

**STEROIDS AND DRUG ENHANCEMENTS IN SPORTS:  
THE REAL PROBLEM AND THE REAL SOLUTION**

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INTRODUCTION

“Did you see Kobe last night? How ‘bout them Bengals? Lance Armstrong is a god among men.” The average American could easily recognize the meaning and context of any of these statements. What’s more, many could respond by providing their own, unique perspective on a multitude of issues arising from each statement, a fact that speaks to the ubiquity of sports in our culture. The extensive histories of sport and fabled stories of athletic competition are also indicative of how important sports really are in our world. It is a generally accepted part of our society that human beings derive multifaceted benefits from participating and engaging in sports. Whether playing, watching, or cheering, people enjoy the physical aspect of sports, as well as the mental stimulation and social connection that comes with involvement in athletics and competition. These driving forces have led to sports permeating almost all aspects of our culture. We are introduced to them as a vital part of our education from younger and younger ages; kids are now playing a vast array of sports and are training seriously at younger ages to get a ‘jump’ on their competition. They are a principal source of entertainment and they serve as a point of pride, be it on the national, regional, city and even local levels.

Given the significant role that sports play in America, they “sometimes serve as a model of the larger society.”<sup>1</sup> Ensuring that model is a positive one becomes an increasingly important goal as sports develop, change and grow within our culture.

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<sup>1</sup> Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL’Y REV. 99, 99 (2004).

Constant discussion and disagreement arise in sports at all levels as to aspects of the games themselves as well as the culture surrounding them. Fighting in professional hockey, violent outbreaks involving fans in professional basketball, the miniscule proportion of black football coaches at the college and professional levels, and mandatory playing time for kids participating in younger leagues are just a few of the innumerable controversial issues. Arguably, the biggest of these controversies in modern sports has been enhancement of individual athletic performance through the use of medical intervention, most commonly with steroids.

Steroids and drug enhancements are regarded to be dangerous for your health, but do provide some benefits to the user in increased performance. Professionals use drug enhancements to boost their performance, ignoring the health concerns and flouting testing because most testing procedures are grossly inadequate in catching users in professional sports. The use of steroids causes long-term physiological and psychological damage.<sup>2</sup> Other enhancements are similar in that they may provide a short-term and limited gain in performance or ability, but may fail down the road in terms of safety and health concerns for the user.

The media tends to cover the use of such substances in professional sports but less adequately addresses the issues of use by amateurs and minors. We must concern ourselves with the use of these detrimental substances and practices at all levels of sport, especially younger aged competition where children and teens may be jeopardizing their health. Acknowledging professional sports as significantly shaping society, Congress set out to eradicate use of these substances in professional sports focusing primarily on

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<sup>2</sup> Nat'l Inst. on Drug Abuse. *NIDA InfoFacts: Steroids (Anabolic-Androgenic)*, available at <http://www.nida.nih.gov/infofacts/steroids.html> (last visited March, 2005).

reducing their harmful effects in amateur and younger aged competition. Congress has reacted to recent concern over steroid use by drafting the Clean Sports Act of 2005 which is aimed at getting steroids out of professional sports. However, focusing on professional sports is the wrong way to approach the problem. Professional use of steroids and other drug enhancements is not a huge problem for society. As professionals, those athletes are better situated to determine the health risks and limit those risks by using their access to the best medical treatment around.

The real problem is that the emphasis on success in sports has lead to much higher levels of steroid use in kids and teenagers. A better solution than the Clean Sports Act would be legislation that addressed the drug enhancement issue with kids and the future development of sports. Such legislation should couple education and testing at younger ages and lower levels of sports in an effort to keep kids and teenagers off steroids. Passing a companion bill to help motivate professional leagues to police enhancement with minimum testing will further help. It will allow professional organizations to tailor their testing policies to the needs of their sports, but also prevent sham testing that could lead to steroids pervading their sport and kids from putting such a drug-enhanced ideal on a pedestal.

The worst dangers about rising steroid use involve their use by youths. While there are valid concerns about the use of drug enhancements by professional athletes, they are arguable, and secondary to those implicating teenagers and youths. The Clean Sports Act of 2005, therefore is inappropriately aimed only at professional sports. A better solution to the “steroids in sports” issue would directly fight youth use of drug

enhancements while also addressing professional use but employing a more balanced approach.

### A. Steroid Use and Doping

There are many performance enhancing drugs. The most common ones are anabolic steroids. A large amount of performance enhancing drugs, including steroids, affect the body in a way that is similar to adding testosterone: they increase protein synthesis and decrease the natural breakdown of muscles, resulting in more lean muscle mass that athletes desire.<sup>3</sup> However, there are unpredictable, negative effects as well. Steroids alter blood lipids and increase the risk of an early onset of cardiovascular disease and heart attacks.<sup>4</sup> Steroids, and other drug enhancements that affect testosterone, can cause liver damage, potentially leading to hepatitis, and fatal tumors.<sup>5</sup> Steroids affect sexual development as well and can stop the natural production of testosterone.<sup>6</sup> For males, their testes shrink, their sperm production diminishes, and they can even grow female-like breasts.<sup>7</sup> Females can experience acne and excessive body hair.<sup>8</sup> The negative aspects of steroids and doping don't end with the physical changes of the body. Steroids can cause violent episodes of what is known as "Roid Rage."<sup>9</sup> Individuals also may experience varying degrees of psychological effects, including euphoria,

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<sup>3</sup> United State Anti-Doping Agency, *Cheating Your Health – Steroids*, [http://www.usantidoping.org/athletes/cheating\\_health.html](http://www.usantidoping.org/athletes/cheating_health.html) (last visited June 11, 2006).

