

# PRESERVING BASEBALL'S INTEGRITY THROUGH PROPER DRUG TESTING: TIME FOR THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION TO LET GO OF ITS COLLECTIVE BARGAINING REINS

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*For the first time in seventeen years, voters did not select a single baseball player to be inducted into the 2013 Baseball Hall of Fame. In response to this news, Hall of Famer Mike Schmidt regrettably stated, "[E]veryone was guilty. Either you used Performance Enhancing Drugs or you did nothing to stop their use. . . . This generation got rich. Seems there was a price to pay." In 2013 alone, Major League Baseball (MLB) issued fourteen suspensions for Performance Enhancing Drug (PED) abuse. The regularity of these suspensions reveals players' willingness to continuously attempt to exploit flaws in the current MLB drug-testing program.*

*Consequently, many baseball enthusiasts have begun to seriously question the validity of players' accomplishments and, thus, the integrity of the game. If MLB's integrity is to be preserved, something needs to change. This Comment proposes a change to the MLB drug-testing process itself. After considering a number of collective bargaining and legislative options, this Comment concludes that the Major League Baseball Players Association (MLBPA) should agree*

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\* Wolfgang Weber, Candidate for Juris Doctorate, May 2014, University of Colorado School of Law. Special thanks to my mother, Yewkiat Weber, for teaching me the true value of hard work and fueling my passion for the game of baseball. Thanks to my father, Larry Weber, for igniting that passion. I am also extremely grateful to Shannon Lenahan and Maximillian Weber for their endless support and encouragement. Moreover, a sincere thanks to Sheila Misselhorn and Rebekah McGarrity for shaping me into the writer I am today. Further gratitude goes to Nick Venetz, Leann Lu, and my good friend, Ben Schloesser, for all of the incredible time and effort they put into providing me with their high-quality input. Finally, I thank all of my colleagues at the University of Colorado Law Review who played a part in the completion of this project—I am humbled by their selflessness and dedication.

*to terms authorizing a credible third-party agency to properly implement a drug-testing policy that effectively deters PED abuse. If the MLBPA and MLB adopt this policy, they finally will take an adequate step towards cleaning up the game and reviving the integrity of America's pastime.*

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## INTRODUCTION

Throughout the past two decades, the American public has ridiculed Major League Baseball (MLB or League) for inadequately monitoring the abuse of Performance Enhancing Drugs (PEDs)<sup>1</sup> throughout the industry.<sup>2</sup> At such a high level of competition, even slight physical advantages gained by players using PEDs can translate into substantial competitive and financial gains.<sup>3</sup> In turn, MLB has suffered from an increase in PED abuse that has caused many baseball enthusiasts to seriously question the validity of players' accomplishments and, consequently, the integrity of the game.<sup>4</sup> While MLB seeks to preserve the integrity of the game, it is also essential to the players that they maintain their rights and privacy through the collective bargaining process. As a result, MLB and the Major League Baseball Players Association (MLBPA or Association) have taken different stances regarding what type of drug-testing policy should be implemented throughout the League.<sup>5</sup>

Since its inception, the MLBPA has used the subject of drug testing as a bargaining chip during Collective Bargaining Agreement (CBA) negotiations with MLB. Consequently, MLB has been unable to successfully implement a testing program

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1. Discussed at greater length in Part II.A, PEDs are any substances taken to perform better athletically. This term typically refers to anabolic steroid and human growth hormone (HGH) use in sports by professional and amateur athletes. *Performance-Enhancing Drugs*, DRUGFREESPORT.COM, <http://www.drugfreesport.com/drug-resources/performance-enhancing-drugs-steroids.asp> (last visited Aug. 17, 2013).

2. 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 11 (2007) [hereinafter MITCHELL REPORT], available at <http://files.mlb.com/mitchrpt.pdf>

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

4. *Baseball Hall of Fame Induction 2013: Steroids Mar Vote for Several Stars*, NEWS CHANNEL 8 (Jan. 9, 2013, 9:19 AM), <http://www.wjla.com/articles/2013/01/baseball-hall-of-fame-induction-2013-steroids-mar-vote-for-several-stars-83871.html> (last visited July 14, 2013).

5. George T. Stiefel III, Comment, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1286 (2008).

that adequately punishes and deters players from PED abuse.<sup>6</sup> Even with the new 2012–2016 CBA, the MLBPA compelled MLB to agree to less than ideal drug-testing terms that have led to twenty drug suspensions in 2012 and 2013 alone.<sup>7</sup>

In the forty-four years since its inception, the MLBPA has gained considerable ground with regards to players' rights, benefits, and wages.<sup>8</sup> At this point, however, the problem of PEDs greatly threatens the health of baseball players and diminishes the continued integrity, popularity, and economic success of baseball.<sup>9</sup> Thus, it is time for the Association to let go of the collective bargaining reins that it holds on drug testing and agree to the best possible option to halt the ongoing PED abuse that has plagued MLB and garnered considerable public ridicule. To determine the best course of action, this Comment explores numerous options available to MLB, such as implementing its own drug-testing program through unilateral change, continuing to collectively bargain with the MLBPA, or accepting government intervention. Inevitably, this Comment concludes that the Association should agree to terms authorizing a credible third-party agency to properly implement a drug-testing policy that restores the integrity of baseball.

Part I of this Comment provides a background of the MLBPA's evolution and MLB's ongoing struggle against drug abuse. Part II identifies specific pros and cons of PEDs and explores the feasibility of regulating these drugs despite evolving medical and technological evasion techniques. Part III discusses the finer details of collective bargaining, unilateral changes, and the current 2012–2016 MLB CBA. Part IV

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6. See *Baseball Steroid Suspensions*, BASEBALL ALMANAC, [www.baseball-almanac.com/legendary/steroids\\_baseball.shtml](http://www.baseball-almanac.com/legendary/steroids_baseball.shtml) (last visited Aug. 19, 2013) (detailing all of the suspensions that have occurred despite MLB's current drug-testing programs implementation).

7. *Id.*

8. Zachary D. Rymer, *Why MLB Players Owe Every Dime of Their Bloated Salaries to Marvin Miller*, BLEACHER REPORT (Nov. 27, 2012), <http://bleacherreport.com/articles/1423916-why-mlb-players-owe-every-dime-of-their-bloated-salaries-to-marvin-miller> (“[B]y the time [executive director Marvin] Miller retired as head of the union in 1982, the MLBPA was something of a labor powerhouse. It's lost none of its influence in the years since Miller's retirement, as the MLBPA reigns supreme as the most powerful union in all of sports today.”).

9. Kevin Bowman, *The Declining Integrity of Professional Sports*, STRAIGHT OUTTA WESTWOOD BLOG (Aug. 23, 2012, 10:07 PM), <http://straightouttawestwood.wordpress.com/2012/08/23/the-declining-integrity-of-professional-sports/>.

analyzes three choices available to MLB and the MLBPA to potentially implement an adequate drug-testing policy through collective bargaining. These options include: both parties maintaining the status quo, MLB making its own unilateral change after bargaining in good faith, and both parties agree to relinquish the responsibility of drug testing to a third-party agency. Part V explores the intricacies of government intervention in the realm of drug testing. Finally, Part VI analyzes the prospect of MLB circumventing the collective bargaining process and appealing to government-implemented drug policies for professional sports.

## I. BACKGROUND

PED abuse in MLB is a problem that has slowly escalated throughout the history of the MLBPA. To provide a better understanding of the drug-testing stance that MLB and the MLBPA have taken throughout the years, this Part takes a comprehensive look at the development of the CBAs between the two parties. Though the details of collective bargaining will be discussed in further depth in Part III, it is important to note up front that the National Labor Relations Act (NLRA) guides the relationship between the parties.<sup>10</sup> As a result, federal law requires the League to negotiate subjects like minimum wages and drug testing with the MLBPA.<sup>11</sup> Without the Association's consent, MLB cannot make unilateral changes during the collective bargaining process.<sup>12</sup> After agreeing to terms through bargaining, both parties endorse a CBA that thereafter becomes a legally binding contract which governs the baseball workplace.<sup>13</sup>

### A. *History of the MLBPA and MLB's Fight Against Drugs (1968–1986)*

In 1968, Marvin Miller helped negotiate the first collective bargaining agreement in MLB.<sup>14</sup> This led to the MLBPA's

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10. The American League of Professional Baseball Clubs & Ass'n of Nat'l Baseball League Umpires, 180 N.L.R.B. 190, 192 (1969).

11. National Labor Relations Act, 29 U.S.C. § 158(d) (2012).

12. DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 171 (3d ed. 2011).

13. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

14. *History of the Major League Baseball Players Association*,

founding and the establishment of basic labor rights under the NLRA such as a minimum salary and the right to resolve grievances through arbitration.<sup>15</sup> Over the past few decades the Association has slowly gained influence in various facets of the game.<sup>16</sup>

In 1971, MLB Commissioner Bowie Kuhn issued a drug policy requiring MLB players to comply with federal and state drug laws.<sup>17</sup> Despite this, MLB could not effectively implement the policy because the MLBPA refused to agree to include any type of drug-detection program in the CBA during labor negotiations.<sup>18</sup> As a result, by the mid-1980's, the League began to encounter a series of drug-related incidents concerning players abusing stimulants such as cocaine.<sup>19</sup>

In the 1984 CBA, MLB first attempted to solve this problem by recommending a mandatory drug-testing program.<sup>20</sup> The MLBPA, however, rejected the proposed program on the grounds that it degraded the players and violated their privacy rights.<sup>21</sup> As a result, MLB was able to negotiate only a voluntary drug abuse program with the MLBPA.<sup>22</sup> Under the program's guidelines, a player seeking help would receive treatment along with immunity from disciplinary action.<sup>23</sup> After only a year, MLB Commissioner Peter Ueberroth and the team owners declared the agreement insufficient and generally ineffective in curbing drug abuse in the League because the voluntary nature of the program failed to encourage players to seek drug treatment.<sup>24</sup>

Shortly thereafter, in 1985, a grand jury investigation in Pittsburgh, Pennsylvania led to some of the most infamous

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MLBPLAYERS.COM, <http://mlb.mlb.com/pa/info/history.jsp> (last visited Aug. 17, 2013).

15. *Id.*

16. *Id.*

17. See David Epstein, *The Rules, the Law, the Reality: A Primer on Baseball's Steroid Policy Through the Years*, *SI.COM* (Feb. 16, 2009), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1151761/1/index.htm>.

18. MITCHELL REPORT, *supra* note 2, at 25.

19. Glenn M. Wong & Richard J. Ensor, *Major League Baseball & Drugs: Fight the Problem or the Player?*, 11 *NOVA L. REV.* 779, 780 (1987).

20. MITCHELL REPORT, *supra* note 2, at 34–35, 43–44.

21. *Id.*

22. Wong & Ensor, *supra* note 19, at 792.

23. *Id.*

24. Tim Freudenberger, *Eliminating Drug Use in Sports: Utilizing Contractual Remedies*, 6 *ENT. & SPORTS LAW.* 1, 2 (1987).

testimony in the history of baseball.<sup>25</sup> Known as the “Pittsburgh drug trials,” several players were granted immunity from criminal prosecution in return for their testimony against men who had supplied cocaine to MLB players.<sup>26</sup> Tim Raines of the Montreal Expos, the reigning National League stolen-base champion at the time, told the jury that he “always slid into bases headfirst to ensure that the glass vial [of cocaine in his back pocket] wouldn’t break.”<sup>27</sup> Keith Hernandez, the 1979 National League Most Valuable Player (MVP), not only confessed to using cocaine but also testified that he believed roughly 40 percent of MLB players did the same.<sup>28</sup> Although the court granted the players immunity from criminal prosecution, the players had provided definitive proof of their own illegal drug use.<sup>29</sup> Without the means to autonomously acquire such concrete evidence because the MLBPA refused to enact drug-testing policies and procedures, Commissioner Ueberroth used the testimony from the Pittsburgh drug trials to suspend eleven MLB players for violating MLB’s drug policy.<sup>30</sup>

Subsequently, Ueberroth made another push for the drug testing of all MLB players.<sup>31</sup> The MLBPA, however, again rejected this proposal in 1985, this time arguing that drug testing presumed guilt on the part of the players.<sup>32</sup> Furthermore, the players insisted that such a program could not be implemented unilaterally because drug testing was a mandatory subject<sup>33</sup> of collective bargaining.<sup>34</sup> After another year of frustration, the Commissioner attempted to circumvent the barriers involved with collective bargaining by including

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25. *1985 Pittsburgh Drug Trials*, BASEBALL REFERENCE, [http://www.baseball-reference.com/bullpen/1985\\_Pittsburgh\\_drug\\_trials](http://www.baseball-reference.com/bullpen/1985_Pittsburgh_drug_trials) (last visited Aug. 17, 2013).

