhancement substances that degrade the concept of pure athletic competition.

I. HOME-FIELD DISADVANTAGE

A. Background

In 1987, the National Football League ("NFL") became the first professional sports league in the United States to begin testing for illegal

38. President George W. Bush, State of the Union Address before a Joint Session of the Congress (Jan. 20, 2004), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29646>.

39. Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 653 (2007); see also discussion *infra* Part III.

40. See sources cited *supra* notes 15–16.

PEDs.⁴¹ The NFL has by far the most stringent PED testing policy of any major sports league in the United States.⁴² Aside from testing its players more often than any other major professional sports league⁴³ (and without notice to the athlete),⁴⁴ the NFL testing program distinguishes itself from other programs with its application beyond athletes. Under the league policy, “[C]oaches, trainers and other personnel are restricted from condoning, supplying, or encouraging the use of steroids” and may be sanctioned by the commissioner.⁴⁵

The National Basketball Association (“NBA”) first began testing for illegal drugs in 1999,⁴⁶ but the focus of the program was geared mostly toward treatment of drug abuse.⁴⁷ Furthermore, even though the testing program covered PEDs, the sanctions for illegal drug use were hardly punitive.⁴⁸ Under the 1999 NBA Collective Bargaining Agreement, a player who voluntarily turned himself in to league officials for any drug use, including PEDs would be given counseling and treatment but would not be penalized for his doping offenses.⁴⁹

It was not until 2002 that Major League Baseball (“MLB”) and the Major League Baseball Players Association (“MLBPA”) finally agreed to implement a mandatory drug-testing program.⁵⁰ It is widely believed

41. Mark Maske & Leonard Shapiro, *NFL's Steroid Testing Policy Gets Kudos on Capitol Hill*, WASH. POST, April 28, 2005, at D1; Paul Domowitch, *Sticking Points; NFL Seems to Have Better Handle than Baseball on Steroid Problem*, PHILA. DAILY NEWS, June 3, 2009, at 74.

42. Paul A. Fortenberry and 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, 136 (2006).

43. *Id.* at 137.

44. National Football League, *Policy on Anabolic Steroids and Related Substances 2009*, at 1–3 (2009), <http://www.nflplayers.com/images/fck/2009%20Steroid%20Policy.pdf>.

45. *Id.*

46. See National Basketball Association & National Basketball Association Players Association, *Collective Bargaining Agreement*, art. XXXIII, http://www.nbpa.com/cba_articles/article-XXXIII.php (last visited Oct. 18, 2008) [hereinafter *NBA Collective Bargaining Agreement*]; Ira Winderman, *New Drug-Testing Policy Covers More Ground*, SUN SENTINEL (FT. LAUDERDALE), Oct. 1, 1999, at 6C.

47. As PEDs are taken specifically to gain an unfair competitive advantage, rather than recreationally, the league should take greater punitive measures against those athletes using PEDs. Zachary Coile, *House Mocks NBA's Policy on Steroids/ Tough-talking Lawmakers Want Federal Intervention*, SAN FRAN. CHRONICLE, May 20, 2005, at A10.

48. Haagen, *supra* note 18, at 841.

49. See NBA Collective Bargaining Agreement, *supra* note 46, at art. XXXIII § 7.

50. Press Release, Major League Baseball, *Special Report: Drug Policy in Baseball*, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited Sept. 28, 2008).

that the league had never previously implemented a testing program because league officials and team owners were aware of the rampant drug use, tacitly condoning the activity.⁵¹ This was because they believed that the increased number of homeruns hit by “juiced up” players would provide an economic windfall to both the teams and the league by bringing more fans to the ballpark.⁵² Not surprisingly, as the number of suspected players using PEDs grew during the 1990s, so did the pockets of MLB executives, team owners, and athletes.⁵³

In the year following McGwire and Sosa’s epic homerun chase, Major League Baseball went as far as to lecture team executives on the benefits of testosterone, eschewing the notion that unnatural hormones could have negative health consequences.⁵⁴ By the turn of the decade, baseball had adopted a steroid culture where teams would hire strength coaches with no baseball experience⁵⁵ who would not only put players on training regimes, but also recommend the best combination of “ergogenic aids”⁵⁶ and how to cycle them in order to maximize performance without depleting the body of its natural hormones.⁵⁷

Former Major League MVP Jose Canseco estimated in 2003 that approximately 85% of players were using some form of illegal PEDs.⁵⁸ Another former MVP and admitted user, Ken Caminiti,⁵⁹ believed half of all baseball players were using steroids.⁶⁰ Canseco’s manager with the Oakland Athletics, Tony La Russa, gave an interview with 60 Minutes⁶¹

51. Steve Henson, *Two Hits and a Big Miss for Hall of Fame*, L.A. TIMES, Jan. 10, 2007, at D1.

52. William C. Rhoden, *Executives Must Answer for Steroids*, N.Y. TIMES, Mar. 3, 2008, at D1.

53. In 1992, Major League Baseball posted annual revenue of \$1.2 billion. Fred Goodall, *Selig: MLB Revenue Climbed to \$6.075B This Year*, USA TODAY, Nov. 15, 2007, http://www.usatoday.com/sports/baseball/2007-11-15-mlb-revenue_N.htm. Those numbers have been rising steadily over the past fifteen years, as MLB posted revenue of over \$6 billion in 2007. *Id.*

54. TORRE & VERDUCCI, *supra* note 5, at 88.

55. Typically, training staff on Major League rosters must earn their positions, by working their way up through the team’s minor league system, much like the players. *Id.* at 101.

56. *Id.* at 109.

57. *Id.* at 94.

58. Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, Mar. 2, 2002, at 34.

59. Caminiti died from what was believed to be a steroid-related heart attack at the age of 41. Frank Litsky, *Ken Caminiti, M.V.P. in National League, Dies at 41*, N.Y. TIMES, Oct. 12, 2004, at B7.

60. *Id.*

61. *Canseco Bragged About ‘Helper’*, ESPN.COM, Feb. 16, 2005, <http://sports.espn.go.com/mlb/news/story?id=1992667> [hereinafter *MLB Responds*].

and explained how Canseco openly discussed his steroid use with no apparent fear of discipline.⁶² La Russa never reported Canseco's likely abuse to MLB⁶³ and later stated that Major League Baseball could have been "more hard-nosed about their approach" in combating PEDs.⁶⁴ Even so, "any effort would likely have been rebuffed by the [MLB] Players Association" ("MLBPA").⁶⁵ The "don't ask, don't tell, don't care"⁶⁶ attitude of the MLB was manifested by athletes exchanging signed memorabilia for sacks of "greenies" directly in front of fans on the field before games,⁶⁷ and players openly discussing their steroid programs in the clubhouse.⁶⁸ Managers and front office executives claimed ignorance under the auspices of "wanting to respect their players' privacy."⁶⁹ By 2001, "[I]f you weren't cheating, you weren't trying."⁷⁰

Until 2002, the MLBPA refused to engage in any discussions of a steroid testing policy,⁷¹ arguing it constituted an invasion of privacy and an "abuse of human rights."⁷² Eventually, the MLB and the Player's Association agreed to initial survey testing, in which each player would be tested twice during the 2003 season, though there would be no punishment for a positive test.⁷³ By spring training that year, players had become so addicted and accustomed to the uncontested use of PEDs and the resulting muscle enhancement and exponential growth in player salaries that they could not stop using even when they knew the tests were coming.⁷⁴

As per the agreement, since more than five percent of the entire league tested positive for some form of PED, mandatory testing was implemented for the 2004 season.⁷⁵ The penalties for a positive test, however, were inadequate, as the punishment merely subjected the athlete to fur-

62. Fortenberry & Hoffman, *supra* note 42, at 139.

63. *MLB Responds*, *supra* note 61.

64. Rebecca Leung, *MLB Swings Back at Steroid Claims*, CBSNEWS.COM, Feb. 16, 2005, <http://www.cbsnews.com/stories/2005/02/15/60II/main674297.shtml?tag=contentMain;contentBody>.

65. *Id.*

66. TORRE & VERDUCCI, *supra* note 5, at 88.

67. *Id.* at 109.

68. *Id.* at 103.

69. *Id.* at 108.

70. *Id.* at 103.

71. Showalter, *supra* note 39, at 658; Barry M. Bloom, *Mandatory Steroid Testing to Begin*, MLB.COM, Nov. 13, 2003, http://www.mlb.com/news/article.jsp?ymd=20031113&content_id=603458&vkey=news_mlb&fext=.jsp&c_id=mlb.

72. Showalter, *supra* note 39, at 658.

73. *Id.*

74. TORRE & VERDUCCI, *supra* note 5, at 116.

75. *Id.*

ther testing and treatment programs, with no suspensions or fines for a violation.⁷⁶ The drug policy was again amended in 2005,⁷⁷ but the penalty for a first time offense was only a ten-day suspension⁷⁸—not even ten games. Even though the league only tested for forty-five banned substances, twelve players received the ten-day suspension in the first year under the amended 2005 drug testing agreement.⁷⁹

This *de facto* “look-the-other-way” steroid policy has drawn “fierce Congressional and media scrutiny” for the inability of the Commissioner’s Office and MLBPA to reach an adequate drug policy.⁸⁰ Former World Anti-Doping Agency (“WADA”) chairman Richard Pound called the 2003 MLB drug testing program “a complete and utter joke”⁸¹ and “an insult to the fight against doping in sport, an insult to the intelligence of the American public, and an insult to the game itself.”⁸² Pound could not believe that the MLB would require an athlete to knowingly cheat *five times* before facing only a one-year suspension.⁸³ Currently the MLB has a new drug-testing regime in place,⁸⁴ but even with national media and political attention focused specifically on the MLB, the league continues to boast the most lenient drug testing policy of all major professional sports.⁸⁵

The PED problem, however, does not lie squarely within the professional sports leagues. As more superstars are admitting to PED use or being caught red handed, public perception is rapidly shifting from

76. *Id.*

77. See Joint Drug Prevention and Treatment Program, *supra* note 14.

78. *Id.* at §9(B).