<sup>4</sup> Memorandum from the Democratic Staff to Democratic Members of the Committee on Government Reform, Full Committee Hearing on Steroid Use in Baseball, 5, [hereinafter *Baseball Memo*] available at <http://www.democrats.reform.house.gov/Documents/20050317183306-12546.pdf> (March 16, 2005), (citing SCOTT E. LUKAS, *Chapter 12: The Pharmacology of Steroids*, PRINCIPLES OF ADDICTION MEDICINE (2003)).

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 5.

invincibility, delusions and paranoia.<sup>10</sup> Finally, rapid withdrawal from steroid use can lead to depression.<sup>11</sup> As a result of these negative effects associated with steroid and drug enhancement use, such substances are normally regarded as dangerous, unless under the supervision of a physician.

### *B. U.S. Doping Law*

Until relatively recently, the issue of performance enhancing drugs had revolved around international competition (like the Olympics). The 1988 scandal involving Canadian track star Ben Johnson's use of a steroid compound was the archetype for how people thought about steroids.<sup>12</sup> They envisioned unfair international competition in sports like track and weightlifting as the main problems surrounding enhancements. Steroids were thought to only be of use to athletes involved in speed and strength events. U.S. government regulation of enhancements, as described in detail below, mirrored those beliefs.

In the United States, there are virtually no drug laws directly tied to sports. However, in the last two decades, Congress acknowledged concerns about athletes on drugs by taking a few actions. First, Congress amended the Pure Food and Drug Act in 1988 to prohibit distribution and possession of anabolic steroids other than those authorized by the Secretary of Health and Human Services or as prescribed by a physician.<sup>13</sup> In 1990, the prohibition of steroids was cut out of the act, and steroids were classified as Schedule III substances.<sup>14</sup> (Scheduled substances range from Schedule I to V

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<sup>10</sup> See Baseball Memo, *supra* note 4, at 5.

<sup>11</sup> Baseball Memo, *supra* note 4, at 5.

<sup>12</sup> John Goodbody, *Stanozolol or Sabotage? IOC's Medical Experts Begin Race to Get to the Truth*, THE TIMES, Sept. 23, 2003.

<sup>13</sup> Greely, *supra* note 1, at 115.

<sup>14</sup> 21 C.F.R. § 1308.13 (2005).

by priority as part of the DEA's Controlled Substances code. Schedule III is therefore the middle of the five "schedule" range of controlled substances).<sup>15</sup> The Pure Food and Drug Act still impacts sports because a prohibition of human growth hormone was inserted in the place of the steroid ban. The act makes illegal the distribution and possession of human growth hormone with the intent to distribute unless it is to be used for treatment of a recognized medical condition.<sup>16</sup> More recent adaptations of law include increased power of the Drug Enforcement Agency ("DEA") in their ability to schedule drugs. The Anabolic Steroid Enforcement Act eliminated the requirement that a drug promote muscle growth in order to be scheduled and now can be scheduled based upon a finding that it "relate[s] to testosterone" as requiring a prescription.<sup>17</sup>

The main restrictions on athletes' use of enhancements are those of the Food and Drug Administration ("FDA"). The FDA regulates all drugs for everyone in the U.S. and any additional rules concerning athletes' enhancement use are imposed by the sports organizations in which the athletes participate. These organizations vary widely in their rules and structure, especially when one compares those that are international to those that are domestic.

## II. DOMESTIC ANTI-DOPING

Sports organizations that operate strictly within the United States have wide discretion in making any and all of their policies, including those dealing with drugs. Most professional sports organizations are private and therefore have overwhelming power to decide drug related matters for themselves. These leagues are driven by profit, and because enhancement of athletes can lead to better performance, it is possible that

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<sup>15</sup> 21 C.F.R. § 1308.13 (2005).

<sup>16</sup> 21 U.S.C.A. §333 (e)(1) (2003).

<sup>17</sup> See Baseball Memo *supra* note 4, at 7.

profits may rise as a result. In this environment the concerns of financial success, athletic health, and fair competition can potentially conflict. In order to understand the drug enhancement controversy, it is important to make a determination as to where there are existing enhancement-abuse problems, and how likely it is for such problems to develop in other areas. It is therefore necessary to examine and compare the testing policies and procedures of these organizations.

#### *A. Major League Baseball*

Major League Baseball (“MLB”) has been the catalyst for bringing the issue of steroids and drug enhancement into the limelight. Despite the enduring speculation and presumption of use of steroids in baseball, MLB denied any existence of a problem. In 1996, Pat Courtney, an MLB spokesperson, when asked about illegal steroids said, “I don’t think that the concern is there that [steroid’s are] being used.”<sup>18</sup> Before 2002, there was no policy regarding the use of steroids even with increased pressure from outside of MLB. The first proposed steroid policy in 1994 was dropped during union negotiations.<sup>19</sup> Testing procedures were not put into practice until recently, and the exact protocols and lists of banned substances was varying, slack, or nonexistent.<sup>20</sup>

Finally, in 2002, under substantial public pressure, the MLB and players association agreed to a temporary policy of unannounced and anonymous testing policy: if 5% of tested ballplayers tested positive during the 2003 regular season, then league-wide testing would be continued, but if less than 5% tested positive then routine steroid

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<sup>18</sup> See Baseball Memo, *supra* note 4, at 10-11.

<sup>19</sup> See Baseball Memo, *supra* note 4, at 7-10.