26. James Lincoln Ray, *The Pittsburgh Baseball Drug Trials*, SUITE101 BLOG, <http://suite101.com/article/the-pittsburgh-baseball-drug-trials-a59057> (last visited Aug. 17, 2013).

27. *Id.*

28. *Id.*

29. *Id.*

30. *1985 Pittsburgh Drug Trials*, *supra* note 25.

31. Mark A. Rabuano, Comment, *An Examination of Drug Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 443 (2002).

32. Wong & Ensor, *supra* note 19, at 802.

33. Discussed in further detail *infra* Part III.B. The NLRA requires parties to bargain in good faith any mandatory subject of collective bargaining.

34. Wong & Ensor, *supra* note 19, at 798–02.

clauses<sup>35</sup> that required random drug testing within individual MLB players' contracts.<sup>36</sup> Essentially, by signing a contract that included the Commissioner's clause, a player agreed to random drug testing throughout the MLB season.<sup>37</sup>

In response, the MLBPA quickly filed a grievance to be heard through arbitration.<sup>38</sup> Under Article II of the CBA, the League recognized the MLBPA as the "sole and exclusive collective bargaining agent for all Major League Players."<sup>39</sup> As a result, the Association contended that the drug-testing clauses bypassed the terms of the CBA because Ueberroth, acting on behalf of MLB, did not negotiate with the MLBPA before adding these clauses to the player contracts.<sup>40</sup> Agreeing with the MLBPA in *In the Matter of Arbitration between MLB Player Relations Committee and MLBPA*,<sup>41</sup> arbitrator Thomas Roberts determined that MLB's contract clauses breached the CBA and violated the NLRA, stating that "any such clauses must be negotiated with the Players Association."<sup>42</sup> Again, the MLBPA had deterred MLB from instituting a drug-testing policy and maintained the subject as a bargaining chip for future negotiations.

### *B. Modern Era: The Persistent Problem of Drugs in Baseball (1986–Present)*

By the end of the 1980s, an increased number of homeruns, strikeouts, and rapid changes in players' physiques resulted in

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35. *Id.* at 805 (noting that the clause stated: "[p]layer agrees to submit to any test or examination for drug use when requested by the Club and the failure to do so shall make the guarantee set forth in (the balance of the guarantee provision) null and void. Player is of the opinion that it is vitally important to him and his professional career that his image not be tarnished by the specter of drugs. Therefore, player voluntarily agrees to submit to any test or examination for drug use when requested by the Club.").

36. *Id.* at 804.

37. *Id.*

38. *Id.*

39. See MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION, 2012–2016 BASIC AGREEMENT 1 (2012) [hereinafter 2012–2016 BASIC AGREEMENT], available at [http://mlb.mlb.com/pa/pdf/cba\\_english.pdf](http://mlb.mlb.com/pa/pdf/cba_english.pdf).

40. Wong & Ensor, *supra* note 19, at 805.

41. In *The Matter of the Arbitration Between Major League Baseball Player Relations Committee and Major League Baseball Players Association*, Decision No. 69, Gr. Mo. 86-1 at 9 (July 30, 1986).

42. *Id.* at 806.



speculation that MLB players were abusing steroids.<sup>43</sup> In 1994, MLB tried yet again to include a mandatory drug-testing program in its CBA but was again rejected by the MLBPA.<sup>44</sup> Four years later, Mark McGwire caught the baseball world's attention when androstenione, an anabolic steroid, was found in his locker during the same season that he demolished MLB's thirty-seven-year-old single-season homerun record.<sup>45</sup> Though the steroid was legal in baseball at the time, the presence of the muscle-building supplement prompted widespread speculation that steroids might be prevalent throughout MLB.<sup>46</sup>

Then, in 2002, the 1996 National League MVP, Ken Caminiti, revealed in a *Sports Illustrated* article that he won the MVP award while using illegal steroids that he had purchased from a pharmacy in Tijuana, Mexico.<sup>47</sup> Caminiti further disclosed that he believed at least half of MLB players were using steroids.<sup>48</sup>

Around that same time, the federal government investigated a steroid scandal involving a company called Bay Area Laboratory Cooperative (BALCO).<sup>49</sup> The investigation began as a result of rumors that BALCO was supplying banned PEDs to Olympic track athletes.<sup>50</sup> As research developed, however, investigators discovered that several BALCO clients were MLB players, including All-Stars Jason Giambi and Barry Bonds.<sup>51</sup> During a federal grand jury investigation,

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43. See Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, at 6, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1025902/index.htm?eref=sisf>.

44. MITCHELL REPORT, *supra* note 2, at 34–35, 43–44.

45. Shaun Assael & Peter Keating, *Who Knew?*, ESPN THE MAGAZINE, Nov. 9, 2005, at 69, available at <http://sports.espn.go.com/espn/eticket/story?page=steroids&num=8> (noting that McGwire admitted to using androstenedione, along with other supplements, and claimed that everyone in baseball was using the same substances).

46. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't. Reform*, 109th Cong. 333 (2005) (statement of Allan H. Selig, Commissioner, Major League Baseball).

47. Verducci, *supra* note 43, at 3–4.

48. *Id.*

49. Mark Fainaru-Wada & Lance Williams, *Sports and Drugs: How the Doping Scandal Unfolded*, S.F. CHRON., Dec. 21, 2003, <http://www.sfgate.com/bayarea/article/SPORTS-AND-DRUGS-How-the-doping-scandal-2545661.php>.

50. *Id.*

51. Mark Fainaru-Wada & Lance Williams, *What Bonds Told BALCO Grand Jury*, S.F. CHRON., Dec. 3, 2004, <http://www.sfgate.com/sports/article/What->

Giambi admitted to injecting himself with BALCO steroids, while Bonds admitted to using a cream supplied by the company but denied knowing that it contained steroids.<sup>52</sup> With all of these scandals, the public spotlight shone brightly on MLB PED abuse.

With continued media attention regarding steroid abuse, the MLBPA finally agreed to a drug prevention and treatment program in MLB's 2002 CBA.<sup>53</sup> Through negotiations, though, the Association still prolonged implementation by insisting that the program be instituted only if 5 percent or more of players tested positive for prohibited substances during an anonymous survey-testing period in 2003.<sup>54</sup> To the surprise of few, the 5 percent threshold was easily met when approximately one hundred players tested positive for PEDs that season.<sup>55</sup> A year and a half after negotiations, the MLB "Joint Drug Prevention and Treatment Program" finally commenced at the beginning of the 2004 season.<sup>56</sup>

### 1. Public Ridicule and Demand for Reform

In addition to being delayed by the demands of the MLBPA for over a year, the 2004 MLB drug program was met with other considerable criticism.<sup>57</sup> For one, the drug program instituted nearly inconsequential penalties for testing positive for steroids: no suspension or fine issued for a first violation, a fifteen-day suspension or maximum \$10,000 fine for a second violation, a twenty-five-day suspension or maximum \$25,000 fine for a third, a fifty-day suspension or maximum \$50,000 fine for a fourth, and a one-year suspension or maximum 100,000 fine for a fifth violation.<sup>58</sup> With further reports of PED use emerging from the BALCO scandal, baseball's program was

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Bonds-told-BALCO-grand-jury-2667365.php.

52. Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRON., Dec. 2, 2004, <http://www.sfgate.com/sports/article/What-Bonds-told-BALCO-grand-jury-2667365.php>.

53. See MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM (2002), at 168 of 2003–2006 Basic Agreement [hereinafter 2002 MLB DRUG PROGRAM], available at [http://www.bizofbaseball.com/docs/2002\\_2006basicagreement.pdf](http://www.bizofbaseball.com/docs/2002_2006basicagreement.pdf).

54. *Id.* at 161.

55. MITCHELL REPORT, *supra* note 2, at 55.

56. *Id.*

57. *Id.*

58. 2002 MLB DRUG PROGRAM, *supra* note 53, at 169.

publicly “mocked and lambasted,” being called everything from “a joke” to “worse than terrible.”<sup>59</sup> By May 1, 2005, MLB Commissioner Bud Selig sent a letter to the MLBPA requesting an increase in the penalties for the first three drug offenses.<sup>60</sup> Nevertheless, the MLBPA rejected this proposal and instead reserved the topic as a bargaining chip for future CBAs.<sup>61</sup>

Congress harshly criticized the MLB drug-testing policy and threatened legislative regulation if its weaknesses were not resolved.<sup>62</sup> Following the BALCO scandal and publicized reports of steroid abuse, Congress began investigating the extent of the problem.<sup>63</sup> Several congressional committees held hearings that called for testimony from MLB officials, representatives, and players.<sup>64</sup> At that point, Congress believed that steroid abuse in professional sports was “undermining the values of sports by desecrating the ‘honesty, integrity, and innate human ability,’ cheating the athletes, fans, and the history of the sport, and setting a bad example for young athletes who look up to the professional athletes.”<sup>65</sup> During the same year, ESPN released a comprehensive sixteen-page special report titled “Who Knew?” that revealed how steroids had spread throughout baseball since 1987 and how many people who were closely involved with the game—executives, players, trainers, and media—had watched it happen and simply looked the other way.<sup>66</sup>

Following the series of hearings, Congress proposed several bills specifically designed to combat PED abuse in professional sports.<sup>67</sup> While each of the proposed bills provided

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59. Fainaru-Wada & Williams, *Sports and Drugs*, *supra* note 49.

60. *Commissioners and Controversy: Alan Selig, Steroid Timeline*, STEROIDSINBASEBALL.NET, at 5 [hereinafter *Steroid Timeline*], available at <http://www.steroidsinbaseball.net/commish/selig5.html> (last visited Aug. 17, 2013).

61. *Id.* at 6.

62. Holli N. Heiles, Comment, *Baseball's Growth Problem: Can Congress Require Major League Baseball To Test Its Athletes for Human Growth Hormone?*, 62 ARK. L. REV. 315, 330 (2009).

63. *Id.*

64. 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, 661 (2007).

65. *Id.*

66. Assael & Keating, *supra* note 45.

67. Matthew W. Kerner, *Why Congress Cannot Require Major League Baseball to Implement Suspicionless Blood Testing for Performance-Enhancing Drugs*, at 16 (Aug. 2011), available at <http://works.bepress.com/>

slightly different methods of achieving the goal, every bill sought to establish minimum drug-testing requirements and stricter penalties that would force MLB to implement more demanding drug-prevention standards.<sup>68</sup>

Following the continued threat of federal legislation, the MLBPA again hesitantly agreed with MLB to strengthen the drug-testing program.<sup>69</sup> Through negotiations, the Association and MLB amended the CBA to impose somewhat stricter penalties for violators and require limited testing throughout the season and offseason.<sup>70</sup> Under this new policy, players were subject to a restricted number<sup>71</sup> of random drug tests that tested for forty-six banned performance-enhancing substances.<sup>72</sup> If a player tested positive at one of these drug tests, he received a fifty-game suspension for the first positive test, a one hundred-game suspension for the second, and a lifetime ban for the third violation.<sup>73</sup>

Despite the implementation of stricter penalties, Congress remained unsatisfied with the penalty structure.<sup>74</sup> A baseball season consists of 162 games, meaning that a fifty-game suspension for a first-time offender would not prevent a player from still receiving the majority of money from a lucrative professional contract.<sup>75</sup> Senator John McCain observed that the drug-testing program established by MLB lagged far behind similar programs established by other sports.<sup>76</sup> Additionally, a

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matthew\_kerner/1.

68. *Id.*

69. Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 *FORDHAM L. REV.* 1777, 1779 (2006) (noting that “[t]he threatened legislation was central to Congress’s success in inducing MLB . . . to adopt a more stringent testing policy”).