79. Showalter, *supra* note 39, at 659.

80. Fortenberry & Hoffman, *supra* note 42, at 127.

81. John T. Wendt, *WADA, Doping and THG*, ENT. & SPORTS LAW., Winter 2004, at 1, 30.

82. *Id.*

83. Jarred R. Tynes, Commentary, *Performance Enhancing Substances: Effects, Regulations, and the Pervasive Efforts to Control Doping in Major League Baseball*, 27 J. LEGAL MED. 493, 503 (2006). Under the WADA Code, an athlete would be permanently banned from competition after only his second violation. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 27 (2003) [hereinafter THE CODE], available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf.

84. The penalties for testing positive for a steroid are fifty games for the first positive test, one hundred games for the second, and a lifetime ban for the third violation, though players may seek reinstatement after serving only two years of the suspension. Press Release, Major League Baseball, MLB, MLBPA Announce New Drug Agreement (Nov. 15, 2005), available at http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20051115&content_id=1268552&vkey=pr_mlb&fext=.jsp&c_id=mlb.

85. Fortenberry & Hoffman, *supra* note 42, at 141.

outrage to apathy.⁸⁶ Fans recently welcomed back Manny Ramirez from his 50-game suspension with celebratory open arms and a standing ovation.⁸⁷ Fans were too quick to forgive Ramirez, considering he never fully admitted wrongdoing or even sought forgiveness. Explaining to eight-year-old little leaguers⁸⁸ that cheaters can still be idolized sports heroes has become nothing more than an unfortunate side effect of entertaining Americans with the allure of 500-foot homeruns.⁸⁹

Controlling the use of PEDs is by no means an issue limited to the United States. Performance enhancement in sports has been around since the ancient Olympic games in Greece when no rules governed the performance of participants.⁹⁰ For centuries, triumphant athletes have been able to reap the rewards and riches that accompany athletic success, ingesting any substance that could potentially enhance performance without risk of punishment.⁹¹ The first major international organization to ban doping in sports was the International Association of Athletics Federations in 1966,⁹² with the International Olympic Committee (“IOC”) following suit the next year.⁹³

Currently, PED use by Olympic Athletes is regulated by WADA, which has established a comprehensive list of prohibited substances.⁹⁴ The list is amended constantly because WADA employs first-class scientists to develop new PEDs, which enables additional tests to be devel-

86. Steve Henson, *Boo-birds Extinct in Mannywood*, YAHOO SPORTS, July 17, 2009, <http://sports.yahoo.com/mlb/news?slug=sh-mannyhomereturn071609&prov=yahoo&type=lgn>.

87. Mario Aguirre & Jim Peltz, *Fans Take a Stand for Manny*, L.A. TIMES, July 17, 2009, at C6.

88. *Id.*

89. William J. Jenkinson, *Long-Distance Homeruns*, in SABR PRESENTS THE HOME RUN ENCYCLOPEDIA: THE WHO, WHAT, AND WHERE OF EVERY HOME RUN HIT SINCE 1876, at 24 (1996).

90. Connolly, *supra* note 30, at 162. Ancient-Greek Olympians are believed to have used extracts of mushrooms and plant seeds. See Mark Stuart & Maria Skouroliakou, Pharmacy at the 2004 Olympic Games, 273 PHARMACEUTICAL J. 319 (2004), available at http://www.pharmj.com/pdf/articles/pj_20040904_olympic.pdf.

91. See Stuart and Skouroliakou, *supra* note 90; see also, Kate Ravilious, *Barry Bonds Steroid Debate Highlights History of Drugs in Sport*, NAT. GEOGRAPHIC NEWS, June 22, 2007, <http://news.nationalgeographic.com/news/2007/06/070622-barry-bonds.html>. Ancient Mayans are believed to have chewed cocoa leaves before playing the violent ballgame “Pok-a-Tok” in which winners were treated as heroes and the losing team was often killed. Cocoa leaves are known to delay fatigue and increase strength. *Id.*

92. Connolly, *supra* note 30, at 162.

93. *Id.*

94. WORLD ANTI-DOPING AGENCY, THE 2009 PROHIBITED LIST (2008), available at http://www.wada-ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf.

oped in an attempt to keep pace with and identify new designer steroids.⁹⁵ WADA has also created universal sanctions for athletes who test positive as part of the comprehensive World Anti-Doping Code.⁹⁶

B. Rationale

Having spent the majority of his efforts as IOC President working to combat doping in sport, Jacques Rogge has stated that PEDs are the foremost danger to fair competition and the health of Olympians.⁹⁷ Former WADA Chairman Richard Pound summarily stated that the credibility of sports would be lost until PED users are banished.⁹⁸ He said, "Doping is the single most important problem facing sport today. If we don't win the fight, Olympic-standard sport will not survive—because the public will have no respect for it. Cheats make what should be a triumph of human achievement into a hollow pretence."⁹⁹

Athletes who use PEDs not only subject themselves to well-documented health risks¹⁰⁰ and potentially life threatening consequences,¹⁰¹ but also peripherally implicate other professional athletes by forcing them to use PEDs to remain competitive, as well as high school and college students who admire such athletes as role models.¹⁰² In fact, after it was first reported that Mark McGwire used the substance androstenedione¹⁰³ during the 1998 season, estimated sales of performance-

95. *Id.*

96. THE CODE, *supra* note 83. The full list of signatory organizations can be found at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270> (last visited Nov. 24, 2008).

97. John T. Wendt, *The Year of the Steroid: Are New Testing Regimes Enough?*, ENT. & SPORTS LAW 8, Winter 2005, at 4, 8.

98. *Id.*

99. *Id.*

100. Mitten, *supra* note 20, at 800–01. Anabolic steroids may cause an increase in blood pressure and harmful changes in cholesterol levels. Lindsay Sutton, *Anabolic Steroids: Not Just For Men Anymore*, http://www.vanderbilt.edu/AnS/psychology/health_psychology/anabolic_steroids.htm (last visited Nov. 22, 2008). They may also increase the risk of cardiovascular disease or coronary artery disease. Anabolic steroids are believed to alter the structure of the heart, which could cause hypertension, cardiac arrhythmias, congestive heart failure, heart attacks and sudden cardiac death. *Id.* Furthermore, anabolic steroids can cause liver damage when the steroids are metabolized, and may reduce sexual function and cause temporary infertility in men. *Id.* Females may experience increases in body hair, deepening of the voice, and the development of traditionally male sexual characteristics. *Id.* In adolescents, steroids use may prematurely stop bone development and alter the normal development of sexual characteristics. *Id.*

101. *See* Tynes, *supra* note 83, at 495.

102. Mitten, *supra* note 20, at 800.

103. According to the Food and Drug Administration:

enhancing substances increased nearly five-fold.¹⁰⁴ Furthermore, a 1990s study on steroid use among teenagers concluded that nearly one million teenage athletes had used steroids at least once.¹⁰⁵ A 2003 survey conducted by the United States Center for Disease Control concluded that “steroid use by high school students had more than doubled since 1991, to more than six percent.”¹⁰⁶

As more athletes are using PEDs to improve on field performance, other athletes may be similarly inspired to attempt to level the playing field. Athletes might use PEDs when they otherwise would not if they are led to believe the league cannot successfully keep the game clean.¹⁰⁷ The nature of sport has evolved as athletes who once trained alone or with a friend in preparation for a season are now likely to be “surrounded by, and to be increasingly dependent upon” an entire staff of medical personnel in an effort to “compete more effectively in their chosen sport.”¹⁰⁸ If medical and support staff can promise athletes improved levels of performance through the use of PEDs, it may be hard for an

Children and adolescents are particularly vulnerable to irreversible effects of androstenedione via its conversion to active sex steroids. These effects include disruption of normal sexual development, specifically virilization in girls associated with severe acne, excessive body and facial hair, deepening of the voice, permanent enlargement of the clitoris, disruption of the menstrual cycle, and infertility. The conversion to estrogens can cause feminization of boys, with breast enlargement and testicular atrophy. In girls, exposure to excess estrogens may confer long-term increased risk for breast and uterine cancer. Finally, in boys and girls, the combined effects of excessive androgens and estrogens can induce premature puberty, early closure of the growth plates of long bones, resulting in significant compromise of adult stature.

FOOD AND DRUG ADMINISTRATION, HEALTH EFFECTS OF ANDROSTENEDIONE, (2004), available at <http://web.archive.org/web/20080307194758/http://www.fda.gov/oc/white-papers/andro.html>. Baseball banned the use of androstenedione in 2005. Chris Snow, *MLB Steroid Policy Outlined*, THE BOSTON GLOBE, Jan. 14, 2005, at C1.

104. Adrian Wilairat, Comment, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL’Y 377, 381 (2005).

105. *Id.* at 382.

106. Mitten, *supra* note 20, at 799; see also Center For Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States, 2003*, MORBIDITY AND MORTALITY WEEKLY REPORT: SURVEILLANCE SUMMARIES, May 21, 2004, at 62, available at <http://www.cdc.gov/mmwr/PDF/SS/SS5302.pdf>.

107. TORRE & VERDUCCI, *supra* note 5, at 96; see also Mitten, *supra* note 20, at 801.

108. Ivan Waddington, *Doping In Sport: Sociological Aspects 2* (Mar. 1999) (presented to a special meeting of the European Commission called to investigate doping in sports).

athlete to turn PEDs down with the possibility of lagging behind cheaters in their sport.¹⁰⁹

Additionally, such prospects of excessive financial reward and international recognition have placed a major emphasis on individual performance. United States Olympic Coach Brooks Johnson explained that the increasing reward from sporting success has driven “top-class international athletes to ‘wake up with the desire and the need and the compulsion and the obsession to win, and they go to sleep with it.’”¹¹⁰ The most lucrative rewards for success at the highest levels of competition are only available to a tiny sub-class of professional athletes.¹¹¹ Robert Voy, former Chief Medical Officer for the United States Olympic Committee, stated poignantly that, in terms of money, “[S]econd place doesn’t count.”¹¹²

The steroid epidemic is hardly limited to our nation’s top performers. As mentioned above, even bench warmers and career minor leaguers are using PEDs and putting their livelihoods in jeopardy for a shot at athletic and financial success that may never come to fruition.¹¹³ For some professional and amateur athletes, a dedication to strength training and close dietary monitoring will not be enough to elevate them to the top of their profession.¹¹⁴ PEDs have the potential of allowing fringe players to extend their careers by years and remain relevant in their profession long enough to carve out a decent financial nest egg.¹¹⁵ Positive tests for PED use are significantly more prevalent in baseball’s Minor Leagues,¹¹⁶ where recent high school graduates and college-age athletes are attempting to live out their dream of playing in the big leagues and signing mega

109. In the United States and, increasingly, in Europe, an Olympic gold medal is believed to be worth several million U.S. dollars in sponsorship deals and product endorsements in the United States. *Id.*

110. *Id.* at 4.