<sup>20</sup> See Baseball Memo, *supra* note 4, at 7-12.

testing would be ceased.<sup>21</sup> Results indicated that 5 to 7% of those tested failed the tests.<sup>22</sup> The 5% threshold in the 2002 agreement triggered more testing in 2004, in which every player was tested once during the season.<sup>23</sup> However, a first offense resulted only in treatment, the second offense resulted in a 15-game suspension (162 game season), with penalties increasing by the number of games missed for each subsequent violation.<sup>24</sup> The fifth violation barred the player from the season, but all violations remained confidential.<sup>25</sup> Baseball representatives claimed that any problem was resolved by this policy and any use that might have existed was eradicated.<sup>26</sup>

(While this paper was nearing completion, MLB agreed with their players association to a more stringent policy to avoid government imposition of the Clean Sports Act. The new policy calls for a 50-game suspension for first offense (roughly a third of the season), 100 games for a second offense, and the possibility of a lifetime ban for a third offense.)<sup>27</sup>

### *B. National Basketball Association*

The drug policy of the National Basketball Association (“NBA”) does not seem as though it is tailored to growing concerns about steroids, enhancing drugs, and the like. Under the policy, NBA players face no random testing at all once they complete their rookie year, after which players are tested once annually during training camp in

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<sup>21</sup> See Baseball Memo, *supra* note 4, at 11 (citing *Sports of the Times; Players’ Steroid Proposal is Lacking Muscle*, N.Y. TIMES (Aug. 11, 2002)).

<sup>22</sup> See Baseball Memo, *supra* note 4, at 12 (citing *Baseball Set for Automatic Steroid Tests*, WASH. POST (Nov. 14, 2003)).

<sup>23</sup> See Baseball Memo, *supra* note 4, at 11-12 (citing *Baseball Set for Automatic Steroid Tests*, WASH. POST (Nov. 14, 2003)).

<sup>24</sup> See Baseball Memo, *supra* note 4, at 12 (citing *Five Strikes and You’re Out*, SPORTS ILLUSTRATED (Nov. 24, 2003)).

<sup>25</sup> See Baseball Memo, *supra* note 4, at 12 (citing *Five Strikes and You’re Out*, SPORTS ILLUSTRATED (Nov. 24, 2003)).

<sup>26</sup> See Baseball Memo, *supra* note 4, at 12 (citing *Positive Steroid Tests Decline*, HOUSTON CHRONICLE (Mar. 6, 2005)).

<sup>27</sup> Kathy Kiely, *MLB, players agree to update drug policy*, USA TODAY, Nov. 15, 2005.

preparation for the season.<sup>28</sup> Additionally, the policy does not cover many of the most common and effective performance enhancing drugs. Human growth hormone, EPO (a protein that increases oxygen levels in the blood by stimulating production of red blood cells), and designer steroids are all absent from the NBA's substance policy.<sup>29</sup>

Furthermore, penalties for the use of performance enhancers are not very severe. A five-game suspension for a first violation is followed by a ten-game suspension for a second; this is not much in an 82 game season.<sup>30</sup> Even for a fourth or fifth violation, the penalty is still only a 25-game suspension.<sup>31</sup> Interestingly, the punishments for street drugs are much more severe and allow for a two-year ban for a first offense for a veteran player.<sup>32</sup> Henry Waxman, a U.S. representative, commented on this discrepancy noting, "Since use of steroids is both illegal and cheating [whereas street drugs are seen as non-enhancing, and therefore just illegal], this disparity makes little sense."<sup>33</sup> The popular explanation that steroids are not thought of as being helpful in basketball because it is not as speed and strength based as other sports is discussed in more depth later.

### *C. National Football League*

The drug policy of the National Football League ("NFL") addresses steroids to a greater extent than many other domestic sports organizations. The NFL has a list of prohibited substances that includes steroids, growth hormones, ephedrine, and others.<sup>34</sup> In addition, the policy prohibits the use of diuretics and masking agents that would help

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<sup>28</sup> *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearings Before the H. Comm. on Government Reform*, 109th Cong. (2005) [hereinafter *Basketball Hearings*] (statement of Henry Waxman, House Rep. of the United States).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Basketball Hearings*, *supra* note 28 (statement of Henry Waxman, House Rep. of the United States).

<sup>34</sup> *Steroid Policy of the National Football League*, available at [http://www.nflpa.org/PDFs/Shared/Steroid\\_Policy\\_2005.pdf/](http://www.nflpa.org/PDFs/Shared/Steroid_Policy_2005.pdf/).

players avoid detection.<sup>35</sup> Also, the policy calls for unannounced annual and random testing of players both in and out of competition.<sup>36</sup> It has exacting collection procedures that make sample switching and contamination near impossible.<sup>37</sup> Further, the punishments do provide a strong deterrent: a strict liability standard for violation, a mandatory suspension for four games (a quarter of the season) without pay for a first offense, and increasingly harsh penalties for subsequent violations.<sup>38</sup>

However, the policy is not completely comprehensive. One issue is that the list of banned substances is not as extensive or complete as it might be (like the list used by the International Olympic Committee).<sup>39</sup> There has been evidence that players do flout the rules and avoid detection. Some players have filled prescriptions for testosterone and were never caught by the policy, and other players were caught using THG (a newer, harder to detect steroid).<sup>40</sup> While the NFL policy is much tougher than most domestic steroid policies, these occurrences suggest that some evasion takes place.

### III. ANTI-DOPING SCENE FOR INTERNATIONAL/OLYMPIC SPORTS IN THE U.S.

Congress has taken little action thus far with regard to legislating against steroid and drug enhancement use in Olympic sports. However, both international and U.S. governmental organizations have been established, that together, provide a structure enabling the U.S. “to combat the use of enhancing drugs in [Olympic Sports.]”<sup>41</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 559-561.