70. *Id.*

71. MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM (2006), at 6 of 2003–2006 Basic Agreement [hereinafter 2006 MLB DRUG PROGRAM], available at [http://bizofbaseball.com/docs/2006\\_jda.pdf](http://bizofbaseball.com/docs/2006_jda.pdf) (stating that players were required to take only two urinalysis tests during the “championship season”: one administered within five days of the start of spring training and one administered at random during the season. Although a limited amount of additional testing was permitted, it was possible for a player to never be subjected to such testing.).

72. *Id.* at 4–5.

73. *Id.* at 16.

74. *Steroid Timeline*, *supra* note 60.

75. Specific dollar amounts earned by MLB players discussed in further detail *infra* Part I.B.2.

76. *Steroid Timeline*, *supra* note 60.

number of public admissions by MLB players,<sup>77</sup> including a published book by retired player Jose Conseco,<sup>78</sup> illuminated the growing problem of PED abuse in baseball.

With continued scrutiny from the media and Congress, Commissioner Selig appointed former Senate Majority Leader George Mitchell to fully investigate the use of PEDs in baseball.<sup>79</sup> In a comprehensive report widely known as the “Mitchell Report,” Mitchell named eighty-nine players who had some type of involvement with PEDs and concluded that the MLB Drug Program fell short of current best practices in drug testing.<sup>80</sup> To update the program, Senator Mitchell recommended that MLB further develop its player drug-education program, increase the number of permissible tests administered to each player, appoint a truly independent drug-testing authority, and implement a “state-of-the-art drug program.”<sup>81</sup> Without these changes, Senator Mitchell emphasized that the MLB Drug Program would remain ineffective.<sup>82</sup>

Since 2008, Commissioner Selig has adopted a number of Mitchell’s recommendations<sup>83</sup> to the extent that he was able to come to an agreement with the MLBPA.<sup>84</sup> With the Association repeatedly exploiting the subject of drug testing as a bargaining chip during CBA negotiations, however, MLB continues to fall short of implementing a program that adequately deters players from PED abuse. In the past four years, the League has issued drug suspensions to twenty-four players, including fourteen suspensions in 2013.<sup>85</sup>

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77. Admissions by MLB players are discussed in further detail *infra* Part I.B.2.

78. Implications by Jose Canseco are discussed in further detail *infra* Part I.B.2.

79. MITCHELL REPORT, *supra* note 2, at 2 (Mitchell was specifically asked to investigate whether any MLB players were associated with the BALCO scandal or otherwise used illegal PEDs after being banned by the 2003–2006 Basic Agreement. Nevertheless, Mitchell was authorized “to expand the investigation and to follow the evidence wherever it may lead.”).

80. *Id.* at 12.

81. *Id.*

82. *Id.* at 7.

83. 2008 amendments and 2012–2016 CBA discussed in further detail *infra* Part III.B.

84. *MLB Establishes Department of Investigations*, MLB.COM, (Jan. 11, 2008, 1:49 PM), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20080111&content\\_id=2343802&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080111&content_id=2343802&vkey=pr_mlb&fext=.jsp&c_id=mlb).

85. *Steroid Suspensions*, *supra* note 6.

## 2. Widespread Player Evasion

As baseball has developed into a multi-billion dollar industry,<sup>86</sup> the MLBPA has attained a considerable amount in terms of pay and benefits for players. In 2012, the average salary for an MLB player was \$3,440,000.<sup>87</sup> Even the lowest-paid players in the League have gone from earning a minimum salary of \$12,000 per season in 1970 to \$480,000 in 2012.<sup>88</sup> In the minor leagues today, conversely, an average minimum salary for a full five-month season is roughly \$8,312.<sup>89</sup> Without a doubt, the prospect of a substantial leap in earnings gives minor league players a tremendous economic incentive to find their way into MLB.

On the other end of the pay spectrum, players also have a significant motivation to maintain success even after making it to the major league level. Alex Rodriguez, for example, is a fourteen-time MLB All-Star and is the highest paid player in the League with a contract totaling \$275,000,000 over a ten-year span.<sup>90</sup> Beyond high-paying contracts, the MLBPA has paved the way for major league players like Rodriguez to

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86. *The Business of Baseball*, FORBES, <http://www.forbes.com/mlb-valuations/list/> (last visited Sept. 10, 2013).

87. *MLB Salaries*, CBS SPORTS, <http://www.cbssports.com/mlb/salaries/avgsalaries> (last visited Sept. 10, 2013).

88. *Minimum Salary – BR Bullpen*, BASEBALL-REFERENCE.COM, [http://www.baseball-reference.com/bullpen/Minimum\\_salary](http://www.baseball-reference.com/bullpen/Minimum_salary) (last visited Sept. 10, 2013).

89. Minor league average minimums were calculated by adding the minimum salaries per month for each level (Class Low-A full season = \$1300, Class High-A full season = \$1500, Class AA = \$1700, Class AAA = \$2150), dividing them by the number of levels (4), and multiplying by a five-month season. It should be noted, however, that since significantly more minor leaguers play at the lower levels than the upper levels of the minors, this admittedly results in an upwardly skewed number. Nevertheless, the calculated minor league salary is still extraordinarily low when compared to MLB minimum salaries. See Jeff Blank, *Minor League Salary*, [http://www.jeffblankbaseball.com/?page\\_id=34](http://www.jeffblankbaseball.com/?page_id=34) (last visited Sept. 10, 2013); Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. OF SPORTS & ENT. L. (2013); Jonathan Lee, *Pay Structure of Minor League Baseball Players*, NAT'L SPORTS & ENT. L. SOC'Y, <http://nationalsportsandentertainment.wordpress.com/2010/03/17/pay-structure-of-minor-league-baseball-players/> (last visited Sept. 10, 2013); *General Minor League Info*, MINOR LEAGUE BASEBALL, [http://www.milb.com/content/page.jsp?ymd=20110604&content\\_id=20017054&sid=t461&vkey=team4](http://www.milb.com/content/page.jsp?ymd=20110604&content_id=20017054&sid=t461&vkey=team4) (last visited Sept. 10, 2013).

90. Imala Weligamage, *A-Rod, Pujols MLB's Richest Players: Are They Worth It?*, BLEACHER REPORT (May 30, 2012), <http://bleacherreport.com/articles/1201500-analyzing-a-rod-pujols-and-the-10-biggest-contracts-currently-in-mlb/page/2>.

potentially gain additional millions in income from lucrative endorsement deals and performance-based contract incentives—simply put, the better a player plays, the more money he can make.<sup>91</sup> The prospect of bigger contracts, profitable endorsements, and additional benefits—all perks that have been gained through the negotiating efforts of the MLBPA—creates an undeniable financial interest in enhanced playing ability. Thus, regardless of whether a player is an up-and-coming minor league player or a seasoned MLB veteran, the dynamics of the industry place considerable pressure on all players to find ways to gain a competitive edge.

Consequently, many athletes believe that they have no choice other than to use PEDs.<sup>92</sup> Professional baseball players may not want to use PEDs but they feel obligated to do so in order to compete.<sup>93</sup> For example, one anonymous National League General Manager (GM) told *Sports Illustrated* a story about an overweight backup player who was barely making the roster in the major leagues.<sup>94</sup> “We signed him,” the GM said, “and two years later the guy looked like someone in a muscle magazine.”<sup>95</sup> By that time the player was in his thirties but still won a starting job for the first time in his career.<sup>96</sup> That season, he played well enough to earn a multi-year contract.<sup>97</sup> Shortly after signing the contract, though, he suffered a string of muscle tears and ruptures<sup>98</sup> that quickly ended his baseball career.<sup>99</sup> Nevertheless, the terms in his major league contract allowed him to continue to receive the remainder of his pay: “He was gone that fast, but the contract probably set him up for life. Other guys see that.”<sup>100</sup>

In a similar vein, while introducing anti-steroid legislation in 2004,<sup>101</sup> Congressman Howard Berman pointed out that

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91. See *Encyclopedia of Players: Alex Rodriguez*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/r/rodrial01.shtml> (last visited Sept. 10, 2013); see also *Player Profile: Alex Rodriguez*, FORBES, <http://www.forbes.com/profile/alex-rodriguez/> (last visited Sept. 10, 2013).

92. Verducci, *supra* note 43, at 3.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Side effects of PED abuse are discussed in further detail *infra* Part II.B.

99. Verducci, *supra* note 43, at 3.

100. *Id.*

101. F. James Sensenbrenner, Jr., U.S. House of Representatives,

“[s]teroids can seem necessary to compete at the highest levels, and the quick rewards can outweigh the long term consequences to the user’s health.”<sup>102</sup> Simply put, players feel pressured to risk their bodies and integrity for a chance to play at the major league level and earn a life-changing payday.<sup>103</sup>

As a result of these dynamics, baseball has encountered an overwhelming amount of proof that PED use is rampant throughout the League.<sup>104</sup> In the minor leagues, 153 players have been suspended for PED abuse.<sup>105</sup> In MLB, in addition to Jason Giambi and Ken Caminiti, fourteen other players have publicly admitted to using PEDs.<sup>106</sup> Among those players, Alex Rodriguez admitted to ESPN in 2009 that,

I felt an enormous amount of pressure [from recently signing a massive contract]. I felt like I had all the weight of the world on top of me and I needed to perform, and perform at a high level every day. . . . I did take a banned substance. And for that, I am very sorry and deeply regretful. . . .<sup>107</sup>

In addition to these admissions, the Mitchell Report named forty-seven MLB players who used PEDs.<sup>108</sup> Furthermore, retired All-Star Jose Canseco released his autobiography implicating nine former teammates.<sup>109</sup> Combining Conseco’s allegations with various other viable allegations throughout baseball, a total of thirty-four players have been implicated for using PEDs.<sup>110</sup> These players include Mark McGwire, Roger

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*Sensenbrenner, Conyers Introduce Anabolic Steroid Control Act of 2004* (March 1, 2004), <http://judiciary.house.gov/legacy/news030104.htm>.

102. *Id.*

103. *Id.*

104. *Timeline of Baseball’s Steroid Era*, BASEBALL’S STEROID ERA, <http://www.baseballssteroidera.com/> (last visited Aug. 17, 2013).

105. *Baseball’s Steroid Era Minor League Suspensions*, BASEBALL’S STEROID ERA, <http://www.baseballssteroidera.com/minor-league-suspensions.htm> (last visited Aug. 17, 2013).

106. *Timeline of Baseball’s Steroid Era*, *supra* note 104.

107. *A-Rod Admits, Regrets Use of PEDs*, ESPN (Feb. 10, 2009, 12:48 PM), <http://sports.espn.go.com/mlb/news/story?id=3894847>.

108. *Timeline of Baseball’s Steroid Era*, *supra* note 104.

109. See JOSE CANSECO, *JUICED* (2005) (revealing in his book that MLB players Mark McGwire, Wilson Alvarez, Bret Boone, Ozzie Canseco, Juan Gonzalez, Dave Martinez, Ivan Rodriguez, Tony Saunders, and Miguel Tejada used PEDs).

110. *List of Players Linked to Steroids & HGH*, BASEBALL’S STEROID ERA, <http://www.baseballssteroidera.com/list-implicated-players.htm> (last visited Sept.



Clemens, and several other All-Star athletes.<sup>111</sup>

Despite numerous indications of widespread evasion, the League has continued to experience pushback from the MLBPA that has left the current drug-testing agreement insufficient.<sup>112</sup> In 2012, six PED suspensions demonstrated the willingness of players to continue to challenge MLB's current drug program.<sup>113</sup> Notably, that year, Melky Cabrera of the San Francisco Giants was suspended for fifty games after winning the National League Batting Title because he tested positive for testosterone.<sup>114</sup>

Moreover, Ryan Braun of the Milwaukee Brewers also tested positive for elevated testosterone in Fall 2011 shortly after winning the National League MVP Award.<sup>115</sup> To make matters worse, Braun was able to successfully challenge the positive test and avoid suspension on grounds of improper chain of custody procedures.<sup>116</sup> Braun's urine sample was not sent to the MLB testing facility in Montreal on the same day that it was produced.<sup>117</sup> Instead, the collector, under the responsibility of MLB's IPA<sup>118</sup> kept the sample and refrigerated it at home for two days before finally shipping it to the testing facility.<sup>119</sup> Though no seals were broken, the lapse in protocol ended up being a decisive factor to the arbitrator.<sup>120</sup> As a result, Braun's suspension was overturned and he played the entire 2012 season.<sup>121</sup>

In 2013, however, MLB caught a lucky break when the

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10, 2013).