111. *Id.*

112. *Id.*

113. TORRE & VERDUCCI, *supra* note 5, at 96.

114. *Id.*

115. Former Major Leaguer Todd Hundley had earned less than one million dollars over his entire career, until he began using PEDs and hit 41 home runs during the 1996 season, turning his career around and earning more than \$47 million by the time he retired in 2004. *Id.* at 95.

116. Thus far, in 2009, four MLB players have tested positive for PEDs, but in the Minor Leagues, 44 players have tested positive for a banned substance. Maury Brown, *All-Time MLB and Minor League Drug Suspensions*, THE BIZ OF BASEBALL, Sept. 7, 2007, http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=996&Itemid=85. In 2008, two Major Leaguers failed a drug test, while 66 minor leaguers were suspended for testing positive. *Id.* In 2005, the first year the Minor League Drug Prevention and Treatment Program was in effect, 87 players tested positive. *Id.*

endorsement deals. How are we to teach our nation's youth that sports are about more than just winning and losing, when their heroes, and even those athletes who never make it to the big leagues, appear repulsively focused on personal statistics and victory alone?

The United States Office of National Drug Control Policy ("ONDCP") has identified doping in sports as an "international crisis" and has declared that it has reached a level where clean athletes will be indefinitely outscored, outrun, outrivalled, and overwhelmed by PED users.¹¹⁷ Still, even though the United States Olympic Committee has adopted the WADA code for regulation of international athletic competition,¹¹⁸ no action has been taken to address similar problems that plague its more prominent national sporting associations.

Many governments and regulatory agencies acknowledge that athletic competition is an essential element of national culture¹¹⁹ and that regulation of PED use is justified by the need to preserve its spirit.¹²⁰ The WADA Code ("the Code") defines the "spirit of sport" as the "intrinsic value [of sport and] the essence of Olympism . . . [it is] the celebration of the human spirit, body, and mind, characterized by values such as ethics and fair play, respect for rule and laws, teamwork, dedication, and commitment."¹²¹

During international competition, athletes represent their countries; therefore, a positive test of a victorious athlete will have ramifications beyond the shamed athlete. Not only will the athlete be stripped of his or her medal, humiliating the athlete's home nation, but the positive test will also suggest that the athlete's home country was unable to properly regulate PEDs within its borders.¹²² Furthermore, Olympic host nations often play a large role in the organization and facilitation of WADA anti-doping regulation, so in an effort to avoid the scandal that has plagued so many previous Olympiads, it is highly important that the host nation

117. Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency*, 50 ST. LOUIS U. L.J. 91, 99 (2005).

118. World Anti-Doping Code Agency, National Anti-Doping Organization Signatories, <http://www.wada-ama.org> (last visited Nov. 23, 2009). Susanna Loof, *IOC Adopts Global Anti-Doping Code*, USATODAY.COM, Jul. 4, 2003, available at http://www.usatoday.com/sports/olympics/2003-07-04-doping-code_x.htm.

119. Most European countries have a ministerial government agency dedicated to sport. Council of Europe, *Ministries of Sport in Europe*, http://web.archive.org/web/20070917075820/http://www.coe.int/t/dg4/sport/resources/ministries_en.asp (last visited Nov. 25, 2008).

120. THE CODE, *supra* note 83.

121. *Id.*

122. See Fortenberry & Hoffman, *supra* note 42.

sponsors a drug-free Olympic games.¹²³ One must begin to question whether recent U.S. bids to host the Olympics—bids that have ultimately failed despite having advanced to the final rounds of consideration—have been stymied by the growing notion that PED use in America cannot be controlled.

Success and recognition are pinnacles of achievement in the medical science profession just as they are in sports.¹²⁴ Major breakthroughs, however, such as the development of a chemical compound capable of producing growth of muscle tissue¹²⁵ in the human body, may provide a significant economic windfall to the developer,¹²⁶ but it will not be likely to attract the same commercial endorsement deals or the notoriety and international celebrity given to Olympic World Record Holders¹²⁷ or Home Run Champions.¹²⁸ When tempted by the vast sums of money and wide recognition among professional athletes, it would not be surprising to see some medical entrepreneurs willing to pair with athletes for a sub-

123. Koller, *supra* note 117, at 98.

124. Each year a list of the best doctors in New York is published and widely distributed across the country. *The Top 1,107 Physicians*, N.Y. MAG., available at <http://nymag.com/bestdoctors> (last visited July 26, 2009).

125. Tetrahydrogestrinone, also known as THG is an anabolic steroid capable of producing increased levels of androgen and testosterone, which may promote muscle growth and weight loss. The steroid was developed by Patrick Arnold for the Bay Area Laboratory Co-operative, a nutritional supplement company. R. Jasuja et al., *Tetrahydrogestrinone is an Androgenic Steroid that Stimulates Androgen Receptor-mediated, Myogenic Differentiation in C3H10T1/2 Multipotent Mesenchymal Cells and Promotes Muscle Accretion in Orchidectomized Male Rats*, 146 *ENDOCRINOLOGY* 4472-78 (2005), available at <http://endo.endojournals.org/cgi/reprint/146/10/4472>.

126. The average salary for a biochemist in 2006 was \$76,320. BUREAU OF LABOR STATISTICS, *OCCUPATIONAL OUTLOOK HANDBOOK, 2008-09 EDITION*, available at <http://www.bls.gov/oco/ocos047.htm> (last visited Nov. 25, 2008).

127. Former Olympic Gold Medalist Marion Jones was a BALCO client who has since been suspended from competition and formally stripped of all her former titles by the I.O.C., even after she had voluntarily returned her five medals, after admitting to using THG between 1999 and 2002. Jones was also sentenced to six months imprisonment in connection to her lying about using PEDs. See Associated Press, *Olympic Committee Strips Medals from Marion Jones' Relay Teammates*, FOXNEWS.COM, Apr. 10, 2008, <http://www.foxnews.com/story/0,2933,349271,00.html>; Phil Hersh, *Marion Jones' fall from grace is complete*, L.A. TIMES, Jan. 12, 2008, available at <http://articles.latimes.com/2008/jan/12/sports/sp-hersh12>; Amy Shipley, *Track Star Marion Jones Admits to Using Steroids*, WASH. POST, Oct. 5, 2007, at A1.

128. Current MLB Home Run Champion and record-holding seven-time Most Valuable Player Barry Bonds has long been a customer of BALCO (since 2000) and has been indicted on charges of perjury when testifying as to his use of steroids before a grand jury in the BALCO investigation. *Raiders Join Bonds, Giambi on List*, ESPN.COM, Oct. 21, 2003, <http://espn.go.com/gen/news/2003/1021/1643138.html>; Michael S. Schmidt, *supra* note 10.

stantial sum and provide them with the tools they desire to achieve greatness in their respective sports.

Why, then, should performance-enhancing drugs be banned? Anabolic steroids have well documented medical benefits, and are currently used for therapeutic reasons such as inducing puberty in men¹²⁹ and treating chronic medical conditions like HIV.¹³⁰ Athletes, however, may be drawn to PEDs for non-therapeutic purposes because they may improve physical condition by inducing the growth of muscle mass by increasing protein and reducing fat.¹³¹

There is a constituency of both athletes and medical professionals who advocate the deregulation of PEDs and would seek to allow athletes to use steroids in sports.¹³² Former world champion skier Bode Miller has publically voiced his desire to allow athletes to use PEDs under medical supervision after receiving full disclosure of known health risks.¹³³ Athletes already achieve success through intense training regimens and strict adherence to diet and nutrient intake.¹³⁴ If professional sports are truly the highest level of athletic performance, why not allow the individual athletes to further enhance their abilities through synthetic supplements?

We cannot condone the legal use of PEDs because their legitimization among professional athletes invites young athletes to use them with impunity, meanwhile society has acknowledged the potentially severe medical risks their use entails.¹³⁵ A popular sentiment among commentators is that “[c]oncern for youth health and moral questions regarding the use of enhancement by youths in sports is without a doubt the driving force in this issue.”¹³⁶

129. Cynthia M. Kuhn, *Anabolic steroids*, 57 ENDOCRINE SOC'Y 411-434 (2002), available at <http://rphr.endojournals.org/cgi/reprint/57/1/411>.

130. Lindsay Sutton, *Anabolic Steroids: Not Just For Men Anymore*, http://www.vanderbilt.edu/AnS/psychology/health_psychology/anabolic_steroids.htm (last visited Nov. 22, 2008).

131. A. Giorgi et al., *Muscular Strength, Body Composition and Health Responses to the Use of Testosterone Enanthate: A Double-blind Study*, 2 J. SCI. & MED. SPORT 341-55 (1999).

132. Mitten, *supra* note 20, at 799.

133. *Id.*

134. *Id.*

135. See Colin Latiner, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 192, 194 (2006).

136. *Id.* at 210.

For many young athletes, PEDs may be a “gateway to achieving athletic dreams.”¹³⁷ For children, athletes are heroes and role models, and the media magnifies their every move:

To impressionable young athletes, [PED use by Olympic and professional athletes] can create the impression of implied legitimacy. Reports of . . . steroid users do not necessarily translate into images of cheaters or lawbreakers in the eyes of a young athlete. It is more likely that they see . . . celebrit[ies] . . . in great physical condition, perform[ing] at the top of their game, and mak[ing] a great deal of money.¹³⁸

As noted by Dr. Denise Garibaldi, who lost her own son after he committed suicide following a bout of steroid-induced depression, desires to make the high school sports team, attempts to earn an athletic scholarship in college, or aspirations to get noticed by professional scouts are common reasons to use PEDs.¹³⁹ Young athletes only see the successes of their heroes on national television and on Wheaties boxes; they do not read about the conclusions of preliminary laboratory tests on the long-term side effects of PEDs.