<sup>40</sup> *Steroid Use in Sports, Part II: Examining the National Football League’s Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Government Reform*, 109<sup>th</sup> Cong. (2005) [hereinafter *Football Hearings*] (statement of Henry Waxman, House Rep. of the United States).

<sup>41</sup> Greely, *supra* note 1, at 116.

Internationally, the International Olympic Committee (“IOC” or the “Olympic Movement”) decides the events in which athletes will be allowed to compete during the Olympic Games. Given their decision making power, they ultimately sign off on a lot of the policy. The IOC has relied on the World Anti-Doping Agency (“WADA”) to fight against doping and to enforce their Anti-Doping Code. WADA, created in 1999, is governed by a “36-member Foundation Board... composed equally of representatives from the Olympic Movement and governments, as is the 12-person Executive Committee.”<sup>42</sup>

The issue of Olympic doping within the U.S. is the responsibility of the United States Olympic Committee (“USOC”). The USOC created a structure similar to WADA by creating the United States Anti-Doping Agency (“USADA”) in 2000 to improve their international credibility, which suffered as a result of accusations “of cover-ups and conflicts of interest” regarding possible drug enhancement scandals.<sup>43</sup> The USADA is an independent, not-for-profit, anti-doping agency for Olympic-related sport in the United States.<sup>44</sup>

The USADA engages in year-round unannounced testing, with increased testing at “times of high-risk doping.”<sup>45</sup> The organization does so pursuant to the Olympic Movement Anti-Doping Code. They test both in- and out-of-competition athletes and does so by position within a sport (not particular athletes). This prevents discrimination or slanted testing that might target more famous or controversial athletes. Further, there are strict collection and anti-tampering procedures. These include specified notification

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<sup>42</sup> World Anti-Doping Agency Website, <http://www.wada-ama.org/en/index.ch2#> (follow “About WADA” menu; then follow “Composition” hyperlink).

<sup>43</sup> Straubel, *supra* note 39, at 559.

<sup>44</sup> Straubel, *supra* note 39, at 559.

<sup>45</sup> United State Anti-Doping Agency, *Doping Control*, <http://www.usantidoping.org/what/process/>.

timetables, encoding and splitting up samples, and the use of accredited testing laboratories.<sup>46</sup>

The IOC's Anti-Doping Code prohibits the use of any substance or method that is harmful to an athlete's health or is capable of enhancing an athlete's performance.<sup>47</sup> The code includes a very extensive list of banned substances and methods.<sup>48</sup> It also provides sanctions and penalties that vary according to the level of the performance enhancement of the violative substance and whether the violation was intentional (and therefore more grievous). Lesser category offenses, which are by definition inadvertent uses, result in suspensions of one to six months.<sup>49</sup> For those with culpable intent or continued use, penalties start at a two-year suspension, plus a fine up to \$100,000. Additionally, all prizes and medals are forfeited for any violation, no matter how small or seemingly insignificant.<sup>50</sup>

#### IV. DISPARITY IN U.S. STEROID/ENHANCEMENT POLICY BETWEEN DOMESTIC PROFESSIONAL SPORTS AND OLYMPIC SPORTS

There is a glaring difference in how U.S. policy treats doping and steroid use in domestic professional sports as opposed to Olympic sports. The safeguards against doping in the U.S. for Olympic athletes are continually amended and improved by the USADA. As shown above, they are extensive and thorough, especially when compared to the standards of the MLB, NBA, or even the NFL. The pronounced gap in protocols is not, however, arbitrary.

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<sup>46</sup> *Id.* at hyperlinks "selection," "notification," "sample processing," "analysis."

<sup>47</sup> World Anti-Doping Agency Website, <http://www.wada-ama.org/en/> (follow menu "World Anti-Doping Code," follow hyperlink "International Standards," follow hyperlink "Prohibited List").

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Straubel, *supra* note 27, at 556-557.

Much of the gap can be attributed to the international implications of Olympic sports. In the Olympics, competitors and nations want equal treatment for all athletes, in part because of national pride. To ensure such conditions requires complex and stringent regulations. Also, within the doping control process, the U.S. and other countries have been accused of cheating. Therefore, there must be a fail-safe, independently-run testing policy that garners the international confidence required for the continued success of the Olympics.<sup>51</sup> This contrasts with professional domestic sports. Those leagues are mainly played within the U.S. so there doesn't exist the same conflicts of interest. Domestic competition does not pit the pride of one nation against another so it would be difficult to imagine justified reasons why the U.S. or the professional organization would favor one of its teams above others.

Additionally, domestic professional sports are run by private organizations, so the U.S. government has deferred decision-making to those running the organizations. This deference is linked to social and economic policy of the U.S. Private businesses and the government both have an interest in profit maximization of firms. Businesses are conducted in order to make money, and the government wants a sustainably successful economy. Since any kind of government regulation of a business is inherently restrictive, and therefore potentially profit limiting, restrictions should only be imposed if necessary.

Government officials did not become concerned with the issue of steroids in professional domestic sports until recently, so regulation did not occur. Only since steroids in sports became a national issue, and began to make headlines in the news on a

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<sup>51</sup> Straubel, *supra* note 27, at 559.

regular basis, did the government really look to take action.<sup>52</sup> In the hearings of the Government Reform Committee on Steroids in Baseball, there was testimony and evidence indicating that MLB's especially slow and reluctant response to the growing problem of steroids by its players was because of their lagging profits and declining popularity.<sup>53</sup> The memorandum submitted in the hearing referenced Dr. Charles Yesalis, an expert on steroids in sports, who links the end of baseball's "financial slump" to the increase of home runs by many players using steroids.<sup>54</sup> The memorandum quoted Harvey Araton, a New York Times sports columnist, as saying "the owners... have been complicit, content to watch balls fly out of the ballparks and make the cash registers ring."<sup>55</sup> Accordingly, the government now sees regulation as a necessary step to address the steroid issue.