111. *Id.*

112. *Steroid Suspensions*, *supra* note 6.

113. *Id.*

114. Ronald Blum, *Melky Cabrera Batting Title? MLB Unlikely to Bar Suspended Giants Player from NL Award*, HUFFINGTON POST (Sept. 19, 2012, 3:37 PM), [http://www.huffingtonpost.com/2012/09/19/melky-cabrera-batting-title-mlb-rules\\_n\\_1898019.html](http://www.huffingtonpost.com/2012/09/19/melky-cabrera-batting-title-mlb-rules_n_1898019.html).

115. Tom Haudricourt, *Ryan Braun Cleared, Chain of Custody is Decisive*, JS ONLINE (Feb. 23, 2012), <http://www.jsonline.com/sports/brewers/138857174.html>.

116. *Id.*

117. *Id.*

118. The Independent Program Administrator (IPA) is an individual assigned by MLB and the MLBPA to direct baseball's drug-testing program. The position will be discussed in further detail *infra* Part III.B.

119. Haudricourt, *supra* note 115.

120. *Id.*

121. *Ryan Braun Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/b/braunry02.shtml> (last visited Aug. 17, 2013).

*Miami New Times* published information that a clinic in Coral Gables, FL, and its proprietor, Anthony Bosch, had supplied performance-enhancing drugs to several notable Major League players including Ryan Braun.<sup>122</sup> After MLB conducted its own investigation, the integrity of baseball was again struck a devastating blow when MLB revealed that it was suspending fourteen players for PED abuse.<sup>123</sup> Among those players were All-Stars Ryan Braun, Miguel Tejada, and MLB's highest paid athlete, Alex Rodriguez.<sup>124</sup> While eleven players were dealt fifty-game suspensions as first-time offenders, Tejada was given a 105-game suspension after numerous PED violations.<sup>125</sup> For cooperating with MLB's investigation, Braun was leniently suspended for the remaining sixty-five games of the 2013 season.<sup>126</sup> Conversely, MLB suspended Rodriguez for a whopping 211 games<sup>127</sup> "based on his use and possession of numerous forms of prohibited performance-enhancing substances" and "for attempting to cover up his violations of the Program by engaging in a course of conduct intended to obstruct and frustrate the Office of the Commissioner's investigation."<sup>128</sup>

While MLB has successfully punished resourceful players like Braun on occasion, the twenty suspensions for doping<sup>129</sup> in the past two years reveals a continuing failure to implement a

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122. Bryan Hoch & Joey Nowak, *A-Rod to Appeal Suspension Through 2014*, MLB.COM (Aug. 6, 2013), [http://mlb.mlb.com/news/article.jsp?ymd=20130729&content\\_id=55168796&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20130729&content_id=55168796&vkey=news_mlb&c_id=mlb).

123. *Steroid Suspensions*, *supra* note 6.

124. *Id.*

125. *Id.*

126. Erik Brady, *Brewers' Ryan Braun Suspended for Rest of Season*, USA TODAY, July 22, 2013, <http://www.usatoday.com/story/sports/mlb/brewers/2013/07/22/ryan-braun-suspended-milwaukee-season/2576215/>.

127. Alex Rodriguez and his lawyer, David Cornwell, have publicly announced that they "will appeal the discipline and pursue all legal remedies available to Alex." Ethan Rosenberg, *Alex Rodriguez Suspended Through 2014 Season*, US NEWS (Nov. 3, 2013), <http://www.usnews.com/news/articles/2013/08/06/alex-rodriguez-suspended-through-2014-season>. Until the appeal process is complete, Rodriguez is authorized to continue playing baseball with his team, the New York Yankees. Most likely, this means that Rodriguez will be able to finish the 2013 season before an arbitrator makes a final decision. Hoch & Nowak, *supra* note 122.

128. *Id.*

129. "Doping" is "the use of a substance (such as an anabolic steroid or erythropoietin) or technique (such as blood doping) to illegally improve athletic performance." Definition of "Doping", MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/doping>.

drug-testing program that adequately deters players from PED abuse in the first place. Essentially, even in the newest 2012–2016 CBA, the MLBPA has continued to drag its feet during drug-testing negotiations.<sup>130</sup> As numerous players continue to receive suspensions, their actions reveal a willingness to continuously attempt to exploit flaws in the current system. Consequently, the American public cannot help but question the legitimacy of every baseball player’s athletic accomplishments. With the integrity of the sport at stake, it is imperative that the MLBPA release the collective bargaining reins that it holds on drug testing and agree to the best possible solution to cease ongoing PED abuse.

### *C. Releasing the Collective-Bargaining Reins*

Throughout the years, the MLBPA has used the subject of drug testing as a collective-bargaining chip during negotiations. Among a number of negotiation tactics, the Association has slowly provided small concessions to MLB drug-testing policies in return for additional player benefits. In doing so, it has earned its players a dramatic increase in minimum salaries, performance-based contract incentives, and numerous other benefits. By not agreeing to stricter drug-testing standards and procedures, however, the Association has also gradually caused a PED abuse problem that threatens numerous facets of the game.

As will be discussed further below, PEDs can cause harmful, long-term effects to an athlete’s health.<sup>131</sup> In addition to harming their own bodies, current baseball players who abuse PEDs are also hurting the sport as a whole. When players abuse PEDs, other major leaguers experience pressure to take drugs that elevate them to a similarly competitive level.<sup>132</sup> Essentially, players who would otherwise play the game “clean” feel compelled to inject themselves with substances that will likely cause severe health problems later

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130. Rather than making dramatic changes to properly address PED abuse in baseball, the current CBA still mirrors the drug-testing format used by preceding CBAs. *See generally* 2012–2016 BASIC AGREEMENT, *supra* note 39.

131. *Side Effects of Anabolic Steroid Abuse*, ASSOCIATION AGAINST STEROID ABUSE, <http://www.steroidabuse.com/side-effects-of-steroids.html> (last visited Aug. 17, 2013).

132. Verducci, *supra* note 43, at 3.

in their lives.<sup>133</sup> On its own, this threat to current and future players should provide the MLBPA with enough incentive to cease using drug testing as a bargaining chip and allow a drug policy that effectively eradicates PEDs from baseball.

As further incentive, the MLBPA should also recognize that PED abuse has tarnished the integrity of MLB. In a game largely coveted for its statistics and milestones, PED abuse has cast a black cloud over the legitimacy of player accomplishments. Simply put, fans have begun to seriously question whether player performances have been sullied by the use of PEDs.<sup>134</sup> This is evidenced by the recent 2013 Baseball Hall of Fame voting, in which, for the first time in seventeen years, not a single player was inducted.<sup>135</sup> Among the rejected candidates were MLB's career home run leader, Barry Bonds, and eleven-time All-Star pitcher, Roger Clemens.<sup>136</sup> When asked about the shocking rejections, three-time World Series Champion Curt Schilling remarked,

I think as a player, a group, this is one of the first times that we've been publicly called out. I think it's fitting . . . If there was ever a ballot and a year to make a statement about what we didn't do as players—which is we didn't actively push to get the game clean—this is it.<sup>137</sup>

Because PED abuse threatens the integrity of the game, the MLBPA must be concerned about the game of baseball as an industry. As the legitimacy of MLB continues to diminish, the interest of fans, sports writers, and other enthusiasts could begin to wane as well. At the end of the day, MLB is a business. As an integral part of that business, the MLBPA needs to ensure that the business continues to thrive by preserving the sanctity of the League. Undoubtedly, this too points to the Association releasing the collective bargaining reins it has on baseball drug testing and agreeing to the best option possible to deter further PED abuse throughout MLB.

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133. *Id.*

134. “[V]oters fail[ed] to elect any candidates for only the second time in four decades.” *Voters Pitch Hall of Fame Shutout*, ESPN (Jan. 10, 2013), [http://espn.go.com/mlb/story/\\_/id/8828339/no-players-elected-baseball-hall-fame-writers](http://espn.go.com/mlb/story/_/id/8828339/no-players-elected-baseball-hall-fame-writers).

135. *Id.*

136. *Id.*

137. *Id.*

## II. THE EFFECTS OF PERFORMANCE ENHANCING DRUGS AND THE FEASIBILITY OF REGULATION

In 1990, Congress amended the Controlled Substances Act (CSA) to classify anabolic steroids as a Schedule III controlled substance, effectively raising penalties for their illegal possession or distribution to levels similar to those applicable to narcotics.<sup>138</sup> Although the federal law explicitly criminalizes the improper possession of steroids and human growth hormone (HGH), MLB players have continued to challenge MLB's drug-testing policy.

Unfortunately, the challenge of PED abuse is not one that can simply be solved and finished.<sup>139</sup> Far too much money persuades brilliant minds to create new drugs and techniques designed to avoid current PED-testing standards.<sup>140</sup> Drug abuse is a dynamic, ongoing problem that needs "constant attention, constant focus, [and] constant effort."<sup>141</sup> Beyond MLB, the realization of this ever-changing problem has influenced the entire spectrum of professional sports.<sup>142</sup> For this reason, agencies like the World Anti-Doping Agency (WADA) and United States Anti-Doping Agency (USADA) have had a significant impact by establishing some of the best drug-testing procedures in the world.<sup>143</sup> With this in mind, the following Parts discuss the intricacies involved with PEDs and the feasibility of creating a legitimate solution to MLB's ongoing PED abuse problem.

### A. *Performance Enhancing Drugs and Evasion Techniques*

PEDs are substances taken to enhance athletic performance.<sup>144</sup> The term commonly refers to anabolic steroid

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138. Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4851.

139. *Year Later, Mitchell Wouldn't Change Report, Thinks Drug Use Down in MLB*, ESPN (Nov. 25, 2008), <http://sports.espn.go.com/mlb/news/story?id=3726874>.

140. *Id.*

141. *Id.*

142. *USADA Soon to Celebrate 8th Anniversary, with Long Road Still Ahead*, ESPN (Sept. 25, 2008), <http://sports.espn.go.com/oly/news/story?id=3609463>.

143. Heiles, *supra* note 62, at 334.

144. *Performance-Enhancing Drug Resources*, *supra* note 1.

or HGH use in sports by professional and amateur athletes.<sup>145</sup> Anabolic steroids are derivatives of the male sex hormone testosterone and are used to promote muscle development.<sup>146</sup> The term “anabolic” means “constructive metabolism,” implying that these substances promote the construction of tissue.<sup>147</sup> Using anabolic steroids enhances the muscle mass of athletes and, consequently, makes these athletes bigger, stronger, and faster.<sup>148</sup>

Anabolic steroids provide three major athletic benefits.<sup>149</sup> First, compared to a normal workout, athletes attain a greater increase in muscle mass and strength when using anabolic steroids.<sup>150</sup> Second, athletes experience diminished fatigue and less muscle breakdown following intense workouts.<sup>151</sup> This decrease in muscle breakdown and recovery time allows athletes to work out more frequently and for longer periods of time.<sup>152</sup> Third, many athletes experience increased aggressiveness.<sup>153</sup> This rise in intensity drives athletes to train harder and longer than normal.<sup>154</sup>

Alternatively, HGH is a protein hormone synthesized and secreted by the pituitary gland that is central for human growth and development.<sup>155</sup> Once dispersed into an athlete’s bloodstream, HGH promotes growth within bones, muscles, and other tissues.<sup>156</sup> HGH has never been medically approved for treating athletic injury or improving athletic performance,

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145. *Id.*

146. See Herbert A. Haupte & George D. Rovere, *Anabolic Steroids: A Review of the Literature*, 12 AM. J. SPORTS MED. 469 (1984).

147. See Richard H. Strauss, *Anabolic Steroids*, 3 CLINICS IN SPORTS MED. 743, 743 (1984).

148. See Morris B. Mellion, *Anabolic Steroids in Athletes*, 30 AM. FAMILY PHYSICIAN 113, 115 (1984).

149. *Id.*

150. *Id.*

151. See Roy Bergman & Robert E. Leach, *The Use and Abuse of Anabolic Steroids in Olympic-Caliber Athletes*, 198 CLINICAL ORTHOPAEDICS 169, 171 (1985).

152. *Id.*

153. See Mellion, *supra* note 148, at 115.

154. *Id.*

155. See George Fan, *Anabolic Steroid and Human Growth Hormone Abuse: Creating an Effective and Equitable Ergogenic Drug Policy*, 1994 U. CHI. LEGAL F. 439, 452 (1994).