II. POLICING THE INTERNATIONAL PLAYING FIELDS

A. *International Agreements*

Conceptually, the legal system functions to impede immoral and dangerous behavior while at the same time attempting to promote desirable social norms.¹⁴⁰ Once the documented use of PEDs became more prevalent in the mid 1980s, the international community determined that the existing drug testing regimes were not solving the problems. As nations gathered to brainstorm ways to address this emerging global concern, their focus was not on punishment of athletes using PEDs, but rather on educating the world regarding the health risks and moral consequences of PED use.¹⁴¹ In 1989, the Council of Europe addressed the issue by creating, and eventually ratifying, the Anti-Doping Convention (the “Convention”).¹⁴² The Convention¹⁴³ set forth a number of technical, legislative,

137. Whitman, *supra* note 12, at 477.

138. Chip Dempsey, *Steroids: The Media Effect and High School Athletes*, 40 *NEW ENG. L. REV.* 731, 732–33 (2006).

139. Whitman, *supra* note 12, at 477.

140. *Id.* at 464.

141. THE COUNCIL OF EUROPE, DIRECTORATE OF YOUTH AND SPORT, *THE ANTI-DOPING CONVENTION: FOR A CLEAN AND HEALTHY SPORT* (2003), available at http://www.coe.int/t/dg4/sport/Source/DepliantDopageHDGD_EN.pdf.

142. Anti-Doping Convention, *opened for signature* Nov. 16, 1989, 1605 U.N.T.S. 3.

financial, and educational standards and regulations grounded upon the consensus that anti-doping laws were necessary to preserve individual health and to maintain the integrity of sports.¹⁴⁴ The Convention calls for the protection of current athletes' health¹⁴⁵ and education for the international youth as to the potential medical consequences associated with PEDs.¹⁴⁶

The IOC's goals of informing young athletes of the medical dangers and ethical implications of PED use is essential for combating PEDs.¹⁴⁷ Article Six of the Convention calls for the implementation of programs targeted at school students and young athletes, dedicated to the education and dissemination of information regarding the health risks inherent in doping.¹⁴⁸ Without these educational programs, there will be little to temper the desire of youths to follow in the footsteps of athletes who have publicly admitted to using steroids¹⁴⁹ or those who are alleged to have done so during their professional careers¹⁵⁰ but who have not faced sanctions from their respective leagues.

The Convention was a good first step toward recognizing the global problem of PEDs in sports, but the document fails to address many important issues necessary for a comprehensive anti-doping regime. The

143. The Convention is not limited to the participating members of the Council of Europe, rather it extends to all those states wishing to adopt its governing principles either in whole, or in part. *Id.* at art. 14.

144. *Id.* at pmb., art. I.

145. *Id.* at pmb., ¶ 4.

146. *Id.* at art. 6.

147. *Id.*

148. *Id.*

149. During the 1998 season in which he set the single-season home run record, Mark McGwire admitting to using the nutritional supplement androstenedione, which raises testosterone levels, and, although it was legal under the MLB drug policy at the time, the pill was banned by the NFL and has since been added to the MLB banned substances list. See Murray Chass, *McGwire's Grand Finale Makes It 70*, N.Y. TIMES, Sept. 28, 1998, at A1; Joe Drape, *McGwire Admits Taking Controversial Substance*, N.Y. TIMES, Aug. 22, 1998, at C3; Barry M. Bloom, *MLB Bans Use of Androstenedione*, MLB.COM, Jun. 29, 2004, available at http://mlb.mlb.com/content/printer_friendly/mlb/y2004/m06/d29/c783595.jsp.

150. In 2006, two *San Francisco Chronicle* reporters, Mark Fainaru-Wada and Lance Williams, released their book *Game of Shadows*, which documented Barry Bonds' alleged use of PEDs over at least five seasons, describing in detail his daily drug usage and his persistent doping, including specific drugs Bonds injected during the 2001 season in which he set the single season home run record. MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* (2006). To this date, Bonds has never failed an MLB drug test nor has he been criminally charged with possession of a controlled substance in violation of the Federal Anabolic Steroid Act.

Convention makes a noble effort to adopt “appropriate legislation, regulations or administrative measures to restrict the availability . . . as well as the use in sport of banned doping agents, and doping methods and in particular anabolic steroids.”¹⁵¹ Yet, the Convention lacks the compliance and enforcement power—issues commonly associated with international soft law documents.¹⁵² The Convention also calls for member nations to assist sports organizations in financing doping controls through subsidies and grants,¹⁵³ but it fails to identify a source for consistent income.

Similarly, the Convention implores parties to “encourage and . . . facilitate” the implementation of anti-doping controls by sports organizations¹⁵⁴ and to assist these organizations and their members in negotiating a satisfactory testing regime that can operate uniformly on the international level.¹⁵⁵ However, without required action or benchmarks for implementation, any specific action pursuant to the Convention is left to the individual member states. The Convention recommends that countries create a harmonized list of banned substances,¹⁵⁶ drug testing procedures,¹⁵⁷ and disciplinary procedures that apply “agreed international principles of natural justice . . . and ensur[e] respect for the fundamental rights of suspected sportsmen and sportswomen.”¹⁵⁸ The Convention further encourages parties to work with their sports organizations in order to sanction medical personnel who may be responsible for disseminating PEDs to professional athletes.¹⁵⁹ But such efforts may become difficult when nation states must not only seek to unify an anti-doping regime within their borders without clear international guidance, but also then attempt to bring these laws in line with their international counterparts.

For nearly a decade, the international sports community struggled to adhere to the lofty goals set forth in the Convention, and sought to create a new international scheme, particularly with regard to implementing doping controls¹⁶⁰ and sanctions for PED use.¹⁶¹ In 1999, WADA

151. Anti-Doping Convention, *supra* note 142, at art. 4, § 1.

152. HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 164–67, 731 (3d ed. 2008).

153. Anti-Doping Convention, *supra* note 142, at art. 3, § 3(a).

154. *Id.* at § 3(c).

155. *Id.* at § 3(d).

156. *Id.* at art. 7(2)(b).

157. *Id.* at art. 7(2)(c).

158. *Id.* at art. 7(2)(d).

159. *Id.* at art. 7(2)(e).

160. Robyn J. Rosen, *Breaking The Cycle: Balancing the Eradication of Doping from International Sport While Upholding the Rights of the Accused Athlete*, *ENT. & SPORTS LAW.*, Spring 2007, at 3, 4.

161. *Id.*

emerged as a byproduct of an international movement to eradicate doping in sports and to “promote, coordinate, and monitor the fight against doping in sports in all its forms.”¹⁶² In particular, WADA was developed in response to the lack of uniform testing procedures and regulation of anti-doping in international sports.¹⁶³

To combat the disjointed nature of the fight against PEDs, the creation of WADA was a major step in the fight against doping in sports because the agency was founded on the notion that a comprehensive anti-doping program should provide athletes and sports federations with the same anti-doping procedures “no matter the nationality, the sport[,] or the country where tested.”¹⁶⁴ Unlike the Convention, WADA has generated a comprehensive four-part scheme to anti-doping regulation that includes: mandatory implementation of specific doping controls with uniform testing procedures and sanctions for violations;¹⁶⁵ education and research programs;¹⁶⁶ well-defined roles and responsibilities for athletes and medical and support personnel;¹⁶⁷ and specific guidance with respect to compliance and interpretation of the WADA Code (the “Code”).¹⁶⁸

Much like the Convention, one of the primary goals of WADA was the promotion of “health, fairness[,] and equality for athletes worldwide.”¹⁶⁹ The goal was not only to protect the health of athletes, but also to restore the integrity of athletic competition and preserve the values of fair play, ethics, and honesty.¹⁷⁰ The purpose of WADA, however, was to move beyond the Convention to ensure effective and uniform enforcement at the international level.¹⁷¹ WADA succeeds by incorporating a list of banned substances and providing specific guidance for laboratory accreditation and testing procedures that are binding on the more than five-hundred sports organizations that have adopted the Code.¹⁷²

162. World Anti-Doping Agency, Mission & Priorities, <http://www.wada-ama.org> (last visited Oct. 21, 2008).

163. The IOC governs testing for the Olympic Games while the individual national sports organizations are left to formulate their own testing procedures. Rosen, *supra* note 160, at 4.

164. *Id.*

165. *See* THE CODE, *supra* note 83, at pt. I.

166. *See Id.* at pt. II.

167. *See Id.* at pt. III.

168. *See Id.* at pt. IV.

169. *Id.* at 1.

170. *Id.* at 3.

171. Rosen, *supra* note 160, at 4.

172. THE CODE, *supra* note 83; World Anti-Doping Agency, Code Signatories, <http://www.wada-ama.org> (last visited Nov. 23, 2009).

WADA takes a hard-line stance towards the presence of prohibited substances in an athletes' body.¹⁷³ Under a strict liability regime, athletes are under a duty of personal responsibility and any specimen that shows the presence of a prohibited substance, or its metabolites or markers, will be considered an anti-doping violation without any consideration of intent, fault, negligence, or knowing use.¹⁷⁴ Therefore, an athlete is guilty of an anti-doping violation as soon as an illegal substance is discovered.¹⁷⁵ Furthermore, athletes who refuse to participate in the anti-doping scheme or those who "fail without compelling justification to submit to a drug test are guilty of an anti-doping violation under WADA."¹⁷⁶

Although the standard for an anti-doping violation does not rise to the level of proof beyond a reasonable doubt, the current regime is necessary to close off potential loopholes in the system. As seen from the BALCO scandal in 2003, in which many prominent American athletes were linked to a drug laboratory known to produce THG,¹⁷⁷ athletes testing positive for PEDs might claim they did not know a particular substance was prohibited, or that they were simply given a supplement by a trainer or medical personnel without knowledge of its illicit nature.¹⁷⁸ Even though many athletes involved in the BALCO scandal have claimed ig-

173. THE CODE, *supra* note 83, at 8.

174. *Id.*

175. Wendt, *supra* note 97, at 9.

176. *Id.* At the Athens 2004 Olympic Games, Hungary's Adrian Annus was stripped of his gold medal in the hammer throw when he failed to submit to a follow-up drug test required by the IOC. *Id.* Although Annus had already been tested twice—once before the event and once afterwards, both with negative results—later analysis suggested possible foul play as samples appeared to have come from two different athletes. *Id.* After initially refusing, "Annus finally returned the medal after IOC threatened to suspend Hungary's Olympic membership and withdraw its financial support." *Id.* Similarly, Greek sprinters Kostas Kenteris and Katerina Thanou missed a doping test before the Olympics that year, and each received a two-year suspension for violating the anti-doping code. Kenteris was rumored to be chosen to light the Olympic flame to open the Sydney games, but instead withdrew from the Games. *Id.* at 10.