Another reason why steroids were not looked at with a critical eye until recently in the major domestic sports leagues is that they were thought to be of little practical use. Traditional concepts of steroids include the idea that they are not of use to those in sports where agility, coordination, and timing are important.<sup>56</sup> Instead it was thought that they are reserved for purely "power" or "speed" sports like weightlifting, track and field events, and the like. In fact, this philosophy is still prevalent.<sup>57</sup> This can be seen in the respective policies of the NBA and NFL. Football is a more speed and strength-based

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<sup>52</sup> Baseball Memo, *supra* note 4, at 2 (explaining "The rise of anabolic steroid use as a health problem has coincided with numerous credible allegations of use in Major League Baseball. The evidence of steroid use in baseball dates back at least 30 years.... In recent months, new evidence of significant anabolic steroid use in baseball has emerged).

<sup>53</sup> Baseball Memo, *supra* note 4, at 12 (citing *Homer Binge a Really Juicy Subject: Whispers of Steroid Use in Baseball Surge in Pace with the Home-Run Binge of Play*, The South Florida Sun- Sentinel (Oct. 6, 2001)).

<sup>54</sup> Baseball Memo, *supra* note 4, at 12.

<sup>55</sup> Baseball Memo, *supra* note 4, at 12. (citing Harvey Araton, *Players' Steroid Proposal is Lacking in Muscle*, N.Y. TIMES (Aug. 11, 2002)).

<sup>56</sup> History of Steroid Use, In the Know Zone Pamphlet series, *available at*, <http://www.intheknowzone.com/steroids/history.htm> (last visited, June 11, 2006).

<sup>57</sup> Basketball Hearings *supra* note 28, (testimony of NBA Commissioner David Stern).

sport than basketball, and the aforementioned enhancement policies of the NFL (relatively strict) and NBA (very lax) reflect these beliefs.

Further, as indicated in the government hearings on “Steroid Use in Sports,” NBA commissioner David Stern and other NBA officials have suggested that “basketball... does not lend itself to the use of steroids and performance-enhancing substances” because of the skill set that is required to be an elite basketball player: agility, quickness, touch, and stamina, as opposed to brute strength.<sup>58</sup> Despite the logical formulation of these beliefs, they have been called into question by the rampant steroid use in baseball. Very similar arguments were used for years in baseball, especially with respect to the pitching position. Henry Waxman alluded to these assertions in his opening statement before the Committee on Government Reform’s investigation on Steroids in the NBA stating, “For years, experts said that only the game’s sluggers would use steroids, not pitchers.”<sup>59</sup> Pitching had always been considered to be about proper mechanics and natural ability, and it was thought that steroids would actually hurt the performance of pitchers. However, almost half the baseball players testing positive for steroids were, in fact, pitchers.<sup>60</sup> “The baseball results tell [the reform committee] that [the government] need[s] to guard against relying on assumptions.”<sup>61</sup>

#### V. ANCILLARY ISSUES FOR ENHANCEMENT REGULATION

The purpose of this discussion on ancillary issues regarding steroids is to provide background and give them due weight with regard to the main issue of whether drug performance enhancers should be banned. Additionally, these concerns and their

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<sup>58</sup> Basketball Hearings, *supra* note 28 (testimony of NBA Commissioner David Stern).

<sup>59</sup> Basketball Hearings, *supra* note 28 (statement of Henry Waxman, House Rep. of the United States).

<sup>60</sup> Basketball Hearings, *supra* note 28 (statement of Henry Waxman, House Rep. of the United States).

<sup>61</sup> Basketball Hearings, *supra* note 28 (statement of Henry Waxman, House Rep. of the United States).

respective critiques serve to frame the issue around the larger and less easily addressed worry about youth development and health with regard to performance enhancing drugs.

As mentioned above, the concern for adolescent health and development is not the only reason for regulating the use of drug enhancements in professional sports. While the purported list of objections to their use by professional athletes is long, the arguments can be condensed into a shorter, less redundant list: health of the athletes, “naturalness” of the game, fairness and cheating, and the coercive effect of drug enhancement use has on non-using players wishing to stay competitive in a “juiced” environment. While each of these issues has some merit, they all fall well behind the concern for youth, even when aggregated. (The concerns revolving around youth steroid use will be fully addressed in the remaining portions of this article.)

As outlined previously, the health of enhancement users is jeopardized in a number of unusual ways. While there can be detrimental effects on health from use of drug enhancements, professional athletes face increased risk of injury and death on a regular basis just by virtue of their participation in heightened competition. “It is not clear that [the] risks [from drug enhancement] are greater than [the] other risks run in sports, and they are probably less, at least in circumstances where careful use is likely.”<sup>62</sup> While doping can be dangerous, professional athletes are uniquely situated to take on those risks. The athletes can minimize the risks because of their access to the highest quality product and medical service. These risks are further diminished when compared to the more concrete and imminent risks involved in playing the game. There is a compelling notion that players in this position should be allowed to gage personal risk for

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<sup>62</sup> Michael Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 81 (1991).

themselves rather than be forced to bow to a paternalistic guardian in the form of government regulation.

Critics of drug enhancements also bring up the “naturalness” or “purity” of the game or competition.<sup>63</sup> Proponents of this line of thinking characterize using drug enhancements as unnatural, and that they ‘pervert’ the sport.<sup>64</sup> A problem with this critique lies in the definition of both the particular sport as well as the particular enhancement. Rules in sports change and grow with the sport, yet these changes do not alter it to a less pure form. Because sports and their rules develop, “there is no intrinsically true definition of... any sport.”<sup>65</sup> Banning the use of substances on the basis that they are contrary to the point or definition of a sport therefore makes little sense.