156. Alan D. Rogol, *Growth Hormone Administration: Is It Safe and Effective for Bodybuilding and Improved Athletic Performance?*, 24 GROWTH, GENETICS & HORMONES 25, 26 (2008).

but its popularity in these capacities has nevertheless risen.<sup>157</sup>

Essentially, players use PEDs in the form of anabolic steroids or HGH because they believe that these drugs will enhance their athletic performance.<sup>158</sup> When asked about the impact of PEDs, Ken Caminiti explained that, “It’s still a hand-eye coordination game, but the difference [with steroids] is the ball is going to go a little farther. Some of the balls that would go to the warning track will go out. That’s the difference.”<sup>159</sup> In the same realm, a minor league player disclosed that he used steroids for quicker reflexes:

I’m not looking for size. I do it for my fast-twitch muscles. If I don’t feel good that week or if my hands don’t feel good, if they’re a little slow, I’ll take a shot or get on a cycle. It helps immediately. I notice the difference. My hands are quicker, so my bat is quicker.”<sup>160</sup>

Such improvements make it hard for players to resist the temptation of PED use.

As a result of the significant physical benefits that PEDs offer, many athletes have attempted to construct various ways to avail themselves of the benefits provided by PEDs while avoiding drug suspensions. These athletes have developed “stacking”<sup>161</sup> and “pyramiding”<sup>162</sup> drug-taking regimens to maximize a steroid’s anabolic effect while minimizing the likelihood of detection. Both of these procedures progressively increase the dose and type of steroids to achieve an optimal anabolic effect.<sup>163</sup> Generally, athletes use anabolic steroids in a cyclical manner<sup>164</sup>—injecting or ingesting the steroids for periods of four to eighteen weeks and then having “drug holidays” that range from one month to a year before beginning

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157. See Mark S. Juhn, *Popular Sports Supplements and Ergogenic Aids*, 33 SPORTS MED. 921, 930 (2003).

158. Verducci, *supra* note 43, at 1.

159. *Id.* at 3.

160. *Id.* at 5.

161. See, e.g., David R. Lamb, *Anabolic Steroids in Athletics: How Well Do They Work and How Dangerous Are They?*, 12 AM. J. SPORTS MED. 31, 33 (1984).

162. See, e.g., Mark A. Frankle, Gerard J. Cicero, & John Payne, *Use of Androgenic Anabolic Steroids by Athletes*, 252 J.A.M.A. 482 (1984).

163. *Id.*

164. *Id.*

a new cycle.<sup>165</sup>

The “stacking” regimen involves an athlete taking one steroid in conjunction with another.<sup>166</sup> For example, an athlete receiving a weekly steroid injection may also take an oral steroid and thus “stack” the two drugs.<sup>167</sup> As another option, “pyramiding” entails an athlete starting with a low dosage level at the beginning of a cycle and then increasing dosages each week until hitting the peak of the “pyramid.”<sup>168</sup> Once this point is reached, the athlete gradually decreases the amount of steroids used to minimize the risk of detection while maintaining optimal benefits.<sup>169</sup> The athlete determines the scheduling and amount of intake depending on potential testing dates and non-testable periods over the off-season.<sup>170</sup> Many athletes engage in a combination of these practices known as “stacking the pyramid” by simultaneously taking high doses of different steroids.<sup>171</sup>

Besides evasion tactics like “stacking” and “pyramiding,” many high-paid athletes simply utilize their wealth to develop new drugs and techniques that evade current detection methods but still provide an athletic edge.<sup>172</sup> For example, when MLB only tested urine, some MLB players used HGH because it could only be detected through blood testing.<sup>173</sup> Despite the fact that HGH was tested in the Olympics as early as 2004,<sup>174</sup> MLB was unable to include blood-testing in its drug-testing procedures until the MLBPA agreed eight years later.<sup>175</sup> Regardless of whether MLB and the MLBPA can come

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165. *Id.*

166. *See* Lamb, *supra* note 161, at 33.

167. *See* Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93, 105 (1990).

168. *Anabolic Steroid Abuse*, NATIONAL INSTITUTE ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/anabolic-steroid-abuse/how-are-anabolic-steroids-abused> (last visited Nov. 3, 2013).

169. *See* Lamb, *supra* note 161, at 33.

170. *Id.*

171. *A Guide to Understanding Steroids and Related Substances*, U.S. DEPT. OF JUSTICE, DRUG ENFORCEMENT ADMIN., <http://www.deadiversion.usdoj.gov/pubs/brochures/steroids/professionals/> (last visited Nov. 3, 2013).

172. *See* Fainaru-Wada & Williams, *Sports and Drugs*, *supra* note 49.

173. Rogol, *supra* note 156, at 30.

174. David Epstein, *HGH Test in Place for Olympics*, SI.COM (July 27, 2012), [http://sportsillustrated.cnn.com/2012/olympics/2012/writers/david\\_epstein/07/27/london-olympics-drug-testing/index.html](http://sportsillustrated.cnn.com/2012/olympics/2012/writers/david_epstein/07/27/london-olympics-drug-testing/index.html).

175. *See* MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM at 13 (2012) [hereinafter 2012 MLB DRUG PROGRAM],



to an adequate drug-testing agreement, it remains clear that new drugs and evasion techniques will continue to develop.

*B. Negative Physical and Social Impacts from Use of Performance Enhancing Drugs*

Anabolic steroids and HGH produce a number of potentially harmful side effects. Among a long list of problems, studies show that the side effects from steroids can include heart and liver damage, exacerbated acne, elevated cholesterol levels, joint and ligament injuries, and strokes.<sup>176</sup> Furthermore, an improper balance of hormones can result in decreased sperm production and testosterone, which can lead to atrophy of the testes.<sup>177</sup> Ken Caminiti remarked that, by the end of his 1996 MVP Season, his testicles had shrunk and retracted.<sup>178</sup> Upon examination, doctors found that his body had virtually stopped producing its own testosterone and that his hormones had fallen to less than 20 percent of the normal level.<sup>179</sup>

Another side effect of steroids is “roid rage.”<sup>180</sup> As discussed earlier in Part II.A, many players consider increased aggressiveness as a benefit for serious workouts and competition. Once those players are no longer in a competitive environment, however, the additional aggression becomes an adverse side effect. Some users experience wild aggression and paranoid delusions.<sup>181</sup> Others experience episodes of increased aggressiveness and spontaneous violence.<sup>182</sup>

Studies show that HGH abuse can lead to nerve, muscle, or joint pain; swelling due to excess fluid in the body’s tissues; carpal tunnel syndrome; extreme numbness and tingling of the skin; and high cholesterol levels.<sup>183</sup> Other side effects of HGH

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available at <http://mlb.mlb.com/pa/pdf/jda.pdf>.

176. *Side Effects of Anabolic Steroid Abuse*, ASS’N AGAINST STEROID ABUSE, <http://www.steroidabuse.com/side-effects-of-steroids.html> (last visited July 20, 2013).

177. *Id.*

178. Verducci, *supra* note 43, at 1.

179. *Id.*

180. Daniel Benjamin, et al., *Shame of the Games*, TIME, Oct. 10, 1988, at 77.

181. Mellion, *supra* note 148 at 36.

182. See, e.g., Drooz, *Steroid Use a Widening Addiction, Doctor Says*, L.A. TIMES, Oct. 9, 1988, sec. 3, at 20, col. 6.

183. *Human Growth Hormone*, WEB MD, <http://www.webmd.com/fitness-exercise/human-growth-hormone-hgh> (last visited July 20, 2013).

can include an increased risk of diabetes and contributory growth of cancerous tumors.<sup>184</sup> While not enough time has passed to conclusively identify all of the side effects, experts in the medical community associate HGH abuse with life-threatening conditions such as cancer, acromegaly,<sup>185</sup> and arthritis.<sup>186</sup>

In addition to negative physical side effects, athletes who use PEDs encourage young players to emulate their actions.<sup>187</sup> A national poll conducted by the National Institute on Drug Abuse revealed that “approximately 8 to 10 percent of high school students have experimented with or are using anabolic steroids.”<sup>188</sup> United States Representative Tom Davis pointed out that, “college athletes believe they have to consider [PEDs] if they’re going to make it to the pros . . . high school athletes, in turn, think [PEDs are] the key to getting a scholarship.”<sup>189</sup> Unless MLB and its players stop tolerating PED abuse and agree to implement an effective anti-doping program, it is likely that impressionable young athletes will continue to follow the poor examples set by some MLB players.<sup>190</sup>

### C. *World Anti-Doping Agency and United States Anti-Doping Agency*

In 1999, the International Olympic Committee (IOC) created WADA as an independent agency.<sup>191</sup> WADA’s fundamental mission is to protect athletes’ “fundamental right

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184. *Id.*

185. Symptoms of acromegaly include abnormal enlargement of bones in the hands, arms, feet, legs, and head. Enlargement of the bones in the jaws and in the front of the skull are typically the most apparent bone changes. *Acromegaly*, WEB MD, <http://www.webmd.com/a-to-z-guides/acromegaly-10808> (last visited July 20, 2013).

186. *Myths and Facts About Human Growth Hormone, B-12, and Other Substances: Hearing Before the H. Comm. on Oversight and Gov’t. Reform*, 110th Cong. 23 (2008) [hereinafter *Myths and Facts Hearing*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg47428/html/CHRG-110hhrg47428.htm>.

187. See MITCHELL REPORT, *supra* note 2, at 16.

188. Leslie Yeransian, *HGH Threat: Works Like Steroids but Undetectable*, June 2006, at 1, available at <http://abcnews.go.com/Sports/story?id=2058493&page=1>.

189. See *Restoring Faith in America’s Pastime*, *supra* note 46, at 5 (statement of Rep. Tom Davis).

190. See MITCHELL REPORT, *supra* note 2, at 9.

191. Haagen, *supra* note 3, at 836–37.

to participate in doping-free sport . . . and to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.”<sup>192</sup> To help proliferate its mission around the world, WADA has created a number of cutting-edge, shared products including The Code, International Standards, and Models of Best Practice and Guidelines.<sup>193</sup>

The Code is a framework for harmonized anti-doping policies, rules, and regulations for sports organizations and public authorities.<sup>194</sup> The International Standards include a list of prohibited substances and methods, testing techniques, laboratory set-ups, exemptions for therapeutic use, and a standard for protection of privacy and personal information.<sup>195</sup> Finally, the Models of Best Practice and Guidelines are optional recommendations that provide rules and regulations tailored to the needs of specific involved parties.<sup>196</sup>

Beyond the goal of worldwide, harmonized drug testing, WADA also has consistently established revolutionary testing procedures in major sporting events.<sup>197</sup> For example, in 2004, the Olympic Games first introduced a blood test to detect HGH.<sup>198</sup> Four years later, WADA improved these testing procedures and released an even more progressive testing program that identified protein markers triggered by HGH use.<sup>199</sup> Even more importantly, WADA recognizes that new illegal drugs are continuously being created to allow athletes to avoid detection.<sup>200</sup> In response, WADA has created a policy by

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192. WORLD ANTI-DOPING AGENCY, *World Anti-Doping Code 11* (2009), available at [http://www.wada-ama.org/rtecontent/document/code\\_v2009\\_en.pdf](http://www.wada-ama.org/rtecontent/document/code_v2009_en.pdf).

193. *Id.* at 12.

194. *Id.* at 11.

195. *Id.* at 12.

196. *Id.* at 13.

197. *See About WADA*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/> (last visited Sept. 10, 2013).

198. *Questions & Answers on Human Growth Hormone (hGH) (Why have there been so few analytical cases for hGH so far?)*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/resources/q-and-a/human-growth-hormone-hgh/> (last visited Sept. 10, 2013).

199. *Detection of Growth Hormone Doping by Gene Expression Profiling of Peripheral Blood Cells in Humans*, WORLD ANTI-DOPING AGENCY, [www.wada-ama.org/rtecontent/document/Prof-Ho.pdf](http://www.wada-ama.org/rtecontent/document/Prof-Ho.pdf) (last visited Sept. 10, 2013).