177. See *supra* note 125 and accompanying text.

178. Wendt, *supra* note 97, at 10; Sal Ruibal, *BALCO Becoming Household Name*, USATODAY.COM, Dec. 3, 2004, http://www.usatoday.com/sports/2004-12-03-balco-over-view-1c_x.htm; see also *USA Shooting & Q. v. Union Internationale de Tir*, 1 Recueil des sentences due TAS [Digest of CAS Awards] 187, 193–94 (Court of Arbitration in Sport establishing a strict liability standard for a positive test for PEDs). Without strict liability, the rule could be undermined by coaches and trainers who provide athletes with the substance. Additionally, a competitive advantage need not be gained in order to violate the anti-doping code. "To require the relevant sports body to establish mens rea would impose . . . a burden which it could not easily discharge, and which could lead to protracted, bitter and ultimately, inconclusive hearings." Michael J. Beloff, *Drugs, Laws and Versapaks*, in *DRUGS AND DOPING IN SPORT* 44 (John O'Leary ed., 2001).

norance to the ingestion of any banned substance, the results of numerous athletic competitions which have not already been overturned may forever remain tainted due to the presence of PEDs in the athlete's body.

For this reason, and, additionally, to prevent athletes from attempting to cover up "knowing and intentional use" of PEDs by declaring their lack of knowledge of the presence of PEDs in their bodies, WADA imposes a strict liability standard¹⁷⁹ for anti-doping violations.¹⁸⁰ WADA also imposes sanctions upon medical and training staff to ensure that those parties who are responsible for intentionally administering PEDs to an athlete without the athlete's knowledge will be punished under the anti-doping code.¹⁸¹ Furthermore, a requirement of intent would impose substantial litigation costs that might not only cripple many sports federations financially,¹⁸² but could also delay the official results of championship competitions significantly. Although many believe the reduced standard of proof under the WADA scheme is unfair to the athletes,¹⁸³ athletes are put on notice of the stringent WADA policies behind the testing regime when they agree to participate in the sporting event. This lesser quantum of proof forces athletes to make informed choices about what substances they put into their bodies with the goal of ultimately reducing the serious health risks PED users impose upon themselves. Athletes who are willing to chance these health risks do so knowing they are also risking their athletic careers.

WADA's comprehensive doping control scheme is ineffective without a method of ensuring compliance by the international sports federations. The Code is a nongovernmental document, thus, many governments are unable to enforce its provisions effectively—the threat of governmental sanctions would make it much easier to engender athletes' compliance with the testing procedures.¹⁸⁴ The international community reconvened to address the issue of noncompliance and lack of enforcement at the United Nations Educational, Scientific and Cultural Organization

179. An "[a]thlete or other Person who fails a drug test for the first time has the burden of establishing no fault or negligence, and if he or she can successfully meet this burden to the 'comfortable satisfaction' of the hearing body, the athlete is eligible for a reduced sanction." David Howman, Sanctions Under the World Anti-Doping Code (Nov. 12, 2003), www.wada-ama.org/rtecontent/document/LEGAL_sanctions_howman.pdf.

180. THE CODE, *supra* note 83, at 9.

181. WADA language sanctions "athletes or other persons" who may be responsible for an athlete's positive drug test. *Id.* at 9.

182. *Id.*

183. Under the Code, athletes may be found guilty of a doping violation based on their use of an over-the-counter drug that contains a banned substance, even when the drug has not been labeled as such. Rosen, *supra* note 160, at 6–7.

184. *Id.*

(“UNESCO”) General Conference in October 2003.¹⁸⁵ Thirty-eight nations “unanimously adopted and ratified the UNESCO Convention (also known as the Copenhagen Declaration on Anti-Doping in Sport) on October 19, 2005.”¹⁸⁶ The agreement was reached upon the premise that “sport should play an important role in the protection of health, in moral and physical education, and in the promotion of international understanding and peace. . . .”¹⁸⁷

The Copenhagen Declaration creates a legal framework for the implementation of the WADA Code, creating the first binding piece of anti-doping legislation.¹⁸⁸ The Declaration required ratification by thirty countries in order for it to become effective¹⁸⁹ which did not occur until December 2006, finally bringing the Convention into effect on February 1, 2007.¹⁹⁰

The Copenhagen declaration calls for nation-states to “provide funding [for WADA] within their respective budgets”¹⁹¹ and requires national legislatures to implement laws to control availability of banned substances¹⁹² and to begin to create domestic frameworks for implementing the WADA code in their respective nations.¹⁹³ The United States, however, has not ratified the Copenhagen Declaration, and has taken no affirmative legislative action in the fight against illegal PEDs.¹⁹⁴

Even though WADA and the accompanying Copenhagen Declaration provide for comprehensive doping control systems and the means for nations to implement the policies, there is insufficient evidence that the policies in place are effective at stopping the abuse of PEDs.

B. National Regimes

1. Rationale

The international agreements only establish a baseline of anti-doping regulations, as participating countries are free to enact more stringent

185. *Id.*

186. *Id.*

187. International Convention Against Doping in Sport, *adopted* Oct. 19, 2005, *available at* <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf#page=2> [hereinafter Copenhagen Declaration].

188. Rosen, *supra* note 160, at 5.

189. Copenhagen Declaration, *supra* note 187, at art. 37.

190. World Anti-Doping Agency, Governments, <http://www.wada-ama.org/en/> (last visited Nov. 25, 2008).

191. Copenhagen Declaration, *supra* note 187, at art. 11.

192. *Id.* at art. 8.

193. *Id.* at art. 7.

194. Rosen, *supra* note 160, at 5; *see discussion infra* Part III.

restrictions that address special concerns of the nation not raised or left unresolved by the International agreements. Many governments have found the Code very difficult to understand and thus even harder to implement into their nations' legal frameworks.¹⁹⁵ For example, the standard sanction to be imposed for a first time offense may be reduced five different ways, each requiring the application of a different section of the Code.¹⁹⁶ Additionally, when the individual sports federation has its own sanctioning policy for anti-doping violations, or a banned substances list that is different from WADA's list, it becomes extremely difficult for athletes and other persons to ensure compliance.¹⁹⁷ By adopting their own standards, national legislatures can help athletes within their respective jurisdictions understand the anti-doping policy and establish a definitive banned substances list that will be standardized for all national sports federations, as long as it is more inclusive than the WADA banned substances list.

Another difficulty for WADA is that its provisions are enforced and upheld by a specialized administrative tribunal, the Court of Arbitration for Sport ("CAS").¹⁹⁸ Even though CAS is an internationally accepted arbitration court that currently holds exclusive jurisdiction over anti-doping violations in international sports, the CAS is only binding upon member states,¹⁹⁹ and, without clear precedent, and, given the potential for conflicting national legislation, there will be no explanatory guideposts for athletes to follow.²⁰⁰ CAS jurisdiction does not extend to professional sports organizations or national sports federations as these groups are not signatories to WADA, so the absence of a localized anti-doping regulation or the creation of a regime that does not adequately mirror the WADA Code may result in incongruous sanctions for the same violation. Similarly, WADA and the Anti-Doping Convention have different definitions for terms, including the definition of "athlete,"²⁰¹

195. Lauri Tarasti, *Some Juridical Question Marks in the Revised World Anti Doping Code*, 8 INT'L SPORTS L. REV. 17, 17 (2008).

196. *Id.*

197. *Id.* at 18.

198. World Anti-Doping Agency, *Doping Control*, <http://www.wada-ama.org/en/> (last visited Nov. 25, 2008).

199. Tarasti, *supra* note 195, at 19.

200. *Id.* at 21.

201. The Anti-Doping Convention defines sportsmen and sportswomen as "those persons who participate regularly in organized sports activities." Anti-Doping Convention, *supra* note 142, at art. 2 §1(c). For the purposes of Doping Control, WADA defines "athlete" as "any Person who participates in sport at the international level (as defined by each *International Federation*) or national level (as defined by each *National Anti-Doping Organization*) and any additional Person who participates in sport at a lower

and, therefore, even when CAS has exclusive jurisdiction, the same evidence may be evaluated on a different standard, which may dictate the guilt or innocence of the athlete differently.²⁰²

Another problem with WADA is that some countries may find the sanctions inappropriate or ineffective.²⁰³ For medical support personnel or physicians who are found guilty of an anti-doping violation, a two-year suspension from the sport may not be a sufficient deterrence from engaging in illicit behavior.²⁰⁴ These individuals can easily shift to another sport, or work privately with teams or athletes that are not governed by international agreements. Some countries may find that a substantial fine or other sanction is more appropriate. Alternatively, the two-year ban for athletes will interrupt their careers and prevent them from engaging in their occupations,²⁰⁵ possibly in violation of national labor laws prohibiting restraint on trade.²⁰⁶ A fine would carry a minimal element of deterrence considering the magnitude of salaries of professional athletes.²⁰⁷

Recent studies have indicated that athletes who still want to cheat even in the face of the comprehensive WADA code can do so with little risk of being caught.²⁰⁸ A study conducted by the Copenhagen Muscle Research Center in Denmark—designed to test the efficacy of the WADA testing facilities—found that WADA accredited laboratories were unable to successfully test for the presence of erythropoietin (“EPO”), a substance that stimulates the production of oxygen-carrying red blood cells that helps improve an athlete’s endurance.²⁰⁹ Researchers

level if designated by the Person’s National Anti-Doping Organization. For purposes of anti-doping and education, any Person who participates in sport is under the authority of any Signatory, government, or other sports organization accepting the Code.” THE CODE, *supra* note 83, at 72.

202. Tarasti, *supra* note 195, at 21.

203. *Id.*

204. *Id.* at 19.