Enhancements, by definition, provide an advantage for the players that use them. However, so do legal enhancements such as weight machines, treadmills, better training programs, better diets, better dieting techniques, computer diagnosed training, hyperbaric chambers, along with innumerable others. These enhancements, or access to them, are not uniformly distributed for the sake of fair competition. It would hardly make sense to say that because U.S. Olympic sprinters have access to superior training facilities, compared to sprinters of Nicaragua, they have an unfair advantage and therefore use of the facilities should be banned.<sup>66</sup> For the same reasons, we don’t discriminate against athletes that have found, or have better access to, superior training methods. In fact, this is one area where athletes are rewarded for their creativity and deviation from the norm because they help develop methods and technology that can be of use to all of society.

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<sup>63</sup> Norman Fost, “*I Was Like -- Whoa*”: A Commentary on Shapiro’s Performance Enhancement and the Control of Attributes, 65 S. CAL. L. REV. 115, 116 (1991).

<sup>64</sup> *Id.* at 116.

<sup>65</sup> *Id.* at 116.

<sup>66</sup> Greely, *supra* note 1, at 118-119.

The use of drug enhancements is very similar in that the drugs are a new way of enhancing performance.<sup>67</sup> Critics claim this comparison is unreliable based on the fact that drugs are a self-executing enhancement, unlike training facilities or well-designed methods.<sup>68</sup> However, enhancement drugs do not work on their own to effectuate athletic greatness. Steroids, for example, much like the legal enhancements of weight machines or a high protein diet, require hard work on the part of the athlete to produce benefit.<sup>69</sup>

Understanding the idea that the choice to risk harm associated with drug enhancements is ultimately up to the individual user, the strongest argument (other than youth development and use of drug enhancements) for banning drug enhancements has to do with its coercive impact on other athletes. Within competitive sports, there is a concern that if one or a number of players choose to take drug enhancements, it will coerce their competitors that would otherwise not engage in use, to do the same to the detriment of their health.<sup>70</sup> In response, certain commentators compare it to the same coercion felt by athletes to work out harder or train longer until exhaustion.<sup>71</sup> It is simply comparing the desires of an athlete to what he is willing to go through to get there. One enhancement commentator, finds that this fuses the argument into an overarching one concerning performance enhancers: why is one kind of pressure (that from a coach or players to work out more) worse than another (to use enhancements)?<sup>72</sup> Both implicate health concerns for the coerced: one by virtue of extreme exertion and the other by virtue of drug enhancement.

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<sup>67</sup> Greely, *supra* note 1, at 112-113.

<sup>68</sup> Greely, *supra* note 1, at 113.

<sup>69</sup> Greely, *supra* note 1, at 129.

<sup>70</sup> Greely, *supra* note 1, at 129.

<sup>71</sup> Fost, *supra* note 45, at 116.

<sup>72</sup> Shapiro, *supra* note 62, at 83.

As evidenced by the ongoing debate of drug enhancement in professional sports, many are unconvinced by all of this analysis and still think that there is a distinction between coercing athletes to work harder without drug enhancements and coercion to use them.<sup>73</sup> The distinction likely lies somewhere in the idea that coercion to use drug enhancement is different in that the negative affects are “scarier.” They are more speculative, more enduring, and potentially more dangerous than those of an athlete overworking himself. Perhaps the feeling is that coercing athletes to risk their health in familiar ways are okay, but coercing them to take on risks blindly is not.

#### VI. THE REAL PROBLEM WITH STEROIDS: AMATEUR & YOUTH USE

The prevalence of the steroid issue can be attributed to the rise in use. However, the problem is not necessarily the rise in use by professional athletes, but rather that by amateur athletes (especially student athletes) and youth.<sup>74</sup> Most of the rhetoric that surrounds the new importance of the steroid issue is directed at promoting the health and positive growth of youth in America rather than the longer list of complaints about use of steroids and enhancements: health of players, level playing field for all professionals, “purity” of the game, etc.

Concern for youth health and moral questions regarding the use of enhancement by youths in sports is without a doubt the driving force in this issue. And it is so for good reason, as use of steroids in youths has been increasing rapidly. The Centers for Disease Control and Prevention reports that in 1993 1 in 45 (2.2%) high school students had used steroids, rising to 1 in 27 (3.7%), and as of 2003, the statistic had further risen to 1 in 16

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<sup>73</sup> Shapiro, *supra* note 62, at 83-84.

<sup>74</sup> Basketball Hearings, *supra* note 28, (Henry Waxman’s statement); *see also* Baseball Memo, *supra* note 4, at 5.

(6.1%).<sup>75</sup> In all of the governmental hearings on steroids, discussion is prefaced and concluded by statistics and repeated concerns of use by “neighborhood kids who idolize” professional athletes.<sup>76</sup> The memorandum on steroids in baseball contained large sections dedicated to describing the three-fold increase in steroid use among high school students in the last decade.<sup>77</sup> U.S. Representative Waxman, when referring to the Clean Sports Act of 2005 (the legislation proposed to deal with the problems of steroids in professional sports) said, “this bill is less about sports than it is about public health.”<sup>78</sup>

Compounding the unease surrounding adolescent use of steroids is how simple procuring the illegal substances has become. The Government Accountability Office’s (“GAO”) report on buying steroids indicates that purchasing them without the proper prescription is easily done by using the anonymity of the Internet.<sup>79</sup> The report states that because of the simplicity of web searches, and the overwhelming complications involved with mail inspection, steroid dealers are very difficult to detect and prosecute.<sup>80</sup> Additionally, young athletes today are web savvy and will have no problem obtaining steroids, if that is what they desire.