200. *See Beijing Drug-Testing Program Most Rigorous Anti-Doping Effort in History*, ESPN (July 2, 2008), <http://sports.espn.go.com/oly/news/story?id=3471402>.

which it stores athletes' blood samples for eight years so the samples can be retested as new technology emerges.<sup>201</sup>

Similar to WADA, USADA also is a non-profit, non-governmental agency with the mission to "preserve the integrity of competition, inspire true sport and protect the rights of athletes in the Olympic & Paralympic movement in the United States."<sup>202</sup> Like WADA, USADA strives to continually refine its testing procedures by seeking smarter testing methodologies directed toward higher-risk drugs that are difficult to detect. To do this, USADA funds its own research designed to recognize new doping substances and techniques.<sup>203</sup> For example, in 2008 USADA created a pilot testing program which collected dozens of blood and urine samples from volunteer athletes.<sup>204</sup> USADA used these samples to create a baseline body-chemistry profile, which can be used for comparison to future specimens.<sup>205</sup> This method surmounts previous processes and is considered the "gold standard" in its area of drug testing.<sup>206</sup>

Beyond advanced research, USADA also "strive[s] to systematically identify and sanction" individuals who attempt to gain an unfair advantage over "clean" athletes.<sup>207</sup> To meet the goal of proper identification and sanctioning, USADA is devoted not only to detecting current drug abusing athletes, but also to ensuring that previous offenders are punished.<sup>208</sup> One of the best modern examples is USADA's recent case against cyclist Lance Armstrong.<sup>209</sup>

In August 2012, USADA charged Armstrong with doping and conspiring as one of the ringleaders of a systematic doping scheme within his Tour de France and Olympic teams.<sup>210</sup>

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201. *Id.*

202. *About USADA*, U.S. ANTI-DOPING AGENCY, <http://www.usada.org/about> (last visited July 21, 2013).

203. *Id.*

204. *USADA Soon to Celebrate 8th Anniversary, with Long Road Still Ahead*, ESPN (Sept. 25, 2008), <http://sports.espn.go.com/oly/news/story?id=3609463>.

205. *Id.*

206. *Id.*

207. U.S. ANTI-DOPING AGENCY, *supra* note 202.

208. Juliet Macur, *Armstrong Drops Fight Against Doping Charges*, N.Y. TIMES, Aug. 23, 2012, available at [http://www.nytimes.com/2012/08/24/sports/cycling/lance-armstrong-ends-fight-against-doping-charges-losing-his-7-tour-de-france-titles.html?\\_r=0](http://www.nytimes.com/2012/08/24/sports/cycling/lance-armstrong-ends-fight-against-doping-charges-losing-his-7-tour-de-france-titles.html?_r=0).

209. *Id.*

210. *Id.* See also Liz Clarke, *USADA Says It Has "Conclusive and Undeniable*

Before going public with its findings, USADA collected numerous interviews with former teammates, e-mails, financial statements, and laboratory results, which were used to compile a comprehensive 202-page report detailing how Armstrong abused PEDs.<sup>211</sup>

As a result of USADA's findings, Armstrong was stripped of his seven Tour de France titles, his 2000 Olympics bronze medal, and any money that he won after August 1998.<sup>212</sup> Beyond that, he also was barred for life from competing or coaching any sport that follows the WADA Code, including the Olympics.<sup>213</sup> Although Armstrong had seemingly avoided detection for several years following his last Tour de France victory in 2005, the persistence of USADA is a testament to the agency's devotion to preserving the sanctity of athletics and maintaining a legitimate drug-testing program.

### III. COLLECTIVE BARGAINING IN BASEBALL

The relationship between MLB and the MLBPA is guided by the provisions of the National Labor Relations Act (NLRA). Enacted in 1935, the NLRA serves as the nation's basic labor relations statute.<sup>214</sup> In *American League of Professional Baseball Clubs & Association of National Baseball League Umpires*, the National Labor Relations Board (NLRB or Board) held that professional baseball was an industry in or "affecting interstate commerce," thus subjecting MLB to provisions of the NLRA.<sup>215</sup>

Before the NLRA was enacted, a number of labor-relations authorities recommended collective bargaining as the solution to strikes and other problematic industrial relations.<sup>216</sup> In general, collective bargaining is a process in which a union and an employer negotiate an initial collective agreement or the

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*Proof*" of Lance Armstrong Doping Conspiracy, WASH. POST, Oct. 10, 2012, [http://www.washingtonpost.com/sports/othersports/usada-says-it-has-conclusive-and-undeniable-proof-of-lance-armstrong-doping-conspiracy/2012/10/10/b8dafd3e-12fd-11e2-be82-c3411b7680a9\\_story.html/](http://www.washingtonpost.com/sports/othersports/usada-says-it-has-conclusive-and-undeniable-proof-of-lance-armstrong-doping-conspiracy/2012/10/10/b8dafd3e-12fd-11e2-be82-c3411b7680a9_story.html/).

211. *Id.*

212. Macur, *supra* note 208.

213. *Id.*

214. RAY ET AL., *supra* note 12, at 9.

215. 180 N.L.R.B. 190, 192 (1969).

216. *Id.*

renewal of a previous collective agreement.<sup>217</sup> With collective bargaining as a fundamental element of the NLRA, a number of courts have emphasized that the Act's purpose is to promote industrial peace.<sup>218</sup> To work towards this goal, the NLRA's provisions regulate the relations among employers, employees, and their labor unions in the private sector.<sup>219</sup> The Act also established the NLRB—an independent federal agency that interprets and enforces the terms of the Act.<sup>220</sup>

The NLRA declares that it is United States' policy to “eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining.”<sup>221</sup> Section 7 grants employees, such as MLB players, the rights to self-organize, unionize, and collectively bargain about conditions of employment through union representatives of their choosing.<sup>222</sup> Section 8 details what actions constitute fair and unfair labor practices.<sup>223</sup> Section 8(d) obligates both parties to meet at reasonable times and “confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>224</sup> This obligation to bargain in good faith<sup>225</sup> requires that the parties have a sincere desire to reach an agreement; it is central to the NLRA's framework.<sup>226</sup> Accordingly, a labor organization or employer commits an unfair labor practice if it refuses to collectively negotiate.<sup>227</sup>

Under the provisions of the NLRA, an employer and union create a CBA by negotiating and reaching an agreement to

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217. *Id.* at 164.

218. Many commentators believe that the importance regarding the purpose of the Act has been overstated. These commentators point out that the original author of the Act thought of it as “a weapon against the Depression. . . . Collective bargaining, he thought, would both restore an element of fairness and industrial democracy to the workplace, and redistribute wealth in such a way as to reinvigorate the economy.” *Id.* at 9–10.

219. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

220. *Id.* § 153.

221. *Id.* § 151.

222. *Id.* § 157.

223. *Id.* § 158(d).

224. *Id.* § 158(d).

225. Some examples of bargaining in good faith include: meeting at reasonable times and intervals, sending representatives that have the power to make decisions on behalf of the party, and cooperating fully with arbitrators and other third-party mediators. RAY ET AL., *supra* note 12, at 9–10.

226. *Id.* at 165.

227. See National Labor Relations Act, 29 U.S.C. § 158(a)(5), (b)(3) (2012).

regulate working conditions.<sup>228</sup> As the exclusively recognized union for MLB players, the MLBPA has the authority to negotiate CBAs with the League.<sup>229</sup> During negotiations, the two parties must discuss any topic that falls under the category of “wages, hours, and other terms and conditions of employment.”<sup>230</sup> In baseball, these subjects include: minimum and maximum salaries, salary arbitration, travel expenses, grievance procedures, and termination pay.<sup>231</sup> Both parties endorse the CBA after agreeing to its terms.<sup>232</sup> In doing so, the CBA becomes a legally binding contract that governs the workplace.<sup>233</sup> For a national industry like baseball, the definition of “workplace” ranges widely from training facilities to hotel rooms.<sup>234</sup>

A. *Subjects of Collective Bargaining and Unilateral Changes*

In *NLRB v. Wooster Division of Borg-Warner Corporation*, the United States Supreme Court divided the NLRA bargaining subjects into three different categories: mandatory, permissive, and unlawful.<sup>235</sup> First, the Court classified subjects listed in Section 8(d) as mandatory subjects. If a subject is classified as mandatory, the parties have a duty to bargain in good faith. Bargaining in good faith, however, does not require that the parties agree to anything; rather, each party is free to maintain its respective position. Alternatively, neither party has a duty to bargain over permissive (non-mandatory) subjects. Although a party may bargain over a permissive subject, it may not bootstrap a permissive subject to a mandatory subject in an attempt to force the other party to negotiate both topics. Therefore, a permissive subject may be proposed during negotiations, but it is never required. Finally, parties may not bargain regarding unlawful subjects.<sup>236</sup>

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228. *See id.* §§ 151–69.

229. 2012–2016 BASIC AGREEMENT, *supra* note 39, at 1.

230. National Labor Relations Act 29 U.S.C. § 158(d) (2012).

231. 2012–2016 BASIC AGREEMENT, *supra* note 39, at 22–33. As will be shown in Part III.A.i, *infra*, MLB drug testing also falls within this category.

232. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

233. *Id.*

234. 2012–2016 BASIC AGREEMENT, *supra* note 39, at 30.

235. *See generally* 356 U.S. 342 (1958).

236. RAY ET AL., *supra* note 12, at 173.

Sometimes it can be a challenge to classify a subject as mandatory or permissive. Originally, the House bill for Section 8(d) included a specific list of mandatory bargaining subjects.<sup>237</sup> The Senate, however, rejected that portion of the bill, claiming that it artificially limited the appropriate subjects of collective bargaining.<sup>238</sup> Instead, the House and Senate conferees of the 80th Congress<sup>239</sup> compromised to adopt the broader language “other terms and conditions of employment.”<sup>240</sup> The Supreme Court interpreted this legislative history as evidence that the NLRB should have wide latitude to define “terms and conditions.”<sup>241</sup>

With this in mind, classifying a subject as mandatory or permissive significantly influences whether an employer has the ability to implement a unilateral change. When dealing with a permissive subject, an employer is not obligated to bargain; therefore, the employer can institute unilateral changes without agreement from the union. On the other hand, an employer must first bargain in good faith before implementing a unilateral change to a mandatory subject.<sup>242</sup>

In *National Labor Relations Board v. Katz*, the United States Supreme Court held that an employer violated Section 8(a)(5) when it attempted to unilaterally change a mandatory subject of bargaining.<sup>243</sup> In *Katz*, the employer and the union had bargained over policies regarding sick leave, an automatic wage increase, and merit increases.<sup>244</sup> During the bargaining period, the employer unilaterally implemented new policies in the three areas being negotiated without notifying the union.<sup>245</sup> Reasoning that a party cannot bargain in good faith if it

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237. H.R. 3020, 80th Cong., 1st Sess. § 2(11)(B), 93 CONG. REC. 3548 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LMRA OF 1947, at 66–67 (1948).

238. H.R. CONF. REP. 510, 80th Cong., 1st Sess. 34–35 (1947).

239. The campaign to amend the Wagner Act in the 80th Congress was led by Senator Robert A. Taft of Ohio, chairman of the Senate Labor Committee, and Representative Fred A. Hartley, Jr., of New Jersey, the Republican chairman of the House Education and Labor Committee. *Id.*

240. Ethan Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 20; H.R. CONF. REP. 510, 80th Cong., 1st Sess. 34–35 (1947).

241. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981).

242. RAY ET AL., *supra* note 12, at 173.

243. *See generally* *NLRB v. Katz*, 369 U.S. 736, 736–38 (1962).

244. *Id.* at 738–39.

245. *Id.* at 740–42.



refuses to negotiate a mandatory subject fully, the Court concluded that “an employer’s unilateral change in conditions of employment under negotiation is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.”<sup>246</sup> Thus, MLB’s capability to unilaterally implement a drug-testing policy depends heavily on whether drug programs are classified as mandatory or permissive subjects of collective bargaining.

### 1. Drug Testing as a Mandatory Subject of Bargaining

In *Johnson-Bateman Co.*, an employer unilaterally implemented a drug-testing program for all medical examinations of employees who suffered injuries while in the workplace.<sup>247</sup> Using a test established by the United States Supreme Court in *Ford Motor Co. v. NLRB*,<sup>248</sup> the Board determined that drug and alcohol testing is a mandatory subject because it is both “germane to the working environment” and “outside the scope of managerial decisions.”<sup>249</sup> As a result, the NLRB found that an employer’s unilateral implementation of drug testing violates Section 8(a)(5).<sup>250</sup> Shortly thereafter, the Board affirmed this decision in *Minneapolis Star Tribune*, again finding that an employer cannot unilaterally implement a drug program for current employees because such programs are considered mandatory bargaining subjects.<sup>251</sup> This precedent remains valid today and corresponds with other Board findings.<sup>252</sup>

### 2. Potentially Moving Past Impasse

Because drug testing is a mandatory subject, MLB may implement a unilateral change to its drug-testing program only after reaching an impasse or deadlock. In negotiations, an

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246. *Id.* at 743.