205. *Id.*

206. See generally Annette Greenhow, *Anti-Doping Suspensions and Restraint of Trade in Sport*, BOND U. SPORTS LAW EJOURNAL, April 2008, <http://epublications.bond.edu.au/slej/7>.

207. *Id.*

208. Gina Kolata, *Olympic-Style Test Didn’t Flag Doped Samples, Study Says*, N.Y. TIMES, June 26, 2008, at A1.

209. *Id.* Eight men agreed to be injected with EPO over a four-week period, following a regimen similar to those used by athletes attempting to cheat. The study collected urine samples on multiple occasions before, during, and after the men were doping. See Carsten Lundby et al., *Testing for Recombinant Human Erythropoietin in Urine: Problems Associated with Current Anti-doping Testing*, 105 J. APPLIED PHYSIOLOGY 417, 417 (2008), available at <http://jap.physiology.org/cgi/reprint/105/2/417.pdf>. When samples were sent

believe that it is very hard to establish the presence of illegal hormones in urine analysis because the body naturally produces hormones such as EPO and testosterone, which are banned substances only when produced artificially, pursuant to WADA.²¹⁰

Athletes will not be effectively deterred by WADA when they believe they can avoid a positive test.²¹¹ A glaring example is the recent drug scandals that have plagued the Tour de France.²¹² The 2007 winner Alberto Contrador did not participate in the 2008 race because his team was excluded, having been involved in various doping scandals over the past two years.²¹³ American Floyd Landis lost his 2006 title after he failed a drug test.²¹⁴ This year, Spanish cyclists Moisès Dueñas Nevado and Manuel Beltrán each tested positive for EPO during the Tour de France,²¹⁵ and Italian rider Riccardo Ricco also tested positive, after which his entire team voluntarily withdrew from the race.²¹⁶ In each instance, the riders allegedly took PEDs fully aware they would be tested consistently throughout the race—the rules stipulated that the winning rider of each stage, the overall leader, and randomly selected riders would be tested each day.²¹⁷ Such results cast doubt upon the validity of previous titles won by the disqualified athletes and also call into question how many other riders were using EPO without being tested and caught.

to WADA accredited laboratories, one lab found some positive and others “suspicious.” Another lab did not find any samples positive, and found others suspicious. *Id.* The two labs did not agree on which samples were suspicious. Under the Code, if one lab finds a sample suspicious, or even finds it positive for an illegal substance such as EPO, the sample must be tested again by a different laboratory, and the athlete is only found guilty of an anti-doping violation if the second lab detects the illegal substance. *Id.* Under WADA rules, none of the eight subjects in the study would have been found guilty of a doping violation, even though all eight men had elevated red blood cell counts and improved endurance performances. *Id.*

210. Kolata, *supra* note 208.

211. *Id.*

212. Edward Wyatt, *Embarking on Tour Of Uncertainty*, N.Y. TIMES, July 4, 2008, at D6.

213. *Id.*

214. *Id.*

215. Edward Wyatt, *Second Rider is Expelled for a Positive Drug Test*, N.Y. TIMES, July 17, 2008, at D2.

216. Edward Wyatt, *More Turmoil at Tour After 3rd Positive Test*, N.Y. TIMES, July 18, 2008, at D1.

217. Jerome Pugmire, *Agencies vie to control anti-doping program*, Oct. 23, 2008, http://www.usatoday.com/sports/cycling/2008-10-23-536248034_x.htm.

Even when the quantity of positive tests is decreasing, it is naïve to believe that athletes are not cheating.²¹⁸ Adding a single grain of powdered laundry detergent to a urine sample will destroy EPO and human growth hormone in the urine.²¹⁹ When the threat of a two-year suspension is not enough to deter an athlete who has knowingly used PEDs from walking into a drug test because that athlete is confident that he or she can beat the test anyway, a new regime must be implemented. The international regime has only forced athletes, medical personnel, and scientists to work harder to beat the drug tests, but individual countries must take it upon themselves to institute a policy that will force dopers out and restore the integrity of sports.

2. Legislation

In an effort to close the loopholes in the WADA regime, and also to more effectively investigate and eradicate doping violations, European countries have instituted national legislative schemes that build upon the WADA foundation. Due in large part to the doping scandals that have plagued some of Europe's most prestigious athletic competitions such as the Tour de France, national governments have taken action to expose and eliminate the use of illegal PEDs because "drug use in sports threatens . . . the credibility of heroes, their accomplishments, and the integrity of the games they participate in."²²⁰ As in the United States, PEDs are becoming more prevalent in European "high school locker rooms and on neighborhood soccer fields."²²¹ PEDs' negative effects can be most harmful when they not only affect the physical health of young people who use them, but also encourage children to cheat and thus corrupt the positive impact sports would otherwise have on their psychological development.²²²

In 2000, the Italian government adopted one of the first national anti-doping statutes aimed at combating the use of PEDs by regulating the health standards in athletic activities.²²³ The legislation states that because the aim of sport is to promote individual and collective health,

218. Gina Kolata, *So far, Drug Testing Has Revealed Only a Few Positives*, N.Y. TIMES, Aug. 16, 2008, <http://www.nytimes.com/2008/08/16/sports/olympics/16doping.html>.

219. *Id.*

220. Edward H. Jurith & Mark W. Beddoes, *The United States' and International Response to the Problem of Doping in Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 461, 462 (2002).

221. *Id.*

222. *Id.* at 464.

223. Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping, Gazz. Uff. (Law) n.294, *adopted* Nov. 16, 2000, *published* Dec. 18, 2000.

sporting activities are to be governed by ethical principles and educational values that are integral to Italian society.²²⁴ As doping is a matter of national health, the Minister of Health is to create, under the law, a commission composed of experts from the entire spectrum of society, including physicians, political representatives, biochemists, athletes, and coaches²²⁵ to help develop a list of banned substances,²²⁶ testing protocols,²²⁷ and to determine appropriate sanctions for violations.²²⁸

Significantly, the law vigorously targets individuals who “obtain, administer or use drugs not justified by pathological conditions that may alter the performance of athletes” by imposing criminal penalties of potential fines and imprisonment up to three years.²²⁹ Similar penalties are imposed for substances that may, or are intended, to modify the results of a drug test.²³⁰ This law is applicable not only to Italian athletes engaging in international competition, but also to all Italian citizens, including professional soccer leagues (which are populated by some of the most talented and most popular athletes in the world).²³¹ Italian athletes would have to heavily consider the allure of PEDs and weigh the benefits of use against the costs of a potential criminal conviction and jail time should they test positive. Even for the greatest superstars, such international embarrassment would likely end their professional athletic careers and assuredly terminate any endorsement contracts they possessed. Even if athletes believe they can beat the drug test, the risk of heavy fines or imprisonment would surely serve as a greater deterrent than a comparatively petty two-year suspension.

In France, the legislature adopted a comprehensive anti-doping program, creating the French Anti-Doping Agency (“AFLD”), an independent public legal authority designed to determine and implement anti-doping measures pursuant to French legislation adopted in October 2006.²³² The law makes AFLD responsible for establishing doping con-

224. *Id.* at §1.1.

225. *Id.* at §3.3.

226. *Id.* at §7.

227. *Id.* at §4.

228. *Id.* at §9.

229. *Id.* at §9.1.

230. *Id.*

231. Kevin Ashby, *Serie A Reiterates Star Quality*, UEFA.COM, May 24, 2007, available at <http://www.uefa.com/competitions/ucl/news/kind=1/newsid=542188.html>; see also Liga Calcio, <http://www.lega-calcio.it> (last accessed Nov. 23, 2009) (the official website for the Italian professional soccer leagues).

232. Law No. 2006-405 of Apr. 5, 2006, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Apr. 6, 2006, at 5193, available at http://www.afld.fr/docs/loi_afld.pdf.

trols,²³³ drafting a list of prohibited substances,²³⁴ and developing prevention, education, and research activities related to anti-doping.²³⁵ It also gives the AFLD the power to overrule sanctions imposed by national sports federations if the AFLD committee deems a sanction too lenient.²³⁶ Under this regime, the French government allows the individual sports federations to police themselves, while still employing independent oversight to ensure that sanctions properly correspond to the seriousness of the crime. French law also employs the criminal justice system to punish individuals who supply athletes or minors with illegal performance-enhancing substances.²³⁷

The law punishes those who facilitate or encourage the use of PEDs “in any way” with five years imprisonment and a fine of €75,000 Euros.²³⁸ This hard-line stance shows the nation’s citizens that their government is committed to preserving the health of all sportsmen, both professional and amateur, and that rather than punish the athlete, the law targets the supplier. Imposing such heavy sanctions upon the source suggests a legislative intent to substantially decrease the availability of PEDs within the country, as physicians and drug suppliers will not risk debilitating fines and lengthy jail sentences when they are only intermediary financial beneficiaries of PED use, compared to the athletes who receive fame, glory, and robust endorsement deals.

In 2008, Germany also introduced its own version of an anti-doping law,²³⁹ as the legislature felt compelled to act to protect “society’s health” upon the recognition that doping “tends to destroy ethical-moral values of the sports world.”²⁴⁰ The legislature based this decision on statistics that found that “sixty-six percent of all adults living in Germany participate regularly in sporting activities and see professional athletes as their heroes.”²⁴¹ The German government believed that the current international doping framework was ineffective, that the individual sports federations were unable to adequately regulate doping in sports, and that

233. CODE DU SPORT [C. SPORT] art. L. 232-5().

234. The banned substances list mirrors the WADA banned substances list and shall be published in the Official Journal of the French Republic. C. SPORT art. L. 232-9().

235. C. SPORT art. L. 232-5.

236. C. SPORT art. L. 232-21, 22, 23.

237. C. SPORT art. L. 232-26.

238. *Id.*

239. BTDrucks 16/5526, available at <http://dip21.bundestag.de/dip21/btd/16/055/1605526.pdf>.

240. Julia Völlmecke, *Doping As a Crime? The Policy Issue Concerning the Choice of Method to Deal with Doping*, INT’L SPORTS L.J., 2008/1-2, at 49, 49.