## VII. CONGRESS’S PROPOSED SOLUTION

Seeing child and teen safety as the primary objective of the steroid issue, U.S. policy must address the fact that professional athletes are among our most idolized and

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<sup>75</sup> Baseball Memo, *supra* note 4, at 5-6 (citing Centers for disease control and prevention, *National Youth Risk Behavior Survey 1991-2003: Trends in the Prevalence of Marijuana, Cocaine, and Other Illegal Drug Use* (2004)).

<sup>76</sup> Basketball Hearings *supra* note 28 (statement of Henry Waxman, House Rep. of the United States). Baseball Memo *supra* note 4, at 5 (where an entire section of the memorandum is entitled “Use of Anabolic Steroids by Youth”). Football Hearings *supra* note 40.

<sup>77</sup> Baseball Memo *supra* note 4, at 5 (citation omitted).

<sup>78</sup> Hearings Before the Government Reform Comm. On Steroid Use in Sports: Introduction of the Clean Sports Act of 2005, 109<sup>th</sup> Cong. (2005) [hereinafter *Clean Sports Act*] (statement of Henry Waxman, House of Rep. of the United States).

<sup>79</sup> H.R. Rep. No. 06-243R, at 3 (2005).

<sup>80</sup> *Id.* at 3.

emulated personalities in American culture. As stated previously, sports do serve as a model for our larger society, and when they no longer promote a positive model then we must regulate them accordingly.

The proposed U.S. governmental solution is to uniformly regulate steroids in professional domestic sports. The Clean Sports Act of 2005 has been introduced, received a quick bipartisan approval by the Committee on Government Reform and could become law in the coming months.<sup>81</sup> It is the culminating proposal to address the issue. Introduced in late May of 2005 by Representatives Tom Davis and Henry Waxman, accompanied by senatorial legislation by John McCain, the act is clear in both its aim as well as its severity.<sup>82</sup> Its purpose is to keep teenagers and youths away from performance enhancing drugs by eliminating their use by professionals in the United States.<sup>83</sup> The bill provides for the uniform adoption by the four major American sports leagues (MLB, NBA, NFL, and the National Hockey League (“NHL”)) of rules similar to the strict Olympic enhancement policies in order to eradicate steroid and enhancement use in competitive professional athletics.<sup>84</sup>

The legislation mandates adoption of testing standards that are “at least as stringent” as the Olympic standard established by the USADA.<sup>85</sup> More specifically, the act addresses the weaknesses of the current varying policies by defining key areas of compliance. The first area is minimum testing requirements. This includes a comprehensive and updated list of banned substances and methods, unannounced multi-year testing of players, on- and off-season testing, and independent administration of tests

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<sup>81</sup> H.R. Con. Res. 2565, 109th Cong. (2005) (enacted).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

to avoid tampering.<sup>86</sup> The second area involves penalties. For intentional violations there is a 2-year ban for a first offense, followed by a lifetime prohibition for a second culpable offense.<sup>87</sup> The legislation also addresses due process concerns to ensure that the application of the policy is fair to players.<sup>88</sup> Additionally, it adds authority given to the Director of the Office of National Drug Control Policy to modify standards for individual leagues as needed.<sup>89</sup> Finally, the act provides for a Commission to report on the use of performance-enhancing drugs in high schools and the Government Accountability Office to report on studies of use by college athletes and the effectiveness of the imposed testing procedures.<sup>90</sup>

The adoption of the Clean Sports Act is very strict. If imposed, it will dramatically change testing procedures and reduce use of drug enhancements in sports in the U.S., particularly in professional baseball. However, there will also be some negative effects as well. The act's strict liability standard for such an increased list of substances might potentially cause a rash of initial, inadvertent violations. Also, any creative attempts to discover new, alternative ways to enhance ability (not necessarily with drugs) will be chilled, and therefore the development of U.S. sports may hit a glass ceiling. It is this development, the thrill of conquering the unaccomplished that makes professional sports thrive and keeps them interesting as well as profitable. Congress has jumped into this legislation head first; it identified the desire to keep kids off steroids and enhancements, yet it has not addressed, or at least not given due weight to, the potentially disastrous affects on professional sports.

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<sup>86</sup> *Id.*

<sup>87</sup> H.R. Con. Res. 2565, 109th Cong. (2005) (enacted).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

## VIII. THE BETTER SOLUTION

A better solution would more directly attack use of steroids and enhancements of youth, teenagers, and collegiate athletes. It would also address the issue of drug enhancement in professional sports by providing a semi-flexible framework for the government and the private professional organizations with which to work, enabling them to best tailor their policies for their individual sports.

There is little doubt that children and teens should not be using steroids. But, as previously detailed, there are arguments both for and against certain kinds of drug enhancement use in professional sports. Therefore, it seems peculiar that, in order to effectuate the goal of keeping kids off steroids, government regulation only takes aim at professional sports. It is too simple an analysis to say that youths in sports emulate professionals, and if professionals are not using steroids then neither will the younger generation. Youths do seek to imitate their favorite sports stars, but it is not because they use steroids that kids want to mimic them. Instead, it is the skill, power, money, fun and or fame that motivates middle school and high school athletes. If what these driven kids want is to play at the professional level or dominate at their current level, and taking steroids seems to them like the only route, then it will not matter that their favorite sport star is clean of enhancements thanks to a rigorous testing policy.

If what is sought by this legislation, and by the country as a whole, is good health and safety of children in athletics then the government should regulate accordingly. This legislation is an 'end run' around the real issue, and it focuses on celebrity glitz and pompous finger-pointing to garner public support. Instead, the legislation should focus on kids, education, and even testing younger athletes in schools and related competitions.