247. *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 181 (1989).

248. 441 U.S. 488, 498 (1979).

249. *Johnson-Bateman Co.*, 295 N.L.R.B. at 182.

250. *Id.* at 188.

251. 295 N.L.R.B. 543, 552 (1989).

252. Rabuano, *supra* note 31, at 454.

impasse is reached when the parties have fully discussed a mandatory subject in good faith and neither party is willing to move from its respective position. Once arriving at impasse, the parties can exert economic pressures on each other such as strikes and lockouts.<sup>253</sup>

While the union has limited options in a deadlock, such as calling for a strike, the employer can engage in a lockout and make unilateral changes in the workplace that are consistent with the offers rejected by the union.<sup>254</sup> Additionally, the employer may hire replacements to counter a union strike.<sup>255</sup> With options considerably favoring the employer, labor law scholars such as Professor Ellen Dannin point out that, “[a]s the doctrine of employer implementation has taken root, it has come to shape a lawless vision of labor law. . . . The law says: ‘There are hurdles to overcome, but it is possible to control the workplace unilaterally.’”<sup>256</sup> Even if a union successfully contests that an employer has not properly reached impasse, the NLRB’s options for remedies subsequent to an employer’s unilateral implementation have been described as “paltry,” “easy and cheap,” and “the Achilles’ heel of employee rights.”<sup>257</sup> Most likely, the Board would be able to do little else<sup>258</sup> than to direct the employer to return to bargaining.<sup>259</sup>

Nevertheless, although an employer can assert great force by reaching impasse and implementing a unilateral change, this course of action may not be the most beneficial choice for either party.<sup>260</sup> Before selecting this strategy, an employer should consider a number of other factors such as its relationship with the union and employees, the significance of the subject at issue, the feasibility of replacing workers in the

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253. RAY ET AL., *supra* note 12, at 171.

254. *Id.*

255. *Id.*

256. Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMP. L.J. 11, 41 (1997).

257. Nancy Schiffer, *Rights Without Remedies: The Failure of the National Labor Relations Act*, 2008 A.B.A. SEC. LAB. & EMPL. L. 4 (Sept. 2008), available at <http://www.abanet.org/labor/lel-annualcle/08/materials/data/papers/153.pdf>.

258. Perhaps if the employer continued to defy the orders of the Board, the NLRB could threaten to hold the employer in contempt. This, however, would likely occur only in extreme cases. *See generally* RAY ET AL., *supra* note 12.

259. *See* Schiffer, *supra* note 256, at 5.

260. *See generally* 25 AM. JUR. PROOF OF FACTS 2D, *Bargaining Impasse* § 4 (2012).

industry, and the overall business economics of potentially forcing an industrial halt.<sup>261</sup> On some occasions, taking a steadfast stance on an issue may hinder future progress for the industry and become detrimental to both parties.<sup>262</sup>

### *B. MLB's Current Collective Bargaining Agreement*

Throughout the past forty years, the MLBPA has used drug testing as a bargaining chip. Instead of allowing MLB to implement a sufficient program, the MLBPA has held the bargaining reins on drug testing while slowly advancing the rights, benefits, and pay<sup>263</sup> of its players. This has resulted in either non-existent or dramatically insufficient drug-testing programs throughout baseball's history.

In 2012, MLB and MLBPA began operating under the 2012–2016 CBA. The agreement includes a penalty structure that consists of a minimum sixty-game suspension for the first positive drug-test, a 120-game suspension for the second, and a lifetime ban for the third offense.<sup>264</sup> Additionally, the MLBPA finally agreed to the blood-testing of players for HGH—eight years after the technology first became available.<sup>265</sup>

To implement the drug program, MLB and the MLBPA agreed to appoint a drug-testing manager with the title “Independent Program Administrator” (IPA).<sup>266</sup> The IPA is selected by MLB and the MLBPA for a term of three years.<sup>267</sup> Either party, however, may attempt to remove the IPA for acting “inconsistent[ly] with the Program or for misconduct that affects his ability to perform as IPA.”<sup>268</sup> Both parties also retained exclusive authority over some of the most important

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261. *Id.*

262. *Id.*

263. As previously noted, *supra*, in Part I.B.2, since 1968 when the MLBPA negotiated its first CBA, the minimum salary for an MLB player has risen dramatically from \$6,000 to \$480,000. The MLBPA has also gained players the potential for bigger contracts, profitable endorsements, and additional benefits from reaching record-setting milestones. Zachary D. Rymer, *Why MLB Players Owe Every Dime of Their Bloated Salaries to Marvin Miller*, BLEACHER REPORT, (Nov. 27, 2012), <http://bleacherreport.com/articles/1423916-why-mlb-players-owe-every-dime-of-their-bloated-salaries-to-marvin-miller>.

264. 2012–2016 BASIC AGREEMENT, *supra* note 39, at 25.

265. 2012 MLB DRUG PROGRAM, *supra* note 175, at 33.

266. MITCHELL REPORT, *supra* note 2, at SR-24.

267. 2012 MLB DRUG PROGRAM, *supra* note 175, at 1.

268. *Id.* at 2.

aspects of the program such as the number of tests administered, the list of prohibited substances, and the selection of entities responsible for collecting and testing samples.<sup>269</sup> Therefore, in reality, although the position is labeled as “independent,” MLB and the MLBPA still maintain a considerable amount of authority over the administrator and the program.

#### IV. ANALYZING THE BEST FIT (PARTS A AND B)

Over the years, it has become well established that the topic of drug testing is a mandatory subject of bargaining and thus an employer may not unilaterally implement a drug-testing program unless bargaining first reaches an impasse.<sup>270</sup> With that in mind, MLB has four viable options to improve its drug-testing policies and restore the integrity of the game. First, MLB could maintain its current approach and continue to bargain with the MLBPA with the goal of gradually instituting a stronger, more thorough drug program that remains under the internal control of the two parties. Alternatively, MLB could strengthen its position regarding drug testing, maintain its stance to the point of impasse, and unilaterally implement its own drug-testing program. Another option would require MLB and the MLBPA to agree to appoint a well-established, external agency to independently handle the entire MLB drug program. Lastly, MLB could attempt to circumvent the collective bargaining process altogether and push for government intervention regarding professional sports drug testing. This Comment discusses the two internal options below in Part IV.A and the external option in Part IV.B. Thereafter, it explores the possibility of federal government intervention and analyzes the option in the context of MLB in Part IV.C.

##### A. *Collective Bargaining: Internal Drug-Testing Program*

One option is for MLB to maintain its current approach and continue to bargain with the MLBPA to institute a stronger, more thorough drug program that remains under the

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269. MITCHELL REPORT, *supra* note 2, at 264.

270. *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 181 (1989).

control of the two parties. The trouble with this approach, however, is that MLB has already undergone over forty years of negotiations with the Association without successfully implementing an adequate drug-testing program.<sup>271</sup> Though the MLBPA has agreed to some changes, the twenty PED suspensions in the last two years demonstrate that the current drug policy is inadequate to deter athletes from abusing PEDs.<sup>272</sup>

In general, the current MLB drug program remains weak in three specific areas: administration of testing, keeping pace with the latest drug-testing technology, and adequately deterring PED abuse through its penalty structure.<sup>273</sup> The program's weaknesses are exemplified by: (1) the IPA botching standard protocol by improperly implementing chain-of-custody procedures during Ryan Braun's drug test; (2) HGH blood-testing being initiated in 2012 despite availability of the technology eight years earlier; and (3) twenty players testing positive for PEDs in 2012–2013, a majority of whom were only suspended a meager fifty games out of the 162-game season.<sup>274</sup> Simply put, the current system is not adequately deterring players from abusing PEDs.<sup>275</sup> Although it is possible for the current MLB Drug Program to catch up with these standards eventually, these improvements cannot be made overnight. Rather, such progress would likely take an extensive amount of time that could prove permanently detrimental to the integrity of MLB.

Another option for MLB is to maintain a strong drug-testing stance during bargaining until it reaches an impasse. At the point of impasse, MLB could implement its own desired drug-testing policy unilaterally.<sup>276</sup> Although this situation is possible, a number of factors make this option less than ideal. First and foremost, MLB is a multi-billion dollar industry.<sup>277</sup> If it attempted to make such a significant unilateral change, MLB would put itself at high risk of a strike or lockout that could cancel part or all of a season.<sup>278</sup> This would decrease revenue

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271. See *supra* Parts I.A–B.

272. *Steroid Suspensions*, *supra* note 6.

273. See *supra* Parts I.A–B.

274. *Steroid Suspensions*, *supra* note 6.

275. *Id.*

276. See *supra* Part III.A.2.

277. *The Business of Baseball*, *supra* note 86.

278. See *supra* Part III.A.2.

considerably and could also deter fans' continued interest in the game.<sup>279</sup>

Along the same lines, if the MLBPA decided to strike, the nature of the baseball industry would make it nearly impossible for MLB to hire viable replacements. Professional baseball requires specialized skills and many major leaguers attract a fan base due to their individual achievements and personalities.<sup>280</sup> Considering all of these issues, a MLB strike would also likely sour relations between the two parties.<sup>281</sup> After devoting decades to negotiating drug testing, the Association would not be pleased if MLB suddenly decided to make its own unilateral changes. Given these considerations, conducting a unilateral change to "win the war" on PEDs would come at a high cost to the overall financial stability and popularity of professional baseball. Such a change could hinder the future economic progress of the industry and become detrimental to both parties.

### *B. Collective Bargaining: External Drug-Testing Program*

Another option is for MLB and the MLBPA to agree to appoint a well-established third-party agency to independently handle the MLB drug program. As previously discussed, agencies such as WADA and USADA have created cutting-edge programs that deter both current and future drug-related abuse.<sup>282</sup> Established over ten years ago, both agencies have extensive experience following proper drug-testing procedures.<sup>283</sup> Additionally, these agencies have demonstrated a willingness to extensively investigate past violations.<sup>284</sup> This is exemplified through WADA's system of storing athletes' blood samples for eight years and USADA's willingness to investigate high-profile athletes after their careers have ended.<sup>285</sup> Combined with severe penalties such as the one imposed on Lance Armstrong,<sup>286</sup> these agencies' actions

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279. *Id.*

280. *Id.*

281. *Id.*

282. *See supra* Part II.C.

283. *Id.*

284. *Id.*

285. *Beijing Drug-Testing Program Most Rigorous Anti-Doping Effort in History*, *supra* note 200.

286. Macur, *supra* note 208.

demonstrate a strong devotion to preserving the sanctity of athletics and deterring PED abuse.<sup>287</sup>

The problem, however, is that the MLBPA has rejected the option to hand over the responsibility of drug testing to another agency since its inception.<sup>288</sup> Over the years, the development of the MLBPA as an organization has been shaped by its rejections and gradual concessions to MLB's drug-testing program.<sup>289</sup> As previously discussed, since 1970, the minimum salaries for MLB players have risen from \$12,000 to \$480,000,<sup>290</sup> and players may now earn additional benefits from lucrative endorsements and performance-based contract incentives.<sup>291</sup> It is clear that the Association has benefitted greatly from keeping the mandatory subject of drug testing on the bargaining table. At this point, though, it would behoove the MLBPA to recognize everything it has gained and concede that it must do its part to uphold the integrity of the game and contribute to its future success.

Over the past decade, the topic of PED abuse in baseball has prompted hundreds of articles, dozens of hearings, and several proposed pieces of legislation.<sup>292</sup> If PED abuse persists due to an ineffective MLB drug program, the integrity of the game could be further diminished and the industry as a whole could suffer.<sup>293</sup> For now, it is in the best interest of the MLBPA to release the reins it has had on the subject of drug testing and allow an established third-party agency to take the responsibility of baseball's drug policy. With a truly independent agency overseeing this crucial facet of the sport, baseball would finally take a positive step towards reviving its good name.