241. *Id.*

criminal law was necessary to protect individual athletes as well as society from harm.²⁴²

3. The Criminalization Rationale

A state-enforced code of conduct supported by the criminal justice system is an appropriate method to avoid the serious threats posed by illegal PEDs to society's welfare, integrity, and health.²⁴³ Methods used for cheating in sports continue to develop at an extraordinary rate, and, as such, the government is in a better position to develop and enforce a code of conduct, as opposed to a private organization whose interests may not necessarily be aligned with the public's.²⁴⁴ Since doping in sports is a public concern, the enforcement of morality-based laws with criminal penalties is valid in that it provides the "certainty, consistency[,] and transparency" that is missing from the private and international regulatory framework.²⁴⁵ "The aim of criminal law is to protect the individual as well as society from harm,"²⁴⁶ and this is a necessary step, not only to police the ball fields, but also to ensure the prominent position of sports in society and to combat a potentially life-threatening influence on young athletes. The promotion of health in society is not met solely by deterring the use of PEDs—a comprehensive regime that can investigate, detect, and prevent potential use of physically harmful substances is necessary.²⁴⁷

Using the criminal justice system to combat doping violations goes far beyond what is employed by the governing international doctrine. The criminal justice system would offer new ways to conduct criminal investigations into allegations of possession, use, and development of PEDs, as well as provide law enforcement with the necessary tools to order investigatory searches and seizures of incriminating evidence.²⁴⁸ An athlete facing criminal charges might be more likely to cooperate with authori-

242. *Id.* at 50.

243. *Id.*

244. "Doping is deemed to be unhealthy. Doping is cheating and . . . immoral. The methods used for cheating have become more and more innovative and have reached epidemic proportions. Doping is therefore of public interest and demands a public rather than a private response." *Id.*

245. *Id.*

246. Gregory Ioannidis, *Legal Regulation of Doping in Sport and the Application of Criminal Law on Doping Infractions: Can a Coercive Response Be Justified*, 6 INT'L SPORTS L. REV. 29, 29 (2006).

247. John O'Leary & Rodney Wood, *Doping, Doctors and Athletes: The Evolving Legal Paradigm*, INT'L SPORTS L.J., 2006/3-4, at 62, 63.

248. *Id.*

ties when faced with imprisonment.²⁴⁹ Even the threat of costly legal proceedings could be sufficiently intimidating to persuade an athlete to cooperate²⁵⁰ in investigations, which could lead to more convictions of those who are most deeply involved in PED production or distribution schemes.

Certainly, criminalization of doping violations would impose new obligations and responsibilities on the state.²⁵¹ The state would be charged with preserving the individual autonomy of the athlete while still acting in the name of the public interest.²⁵² Although the criminalization of doping violations, which would ultimately require the use of evidence collected via mandatory drug-tests in criminal proceedings, may evoke Constitutional challenges in light of the Fifth Amendment's prohibition on forced self-incrimination, such use of real evidence in a criminal proceeding will likely pass muster under the standard set forth in *Schmerber v. California*.²⁵³ On the other hand, State constitutional provisions often provide greater protection to the accused,²⁵⁴ and, therefore, additional Constitutional issues may arise depending on jurisdiction, which further complicates essential doping-control uniformity. Participation in sports, however, necessarily requires acceptance of the governing rules,²⁵⁵ and it is of paramount importance that the public confidence in the integrity of athletic competitions be restored by ensuring the continuing "adherence to the essential values of fairness, justice[,] and equality"²⁵⁶ that form the cornerstones of competitive sport. The European Convention on Human Rights provides for the qualified right of respect for privacy, but allows for special exceptions when interference is "necessary in a democratic society . . . for protection of health or mor-

249. Völlmecke, *supra* note 240, at 50.

250. *Id.*

251. Ioannidis, *supra* note 246, at 30.

252. *Id.*

253. *Schmerber v. California*, 384 U.S. 757, 764 (1966) ("the privilege [against self-incrimination] is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.").

254. *See, e.g.*, S.D. CONST. art. VI, §9 ("No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense."); M.A. CONST. pt. I, art. XII. ("No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself . . ."); I.L. CONST. art. I, §10 ("No person shall be compelled in a criminal case to give evidence against himself . . ."); *cf.* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . .").

255. Ioannidis, *supra* note 246, at 31.

256. *Id.*

als.”²⁵⁷ Under this document, preserving individual privacy may be outweighed by the justification for criminalizing the harms and risks that threaten “society’s welfare, integrity[,] and existence.”²⁵⁸ If the national legislature determines societal concerns demand the criminalization of doping violations, athletes who participate do so via free will with full knowledge of the consequences of their choices.

Additionally, as sports law expert Gregory Ioannidis notes, sports are inextricably linked with society²⁵⁹ and serve to promote values that society honors and desires to protect,²⁶⁰ thus, the criminalization of doping violations is an important step forward in working to preserve the safe and healthy development of the nation’s youth.²⁶¹ In addition to honesty and fairness, sports promote healthy development by encouraging young athletes to stay active and to get much-needed exercise,²⁶² all while helping to develop a sense of community and camaraderie fostered by teamwork. It is argued that morality should not influence the law,²⁶³ but the criminalization of PEDs is only a small step beyond current law in the United States, which punishes the use and possession of substances with limited or unknown health benefits under the Controlled Substances Act.²⁶⁴

The legal framework is already in place for the United States to follow its international counterparts in adopting a more dynamic approach to counter the unprincipled “pursuit of wealth and fame [that] now threaten[s] our very social fabric.”²⁶⁵ The criminal code has already been employed to preserve and protect the health of society; why not adopt legislation in the United States that also safeguards the public interest²⁶⁶ in sport, which encompasses education, professionalism, and ideals of fairness, justice, and equality?

257. Convention for the Protection of Human Rights and Fundamental Freedoms art. VIII, *opened for signature* Apr. 11, 1950, 213 U.N.T.S 221.

258. Ioannidis, *supra* note 246, at 38.

259. *Id.* at 32.

260. *Id.* at 33.

261. *Id.*

262. *Id.*

263. See generally RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999) (arguing from a pragmatic standpoint that moral theorizing should not form the basis of legal judgments).

264. Comprehensive Drug Abuse Prevention and Control Act of 1970, 91 Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 42 U.S.C.).

265. *Id.*

266. Ioannidis, *supra* note 246, at 34.

III. THE INDECISIVE STATES OF AMERICA

Although the United States Olympic Association is bound by the WADA Code²⁶⁷ and testing is carried out by the United States Anti-Doping Agency ("USADA"),²⁶⁸ American professional sports remain outside WADA jurisdiction.²⁶⁹ The decision to remain outside the reach of WADA falls squarely on the individual sports leagues, and the inability to agree upon a standardized testing regime is due in part to the fact that professional sports are governed by the National Labor Relations Act ("NLRA"),²⁷⁰ which severely restricts the ability of the league to unilaterally impose any conditions upon its participants.²⁷¹ Sports organizations with a collective bargaining relationship must bargain in good faith for "wages, hours, and other terms and conditions of employment."²⁷²

Drug testing is a mandatory subject of collective bargaining.²⁷³ For players who want to use PEDs, or others who feel the testing regime imposed by WADA is too restrictive,²⁷⁴ the collective preference of the various Players' Unions in professional sports has been to take a strong stance against the adoption of the WADA Code. Why would an athlete want to subject himself to out-of-season testing, having to report his whereabouts to league officials any time he leaves the state or risk losing his multi-million dollar endorsement deal if he were to test positive for a PED because he took an over the counter common cold medicine that contained a banned substance?

Although athletes who have already made it to the professional leagues may not consider the integrity of the sport in jeopardy, the use of PEDs in sports poisons American youths' conceptions of fairness, honesty, and, most importantly, health. Seeking to address these important issues of

267. See sources cited *supra* note 83.

268. Jurith & Beddoes, *supra* note 220, at 475.

269. *Id.* at 476.

270. 29 U.S.C. §§151–169 (2006); WALTER T. CHAMPION, SPORTS LAW IN A NUTSHELL 41 (2d ed. 2000).

271. Showalter, *supra* note 39, at 655.

272. 29 U.S.C. § 158(d) (2006).

273. Johnson-Bateman Co., 295 N.L.R.B. 180, 182 (1989) (finding that drug and alcohol testing is a mandatory subject of collective bargaining because it is "germane to the working environment, and, outside the scope of managerial decisions," which are two criteria the Supreme Court had established for mandatory subject matters).

274. "In order for authorities to conduct random testing, [athletes] must keep [authorities] informed of . . . [their whereabouts] . . . 365 days a year . . ." Rosen, *supra* note 160, at 8 (internal quotation marks omitted). Athletes would be eligible to be tested at any hour of any day, without any prior notice, regardless of whether or not their sport is in season. *Id.*

public interest, Congressional leaders have proposed legislation to require professional sports leagues to come into accordance with WADA testing protocols to be governed by the USADA,²⁷⁵ and for doping violations to be sanctioned based upon the WADA guidelines,²⁷⁶ yet no legislative action has been taken.

Although the rationale behind the proposed legislation²⁷⁷ mirrors the intent of many European legislatures that have successfully adopted national anti-doping laws, such legislation faces heavier resistance in the United States due to privacy issues and Fourth Amendment concerns of unreasonable searches and seizures.²⁷⁸ Under the proposed legislation, “through the [Controlled Substances Act], the federal government would compel certain private parties—the various professional sports leagues—to drug test their employees.”²⁷⁹ Under current constitutional law, the only way the federal government could require private drug testing would be on the basis of a special needs exception that could only be justified after a careful balancing of both public and private interests.²⁸⁰

Proposed mandatory drug testing will not be constitutional if the government cannot show a special need beyond normal crime control.²⁸¹ In order to support the argument that drug testing of professional athletes

275. The Clean Sports Act of 2005 would apply to all four major sports in the United States, and testing policies and procedures are to be as stringent as those of USADA (mandatory two-year suspension for a first offense, and a lifetime ban for a second offense). S. Con. Res. 1114, 109th Cong. §4(b) (2005). Athletes would be tested five times annually, *id.* at §4(b)(1), and leagues could be fined a civil penalty of \$1,000,000 for each violation of non-compliance with any of the Act’s substantive provisions. *Id.* at §6(b)(2). Similarly, the Drug Free Sports Act, H.R. 1862, 109th Cong. (2005), would cover all four professional sports, as well as Major League Soccer and the Arena Football League. *Id.* at §2(2). Random testing could be conducted at least once a year and sanctions for positive tests mirror those imposed by WADA. *Id.* at § 3(1)–(4). Additionally, the professional sports leagues would be fined \$5,000,000 for failure to adopt testing policies and procedures consistent with the regulations. *Id.* at §§ 3–5; *see also* H.R. 2565, 109th Cong. (2005); Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (2005); Professional Sport Integrity Act of 2005, H.R. 2516, 109th Cong. (2005).