### *A. Professional League Regulation*

This is not to say that professional sports should not be regulated as well. In fact, one of the biggest issues in baseball is confidence in the sport itself as a result of the unbridled steroid use. However, the Clean Sports Act of 2005 is not well thought out. Its penalties are overly harsh and its scope for violations is overly broad. If implemented, there will be an adjustment period, especially in baseball, during which both players and the level of play will suffer. Many players will be punished, some for taking things that are perfectly legal from a drug store and others for involuntary infractions. There will be heavy sanctions and sacrificial lambs in the form of many of America's most famed and idolized sports celebrities. Other athletes, rather than risk getting caught, might simply retire for fear of tarnishing their reputation.

The quality and level of play in professional sports may also diminish. It will be affected not just from players being ousted or from leaving competition, but also possibly because the use of drug enhancements had been elevating performance. These effects could be particularly pronounced in baseball, where steroid use is believed to be so widespread. The recent, repeated breaking of home run and hit records that have helped revive baseball after the strike in the 1990s will almost certainly become a thing of the past.

The level of play is important to the development of the sport and its profitability. A stall in the advancement of skill and ability could have negative repercussions for the leagues. Profitability and popularity of professional sports serve as a bellwether for interest in the sport. A downturn is not just limited to lesser salaries for those involved at the professional level, but can affect the vitality of the sport on all levels.

Professional athletes are admired for the extraordinary things that they can do. They define the outer limits of what is possible in sports by competing and continually shattering records and raising the level of play beyond what has ever been accomplished. This ability to shape the future of our sports and our athletic abilities provides athletes with some leeway that non-professional athletes do not receive. Rules are bent or ignored at the highest level of play to allow experimentation in the hope of discovery. Pro football linemen are praised for blocks that are defined in the rules as a holding penalty and would be so called at lesser levels. Basketball players are allowed to use dribble moves that if slowed down and examined are undoubtedly traveling violations and, therefore, technically not permitted. There are other examples, but they all stand for the idea that professionals, by their ever expanding abilities, define the edges of the sport itself. If forced to fit into a strict definition of that sport, we will limit the expansion and innovation therein, thus defeating one of the essential reasons to compete and watch sports. This article does not stand for the proposition that all drug enhancements should be allowed in each sport, but rather that an across-the-board ban on what is a very long list of substances (many of which are perfectly legal and safe for regular consumer use) is shortsighted and ill-conceived.

#### *B. Amateur & Youth Regulation*

The problems with steroids and enhancements in the U.S. would be best solved by government action that (1) focused on the real concern of adolescent steroid use and (2) addressed professional league use by regulating them in a way that still allowed private professional sports leagues to tailor their own enhancement testing policy. Providing for education, testing, and screening of steroids in high schools and teenaged sports leagues

would likely dramatically reduce use and would send a clear message to kids that using drug enhancements will not be a recipe for success and it will not be tolerated. Enacting legislation providing for this strict policing of youth and college sports would provide motivation for professional sports leagues to get their steroid policy right or be subject to sanctions in the form of fines or increased government regulation. Such a bifurcated approach is more likely to ensure youth athletic health than the Clean Sports Act, and it allows professional leagues to set their own rules in ways that can avoid chilling the athletes' creativity and ability while providing a governmental check in case the league becomes lax in its duty to uphold its standards.

A potential disadvantage that could be associated with the bifurcated approach is the high cost and difficult administration of testing and screening high school athletes. There are so many potential users that finding the real ones may be an insurmountable task. However, education about the dangers and risks of use, as well as the threat of being caught, is a motivating force and should still have a positive impact on steroid use by teens. Additionally, professional athletes have access to drug enhancement technology that is intended to circumvent detection. Finding a user who has the aid of the best medical and technological advancements in the world is far more difficult than locating a high school student whose only access would be to buy garden-variety steroids on the Internet. While there may be more youths and teens to screen than professionals, the process for teens would not be, nor would it need to be, nearly as complex or comprehensive.

Another possible problem with the proposed solution is that it is almost certain that professional athletes will continue to use banned substances and will therefore, still

serve as role models for drug enhancements. Unlike amateur athletes, a professional athlete's career and livelihood might depend on whether he or she can avoid detection but still use the banned substances. It might be his or her only option. The role model scheme is the crux of the proposed legislation, but if the above mentioned education and screening process is done effectively, and college sports are adequately tested, then using steroids and other drug enhancements to get to the professional level will not be an option. Therefore, the career and livelihood issues that currently face professional athletes that use banned substances should fade away over time. Any role model effect will also be diminished by imposing individual league testing policies that, while they may provide some latitude, will still likely ban many drug enhancements.

## **IX. CONCLUSION**

There are many problems with steroid and drug enhancement use in sports. The most compelling, and only one that the U.S. government appears to be concerned with, is the effect on youth and their health in athletics. Unfortunately, Congress' proposed solution, the Clean Sports Act of 2005, is a hasty measure that will not likely solve the problem. Instead, it focuses only on professionals as opposed to the youths it is purportedly trying to help. Through its overly strict prohibitions and penalties, it may create other problems of its own in hindering the development of sports and professional athletics by chilling innovation, ousting favored sports icons, and lowering the level of play.

A better solution is that of a bifurcated approach: one to stamp out use of steroids and other drug enhancements in youth and college sports and one that will oversee policing efforts of professional sports leagues but still provide them with the ability to

implement their own policies. Not only will this approach be more likely to keep developing teens off of steroids, but it also will allow the professional leagues to keep expanding their level of play by permitting some deference to professional athletes' creativity.