## V. POTENTIAL FEDERAL GOVERNMENT INTERVENTION

In 2004, Congress discussed the status of drug testing in professional sports.<sup>294</sup> During one congressional hearing,

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287. *Id.*

288. *See supra* Parts I.A–B.

289. *Id.*

290. BASEBALL-REFERENCE.COM, *supra* note 88.

291. *See Encyclopedia of Players: Alex Rodriguez*, *supra* note 91; *see also Player Profile: Alex Rodriguez*, *supra* note 91.

292. *See supra* Parts I.A–B.

293. *Id.*

294. Haagen, *supra* note 3, at 843.

Senator John McCain aggressively told the MLBPA's Executive Director that his "failure to commit to addressing this issue straight on and immediately will motivate this committee to search for legislative remedies. . . . Unless the players at [MLBPA] act in affirmative and rapid fashion."<sup>295</sup> Shortly after the 2004 hearings, Congress introduced six bills focused on implementing much stricter regulations on PEDs.<sup>296</sup> All of the proposed legislation included the incorporation of WADA's prohibited substance list and was more stringent than any other program that existed in American professional sports at the time.<sup>297</sup> In response, the MLBPA eventually agreed to stricter drug-testing policies and none of the bills ever became law.<sup>298</sup> It is clear that government intervention, or at least the threat of it, has the potential to influence the MLBPA's stance on drug testing and, consequently, should be further evaluated.

#### A. *Fourth Amendment Considerations*

If the government attempts to intervene, athletes and players' unions would likely argue that any law enacted to conduct random drug testing is an unreasonable search and seizure.<sup>299</sup> Under the Fourth Amendment, all Americans have the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the federal government.<sup>300</sup> Typically, the reasonableness of a search is determined by balancing the government's interests against an individual's privacy rights.<sup>301</sup> Before addressing the interests of the two sides, however, it is important to first

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295. MITCHELL REPORT, *supra* note 2, at 56 (citing *Steroid Use in Professional and Amateur Sports: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. 33 (2004) (statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Sci., and Transp.)).

296. Showalter, *supra* note 64, at 660.

297. *Id.* at 661.

298. *Id.*

299. See CHARLES V. DALE, CONG. RESEARCH SERV., RL32911, FEDERALLY MANDATED RANDOM DRUG TESTING IN PROFESSIONAL ATHLETICS: CONSTITUTIONAL ISSUES 2 (2005), available at <http://d1lj51l9p3qzy9.cloudfront.net/handle/10207/bitstreams/2437.pdf>.

300. U.S. CONST. amend. IV.

301. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989). The Court held that the "collection and testing of urine intrude[d] upon expectations of privacy that society has long recognized as reasonable [and] . . . these intrusions must be deemed searches under the Fourth Amendment." *Id.* at 617.



consider if the reasonableness requirement pertains to the party involved. In general, Fourth Amendment concerns apply only to the public sector, and private employers are free to implement policies on their own initiative.<sup>302</sup>

Alternatively, if federal legislation required a private industry to enact specific drug-testing policies, then private employees could argue that the legislation violates the Fourth Amendment because it forces the industry to act as a government agent.<sup>303</sup> Courts have held that a private industry's act is attributable to the government when a "sufficiently close nexus" between the government legislation and the challenged action exists.<sup>304</sup> To determine whether a "nexus" has been established, courts consider all of the circumstances involved and determine whether the legislation "influenced or implemented" a private employer's policies and actions.<sup>305</sup> Because MLB is a private industry, it is very likely that any government legislation superseding MLB's drug-testing policy and implementation would create a sufficiently close nexus and would, therefore, violate the players' Fourth Amendment interests.<sup>306</sup>

### *B. The Special Needs Exception*

Generally, an agent must obtain a warrant supported by probable cause before conducting a reasonable search and seizure.<sup>307</sup> Under limited circumstances, however, it is possible for a search that is not supported by probable cause to be constitutional if there are "special needs, beyond the normal need for law enforcement."<sup>308</sup> A "special need" is a judicially created exception to the "warrant and probable cause requirement" for suspicionless searches.<sup>309</sup>

The special needs exception deems a suspicionless search

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302. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974) (discussing the "state action" requirement).

303. *Skinner*, 489 U.S. at 614 (holding that a railroad that complies with the provisions of government regulations does so by "compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment").

304. *Jackson*, 419 U.S. at 351.

305. See *Skinner*, 489 U.S. at 615–19.

306. Heiles, *supra* note 62, at 348.

307. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

308. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

309. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

as constitutional if the government can establish that it has a compelling interest.<sup>310</sup> To determine if a compelling interest exists, courts balance the legitimacy of the government's interest with the level of intrusion on an individual's Fourth Amendment rights.<sup>311</sup> A suspicionless search may be reasonable if the privacy interests implicated by the search are minimal and requiring a higher level of individualized suspicion would jeopardize an important government interest.<sup>312</sup> Accordingly, a number of cases have applied the special needs exception to suspicionless drug testing.

In *Skinner v. Railway Labor Executives' Association* the United States Supreme Court upheld a suspicionless drug-testing program instituted by the Federal Railroad Association after numerous railroad workers suffered narcotic-related injuries.<sup>313</sup> The Court noted that the railroad workers had a reduced expectation of privacy because they worked in a heavily regulated industry.<sup>314</sup> Furthermore, the government had an interest in preventing accidents from harming passengers and other employees.<sup>315</sup>

Similarly, in *National Treasury Employees Union v. Von Raab*, the United States Supreme Court determined that extraordinary safety was a sufficient government interest to permit suspicionless drug testing of Customs Service employees who handled illegal drugs, firearms, and classified material.<sup>316</sup> Six years later, the Court also applied the special needs exception to public schools in *Vernonia School District v. Acton*.<sup>317</sup> Looking at a policy that implemented mandatory drug testing of student athletes, the Court determined that the government has a special need to protect the safety of students and to discourage them from abusing drugs.<sup>318</sup> Moreover, those same students possessed a diminished expectation of privacy because they volunteered to participate in athletics in a school environment.<sup>319</sup>

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310. See *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1974).

311. *Id.*

312. *Id.* at 624.

313. *Id.* at 619.

314. *Id.* at 627.

315. *Id.* at 657.

316. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

317. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

318. *Id.* at 661-62.

319. *Id.* at 657.

## VI. ANALYZING THE BEST FIT (PART C)

*C. Implementing a National Drug-Testing Program:  
Government Intervention*

In MLB's circumstances, any government legislation that supersedes MLB drug-testing policy would likely violate the players' Fourth Amendment interests.<sup>320</sup> To circumvent the constitutional violation, the government would be required to legitimize its legislation through the special needs exception. Although the government may have some evidence to demonstrate a special need, it is unlikely that the interest would be considered sufficiently compelling when weighed against the players' Fourth Amendment privacy concerns.

To begin, MLB players do not fit easily within the confines of the special needs exception. Unlike the school-sponsored student athletes in *Vernonia School District*, MLB players do not participate under the auspices of school regulations. Rather, professional baseball players are focused solely on playing professional baseball and are financially invested in the sport. Additionally, professional baseball is not a highly-regulated industry like the railroad in *Skinner* or the Customs Service Office in *Von Raab*. Though certain rules and obligations exist in MLB, these are not the same type of safety guidelines that railroad workers or Customs Service employees must follow. An MLB player may be required to wear a batting helmet, but he does not have to learn how to properly handle firearms at a national border or operate dangerous railroad machinery.

Despite all of this, the government could assert that it has a safety interest in protecting the health of professional athletes and the younger athletes who emulate them, and thus, a need to enforce the federal ban on criminalized PEDs. Although MLB players who abuse PEDs subject themselves to some medical risks, it is unlikely that a court would consider the prevention of these self-induced health issues as a sufficiently compelling government interest. Furthermore, even if players become stronger and faster from PED abuse, it is doubtful that this will translate into injuring other athletes in a low-contact sport like baseball. In general, the likelihood of

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320. Heiles, *supra* note 62, at 348.

severely hurting another MLB player on a baseball field is a great deal lower than the probability of harming another railroad worker in a busy rail yard. Besides professional athletes, younger players have also begun abusing PEDs. National polls, however, have shown that only 8 to 10 percent of high school students have experimented with or are using anabolic steroids.<sup>321</sup> Though these numbers are significant, they are still too low to legitimize a compelling government interest.

Moreover, even with documented instances of athletes using PEDs, the government's interest in preventing such abuse can likely be satisfied through more effective means. For example, instead of focusing on individual athletes breaking the law, agencies like the Drug Enforcement Administration should concentrate on thwarting manufacturers and distributors that handle controlled substances such as PEDs.<sup>322</sup> As such, the existence of other viable avenues to enforce federal PED restrictions demonstrates that it is unnecessary for the government to impose additional regulation that intrudes on players' privacy.

Overall, although the government has some possible special interest claims, none of these interests would likely trump an MLB player's Fourth Amendment rights. It is one thing for a union to agree to drug testing through collective bargaining; it is another for the government to insist that United States' players involuntarily provide urine and blood samples without any reasonable suspicion.

Beyond the Fourth Amendment challenges that would likely occur with a government drug-testing intervention, a number of other reasons exist to favor collective bargaining. To begin, courts tend to give greater deference to collectively bargained terms abiding by the NLRA than government-mandated terms that infringe upon citizens' privacy rights.<sup>323</sup> Along similar lines, creating an improved drug-testing policy through collective bargaining would likely result in a greater acceptance from the players in comparison to a policy that is forcefully imposed by Congress. By preserving the MLBPA's sense of ownership and choice in the matter, players would be

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321. See *supra* Part II.B.

322. See DEA Mission Statement, U.S. DRUG ENFORCEMENT ADMINISTRATION, <http://www.justice.gov/dea/about/mission.shtml> (last visited Sept. 10, 2013).

323. Showalter, *supra* note 64, at 676.

more willing to accept and adhere to an agreed-upon program.<sup>324</sup>

Additionally, though MLB is a multi-billion dollar industry, Congress still has several other more important national issues on its agenda. When considering all of Congress's responsibilities, the professional sports world simply should not take precedence over major issues that influence the overall state of the nation. Creating a policy that properly implements a drug-program for professional sports is too time-consuming. Even though numerous bills have been previously drafted, extensive time and effort would be required to modify, support, and ultimately pass legislation. On top of this, several of the deficiencies in MLB's current drug program demonstrate that rapid technological and medical advances make it extremely difficult for new regimes to keep pace with the world's best PED detection practices.

#### CONCLUSION

Over the years, it has become clear that the MLBPA has benefitted tremendously from maintaining the subject of drug testing as a bargaining topic during CBA negotiations. Besides advancements in players' rights and benefits, minimum salaries for MLB players have climbed from \$12,000 to \$480,000 in the past forty-four years. As a mandatory subject of collective bargaining, drug testing has been a valuable bargaining chip throughout the MLBPA's development. Nevertheless, although much has been gained for the players, the MLBPA's reluctance to work with MLB to institute a truly effective drug-testing program has come at a significant cost: PED abuse has become a dangerous problem that threatens the health of baseball players and deters the continued integrity, popularity, and economic success of baseball. Thus, it is time for the MLBPA to let go of the collective bargaining reins it holds on drug testing and agree to the best possible option to halt the ongoing PED abuse that continues to plague MLB.

History has shown that MLB and the MLBPA are incapable of negotiating and developing an adequate internal drug-testing policy that properly punishes and deters PED abuse. Furthermore, though the possibility of making a

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324. *Id.*

unilateral change after reaching impasse may initially seem attractive to MLB, it is likely that such an extreme action could risk the League a considerable amount of revenue, diminish relations with the Association, and prove detrimental to the future progress of the industry as a whole. Besides these options, congressionally-mandated drug testing also creates a number of complications that do not otherwise exist through collective bargaining. With potential constitutional challenges and additional burdens on Congress, the drug-testing policies of MLB should be left to the League and MLBPA.

Inevitably, then, it is in the best interest of the game for the Association to permit a third-party agency like WADA or USADA to independently assume the responsibility of implementing and maintaining an adequate drug-testing program for baseball. By releasing the reins to a reliable, prestigious agency that specializes in the most cutting-edge drug testing technology, the MLBPA and MLB would finally take an adequate step towards cleaning up the game and reviving the integrity of America's pastime.