276. S. Con. Res. 1114, 109th Cong. § 4(b) (2005).

277. “To protect the integrity of professional sports and the health and safety of athletes generally,” with the objectives of eliminating performance-enhancing substances from professional sports and reducing usage by children and teenagers. *Id.* at § 2(a)(8)–(b).

278. *See* Lindsay J. Taylor, Note, *Congressional Attempts to “Strike Out” Steroids: Constitutional Concerns About the Clean Sports Act*, 49 ARIZ. L. REV. 961, 963–78 (2007).

279. *Id.* at 979.

280. *Id.*

281. *Chandler v. Miller*, 520 U.S. 305, 313–14 (1997).

can evade traditional Fourth Amendment warrant and probable cause requirements,²⁸² the three elements of a “special need” must be met: (1) the drug use must be an actual threat; (2) the drug testing must be aimed at actually detecting drug use, not simply deterring it; and (3) there must be a genuine threat to public safety.²⁸³ Without a special need, warrantless and suspicionless drug testing is a clear violation of the Fourth Amendment.²⁸⁴

While this might at first seem discouraging for proponents of federally mandated drug testing policies in professional sports, supporters identify a 1995 Supreme Court opinion as providing sufficient grounds to establish drug testing as a “special need” necessary to protect public safety.²⁸⁵ In *Vernonia School District 47J v. Acton*, the Court held that the significant governmental interest in protecting the public safety—especially the safety of children—was sufficient to outweigh the student athletes’ privacy interests.²⁸⁶ The Court stated that in an effort to curb teenage use of PEDs, random drug testing of student athletes by the school district was constitutionally permissible because drug use had reached uncontrollable levels and participation in athletics was a voluntary decision, to be made with full knowledge of drug-testing procedures.²⁸⁷ The constitutionality of special needs are assessed under a reasonableness standard,²⁸⁸ and surely it would be reasonable to extend *Vernonia* to permit federally mandated drug testing of professional athletes as a matter of public health and safety based on the statistical correlation between use of PEDs by athletes and use by teenagers.

Another argument asserted by professional sports organizations against the imposition of sanctions upon athletes is that the sports leagues are in a better position to regulate the conduct of participants, and, historically, Congress has declined to regulate internal governance of professional sports and the collective bargaining process.²⁸⁹ The leagues argue that they are the primary victims of banned PED use because the principle resulting injury sustained is the shame that players who have been caught

282. Showalter, *supra* note 39, at 671.

283. Joy L. Ames, Note, *Chandler v. Miller: Redefining Special Needs for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 291–94 (1997).

284. *Chandler*, 520 U.S. at 318–22 (holding that requiring state government candidates to undergo drug testing before running for office violated the Fourth Amendment because using testing to set a good example was not a special need that outweighed the candidate’s privacy interests).

285. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

286. *Id.*

287. *Id.*

288. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989).

289. See Mitten, *supra* note 20.

cheating bring to the league, resulting in the damaged faith and integrity of once-glorified historical records.²⁹⁰ However, this argument is short-sighted, as it seeks to prevent the government from entering a new regulatory field when legitimate public interest so requires. Health and safety of all citizens is of paramount concern for a government, be it the well-being of children or professional athletes.

IV. RISE OF THE MUTANT-ATHLETE?

The deterrence power of civil sanctions is only as effective as the testing policies and the efforts to remain ahead of PED developers. PEDs undetectable by any drug test may soon be (or already have been)²⁹¹ developed. "Gene therapy involves injecting synthetic [genetic material] into muscle cells, where they become indistinguishable from the receiver's DNA."²⁹² As gene therapy can speed up metabolic processes in the body thereby increasing endurance as well as muscle mass, athletes may turn to this innovative field of science to improve performance while avoiding detection.²⁹³ Early lab tests on mice suggest that successful genetic engineering has the potential to double athletic output with no identified side effects.²⁹⁴ On the other hand, a clinical trial using gene therapy in French teenagers to treat defective immune systems had less promising, lethal results.²⁹⁵

Although gene therapy is highly experimental and the potential long-term biological effects are largely unknown,²⁹⁶ current use of PEDs suggests a willingness among athletes to risk the medical uncertainties for the sake of short-term success.²⁹⁷ With multi-million dollar contracts and even more lucrative endorsement deals at stake, the cost of genetic dop-

290. *Id.*

291. Some geneticists predict that the 2008 Beijing Olympics were probably the first Olympic Games with genetically enhanced athletes. Kristin Jo Custer, Note, *From Mice to Men: Genetic Doping in International Sports*, 30 HASTINGS INT'L & COMP. L. REV. 181, 187 (2007).

292. *Id.* at 185.

293. *Id.*

294. The genetically enhanced mice were able to run nearly 6,000 feet for two and one-half hours compared to the natural mice, which ran for 90 minutes at a distance of 2,950 feet. James Reynolds, *Genetically Modified Mice That Spell Age of Athletic Superhero*, THE SCOTSMAN (Edinburgh), Aug. 25, 2004, at 9.

295. Three of the teenagers contracted cancer, and one has since died. Duncan Mackay, *The Race Hots up to Destroy Genetic Monsters: Gene Doping is the Ultimate in Cheating*, THE GUARDIAN (London), Apr. 29, 2005, at 32.

296. Custer, *supra* note 291, at 186.

297. Kevin Van Valkenburg, *Gene Doping Looms as Next Sports Edge; Boost at Cellular Level is All but Undetectable*, THE SUN (Baltimore), Jan. 16, 2005, at 1A.

ing would hardly serve as a barrier to elite athletes, and amateur athletes might even consider the cost an investment in their athletic career. If genetic doping becomes a real possibility—assuming it has not already—the integrity of pure athletic competition will be lost for good, as athletes will be juiced with PEDs that cannot be detected by urinalysis or even blood tests.²⁹⁸

If performance enhancement reaches this level, athletic competition will be dominated by a super-race of genetic mutants, biochemically engineered to run faster, jump higher, and out-muscle the competition. As new world records are set and the history books are rewritten, it will become harder to prevent young athletes from experimenting with either genetic doping or some cheaper, more easily available alternative that carries equal or greater health risks. Furthermore, countries that cannot regulate the doping epidemic may be banned from international competition, resulting in utter embarrassment not only to the government that was unable to regulate PEDs, but also to the ordinary citizens who no longer have the ability to compete in the games they love or even support their compatriots against the world's greatest natural athletes. Indeed, the cheaters will have won the race to the finish line.

CONCLUSION

If anti-doping violations are not criminalized, we cannot adequately attack the source of the problem. Current sanctions only punish the PED user, while those who develop and distribute PEDs are free to continue to adulterate the integrity of professional sports, certain to find another athlete who will stop at nothing to achieve his or her dream of being the champion. The goal of criminalizing PEDs is not only intended to punish those who are willing to violate the integrity of the game, but also to uncover the culture of fraud that has thus far remained a step (or three?) ahead of efforts to detect and deter PED use.

Unless Congress takes action to further a more comprehensive, effective policy to investigate and tackle the use of PEDs, doping will remain an integral characteristic of American sports, not only tainting the history books but also intensifying the perception of American athletes as cheaters. Legendary former NFL coach Vince Lombardi's use of the famous

298. "Detection might involve a magnetic resonance imaging scan or muscle biopsies, which would require inserting a large needle into the muscle." *Id.* Athletes will never agree to such bodily invasions. The cost would be ten times as much as it costs to conduct steroid testing. Because different genes are produced by different muscles, an anti-doping agency would need advance knowledge of the substance they were seeking in order to know what part of the body to test. *Id.*

quote, “Winning isn’t everything, it’s the only thing”²⁹⁹ perfectly epitomizes the current nature of professional sports: to be the best at the highest levels of competition, athletes, teams, coaches, and even medical staff will do anything and everything to attain victory.

Current drug testing protocols and league-mandated sanctions are not an effective deterrence mechanism in the fight against PEDs. The Congressional effort to detect and test for new substances must equal or outshine the rapid development of designer steroids and masking agents conceived by *dirty chemists*, or society will be forced to trust the safeguarding of athletic integrity to the conscience of professional athletes. As more gold medals are revoked for anti-doping violations and more elite athletes are unmasked as current or former PED abusers, the time has come for Congress to recognize that dependence on professional athletes to self-regulate the integrity of sport is no longer feasible.

The longer Congress waits to act, the greater the chance young athletes will be influenced by athletes who set world records and achieve instant fame but who are later discovered to have fraudulently achieved their success through illicit performance enhancement. By imposing criminal punishments on par with those linked to the Controlled Substance Act for cocaine, heroin, or psychoactive drugs such as ecstasy, Congress can help save the lives of children and professional athletes alike who might otherwise succumb to the serious health problems believed to be associated with PEDs. The United States must follow the lead of its international counterparts and grant crime prevention authorities the tools necessary to investigate and deter and punish PED production and distribution—the heart of the PED crisis—rather than trust that tough talk, empty threats, and blind faith will save the health of our athletes and children and preserve the integrity of our sports. If we can put the teeth of the criminal justice system behind our desire to clean up the game, we can affirmatively state that the race to the finish line is not over, and

299. STEVEN J. OVERMAN, “WINNING ISN’T EVERYTHING. IT’S THE ONLY THING”: THE ORIGIN, ATTRIBUTIONS AND INFLUENCE OF A FAMOUS FOOTBALL QUOTE 84, *available at* <http://www.aafra.org/SportsLibrary/FootballStudies/1999/FS0202h.pdf>

America can still prevent the creation of a genetically modified class of athletes and avoid international embarrassment, all in the name of preserving our most cherished values of health, fairness, honesty, and pure athletic competition.

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